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The collective monograph of the author's group of the Faculty of Law of the National Aviation University is dedicated to the relevant problems of jurisprudence in the modern information space. The main globalization tendencies of the development of the law, in particular the fundamental values of the law, their interpretation and interaction of legal systems, the role of fundamental principles of law, state sovereignty and human rights, modern tendencies in ensuring legal security and economic freedoms in the light of the interaction of national legal systems are considered.

The collective monograph consists of 22 chapters, which are both the general theoretical and practical block of monographic work, and the scientists conducted a comprehensive analysis of the issues of the legal system of the social state, isolates and analyzes the essential characteristics of such a legal system and identifies the ways of developing the legal system in the context of globalization changes in the world. Also, the monograph reflects the results of scientific research of political and legal tendencies of interaction of national and international principles of statehood development, which later became the basis for considering the peculiarities of reforming state-legal institutions as a necessary condition for the development of a social and legal state in Ukraine.

Scientific publication contains articles covering issues from different branches of law.

The publication is intended for lecturers of law faculties of higher educational institutions and persons who are interested in development of legal science in Ukraine.

Contents of scientific papers do not always coincide with the views of the editorial board.

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Introduction

by Irina Sopilko of the Doctor of Law, Professor, Dean of the Faculty of Law of the National Aviation University, Ukraine



The current state of information progress requires constant development of statehood and the legal system, which necessitates a rethinking of scientific ideas and provisions that determine the general theoretical laws of the state and the law in the context of their development and improvement. At the same time, law does not merely serve as a means of formalizing and managing globalization processes, but it also has a significant influence on their part. In this regard, the study of any issues related to the transformation of legal phenomena and processes in the modern information space is

extremely relevant today.

The discovery of atomic energy led to the emergence of nuclear power plants and atomic bombs, and the emergence of the Internet has opened qualitatively new horizons in the field of human communication, education, cultural improvement and at the same time is a material prerequisite for the formation of a qualitatively new type of crime - crime in the field of computer technology.

In the situation prevailing qualitatively changing the nature and content of legal regulation, carried out in the information sphere. On the one hand, the effectiveness of state-legal regulation is reduced with the help of imperative methods within the framework of relations of power-subordination, on the other - the importance of international legal institutes regulating information relations with the help of complex imperative-dispositive methods within the framework of coordination relations is increasing. Thus, the very fact of the emergence of the information society and information space makes it necessary to rethink the essence, content, legal technique of legal regulation in this area of social relations.

In this context, the theoretical and legal basis for the development of the legal system of Ukraine in the modern conditions was conducted. The collective monograph consists of 22 chapters, which are both the general theoretical and practical block of monographic work, and the scientists conducted a comprehensive analysis of the issues of the legal system of the social state,

isolates and analyzes the essential characteristics of such a legal system and identifies the ways of developing the legal system in the context of globalization changes in the world. Also, the monograph reflects the results of scientific research of political and legal tendencies of interaction of national and international principles of statehood development, which later became the basis for considering the peculiarities of reforming state-legal institutions as a necessary condition for the development of a social and legal state in Ukraine.

Some chapters of the monograph devoted to the coverage of leading private law institutes. The authors carried out a comprehensive analysis of national and foreign legal systems, defined the methodology of private law, and studied the trends of the development of copyright protection.

At the same time, one should focus on the chapters where issues of public administration are considered in the key areas of our country - administrative and environmental. Public administration covers almost all spheres of public life. However, its universality does not mean total interference and overregulation of social relations, especially during the period of the information revolution. Therefore, an innovative approach in generalizing the current legislation provided a series of proposals offered by the authors of the relevant articles.

The monograph explains the nature and types of global legal issues that are the subject of studying law. It is emphasized that, on the one hand, global legal problems destructively affect national law; on the other hand, they have the ability to stimulate the implementation of the highest social, economic, labor, political international standards in the domestic law. As a result, modernist ties and certain integral legal relationships change the international, intergovernmental, social and individual ties between the subjects of law; therefore, the scientific analysis of the mutual influence of national and international law in the measurement of globalization changes is very important.

The proposed collective monograph is a continuation of a number of scientific publications of the author's collective. We hope that this work will be useful to anyone interested in problems of state and law making in the global dimension of our time.

Irina Sopilko

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Chapter 1

Comprehensive approaches to define legitimacy and its role in regulating social relations at the present stage of Ukrainian development

Over the last three years Ukrainian legislative sphere experiences great updating of the current legislation, implementation of the reforming initiatives aimed at democratic transformations in Ukraine. All these lead to an intensive lawmaking process. At the same time, numerous gaps and collisions appear, along with the highly qualified novelties, and they generate some negative aspects of the lawmaking and lead to the spread of the legal nihilism. Considering such circumstances, ensuring the effectiveness of legislation, especially considering the public law sector, needs certain system approaches, but not the local ones. The abovementioned objectively demands appealing to the scientific researches purporting to find the most effective tool to overcome the existing situationality traits of the lawmaking, regulating the implementation of the legitimacy principle regarding the state bodies activity.

The legitimacy receives a very special role when forming a law-governed state together with a civil society, ensuring compliance with the rule of law principles and certain universal human ideals, as well as with the fairness principles.

Many years ago, prominent and influential German philosopher Immanuel Kant once said that constitutionality of the state depended on the existence and strict observance of the written laws. Although, as it was stated above, the written law cannot be regarded as the panacea for the rule of law, still, the rule of law scholars considers the legitimacy principle as the crucial point of the constitutionality itself. Some modern scientists regard the legitimacy concept in a similar manner. At the same time, the rule of law concept does not regard the constitutionality only as the formal legality, in comparison to the positivist tradition, in other words, it does not regard the constitutionality purely as a rule of law, irrespective of this law nature. According to most Western lawyers, by interpreting the legitimacy in such a way one cannot sufficiently restrict the powers, which is the prerequisite to the rule of law. First and foremost, the rule of law implies such a legitimacy which is based on the recognition and peremptory acceptance of a human being as the highest value, his/her protection against the arbitrary and willful behavior of the state authorities, so to say, the legitimacy as the legal practice, as it has often been determined by the national scholars. This fully corresponds to the practice of the European Court of Human Rights, the

decisions of which repeatedly emphasized that the phrase *in accordance with the law* means that *the law shouldn't contradict the rule of law principle*.^[1]

Secondly, the legitimacy based on the rule of law principle, covers mainly the activity of public authorities, and not all the law subjects citizens and their unions, as the national scholars of law traditionally regard. Such a diverse interpretation of the legitimacy subjects virtually eliminates the high danger of the law violations by the officials in comparison to the violations by citizens (the legal order violations occur when the citizens infringe the law).

Thirdly, every state authority, including the legislator (parliament) is subdued to the law. The Parliament is bound by the law until the law is repealed or amended in accordance with the legislative procedure, established in a legal manner, and the principles of which are determined by the Constitution, as a rule.

Fourthly, any act of governance cannot replace the law by its regulation, considering the rule of law principle, and public authorities and their officials shall be obliged to act only on the grounds of the law, that is, to correspond to the principle, stating *what is not explicitly allowed by law shall be prohibited*. This principle is outlined in the Article 19 of the Constitution of Ukraine.

Fifthly, according to the long-established national tradition, the legitimacy principle, first and foremost, presupposes the rule of legislative (statutory) acts. It seems of no use to preserve the very term *the rule of legislative acts* as the new term *the rule of law* has already been introduced into the national legal system. The widespread usage of these two terms brings some kind of confusion into the Ukrainian legal world, as the English term *rule of law* has often been interpreted by Ukrainian politicians, journalists, and sometimes even by English experts as *the rule of legislative acts* (English word *law* means *legislative act* in Ukrainian). M. I. Koziubra supposes that the term *the rule of legislative acts* is not used in the Constitution of Ukraine to prevent such confusion.^[2]

To define the very essence and nature of the legitimacy concept, national scholars have analyzed the wide range of general theoretical legal issues along with some legal points, including administrative law and process. Regarding the general theoretical perspective, the legitimacy presupposes such a legal regime which enforces the legal relation subjects to comply with the laws and by-laws norms in a very intense and strict manner. ^[3] A great number of authors study the legitimacy considering the constitutional law and criminal process. A. D. Pieshyi thinks that historically 'the idea of legitimacy as a phenomenon appeared much later than the laws (divine, natural, human) and much later than the political power was formed. Legitimacy, considered from the point of view of interactions between the rulers and laws, originates from the period of state onset and its

1 Zahalna teoria prava: Pidruchnyk / Za zah.red M. I. Koziubry. – K.: Vaite, 2015. – S. 365.

2 Zahalna teoria prava: Pidruchnyk / Za zah.red M. I. Koziubry. – K.: Vaite, 2015. – S. 365.

3 Suchasna pravova entsyklopedia/ O.V. Zaichuk, O. L. Kopylenko, N.M. Onishchenko, ta in.; za zah. red O.V. Zaichuka; In-t zakonodavstva Verkhovnoi Rady Ukrainy. K.: IurinkomInter, 2010. – S. 121.

further development. Therefore, to study the legitimacy matters, the jurisprudence has to appeal to the earliest periods of state and law evolution, when people only started thinking why the life appears to be impossible without laws, how the laws should look like, and the level of freedom granted to the rulers and the citizens, adhering to these laws. The national jurisprudence in general and the criminal process in particular witnessed the emergence and assertion of the notion of legitimacy thanks to the Decree of Peter I on January 12, 1722, declaring the creation of the Prosecutor's Office as the 'eye of the sovereign' watching the precise and severe observance of all the orders coming from the sovereign as such and state bodies overall. The strict observance of the state laws, supervised by the Prosecutor's Office was further interpreted as the supervision over the legitimacy. It gave rise to the idea of legitimacy as strict, severe and precise adherence to the current laws. However, it should be noted that Peter I had not only introduced the concept of legislation and legitimacy, accordingly, created special body – Prosecutor's Office to ensure the legitimacy, but he had also determined the essence of this legitimacy. [4]

The law is well-known to be the most effective and universal regulator of the social relations, therefore, the issues related to its arrangement, passing and implementation have always been under the precise attention of the legal science and practice. The laws are considered to be of particular importance during such periods of social transformations, as the change of social system, implementation of reforms into all spheres of social relations. With regard to the abovementioned, diverse social and political transformations, taking place in Ukraine over the last twenty years, on the one hand, need some due and appropriate legislative support, and on the other hand, they need to be firmly and steadily fulfilled by all those subjects to whom they are addressed. Here one talks about the legitimacy regime, created to support the state order. [5] Thus, N.M. Parkhomenko states that, unfortunately, the category of *constitutional legitimacy* in comparison to the category of *legitimacy*, has not been deeply analyzed either by the theory of law or by the constitutional law. At the same time, the political and legal transformations, including the constant efforts of the state authorities to amend the current Constitution of Ukraine, the amount of appeals to the Constitutional Court of Ukraine regarding the compliance of the laws and subordinate laws with the Constitution of Ukraine, approve the necessity to thoroughly elaborate the very essence and nature of the constitutional legitimacy as the legal category and social phenomenon.

Analyzing the notion of legitimacy, first of all, it should be noted that the majority of scientific works authors recognize the complex nature of the

4 Pieshyi D.A. Poniattia ta zmist zasady zakonnosti kryminalnoho provadzhennia: zahalnoteoretychnyi aspekt . / Pieshyi D.A. / Naukovyi visnyk Khersonskoho derzhavnoho universytetu . – 2014. – Vypusk 6-1. Tom 4.- S. 97.

5 Parkhomenko N.M. Konstytutsiina zakonnist iak meta, vymoha ta pravovyi rezhym : teoretychni aspekty . / N.M.Parkhomenko. – Almanakh prava, - 2012, vyp. 3. - S. 38.

legitimacy. It includes many components; it is qualitatively characterized in many ways. Considering the analysis of the scientific and legal opinions, one can count more than 20 comprehensive approaches to define this concept. We should agree with the professional opinion of S. Aleksiev stating that concept of legitimacy covers three elements. The first element proclaims the binding character of the law, leading over the other two components. Legitimacy herein is only the projection, specific feature of the law properties; such is the very nature of the law that can become tangible only if the regulatory requirements are embodied into reality. Since the law exists, the legitimacy exists as well, presupposing such an order which enforces the participants of the public relations to strictly observe and comply with the rules of law.

The second element is the idea of legitimacy itself, which is the idea of the legal consciousness declaring the viability, relevance and necessity of the eligible behavior of all the public relations participants, which totally and absolutely excludes the forwardness. By promoting such an idea of legitimacy, one can ensure the binding character of the law, therefore, implementing the subjective rights into reality. And such an idea inevitably entails the social system issues, political regime matters, i.e. the issues regarding the political consciousness categories. Taking the aforementioned into account, the legitimacy concept, the principles it covers (equal protection of all by the law, lack of privileges, the supreme power of the law, inevitability of the legal liability for offences, etc.) are presented, first and foremost, as the elements of political consciousness, as the principles of political democracy.

The last, and therefore, the third element of the legitimacy defines the legitimacy as an independent, distinct from law, peculiar phenomenon, existing only if the first two elements of the legitimacy are embodied into the social and political life with regard to the special regime, and also are embodied into the element of the legitimacy requirements. Some authors present quite a wide range of legitimacy definitions depending on versatile criteria. Thus, O. Zaichuk and N. Onishchenko regard legitimacy as a complex political and legal category reflecting the legal character of the political and social life, harmonious interaction between law and power, law and state. Considering the form and character, the legitimacy describes the legal reality, characterizes the subjects of law activity, it seems to be the method, the principle and the regime. Considering the role of legitimacy in implementing the will of authorities and the people, the abovementioned authors regard legitimacy as the legal quality of acts, setting the will and ensuring their realization. Also, these authors have chosen the development of the legal matter as the criterion to define the legitimacy. Regarding this, the legitimacy is explicated as the legal movement, ensuring the implementation of law and possibility to reach the legal result. Also, O. Zaichuk and N. Onishchenko define the legitimacy, considering its role in the sphere of law, as the tool to establish the legal order and

underscore the need for this order. Considering the regulation of public relations, the legitimacy determines the probability of implementing the process regulating these relations. [6]

Being a legal category, legitimacy covers the following aspects: the principle of establishing and functioning of the state and society, meaning that all the public relations subjects are obliged to be bound by law prescriptions, set out in the Constitution, and being provided for by means of the state coercion. The subjects, obliged to comply with the provisions of the Constitution, are public authorities and bodies of local self-government, enterprises and companies of all ownership types, citizens, foreigners and stateless persons. Among the factors ensuring the implementation of the constitutional legitimacy principle is a coherent system of legislation including explicit prescriptions of law. Also, the mechanism, implementing the legislation system, plays quite crucial role for the constitutional legitimacy. Constitutional legitimacy is one of the methods embodying the state power, thus, the state works out the necessary legislative acts, the mechanisms of their implementation and the appropriate means of control over the implementation process. Therefore, the legitimacy as a method is used for the law-making activities and the law-implementing processes. [7]

The the scholar's researches studying the legitimacy of the criminal process appear to be rather interesting too. Some of them state that the legitimacy concept is well highlighted in a huge amount of different scientific works, also, there are many definitions of this concept, but the special attention should be drawn to the fact that all these definitions underscore the fundamental, core point, the essence of the legitimacy, that is, that all the subjects of the legal relations are obliged to be bound by law, to adhere to it, to steadfastly comply with it. Exactly this aspect of legitimacy is touched upon Part 1, Article 9 of the Criminal Procedure Code of Ukraine. Pursuant to it, during criminal proceedings, a court, investigating judge, public prosecutor, chief of pre-trial investigation agency, investigator, other officials of state authorities shall be required to steadfastly comply with the requirements of the Constitution of Ukraine, this Code, and international treaties the Verkhovna Rada of Ukraine has given its consent to be bound by, and requirements of other laws. The legitimacy principle as one of the most comprehensive principles of the criminal proceedings concerning the theory of criminal process is regarded as the one obliging the state authorities and public officials, conducting the criminal proceedings, and all the other its participants to be bound by laws, to steadfastly comply with the subordinate legal regulatory acts. Applying such an approach, legitimacy actually means the state governance over the society, which is nothing else, but a form of dictatorship, i.e. the state forces

6 Kolpakov V.K., Hordiev V.V., Sopilko I.M. ta in. Protsesualnyi prymus v administratyvni vidpovidalnosti . Monohrafiia. – Kh.: Kharkiv iurydychnyi , 2011. – S. 317.

7 Parkhomenko N.M. Konstytutsiina zakonnist iak meta, vymoha ta pravovyi rezhym: teoretychni aspekty . / N,M, Parkhomenko. – Almanakh prava , - 2012, vyp. 3. - S. 39.

the society to act in a way it considers necessary. Although, the laws of the state are adopted and have an effect only if they are properly observed, but at the same time, the relationship between state and society have to be formed otherwise, especially considering the formation and functioning of a law-governed state. The democratic, law-governed state, with society forming the state power, shall fulfill only those acts which adhere to the will and interests of the people, building the state. Using such an approach to relationships between state and society, the legitimacy cannot be regarded as the regime (framework, method, principle) of state governance over the society, but vice versa, the legitimacy is the deterring factor, the factor providing the state and its bodies, acting on behalf of the people building the state and in its interests, with the proper legal framework. [8]

Minchenko O.V., studying the legitimacy, underscores its immense role of the legal regulation mechanism the legitimacy belongs to the elements of the legal means system, allowing the state to influence the public relations. Some other elements of this mechanism include legal norms, law enforcement acts, legal relations, subjective legal rights and duties implementation acts, legal consciousness, interpretive legal acts. Fulfilling the legal regulatory role, the legitimacy interacts with all the elements; however, it influences them differently, but pursues the sole goal of providing certain regulatory tasks. Thus, considering the rules of law, the legitimacy is regarded as the one making the law (lawmaking) and implementing it (law enforcement). Considering the law implementation acts, the legitimacy is regarded as a principle or regime (framework), embodying the legal reality. Considering the law enforcement acts, the legitimacy is deemed as the principle or requirement. Similarly to legal liability, the legitimacy is the basis of applying the legal influence means. Moreover, the legitimacy shall become the part of the legal culture of a person, who should know and respect the law, intentionally strive to comply with the legal requirements.

Some authors suggest quite a wide range of legitimacy definitions depending on versatile criteria. Thus, O. Zaichuk and N. Onishchenko define legitimacy as the complex political and legal category, reflecting the legal character of social and political life, natural interaction of law and power, law and state. The legitimacy is deemed to reveal the legal reality regarding its essence and nature, it describes the activity of law subjects, it is the method, principle and regime (framework). Also, these authors consider the role of legitimacy in implementing the will of authorities and people, and therefore, state that legitimacy reflects the legal quality of acts, supporting the will, and ensures their implementation. Also, the authors have chosen the development of the legal matter as the criterion to determine the legitimacy. In this regard, the legitimacy is deemed as the legal movement ensuring the law implementation and allowing achieving the legal

8 Pieshyi D.A. Poniattia ta zmist zasady zakonnosti kryminalnoho provadzhennia: zahalnoteoretychnyi aspekt . / Pieshyi D.A. / Naukovyi visnyk Khersonskoho derzhavnoho universytetu . – 2014. – Vypusk 6-1. Tom 4.- S. 99.

result. O. Zaichuk and N. Onishchenko also define the legitimacy, considering its role in the sphere of law, as the tool to establish the legal order and underscore the need for this order. Considering the regulation of public relations, the legitimacy determines the probability of implementing the process regulating these relations.

S. Tymchenko, R. Kaliuzhnyi, N. Parkhomenko and S. Lehshy consider legitimacy as the fundamental category of all legal science and practice; it reflects the level of law observance, its influence on social behavior, consciousness, will and behavior of people. On the one hand, such definition is more comprehensive, but on the other hand, it is a little bit restricted. The main portion of attention is paid to people obliged to observe the society laws. At the same time, the authors consider the rule of law, the comprehensive character of legitimacy, the compliance with the legitimacy rules, guarantees, relevance, democracy and justice, unity and control over the legitimacy, interrelation of legitimacy and culture to be the legitimacy principles. [9]

Applying the comprehensive approach to defining legitimacy, scientists can take into account the social factor and legal form when describing the legitimacy nature, corresponding to the social life trends and accounting for the justice principle as the basis for subjects of law lawmaking and law enforcement in the course of their activity. Recognition of the legitimacy social nature and legal form serves as basis for characterizing its essence considering the interrelation and interdependence of such elements as principle, method and mode of state functioning. [10] Thanks to interrelation of legitimacy and justice, there exists one more approach to define legitimacy considering its social and legal nature. According to this approach, the legitimacy is deemed not only with regard to the steadfast observance of the law, the functioning of the legal regime (framework), lack of legitimacy in case the main legitimacy element (law) is absent, but also considering the implementation of general rules of behavior, obligatory to being observed, into the law. [11]

The above presented scientific approaches not only do not contradict, but even complement each other, establishing and reproducing the objective character of the legitimacy and justice interrelations, legitimacy and ethics, legitimacy and legitimizing of the general rules of conduct, prevailing in this or that society. Such an approach objectively demands establishing the criteria defining the conformity of the legitimacy in general and of the law in particular, with ethics

9 Kolpakov V.K., Hordiev V.V., Sopilko I.M. ta in. Protsesualnyi prymus v administratyvni vidpovidalnosti . Monohrafiia. – Kh.: Kharkiv iurydychnyi, 2011. – S. 318.

10 Suchasna pravova entsyklopedia/ O.V. Zaichuk, O. L. Kopylenko, N.M. Onishchenko, ta in.; za zah. red O.V. Zaichuka; In-t zakonodavstva Verkhovnoi Rady Ukrainy. K.: IurinkomInter, 2010. – S.121.

11 Kapustin M.P. Iest li zakonnost «kaluzhskaia» i «kazanskaia»: V 2-h vyp.: dialogi iurista s filosofom. M.: Znanie, 1990. Vyp. 1. - S.14.

and justice as the basis of social and state life, which intrinsically represents a philosophical and legal problem.

Constitutional legitimacy as a legal category means the strict observance of the constitution if the constitutional norms are directly implemented; if the laws are made by the authorized bodies of state power; if the laws are implemented by the social relations subjects. In practice, it means that the laws are made and enforced only due to the Constitution of Ukraine and its laws. For example, during the lawmaking all the stages of this law-making process have to comply with the Constitution of Ukraine and other relevant laws. The legislative corpus has to be regularly monitored in order to timely amend or revise the laws, codes, statutes, bills, etc., to eliminate contradictions and to systemize the regulatory legal acts. The law enforcement process is deemed as the implementation, use, adherence and application of the legal norms by the public relations subjects, and all of these also must comply with the Constitution of Ukraine and other laws of Ukraine.

The constitutional legislation serves as prerequisite for constitutional legitimacy (regarding the laws the adoption of which is provided for by the norms of the Constitution, and also, some other regulatory legal acts complying with the Supreme Law). At the same time, the quality of the legislative framework is of vital importance, i.e. absence of conflict of regulatory legal acts, the univocacy of the used terms, high quality and uniformity of the law enforcement activity.

The constitutional principles of humanity, justice and legitimacy are expressly stated and implemented in the Code norms enabling the person, committing some minor crimes (misdemeanors) to be relieved from criminal liability due to active repentance (Article 45), due to the reconciliation of the accused with the victim and compensation of damages caused by the accused or elimination of damages caused (Article 46), due to the probation period of a person, (Article 47), due to change of circumstances (Article 48); the person can be relieved from punishment if he/she is not regarded socially dangerous during the court hearing (Part 4, Article 74), etc.

Regarding the foregoing, we agree with N. M. Parkhomenko opinion stating that the guarantees of the constitutional legitimacy are revealed by allowing the state coercion to be applied to the constitutional norms' breakers. The person may be hold liable both for the acts contradicting the constitutional norms and for omission to act. Moreover, as the Constitution of Ukraine defines the powers of the state bodies, the constitutional legitimacy ensures these powers by determining the main vectors of state bodies' activity (legalization and legitimacy). Externally, the implementation of the constitutional legitimacy is embodied via the activity of the public relations subjects, including both the supreme bodies of state power and just ordinary citizens. Taking into account the fact that the norms of the Constitution of Ukraine have direct effect, the abovementioned subjects are, on the one hand, obliged to comply with them, and on the other hand, they shall have

the right to appeal to court, including the Constitutional Court of Ukraine, to protect their infringed rights and freedoms, provided for by the Constitution of Ukraine. This also proves the security of rights and freedoms guaranteed by the Constitution. [12]

The above stated general theoretical and statutory approaches defining the nature of legitimacy, proving the relevance both of the complex approach, determining this category, and of the recognition of the legitimacy complex character as the social and legal phenomenon, are specified in branch-wise legal researches with regard to certain scientific peculiarities of some areas of law.

V.B. Averianov, studying the effectiveness of legislation, pointed out that one must account for the compliance of the legal decisions with the general principles and directions of the state legislative policy, and therefore, with the objective and subjective social needs. [13] In order to adopt regulatory legal acts of systemic character, avoid solving certain social problems during the rule-making process in a situational manner, one has to use such an approach that enables making new norms or updating the existing ones, taking into account the current trends of social development. In fact, such an approach to the rule-making process is based on the recognition of the legitimacy complex character and on the direct relationships with and dependence on the social processes taking place in the society.

Describing the nature of legitimacy, one should mention the Article 6 of the Constitution of Ukraine, expressly ascertaining the legal order addressed to the legislative, executive, and judicial bodies exercising their authority within the limits determined by the Constitution and in accordance with the laws of Ukraine. [14]

By providing doctrinal interpretation of this constitutional provision, the scholars emphasized the social and humanistic significance of the state power division into legislative, executive, and judicial branches, its focus on ensuring the rights and freedoms of a man and a citizen, political stability and power deconcentration. The structural aspect of the state power separation covers the functional division and differentiation, not excluding the interdependence of the respective state authorities' functions. Thus, the executive and judicial branches of power have to comply with the current laws, which are the products of the legislative power and serve as the basis of the executive activities. [15] Therefore, one comes to quite logical conclusion that legitimacy presupposes such a state

12 Parkhomenko N.M. Konstytutsiina zakonnist iak meta, vymoha ta pravovyi rezhym: teoretychni aspekty. / N.M. Parkhomenko. – Almanakh prava, - 2012, vyp. 3. - S. 39.

13 Averianov V. B. Vybrani naukovy pratsi / uporiadnyky: Andriiko O.F. (ker.kol.), Nahrebelnii V.P., Kysil L.I.e.ta in., za zah.red.: Iu. S. Shemshuchenka, O.F. Andriiko. K.: Instytut derzhavy i prava im. V. M. Koretskoho NAN Ukrainy, 2011. - S.52.

14 Konstytutsia Ukrainy vid 28.06.1996 r. № 254к/96-VR. Ofitsiyni visnyk Ukrainy. 2010. № 72/1 (01.10.2010), St. 2598.

15 Konstytutsia Ukrainy. Naukovo-praktychnyi komentar / redkol.: V.Ia. Tatsii (holova redkol.), O.V. Petryshyn (vipd. sekr.), Iu.H. Barabash ta in.; Nats.akad.prav.nauk.Ukrainy. 2-he vyd., pererobl. i dopov. Kh.: Pravo, 2012. – S.38-39.

authority's activity that totally abides by the law and is within its framework. Also, legitimacy presupposes the division of power principle, excluding the performance of functions by the public authorities which are beyond their powers.

The only body bearing constitutional jurisdiction must legally define and prove the interpenetration of law, legislation, and such social regulators as morality, traditions, customs, etc., legitimized by society and stipulated by its cultural background. In fact, the Constitutional Court of Ukraine pointed out the elements of law, united by quality and answering the justice demands, law principles, set forth largely by the Constitution of Ukraine. Hence, quite logical conclusions can be drawn, underscoring the absence of identity between law and legislative acts, the latter being unfair, restricting the freedom and equality of a person. The justice is inherent in law, but not in legislative acts, which can be proved by the smooth legal scopes of a conduct and by the proportionality principle, declaring the legal liability depending on the committed offence. (Clause 4.10f of the reasoning part of the Decision dated 02.11.2004. № 15-rp/2004).¹⁶

Thus, regarding general, theoretical, constitutional standpoint, the legitimacy should be estimated as complex social and legal phenomenon, encompassing such elements as: principle, method, the mode of state functioning. The bodies belonging to three branches of power – legislative, executive and judicial – define legitimacy as legal requirement and legal right to act in strict conformity with the Constitution and other laws of Ukraine adhering to the principle of state power division, and the equality principle stating that are equal under the law forms the basis of the due legitimacy.

Describing the correlation between the rule of law principle and the legitimacy, I.L. Nevzorov asserts that society, establishing the rule of law principle, reveals such a close union of law and legitimacy that one can claim the existence of the due legitimacy phenomenon as the comprehensive and fundamental phenomenon peculiar of society having developed civil and democratic institutes. At the same time, the researcher interprets the rule of law, primarily, with regard to the human rights. He also finds such an interpretation to be an essential feature of the legitimacy principle. I.L. Nevzorov also notices that Western authors gradually recognize the due legitimacy concept, advocating the freedom values. The scholar finds the inseparable unities of fundamental and functional legal values to be essential features of the due legitimacy. [¹⁷]

So, one has to admit the afore-presented by I.L. Nevzorov scientists conclusions stating that: 1) the formal guarantees of legitimacy should

¹⁶U spravi za konstytutsiinym podanniam Verkhovnoho Sudu Ukrainy shchodo vidpovidnosti Konstytutsii Ukrainy (konstytutsiinosti) polozhen statti Kryminalnoho kodeksu Ukrainy (sprava pro pryznachennia sudom bilsh miakoho pokarannia): Rishennia Konstytutsiinoho Sudu Ukrainy vid 02.11.2004 № 15-rp/2004. Ofitsiyni visnyk Ukrainy. 2004. № 45 (26.11.2004), St. 2975.

¹⁷ Nevzorov I. L. Printsyp zakonnosti v pravoprimeritelnoi deiatelnosti: dis. ... kand.iurid.nauk: 12.00.01. Natsionalnyi Universitet vnutriennikh del. Kh., 2003.- S. 49, 64.

preponderate the notional ones; 2) any valid law is based on the relevance principle.^[18]

Overall, the legitimacy is one of the most complicated and pivotal issues of jurisprudence, which can be explained by the fact that there is a huge amount of versatile interpretations of this category, both similar and incompatible ones. Such a divergence of views occurs due to the fact that legitimacy is deemed to be extremely politicized and ideologically charged phenomenon, it reflects the will of various ruling élites, who changing one other, strive to endow the legitimacy category with features and directions they need, in order to reach their own goals. Moreover, we consider it relevant to include the rule of law principle into the Constitution of Ukraine accounting for the transition to the presidential-parliamentary form of governance, and regarding legal shortcomings of certain law provisions. The acknowledged academic Iu. Shemshuchenko pays attention to the fact that such principle is not outlined in the Constitution of Ukraine. At the same time, Parkhomenko N.M. reckons that the main aim of implementing the legitimacy principle is to ensure the rule of Constitution of Ukraine as the main source of law and, accordingly, the rule of law as the fundamental principle of legal, social, democratic state; effective activities fulfilled by the public authorities. At the same time, it should be admitted that the constitutional legitimacy concept is not thoroughly elaborated, as well as the mechanism of its implementation needs further development, and the constitutional liability mechanism must be improved too. The implementation of the Constitution of Ukraine norms, the rule of law principle directly depends on the existence or absence of the constitutional legitimacy. [19] Recognizing the multifacetedness of the *legitimacy* concept, M. Matuzov considers that it has rather simple and brief definition. The legitimacy obliges all the subjects of law to be bound by current legislative acts and subordinate regulatory legal acts, to adhere to them, to steadfastly comply with them. The key point of this definition goes to *observance*. Exactly this point determines the essence of the phenomenon in question, and any its interpretation would become void if there is no observance, because absence of observance leads to absence of legitimacy. The scientist reasonably asserts that the legitimacy concept has to cover not only the scopes of law enforcement, but the whole sphere of laws creation, i.e. lawmaking, and even more broadly, the whole lawmaking as such, because these processes are also assessed with regard to morality, ethics and legitimacy. The scholar underscores that the laws, first and foremost, should be observed by authorities, otherwise, the legitimacy would become incomplete and restricted, and authorities would become unlawful. The

18 Nevzorov I. L. Printsyp zakonnosti v pravoprimeritelnoi deiatelnosti: dis. ... kand.iurid.nauk: 12.00.01. Natsionalnyi Universitet vnutriennikh del. Kh., 2003.- S.49.

19 Parkhomenko N.M. Konstytutsiina zakonnist iak meta, vymoha ta pravovyi rezhym: teoretychni aspekty . / N,M, Parkhomenko. – Almanakh prava , - 2012, vyp. 3. - S. 41.

theory of law often regards legitimacy as the state and legal regime, ensuring the comprehensive character of legal norms within the society and state framework. The essence of legitimacy comprises the observance of legal rules and regulations. This requirement is deemed to be important and severe with regard to the executive power sector and state administration activity. Many regulatory acts contain such a requirement, including the Constitution of Ukraine; it is set forth according to the law and basing on it. Legal norms are binding until they are changed or cancelled, and all governmental and non-governmental structures, their representatives, public organizations, citizens of Ukraine and foreigners are obliged to steadfastly adhere to them. ^[20]

One must admit that although more than ten years had already passed since the aforementioned research was conducted, the above stated legitimacy features are still relevant. For example, one of the most widespread opinions regarding legitimacy is the one, expressly highlighted by Iu.S. Shemshuchenko. He defines legitimacy as one of the main principles organizing the public life, the basis of the legal framework and legal order in the state and society, aimed at strict and firm compliance with laws by those whom they are addressed. ²¹ There is a huge amount of such addressees comprising, in fact, all subjects of law. Being a constitutional principle, the legitimacy cannot be substituted by political or some other relevance, and the relevance factor must be embedded in the law itself. The laws shall cover the interests of all the people, and regarding the legal component, the laws have to be lawful, they should ensure the legal order in the state. It has been emphasized that the level of legitimacy depends on the level of the state social and economic development, the democracy status of the society, the level of legal consciousness and legal culture of the population, etc. The legal liability performs the functions of legitimacy special guarantees. ²² The observance of the legitimacy principle is deemed to be the distinctive feature of the law-governed state. ²³

Consequently, in comparison to the definition of legitimacy suggested by I.L. Nezorov, Iu.S. Shemshuchenko's approach adds the following features to this phenomenon:

- clear definition of legitimacy as the basis of the legal framework and legal order in state and society;
- inadmissibility (prohibition) of the legitimacy substitution by political or any other relevance;

20 Shai R.Ia. Pravoporiadok i zakonnist iak oznaky pravovoi derzhavy. Elektronnyi resurs. Rezhym dostupu http://science2016.lp.edu.ua/sites/default/files/Full_text_of_%20papers/vnulpurn_2014_801_23.pdf

21 Velykyi entsyklopedychnyi iurydychnyi slovnyk / za red. Iu. S. Shemshuchenko. K.: Iurydychna dumka, 2012.- S.290.

22 Velykyi entsyklopedychnyi iurydychnyi slovnyk / za red. Iu. S. Shemshuchenko. K.: Iurydychna dumka, 2012.- S.290

23 Teoriia derzhavy i prava: pidruchnyk / O. V. Petryshyn, S.P. Pohrebniak, V. S. Smorodynskyi ta in.; za red. O.V. Petryshyna . Kh.: Pravo, 2015. – S.330.

- the requirement to take into account not only the fundamental human rights, but the interests of all the people when making laws;
- determining the legitimacy guarantees.

Specific requirements render the essence of the legitimacy principle: the highest legal force of the law with regard to the system of regulatory legal acts; the binding force of the current legislation legal orders regarding all whom they are applied to; the uniformity of the legal requirements with regard to all subjects of law; inadmissibility (prohibition) of opposing the legitimacy and relevance with regard to the state bodies activity; inevitability of punishment for a committed offense. [24]

Thus, currently, it seems possible to define the following basic features of legitimacy as the principle establishing the social life, in addition to regarding legitimacy as the general requirement concerning the due implementation and application of the legislative norms: legitimacy is the basis of the legal framework and legal order in state and society; existence of requirements concerning the essence and form of the legislative acts adoption. The legitimacy is deemed to be a complex social and legal phenomenon, combining the society social needs and interests, and requirements for the due legitimacy, and equality of all under the law. Considering the before mentioned, it seems reasonable to underpin the scientific approach, defining legitimacy both as the principle, method and legal framework. Regarding the essence of legitimacy, the legal order is a phenomenon, associated with it.

Describing the legitimacy kernel, the following legitimacy components are mostly identified: principles, functions, balance of legitimacy, law and legislation. The legitimacy principle largely performs the functions of the social benchmark, and the citizens, public organizations, public officials must systematically check their activity regarding such a benchmark in order to bring it closer to the legal requirements of the state. The rule of law (legislative, statutory act) or, in other words, the exclusive character of law, obliges all the legal acts (both regulatory legal acts and all statutory enactments) to be bound by law, to comply with it. The constitution of the state has the highest legal force, that's why all the laws have to adhere to it, all the subordinate regulatory legal acts have to adhere to laws, and one has to underscore that subordinate legal acts are adopted and come into force only on condition that some social relations are not settled by law. [25]

Drawing conclusions, it should be underlined that the basic features of legitimacy, as the principle, establishing the social life, in addition to regarding legitimacy as the general requirement concerning the due implementation and application of the legislative norms, are defined the following ones: it is the basis

24 Teoriia derzhavy i prava: pidruchnyk / O. V. Petryshyn, S.P. Pohrebniak, V. S. Smorodynskyi ta in.; za red. O.V. Petryshyna . Kh.: Pravo, 2015. – S.337.

25 Kolpakov V.K., Hordieiev V.V., Sopilko I. M. ta in. protsesualnyi prymus v administrativnii vidpovidalnosti. Monohrafiia. – H.: Harkiviurydychnyi 2011. – S .319.

of the legal order and legal framework in state and society; existence of requirements concerning the essence and form of the legislative acts adoption. At the same time, the scientists are greatly interested in the subject-matter of the legitimacy principle as one of the legal liability principles, regarding studying the topical issues of administrative and legal means ensuring the legitimacy and legal order. So, one has to explicate the legitimacy subject-matter herein regarding the legal requirement to apply legal liability only for those acts which at the time of their commitment were considered to be offences, provided for by the current legislation, and apply the legal liability measures within sanctions of the legal norms. Legitimacy also means that only authorized officers have the right to hold the person legally liable within the framework of the established procedural order. [26]

Thus, the legitimacy principle as one of the legal liability principles includes the inseparable unity of four integral components: legal framework, legal requirement, legal personality, and legal procedure.

Namely, the legal framework provides for the enactment of a norm, defining the offence; legal requirement means the demand to apply liability within sanctions of the legal norm; legal personality is determined as the authority, provided by law, to hold a person legally liable; legal procedure provides for the enactment of the prosecution process, enshrined in the procedural rules.

The legitimacy is defined as the principle of applying legal rules, i.e. the adoption of a law enforcement decision by the authorized officials within their powers; procedural legal rules regulate the order and types of the law enforcement; there is a requirement and legal duty of the authorized law enforcement bodies to choose correctly the substantive law rules to properly interpret them and to make decisions in accordance with legal requirements. Thus, there are the following elements of the legitimacy principle, which is the basis for the rules of law application: legal personality; procedure of law implementation; legal qualifications.

The principle prohibiting to oppose the legitimacy and relevance implies that the law cannot be rejected regarding the life relevance reasoning (local or individual), as the individual reasoning is considered within the law scopes. The law relevance presupposes the necessity to make a choice for the benefit of the most effective way of implementing the law-making and the law-enforcement activities strictly within the law framework. And finally, the main goal of the legitimacy is to factually implement the legal rules into all types of activity and the inevitability of liability for any of the possible violations, by virtue both of general social factors and peculiar state-legal ones, including the coercive measures. These legitimacy principles can effectively influence the state and public life of the country only due

26 Теорія держави і права: підручник / О. В. Петришин, С.П. Погребняк, В. С. Смородинський та ін.; за ред. О.В. Петришина . Kh.: Pravo, 2015. – S.261.

to certain requirements, embodying the legitimacy principles into real legal relationships. Also, the legitimacy principle performs the functions, outlining the main trends of its influence onto the state, legal, social and political activity, along with the legitimacy principles, requiring certain modes of behavior (actions, activities) to be observed by the public relations participants.

To conclude, the legitimacy functions are deemed to be its main influential guidelines regarding the public relations, expressing its subject-matter and social purpose. The first legitimacy function worth mentioning is called the regulatory function. While fulfilling this function, all public relations participants are aimed at exercising legally significant actions regarding this or that sphere of state and social life. It is the function that gives the brightest idea of legitimacy as the self-acting social and legal phenomenon.

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Chapter 2

Legal communication in the modern information space

In the era of the information society legal relations are characterized by large-scale processes of informatization and integration. The entry into the European community and the expansion of international relations bring up several challenges for Ukraine, including integration into the world of information space. As we know, informatization, information and knowledge become key factors of production, and the field of information and communication technologies becomes an important tool for achieving the necessary results. Information and communication technologies, which include legal communication, are used for legal regulation of social relations. Under the conditions of the establishment of a democratic society in Ukraine, in accordance with the European standards, there is a need to find new approaches to the understanding of the law, its perception and enforcement, in particular, the study of its communicative qualities. Thus, in the process of development of social relations, new legal norms and values of the modern information space that is characterized by dynamism, a variety of social and economic and communication ties, the introduction of new management methods and rules arise. Taking this into account, the relevance of the study of legal communication is determined by the scientific and theoretical and practical significance for the development of modern information space.

Issues of legal communication were investigated both by national and foreign scientists. In particular, J. Habermas studied a communicative act, J. Peters investigated the history of communication, Mark van Hoek considered the law as communication, A. Polyakov is a representative of the communicative approach to the law, A. Tokarska investigated legal communication in the context of non-classical legal consciousness, I. Chestnov analyzed dialogical interaction in the law. Various aspects of legal communication were studied by V. Bachinin, N. Luhmann, S. Maksimov, N. Onishchenko, P. Rabinovych, O. Stovba and others. Scientific analysis of the works of famous scientists gives grounds to state the lack of unity in approaches to understanding nature, concept, and essence of legal communication.

The purpose of the scientific article is to study the essence and role of legal communication in the modern information space.

The information society is an environment in which the values of civil society are effectively implemented. Ukraine joined this process as a state that declared its development based on democracy. The problems of the formation of the information society are especially relevant for countries in transition, in particular for modern Ukraine, where the processes of statehood establishment take place, analysis and generalization of the world experience of state formation are carried

out, new models of public administration and legal communication, which are aimed at strengthening the interaction between society and authorities and ensuring the effectiveness of the legislation and legal policy of the state, are approbated.

Under the conditions of globalization and information saturation of an individualized society, it is increasingly difficult for the law and state authorities to preserve the foundations of human existence. Rationally built institutions – organizations, norms, ideas, which have been ensuring the stability of communication for centuries, are increasingly losing ground. The sense of their imperfection becomes a determinative stimulus for changes in jurisprudence [1, p. 5].

The development of information and communication technologies as well as the growth of information openness of society depends not only on the progress of scientific and technical thought, but also on the social and economic and legal conditions under which legal communication functions. In particular, the lagging of legislative insurance of human rights to information, personal privacy and personal data as well as media and communication restrictions can lead to public consciousness manipulation and control over the personality by government institutions or criminal structures. In addition, the vulnerability of information and telecommunication systems that provide information security of the state is a significant concern. Taking these into account, most developed countries consider the formation of the state information policy as one of the most important tasks, since the information society provides new opportunities for the development of democracy, consideration of public opinion and control over the activities of state authorities. The term "information" was introduced into legal science in the late 60s of the XX century in connection with attempts to apply the achievements of cybernetics and information theory for the analysis of information and legal processes. The first attempts to define the concept "legal information" were made in the late 60s – 70s of the XX century while studying legal information as one of the types of information. Other works that reveal the features of the law as a carrier of information, characteristics of legal information, computer and information law appeared later in legal literature. The Constitution of Ukraine proclaimed Ukraine a constitutional state that recognizes the law as a measure of freedom and justice, expressed in laws, subordinate acts and practice of enforcing human rights and freedoms, democracy, etc.

Information space of any state is an objective component and an integral attribute of its appropriate functioning. Ukraine is experiencing the period of transformation of the legal system and all its elements the legal world outlook and legal culture and it needs reforms and changes. This process is rather ambiguous, complex and contradictory, since there is still the influence of the previous information and communication system and it slows democratic transformations

down. N. Onishchenko points out that the development of the national legal system depends on many factors, such as economic, social, political ones, as well as personal legal culture, legal awareness, legal world outlook of each representative of a civil society who is capable of thinking independently, making decisions, expressing his / her opinion publicly, being responsible for the consequences of his / her activities, showing interest in a dynamic development of the legal system [2, p. 8].

Moreover, a thorough study of the problem of legal communication requires a new approach for modern jurisprudence that would provide a comprehensive study of legal communication, principles, goals and functions based on existing works in the theory of state and law, philosophy of law, sociology of law and other sciences. As A.S. Tokarska points out, the solution of problem relations lies in the sphere of legal communication, which is the source of the formation and the object of law. The law cannot be the unappealable will of the power of the legislative entity or the will of another state; it can develop as an ontological result of an intersubjective interaction [3, p. 38].

In a democratic information society a person is the source of actions, not the one who is inactive, but the one who is thoughtful, who has understood himself / herself and the world and wants to improve it. The limit of each individual's freedom is determined by the possibilities of discussing problems and making common progressive decisions in the legal space. The precondition for making an objective decision is always the language and speech activity of the individual and the extent of his / her social activity. To move away from participating in decision making is to move away from making a choice and exercising one's own freedom. The quality of the decisions made, and hence the limit of human freedom, depends on many factors, which include legal education and legal knowledge, intellectual activity of a person and play an increasingly important part in the progressive development of society.

For many decades, national jurisprudence has been deprived of the experience of harmonizing heterogeneous discourses and still needs to improve methodological issues of legal knowledge. The problem is particularly acute in connection with the entry of Ukraine into the European information space, which is impossible without establishing the value of law and its in-depth theoretical understanding.

The term "communication" (from Latin *communicatio*) appeared in scientific literature at the beginning of the XX century. One of the founders of American sociology, Charles Cooley, believed that communication means the mechanism by which the existence and development of human relationships become possible – all the symbols of mind, together with the methods of their transmission in space and conservation in time [4, p. 379].

Legal communication arises and develops in the process of society development. Its origins date back to the era of the ancient world. The first oral-written communicative acts had the form of religious norms expressing the motives of human behavior. The theory of communication was studied by Plato, Aristotle, Cicero, M. Aurelius, Augustine of Hippo who initiated the theoretical elaboration of the idea of social dialogue. The idea of solidarity is the most fully represented in the philosophical thought of ancient philosophers. Aristotle was the first to suggest this idea, he reproduced the presence of it in the very essence of human nature. Further studies of the theory of communication are observed in the writings of Plato and Cicero. In their worldview, the "the correct laws of the state" must perform the role of the regulator of social relations, and the state emerged as an association of people with common interests and rights. According to a Stoic philosopher M. Aurelius, the irresistible human nature is the basis of the consent and unity in society. Augustine of Hippo interpreted the establishment of consensus as a way of organizing society and strengthening the state [5, p. 17].

As it is known, Heraclitus stimulated the reasoning that the problems of being are not solved only by means of one's own mind, which are deprived of the "unity of oppositions". An ancient Greek philosopher Socrates is the founder of the method of finding the truth in a dialogue.

The idea of regulating conflicts by the state is developed further in the works of N. Machiavelli and Ukrainian philosophers Yu. Kotermak-Drohobych, P. Rusyn, S. Orikhovsky-Roksolan. At the next stage, attention is drawn to civil society, the emergence of the theory of social contract (G. Grotius, T. Hobbes, B. Spinoza, J. Locke, I. Kant, S. Montesquieu, So-Tszy, J.-J. Rousseau). In the Modern Age the communication between the authorities and citizens was studied by G. Hegel, A. Tocqueville, A. Ferguson. The thoroughness of the theoretical justification of the approaches to the interpretation of the relation "historical process – society – communication" is a feature of the concepts of K. Jaspers and his opponent M. Buber. K. Jaspers considers communication as the basis of existence, in which "being" and "being in communion" are consubstantial. M. Buber, in order to overcome the "monologism" of existential communication, connects the emergence of a new social sphere not only with communication (the primary manifestation of relations), but with the sacred being, which fills human interactions with openness and frankness [6, p. 17]

A brief analysis of the peculiarities of legal communication based on philosophical and legal sources indicates that the appearance of elements of legal communication was directly or indirectly evidenced in the national and legal heritage, and legal norms were created as obligatory components of the communication process. Philosophic and legal sources were formed both in a foreign legal thought and in national ideas and created the ground for modern legal communication.

Based on the philosophical and legal heritage of the past, the following legal values appear: the right to information, freedom of thought, freedom of expression, and freedom of information.

Modern development of legal communication has led to a synthesis of the western and eastern traditions of the history of law. The first one took its origins in the systems of law of ancient Greece, Rome and Byzantium, and the second one in Egypt, India and China. The views of researchers in the estimations of this heritage coincide, concentrating on the initial function of communication as an effective tool of social relations (V. Kravitz, L. Ozadovska, O. Petroe, A. Polyakov, A. Tokarska, I. Chestnov, etc.). First of all, the communication theory of law of A. Polyakov and the theory of dialogue in law of I. Chestnov are worth noting. A. Polyakov was one of the first Russian scientists who investigated problems of the law and its functioning in society, emphasized the communicative, and hence the behavioral orientation of the law. After all, the law (although it should be noted that the researcher mostly used the notion of "a legislative act") is intended to arrange communicative actions and discursive mutual understanding within the limits of a certain legal reality, being based mainly on the deep level of social relations as a kind of communicative interrelations. I. Chestnov considers the law as a dialogue in the diachronous (historical) and synchronous dimensions, providing the mechanism of reproduction of the law and understanding the dialogue, first of all, ontologically; makes conclusions about the dialogics of social life on the basis of the dialogic approach of M. Bakhtin, M. Buber, F. Rosenzweig, O. Rosenstock-Huussy, and also dialogic ideas in the semiotics of Yu. Lotman, B. Uspensky and others.

I. Chestnov believes that a dialogue is empirically possible only between people (both real and virtual-internal dialogues). It is the person who constructs the rule of law on the basis of the act of a decision, that is, a legally significant action, in which the concept of a desirable new version of legal behavior is formulated. The scientist suggests to consider a dialogue as harmonization, coordination of joint efforts of people to meet individual ones as a content of legal communication [7, p.26].

According to O. Petroe, the basis of the concept of a social dialogue is the idea of solidarity, which marks the totality of different aspects of unity, such as interests, beliefs, values, actions in relations between people who share common values and form a certain social integrity [8, p. 38].

The methodology of legal science provides an informational and communicative function, which consists in obtaining comprehensive information, as well as refinement, systematization and enrichment of scientific terms and concepts; creation of a system of scientific information, which focuses on the facts and logical and analytical tools of scientific knowledge. The processes of provision and transmission of legal information are provided through legal communication.

Legal communication also functions according to certain rules, in the mode of legal norms, as a system of interdependent and interrelated assertions (competences) and duties that have, as compared with other social norms, the highest, dominant character. Participants of legal communications can establish normative rights and duties (that is, establish legal content) outside of special legal texts. This also applies to normative practice, that is, legal custom, legal precedent, as a result of legal communication in the field of certain public relations. Legal communication cannot be limited only to the interpretation of legal texts. Creation of these texts is also the result of legal communication through a special procedure that is used by the competent authorities of the state. At the same time, the formation of legal norms is not limited to the creation of legal texts through a special procedure, albeit one that has received priority in many jurisdictions. Legal norms are created outside of such a procedure, they can also arise directly during social communication, that is, when certain rules of conduct and relations of communication participants are given a dominant, priority character or when certain rules are recognized as the ones that have the highest power and occupy the highest position among other rules of social regulation, they, as a matter of fact, are given the nature of legal norms.

According to a well-known European scientist Mark van Hoek, the law is always essentially based on communication: communication between a legislator and citizens, a legislator and the judiciary, communication between the parties under a contract, communication during trial. This communicative aspect is considered today within the framework of the legitimization of the law: a rational dialogue between lawyers as the main guarantee for the "correct" interpretation and application of the law [9, p. 20].

Consequently, communication as the interaction of subjects contains two approaches according to scientific assessments: on the one hand, it is interpreted as a process of communication, which is based on the information exchange (and these views prevail among researchers of various fields), on the other hand, communication is considered to be the way of solving problem issues, the method for regulating relations, rather than a habitual exchange of information. However, in the first and second cases, branch communications, in which the subjective rights of their participants are exercised are less studied than general features of the first and the second methods of legal interaction in the practice of human relations. In the broadest sense, communication in the law is complicated by legal interpretations of the definitions of legal acts, the process of interaction between subjects, which is aimed at achieving a communicative balance and consensus, primarily in the structure of legal regulation. Legal communication provides the solution of legal problems based on the highest insurance of rights and freedoms of all subjects.

The opinion of a Canadian legal scholar G. Provencher is also interesting in terms of the theory of law. According to it, there is a relationship between the law and communication, which manifests itself through a coherent, coordinated "action", as well as through a combination of the legal and the communicative. Such interconnection of spheres allows, on the one hand, to consider legal communication not only as an abstract concept, but also as a practical sphere of coordination of interaction (through behavior) of people in a legal and communicative society [10, p. 117].

A communicative act is, as a rule, the basis of legal communication. According to A. Tokarska, a legal communicative act has not been static, it has changed due to political, economic, geographical and other conditions of the state functioning. The dynamics of the interaction of authorities and philosophically and legally oriented society was that society, through mentally formed communicative and legal intentions, entered into interaction with state institutions, where it sought justice [6, p. 11-12].

O. M. Balynska believes that from the point of view of semiotics, legal communication is a cognitive process, which is carried out with the use of legal awareness, legal world outlook, experience, legal customs and traditions as representational manifestations of what was preliminarily modeled in the law [11, p. 177]; as well as (as a process of understanding law) is not as close to the disclosure of the identity of the intention of a lawmaker, legislator, as to the co-authorship, designing models of interpretation of legal norms in the process of producing legal behavior [11, p. 211].

According to the communicative approach, S. I. Maksimov points out that legal reality cannot be fully grasped by us, not only because of its dynamism... the meaning of the law does not resolve in the consciousness of a subject or in the external social world, it is considered as the result of meeting (communication) of subjects immersed in the world of life, during which, the law is exercised and reproduced [12, p. 66].

A. V Polyakov pays particular attention to the fact that legal communication is an interaction, which is universal, based on legal rules and affects the motivational sphere of subjects (both individual and collective ones), ultimately defining the direction of their activities [13].

Legal communication is characterized by a sequence of actions, determined by the appropriate legal means (means of actions and means of establishment), which are dispositive and imperative. Legal communication consists of elements, has a complex structure and requires the stability of connections, which makes it possible to preserve its integrity under conditions of internal and external changes.

Yu. V. Pasmor under social and legal communication understands the totality of processes of structures that provide purposeful circulation and spreading of

regulatory information and legal knowledge in the social space-time continuum [14, p. 35].

The divergence of assessments of legal communication allows us to state that legal communication is: 1) the process of exchange and interaction of legal information used by various state and legal institutions in managerial measures of organizational, economic, social and other nature, 2) the process of realization of legal communication is carried out by social institutions that create and transmit legal information in time and space; 3) interpersonal legal communication in the process of communicative and legal relations.

Legal communication is a set of processes and entities that provide purposeful circulation and spreading of regulatory information and legal knowledge in the modern information space.

Intersubjective legal relations arise during legal communication and they are the source of rights and duties of subjects. Legal norms establish the rights and duties of subjects that enter into communication between themselves and with the state on their basis. The ability to engage in legal communication is inherent in the subjects of social relations – citizens, their associations, public authorities. In order for communication to arise, such a norm should have certain qualitative properties, in particular, to be perceived by the subjects as legal, that is, the one that primarily contains valuable, real (which can be exercised), and not declarative rights and duties. The process of perception of legal norms by their recipients (law recipient) can be considered communicative and didactic, since the effectiveness of legal communication lies in the cognitive and didactic influence of the law. This seems possible if the legal norm is interpreted in terms of a definitive language. In this sense, the definition is a certain model. Accordingly, a legal norm, which does not include specified qualitative characteristics, is not able to create communication between the subjects, and above all, it concerns legal norms contained in regulatory legal acts adopted by the state law-making bodies. Consequently, the law is the means of communication between a person (citizen) and the state, its bodies. More precisely, these are the rights and duties that are stated in legal norms and enable corresponding actions.

According to Article 5 of the Law of Ukraine "On Information", everyone has the right to information, which provides for the free acquisition, use, spreading, storage and protection of information necessary for the exercising of one's rights, freedoms and legitimate interests. The exercise of the right to information should not violate public, political, economic, social, spiritual, environmental and other rights, freedoms and legitimate interests of other citizens, the rights and interests of legal entities [15].

Undoubtedly, legal communication between the western tradition of the law and the national law is expressed in the gradualness of specifically determined actions: the determination of the aim and the purpose of exchange; availability of

legal principles; object; subjects that exercise their legitimate interests and needs; ways and methods of communication; legal texts; appropriate regulatory framework; feedback. The main purpose of legal communication is to ensure an effective interaction of states, as well as the borrowing of certain positive structures for the national legal system. In addition, the purpose of legal communication is to ensure the quality and effectiveness of law-making activities; the effectiveness of the implementation of administrative legal socially important tasks; providing legal information to society, adhering to European values in relations between authorities and public; ensuring publicity and access of citizens to information, implementation of constitutional interests and legal rights of citizens; ensuring law and order in society and accelerating the solution of information security issues.

Under conditions of search of an optimal model of public administration, in the field of communication between authorities and civil society, information and analytical activities are important in order to ensure the effectiveness of legislation, law administration and law enforcement activities.

According to N. Onishchenko, the activation of modern social and legal relations, first between the state and society, requires scientific substantiation and introduction of new communication forms in the complex interaction of the coordinate system "community – authority". Social and legal communications of the transitive age serve as a means of ensuring the dialogue of the state of the citizen and as a regulatory and social constructive factor of social development [16, p. 182].

Among the objective factors influencing legal communication, the following ones should be mentioned: the state of law and order, an appropriate level of legal protection of the population and social adaptation in society, effectiveness of implementation of legal norms, the flexibility and harmony of the system of legislation, timely response to changes in society. Legal communication affects the development of Ukrainian society under conditions of European integration. For two years in a row, Ukraine has undergone a concentrated impact of various challenges: from internal social and political problems to external information and war aggression. Communication becomes an integral part of the national security system under conditions, when there are consistent efforts to destabilize the situation in the country, which ultimately aims at disturbing trust of the society to the government, and, therefore, dismantling the existing system of governance [17, p. 52].

An important aspect of influence of the law on the state is its communicative characteristics. In particular, the ability of the legal norm to consolidate the rights and obligations of the subjects, who on their basis, enter communication between themselves and directly with the state. The ability to enter legal communications is common to all subjects of social relations – people, their associations, state

(public) authorities [18, p. 234]. As A. V. Polyakov notes, law is a form of the standardized psycholinguamental activities of entities (physical and legal) within the context of communicative intersubjective interaction, the consequences of which are objectified in the legal culture, social institutions, legal texts and affect legal awareness, legal norms and legal relations, forming a unified legal structure [19, p. 73].

The subjects of legal communication are citizens of Ukraine, foreigners, associations of citizens, mass media, bodies of state (public) authorities, that is, users and consumers of normative and legal information and information activity in the informational space. Therefore, it is important for subjects to understand and realize the essence and the purpose of the law in society in the process of legal relations.

Legal communication acts as a process of interaction of subjects on the basis of the rules of conduct, reflected in regulations and other legislative acts, through the effectuation of their rights and duties in order to achieve a compromise and mutual understanding.

The subject of legal communication (for various reasons: interest, material grounds, pressure, threat, fear of punishment) can manipulate argumentation in allegations, explanations and interpretations. Under these conditions, there are few reasons for effective legal communication, as well as the possibilities to distinguish between true and false aspirations to reach the agreement. The second reason that does not contribute to the desired discursive mutual understanding is the unequal understanding of legal norms by the communicators. If the subject of legal relations acts as the bearer of the ideas of the rule of law, then another participant in the legal dialogue becomes the main opponent-communicant, who takes a defensive, aggressive or anticipating and observational position.

The following features can be distinguished: 1) legal communication arises between the equal subjects at the micro level (between the subjects of law) and the macro level (between the individuals and the system of law in general); 2) subjects of legal communication choose certain variants of behavior in the course of interaction; 3) the level of legal culture of a subject of legal communication plays an important role in legal communication; 4) subjects in the process of legal communication act as holders of right and legal duties; 5) legal communication is objectified in the text of a legal norm; 6) the main purpose of the legal communication is to ensure consensus between objects and achieve mutual understanding between them.

As it is generally known, information society is a civil society with developed information production and a high level of information and legal culture in which the efficiency of people's activities is provided by a set of services based on intelligent information technologies and communication technologies. In the process of formation of the information society in Ukraine it is necessary to use all

the accumulated world experience in the formation of the information society and the state regulation of national information processes, adapting it to Ukrainian realities, first of all, the mentality of the Ukrainian people and the current state of the Ukrainian economy. The peculiarities of the formation of information society in Ukraine are determined by political, social and economic and legal conditions that are controversial due to the transition of society. One of the ways of formation of information society in Ukraine is to improve the various forms of legal communication, in particular the use of modern information and communication technologies. The underestimation of the influence of the law on the development of the information community may have negative consequences, in particular the spreading of legal nihilism, and crime growth.

It should be noted that the study of legal communication is necessary, as far as it is used in almost all spheres of social relations that require legal regulation. This process is supported by the implementation of electronic government technologies (e-governance), e-justice, e-democracy, e-parliamentarism (e-parliament), the need to confront cybercrime and cyber-terrorism, and regulation of the Internet sphere. To modernize the law under modern conditions, conscious support of citizens is extremely necessary, which will be provided by ICT in the process of new forms of interaction between the authorities and society in accordance with the principles of deliberative democracy. As it is known, methods and techniques of legal communication are widely used to discuss topical issues in a democratic society, including debates and discourses that are reflected in the notion of deliberation. The philosophical basis of the model of a deliberative (advisory) democracy or "democracy of discussion" is the communicative theory of a famous German philosopher Jurgen Habermas. According to the scientist, the beginning of the formation of a communicative deliberation process is connected with the national state, although within this framework, this process has not yet received proper development. The main democratic procedure under such conditions is the "dialogue communication" between state power and the free public, and the consequence is the achievement of a compromise [20, p. 78].

It is necessary to consider the etymology of this notion. The term comes from Latin "deliberatio" (English equivalent – "deliberation"), which means "diligent weighing", "discussion", "thinking over", "thinking about". Only in the aggregate these synonyms sufficiently reflect the content of it, and in the political science literature, the Ukrainian translation is used: "advisory process", "advisory democracy". In the modern information space, it is necessary to find other new progressive forms of legal communication in the plane authority-community. According to modern scholars, in the previous period, a protective way of liberal democracy was on top, but it did not take into account "that the modern model of relations between the state and citizens should be built not according to the traditional principle of subject-object relations (controlling-controlled), but on

mechanisms of "communicative behavior", that is, subject-subject relations, on the principles of determining the equality of both a person of the state and a "private" person.

A large set of theoretical and practical problems has recently been developed autonomously in this regard within the framework of the concept of electronic rulemaking (e-rules development). Significantly, with the support of the world's leading law schools – Yale, Harvard, New York and others, this theory, methodology and technology have been supported and spread not only in the USA but also in leading world countries [21].

The Association Agreement is aimed at gradual rapprochement between Ukraine and the EU, formation of the necessary framework for bilateral dialogue in all spheres, strengthening of cooperation in the spheres of justice, freedom and security in order to ensure the rule of law, respect for human rights and fundamental freedoms, gender equality and the elimination of discrimination in all its forms and manifestations. Processes of European integration should find support among society. Thus, the Communication Strategy for European Integration for 2018-2020 states that the implementation of the provisions of Association Agreement, the impact of these processes on the lives of every citizen makes it necessary to conduct powerful explanatory and communication work [22].

Special way of communication is typical for the law as a subject and communicative system. Legal communication is based on the idea of forming a common legal will, in which will of one person is proportional to the will of another one. According to L. A. Gorbenko, the legal way of communication should not concern the content of the will, but the external side (form of will). This method of communication foresees unity of goals in itself, based on the freedom of subjects, on establishing their mutual interest. At early stages of social development, legal communication becomes the result of legal regulation, which is understood as the purposeful impact of the legal and regulatory system on society and its subjects. This system is an integral part of legal regulation [23, p. 10].

At the stage of transition to an information and legal society, the relationship between legal communication and legal regulation should change. Legal communication should acquire independent significance with regard to legal regulation, which is precisely the system that is the derivative element of legal communication.

Legal communication principles are important for its functioning. In legal science, the principles of law, principles of legal responsibility, principles of legal state and other ones are distinguished. As a rule, it refers to initial, fundamental, oriented and legitimate requirements that are the basis of a particular legal phenomenon. The principles are compulsory and make the most important elements of any legal phenomenon. They have a world-wide experience of history

and development of law, the experience of a certain civilization. Principles are the initial provisions that establish the objective laws of social life. Their leading role is provided by their direct or indirect consolidation in the norms of law. In the same sense the principles are used while describing legal communication.

Principles of legal communication are the basic principles, regulations, which reveal the essence and purpose of legal communication. The principles of legal communication create the basis for ensuring the quality and effectiveness of law-making activities; the effectiveness of the implementation of administrative legal socially important tasks; provision of legal information to the public, observance of European principles in relations between the authorities and the public; ensuring publicity and access of citizens to information, implementation of constitutional interests and legal rights of citizens; ensuring law and order in society and accelerating the resolution of information security issues.

In addition, the principles of legal communication are related to the principles of information relations and principles of information law. According to Article 2 of the Law of Ukraine "On Information", the main principles of information relations are: the guarantee of the right to information; openness, accessibility of information, freedom of information exchange; faithfulness and completeness of information; freedom of views and beliefs expression; the legality of obtaining, using, spreading, storing and protecting information; the protection of the person from interference in her personal and family life [15].

The principles of legal communication can be divided into two groups. General principles are the following: rule of law, humanism, publicity, equality of rights of citizens, democracy and legality. Special principles are the following: openness, transparency, faithfulness, accessibility, forecasting and timeliness. It should be noted that this is not an exhaustive list of principles of legal communication, which will be the subject of further research. The principles of legal communication should become the fundamental principles on which all information and communication activities should be based, and their implementation will ensure the development of the information and legal space in Ukraine on the basis of universal values, taking into account the best world legal experience.

In our opinion, one of the reform directions is the formation of a new type of legal information space, a part of which is legal communication, and its subjects are the mass media (hereinafter - the media), which provide legal knowledge to citizens and form their legal culture.

In a theoretical concept of communication the law appears as a phenomenon that arose because of the ability of a person to interact with other people, different institutions and control and settle their relationships. Modern society can not exist without multilateral, accurate information about legal reality. Feeling the need for legal information, it creates special institutions that provide it with legal information. On the other hand, these institutions use the power of information to

influence society, forming its legal consciousness and legal culture. There are various forms of informing about the current legislation: legal informing through mass media, through the Internet, through the influence of legal practice, legal advice and legal education.

One of the main issues is the legal information provided by the mass media, the advantages of which are the speed of information submission, the maximum number of people covered, the daily impact and the availability of legal information. According to various criteria in scientific literature various manifestations of legal communication, which will be the further subject of further scientific research are distinguished. Thus, legal and newspaper discourse are distinguished. One of the types of legal communication S. Kost determines the legal newspaper discourse and indicates its types: 1) the discourse of violent content; 2) the discourse of informative and statement content; 3) the discourse of law-making content; 4) the discourse of regulatory and explanatory content; 5) judicial discourse: a) protective; b) indictment); 6) critical and evaluative discourse of analytical content; 7) problem and legal discourse [24, p. 483].

The mass media as the subjects of legal communication are the material and other media of legal information, bodies and organizations (legal entities) registered in accordance with the established procedure, which ensure the public distribution of legal printed and audio-visual information. The main types of the mass media as the subjects of legal communication are: printed (press) – newspapers, magazines, newsletters, etc.; audiovisual – broadcasting, television, cinema, sound recording and electronic media. In the process of legal communication the media, as its subjects, have the following functions: law-educational, value and normative, law-oriented, communicative, preventive, law-socializing, prognostic. A necessary condition for the formation of the information and legal space is the proper level of legal culture of journalists as subjects of legal communication.

Legal communication is an important link in the system of public administration, since the completeness, quality and reliability of the information used to make social and political decisions determines the fairness and validity of such decisions. Mass media is one of the components of the formation of a legal world outlook of a person. It is worth noting that mass media is a preventive measure to avoid destructive influence on a person. The availability of legal information in the mass media is explained, firstly, by the fact that in contrast to the official publication of a law, which contains only its text, mass media in most cases clarifies legal norms, and explains how to apply them in practice. Secondly, this information finds its recipient, however, there are cases when mass media often has a destructive effect on Ukrainian citizens. Thus, in mass media flawed bills are sometimes actively discussed, creating an impression of low quality of the legislative base and low qualification of legislators; there are cases of unsuccessful

or incorrect use of legal terms. On the radio and television there is a negative aspect of appealing to news releases and analytical programs, which consists in the selectivity of presenting legal information: unpopular laws, resonance cases, journalistic investigations, broadcasting films and criminal chronicles that propagate standards of legal behavior that are incompatible with legal values of Ukrainian society.

As it is generally known, legal culture in public relations performs a communicative function, ensuring communication of citizens in the legal sphere, exercising a legal influence on a person. The law has the following communicative characteristics: it is a system of legal information, created and spread in the process of social communication, expressed in a specific language form, spreads to an indefinite number of persons; created in single procedural forms. The law is a public phenomenon of cognition and evaluation by communicants; channels of transmission of legal information are formalized, created and controlled by state authorities and are subjects to the law. Legal communication, as a rule, is characterized by one-sided orientation (the legislator is a subject of law) and has two forms: mass (normative legal regulation) and interpersonal.

Any systematic legal reform should be combined with the processes of moral renewal of society and aimed at substantial strengthening of moral principles of law and a deep understanding of its social value. The acquired legal knowledge should become value orientations of the person, her internal convictions, and, accordingly, to find her reflection in lawful behavior. With the help of communicative connections existing in society, a peculiar "valuable field of justice" is formed, in which the concepts of the law, freedom, legislative act, justice, equality, etc. are formed, functioned and retransmitted to different levels of the system. To ensure the implementation of information policy, efforts are needed both by state and public institutions, especially in the direction of the formation of a legal culture under modern conditions. In the information and legal society, the legal culture of citizens determines the fate of political and legal reforms and the functioning of the legal system of Ukraine. According to N. M. Onishchenko, the implementation of the functions of the law in the information form notifies the society about state permissions and prohibitions, information on methods and means of achieving socially useful goals. Legal awareness of members of society is a necessary condition for the functioning of the legal system [25, p. 6].

The interaction of public authorities and civil society institutions in the process of legal education should be carried out on a value basis, which should play the role of a world-view basis of communicative interactions between the government and public organizations. Under modern conditions, improvement of legal communication, which provides mediation between society and the state, is relevant. In addition, it allows citizens to access information and make weighted, socially significant political decisions, and most importantly – to form a

"democratic person" (the one that has responsibility, desire for freedom, independence, self-sufficiency, law abidance, respect for the rights and freedoms of other citizens, initiative). The formation of a democratic information and legal society is the result of effective interaction between the authorities and the public, a high level of legal culture of the population and the ability of state to solve social and legal problems, taking into account the legitimate interests of citizens. Moreover, legal communication provides great opportunities for improving democratic practices and the participation of civil society in state-building processes, which will enhance the transparency, accountability and responsibility of government institutions, as well as for encouraging public participation and increasing opportunities to enhance the accessibility and openness of the democratic process.

The research of the role of legal communication in the context of the modern information space forms a modern postclassical legal consciousness that is oriented towards ensuring the rights, freedoms and legitimate interests of citizens. Updating of legal relations, first of all between the state and society, requires scientific substantiation and introduction of new forms of communication. Legal communication in this case serves as a means of ensuring dialogue between the state and citizens as a regulatory and social and constructive factor of social development. At the stage of transition to the information and legal society, the relationship between legal communication and legal regulation is changing. Legal communication becomes independent in terms of legal regulation, which becomes a system, a derived element of legal communication. We hope that in future the information legislation will meet the norms of the European Union, and the model of dialogue between the authorities and the public should be based on a clear conceptual and categorical apparatus and an appropriate organizational and legal mechanism, which causes necessity of introduction of new forms of legal communication in accordance with the European democratic standards. Legal communication contributes to the formation of legal values in the modern information space, the positive perception of law, the improvement of legal policy of the state and state information policy. The conditions of entry of Ukraine into the world information space are the following: improvement of the legal mechanism of interaction between the authorities and society, solving problems of ensuring the effective development of the national information infrastructure, creation of an informational analytical system of the activity of state authorities, accelerating the processes of modernizing the material and technical base, and reliable information resources protection. The effectiveness of legal communication is ensured by observance of the principles of publicity, democracy, forecasting and priority of human and civil rights and freedoms. In the future, the information law should meet the requirements of European standards, and the

interaction of the authorities and the public should be based on the appropriate organizational and legal mechanism.

The analysis of the main directions of modern studies of the communicative nature of the law and legal communication proves the necessity to create a broad interdisciplinary research program built in course of integral paradigm of legal consciousness, on the basis of which the general methodological philosophical and legal approaches would be supplemented by appropriate specification of legal, informational, axiological and other aspects of the analysis of communicative activities. The purpose of such research should be the search of conceptual models and ways to optimize legal communication, as well as to develop regulatory and legal means for its regulation.

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Chapter 3

Philosophical and legal concepts in the context of regulating national and international public order

The modern globalized information world is a unique phenomenon and unknown to past epochs. On a history scale it is a moment in which humanity began to understand its commonality, but for the sincere feeling of "ordinary earthman" of international solidarity, it is necessary for humanity to realize itself, firstly, transhistorically – as a planetary unity, branched into various spiritual and intellectual development lines, each of which has a unique experience of knowledge about a person, preserved in the cultures of the peoples of our time, and secondly, in the context of the development of the Universe – as a phenomenon of cosmic order. The concept of the noosphere, formed in the works of E. Le Roy (Le Roy, 1928), V. I. Vernadsky (Vernadsky, 1991) and P.T. de Chardin (Chardin, 1989), seems to be an important factor in the solidarity of mankind, in spite of the diversity of its contemporary interpretations. The noosphere is a certain result of the evolution of the Universe, implemented on the planet Earth in the form of one of the geospheres, globally arranged by the solidary scientifically grounded activity of mankind (Vernadsky, 1991: 256). However, despite the positive results of scientific activity, permanently unclear are both criteria of its "scientific validity", especially on a planetary scale, and the content and prospects of science itself. "Revolt against mind", which in due time drew K. Popper's attention (Popper, 1994: 84), albeit in other various contexts, reflect the general tendency of mankind to periodic disappointment in science, because of its own miscalculations and the fluctuations of the general public mood (Sorokin, 2006: 97). The current aggravation of social relations of various levels, including international ones and events on the verge of previous centuries suggest that the "spontaneous" component of human nature in these transitional periods is mass in conflict with the prevailing scientifically grounded "pictures of the world" and the rules of the organization of societies (Radzivill, 2018: 25). However, during these periods appealing to "non-scientific" forms of knowledge makes actual and updates the most interesting philosophical ideas. The concept of the noosphere, as a reflection on events at the turn of the XIX-XX centuries embodies, firstly, the general methodological approach established by I. Kant at the turn of the XVIII-XIX centuries, according to which any notion of reality and adequate activity are conditioned by our motives and the ability to perceive and, while discussing, systematize empirical experience, and secondly, gives ideas about international law and the development of a global civil society (Tihomirov, 1899).

The purpose of the chapter – realizing that the challenges to mankind at the end of the second – at the beginning of the third millennium acquire previously unpredictable volumes, and based on the fact that the recurrence of such challenges is observed at the turn of the several previous centuries, embodied, in particular, in the crisis of the dominant rational foundations of science and the organization of social relations, – to show the heuristicity of the philosophical ideas formed as a reflection on the events at the turn of, respectively: XVII – XIX centuries – in the works of I. Kant and the nineteenth and XIX – XX centuries – in the concept of the noosphere.

Philosophical aspects of the concept of the noosphere

Describing the philosophical spectrum in the doctrine of the noosphere, its variety should be noted, from which, first of all, one can distinguish methodological and value aspects.

Methodological aspects of the concept of the noosphere, presented by the authors, are based on the epistemology of I. Kant that is taking into account the condition of sensory impressions and rational conclusions of the subject of the inquiry – the characteristics of himself, including existing circumstances, in which the inquiry is carried out. Particularly clearly this approach is embodied in the idea of "the Omega Point" T. de Chardin, which is understood as a mode of inquiry, in which "the subjective point of view coincides with the objective order of things" (Chardin, 1989: 38). In general, the concept of the noosphere is developed in the paradigm of evolutionism. Beginning with the works of G. Spencer (Spencer, 2012: 742, 743), the nonlinearity of development is clearly recognized in evolutionism: to its generally progressive characteristics (irreversibility) such significant complications as discontinuity, large-scale fluctuations and levels of quantization are added. Inadequacy of separate chronological development periods is realized, that is, the previous stages of evolution are considered not as coordinate, but as fundamental in relation to the following ones, since they lay the essential features of the latter, with the fact that each subsequent stage may have external characteristics, alternative to the previous one. Such an approach allowed to interpret the evolution of any complex system as the disclosure of its potential by a certain general algorithm, which is implemented in multi-level, different-scale, multi-inertial, and differently vectored ways, an example is Haeckel's-Muller biogenetic law) (Yatsik, 2006: 271), as well as to reveal the fundamental differences in the interpretation of the evolution of inorganic and organic, biological and social (Evolutionism, 2005: 14).

One of the logical conclusions concerning understanding the evolution as the development of already existing potential is the idea of its predestination, at least in the fundamental characteristics. In particular, P. T. de Chardin considers the development of the Earth's noosphere as a natural consequence of the cosmic

"predestination" appearance and development of the Homo sapiens in the evolution of the Universe. His evolutionism goes beyond the materialist "evolution of bodies" and focuses on the predictors of what, in the end, was embodied in the spiritual and intellectual traits of human. He considers matter as a quantum in the process of self-development, which once formed, is not enriched with other sources, revealing and detailing its initially laid potential, that is, future structures, the dynamics of their complications and harmonization, in the end, behavior and consciousness (Chardin, 1989: 47,48). Not being a supporter of either materialism, or Cartesianism (as the methodological basis of materialism) and trying to reconcile the idea of "the Divine Providence" with the empirical data, P. T. de Chardin highlights redistribution of internal characteristics of matter, including consciousness, initially «distracted» on its more basic levels as the main driving force of the evolution of the Universe. It should, however, be taken into consideration that, as he further explains, "consciousness", in his understanding, should be regarded as a specific function of complexity (Chardin, 1989: 234). Consequently, in the course of the evolution of matter in the Universe the formation of increasingly complex and perfect formations take place, some of which (that is, at certain levels of structural complexity) begin to behave more and more variably at a certain stage of the evolution. This trait, inherited in living matter, develops in its bosom to more perfect forms of behavior, which at the final stages of biological evolution are completed with the ability to certain prognostic actions, on the basis of which reflex traits of a human are formed (Chardin, 1989: 126-127).

V. I. Vernadsky, sharing the basic principles of evolutionism, focuses on the near-surface (geological) space of the Earth. As T. de Chardin, he begins with an explanation of the methods of the inquiry. In his opinion, the evolution of the surface of the planet is clearly observed only on a planetary scale, but for an adequate understanding of such a macroevolution, the "geological thinking" of the researcher should also include his ability to quickly adjust the "caliber" of observation and analysis on various scales of geological phenomena, which by their nature are multi-level and multi-inertial (Vernadsky, 1991: 305-507). The geological space of the Earth, according to Vernadsky, is formed and further complicated as a result of the interaction of two cosmic origins – the stone inert of "the planet foundations" and the scattered matter of the Cosmos, represented by cosmic dust and meteorites, as well as powerful radiation of different origin and frequency interval. As "frontier" and a product of synthesis of these two general interaction parties, geological space as a whole and all its components develop the most dynamically and differently, replenished with new formations of variable scales, from isotopes of chemical elements to geospheres (Vernadsky, 1934: 52-54).

Without appealing to the ideas of T. de Chardin in relation to the primarily distracted "consciousness of matter", V.I. Vernadsky draws attention to the

characteristics of self-regulation of the surface of the planet. He considers its ability to respond more and more adequately to the devastating effect of Cosmos the most important internal factor in the evolution of the Earth's geological space. However, he appeals to Le Chatelier's principle, according to which, processes in the system (that is in geological space) go in the direction of neutralizing actions that violate the existing equilibrium of the system (Vernadsky, 1934: 283). Consequently, according to V.I. Vernadsky, the totality of geospheres, in the process of their general variation and evolution of each of them, impeded the destructive effect of the Cosmos more effectively, while providing increasingly flexible mechanisms for the selection of favorable for the planet forms of introduced energy and matter from the Cosmos by its filtration and transformation at different altitudes from the surface of the planet, and most importantly – through their "biologization".

The main factor of the evolution of geospheres, that is isolation and complication within the limits of the geological space – mantle, lithosphere, hydro-, bio-, atmosphere, and others, higher and lighter geospheres according to Vernadsky are the global migration of chemical elements, the redistribution of which is carried by water and living organisms that served as a powerful factor in accelerating the Earth's evolution in relation to other planets (Vernadsky, 1934: 99). Water, in comparison with living organisms, operates for a longer time and at greater distances in depth and in altitude above sea-level. The unique characteristics and the total amount of water on the Earth provide the dispersion and dissolution of solid rock and their intensive migration, which, in turn, increases the probability of new formations as a result of chemical reactions. Concerning the appearance and geological action of the biota, it should be noted that V.I. Vernadsky positively takes the idea of panspermia, arguing that necessary time for the evolution of the formation of biopolymers as predictors of living matter within the "prebiological" stage of the Earth's evolution, may be insufficient, therefore, he assumes their cosmic origin (Vernadsky, 1991: 158-160).

The significance of the biosphere for the evolution of the planet is a special subject of V.I. Vernadsky's attention (Vernadsky, 1991: 292). Reproductive activity directs living matter to the constant expansion and filling of all niches of the planet with renewable and genetically fixed material. Organic systems can accumulate enormous amounts of energy, due to which their quasi-stability is established: these systems are dissipative and live through a narrowly balanced, in the course of evolution, regime of metabolism, energy and information with the environment, specific to each taxonomic unit. In time, I. Prigogine identified this characteristic as a "curse of living systems," which he formulated as the need to destroy the ordering of other systems to maintain their own order.

Consequently, the main vector of evolution of the surface of the planet is understood by V.I. Vernadsky as production of increasingly effective mechanisms

for the preservation of a stable order, which opposes the diversity of short-lived chaotic formations. Both for the Universe and for the geological space of the Earth, the evolution of matter, if abstract from the specifics of its embodiment, acts through the Darwinian triad – variability, heredity and selection: highly harmonized (highly symmetric) compounds, formed as unlikely combinations of high internal order, are found to be significantly longer in time on the background of the chaotic appearance and disintegration of compounds of low symmetry, which constantly increases their overall volume and the probability of a new appearance. These combinations are "information discoveries of evolution": once they appear, they do not disappear, they are constantly reproduced and enter into more complex ensembles as their constitutive components. The inheritance of the general direction of the evolution of the Universe is ensured precisely by the fact that the elementary highly harmonious compounds necessarily create highly homogeneous formations of higher levels, by which the multi-level genetic connection of the Universe and the nonlinear growth of elements of ordering by limiting chaotic processes in it are achieved. A part of highly harmonious compounds at the level of polymers reveals inherent in their structure potentialities of complex variable reactions on irritants – predictors of behavior. Within the geological space, silicate and carbon polymers became particularly important for the pre-biologic stage: the first ones created a peculiar buffer for the Earth at an early stage of its development which, growing, protected the planet from sharp fluctuations in temperature and spectra of radiation and now covers the lithosphere and mantle. A part of carbon polymers has become the basis of life on the Earth.

The most interesting sections of the "Phenomenon of Human" of T. de Chardin are dedicated to the development of life on the Earth, the biological evolution of primates and among them - the ancestors of human beings, as well as the appearance of the Homo Sapiens, as a biological species, and his further settlement on the planet as a social being. Living systems, being in a state of constant imbalance, are forced, on the one hand, to attract a certain resource from the environment, and on the other - to periodically divide to reduce internal instability, which is caused by the constant expansion of the living. Support of the viability of a separate taxonomic unit through the dying and updating of its individual elements provides the evolution of living variability and the growth of the effectiveness of inheritance mechanisms (Chardin, 1989: 110). For example, the growth of "information accuracy" and the thrift of inheritance mechanisms shows a comparison of them in the "early" and "late" chords: only a few dozen whitebait can survive from a million spawns, while most mammals not only nurse younglings but also teach them later to fully use the inborn individual behavior potential of the species. The growth of the accuracy of inheritance and variation of the adaptation becomes the main direction of the evolution of the living: once the fixed genetic

combination does not change on the basic (conditional and genetic) level, but varies and branches out, it is capable of creating more and more adaptive variants on its basis, which acquire information from the environment through phenotypes, laying the preconditions for the further evolutionary changes. Thus, the species genotype becomes dead-end, or gives an explosion of variations based on its structure, thus extending to the level of the genus, order and class. This alternative is being implemented in the periods of geological changes, when narrowly adapted groups perish, and the achievements of a general evolutionary value are implemented at the further stages of evolution (Chardin, 1989: 112).

Valuable dimension of the concept of the noosphere relates to the study of the prospects of universal human solidarity and the interpretation of human's nature on the basis of belief in the dominance of its humanistic potential. As a necessary moral and ethical ideal, it establishes a positive motivational basis for solidarity efforts of mankind in the development of the noosphere. According to T. de Chardin, with the appearance and spread of the "Homo Sapiens complex", the biological evolution on the Earth rapidly ends with the formation of a perfect physical body and the corresponding psychophysical traits of a modern person. Having reached stagnation in this field, evolution continues in the development of consciousness and other human abilities, directly or indirectly important for a social organization. Quite interesting is the assumption of T. de Chardin P.T. that there are two the most "energetically beneficial" levels of stability for mankind – the individual and global humanity (Chardin, 1989: 67, 233). The main axis of human evolution, according to T. de Chardin, is the improvement of its individual abilities, among which, in one or another way, they receive further mass development that contribute to the formation and support of the most socially safe for individual (in certain circumstances place and time) social environment.

The main feature of people, which connects the individual and collective level of their existence, according to T. de Chardin, is the virtue of reflexion, which is defined by him as acquired by consciousness ability to focus on and collect oneself (Chardin, 1989: 136). The reflection of human beings, that is, their "thinking about" everything that happens with them and with the world around them, is also the main characteristic that separates human beings from the biological world: the animal also "knows", but, unlike a human being, it does not know, that it knows (Chardin, 1989: 137). It is also important to note, that in the "energy" of human relationships, T. de Chardin gives a prominent place to the ability to love, which remains undeveloped at the present stage of the history of mankind. The philosopher considers only an immense love for all people and the world, which, as a rule, seems unrealistic as a mature form of love. However, according to T. de Chardin, such an immense love is not only psychologically possible, but it is "the only one and complete way we can love" (Chardin, 1989: 210). The disclosure of the Human potential for such love is also due to the level of self-knowledge.

All social forms of coexistence of people, as their size and complexity grows, require a lot of "energy expenditure", including cultural assets and means of ensuring public order and emotional solidarity. According to T. de Chardin, the very global community of mankind, due to its planetary conditionality, makes it possible to distribute and use the resources of the planet for the benefit of all mankind. This community is not considered to be one-dimensional homogeneity, on the contrary, its concept of "grain" of matter (Chardin, 1989: 43) provides the "naturally spontaneous" division of the levels of its quantization, which, in relation to humanity, is embodied at certain historically established levels of the legal personality of human communities, as this, in particular, shows in the "new law of nations" G. Scelle (Scelle, 1932).

Prerequisites of "noospheric" thinking in the philosophy of I. Kant

Laid in the social nature of the Homo sapiens, that is, when it emerges as a species, reflection needs its disclosure in the long historical development. Early forms of institutionalization of the reflective traits of humanity are associated with the emergence of ancient philosophy (Reale, 1994: 3-4), however, according to T. de Chardin, only at the turn of the XVIII – XIX centuries a complex institutionalization of the consciously directed and systemically organized reflexion of mankind on its historical experience took place, gained on its basis the empirical knowledge and, the most importantly, on the traits of the human mind. At this time, in all areas of social consciousness, there have been such important changes that T. de Chardin compares their scale and consequences with the changes of the Neolithic revolution (Chardin, 1989: 172). Change in the attitudes to the relations of human beings and the world is considered by T. de Chardin as one of the most important achievements of this critical period: being included in the process of evolution, a human ceases to be perceived as a distant observer of reality, as it was typical for Cartesianism. "A human being is an evolution that conscious himself" he quotes J. Huxley (Chardin, 1989: 176).

According to J. Reale and D. Antiseri, "artillery preparation" to radical changes at the turn of the XVIII – XIX centuries began in Germany in the 1770s, embodied in a movement called "Sturm und Drang" ("Storm and Onslaught"), and later in Romanticism (Reale, 1997: 3). Philosophical Romanticism, by definition of B. Croce, "raised the flag of what is sometimes called ... intuition and fantasy, as opposed to the cold mind and the abstract intellect" (Reale, 1997: 9). The fundamental figure of this period is I. Kant, whose views were formed during the spread of Romanticism. The foundations of the new (non-Cartesian) philosophy laid down by him are based on the study of not only the rational, but also the intuitive and volitional components of the human mind in which the representatives of Romanticism were concentrated. Already his first work in 1758 "On the forms and principles of sensual and rational human perception" indicates

that he was aware of the problem of adequacy of human knowledge and the need to revise their epistemological basis (Reale, 1996: 628). Mature consequence of efforts in this direction were "Critique of Pure Reason" (1781), "Critique of Practical Reason" (1788) and "Critique of Judgment" (1790) (Reale, 1996: 269). Already in the first "critique" I. Kant carried out the "Copernic Revolution" in metaphysics: just as Copernicus argued that the Sun is not rotating around the Earth, but on the contrary, the Earth, rotating, is irradiated by the Sun, I. Kant proved that not subject explores the object "as it is," and vice versa, the object becomes known in forms, due to the properties of the subject (Reale, 1996: 634). Kant distinguishes cognition of sensuality, which is fixed in phenomena and rational, which forms noumena (Kant, 2006). The virtue of a human to rationally deduce the notion of neo-obvious (noumena), even Plato defined as "second navigation", studied in detail by Kant in "Critique of the capacity to judge" (Reale, 1996: 663).

In his "Critique of Practical Reason" I. Kant explores the ability of the human reason to moral activity. Only "pure", that is, not under external influence (aspirations, feelings, experiences) practical reason is the basis of human's moral actions, and Kant's critique is aimed precisely at the practical reason conditioned by external influences – in order to promote awareness of such influences and establish control over them. By dividing the practical principles into "maxims" (subjective principles) and "imperatives", Kant defines a moral imperative as an objective practical principle in understanding its significance for everyone. The imperative must be unique, but it may have different formulations, the most common of which are the following: "Act only according to that maxim whereby you can, at the same time, will that it should become a universal law." and "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end" (Reale, 1996: 657). An important conclusion from Kant's work in the realm of moral laws became the understanding that all beliefs, whether religions, laws, or scientific world pictures are based on our choice, our reasons for choosing certain facts, and their explanation to justify our thoughts and actions. This provision makes us realize the fullness of our own responsibility for everything that is happening around, because it is a consequence of our choice.

In his "Critique of Judgment" Kant highlights the descriptive and reflective capacity to judge: the latter, considering and purifying our conditionality, is aimed at finding universal and can be embodied in "aesthetic" and "solemn" ability to judge (Reale, 1996: 644). This justifies the need to educate a human in the sense of beauty and holy (the latter should not necessarily be the subject of religion, but rather morality, that is, again, of one's own choice). The predictor of "the Omega Point" of T. de Chardin can be recognized in the following words of Kant: "Nature, perceived noumenally, remains "a thing in itself," but it will not prevent the

interpretation of it as organized rationally, due to the unwavering striving of a spirit to think about it this way" (Reale, 1996: 667).

I. Kant approbates his new methodological approach on the basis of the well-known empirical generalizations in the field of natural science, morals and law. He, in particular, developed a model of the formation of the Universe that was later developed and published by Laplace and widely known as "Kant-Laplace nebular hypothesis" (Reale, 1996: 630). Questions of the organization of social relations were covered in his "Groundwork of the Metaphysics of Morals" (1785), "Metaphysics of Morals" (1797), and "On Pedagogy" (1803) (Reale, 1996: 629). But the most interesting for the future "noospheric" thinking are two works – "Idea for a Universal History with a Cosmopolitan Purpose" (1784) (Kant, 1994a) and "Perpetual Peace: A Philosophical Sketch" (1795) (Kant 1994b), which laid the legal foundations of global civil society, left out by the authors of the concept of noosphere.

Legal aspects of the concept of noosphere

In the work "Idea for a Universal History with a Cosmopolitan Purpose" I. Kant shows that the motives of human activity, acting as the driving force of history, are fulfilled against the backdrop of the most extensive universal trends, which have all signs of predestination. Accordingly, the task of philosophers should be the development and presentation of the system of history – as a plan of nature, aimed at improving civil association of the human race (Kant, 1994a). He writes: "What seems to be confused and unconditional of any laws of individuals, one could recognize with respect to the entire human race, as the invariably progressive, albeit slow, development of its original inclinations" (Kant, 1994a). The most important problem for mankind, solving which is compelled by nature, is the achievement of a universal legal civil society: only in such society it is possible to achieve the ultimate goal of nature – the development of virtues laid down in a human. Stating his point of view on history as a higher sense of human development to the "civil status of public security," Kant notes that by giving the person wisdom and will, nature wants people to deserve merely that happiness and perfection they create by themselves free from instinct, by their own reason. The tool that nature uses for this is an antagonism of human interests, which, through trial and error, ultimately should lead to the formation of an order consistent with universal laws (Kant, 1994a). This problem is the most complicated and therefore is resolved in history later on, because it is associated with the spread of the correct understanding of nature of a perfect public order by people, which can only be provided by long historical experience and culture (Kant, 1994a). The established perfect social order in certain states can be provided only with the support of legally regulated relations between them (Kant, 1994a). Therefore, the history of the mankind can be regarded as the implementation of the secret plan

of nature – to establish internal and, for this purpose, also – an external perfect social order, as the only state in which nature can fully develop all the contributions that it has invested in mankind (Kant, 1994a).

Continuing the idea of a world civil society in the work "Perpetual Peace" Kant begins with the fact that this is the name of a tavern in the Netherlands, drawn against the background of a graveyard, but his work is based on the belief that mankind has a chance to gain eternal peace other than at the cemetery, although this issue remains open because of the blemishes of people, especially the heads of states who can not gorge with war (Kant, 1994b). Kant admits that all "peaceful" treaties, as they are quickly violated, are in fact agreements on armistice: like any other political phenomena, these violations are caused by the very nature of a human. To achieve truly eternal peace, I. Kant offers "preliminary" and "definitive" articles. The first ones should be achieved as soon as possible – these are the principles that appeal to the conscientiousness of governments, which, in turn, should foster their mutual confidence. There are six of them: 1) no peace treaty shall be considered valid if it was made with a secret reservation of the grounds for a future war; 2) no state, regardless of its size, shall be acquired by another state – not by inheritance, exchange, purchase or gift; 3) standing armies shall disappear over time; 4) national debt shall not be used as an argument in external affairs of the state; 5) no state shall forcibly interfere in the political structure and government of other states; 6) no state during war shall use the dishonest military acts (employment of assassins, the instigation of treason, etc.) that would make mutual trust impossible during a future time of peace (Kant, 1994b).

Kant begins the presentation of "definitive" articles with the postulate: "All people who can influence each other should be united in civil society." Civil (civilized) society is understood as the one that is subject to law, and not to the arbitrariness of the powerful ones, he distinguishes between three most relevant and interrelated levels of legal provision of social relations in its development: a) state public order in the composition of the nation; b) legal regime of international law concerning the relations of states with each other; c) universal civil order, which covers both the relations between states and the relations between people, since all people shall be regarded as subjects of universal civil law and order (Kant, 1994b). Kant further reveals the content of three definitive articles, which he formulates as follows: 1) social order in each state should be republican (Kant, 1994b); 2) international law should be founded on a federation of sovereign states (Kant, 1994b); 3) the law of world citizenship shall be limited to the conditions of universal hospitality (Kant, 1994b). More than half of the work "Perpetual Peace: A Philosophical Sketch" is occupied by supplements. In the first one – "On the guarantee for perpetual peace" – the author proves that such a guarantee "is magnificent in its art, nature, which course of development leads to providence"

(Kant, 1994b). The content of the second one, titled "Secret Article for Perpetual Peace," is briefly formulated as follows: "Governments that are armed for war shall take into account the maxims of philosophers on the conditions of the universal peace." Noting that the very title of the supplement is contrary to the conditions of perpetual peace, which must be based on trust and transparency, Kant acknowledges that the supplement contains an inherent in international relations conflict between the subjective maxims of politicians and the moral imperative, therefore, every politician should conform his maxims that are conditioned by the practical demands of today at least to maxims of philosophers that are usually closer to the moral imperative and act in perspective. This idea is revealed in the appendixes to the second supplement, which titles are self-explanatory: "On the Opposition Between Morality and Politics With Respect to Perpetual Peace" (Kant, 1994b) and "Of the Harmony Which the Transcendental Concept of Public Right Established Between Morality and Politics" (Kant, 1994b). Kant proves that, as a goal of history, such harmony should be carried out in perspective, and as a philosopher he offers his own working maxim for this purpose: "The maxims aimed at the harmony between law and politics require publicity" (Kant, 1994b), that is, universal awareness, recognition and support.

The prospects of the world civil society regulated by the law defined by I. Kant at the end of the XVIII century were partially implemented only after the Second World War in the neo-liberal international order established by system-building agreements between sovereign states. This rule of law has become the latest contribution of positivism in the theory and practice of legal regulation. Due to the supremacy of the obligations of states under the UN Charter (Art.103) (United Nations, 1945), international public law gained systemic unity for the first time during this period, rapidly gaining a codified basis and institutional provision of all areas of international cooperation. However, within this system, neither individuals that are under jurisdiction of a state, who were seen by Kant as "subjects of universal civil law and order", nor collective subjects other than sovereign states received their own status (Carty, 2005: 535). The fundamental discoveries in human and social sciences, which during the last century have become the basis of a new paradigm for the whole system of knowledge, contributed to the awareness in the theory of law: firstly, of primacy, in relation to the collective legal personality – the individual legal personality that comes from psychophysical properties of a human; secondly, multi-leveledness of collective legal personality, where there is a potential possibility of each level to influence the overall course of history: accordingly, an important condition for the maintenance of the rule of law at different levels of social relations is not the privileged status of one of these levels (in positivism it is the level of public authority of the state) but the definition of the rules for the coordination of collective interests between the main historically established forms of organization of human communities, as

defined, in particular, in the already mentioned concept of the law of nations of G. Scelle (Scelle, 1932b). The task of the new law of nations must obviously be the institutionalization of all the established levels of collective subjectivity (from generations and neighboring communities – to national states, regional entities and the entire international community) with the definition of the scope of rights and responsibilities of each level, as well as the development of principles and procedures for the harmonization of different levels of legal personality and procedural rules for the coordination of current "conflicts of interest" that will naturally arise in the process of "intersubjective" cooperation (Radzivill, 2017: 7). Thus, international law, without infringing on the legitimate powers of sovereign states, must legalize the internal multi-leveledness of the international community, necessary for any complex system. At the same time, the main factor of observance of legal norms and decisions is the principle of faithful fulfillment of legal obligations, which is based not on state coercion, but on the understanding of their social significance. Such factors as reliability of information, transparency and clarity for citizens of the laws and acts of the bodies of justice, grounds and volumes of delegation of authority to public institutions, criteria of the election of authorized persons, logistics of financial flow, and other public resources become the guarantee of effectiveness of such an approach. Procedural provision of the participation of civil society in making socially significant decisions at all levels of social relations is also an important task of law. In the movement of civil society institutions to their maturity education plays a crucial role, which is much broader than it is considered by the relevant ministries, due to the variety of new means and opportunities provided by the "global information civil society", main objectives and characteristics of which are set out in the Okinawa Charter on Global Information Society of July 22, 2000 (Okinawa Charter, 2000) and in the Declaration of Principles "Building the Information Society: a global challenge in the new Millennium" of December 12, 2003 (Declaration, 2003). These "soft law" acts outline the possibilities that open up the world's communications networks to humanity, transferring the main volume of international contacts into the level of interpersonal information exchange. Being focused, above all, on the comprehensive assistance in a convenient mode for each person, they contribute to the awareness of the subjects of the global information civil society of the prospects and opportunities of powerless international relations, as well as their mutual learning and, ideally, the development of a sense of responsibility of everyone for the choice of the direction of further development by mankind. Nevertheless, the words of T. de Chardin remain relevant against the backdrop of these shifts: "Science and humanity go round in a circle because they do not dare to recognize the existence of a privileged trend in evolution. Exhausted by this fundamental doubt, scientific research is scattered, and humanity is lacking determination to undertake the improvement of the Earth (Chardin, 1989: 119).

Conclusion

Crisis phenomena at the turn of the XX-XXI centuries, when the efforts of the United Nations to maintain peaceful international law and order are blocked by spontaneous social movements of the transition period, often accompanied by "rebellions against reason", require the shift away from established in the previous century paradigms and the use of philosophical concepts of the past "transition periods", separating for further development those that best contribute to the restoration of the constructive origin of human consciousness and collective activity. In this sense the concept of noosphere, which embodies the philosophical novels of the early twentieth century, and the new (non-Cartesian) philosophy of I. Kant, which, at the turn of the XVIII-XIX centuries, systematized the purpose, possibilities, and functional correlation of epistemological, ontological, and deontological knowledge, activating a range of further research in these areas, – are a powerful source for their updated interpretation and further development.

Of particular relevance, although "extrascientific" from the point of view of both materialism and "political realism", is the idea of the sense and predestination of history, which stands firmly in the works of I. Kant, and the authors of the concept of noosphere and develops in modern metascientific, philosophical, and political and legal theories such as the principle of anthropy, the concept of a common heritage of mankind and the "human dimension", etc. Having made a moral choice of these ideas as value benchmarks, scientists may need to conventionally outline and further develop such an understanding of the historical process in which it has the meaning as the movement and approach of mankind to a highly harmonious at all levels of its organization state in which each personality and all collective subjects of social relations will have the whole complex of possibilities to fulfil their creative humanistic potential in the best way possible. This condition, being objectively hardly probable in the past historical epochs, when searching for and securing of its individual components were carried out, may become dominant after the general awareness of the international community of its advantages and specific characteristics. Technically, global information environment greatly contributes to this process, and already effectively provides the spread of positive experience of successful examples of organizing favorable public order for the development of personality. General awareness of the planet's population of the uniqueness and value of the phenomenon of a Human on the scale of the entire Universe can become the axiological stimulus in this movement of mankind to its maturity. Understanding the aspiration of peoples to the planet-wide spiritual and intellectual unity – as a value-emotional vector of the transhistorical orientation, the authors of the concept of noosphere, providing rational basis for this endeavor, lay emphasis on science that acts as a powerful geological force that requires a balanced and

responsible attitude to its results, and as well as constant reflection on their effectiveness and morality.

According to Kant's ideas, the law should be an integral part of the scientific provision of a harmoniously organized public order at the level of nations and the international community. Contemporary international law is built on the principle of sovereign equality of states and other principles of the Charter of the United Nations and has served for more than half a century as a rationally grounded framework basis for national legal orders, which helps to overcome religious or other ideological differences and eliminate conflict situations – through the development of recommendations and legal formulation of compromises achieved in multilateral treaties between states. However, current challenges and rethinking of methods and sources of legal regulation require a serious improvement of positive law, perhaps through creative synthesis with centuries-long experience and conceptual wealth of the law of nations. Such synthesis, in turn, should become an integral part of system-wide changes – both in the style of regulation of social relations at all levels of their institutionalization and in the dominant elements of the vital priorities of individuals in their interpersonal communications.

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Chapter 4

Political systems: historical and philosophical aspect

Plato and Aristotle carried out the analysis of the philosophical aspect of political systems in antiquity. Of course, these thinkers did not undertake the very notion of “political systems”. The desire to solve the problem of political systems implies an answer to two questions: a) whose will should dominate society?; b) whose interests should be represented by the political system? In addition, it was in this way that this problem was formulated in Plato’s “State” (428-348 BC), which for the first time divided all the ancient Greek city-states into the following types: aristocracy, democracy and monarchy [1.p -410]. At the same time, Plato proposes another classification of political systems. It comes from the fact that they are all divided into "distorted" and "correct." In total, as Plato notes, there are four types of distorted forms of political systems: timocracy (Cretan-Lacedaean type), oligarchy, democracy and tyranny [2. p-328-329].

Each of them has certain features and characteristics. So, for democratic forms the spirit of rivalry is inherent. To a certain extent, they can be described as such, occupying a middle position between the aristocracy and the oligarchy. They do not appoint honest and wise people to government posts, since all rulers there are people with mixed customs. Everybody tries to escape from the law, which exists only formally, these states are constantly at enmity with others, with external frugality regarding public needs, officials direct all efforts to constantly accumulate their own capital, treachery is considered to be charity of the government, etc. [2, p - 332].

Oligarchic political systems are based on the principle of viability. The main condition and purpose of dominion in these systems is the accumulation of money by any means. These states fight only when they are forced to do so. Even so, they are trying to spend less money, and therefore mostly lose out in military conflicts. This is also the potential instability of oligarchic political systems. The fact is that when a timocracy, having such a property as courage, always resorts to the use of force in the event of a danger of sovereign power, the oligarchy “loosened by wealth” can never and will not fully defend its interests [2,p -343].

Interestingly, among all distorted forms of political systems for Plato, only tyranny is worse than democracy, it is clear that tyranny arises from democracy [2, p -350]. Democracy is such a system of realization of political power, when the poor, expelling or destroying their opponents have won, equalize all civil rights and tenure in public posts [206; 344]. At first glance, it seems that such a political system is the most fair and free. However, it forms a rather specific political culture that neglects the laws and rejects any charity, raising to the rank of the highest

value exclusively the friendship of the crowd. From this crowd and there is a tyrant. Tyrant, - writes Plato, - is a protege of the people [2, p - 354].

Continuing the Platonic tradition, Aristotle (384-322 BC), begins his "Politica" from the fact that he proposes to distinguish two criteria that allow us to distinguish between states and, accordingly, political systems. The first of these criteria relates to the nature of the goals for which the political system functions, and the second to the direct form of power to which society obeys [3, p. -455]. Aristotle recognizes the first of them as correct, and the second - as erroneous: "when one person, or several people, or the majority are guided by the common good, such types of government should be considered correct, and others deviations" [3, p. -457]. Due to the fact that, according to Aristotle, the purpose of the functioning of the political system is the "happy life of all citizens" [3, p. -460].

The next thinker who proposed his own approach to the analysis of types of political systems is Thomas Hobbes (1588-1679). The political system is presented to them as a form of state that synthesizes in itself the forms of government, political regime and form of government. Internal integration of the political community and the establishment of certain laws that are recognized by all its members leads to the formation of such an element of the political system as a state. In total, Hobbes describes three possible types of distribution of supreme political power: power belongs to one person, or a group of people. However, in the latter case, the right to take part in the implementation of political activity can have either all, without exception, or only a certain group of persons. Thus, we get three types of political systems, as Hobbes sees them: monarchy, democracy and aristocracy [4, p -209].

The continuation and criticism of the political theory of T. Hobbes in the context of the classification of political systems was the teaching of John Locke. In the political and legal concept of J. Locke (1632-1704), in particular, in the second book of the treatise On State Government (1690) the concept of "political society" was introduced [5, p. -147], which, according to J. Locke, is created with a threefold purpose: a) establishing uniform and obligatory laws for all members of society, b) establishing the institution of refereeing, c) legitimizing and ensuring military influence in cases of violation of legal and political norms [6, p. -72-73]. Considering the goals and mode of operation of a political society, J. Locke concludes that a necessary condition for its existence is the presence of specific subjects of government. The totality of these subjects of political power can be defined by the concept of "state" ("commonwealth").

The author of the following thorough classification of political systems was Charles Louis Montesquieu (1689-1755). The concept of a political system can actually be presented as a way of legitimate influence of political power on society, which he defines in his work "On the Spirit of Laws" with the term "mode of government". In total, he considers three main forms of government: the republic,

the monarchy and despotism, which should be investigated considering the conditions that influenced their occurrence [7. p -157]. He tries to identify typological features within everyone of the political systems considered by him.

So, speaking of the republic, he identifies two possible types of realization of political power: democracy (when power belongs to the whole people) and aristocracy (when the supreme power is concentrated in the hands of a part of the people). Each of these types corresponds to a certain political and legal structure with an aggregate of several specific political institutions or elements of the political system.

For a monarchy, the main laws are those that determine the right of a part of a nation to issue laws and monitor their observance. However, C. Montesquieu notes that it will be the higher; the closer it will be to democracy, that is, the more people will be guaranteed the right to participate in the political decision-making process [8. p-736].

And finally, in the case of despotic political systems, everything happens, at first glance, just as with the monarchy — one rules. With only a striking difference, which gives us sufficient legal, theoretical and methodological grounds for distinguishing them as a separate systemic type, any laws other than the ruler's own will do not limit the despotic power in these political systems.

Thus, C. Montesquieu is trying to provide the most complete classification of political systems, including the content of this concept, the method of exercising political power in society, the presence of certain political institutions and structural and functional links between them, the nature of the legal framework of political processes, the type of political culture , prevails in society, the principles of government and the nature of government. At the same time, it is important to note that the power in the political system Montesquieu regarded as one that should control not only social life, but also itself.

So, as we can see from the example of this short historically - philosophical analysis, depending on the dominance of which components or main features of the political system the thinkers mentioned by us noted, their classification political science matrix, which they received in the course of their research, changed accordingly.

Modern society has a complex system of social institutions and norms, according to which state-power relations are realized. Knowing them is of great theoretical and practical importance. Accordingly, the problems of the political system of society, its structure, functions, and typology are always relevant from the point of view of the development of any state.

Today, the political system is often defined as "a set of three interacting subsystems: institutional, informational-communicative, and regulatory - regulatory." The institutional subsystem includes such institutions as the state, political parties, interest groups. The informational - communicative subsystem

establishes the connection between the institutions of the political system. Regulatory subsystem forms a variety of norms that determine the behavior of people in political life [9]²⁷This is a philosophical and sociological definition of a political system.

Close to the concept of "political system" is the concept of "political organization of society" as a combination of state, political and other public organizations, which are a form of expression of political relations in society. At the same time, the state is recognized as the main element of the political system and political organization of society. The political system is more complex in structure and content than a political organization.

The political organization by its purpose is a structural component of the political system, its foundation, the fact that it provides the political system with qualitative certainty. This is the organizational basis of the political system of society, which unites the political system into a whole organism, is its organizational mechanism, so to speak. In the end, in the political system as a whole, the political organization of society is its main structural component, which does not cover the entire political system, which, in addition to the political organization, includes other important elements, in particular, the political regime, electoral and referendum institutions, rights and human freedoms and the like. The political organization of society is a kind of management mechanism, with the help of which political power is exercised, a formalized political system and its institutions are activated.

If we compare, correlate, the state and society, the state as a whole acts as a political organization of society. This is explained by the fact that the need for a state-political structure of society is due to the need to harmonize and protect the interests of both individual and public, the management of society, the coordination of its life activity. It is from this point of view that the state is the political organization of society. In the narrow sense, the state is the political system of society.

The problem of the relationship of the state, the individual and society is connected precisely with the political organization of society, with the question of the place and role of the state in it. From this point of view, the study of the political organization of society as a result of interaction (struggle, cooperation, compromise) of the main political forces of society allows the most accurate determination of the role and place of the state in the system of political organization, the nature of its relations with society, including the nature of relations between citizens and the state .

In a broad sense, the political organization of society acts as its political system, in which the state plays the role of the nucleus, around which a complex of non-state political organizations and institutions (state, professional, religious,

²⁷Look.:PoliticalsystemofUkraine: specialfeatures, trendsofdevelopment. - K., 1998. - P. 8–9.

etc.) is formed. Through this structure of the political system of society and the corresponding relations, the political will of the people is shaped. People exercise their constituent function in the formation of state power and legislative legislation on the adoption of laws by the mechanism.

The political system of a society and its political organization is a model of the political structure of society, which has an officially public character, corresponding legislative consolidation for the Constitution, laws, and other normative acts. This means that each state is characterized by a certain legalized political system.

Today more than 200 countries in the world and they all have a unique history of development, characterized by different state-political structures. At the same time, individual groups of countries have certain similar features of their political systems, according to which they can be combined to an appropriate degree. The criteria for unification, as a rule, are formational (historical stages of development of countries), socio-economic (level of economic development of a country, dominant social forces), organizational and political (level of development of forms of state-political arrangement), etc.

In particular, the following types of political systems are conventionally classified according to the level of socio-economic development: the political system of a highly developed bourgeois society; the political system of middle-level bourgeois society; political system of transforming countries; political system of developing countries [120]²⁸.

In my opinion, this is not a combination of political systems, but societies, because there is no main element of any political system - the nature of political power and the method of its implementation, that is, what defines the essence of politics and its purpose. And on this basis, the political system in its legalized, institutional form in the societies mentioned above can be of the same type.

So, political systems as a political-legal or state-political phenomenon can be classified according to certain types only depending on the nature of political power and the method of its implementation. On this basis, political systems of a democratic, authoritarian and totalitarian type differ. Sometimes they also add a constitutional type of political system. The countries with constitutional political systems include the USA, England, Canada, Australia, and the countries with liberal democratic political systems - France, Germany, Italy [9]²⁹.

As a generic notion, the political system of society includes the most common features and characteristics inherent in all, without exception, specific political systems that exist within various socio-economic formations.

²⁸Look.:Melnik V. A. PoliticalScience. - Minsk, 1996. - p. 139–140.

²⁹Look .: Political system of Ukraine: special features, trends of development. - p. 10.

The democratic type of the political system as a certain institutional system includes its modifications; at the constitutional level, it is fixed: the democratic form of government (parliamentarism, separation of powers, wide participation of the population in the formation of power, government decision-making); multi-party system, freedom of activity of other public organizations, a wide range of rights and freedoms of citizens and their guarantees; freedom of information; public control over the activities of public authorities, especially the media; recognition and state support of local government.

Democratic type is possible only in a legal state and civil society, in the center of which is a person, his rights, freedoms, interests. Under a democratic system, the rule of law prevails, respect for the law, which is impossible under authoritarian and totalitarian regimes.

Considering the problems of political systems, it is impossible to circumvent such a concept as “political regime”, its relation to the concept “political system of society”. The political regime is directly determined by a certain legal political system, but in its content does not fully coincide with it, and under certain conditions, it may be opposite to it. If in a democratically organized society, the power operates in the legal field of the constitution and laws, properly ensures the rights and freedoms of citizens, all other democratic principles of society, that is, the formally established (legal) political system coincides with the real political regime.

It should be noted that in a legalized political system a non-democratic political regime can also function. For example, in all Soviet constitutions, an outwardly democratic political system was proclaimed, but in real life, there was a rigid, totalitarian system. Consequently, under a constituted, externally democratic political system, the authorities can establish both an authoritarian and a totalitarian political regime. For the development of a legal state, it is important to develop and implement legal mechanisms that could prevent the difference between the real and the proclaimed political regime. Particular attention should be paid to a moderate system of checks and balances. Positive experience in this regard has been gained in the USA. Thus, in some states there is an effective mechanism of protection against the arbitrariness of judges, the executive branch is divided into several levels of authority. In the end, the real political regime is determined by the nature of the interaction of all components of the political system; it is a way of obtaining, exercising and maintaining political power, that is, again democratic, authoritarian or totalitarian, that is, it's about the uniformity of classification of political systems and political regimes, not about their coincidence in each specific case at a certain historical stage, in a particular country. In other words, only common characteristics of similar political systems and political regimes coincide.

Thus, the characteristic of a constitutionally legalized political system in real life may not coincide with the current political regime, or the latter deviates a certain degree from it towards the authoritarian or totalitarian regime, depending on the specific method of exercising power.

As for the legalized authoritarian or totalitarian political systems, they always coincide with the current political regime, since it is impossible to assume that a democratic regime operates under the constituted totalitarian system. But, the nature of the political regime is determined primarily by the official political system, the mechanism for organizing political power. So, the not quite perfect separation of state power and the mechanism of checks and balances lead to confrontation between the legislative and executive branches of government, complicate the political situation in the state, and destabilize society.

The nature of the political regime is directly related to the level of political structuring of society, primarily of state power. Political unstructured negatively affects the functioning of the political system, the exercise of state power, intensifies the contradictions between the legislative and executive branches of government. Political systems (regimes) of an authoritarian type are characterized by the unlimited power of one person or a narrow group of people. Their main features are: legalized liquidation or substantial restriction of the democratic rights and freedoms of citizens; prohibition of individual or all opposition parties and other public organizations; restrictions on the election of public authorities; the transformation of parliament into a decorative body; merging the ruling party with the state apparatus; ban on opposition press; the use of uniformed state structures and coercive methods for combating opponents of the regime.

If, under an authoritarian political regime, certain representative institutions are involved in government, this is usually based on a large bureaucratic and police apparatus, based on a coercive character.

At the same time, to characterize authoritarian political systems only from the negative side is not entirely objective from the point of view of the development of society as a whole, since most of its history, mankind has developed precisely in this type of political systems. Authoritarianism, as a rule, was a form of power organization inherent in pre-industrial society. But even today, authoritarian political regimes exist in a number of countries in Asia, Africa, and Latin America. Their formation is justified by the need for national liberation and rebirth. Authoritarian rulers achieve their recognition not only by force, but also with the help of the so-called charismatic image of their legitimacy, that is, due to their personal qualities. For a relatively short period, the authoritarian government is able to ensure public order, reorganize social structures, and carry out political and economic reforms. However, it should be borne in mind that today authoritarian political systems are, as a rule, transitional in nature, evolving to either a democratic form of government or totalitarianism.

Political systems (regimes) of the totalitarian type are characterized by total state control over society and the individual. Their generalized features are: absolute restriction of the rights and freedoms of citizens; the formation of state power at all levels by appointment from above; de facto recognition of the principle of separation of powers; the presence of only one ruling party headed by the leader; the imposition on all members of society of a single ideology that penetrates into all forms of public and private life; state-organized terror and violence, the dominance of repressive (power) structures that persecute everyone who is counted among the enemies of the regime. The totalitarian political system is an authoritarian system in its extreme antisocial, aggressive forms.

The concept of "totalitarianism" (all-pervasive, all-encompassing) was proposed by the Italian philosophers J. Amendola and P. Tabet to characterize the fascist regime of Mussolini. Ideas of complete subordination of man to the state have deep historical roots, but as a real political system, totalitarianism became possible at the industrial stage of development of society, with the emergence of monopolies and their merging with the state, the spread of collectivist consciousness.

Historical experience shows that the totalitarian regime arises, as a rule, in conditions where the country is faced with exceptional tasks, which require extraordinary mobilization and concentration of efforts of the whole society, which supports this regime and shows readiness victims. The tendency towards totalitarian ideology and such a political regime increases during periods of socio-economic crises, accompanied by the impoverishment of large masses of people. It was under such conditions that totalitarian political systems arose. The danger of establishing totalitarianism in Ukraine, based on its real economic condition, has not been overcome.

Sometimes they point to certain rational elements of totalitarian regimes (for example, mobilization in crisis or military periods). However, totalitarianism in any form, if it restricts the rights and freedoms of people, degrades human dignity, leads to mass impoverishment, and cannot be justified. Totalitarianism destroys the motivational side of human activity, inevitably causes stagnation and regression, which ultimately leads to the collapse of all totalitarian systems. So it was with fascist Italy and Germany.

The types of political regimes are considered - these are, in my opinion, their main types, classified according to certain common features. There are many modifications of political regimes that do not fit into their classic types. The political regime as a way of exercising power always deviates from the constituted political system. These deviations in real life can acquire different content depending on certain circumstances of an objective and subjective nature, including the personal qualities of the highest officials of the state. However, the most important thing that determines the democratic nature of a political regime

is the degree of maturity of civil society, the development of the institutions of the rule of law state.

In real life, between these extreme types of political systems (regimes) there are always intermediate forms, one way or another, to one of these types. Today in the world in a number of countries there are precisely such political systems inherent in transitional societies, societies that are transforming, making the transition from one socio-economic system to another, from one type of state-political system to another. Political systems of transitional types are characterized, as a rule, by the weakness of all political institutions, the loss by social groups of the usual ideological and political orientations, the underdeveloped state-legal institutions and mechanisms, and the like.

It should be noted that in every society there are numerous supporters of both paths, but it is impossible to walk in two ways at the same time, it must be determined. What are the reasons for this choice? It is known that developed societies depend on the degree of freedom, the initiative of its members. From the primitive communities ruled by the leaders, through slavery and despotism, people gradually went to democracy, where everyone, choosing their life path, also determined the development of society.

The civilization of the East, almost unchanged since the times of ancient China and India, is characterized by a monocracy of power, and in the family - by the dominance of the elders. As a result, blind obedience to the owners condemned this civilization to collapse. But the dynamic civilization of the West won. She began to emerge in northwestern Europe, in which the feudal lords could not conquer the city and were forced to enter into agreements with them. There was a polycracy of power - the germ of democracy and the free market. Later, all of Europe, the states of immigrants from it, and now - most of the countries of the world came to this. But Asia has adopted some European values. The power of the feudal lords changed by oligarchy - a hybrid of democracy and despotism, free enterprise and monopolies.

Eastern Europe was a transitional zone. Russia's centuries-old race for Europe was not a success. Peter I, destroying the polycracy of power, created the Asian military-bureaucratic empire, but with European refinement, which preserved Russia's backwardness for centuries. The Bolsheviks, in turn, eliminated the polycracy of power, which arose from the reforms of Alexander II.

Marxism in Europe gave birth to social democracy and so-called Swedish socialism, and in the East, the totalitarian system of Stalin and Mao - the power of the partocracy.

The mentality of Europeans is due to the fact that the democracy of the West means a constant change of leaders, primarily unsuccessful ones. When conditions and circumstances change, political parties propose, and voters change even the most prominent leaders, such as de Gaulle, Churchill, Thatcher, Kohl. They were

forced to resign in the prime of their leadership abilities. However, under the conditions of the Asian monocracy, the masses are essentially excluded from the choice, and a certain part of the elite is a profitable, manageable and not very experienced leader.

The mentality of this or that nation (nation) has been formed for centuries, and therefore neglect of this important factor in the development of the state, the transformation of its institutions, the formation of a new political system will lead to negative phenomena, slow down progress, stimulate nostalgia for authoritarian or totalitarian social institutions.

We considered some general methodological problems of a politic system (its concept, content, typology, correlation with the concepts of "political organization of society", "political regime"). However, the elucidation of the essence of such a complex social phenomenon as a political system will not be complete without the study of the components of the political system — its structure, functions, and legal basis.

In general terms, the structure of a political system is a combination of its components, an internal structure. In modern scientific literature, and these are mainly philosophical sources, there are different views on the structure of the political organization of society. In particular, its structural elements, in addition to various socio-political institutions, are also considered political relations, labor collectives, classes, people, family, various forms of public initiative, the media, various forms of direct democracy, and the like. There are researchers of the political system, consider political ideas, attitudes, political consciousness, political ideology, etc., to be the structural elements of the political system. [113]³⁰.

In my opinion, the political system of a society is a system of a state-organized society, according to its institutionally legalized (fixed by law). That is, it is in a certain way a material system with specific material institutions. And the fact that specific types of political system, corresponding political views, ideas, ideology, political culture, political consciousness does not exist in isolation from material institutions does not mean that the latter lose their substance and nature and become elements of the political system.

Law that is, regulates a political system defined by law by a political-state-legal concept, which covers a set of relevant political institutions (subjects) with a certain legal status.

Studying the political system from the point of view of its legal aspect, and it is more important than its factor, we determine that the structure of the political system is formed by its components (elements): the legal basis (legal institutions) the subjects of the political system (state, state bodies); self-protection organs; political parties; other public organizations, in one way or another, influence the formation of politics, the mass media, the institutions of the political system proper

³⁰Look.:Luzan A. A. The political life of society: theoretical issues. - K.: Vishchasckola, 1989. -P. 49–74

(elections, referendums). If you build an internal hierarchy of the political system (structure), it will look like this: legal basis (Constitution, laws) - elections, referendum - state (state bodies) - local governments - political parties - other public organizations that participate in political life - the media.

The proposed structure is a framework model of a political system. It incorporates a legislatively defined mechanism for the interaction of all its components. If we add to it specific political and legal relations that are forming within it, that is, concrete actions and decisions of the authorities, we will get one type or another, a modification of this or that type of political regime. It should also be noted that the legal basis of the political system in its internal structure plays the role of a specific foundation on which the specific structure (subjects, institutions) of this system is formed.

The basis of the legal foundation of the political system is the Constitution (Fundamental Law) of the country. The Constitution is, so to speak, a framework document of the political system, in which the fundamentals of the constitutional order are defined, and, in fact, the political system, since a certain constitutional order is the main content of the political system. In addition to the basic principles of government, (form of government, the principle of separation of powers, self-government, etc.). The constitution regulates in general terms the activities of specific subjects and institutions of the political system.

In addition to constitutional regulation, each subject and institution of the political system has a certain legal status, enshrined in the current legislation, in a particular system. Legislative acts are direct political and legal regulations. But, the political system lives and acts on the basis of the general legal system of society, which regulates all spheres of its life activity, for we are unlikely to find any of them that did not have a political and legal aspect.

Thus, the social sphere has not only a special political character, influencing the activities of political institutions. It can play a crucial role in the formation of the political system itself. This also applies to the economic sphere. It should be noted that the socio-economic basis of a democratic political system is a market economy based on free enterprise and fair competition. Historical experience proves that the processes of formation of market economic relations and the democratic foundations of the political system are always parallel.

Having found out in general terms what is the structure of the political system, one should analyze the functions that it performs. First of all, it is necessary to determine why these functions should be implemented. The answer to this question lies in the plane of the relationship between the concepts of "political system of society" and "society". To begin with, the phrase "political system of society" indicates that the concept of "society" is broader than its political system.

The society itself forms the political system, forms its core - the state, a certain state system. So, the political system is a component or subsystem of a more

general social system - a society that has political, non-state factors other than political, state-legal institutions. A society is by its nature richer and more complex a social phenomenon than its political system and political organization. Therefore, the political system performs certain functions in relation to society as a whole and its individual subsystems.

What is this feature? It is appropriate to cite the most generalized approach to defining the functions of a political system, described in the scientific literature, according to which its functions are: power integration, goal definition, organizational and regulatory [37]³¹. The power integration function of the political system is to integrate, unite into one whole elements of social structure based on certain ideals and values; the function of defining the goal is to define the goals and objectives of the political, economic, social and cultural development of society; organizational - in the mobilization of human, material and spiritual resources to achieve the goals that society sets itself; regulatory - in ensuring public recognition of politics and government, the appropriateness of political decisions, the activities of political institutions.

Of course, a classification is given of the functions of a political system, mostly of a philosophical nature, has the right to exist, since it contributes to a deeper understanding of the political system and its purpose. But, since we have come to the conclusion that the political system of society is a legalized, legislatively institutional system, the most important meaning of which is political, state and legal, then it is advisable to approach the definition of its functions from more formalized positions.

I single out two main groups of functions of the political system: the general functions that the political system performs as a whole (here we can take as a basis and their classification above), and the features of the functions that individual subjects and institutions of the political system perform. The first group of functions, in our opinion, belongs to the regulatory function (in its broadest sense).

Other, more specific, functions of the political system are the functions of the state. We observe and state that in different historical epochs and periods scholars and politicians gave a different definition of the state, based on the political circumstances that were observed to specific states of the time. Even if it is sparse, to look schematically into the historical past, it can be stated that the understanding of the state by ancient philosophers, scientists and the Middle Ages, and the new time is the process of intellectual immersion in such a complex phenomenon as a state [V. Sirenko 5]. The starting position here should be that the state is an instrument of society, its main element (core).

First, the state can be viewed as the main component of the political system, that is, in relation to other elements of the structure of the political system (local governments, political parties, other public organizations). Secondly, the state can

³¹Look.:Burlatsky F. M., Galkin A. A. Modern Leviathan. - M.: Thought, 1985. - P. 31-32.

be considered as a separate, relatively independent system, which has its own internal structure. In relation to other structural elements of the political system, that is, self-government bodies and public organizations, their connections are determined by the functional role of the state as an integrating factor of society. Society through the state, its legislative body determines the legal status of public organizations, including political parties, ensures their activities. On the other hand, political parties with a certain electoral system play a crucial role in the formation of government and state bodies. In relation to self-government bodies, the state, through the legislative body, not only determines their legal status, but also delegates to them their authority, controls their implementation within the boundaries of the constitution and current legislation.

So, the state is the main subject of the political system of society, in fact, its political organization. This predetermines the peculiarities of its legal status, which covers the dominant part of the public law regulation of public relations. One of the peculiarities lies in the fact that the state as a subject of the political system determines the legal status of other subjects (and institutions) of this system. The basis of the legal status of the state, of course, the constitution - the basic law of the state. The legal status of the state is also determined by other legislative acts regulating the activities of relevant government bodies.

The state has a relatively independent (functional) character in relation to society, which forms a state to ensure various kinds of individual, group and common interests, that is relatively independent in relation to the state. A society is hard to imagine without a state, just as the latter cannot be imagined without a society. It is in this that the moment of their unity in a single organism, in an integral system, manifests itself. So, the state as a structure of the relevant bodies is a scientific concept that gives an idea about a certain state structure of society. In real life, a state is a society (in a certain country), and a society is in a certain state.

Its functions are socio-economic, cultural, purely legal, related to state coercion, maintaining public order and security, legal proceedings, defense, foreign policy, that is, functions that are assigned to certain state structures. As for self-government bodies, these are, in fact, also state functions of local (regional) importance, but delegated for implementation to territorial communities and their self-governing bodies. As for political parties, these are functions of revealing the political will of citizens, involving them in political activities, and participating in the formation of state bodies (political power).

Thus, the internal deep meaning of the political system, its essence is determined by social factors, the need for political self-organization of society, coordination of efforts to protect the interests of specific members, individual social groups and society as a whole. Each component of the political system also has a certain social and, finally, political and legal content, corresponding social orientation and functions.

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Chapter 5

Legal Consciousness and its Role in the Process of Innovative Development of Society under the Conditions of Informatization

The activity, which relates to the development and implementation of the newest technologies, the production and sale of new products created as a result of scientific and technological progress, occupies a significant place in the development of modern society. The issue is that an innovative development of society as a system of social relations, which promotes an increasing the standard of living of a person and society in general, with the help of innovations, provides competitiveness on the market and in interstate relations, increases the efficiency of implemented reforms in various spheres of public life. At the same time, the innovative development of society is a complex and long-term process that requires complex regulation through the combination of various social regulators and the obligatory participation of the state. Under such conditions, the main theoretical aspect is the formation and application in the process of scientific knowledge of a new strategy of study of the law, based on the provisions of the classical types of legal consciousness, and which allows us to justify a set of modern legal regulations, which are based on the idea of the law as a human-dimensional phenomenon that is an integral element of the modern sociocultural system.

Under the conditions of informatization and globalization of the world, integration into the world and European space is an important direction of Ukraine's development. This leads to the transition to a new digital model of interaction of public administration subjects with citizens and legal entities, which affects the system of the law, forms of social communication, the newest social relations, and therefore the legal awareness, legal culture, and legal dimension in general. That is, the main factors that currently actively influence on the innovative development of society are, firstly, informatization, which is directly related to the idea of "technological innovations" and is characterized by the implementation of communications necessary for exchange of information resources at a considerable rate and in an unlimited amount, and secondly, globalization, which involves the interpenetration and interaction of different societies, states and non-state entities in the spheres of economy, politics, culture, etc., as well as the development of common standards and contradictory localization process that is impossible without territorial and corporate resources concentration. At the same time, along with positive tendencies, informatization, which is a

product of innovation development, still causes a lot of additional problems. Since the exchange of information in the above-mentioned parameters allows to accelerate scientific activities and innovative processes, however, the uncontrollability of information flows threatens the security of the individual and the whole society. Speaking about globalization, together with facilitation it can also hinder the development of technologies, generate information and technological wars, the growth of inequality among subjects of information relations, and influence the changes in innovation policy. Such changes in the direction of the development of the state and society require a scientific understanding of theoretical, normative and social factors of transformation of legal reality, as well as the need to find new criteria for the implementation of legal regulation and the provision of world law and order.

In many respects, the development of society in the technological sphere is conditioned by the development of social consciousness the legal awareness. In other words, it is important which technologies the society is ready to accept, which technologies are popular in society, which ones it stands against. In fact, public consciousness is a very delicate matter that reflects not only the material but also the spiritual needs of society, which, in turn, also affect technological development. In this case, legal communication is important, which should be understood not only as an abstract concept, but also as a practical sphere of coordination of interaction (through behavior) of people in a legal and communicative society [1, p. 117]. Considering the innovative development of society under conditions of informatization as a way of social systems functioning, in which tendencies of introduction of new ideas, technologies, norms and values in all spheres of society prevail over opposite tendencies of preservation of the existing state [2, p. 15-16], one can ascertain that innovative activity on the scale of interests of both separate individuals and society as well as the state as a whole serves the solution of numerous social problems, in particular moral and ethical ones. Indeed, in an innovative society, a person is not simply an "economic person", which refers to a complex of economic functions and roles that determine the rational behavior of a person in an industrial type of economy, but a multifaceted personality that acts as a decisive factor and the main resource of an innovative society [3, p. 57].

Investigating the issue of innovative development of society, special attention should be paid to the problems of legal regulation of social relations in this field due to the fact that the settlement of such relations is now provided through legal means, but in the most states they are insufficient, chaotic and inconsistent in legal regulation. The main gap is the lack of a systematic approach to understanding the nature and structure of the subject of legal regulation, the total volume of organized relations. Although, given

the fact that in the economic and legal scientific literature the innovative activity as a concept is usually associated with business processes and entrepreneurship, the innovative development of society is a logical and justified complex object of legal regulation and it has a number of characteristics:

- it is an element of the social development of society, which at the present stage of development is perceived not only as a part, but also as an important essential characteristic of social development;

- it is a system of social relations that are connected with the creation of conditions, the development and practical implementation of new knowledge, that is, relations arising from innovations and in order to create conditions for the development and practical implementation of innovations;

- it reflects the system of relations not only at the level of individual subjects of innovation activity, but also at the level of the whole society, state policy, because it includes both microeconomic and macroeconomic levels;

- it has specific goals for the development of a certain sphere of public life (raising the living standards of the population, ensuring the competitiveness of enterprises at all levels of entrepreneurial activity and the competitiveness of the state in international relations; solving environmental, demographic, food, medical and other social problems; promoting the efficiency of reforms and state transformations etc).

The above-mentioned law-making problems arise from the problems of jurisprudence as a science, and, first of all, the theory of state and law, since at the present time the whole set of social relations in the field of innovative development of society remains poorly investigated and not generalized; their systemic laws as the subject of legal regulation are not developed; the correlation between the processes of formation of the state innovation policy and the legal regulation of innovation relations is not established; common terminological apparatus, principles and basis of legal regulation are not defined, as well as identical recommendations on the formation of a legal and regulatory framework. That is, the change in the vector of modern development of society, which undoubtedly affects the transformation of state and legal institutions, causes the necessity to consider this category in the aspect of the basic types of legal consciousness and its role in the processes of globalization and informatization. Since a detailed research and study of state and legal regularities, as well as the determination of the mutual influence and interdependence of legal awareness and innovative development of society under modern conditions are one of the main tasks of national legal science.

Of course, considering law as a sociocultural phenomenon under the conditions of informatization and innovative development of society is a

complex and multidimensional problem, the solution of which is impossible without the use of an interdisciplinary approach in the process of knowledge and understanding of law, and also without taking into account the influence of subjective factors on social phenomena. That is why the appeal to the achievements of both national and foreign sociological and philosophical and legal thought is important. In particular, the theoretical basis of this research was the works of V. Belyakov, G. Berman, B. Bondarenko, V. Dozortsev, O. Kolodiy, K.-H. Ladeur, S. Onopriyenko, Yu. Ostapenko, T. Parsons, A.-M. Slaughter, O. Tikhomirov, G. Teubner, E. Toffler, I. Shopina, N. Yakushev etc. After all, the generalized scientific conclusions of these scientists prove that the modern development of the theory of methodology of law cognition in the process of innovative society formation is far ahead of the level of readiness of the law-enforcement sphere to practical legal manipulation with these legal phenomena and, in turn, constitute the basis for finding new ways in the development of the legal mechanism of regulation of social relations under the conditions of globalization and informatization. The research of scholars formed the basis for the analysis of existing scientific concepts of legal consciousness, ascertaining their significance in the process of legal regulation of innovation and information relations, as well as revealing the objective regularities of the transformation of Ukrainian society in the aspect of its informatization and modern tendencies of the development of the legal system of Ukraine under the conditions of globalization.

Scientific developments of the theorists of law have repeatedly argued that the law, serving as the guarantor of the stability of social development, represents not only one of the most important elements of contemporary social life, but also a complex social formation of worldview significance. Despite of the fact that in the history of philosophical and legal thought the concept of law has already acquired the relevant characteristics, the scientific interest in its cognition not only does not disappear, but also constantly grows. And the task of understanding of the essence of law remain relevant today. This is primarily due to the complexity and multiplicity of the law as a sociocultural phenomenon, in the research of which there is always the prospect of finding new sides and qualities of the law, for example, the law as a value relation, and as a consequence, the development of new approaches to the interpretation of its understanding. The opportunities for spreading and deepening legal knowledge particularly increase in the general methodological movement that arose in the philosophy of the XX century, namely: the transition from the classical to the neoclassical and further to the post-classical stage. A characteristic feature of the last stage is methodological pluralism, which today can be regarded as the main direction of the development of the

methodology of law. The possibility of a real and consistent updating of the interpretation of the law appears within the limits of this direction.

The growth of the interest of scholars in cognition of law is also due to the transition of modern society into a qualitatively new information state, which implies other characteristics of the law and the legal reality. The emergence of new sociocultural conditions of existence of society, along with accumulated numerous data on non-positive manifestations of the law, cause a necessity in concretization of the concept of law, for example, the spreading of the structure of subjects of rule-making through "independent administrative authorities", whose recommendations are obligatory in certain areas of social life, foresees clarification of their role and place in the structure of all subjects of law-making activity, determination of the legal status of the results of their "legislative" activities. Due to the fact that new subjects of rulemaking are subjects of civil society, and not public authorities, it is expedient to analyze their activity not from the point of view of the specifics of the political and legal system, but taking into account the peculiarities of the sociocultural reality of a definite community of citizens.

Herein, first of all, it should be noted that the modern world is an epoch of an information society that is developing in an innovative way, the main characteristic of which is globalization that undoubtedly affects the legal reality of both individual states and the world as a whole. Surely, as a result of globalization, the social world is experiencing the pressure of various, quite often opposite to each other technical and psychological forces (computerization of information flows, the Internet, intensification of labor, "syndrome of chronic fatigue"), which constantly destroy its traditional foundations. Trying to refrain from self-destruction, the modern world creates additional mechanisms of social and legal regulation through the adoption of new laws, which leads to a sharp increase in the regulatory body.

A quantitative increase in prescriptions of law is necessarily accompanied by the emergence of new branches of law, which pretend to their own subject of legal regulation. And this, in turn, leads to the systematization of positive law and, consequently, its fragmentation: sometimes a legal object of cognition valuable for perception experiences a disintegration into numerous fragments. As a result, the preservation of the general ideas of this different regulatory body in consciousness of one person becomes impossible as, in fact, the use of such ideas in everyday life. A pattern of images of individual aspects of the existence of mankind replaces a single and integral legal picture of the world, which inevitably leads to the mosaic of legal consciousness and legal culture of a modern human.

Realizing the negative effects of the quantitative growth of statutory documents, world society tries to order a regulatory body by computerization

of legal information [4, p. 27-35]. However, as practice shows, it is implemented by bringing law to the level of the usual information flow, which may include, for example, economic statistics and other data that can be mathematically processed. The classification of normative information takes place according to formal features and key words. And this foresees the implementation of a mechanical extra-valuable approach to a legal object. Legal information obtained as a result of computerization will be mainly the result of a search operation conducted in accordance with the laws of mathematical logic, in some cases it will be a result of legal qualification, and sometimes it will be represented by an act of legal cognition or an act of legal judgment, which reflects a certain value and legal content. This is probably one of the main paradoxes of the modern law: the greater the regulatory body is, the more means of its processing and classification there are, and there is the less law as an effective regulator of social relations, which has a certain semantic meaning.

Modern progressive changes in social life inevitably lead to the emergence of "a new human" – a numeric human, whose intellectual ability is limited by sign and digital symbols, which, accordingly, affects the reduction of spiritual and creative orientation. And as a result, there is a sharp decrease of the level of legal thinking of a modern human, as sociologists and anthropologists warn of [5, p. 38-40].

At present, technical, mechanical character of the influence on society, its social relations and structures manifests in the action of law. The law under such conditions comes to a so-called regulating machine, "stamping" monotonous legal forms with a various material of human behavior. The law is transformed into lawmaking, into a certain technical and legal unit, mainly the forming order, designed in particular to adequately formalize the decision of business problems.

The analysis of tendencies in the development of legal reality suggests that one more result of the globalization of the modern world is the creation of various international unions and associations on the basis of uniformization of legal reality. For example, one of the most important conditions for the entry of new states into the European Union or the Council of Europe is the standardization of their legal systems and, consequently, the phased abandonment of national peculiarities of the legal life of separate states-nations. National law is less and less paid attention to. This means that the law, according to the will of lawyers, theorists and practitioners, "tends" to seek universal schemes that embody the "highest" achievements of the human mind, but as a rule, not taking into account the peculiarities of a particular cultural and historical process of development of separate peoples. Everything that is global, universal will always be impersonal. Everything has a detrimental

effect on legal reality, since the law is regulated not by impersonal relations, but by the relations between people of particular nations.

However, in this context it should be noted that in countries with common or rather close cultural and historical norms, the standardization process can have successful results, although, where there are essentially different sociocultural phenomena, uniformization involves the rejection of own legal system and the establishment of absolute legal ideas, and this, as a rule, negatively affects the formation of law and order.

It is considered necessary among the directions of development of modern legal reality to distinguish the tendency that is aimed at establishment of a completely different hierarchy of legal norms, in comparison with the one, in which the life of previous generations took place. Historically formed types of legal awareness and legal consciousness are destroyed. Therefore, especially acute in the context of the formation of an information society and its innovative component appears the necessity of justifying the law as a sociocultural phenomenon. After all, agreeing with the opinion of B. Bondarenko, it should be noted that the law, having a social character, is considered as a means of regulation of social relations thanks to its application by judges and officials to specific life situations (so-called "living law"), that is, the law recognized by its functioning and direct action in specific social relations. The subjects, who exercise the law, such as judges and administrators are recognized as real rulemakers, as they reproduce in their acts the obligatory standards that have developed in the field of public environment. This is a sociological type of legal consciousness, which proceeds from the fact that the law is created in real social life, its fundamental principle is recognized the interaction of various social subjects in the state-legal sphere, which causes the necessity of adaptation of the law to the vital needs of specific individuals through the process of law enforcement [6, p. 96]. Under such conditions, the understanding of the law can not be reduced only to the interpretation of those rules, which are fixed on paper and to its identification with legislation. After all, the law contains the norms of official law, and norms that are produced in the process of law enforcement. Therefore, it is important to cognize the law through the prism of law-making and law-enforcement activities as inseparable processes, the combination of which leads to more effective use of legal means in the relevant situation and an individual approach to the implementation of legal norms for effective and balanced legal regulation of social relations in the information sphere. Indeed, the formation of institutions and structures of law is now considered as a complex contradictory process, the peculiarity of which is the understanding that in the information environment regulation of behavior, which previously belonged to the competence of global institutions (state-legal organizations), becomes a

personal issue of autonomous subjects. Social regulation, including legal one, in this case is caused by two basic principles of the present: pluralism of power and freedom of choice in order to preserve identity. Considering the first principle, subjects can be guided by their own goals, only to the extent that they take into account the interests and needs of other subjects in the course of their activities. The second principle foresees increased responsibility of subjects and, first of all, moral and legal one. The main mechanisms of social regulation here are such activities as self-reflection, self-control and self-esteem [7, p. 36-37]. And to determine the content of social, in particular, legal regulation, it is important to understand those goals, assessments, values that a person places in the basis of his / her behavior and relationships with other people, which, in turn, determines the necessity of conducting research of the state of the spiritual culture of a particular society in a specific and historical period from which these values, evaluations and ideas are taken.

Such an understanding of recovery of law crisis is consistent with the cultural and normative concept of the law of an American sociologist and theorist T. Parsons, according to which the legal connection of subjects is determined by the priority of cultural values. "The beginning" of the law is not just an assertion, even in the sense of social waiting, but an identified socio-cultural assertion. For the emergence of the relationship between the subjects as "the sum of reciprocity", each of the subjects must correlate his values and values of another one, and only this way, according to T. Parsons, identified assertions acquire the qualities and status of assertion of law [8, p. 206]. This means that in determining the ways of developing or reforming law, it is important to consider not only social changes in society, but also the content of the culture of this society and the changes that take place in it.

That is, the study of legal regularities from the position of the integrative type of legal consciousness, which in our time is at the stage of active formation and practical development, is relevant. In its essence, this type of legal consciousness is complex, synthesizing different positions and aspects of other types of legal consciousness. Given this, it should be noted that the study of the legal regularities of innovative development of society from the position of the integrative type of legal consciousness will be the most well-grounded and complete, since all aspects and features of state-legal phenomena, the interaction of which mediate legal regularities, will be considered essential and necessary. In addition, within this type of legal consciousness, pluralism of understanding of the state-legal categories and the interrelations between them is possible, which allows to differently consider the state-law regularities reflecting the relation of the law and legislative act, and maximally reveal their essence. Since the integrative type of legal consciousness is not constant and is perpetually forming and expanding, the study of any phenomenon of the

state-legal sphere in its aspect will reflect the dynamics of the development of understanding law, which, of course, is a positive factor, since such research will always correspond to actual social relations and will reflect the modern level of development of legal science in itself [6, p. 98-99].

In this case, the conclusions of K. Belyakov, S. Onoprienko, I. Shopina concerning the tasks of the jurists are appropriate. Scientists note that "significant information and global transformations in society are causing the constant development and modification of forms of social communication, the discovery of the latest social relations, which cannot but affect the legal system, and, consequently, the legal consciousness, legal culture and the legal dimension in general" [9, p. 8].

According to N. Yakushev, for the purpose of determining the legal regime of innovation and information relations, the development of entirely new legal institutions and mechanisms should be considered, which should take into account both the previous experience of developing theoretical legal concepts and the specifics of the sphere of legal regulation itself, which generally has no analogues in the legal consolidation of the relevant legal relations [10, p. 41]. From the point of view of V. Dozortsev, the questions about interpreting the law must be put more radically, since "information" is not just a new object of legal regulation, but an object that occupies a central, determining place in the life of the information society. In this case, it is necessary to take into account not only new legal mechanisms, but rather the change of the paradigm of legal thinking and re-thinking of the theoretical foundations of the law in general [4, p. 31]. After all, the interpretation of the law as a phenomenon, which by its very nature is a dynamic one, and not a fixed system, allows to understand the changes inherent in the legal activity of the information civilization of an innovative type, the reality of which is characterized by "potential transparency" [11, p. 9]. Therefore, characterizing the law, it is expedient to separately analyze its content and form.

However, given the position of the integrative type of legal consciousness, one should not seek a generalized form of the law, since the law is always imperfect from a certain point of view and requires constant changes. According to the theory of D. Hall, who in his works tries to create a unified view of the law through the synthesis of legal norms, legal processes and moral values, one can conclude that the search for a general approach to understanding the law is not justified and should be rejected. In the interests of legal science and practice, one should give preference to pluralistic approaches to understanding the law, to study various definitions of the law and to synthesize them within a single approach. There is a point of view according to which the integrative definition of the law is considered in the literature as a set of recognized in a certain society and secured by state-legal

regulation standards of equality and justice, which regulate the competition and the consent of different wills in their relations with each other [12, p. 311-316].

In order to function in a situation where the unity of reality is not clear and indisputable and acquires such fundamental quality as pluralism, the law requires the effectiveness of legal acts. The solution of certain controversial issues or problems can no longer occur due to the mechanical application of general rules to private cases and therefore it is not a random activity, but rulemaking in each particular case. This activity can be meaningfully described as a continuous process of law-making concerning the emergence of new relations and the introduction of new organizations, which, in turn, create an opportunity for new interconnections. Such rulemaking is simultaneously an activity that provides support for the legal system and strengthening its autonomy. This activity protects the system and maintains it in a working order.

Accordingly, the main function of the law for the innovative development of society under the conditions of informatization is the continuous activity in the formation of viable models that regulate certain specific relations between the subjects. And in order to navigate existing relations between operations and be able to use existing samples in the process of continuous self-design, the law can use only its own history – self-identification. It is important that no unity is foreseen in advance, that is, it (the unity) is not reproduced during the process. Unlike the hierarchy inherent in traditional systems, such legal system is "heterarchical", since it does not create a fundamental unity. Rules generated by such legal system cannot be followed otherwise than in the very process of their enforcement. There is no absolute beginning in it and there is no fixed set of rules that would form the basis of the process of self-preservation and self-reproduction. This means that in the era of expanding the information space and innovative development of society, the process of enforcing legal norms is becoming a priority in the law. Such legal system does not consist of strictly defined components, for example, such as the system of legislation, private, that is, unauthorized by official positive law legal acts become its kernel, and legal communications are the basic legal reality [13, p. 117].

This trend of legal evolution was foreseen in the 1970s by an American futurologist A. Toffler [14, p. 13-23]. In particular, he argued that a significant number of continuously emerging and fading independent groups would be forced to make day-to-day decisions, agreed not with the general normative standards fixed in the laws and other acts of representative bodies or central executive authorities, but with the internal imperatives of situations involving groups and their individual members. Any decision will be made only for a

specific case (*ad hoc*), it will be unique to the same extent as the situation itself. A. Toffler called this system of decision-making adhocracy, believing that it would determine the style of legal life of the information society. According to A. Toffler, a free agreement will become the basis of intergroup relations, a layer of professional lawyers will disappear, amateur forms of court proceedings, arbitration, mediation in disputes will appear, which will provide more complete opportunities for the protection and realization of the interests of all groups.

Despite the fact that in this forecast attention is focused not on meaningful points but on formal and procedural ones, it indicates the most important thing: the law begins to return to the path of its self-development, which was broken as a result of the emergence of a legislative act at a certain stage of social and cultural development of humanity, which sought to bring the law under control of some unified supreme principle, to integrate it into the general public, which is controlled by an authoritarian entity – the state. The return of the law to the path of self-design will undoubtedly lead to the restoration of the true content of the phenomenon under study.

N. Luhmann and G. Teubner were the first to consider the law as a self-generating, autopoietic system. Thus, a German philosopher of law G. Teubner proposed to qualify the law as a system capable of reflection, structured by internal constraints in the form of a rational argumentation. As an autopoietic system, the law reproduces itself through the timely differentiation of itself and something that is not the law. Also, the law, according to G. Teubner, possesses the procedures for legal comprehension of advanced achievements in various spheres [15, p. 727-730].

Since in the era of information technologies and innovative development of society the reality becomes pluralistic, in the context of such a society, relations in their nature are heterogeneous, complex and initially not foreseeing any single trivial decisions based on rigid regulations. In this regard, the hierarchy of sources of the law as an autopoietic system can be represented as follows: private legal acts are in the center, followed by judicial practice (including all kinds of arbitration and intermediate courts), and finally, legislation is situated on the periphery of the legal system. This actualizes one of the paradigms of the philosophical and anthropological methodology of the law – the value perception of normative prescriptions. This is evidenced, for example, by the voluntary fulfillment of the obligations taken on by a legal subject on the basis of compliance of the content of the law with his ideas of justice, equality, freedom and other legal ideas. And this means that the questions of the spiritual and moral content of the law, the inclusion of ideas about rights and obligations in the cultural and historical context of social life are being put into the foreground. It is legal regulation of achievements of the

sciences that arise at the junction of social and economic, humanitarian knowledge and knowledge in the field of exact sciences most clearly reflect the cultural and spiritual conditionality of the law as an autopoietic system. After all, the law cannot disengage from significant and even critical discoveries in the scientific sphere, since it will seriously violate the legal order. But the law is not able to incorporate scientific achievements as some kind of tribute, since such incorporation cannot be neutral from the very beginning. Unlike other social phenomena, the law has the function of ensuring a stable and fair order in public life. This means that the law must, without losing its autonomy, develop its own relation to the intellectual component of modern society's life only on the basis of spiritual and moral culture.

Of course, nobody has canceled and cannot cancel the primary role of laws, but from the point of view of the theory of the autopoietic system, they do not have such role from the very beginning, they become such to the extent that the judge makes them a part of specific practical decisions. Neither laws nor other regulations adopted by the competent public authorities form the core of the legal system, because it is formed only by individual actions, which either have or do not have specific legal consequences.

In the scientific literature private legal acts include, first of all, administrative decisions that ensure the effective operation of an enterprise, pre-contractual disputes, accession agreements, contracts, etc., the sources of which are neither special laws or codes, nor international conventions or the traditions of business turnover. In addition, there is a completely independent sphere of activity in developing regulatory rules for regulating certain public relations, which can include the so-called international model legal acts containing international legal acts and principles [16, p. 1].

Among international model legal acts, it is possible to distinguish various recommendations developed by credible organizations, which are mainly intended to regulate and protect homogeneous and similar social relations. Credible organizations include, for example, a Special Commission on the Development of Recommendations established by the British Trading Corporation for the Securities, the European Committee for Standardization (CEN) and the International Organization for Standardization (ISO) [17, p. 54].

The specific features of these and similar organizations are the following: firstly, representation (i.e. representation of the maximum number of interests) and, secondly, qualification, professionalism, which ultimately ensures the credibility and scope of the implementation of the regulatory legal acts adopted by such organizations. This is due to the fact that independent credible organizations have arisen and exist at the intersection of two subjects of the law – the private sector of public life and public authority, and therefore their activity allows to solve the contradictions between the state and civil

society to some extent. They are actually state policy conductors, but their functioning is not based on an administrative principle, and their right to create rules that are mandatory for use in the areas of their competence provides a successful combination of law-making and law enforcement activities.

The practice of applying administrative decisions, the development and implementation of model legal acts and recommendations created by credible organizations shows that they are created as rules of conduct intended for use by members of public relations at their discretion. Such documents do not require any approval from the state and are intended for application to a specific contract (agreement), provided that its parties agree to voluntarily subordinate their relations to such documents and acts, they undergo an inevitable verification by practice, their practical expediency is proved or denied. And as a result, professional legal recommendations are not only the best, the most effective, but also the only acceptable way of behavior in most areas of social relations. However, the most important in this case is that these private acts meet the basic legal criterion, which can be represented as the existence of a certain connection between the two legal centers (the subject of the law and the subject of the obligation), as well as the interconnection between the direct creation of legal norms and their specific implementation.

In this context it is necessary to take into account a principal methodological position expressed by K.-H. Ladeur: "social conventions are not forms of coordination, which are deprived of a legal nature, but forms of coordination of inter-organizational generation of interconnected relations, which should be regarded as normative (legal) phenomena" [11, p. 19]. Regulations created in such a way meet all the formal requirements that are imposed on the legal norms: general acceptance, credibility (authority), specificity of the content, etc. The parties, taking on a voluntary commitment to comply with the relevant rules, bind themselves with the legal consequences and simultaneously legalize the norms they follow. In addition, the violation of these rules leads to the emergence of sanctions, including court cases, which are used "on their own", for example, by the intermediate court.

Thus, in the era of information technologies and innovative development of society, the inherent characteristic of which is pluralism, when each citizen can choose which system of values to be guided by in a given situation, some manifestations of the modern law can be described as manifestations of the "soft law". This is caused by the formation of a new trend and legal evolution, the content of which is the "lodgement" of decisions independent of state structures by legal force. Legal relations between the subjects of private law are increasingly established in the direction outside the law-making activities of the legislative bodies of the state [18, p. 520]. Since the main legal criterion

of the activities of non-governmental structures is the relation between the development of norms and their specific application, and the close connection between mutual rights and responsibilities – they become representatives and conductors of the new world order, which is not directly related to the will of the state. The main advantage of the non-governmental sector of rule-making is that the norms created by it do not require a procedure for their recognition as invalid, since their observance is voluntary and the time of their action is determined by the coefficient of their demand by the subjects of the law. Observance and use of such norms continue as long as they successfully regulate certain social relations, and the irrelevance of their operation is conditioned by their inapplicability due to time or a particular life situation.

It should also be noted that in the information society, the interrelation of the positive law established or authorized by the state and the "soft law" created by the members of civil society become of importance. Since the regulation of public relations in the innovation and information sphere is carried out by a large number of regulatory legal acts, and the current legislation of Ukraine cannot provide full-scale regulation of relations arising in connection with the development, creation and spreading of innovative products and the expansion of information space. This problem is explained by the availability of legal norms that belong to different industries and the absence of a comprehensive regulatory legal act on the implementation of these activities in the legislative insuring of innovative and informational social relations. For example, the greatest attention has been given to the study of innovations in national jurisprudence among representatives of civil and entrepreneurial law. The issues of public law branches, in particular regarding the formation of public policy in the innovation sphere, the activities of science and educational institutions, innovative relations of non-market character require a detailed theoretical development.

The primary task is to generalize and carry out a systematic analysis of innovation and information relations with the aim of developing a single conceptual apparatus, the bases and principles of legal regulation, recommendations for improving the current regulatory legal basis and the formation of a new one. It is important to study the role of the state as an institution that carries out innovation policy in order to ensure a sustainable innovation development of society. It is also necessary to pay attention to the enhancement of the interaction of jurisprudence with other humanities in the field of research of innovations and, first of all, with the economics, because the law remains the main lever in regulating social and economic processes and all social development. The innovation and information sphere now requires mastering the basic concepts and laws of economic science by legal scientists, for example, studying the issues of legal support for the introduction of

innovations at the macro and microeconomic levels by creating a peculiar crossing point for active interaction and interpenetration of various sciences, theoretical concepts and cognition methods. It should also be noted that in positive law it is necessary to consolidate not only the natural process of standardization of social relations, including the ones that take place in the information sphere, which are a reflection of social conventions or expectations, but also mechanisms for active promotion of this process. This approach to the legal provision of innovative development of society under the conditions of informatization will allow to achieve a balance between the creative potential of private entities of the law and the conservatism of legislation and justice.

Therefore, at the present stage, the official law, which can acquire the title of a post-positive law, becomes a priority. It is characterized, first of all, by the domination of individual legal acts of non-state structures, which should not be approved by the state. Secondly, it contains internal sanctions – voluntary performance of legal instructions. Thirdly, there is an extension of the notion of "norm" in the event of a refusal of strictly defined rules of conduct, and in terms of the process of legitimizing norms and guarantees of their observance. Finally, the process of implementing norms prevails in the modern law, that is, the law is associated with activity and communication. Under these conditions one can clearly state that the law becomes self-sufficient and self-contained, independent from external forcible factors, including the state. This law is often referred to as "soft law" or "reflexive law", which, regardless of terminology, should be considered as a new form of law [19, p. 98-107]. This form of law allows to take into account the interests and strategies of participants of civil and economic turnover more fully, move beyond the limits of standard legal regulation in order to ensure the effectiveness of the mechanism for the distribution of responsibility and the ordering of new phenomena and opportunities related to them that are continuously generated by private law.

The emergence of "soft law" as one of the modern ways of legal regulation of social relations implies the existence of various horizontal ties and contacts between legal infrastructures. In such circumstances, the multiplicity and principal openness of the sources of the law is its feature. The so-called "mixed sources" are distinguished in the scientific literature as a new kind of sources, which are one of the most flexible instruments that allow to reach a compromise between the state, on the one hand, and the market, on the other hand [18, p. 503-538]. Such sources of the law include, first, model legal acts and recommendations made by credible organizations.

All of the abovementioned allows to determine the innovative development of society in the legal sense as a system of social relations

associated with the creation of conditions, the development and comprehensive practical implementation of new knowledge in different areas of human activity in order to improve the level of life of people and society as a whole, solve social problems, ensure competitiveness in the market and interstate relations, increase the efficiency of reforms and transformations. At the same time, there are complexities of the problems of innovative development of society, which are connected, first of all, with the fact that in this case the laws of functioning of the systems operate: for its existence the system needs a balance between two tendencies – preservation of its condition and further development. That is, it is a matter of the fact that relations connected to the innovative development of society are undoubtedly a complex and important social institution, which includes various spheres of human activity, interests of an individual, society and state, and also has specific open legal problems, which from a scientific point of view requires their theoretical and legal understanding and research, and from the practical point of view – the modernization of innovative legislation, the result of which should become a codified act, which would be the result of systematization of legislation, identification and elimination of gaps and contradictions between various provisions of legal norms. The complex of such measures will help to identify the system of innovative relations that are included in the subject of legal regulation with their unifying features, subjects and content, with the institutes of the system of law that directly regulate them, as well as with those principles and ideas that, from the point the view of legal science, should form the basis of the state innovation policy.

In this aspect it is also important to study the modern legal reality as a whole, in the implementation of which one must focus on the methodological pluralism that arises from the recognition of the impossibility to understand and interpret the legal reality of innovative society within a single method. Agreeing with the point of view of K.-H. Ladeur, it is worth emphasizing that the law always faces new requirements, the implementation of which cannot be deduced from the established rules [11, p. 10]. Only the methodological synthesis of various methods allows to investigate the law as a multifaceted and multidimensional phenomenon addressed to a personality, interests and needs of a human, as well as to develop theoretical legal constructions, taking into account a new national legal ideology of the "human-centrism", the idea of humanization of administrative and legal regulation and fulfillment of the requirements of the steady observance of the general principles of fairness, conscientiousness and reasonableness.

Today's society is an information society, which develops in an innovative way, and new, non-existent before problems that require legal regulation arise in it. Modern information and globalization transformations in society

determine not only the emergence of new legal mechanisms, but also the need to change the paradigm of legal thinking and re-thinking of the theoretical foundations of the law. The revealed ambiguity of the situation requires, firstly, the theoretical understanding of the reasons that lead to legal transformation and transformation of social life; secondly, the identification of the causes of legal evolution and the creation of ways for a gradual development of the law in the context of the multidimensional social and cultural reality. And only due to the whole set of conceptual views on the essence of the law, its forms of expression, sources, interrelations with the state, causes of the origin, its purpose that constitute the content of legal consciousness, it is possible to cognize and understand the role of the law in the process of innovative development of society under the conditions of informatization.

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Chapter 6

Labour law under the conditions of the information society development

At present nobody doubts that modern society is at this stage of its development, when information becomes one of the key elements of the economy³². It is one of the main production resources, and in this context, changes occur in the field of labour resources. The post-industrial economy dictates the changes connected with the growing role of information. Electronic technologies are becoming an effective working tool in labour activity³³. Because of the expansion of information activity, the professional qualifications, the educational structure of society, the nature of work also change. The employee's roles and functions change, intellectual and creative work displaces the work of an individual directly involved in the production process. Today the legal world of the employment differs from that of 25 years ago. The employer is confronted with the fact that its rights to information are greatly reduced by limiting its right to ask questions. An example of this is a ban on the question of a possible future pregnancy³⁴.

One of the modern trends in the development of labour law in the context of globalization is the tendency to reform the employment legal regulation. Developments in the field of information technology coupled with automation, computerization and robotization predetermine the unprecedented technical and social and economic changes resulting the employment transformation. The transformation of the employment institute relates to the arising and spread of non-standard (atypical, non-traditional, volatile) forms of the employment. Non-standard employment is a form of attracting people to work, that is a manifestation of the increased flexibility and individualization of labour relationship, the essence of which is the presence of differences in one of any features of standard model of regulation of relationship between the participants of labour process, based on the indefinite labour agreement, full working week, work under the direct supervision of one employer in its premises at the same

³² Проскурин А. С. Понятие правовой информации как основы информационного общества. Вестник Волгоградского гос. ун-та. Серия 5, Юриспруденция. 2016. № 1 (30). С. 51–57.

³³ Туманов А. А. Электронное взаимодействие субъектов трудовых и непосредственно связанных с ними отношений: правовой аспект: автореф. дис. ... канд. юрид. наук; специальность 12.00.05 – трудовое право; право социального обеспечения. Екатеринбург, 2018. 33 с.

³⁴ Армбрюстер К. Непрерывность и изменения мегатенденций в праве (теоретико-правовое исследование на примере норм трудового права). Вестник Московского государственного областного университета. Серия: Юриспруденция. 2018. № 4. С. 9–24.

workplace, subject to the rules of internal labour regulations and becoming the part of the labour collective³⁵.

At the heart of division of the employment into standard and non-standard is peculiarity of the labour process organization, which obtains various forms. In scientific literature non-standard employment is defined as “the activity of citizens based on such relationship, in which there is missing or modified one of the essential features of traditional labour relationship: personal, organizational or proprietary”³⁶, “the labour activity of employees of a certain classification group, provided or not prohibited by the effective legislation of Ukraine, however because of the peculiarity of organization of working hours, workplace and working conditions it does not meet the standard rules and requires a special mechanism of legal regulation and organizational and economic ensuring”³⁷.

The non-standard employment includes:

- 1) the temporary employment;
- 2) the employment with overtime, flexible and short working hours;
- 3) the call work;
- 4) the distant work;
- 5) the work of employees who are included in the relationship with the borrowed work³⁸.

Atypical employment is also domestic work, i.e. work done in the household or for a household. According to the Article 1 the ILO Convention No. 189 “Decent Work for Domestic Workers” (2011) the term “domestic worker” means any person engaged in domestic work within an employment relationship.

Abroad they distinguish the following forms of atypical employment:

- the part-time work;
- the fixed-term or short-time;
- the work-at-home;
- the telework, e-work;
- the self-employment;
- the pseudo-self-employment;
- the temporary-agency³⁹.

³⁵ Велика українська юридична енциклопедія: у 20 т. Т. 11: Трудове право / редкол.: С. М. Прилипка (голова), М. І. Іншин (заст. голови), О. М. Ярошенко та ін.; Нац. акад. прав. наук України; Ін-т держави і права ім. В. М. Корецького НАН України; Нац. юрид. ун-т ім. Ярослава Мудрого. Харків: Право, 2018. С. 366.

³⁶ Мощная О. В. Нетипичная трудовая занятость: некоторые проблемы теории и практики: дис. ... канд. юрид. наук: спец. 12.00.05. М., 2009. С. 10.

³⁷ Котова Л. В. Поняття та юридична природа альтернативних форм зайнятості у сучасних умовах. Актуальні проблеми права: теорія і практика. 2012. № 25. С. 131.

³⁸ Велика українська юридична енциклопедія: у 20 т. Т. 11: Трудове право / редкол.: С. М. Прилипка (голова), М. І. Іншин (заст. голови), О. М. Ярошенко та ін.; Нац. акад. прав. наук України; Ін-т держави і права ім. В. М. Корецького НАН України; Нац. юрид. ун-т ім. Ярослава Мудрого. Харків: Право, 2018. С. 366.

³⁹ Григорьев И. Е. Рынок труда и механизмы его регулирования в условиях формирования новой экономики: дис. ... канд. экон. наук: 08.00.01. СПб, 2006. 171 с.

We believe that non-standard and atypical employment can be considered as identical concepts. Equally with them they also mention unstable employment. Foreign researchers have proposed several options for distinguishing non-standard and unstable employment. Thus, O. Panov divided the requirements to standard employment into three groups:

1. The institutional requirements:
 - a) work in the formal sector;
 - b) full scope of social benefits and guarantees, observance of all labour rights regulated by the legislation;
 - c) the employee should be represented by the independent trade unions.
2. The requirements to employment conditions:
 - d) presence of one employer (because of the wage the employee is not interested in searching the additional employment);
 - e) termless nature of the labour agreement;
 - e) full working hours;
 - f) all year-round employment;
 - g) using the employer's means of production.
3. The trade conditions:
 - h) decent wages: sufficient, regular, stable labour income;
 - i) the minimum risk to lose the employment (stable employment, predictability of the working hours)⁴⁰.

Depending on the observance of such conditions this scientist divided the employment into three groups by the degree of stability:

- 1) standard;
- 2) non-standard;
- 3) unstable, which includes the precariat.

To O. Panov's mind, standard employment is characterized by observance of the whole list of the above-mentioned requirements. Non-standard employment is characterized by the obligatory observance of the first, second and last requirements. It means that the employee should be employed in the formal sector of the economy, he/she should be granted by all rights and guarantees, which are typical for his/her employment form, the employee should be sure that his/her workplace will be kept. Moreover, the requirements to employment conditions should be fulfilled by the employee's voluntary consent. In other words, if the employee concludes the fixed term agreement, he/she voluntarily has a part-time employment (for example, if he/she has sufficient income and wants to spend more time for leisure, family, etc.), then we can talk about non-standard employment. Unstable employment (except of precariat) means that one of the

⁴⁰ Панов А. М. Неустойчивая занятость: концептуализация понятия и критерии оценки. Вопросы территориального развития. 2016. № 3 (33). С. 23.

requirements to stable employment – formal employment – should be observed and at least one of the rest requirements should be not observed⁴¹.

To counterbalance the non-standard employment, deviations from the requirements to employment conditions are compulsory. For example, if the employer forces the employee to conclude a temporary labour agreement (when his/her work is not temporary), to change to the part-time working hours schedule or take a leave on his/her own account, to “voluntarily” withdraw from the staff, then it is unstable employment. To O. Panov’s point of view, the difference between non-standard and unstable employment is that in the case of non-standard employment the employee’s rights are kept and the rejection of employment conditions from the standard is voluntary. Precariat took special place in the classification of types of employment and it is characterized by the fact that the first requirement – work in the formal sector – is never kept: it is informally employed persons. In result, they can not rely on other two institutional requirements. By analogy with standard employment, the precariat can be called as a “core” of unstable employment: this category of employees is characterized by the greatest risk in the labour market – the employer has no formal obligations in relation to them⁴².

Thus, O. Panov determined that unstable employment is non-standard employment, but the deviation of employment conditions from the standard conditions is compulsory. Such employment is characterized by threats and risks of incomes instability, full or partial deformation of labour relationship between the employee and employer, increased risks of dismissal, inobservance of labour guarantees and rights.

To P. Bizyukov’s mind, unstable employment is non-standard forms of employment with low wages, lack of protection against dismissals, lack of system of social protection and inability to use own rights⁴³.

Consequently, unstable employment should be considered as an independent scientific category. A. Popov correctly stated that, firstly, features of unstable employment can affect employees with any form of employment. In case of “standard” employees, it could be a low level of wages, which does not ensure reproduction of the workforce. Secondly, unstable social and labour relationship, as a rule, is compulsory, but not voluntary. Thirdly, unlike unstable employment the non-standard one does not always lead to deterioration of position of the employees⁴⁴.

⁴¹ Панов А. М. Неустойчивая занятость: концептуализация понятия и критерии оценки. Вопросы территориального развития. 2016. № 3 (33). С. 25.

⁴² Панов А. М. Неустойчивая занятость: концептуализация понятия и критерии оценки. Вопросы территориального развития. 2016. № 3 (33). С. 26.

⁴³ Бизюков П. В. Практики регулирования трудовых отношений в условиях неустойчивой занятости. М.: АНО «Центр социально-трудовых прав», 2013. С. 36.

⁴⁴ Попов А. В. Неустойчивая занятость: распространенность и социально-демографические характеристики работников. Государственное управление. Электронный вестник. 2017. № 63. С. 266–267.

Distant employment is the most common type of non-standard employment in the information economy. The scientific community of different countries uses different terms, which in their essence are synonymous, but in content they may reflect various distant employment aspects. In the heart of all definitions (such as: telework, telecommuting, telejob, explace, peripheral jobs, work-at-home, home-based work, distant work, e-work) is a form of conducting and mean (respectively, the distant form, i.e. at distance, and modern communications as a mean).

At the same time, quite often work-at-home is considered as a type of distant work. B. A. Rymar rightly mentioned that work can be or distant, or “stationary” (in the premises of the employer or at home). This author did not consider work-at-home as a type of distant work⁴⁵. Meanwhile, V. O. Nosenko stated that work-at-home is a variety of distant work and states that in the 2010-ies work-at-home finally lost its position among forms of distant employment since it is usually aimed at executing mechanical work by the low skilled specialists. The author argued that the leading positions are currently occupied by freelancers and teleworkers, who are mostly highly skilled specialists with higher education and freedom to choose the object of work, the absence of attachment to the employer and workplace, the combination of work results and income received, etc⁴⁶. O. S. Pogoryelova thought that “distant work” is a broader concept than “work-at-home” and includes the “homework” concept⁴⁷.

According to the Dictionary of Ukrainian Language the distant means the one, which is carried out or which operates at a certain extent, distant⁴⁸. So, if the starting point is a place where the employer is located, then work-at-home is also distant. It is no accidentally that during some years scientists expressed an idea that the “work-at-home” concept should be replaced by more general concept – “distant work”. However, we believe that homework is not distant because it is not executed outside the fixed workplace. The workplace of the home worker is his/her place of permanent or temporary stay. In addition, the distant work necessarily involves using information technologies.

Researching the workplace as a category of labour law, A. V. Kruze distinguished the non-stationary and distant workplaces. Non-stationary ones are workplaces of employees whose work relates to permanent displacements in space. A. V. Kruze stated that the distant work, i.e. work outside the production

⁴⁵ Римар Б. А. Договори про дистанційну роботу. Актуальні проблеми теорії трудового права та права соціального забезпечення: монографія / кол. авт.; за заг. ред. д.ю.н., проф. Г. І. Чанишевої. Одеса: Фенікс, 2015. С. 120–121.

⁴⁶ Носенко В. О. Правове регулювання дистанційної зайнятості працівників в Україні: автореф. дис. ... канд. юрид. наук: 12.00.05 – трудове право; право соціального забезпечення. К., 2015. С. 7.

⁴⁷ Велика українська юридична енциклопедія: у 20 т. Т. 11: Трудове право / редкол.: С. М. Прилипка (голова), М. І. Іншин (заст. голови), О. М. Ярошенко та ін.; Нац. акад. прав. наук України; Ін-т держави і права ім. В. М. Корецького НАН України; Нац. юрид. ун-т ім. Ярослава Мудрого. Харків: Право, 2018. С. 106.

⁴⁸ Словник української мови: в 11 тт. / АН УРСР. Інститут мовознавства; за ред. І. К. Білодіда. К.: Наукова думка, 1971. Том 2: Г-Ж. С. 286.

premises or the employer's place of location, is a work of home workers and distant workers. The author distinguished these workplaces under the territorial criterion, noting that workplaces of home workers could be created only in particular residential premises, while the distant workplace could be located anywhere if there is a technical ability to communicate with the employer, so it is spatially indefinite⁴⁹. According to the proposed classification, we can conclude that work-at-home is simultaneously distant and stationary work, since it is not related to displacements in space. Obviously, there is a problem in choosing a criterion for classification.

The analysis of the peculiarities of legal regulation of work depending on the place of work and workplace characteristics shows that characteristics of the place of direct labour function execution have a certain influence on the legal regulation of work of the employees and become a factor of labour legislation differentiation. The factor of differentiation, which determines the peculiarities of legal labour regime, is location of the workplace relative to the place of work. Depending on this factor, the following labour schedules are separated:

- 1) the general labour schedule: the workplace and place of work (location of the organization-employer or its structural subdivision) are territorially coincided;
- 2) the work-at-home schedule: the workplace is located at the employee's place of residence;
- 3) the watch method labour schedule: the workplace is located away from the location of the employer organization;
- 4) the labour abroad schedule for persons who are sent to diplomatic, consular missions;
- 5) the underground labour schedules.

The workplace stability is one more factor of differentiation, which determines the peculiarities of labour legal regime. Depending on this factor, the following labour schedules are separated:

- 1) the labour schedule when the employee works at a permanent workplace;
- 2) the labour schedule when the employee's work has travelling character;
- 3) the labour schedule when the employee works in the field conditions.

Consequently, distant work when the employee's workplace can be located anywhere in relation to the location of the employer's organization and this workplace is not permanent involves the arising non-standard labour schedule for employees. Under conditions of digital economy workplaces are no longer tied to physical locations. They become "digital", virtual and mobile, i.e. they do not require permanent placement of the employee in workplace.

Call work is a separate type of non-standard employment. Call work means specific type of work, characterized by the involvement of the employee to

⁴⁹ Крузе А. В. Рабочее место как категория трудового права: автореф. дис. ... канд. юрид. Наук. Екатеринбург, 2015. С. 15, 20.

perform work on the employer's call, and only when it is necessary for the employer. There are several types of such agreements:

1) under "minimum-maximum contracts" the employee has minimum working hours, which should be ensured by the employer, as well as maximum working hours, which should be ensured by the employee with performing the employer's orders. Otherwise, "minimum-maximum contracts" determine work with normal short working hours under flexible labour schedule. The only parameter, by which the "minimum-maximum contracts" do not fit into the effective national legislation, is that the beginning, ending and the total duration of the working hours are determined not by the parties (as in the case of work under flexible labour schedule), but solely by the employer – even within the limits determine by the parties;

2) under "zero-hours contracts" the employer is not required to give work to the employee and it is not responsible for the lack of work for the employee (for example, in the form of payment of certain compensation). Minimum working hours and labour schedule are not agreed. Here, unlike telework and work under flexible labour schedule, the employee is virtually absent from the freedom to choose the place and time of work. On the contrary, the employer gets the maximum freedom to choose when and how to use the employee's work. Thus, in the literature it was correctly noted that call work, especially "zero-hours contracts", is the most unstable form of employment.

A common for all types of such relationship is a feature of the employee's engagement to work and only when it is necessary for the employer. The question of legal nature of such an agreement is controversial. In the effective Labour Code of Ukraine, the definition of the labour agreement does not explicitly foresee the employer's obligation to give a work to the employee. However, p.1 of Article 32 of the Draft of the Labour Code of Ukraine⁵⁰ determines that labour agreement is an agreement between the employee and the employer, under which the employee should execute the work (labour function) specified in this agreement personally, observing labour legislation, collective agreements, rules of internal labour regulations under the guidance and under the control of the employer, and the employer should give a work to the employee under this agreement, to ensure proper, safe and healthy working conditions, proper sanitary conditions and pay full amount of wage in time. Consequently, if under the labour agreement the employer agrees to give a work to the employee, the agreement under which the employer is not obliged to give a work should not deem as the labour agreement.

In case of call work the proprietary feature of labour relationship undergoes essential changes. According to the traditional understanding, this feature means, in particular, the payment for time during which the employee was ready to

⁵⁰ Трудовий кодекс України: Проект № 1658 (доопрацьований) від 20.05.2015. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221

execute his/her work but did not work from the reasons independent of him/her. In case of call work, this time is extremely limited, and the employer gets the opportunity to pay only for the actual work given. In case of call work legal relationship is not always long lasting as in case of traditional labour relationship. If theoretically the existence of such agreements is permissible, then the expediency of their legalization in labour law at present seems questionable.

As regards the relationship on the “borrowed” work, we can state that it goes beyond the limits of labour law, which still regulates the relationship between the employee and his/her direct employer. However, the relationship between the employer and the beneficiary of the relevant work (the receipt of which should be a motivation for such legal relationship) directly denoted by the state as civil or economic.

I. I. Motorna pointed out the changes in the subject field of social and labour relationship in connection with the spread of distant employment and the borrowed work in such directions:

- a) the workplace institution modernization;
- b) the transformation of pay for labour systems;
- c) the change of social guarantees system;
- d) the arising, along with traditional, new subjects of social and labour relationship, which include firms-intermediaries (lessors and workforce providers)⁵¹.

The development of modern labour relationship leads to the transformation of the main labour law institutes. K. Armbruster noted that after civil society of freelancers (entrepreneurs) of the XIX century and society of workers of the XX century, in the beginning of the XXI century we are on the threshold of formation of society working on the individual basis⁵².

The rapid globalization of individualization, personalization of labour schedules, modernization of production have led to the arising of “compressed” working week schedule, which means that the entire normative duration of the particular employee’s work is divided into less working days a week with a longer working day up to 10-12 hours. On other days of the week another employee works, and the length of his/her working day (shift) also increases with a simultaneous decrease in the number of working days per week. The application of such schedule gives the employee a fairly long rest during the week, and the employer – an opportunity to organize the continuous work of its organization during the week.

⁵¹ Моторна І. І. Соціально-трудові відносини: формування та розвиток: автореф. дис. ... канд. екон. наук: 08.00.07. К., 2009. С. 7.

⁵² Армбрустер К. Непрерывность и изменения мегатенденций в праве (теоретико-правовое исследование на примере норм трудового права). Вестник Московского государственного областного университета. Серия: Юриспруденция. 2018. № 4. С. 9–24.

Information and technologies are already present in each industry. Digital technologies also bring obvious changes to the labour law. In many fields of economy modern technologies allow to carry out labour functions outside the workplace and place of work, not just at home office, but also in any place (mobile office)⁵³. Employees are often expected to be available at anytime and anywhere. In the developing economies such process is perceived positively by the employees who want to earn more and by consumers to whom it is comfortable, for example, to make purchases at night.

But the traditional values (the right to rest and privacy) dominate in the developed countries. On August 8, 2016 the Law on Work, Modernization of Social Dialogue and Career Development⁵⁴ was adopted in France and one of its chapters was entitled as “Adaptation of Labour Law to the Digital Age”. The employee’s right to disable digital devices, i.e. phone and e-mail, is foreseen there in order to keep his/her rest time, vocation, as well as private and family life. That is, during non-working hours the French employees have the right not to answer the calls and e-mails of the employer. And indeed, on weekends and holidays, the French are practically “inaccessible”.

In this context, we fully share S. M. Chernous’s opinion that the right to rest is a natural human right (the right of the first generation). It is primarily due to the physical need of the human body in rest. The author rightly stated that the right to rest should be considered as a derivative of the right to life and health, and not to the right to work⁵⁵.

We share M. I. Inshyna’s point of view that the time of rest differs from non-working hours. All the time outside of the working hours is non-working and it can be counterbalanced by the working hours because it is the opposite of the concept of its nature. However, not all non-working time is the time of rest, but only that active period during which the employee pays attention to the immediate active process of restoration of the workforces⁵⁶.

By its nature, rest is a special psycho-emotional state of a person aimed at restoration, preservation of health and labour capacity, satisfaction of his/her own vital needs and interests.

K. Yu. Melnyk defined the following features of rest:

⁵³ Чесалина О. В. Работа на основе интернет-платформ (crowdwork и work on demand via apps) как вызов трудовому и социальному праву. Трудовое право в России и за рубежом. 2017. № 1. С. 52–55.

⁵⁴ URL: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032983213&fastPos=3&fastReqId=644176944&categorieLien=id&oldAction=rechTexte>

⁵⁵ Черноус С. М. До питання про право на відпочинок як природне право людини. Актуальні проблеми соціального права в Україні: збірник наукових праць / за ред. М. І. Іншина, В. І. Щербини, С. Я. Вавженчука; відпов. ред. І. С. Сахарук. Х.: Юрайт, 2017. С. 126.

⁵⁶ Іншин М. І. Щодо поняття часу відпочинку працівників. Правове регулювання відносин у сфері праці і соціального забезпечення: проблеми і перспективи розвитку: тези доповідей і наук. повідомлень учасників VI Міжнар. наук.-практ. конф. (м. Харків, 3–4 жовтня 2014 р.) / за ред. В. В. Жернакова. Х.: Право, 2014. С. 12.

1) non-fulfilment by the employee of his/her labour function during this time. In other words, currently the employee does not execute any work in the interests of the employer. If the employer gives the employee any work during the rest time, such period is subject to inclusion in working hours;

2) using this time interval by the employee at his/her own discretion. This allows to differentiate the rest time from the time of dismissal from work to achieve certain goals (for example, to study without interruption from production)⁵⁷.

The problem of realization of the right to rest is especially acute for scientific and pedagogical workers, whose work does not stop during non-working hours and is not limited to the place of work. However, employers often neglect this employee's right, obliging him/her, for example, during the weekend to develop a program, during the holiday – a teaching and methodological complex, etc.

International experience suggests that high technologies, including information and telecommunication, have already become the engine of social and economic development in many countries. The consequence of such modernization is the rapid development of communications. The development of these technologies is dangerous because the employees will be under constant “control” of the employer, always in touch, which will lead to a reduction in full-time rest.

At the same time, the ILO draws attention to the fact that a decent organization of working hours should meet five interrelated criteria:

- to maintain the health and safety of the employees;
- to consider the interests of the family;
- to promote the principles of gender equality;
- to promote productivity and to consider the opinion and choice of employee regarding his/her working hours⁵⁸.

Ratifying the European Social Charter (1996) (revised) by the Law of Ukraine dated September 14, 2006 Ukraine is obliged to consider as mandatory points 1, 2 of the Article 26 “The right to Dignity at Work”. In this context, there is a problem of permissibility of the employer to control and monitor the employee's activities during working hours (Internet activity tracking, employee's e-mails, using office equipment by the employee (for example, printer, telephone), and behaviour of the employees in and out of workplaces in whole).

Abroad employees often bring in an action against the employer on violations of their privacy, confidentiality of correspondence. However, courts often turn to the side of the employer if it succeeds in proving the feasibility of such actions for the effectiveness of its business, the limitation of such control only

⁵⁷ Мельник К. Ю. Трудове право України: підручник. Харків: Діса плюс, 2014. С. 238–239.

⁵⁸ Шестерякова И. В. Проблемы совершенствования трудового законодательства. Вестник Саратовской государственной юридической академии. 2014. № 1 (96). С. 246–247.

by the issues directly related to the labour functions of the employees and the absence of personal motives in this.

Some authors define such components of the employee's right to the inviolability of his/her personal life in the workplace:

- 1) the inviolability of the means of the employee's personal communication if private information was received at the official address, the employee's official communications;
- 2) the integrity of the employee's private documentation;
- 3) the integrity of external employee's account;
- 4) the non-use of audiovisual control means to the employee's behaviour in the workplace;
- 5) the employee's physical integrity (searches, reviews, etc.);
- 6) the non-use of special control means over the reliability of information provided by the employee (for example, using "lie detector")⁵⁹.

The important indicator of the working life quality is a job satisfaction. Job satisfaction depends on several factors. International studies determined that the degree of satisfaction is greatly enhanced by greater autonomy of work. Why is it important to pay attention to job satisfaction? With the adoption of the Lisbon strategy for improving the quality of working life and workforce, it has become one of the EU's priorities in implementing its social and economic policies. Globalization requires from the entrepreneur's sustainability in the competition. Thus, improving the quality of working life reflects not only the desire to meet the minimum standards, but also to guarantee the continuous development of working life. Measuring the quality of working life should be considered as objective factors related to labour (wages, labour environment), the employee's compliance with the workplace (qualifications), but also subjective indicators that reflect the assessments of employees of their work.

Taking into account the above mentioned, we fully share the position under which in the effective legislation of Ukraine the term "satisfactory living standard" should use the phrase "decent living standard", since in the first case it is a level that actually corresponds to the minimum human needs (i.e. minimum means not the lower limit of human poverty), the importance of the second is that it is a level that proceeds from the fact that human is the highest social value. It is dignity that allows a person to feel self-respect and to realize his/her own social value⁶⁰.

The development of non-standard forms of employment caused the spread of a worldwide phenomenon, which was called as "precariat". So, one of the most important problems of modern labour legislation is an adequate response to

⁵⁹ Трудовое право России: проблемы теории / под ред. С. Ю. Головиной. Екатеринбург, 2006. С. 179–181.

⁶⁰ Ярошенко О. М. Гідний життєвий рівень як правова категорія і конституційне право. Актуальні проблеми трудового права та права соціального забезпечення: матеріали Міжнародної науково-практичної конференції (м. Харків, 5 квітня 2019 р.). Харків: Юрайт, 2019. С. 137.

changing types of employment, the spread of its atypical forms, precarization of labour market.

Precariousness (from the English “precarious” and Latin “precarium” – risky, unstable, unreliable, vulnerable) is a tendency for the development of social and labour relationship in modern society, which involves the transition from classical labour agreements to the forms of employment, in which the increasing number of people forced to use his/her own ability to work independently in the conditions of instability and lack of employment guarantees, which increases their economic and social vulnerability, promotes the loss of professional identity and the ascent to the lower layers of society.

That is, the process of forming unstable (unsteady) type of atypical employment and its corresponding social and labour relationship with negative assessment of employees of their expected consequences. Precariousness means deformation, the crisis of labour relationship, which is manifested in arising numerous groups of employees, permanently employed temporary, which is associated with the vulnerability, unreliability of the social situation of this category of population.

Precariousness of work (employment) is a process of increasing instability in the social situation of the hired workers or inadequate, unstable employment, employment relationship that can be terminated by the employer at anytime due to the lack of legal and social guarantees⁶¹.

The introduction of the concepts of “precarious work”, “precarious employment”, which is translated as “dangerous, doubtful, unreliable employment”, requires a corresponding review of the legislator, since the lack of legally established guarantees, the employer’s obligations to employees contributes to the dissemination the negative consequences of this social and economic phenomenon. Therefore, the state faces the task of proper operational support for using new forms of employment and development of general regulatory approaches to their regulation.

The question of whether there is any non-standard (atypical) employment as a manifestation of punishment, there is no unique answer. Precariousness is mentioned when labour relationship does not provide the established standard of decent income and social protection, the ability to plan the future. In this case, precariousness means the employment, in which there is no stability (borrowed work, employment at the fixed date), low wages (low pay for work) are paid; low level of social security is established.

The problem of the modern labour market is digitalization of employment, which causes not only the arising and expansion of new professions, but also the

⁶¹ Велика українська юридична енциклопедія: у 20 т. Т. 11: Трудове право / редкол.: С. М. Прилипко (голова), М. І. Іншин (заст. голови), О. М. Ярошенко та ін.; Нац. акад. прав. наук України; Ін-т держави і права ім. В. М. Корецького НАН України; Нац. юрид. ун-т ім. Ярослава Мудрого. Харків: Право, 2018. С. 510.

disappearance of certain occupations and areas of employment. So, according to the report of the World Economic Forum “The Future of Jobs”, automation in many industries will generate 2 million new jobs that can be borrowed by developers of unique software, engineers and analysts, but will reduce 7 million seats, currently employed by the middle-level specialists⁶².

Thus, it is important to ensure effective organization of vocational education. After all, the main trend in labour markets in the near future predicts a huge increase in unemployment among employees with low and average qualifications. So, according to the ILO, by 2019 the world will have more than 212 million unemployed that is more by 11 million than in 2016⁶³.

In today's market conditions, just getting a good basic education is not a guarantee of a successful career, like it was in the Soviet era. A significant role is played by the quality of the employee, allowing him/her to react to changes in the development of society, to continue to develop constantly, to improve his/her qualifications and even to undergo vocational retraining in case of necessity to correspond to changes in the conditions of the economy and, as a consequence, demand in the labour market.

The narrow specialization and narrow professionalism gradually go away.

Universalization is reviving through advanced training, continuous training and combining functions and operations.

The specifics of the modern labour market require human autonomy, mobility, creativity and engagement in professional activities.

The benefits of employment in the information economy are freedom of movement and the freedom to choose the place of labour activity, the optimal combination of work, personal and family life. There are additional opportunities for work and employment.

Potential employment in the information area can allow people in areas with high unemployment to gain access to the employment opportunities that occur in any region of the world. Open access to work for people with disabilities, single parents who can not leave the child or take care for elderly or sick relatives. In general, this is another way of life and self-realization, it is a departure from strict regulations related to labour regulations, direct leadership and indispensable presence in the workplace.

In the modern world the role of interactive platforms is growing. The most sought after digital online tools for online employment include Uber, LYFT, Task Rabbit, Up-Work and Amazon Mechanical Turk. The data generated by these platforms becomes important for understanding the specifics of employment within digital economy⁶⁴. In general, foreign experience indicates a rapid and

⁶² Гидирим А. Талант на платформе: как цифровые технологии изменят рынок труда. URL: <http://www.rbc.ru/opinions/business/21/06/2016/576934269a79479aab95fdc9?from=newsfeed>.

⁶³ A labour Market That Works Executive summary. McKinsey Global Institute (MGI). June 20, 2015.

⁶⁴ Kuhn P., Mansour H. Is Internet Job Search Still Ineffective? The Economic Journal, 124 (581). 2014. Pp. 1213-1233.

widespread dissemination of digital tools, interactive platforms and information technology in the labour market. There is implementation of various types of information systems at enterprise, which are positive shift in organization of internal organizational circulation of documents and increase the effectiveness of local regulation.

The new digital economy transforms both human and society into “society outside the work”. There is a danger that this will mean not only the alienation of human from the level of technological development achieved, as noted by the famous Russian futurologist E. A. Arab-Ogly or the German existentialist philosopher K. Jaspers, but also from social policy, and from the possibility of influence on decision making process.

It feels largely for young people who are having difficulties both with entering the labour market and in the process of self-employment. There was even a special term – NEETs – which denotes youth beyond employment and training. For example, according to Eurostat, in Europe such NEETs are about 10%. At the same time, the overwhelming majority of working young people (reaching up to 70% in some countries) work in non-standard conditions (temporary contracts, short time employment), almost two thirds of them do it involuntarily. This total instability also forms “human qualities”, personal peculiarities of generations.

Globalization and digitization of the economy require new legal regulation. Law always feels the effect of “digitalisation” remaining beyond the objects that undergo transformation under its influence. Thus, T. Ya. Khabriyeva and N. I. Chernogor stated that legal science should solve serious fundamental problems related to the understanding of the transformations that occur with the law in the conditions of digital reality, namely⁶⁵:

1) the formulation and development of the problem of virtual and real in law, the development of the methodology of legal science, its enrichment by cognitive means, allowing to study law from the standpoint of the ratio of virtual and real;

2) the identification of mechanisms and rules of the “digitalization” influence on the law;

3) the researching nature of “cyclic legal sets” and the mechanism of their formation, as well as influence on social relationship, law, its system and structure, law practice. The results of such kind of research will help to form the modern scientific vision of the system and structure of law, serve as a methodological basis for the preparation of concepts for the development of legislation, the solution of problems of legal regulation of social relationship in the field of the formation and use of information databases, as well as digital technologies, will allow scientific positions to assess the admissibility and define the boundaries of reconfiguration

⁶⁵ Хабриева Т. Я., Черногор Н. И. Право в условиях цифровой реальности. Журнал российского права. 2018. № 1. С. 85–102.

of universal legal instruments to solve the problems of development of digital economy;

4) the preparation of forecast scenarios for changing the place and role of law and state in the regulation of the digital economy, their future transformations, the arising new normative complexes in the system of social norms along with existing ones (morality, religion, law);

5) the development of strategy, tactics and legal tools to manage these transformations;

6) the creation of the concept of a leading reflection in the public relationship law in the fields related with using digital technologies;

7) the development of models of legal regulation of social relationship connected with using digital technologies and those that define the basic principles of regulation and vector of the approval of modern multidirectional trends in regulation of relevant social relationship, variants of interaction and the combination of different levels, types, means and methods of regulation, distribution or the concentration of regulatory functions and powers in this area, as well as ways of balancing private and public interests;

8) the creation of “digital yurteh”, etc.

In conclusion, the authors pointed out that the new digital reality puts forward new requirements to legal science and legal practice, including the development of effective tools and models of legal regulation of various fields of public life. The task of lawyers is to provide this reality with a legal form. Legal science is ready to offer legal solutions. It is important that the voice of scholars be heard by practitioners⁶⁶.

Global informatization processes determine the specificity of modern world, new forms of its organization and social and labour relationship. Flexible employment and formation of e-self-employment characterize the modern labour market, in which intellectual work is recognized as the main. Modern processes of the development of labour relationship become inadequate to the classical theoretical ideas on the labour market. This limits the possibility of substantiating and implementing effective policies both in the labour field itself and in the economy. Thus, a science has new research problems, the solution of which requires the revision of methodological principles and the theoretical basis for the analysis of a new type of work – information work, changes in approaches to assess its results and driving forces, overcoming a number of the established stereotypes and dogmas, the formation of relevant new historical situation priorities in policy and practice management of social and economic processes⁶⁷.

⁶⁶ Хабриева Т. Я., Черногор Н. И. Право в условиях цифровой реальности. Журнал российского права. 2018. № 1. С. 85–102.

⁶⁷ Комаров О. К. Развитие трудовых отношений в информационной экономике. Вестник Поволжского ин-та управления. 2016. № 2 (53). С. 13.

The present working conditions in the most countries equally comprise the labour activity computerization, but not in all countries the form and content of labour meet the requirements to information society due to the existence of institutional peculiarities.

We can list the following features, which testify to the non-implementation of the labour model in the information society in modern Ukrainian conditions:

1) the low social and economic assessment of professionalism and professional work. Low wages force the employees to work only for ensuring their vital needs. Low income contributes to multiple employment and high professional mobility of the employees, i.e. changing a specialty resulting in suffering the professional interests and qualification;

2) the insufficient implementation of flexible employment and freedom of labour form of work, which are characteristics of the information society. Negative influence on the development of professional potential is carried out by the persistence of stereotypes of the command-administrative style of management in organizations, in which the more demanded executive discipline and the ability to execute orders of managers than the initiative and ability of the performer to make independent decisions that are effective for solving the emerging issues. In the information society, successful occupation of a person depends on his/her ability to create. Work is transformed into a way of creative self-realization of personality. There is a new type of workforce whose high professional potential makes them independent of demand and supply in the labour market: the employers themselves seek to offer them the conditions for self-realization of the individual. The economic status of such employees directly depends on their professionalism and personal ability to create;

3) the problem of informatization of the country. Unlike the Western countries, in Ukraine there are categories of people who are sharply restricted in access to information and computer technologies (rural population, children from low-income families, pensioners, invalids). Low incomes do not allow to ensure properly the professional work in Ukraine by necessary software products.

The assessment of social and labour relationship in the field of distant employment and the borrowed labour revealed such problematic issues: the Ukrainian legislation does not regulate social and labour relationship in the field of distant employment in relation to working conditions, organization of the workplace, labour protection, wages, etc.; employees who work distantly can not correctly calculate the cost of time and time for the organization of work at home; no institutional framework for the borrowed work has been established; contractual relationship between its participants are formed mainly chaotically.

At the same time, it is urgent to develop electronic ways of communication of the labour relationship parties, i.e. organizing the electronic exchange of information and documents; informing the employees, in particular, familiarization

with local regulations, organizational and administrative documents using electronic resources of the employer; application of video surveillance systems in order to ensure labour discipline.

Vital question is also using the Intranet – a computer network, which uses Internet standards with restricted access to members of some organization, for example, a company. In particular, the corporate portal may require the creation of an account for each employee of the organization (automatically, taking the employee to work), which will be used for the electronic exchange of documents and messages. Also, this portal may contain a database of local regulations of the employer and other documents necessary to implement the labour function with a possibility for any employee to access to it⁶⁸. We suppose that the introduction of various types of information systems at the enterprise is a positive move in the organization of internal organization of documents and increase the effectiveness of local regulation.

In conclusion, we fully share K. Armbruster's conclusion that even in the world of fierce competition and digital economy the law carries an important mega tendency – the tendency of spirituality, which should be reflected in the main codified laws⁶⁹.

⁶⁸ Туманов А. А. Электронное взаимодействие субъектов трудовых и непосредственно связанных с ними отношений: правовой аспект: автореф. дис. ... канд. юрид. наук. Специальность 12.00.05 – трудовое право; право социального обеспечения. - Екатеринбург, 2018. С. 27.

⁶⁹ Армбрюстер К. Непрерывность и изменения мегатенденций в праве (теоретико-правовое исследование на примере норм трудового права). Вестник Московского государственного областного университета. Серия: Юриспруденция. 2018. № 4. С. 9–24.

Chapter 7

Protection of the of the national legal system's authority under globalization

The legal system is a unique legal phenomenon where the whole legal life of society is concentrated and reflected. The term "legal system" has been used since the XIX century. However, at those times this term was interpreted as a synonym for law or legislation. An active study of this legal phenomenon was associated primarily with the intensive development of such a direction of study as comparative law during the last century. For a long time in comparative law, the term "legal system" was used in three meanings: 1) in the understanding of the law type; 2) as identical concepts with the law or legislation; 3) in the understanding of groups of legal systems ("legal family"). Modern comparative literature distinguishes between broad and narrow understanding of the legal system. In the broad sense, it is a collection of national legal systems that unite the origin of sources of law, the basic legal concepts, ways and methods of development. In the narrow sense it is the national legal system [1, p.40].

Identity is an essential and permanent manifestation of those components of the cultural heritage of society, which appear to be functionally necessary at the new stages of its existence, ensuring its self-preservation and identity with changes in normative value and semantic spheres. Self-identity can also be defined as the ability to support the principles of social cultural regulation inherent in this society in different situations [2, p.356].

The identity of the national legal system is crucial for its functioning and acts as factors of various contents. They determine the originality of a particular social and historical character. This is, first and foremost, the civilization characteristic of every society in the framework of which the national legal system is formed and characterizes the real role of law in public life, as well as the influence of social factors on the functioning of the national legal system.

In other words, the national legal system is a distinctive phenomenon, which reflects virtually all the specifics and peculiarities of the civilization within which it is formed and functions. The identity of the national legal system serves as a means of balancing the interests of different groups, communities and classes of the population, forming the social structure of society. The legal system serves as a stabilizing factor, which provides a reduction of social tension and harmonious coexistence of all individuals. Thus, political, social and economic stability in society is ensured. This generally depends on how smoothly all the forming structure components function.

In this context, it should be noted that Ukrainian law is not just a self-sufficient legal system, but also a developed, independent and original system. Although this system has undergone peculiar influences (as well as any other legal system), its evolution is due to internal laws and fundamental principles. Therefore, it is important to refer this issue to the customary law, to find out the impacts on its development and place in the modern legal system of Ukraine.

The identity of the national legal system reflects the specifics of national legal consciousness, legal culture, legal mentality, dominant legal understanding, determined by national legal traditions, value priorities and benchmarks in every society. Philosophical dictionary defines this value as "specific social definition of objects of the surrounding world" [3, p.407]. Legal values reflect positive or negative moments in the functioning of national legal systems.

Meanwhile, the identity of the national legal system can not be the reason for its isolation from occurring events and processes. In a comprehensive study it is necessary to take into account its dynamism, which means that it is in a state of constant development. The legal system, as well as the society itself within which it functions, is in a constant exchange of information and dialogue with other similar phenomena, resulting in a process of interdependence and interpenetration. It must be stated that the degree of readiness of different legal systems for such a dialogue is unequal, and it depends on their substance and content. If the national legal systems of the same type are willing to engage in such a dialogue with each other and the process of their interpenetration is not painful because of their single civilization. The results of such a dialogue between the national legal systems belonging to different types of legal systems are not so smooth. Only the dialogue aimed at legal borrowing can be effective, which does not undermine the civilizational foundations of one or another legal system. F. Kessidi wrote on this subject: "Each of the cultures (civilizations) of both the East and the West has its own special genotype, in the proper sense of the word, and the internal (in other equal terms) logic of development. This means that speaking in the nearest (and even distant) future about the possibility of creating a "large-scale community on the basis of a certain socio-cultural paradigm" is inappropriate. We can say only about interaction, but not about their interpenetration, that is, the tendencies for integration, in any case, when it comes to the cultures of the East and the West "[4, p.77].

Under the globalization, as it was emphasized above, there is a universalization of different spheres of society's life, but not all of its spheres are transformed to the same extent. First, it is a spiritual component of social life. As it was noted by S. Huntington, "peoples and countries of similar cultures converge. Peoples and countries of different cultures are not the same" [5]. And this circumstance makes it possible to take into account the identity of the national legal systems while promoting the globalization projects,.

As you know, the law and the legal system as complex phenomena are sufficiently sensitive to such phenomena as culture and religion, politics and economics, and so on. The originality of national legal systems is precisely the basis for the rejection of those alien legal provisions that do not fit into their civilization code. Thus, the sphere of protection of human rights and their freedoms has a sufficient normative base, which contributes to its universalization. Most states of the world have consolidated the provisions of the Universal Declaration of Human Rights in their national legislation. However, this is not a reason to assert that the attitude to the concept of human rights within all national systems is the same. If within the Western types of legal systems a general understanding of the problem prevails and the national legal systems of the West fully accept the provisions of the Declaration, then in many regions of the world, in which the national legal systems of religious and traditional character operate, it has developed its own approach to this problem, different from the western one.

The originality of the national legal system leads to a different attitude to borrowing of legal provisions. If we are talking about internationalization, which means, first of all, convergence of political and legal systems of states, deepening their interaction and interaction, then such borrowing can lead to a positive result. However, if it is a "legal expansion", it can be neglected because of the incompatibility of those legal provisions that do not correspond to the "genetic code" of one or another legal system. The confirmation of this idea is the words of A. Ovchinnikov that the classic ideal of European legal thinking involuntarily acts as the leader of globalization, and the most negative of its tendencies and qualities [6].

Thus, legal globalization aims at universalizing Western standards in those areas that are subject to these processes. Their consequence for those legal systems and legal cultures, which operate based on non-Western standards and models, is the loss of their own civilization roots. On their part, it is a protest and a certain counteraction to the growing pressure of international organizations.

According to M. Marchenko, the contradictory nature of globalization processes in the legal sphere is that on the one hand the concept of formation in the modern world of a single "global jurisprudence", the purpose of which is "promotion" of the process of universalization and unification of law at the global and regional levels in recent years, on the other, the desire to preserve the "legal foundations of national and local culture," as well as the maintenance of a "balance of values" between individual autonomy and effective administration of justice, and at the same time and health care system [7, p.7].

Analysis of the process of globalization and its influence on the legal sphere in general and the transformation of the national legal system in particular, shows that as a controversial phenomenon it affects this sphere not to the same extent,

the scale and depth of its impact on different spheres of legal life and different components of the national legal system are not the same too.

In order to solve problems in certain areas, it is necessary to involve the efforts and use the potential of different legal systems, and the process of integration is a natural way out of the problems. The environmental sphere can be called as an example. Thus, the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change and the 11th Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, held from November 30 to December 11, 2016 in Paris, the French Republic aimed at signing an international agreement to support the increase in the average temperature of the planet below 2°C, the agreement will be applied to all countries. Countries have promised to reduce global emissions as much as possible. In other words, they try "to achieve a balance between anthropogenic emissions and sources of absorption of greenhouse gases in the second half of this century." According to experts, this means reaching "pure zero emissions" between 2050 and 2100. UN climate panel shows that the level of pure zero emissions should be reached by 2070, in order to avoid dangerous warming.

However, there are areas in which the preservation of the national legal system's identity is a condition for its effective functioning. Thus, in the mentality of particular people there are basic elements that form the most important vital installations. So, the prospects for modernizing society depend on the degree of readiness to adopt and implement the principles of civil society. That is the question of mentality in general, and of legal mentality, has access to the problem of preserving the identity of the national legal system. Let's take the example of the customary legal sphere. For example, in our society a custom takes a definite place in the legal regulation of inheritance relations, although in general in the domestic civilian, hereditary, the right sphere of application of the custom is limited. The following pattern is clearly revealed here: the more perfectly all the parameters of legislation (including in terms of impartiality), the lower the role and narrower scope of the custom.

Customs cover the whole system of inheritance relationships, from the commissioning of the inheritance procedure by the testator (that is, it is really before the onset of the inheritance relationship associated with the death of the testator) until the completion of the procedure for obtaining the inheritance and entry into hereditary possession.

The transfer and division of the inheritance is a sphere of national life, in which the customary traditions of generations have survived to the present. First of all it is noticeable, that the material gains of a person or a spouse during his /her lifetime and his/her transfer to the immediate blood relatives - concepts that arose simultaneously and continue to function inseparably. Over time, consciousness

formed the conviction that the inheritance should be transmitted exactly like that, and not otherwise. Prolonged practice became a custom.

The influence of customary legal norms is noticeable in determining the grounds for the removal from the right of inheritance (Article 1224). First of all, they do not have the right to inherit a person who intentionally deprived the life of the testator or any of the possible heirs or made an attempt on their life. There is no right to inherit a person who deliberately prevented the testator from creating or making changes to it. The paragraph 3 of this Article from the national Civil Code has got a vivid customary legal nature and provides no right to inherit by law parents (adoptive parents) and adult children (adopted), as well as other persons who have avoided fulfilling the obligation to retain the deceased (if this circumstance is established by the court).

Initially, the land was considered the main wealth and means for the existence of Ukrainians. Normative acts of the first decade of Ukrainian statehood did not give an answer to the question of who owns the land, and only on October 25, 2001, the Verkhovna Rada of Ukraine adopted a new version of the Land Code, according to which the Article 80 (a) recognized the right of private property of citizens to land. Article 81 of the same code provided for the acquisition of the inheritance as one of the grounds for the acquisition of the right of private property, including land. Article 1225 of the Civil Code of Ukraine "Inheriting the right to land" says that the ownership of a land plot goes to heirs on general grounds, with preservation of its intended purpose. In this norm there is the influence of the custom on the indivisibility of the family farming and the preservation of its effectiveness after divisions/inheritance.

Currently, the legalization of the ownership of the peasants to land plots takes place. Today, as in past times, not only houses, apartments or cars can be transferred to successors but also fertile brooms, as it was in our history from the XI - to the beginning of the twentieth century

The provisions of Article 1226 of the Civil Code concerning the inheritance of a share in the right of joint ownership correspond to the nature of family business within the framework of a traditional Ukrainian household, where the property belongs to family members based on jointly owned joint ownership. In determining the share in the right of joint ownership (as in modern legislation), in the case of the allocation of a share of the property that is in joint ownership, it is considered that the shares of each of the co-owners are equal, unless otherwise established by an agreement between them, a will or a decision the court (Article 370 of the Civil Code). The subject of the right of joint ownership is entitled to bequeath its share in the right of joint ownership to its definition and distinction in kind (Article 1226). The similarity of the custom and the law in the field of inheritance lies in the fact that in both cases the sons were inherited equally. The difference between them consists only in excommunication from inheritance. In customary law, the

only ground for deprivation of inheritance is a distinction in one form or another. In law, separation and deprivation of the inheritance are different things. Separation by itself does not eliminate inheritance; it is only considered. The customary legal equality with respect to the inheritance parts was practiced also with respect to the daughters of the testator, provided that the family had no sons.

It is important to note that Ukrainian customary law, in contrast to Western European or even Eastern laws, gave women a significant right. The main Ukrainian specificity of the patriarchal variant of inheritance was that, in case of the death of the deceased father, his wife became the property manager predominantly. Although women generally did not escape inheritance, their right to inheritance was unclear in the custom. It was either temporary, depended on different conditions, or was liquidated through the provision of dowry, money, etc. A widow in a simple separated family with children had the right to use her husband's property for lifetime. In case of separation, he received an equal share of the children, and in the absence of children it was considered a complete heir of the husband.

The problem of national legal systems' identity is in a dialectical relationship with the formation and existence of local civilizations. In the framework of local civilizations, the formation of different cultural and legal traditions. They in turn lay the foundation for the formation of different types of states with the corresponding legal systems. With regard to the specifics of the local civilizations' rights (that is, the legal traditions themselves), here (with the exception of Western Europe), significant innovations in connection with globalization, according to R.Ivants, did not take place. Much earlier, as a result of modernization affecting one or another measure of all civilizations, the latter were borrowed (and in the colonial countries imposed by force), many elements inherent first legal families that have developed within the Western legal tradition. These include the system of legislation, legal doctrine, justice. However, such essential characteristics as the role of law in society, the relation to the law, had no special changes [8, p. 91-92].

It is obvious that purely mechanical transfer to the level of normative regulation of legal norms and the use of techniques of legal technology, as noted by M.M. Marchenko, is not enough for the most effective implementation in the national law of one country. It is unsuccessful even if there were already successfully functioning legal norms which contained within the national law of another state. There must be a "creative approach, in which one can rely on the fact that institutes that are reintroduced or transferred from other legal systems, norms or principles will not only be formally included in the structure of the new legal system, but also effectively implemented" [9, p.227].

The state of the national legal systems' functioning, their identity, as well as the potential for transformation in recent times also depends on the processes of

migration. As L.V.Andrichenko notes, globalization has exacerbated the problems connected with the migration of the population. International law is influenced by means of international legal instruments for solving migration problems, especially in terms of preventing illegal migration of people [10, p. 7-8].

In the modern world, the problem of migration, which has various reasons (first of all, political, economic, humanitarian, etc) affects different regions of the globe. As a result, the relevant communities (diasporas, communities) are formed, which are based on certain principles and traditions, transposed from the "root" cultural and legal traditions. As the experience of some states shows, this circumstance begins to affect the characterization of the relevant national legal systems. In accordance with the law of dialectics i.e. the transformation of quantity into quality, an increase in the population representing another culture, legal, affect the content and specificity of the functioning of national legal systems.

Using the achievements of the scientific and technological revolution in various spheres within different societies does not mean their automatic entry into another cultural environment. The experience of many states with ancient civilizational roots clearly demonstrates that the development of these societies is based on the combination of integration processes as an element of the globalization era and the preservation of the national societies' identity and legal cultures. Such countries as China, India and some others whose economies are the most promising in the next 20 years have been involved in the process of modernizing their public life for a long time. However, this did not prevent them from abandoning those civilizational foundations that reflect the originality of their social life.

In the scientific literature there is an opinion that globalization processes will lead to universalization, which will result in the formation of a world "global" culture [11]. However, this point of view is not supported by all researchers.

This is extremely important because the universality of legal cultures in the context of globalization is not inevitable. It is supposed that "the emergence and formation of a new hierarchical level of world civilization development can be possible with the optimal correlation of unification processes and the growth of diversity". This is also a characteristic of the legal sphere's development.

Regarding the interaction between national legal systems, which today is characterized by an increase in the level of conflict, its effectiveness can be increased by the refusal of total universalization and the recognition of the need to preserve civilizational and cultural differences. Ignoring the existence of distinctive national legal cultures means contributing to the creation of conflict situations where there are contradictions between different legal cultures i.e. contradictions that can be entirely resolved through constructive dialogue. Moreover, there are objectively prerequisites for such a dialogue.

The only way to optimize intercultural dialogue and interaction in a globalizing environment is to implement it based on a pluralistic paradigm, which involves acknowledging the differences that exist between national legal cultures. The pluralistic paradigm derives from the unconditional recognition of the differences, the versatility and multi-dimensionality of the ways of legal existence and legal thinking, and, consequently, the need for active intercultural dialogue not only in intergovernmental communication, but also at the internal level. The latter is especially relevant for multinational states [12, p.6-8].

The dialogue of legal cultures must be ensured not only in intergovernmental relations, but also within the borders of the states themselves, where representatives of different cultures live. The current state of legal culture is characterized by socio-cultural pluralism, when two or more legal cultures coexist simultaneously in the same state-territorial boundaries, actively interacting with each other.

The problem of socio-cultural pluralism and for the modern Ukrainian society is rather urgent.

One can agree with the opinion of Yu.P. Loboda that events of his own legal history left in the legal tradition of the Ukrainian people and the real legal system of Ukraine as one of the phases of its dialectical formation a much deeper imprint than theoretical concepts in which the experience of Western countries is generalized Europe of the last half century. It is incidentally dominated today in the national scientific literature and is used by their adherents to study the domestic legal history and the legal system. All heterogeneous, dissimilar elements in the system form a unified legal tradition of the Ukrainian people, whose category, unlike the categories of legal culture or legal consciousness, does not reveal the specific character that characterizes each ethnocultural element, but shows the general one that unites the entire diversity of the legal life of the people for many generations into a single grandiose legal system [13].

Consequently, at the present stage of the development of society, the problem of preserving the national legal tradition, national identity faces challenges posed by the era of globalization. For the further development of modern Ukrainian society, the need to preserve national legal traditions should be combined with the problems associated with Ukraine's involvement in European integration processes. This circumstance becomes of particular importance for the effective functioning of the national legal system of Ukraine, which, on the one hand, is based on the legal traditions of the Ukrainian people, on the other hand, takes into account the processes taking place in the modern world.

The process of Ukraine's integration into the European legal space should not turn into an end in itself. This process is of great importance, since it can provide a stable path for the development of Ukrainian society for a long time to come. However, this process is quite complex, its implementation requires taking

into account those cultural traditions of Ukrainian society that form its legal consciousness, legal mentality, legal culture and legal thinking, that is, the real role of law in public life.

The concrete manifestation of the influence of globalization processes on the national legal system manifests itself through computerization in the legal field. It can take place within the framework of law-making, law-enforcement and law-protective activities of states. Computerization in the legal sphere is carried out through the introduction of computer technologies in the legislative, executive and judicial authorities. The creation of nationwide and regional computer systems that contain relevant regulatory material contributes to the implementation of the state's activities and the effective functioning of the national legal system.

The researchers of the transformation problems of the national legal system point to the existence of contradictions in the ideological view of the harmonization of national and international law [14, p.93]. First, there is no unity of views on the terminology used. For example, some authors call the "transformation" directly the process of coordination [15, p.92]. Others believe that transformation is just one way (along with others) to implement the rules of international law within the country [16].

There is also no unity of views on the nature and extent of transformation. Some researches include the concept of transformation of referrals, acts of ratification, publication of a contract, the publication of special laws, administrative orders. Thus, Yu.T. Usenko speaks of transformation as "an objective phenomenon that is expressed in various ways of implementing the international obligations of the state through the publication of its national legal acts" [17, p.16]. Other researchers are singling out along with transformation and referral or pointing to reception and transformation.

Scientists also introduce the concept of "implementation" ("domestic implementation", "national legal implementation", "internal legal implementation" into scientific circles), and also the use of the term "sanctioning" [18, pp. 70-71].

In foreign literature, there is also no unity of thought. However, the concept of "harmonization" and "adaptation" became the most widespread.

It should be noted that in the general theoretical plan, the diversity of thoughts on this problem is a completely natural state for science.

In the legal literature, there are several types or forms of transformation of the norms of international law in the national. Yu.T.Usenko believes that all types of transformation can be divided into two types: general and special. The general transformation consists in the establishment of a general rule by the state in national law, which gives the international legal norms the force of internal state action. Special transformation is to provide the state with the specific rules of international law of the forces of the internal state through their reproduction in

the law in a textual form or in the form of provisions adapted to national law, or by legislative approximation to their application in another way [17, p. 16-17].

Transformation can take place directly, i.e. imply, for example, the application of international law within the national framework. It happens when it follows from the norms enshrined in the constitution or other normative legal acts that prescribe the primacy of the norms of international law over the norms of national law. This form of transformation is called a direct transformation. In particular, Article 9 of the Constitution of Ukraine provides: "International treaties agreed upon by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine" [19].

There is also another form of direct transformation (also called incorporation), according to which some norms of international law are not only recognized by their legal force as part of national legislation but are included in the internal law that is envisaged for certain types of rules of international law. Such practice takes place in such European countries as Austria, Germany and others.

The legal literature also distinguishes indirect transformation, according to which, for the recognition of the norms of international law, it is necessary to publish or adopt a corresponding legal act within the framework of the national legal system. This practice is being implemented, for example, in France and concerns the most important international treaties. Thus, Article 53 of the Constitution of the French Republic provides that "commercial, financial treaties relating to an international organization to a person's position may be ratified or approved only by law and come into force only after ratification or approval" [20].

There is another practice in the national legal system of Spain. Articles 92-94 of the Spanish Constitution stipulate that "an organic law may decide to enter into treaties for participation in international organizations or institutions of supranational organizations to which the respective competence is transferred" [21]. That is, parliamentary approval is required for concluding political, military, financial treaties, as well as treaties, agreements that affect the abolition or adoption of laws.

Thus, if the direct transformation of the norms of international law automatically results in the same changes in the national legal system, then, if an indirect transformation is used to make changes within the national legal system, it is necessary to adopt the corresponding legal act.

As the experience of the functioning of national legal systems shows both direct and indirect transformation of the national legal system is used for the effective transformation of national law under the influence of globalization processes. This process is quite complex and controversial. Transformation can be reflected in the transformation of the most diverse components of the legal system. The degree of these transformations depends on many factors that determine the peculiarities of these components, which are different in nature and

content. If some components are adapted to change, then others are rather conservative and, accordingly, less flexible.

The influence of globalization processes on the national legal system affects, above all, the process of law-making and law-making, which is rather complex phenomena, determined by the relevant social, economic, political, social, ethical, religious, philosophical factors. The legal norms contained in normative legal acts, adopted in conditions of both formal and informative aspects, take into account the specifics of globalization processes.

Law-making and law-creation in the conditions of globalization are transformed, first of all, towards the spread of their social base, i.e. more and more subjects accept not the passive but the most active and direct participation in this process. This process is also transformed by the fact that new problems arise in the legal field, the resolution of which requires a mandatory legal settlement at the national and supranational levels. The problems of ecology, security, information, demography demand a new approach and a new understanding, in which it is necessary to combine all areas of legal regulation. It is equally true that globalization requires a different view of the process of law-making and, accordingly, other principles of regulation of modern social processes. An ethical turn in international relations must take place, which should be based on the ethical principles of human existence in the world: justice, freedom, equality, consensus, pluralism. It is impossible in the legal field to ignore the traditions, the mentality of the peoples and to impose unified legal rules. Any law can function effectively when it is legitimate, that is, an acknowledged people. If the law is not legitimized, it will not have legal force and will be implemented through violence [22, p.13, 14].

It concerns establishing or restoring the equilibrium of the relations of the subjects, which is both in ensuring equal rights and opportunities for their implementation, as well as compensation for losses, social mobility of statuses, organizational and procedural security of activity, the combination of individual, group and general social interest [23, c .52].

When adopting regulations, a number of factors must be taken into account, but globalization requires consideration not only of national factors, but above all of regional and international factors, and therefore the principles and norms of international law must be taken into account when developing national law.

"In the theoretical and practical terms," says M.Marchenko, "there is a restriction of the state monopoly in the field of national law-making and the inclusion of a number of other non-state actors in this process." More and more international organizations and corporations are involved in this sphere. In some spheres of legal regulation, their participation becomes dominant. An example is the sphere of trade relations [24].

For example, taking into account the dynamics of the globalization process the Lisbon Treaty of 2007 significantly extends the scope of the EU's powers to implement policies and activities in such areas as the service of general economic value, space, sports, tourism, energy (except nuclear), civil defense, coordination of administrative cooperation between Member States in the realization of the law of the European Union, coordination of assistance measures to Member States affected by terrorist acts or disasters, humanitarian assistance to third countries [25].

The current legislative policy of the states is formed in accordance with the basic laws of the modern state and law development, which are transformed under the influence of globalization processes. This policy should be based on a flexible basis, since legal expansion increasingly reflects the impact of globalization on national legal policy. And if some states are more prepared for such an expansion, then other states perceive it differently. In particular, EU member states are actively transforming their national legislation in line with EU standards, in particular in regulations, directives and other EU legal acts, within the limits of the general agreements reached on the creation of a united Europe. In order to implement the provisions of the Treaty of Rome on the establishment of the European Economic Community in 1957, the Member States have incorporated into their constitutions provisions on the possibility of limiting their sovereign rights and the transfer of these EU rights (eg, the Constitution of Germany, Italy, Spain).

Several states, through a special position in various fields, in particular in shaping legal policy, are more conservative and, accordingly, the transformation of their national legal systems requires more time and a set of all-round measures aimed at minimizing the negative perception of its consequences.

Globalization processes directly affect not only the process of law-making, but also the process of law enforcement as a specific activity, aimed at implementing the established legal norms. These manifests itself in the improvement of procedural legislation. This influence requires some innovations in the organization of law-enforcement activities of the state. Law enforcement is a dynamic process, and this dynamism becomes even more prominent in the context of globalization. Under these conditions, the institute of administrative justice is being actively introduced to improve the efficiency of law enforcement activity. In particular, due to this, the general government policy aimed at combating corruption can bring the expected results [26].

Under the conditions of globalization strengthening the role of law in public life manifests itself in the spread of spheres of legal regulation. V. Sorokin notes that "under globalization in the economic sphere there is a deregulation of social relations, the role of legal regulation increases significantly" [27, p.65]. This circumstance, first of all, is explained by the fact that both the object and the

subject of legal regulation are not only complicated, but also spread. This spread is explained by the fact that new spheres of public relations are in need of legal regulation as it was already mentioned above. As a result, new legal norms appear, which, in turn, form new legal institutions and legal branches. For example there are the rules of law governing the scope of increasing integration. These norms, combined with the legal community, claim to be relatively independent in the structure of law.

The processes of globalization are gaining momentum and, of course, according to V.M. Konovalov, affect the functioning of the states, their basic institutions, functions and sovereignty [28, p.337-346].

The impact of globalization on state's functions is shown in internal and external functions. The tendency of internal functions of the state's development in the era of globalization is called their internationalization, i.e. the provision of internal functions of the corresponding international aspect [29, p. 101-102].

The processes of globalization affect the functioning of states in the direction of limiting the sovereignty of the national state most significantly. According to Diaz-Melian de Hanish, it is widely circulated today that there is an opinion on the obsolete sovereignty, its incompatibility with the current trends in the development of the international community and the tendency of general and legal integration /

L.S. Mamut believes that global integration has a reverse side. It is a national disintegration, which involves weakening of internal relations, the breakdown of the mechanism of national sovereignty. According to the scholar, the national state factor gradually ceases to be basic for and dominate the nations [30, p.174].

Also, researchers draw attention to such problems of modern legal development as the existence of a tendency to influence the legal systems of the western on "non-western" legal systems without taking into account the peculiarities of these legal systems, ignoring the positive that these systems have [31, p.73]. In this connection, the term "legal expansion" was used [32].

Such tendencies contradict the nature of legal integration. States borrow legal norms, institutions, branches of law from each other, but not the legal system. Norms acquired in the national legal system acquire national specifics over time.

According to English researcher W. Twining, "the most radical forms of discussion on the processes of globalization include such words and expressions as "the end of sovereignty", "the rejection of national statehood", "global government", "the world without borders". Obviously, such conclusions deserve special attention from scientists and lawyers, but their significance is controversial and difficult to interpret. However, the argument that the phenomenon of supranational law deserves greater attention from lawyers and lawyers does not include any specific obligations regarding the occupation of a position related to

these findings. As the relative significance of national states actually decrease, the question is extremely complex, since the answer to it requires a generalization at the micro level [32, p.629].

Analyzing the effects of globalization on a nation state, the American sociologist R. Streyker makes the following conclusions: firstly, globalization leads to an increase in the state's dependence on capital not only of the national but also of the foreign one. Secondly, financial and industrial globalization increases the risk of capital outflow from the country in those cases where business believes that the state's tax system and financial policy do not provide it with high profits. Thirdly, the growing financial integration limits the ability of the national government to develop economic policy. The government must strictly adhere to budget discipline, reduce social spending and public debt in order to convince the international financial markets of their intentions to prevent inflation from rising [33, p.49].

Globalization leads to the formation of fundamentally new approaches to this problem. The essence of the globalization restructuring of international relations and global development M.O. Kosolapov sees in a fact of the new construction of the territorial component. A new virtual "shell" for further development is created. It is not simply new, but fundamentally new. From this perspective, he defines globalization as the process of organization in one system of many "spaces" that have arisen in different times and constitute the sphere of international relations (from the sub-state to the global levels of the modern world order) [34, p.10-11].

Modern understanding of state sovereignty means the sovereignty of participants in international communication [35, p.168]. It is thanks to sovereignty that the national state is recognized as an independent subject of international relations. In addition, such a phenomenon as supranationalism that has emerged in a globalized context reflects a situation where a nation state is compelled to comply with norms established without its consent based on its predetermined powers to international organizations or regional associations. In such cases, the latter, based on their legal personality, take voluntary decisions in the form of mandatory legal regulations, which often have the right of direct action (for example, the EU).

In a globalized world, the transformation of the national legal system leads to significant changes in such an important sphere as the rights and freedoms of an individual and a citizen.

In this area, several major international legal acts aimed at its universalization have been adopted. In the substantive aspect, this tendency, as it was noted by P. M. Rabinovich, is manifested in the fact that today the absolute majority of states recognized the existence of problems of the implementation and protection of inalienable natural rights and freedoms of an individual and a citizen

and the need for a gradual solution of such problems. It is also proved by the fact that they agreed with the consolidation of the minimum necessary list of rights and freedoms in the Universal Declaration of Human Rights; agreed on the creation of international (supranational or interstate) bodies, which they are authorized to monitor and monitor the state of observance of human rights in the respective member states, and to give it control and influence, and also have agreed to implement the recommendations and decisions of these bodies; reached a consensus on the procedure for considering issues related to violations of human rights in different countries and defining measures of international response to such violations "[36, p.3-4].

In the context of globalization, the issue of the implementation guaranteeing and observance of human and citizens' rights and freedoms, at both the national and state level, becomes a decisive factor in the above-mentioned sphere. As a result, the problem of human rights and freedoms has ceased to be only an internal affair of the state, and for the most part it is under the special protection of supranational law.

Under these conditions, the role and significance of the activities of international organizations aimed at the formation of appropriate universal standards in the field of human rights, as well as the establishment of effective mechanisms for their implementation and control, is increasing. Thus, the activities of the United Nations and its special bodies (the Human Rights Council, which has replaced the outdated international institution - the UN Commission on Human Rights) is gaining ever greater significance.

The transformation of this sphere is also since the problem of protecting human rights goes beyond the sovereignty of the national state and the internal competence of the states. However, this does not mean, as A.V. Cholakhyan observes, that the protection of human rights at the national level is pushed to the background. Now, under the conditions of globalization, the role of the state has become much more complicated. In addition to its classic functions in the protection of fundamental rights and freedoms of the individual, law and order, health, education, the state assumes increasing responsibility for ensuring equality, justice, poverty eradication, maintaining a favorable environment and solving other problems.

Under the influence of globalization processes, the very concept and the limits of human rights and freedoms are subjected to serious changes, as relations between the man and the state change. This is since international and regional associations and organizations act as independent parties in such relations. This is most evident in the territory of Europe, as exemplified by the European Union.

It appears that the development of human rights and freedoms will be influenced by the processes of integration of states into the international legal space. This, in turn, will also result in restrictions on state sovereignty and the

spread of the jurisdiction of international and regional organizations. International legal cooperation and legal integration, which are part of globalization, have come to a new level of quality today, moving from economic, financial, trade, industrial globalization, associated with some authors with negative results of this process, to cultural, human rights and legal components that bring many benefits to mankind. If national states are to respond responsibly to all processes of globalization, then they will be able to reduce their negative manifestations and develop positive trends. Of course, this does not exclude the need for the development and introduction of natural and inalienable human rights and the values of civil society within the framework of national law in the social life [37].

In the era of globalization, the process of limiting the sovereign rights of the state will lead to the strengthening of the sovereignty of the individual. State sovereignty can no longer act as a violation of human rights. Many of the principles and norms of international law, which are applied today, prevail over sovereignty of states and national laws. Human rights extend beyond national boundaries, while regulating both the laws of individual states and international law, in connection with which now began to talk about the sovereignty of the individual, that is, the basic rights and freedoms of each individual, protected by national and international standards.

Problems related to human rights are global in nature and can only be solved by joint efforts of States. According to many scholars, the solution of problems of interstate nature is naturally reduced to the idea of "global governance", which is largely like the proposals for the establishment of a world government [38, p.5].

Preserving the identity of national legal systems under the conditions of globalization is updated as never before. The originality of the national legal systems manifests itself in the special components of the legal system, which reflects their identity on the basis of the maintenance of the principles of social cultural regulation inherent in every society, determined by the national legal tradition, value priorities and guidelines in each individual society: national legal consciousness, legal culture, dominant legal thinking, legal mentality. The identity of the national legal system reflects the specificity of the national legal consciousness, legal culture, dominant legal thinking, legal mentality, which are conditioned by the national legal tradition, value benchmarks in each individual society.

In order to minimize the negative effects of globalization and preserve the identity of national legal systems, avoidance and resolution of contradictions and the soft introduction of international and regional law into national law, the process of legal infiltration is of considerable interest, which ensures maximum consideration of the peculiarities of the formation and functioning of the relevant national legal systems. Due to legal infiltration, it is precisely those provisions that are not alien to the relevant national legal systems. Effective use of the mechanism

of legal infiltration will facilitate painless and effective transplantation of legal provisions contained in international legal acts or in national legislation of foreign countries into the national legal system.

The condition for optimizing intercultural dialogue and interaction in a globalized world is recognition based on a pluralistic paradigm of the differences that exist between national legal systems. The pluralistic paradigm comes from the unconditional recognition of differences, the multidimensional ways of legal existence and legal thinking, the need for active intercultural dialogue, not only in intergovernmental communication, but also at the interstate level.

At the present stage of the development of society, the problem of preserving the national legal tradition of Ukraine, its national identity is faced with the requirements of globalization. The further development of the modern legal system of Ukraine is inextricably linked with the preservation of its identity, which is based on national legal traditions, and on the ability to meet the requirements of the present. It concerns the inclusion of Ukraine in European integration processes. The process of Ukraine's integration into the European legal space should not turn into an end in itself. Meanwhile, this process is of great importance, since it can help to ensure a stable path for the development of Ukrainian society.

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Chapter 8

Types of the law-enforcement administrative procedures' regarding the realization of judges independence' guarantees

Law-enforcement administrative procedures' regarding the realization of judges independence' guarantees are quite various, which is conditioned firstly by a significant circle of judges independence' guarantees, and secondly by its content, since many of them, as a rule, involve, several procedures of the realization at once. The abovementioned determines the relevance of the systematization of the administrative procedures as to the realization of the administrative legal guarantees of the judges' independence.

Natural classification is considered simultaneously as a method of scientific knowledge. In this regard, proper classification should provide complete information about the object of knowledge. Taken into consideration the philosophy's established approach to the unity and form of any phenomenon, such a classification should encompass both the internal and external features of the mentioned procedures.

The issue of the systematization of administrative procedures in general, and – within the work of courts and judges, has already been the subject of scientific research. Consequently, conduction of the mentioned systematization involves considering the scientific results of existing scientific research. In this context, first, the scientific researches of V.V. Schepotkina and O.S. Lagoda should be noted, who directly focused attention on this issue. In addition, should be mentioned the latest scientific papers of the following researches, which deal with the classification of administrative procedures directly: N.P. Khrystynchenko, V.Yu.Maschuk, S.G. Brattel.

O.S. Lagoda provides the classification of administrative procedures based on criteria such as the implementation procedure (formal and informal or ordinary and simplified), the type (direction) of the executive and local government, the subject of the initiative, the consequences for the private person, the presence or absence of a dispute in the relations between the administrative body and private person, the procedure for implementation. Taking into consideration the criterion of direction there are external and internal administrative procedures. Internal ones involve the activities of administrative bodies, which are carried out without the involvement of private individuals, namely, it is the relations, which are arisen and are executed within the system of bodies; internal ones foresee the presence of one more party, that is private (natural or legal) person besides the administrative body. Under the criterion of the subject of the initiative, external

administrative procedures are divided into applicational and interventional. The applicational procedure is understood as a proceeding, which begins with the appeals of individuals and legal entities. Interventional procedures are carried out at the initiative of the administrative body. Considering the criterion of consequences for a private person, interventional procedures are divided into «negative» (possessing a legal limitation character) and «positive». According to the criterion of presence or absence of a dispute, there are claim and non-claim administrative procedures. As will be demonstrated below, almost all these criteria have been recognized in legal doctrine. However, nowadays it is controversial only the last criterion - whether there is or there is not a dispute. Some researchers identify incontestability, as one of the features of administrative procedures [4], while other researchers agree with the possibility of distinguishing complaint administrative procedures [5, c. 270]. From our point of view, the disputed nature of the administrative procedure does not contradict its general definition as the modalities of work of the authorized body, which is aimed at the consideration and resolution of individually determined administrative cases.

T.O. Kolomoets, P.S. Lyutikov, O.Yu. Melikhova supplemented the above classification of administrative procedures, adding such a classification criterion as the form of activity of the subjects of public administration. According to this criterion administrative procedures differentiate into a normative act of administration, an individual administrative act, a conclusion of an administrative contract, a commission of an organizational or technical action of the administration. [5, c. 270].

It is also worth attention attempts to systematize existing criteria for the classification of administrative procedures conducted by such researchers as S.G. Bratel, V.Yu. Mashchuk, N.P. Khrystynchenko [6; 7; 8]. S.G. Bratel illustrate the scientific position of Yu.O. Tykhomyrova regarding such a criterion of division as the competence of executive bodies, according to which administrative procedures are divided into: organizational, rulemaking, informational, related to the implementation of organizational and technical actions, administrative and managerial, etc. [6; 9, p. 4]. In addition, there are such classification criteria as widespread, purpose of execution, functional orientation, etc. The researcher also examines separate sectoral classifications of administrative procedures: in the law-enforcement sphere, in particular regarding professional selection and recruitment to the bodies of internal affairs. Particular attention deserves the general conclusion of S.G. Bratel concerning impossibility of existence of single criteria for such classifications, and also concerning the existence of a problem of delimitation of administrative procedures on the fields of operation [6]. Consequently, it may be concluded that there is a significant variety of criteria for the classification of administrative procedures that take into account both the general provisions concerning them and its division according to the particular

sphere of social relations. Conclusion of S.G. Bratel concerning the impossibility of an exhaustive classification of these procedures leaves a relevant scientific research for its conduct in relation to the administrative procedures.

Referring to the already substantiated researchers concerning the classification of administrative procedures in the judicial field, we can specify the work of V.V. Schepotkina, which proved the advisability of the allocation of two types of administrative procedures in the work of courts and judges and called them «basic» - organizational and administrative-jurisdictional. Organizational procedures were considered the following: a) organizational management in the courts; b) staffing the activity of courts (selection of judges and appointment to a position of judge for the first time, dismissal from office in the general order); c) realization of the right of access to public information. As administrative-jurisdictional procedures, the scholar considered: a) procedures for bringing judges to disciplinary responsibility and dismissing a judge from office in special circumstances; b) procedures for bringing to administrative responsibility for the commission of corruption administrative offenses [10, p. 12].

Proposed classification of administrative procedures by V.V. Schepotkina, has a scientific significance and reflects the existence of administrative-legal relations procedural in the field of judicial system. Despite its undeniable scientific validity, it is not indisputable. Thus, the procedures of realization of the right of access to public information, although have consistent character, but it is difficult to distinguish between them the stages, especially taking into account such a basic feature of the stage as the completion of it with a certain legal act, which is considered at the same time as the beginning of another stage. In addition, the allocation of administrative procedures for enforcement activities in relation to the implementation of guarantees of the independence of judges provides for the consideration of their target orientation, and therefore proposed classification of administrative procedures by V.V. Schepotkina in the work of courts and judges can be used as the basis for further scientific analysis. Thus, it is necessary to take into account the existence of such procedures aimed at ensuring the independence of judges as a procedure for the application of measures to ensure the safety of a judge, his/her family members, property, and procedures of organizational management in courts can hardly be attributed to those relating to the implementation of guarantees of independence judges.

Consequently, the existence of critical cautions to the already existing theoretical model of administrative procedures in the work of courts and judges, as well as the consideration of the subject of scientific analysis, leads to further scientific search for administrative procedures of law enforcement activities in relation to the implementation of guarantees of independence of judges and their classification by certain types.

Research of scientific results in this sphere suggests that there is no single scientific position regarding the structural construction of an administrative procedure and its elements. It is generally accepted that the internal construction of another administrative procedure is similar to the concept of administrative proceedings, according to which any proceedings consist of procedural stages, which, in turn, are divided into phases filled with actions [5, p. 264]. This approach is accepted by part of the scientists in relation to the definition of the structure of the administrative procedure [11, p. 28, 29; 12]. At the same time, other scholars identify such elements of the administrative procedure, as the terms, subjects, evidence, the actual actions of the subjects, the legal fixing of these actions, etc. [13, p. 2; 14, p. 10]. Moreover, this group includes works of a higher level of generalization - the theory of law [15; 16, p. 5]. It should be noted that there are instances of application of the second approach in formulating proposals for improving existing legislation at the level of state authorities [17].

In order to select appropriate classification criteria to systematize administrative procedures of enforcement activities in relation to the implementation of the guarantees of the judges' independence, it is efficient to consider in more detail the above-mentioned views of scholars.

In the theory of law, within the framework of the second approach, distinguish the following elements of the legal procedure: the actual actions of their subjects, the legal fixing of these actions [16, p. 5], the subject of the legal procedure, the object of the legal procedure, the outcome of the legal procedure [15].

Also noteworthy are studies on the selection of elements of administrative procedures that arise in certain areas of social relations. V.P. Tymoshchuk in his thesis «Procedure for Adoption of Administrative Acts: Issues of Legal Regulation» (2009) defines the elements of the procedure for the adoption of administrative acts: stages, phases, procedural actions and procedural decisions [14, p. 10]. In his earlier work, «Administrative Procedure and Administrative Services. Foreign experience and proposals for Ukraine» (2003) V.P. Tymoschuk distinguishes the following elements of the administrative procedure: the beginning, settlement, terms, rights of the person, duties of the administrative body, informing and personal reception, invitation, evidence and proving, hearing [13, p. 2, 49].

According to the results of the research, taking into account the features of the administrative procedure, it is easy to discern that the approaches of the second group of scientists (O.S. Sereda, K.V. Nikolina, V.P. Tymoshchuk) determine such elements of the administrative procedure that reflect their features. At the same time, it can be argued that, despite the fundamental difference in the abovementioned scientific approaches, they do not contradict each other from the position of clarifying the essence of the administrative procedure.

The determination of classification criteria regarding the internal specificity of administrative procedures for enforcement activities regarding the implementation of guarantees of the judges' independence requires consideration, except: a) the abovementioned scientific achievements in relation to elements of the legal and, in particular, administrative procedure; and b) the researched features of administrative procedures, also available in scientific research approaches to classification of administrative procedures.

It should be noted that most of the researched administrative procedures are classified according to the criteria defined for administrative procedures in general. However, for certain procedures, the specified criteria can not be fully applied. Thus, according to the criterion of the subject of the initiative, administrative procedures are divided into applicational and interventional. Applicational procedure refers to proceedings that begin with the appeals of individuals and legal entities (O.S. Lagoda) [3, p. 28-29]. The researcher divides the applicational administrative procedures into three main types according to the Law «On Applications of Citizens»: application for administrative services; application with proposals and remarks; application with complaints about actions or omissions of the administrative body [3, p. 29]. From the mentioned classification, as well as from the context of another material in relation to the applicational procedures, it is possible to draw an important conclusion regarding the additional feature of such procedures, namely, that the applicational procedures initiated by the application not only of the person, but of the person concerned, that is, on the realization of the rights of that particular person appealing.

In this context, attention is drawn to the following administrative procedures of law enforcement actions concerning the implementation of safeguards for the independence of judges, as procedures for ensuring: the application of special measures to ensure the safety of a judge, a member of his/her family, property, and the automatic distribution of cases between judges, separate administrative procedures, related to the activity of the bodies of judicial self-government, etc. In accordance with the provisions of Part 1 of the Article 14 of the Law of Ukraine «On State Protection of Court Workers and Law Enforcement Bodies» of 23.12.1993 № 3781-XII (hereinafter - the Law «On State Protection of Court Workers and Law Enforcement Bodies») [18], the decision to take special measures to ensure security in relation to the judge accepts the court chairman.

Consequently, the administrative procedure for the adoption by the department of paramilitary protection of State Judicial Administration of Ukraine of a decision on the application of security measures is unequivocally called the applicant difficult, since, in fact, the grounds for the adoption of such a decision should include not only the relevant appeal of the judge, but also the decision of the court chairman, which is not the issues of his rights and obligations as a person

taken under protection are solved. But it is even more difficult to call such an interventional procedure because it does not start at the initiative of the relevant unit. The procedure for automatic distribution of cases between judges is similar in nature.

It should also be noted that there is a sufficiently wide range of initiative' subjects of the administrative procedures under consideration. Unlike administrative procedures in other spheres of state power, subjects whose rights and responsibilities are not directly resolved by the results of these procedures may initiate separate administrative procedures for enforcement activities concerning the implementation of safeguards for the independence of judges. The above refers to appeals of a meeting of judges with a statement on bringing to a disciplinary charge a lawyer, prosecutor, official of a state authority or a local self-government body for committing acts or omissions that violate the guarantees of independence of the court and the judge, respectively, paragraph 5, part 5 of Article 128 of the Law of Ukraine «On the Judiciary and Status of Judges» dated 02.06.2016 No. 1402-VIII.

Thus, subjects that can initiate administrative procedures for enforcement activities in relation to the implementation of safeguards for the independence of judges can be defined by a sufficiently wide range of subjects of law.

The interest in determining the internal specificity of the investigated administrative procedures is also in a criterion for the nature of an act adopted on the results of a particular administrative procedure. In particular, as was indicated above, the following acts that occur as a result of administrative procedures are distinguished: adoption of a normative act of administration or an individual administrative act, the conclusion of an administrative contract, the commission of an organizational or technical action of the administration [5, p. 270]. From this point of view attention is attracted by decisions of bodies of judicial self-government. In accordance with clause 7 part 2 of Article 129 of the Law of Ukraine «On the Judiciary and Status of Judges», the congress of judges of Ukraine is empowered to deal with proposals on issues of court activity to bodies of state power and bodies of local self-government. In accordance with Part 3 of Article 129 of the Law «On the Judiciary and the Status of Judges», binding decisions of the congress of judges of Ukraine, adopted within its powers for all bodies of judicial self-government and all judges, were established. At the same time, the issue of the legal force of the said decisions for other subjects of law not belonging to the judicial system is not regulated directly.

This can be considered because of the special legal nature of the bodies of judicial self-government, which are formed by judges for, among other things, the expression of their interests as carriers of the judiciary [19, p. 230].

Consequently, taking into account the above, the systematization of administrative law enforcement procedures regarding the implementation of

guarantees of the independence of judges from the point of view of the peculiarities of these procedures should be made on the basis of: 1) the purpose or functional orientation of these procedures; 2) the need to take into account their internal specificity.

Conclusions regarding the purpose (functional orientation) of the administrative procedure for the implementation of administrative and legal guarantees of the independence of judges may be derived from existing doctrinal developments in relation to the purpose of the administrative procedure in general. A general conclusion can be drawn from the definitions of the administrative procedure discussed in section 2.1, according to which such an objective can be generally determined by the consideration and resolution of individual administrative cases [5, p. 269-270; 20; 21; 22, p. 386; 4].

In the legal doctrine has been repeatedly expressed scientific positions regarding the direct definition of the purpose of administrative procedures. The decision on the possibility of applying the mentioned conclusion regarding administrative procedures for the implementation of administrative and legal guarantees of the independence of judges requires the recourse to scientific work on such procedures. A.L. Borko, researching the issues, in particular, the order of dismissal from the post of judge, the mechanism of its employment as one of the key guarantees of independence and immutability of judges, observes that the establishment of objective grounds and a transparent legal procedure for the termination of powers of a judge, its sufficient administrative and legal provision creates conditions for the proper performance by judges of their professional duties. In this case, the absence of influence on the judge through the possibility of his illegitimate release and lawful activity of the plenipotentiary judge is guaranteed [23, p. 21].

Consequently, these mechanisms can be considered an important condition for the realization of the legal status of a judge. Without going into a detailed study on the significance of other legal procedures for the implementation of administrative and legal guarantees of the independence of judges, it becomes obvious that the judge can not properly exercise his/her legal status in the absence of them. Consequently, the above general conclusion regarding the purpose of the administrative procedure is also valid for the researched type of such procedures.

The vast majority of legal guarantees of the independence of judges enshrined in Articles 6, 48 of the Law «On the Judiciary and the Status of Judges» relate precisely to the implementation of the status of a judge, which follows, first of all, from their wording, which presupposes the presence of a person with the appropriate status. However, this conclusion is not valid for all of these guarantees. Thus, in clause 1 of Part 5 of Article 48 of the mentioned Law is concerned, in particular, with the proper procedure for appointment, prosecution,

dismissal and termination of a judge's powers. Systemic interpretation of this norm in conjunction with the norms, in particular, paragraph 4 of the mentioned Law, gives grounds to assert that the mentioned guarantees concern not only the realization of the status of judge but also the acquisition of such status.

Taking into account the above, according to the criterion of functional orientation, administrative procedures for the implementation of administrative and legal guarantees of the independence of judges should be divided into: 1) administrative procedures for obtaining the status of a judge; 2) administrative procedures for the realization of the specified status.

From the standpoint of features and structural construction of the mentioned administrative procedures, it is interesting, first of all, the following criteria for classification: the subject of the initiative (applicational and interventional); the nature of the act adopted on the results of a particular administrative procedure. Regarding the first criterion, the detail of the legal status of the subject of the initiative (private individual, judge (other employee of the court), judicial self-government body, etc.) is essential.

The selection of types of administrative procedures for enforcement activities in relation to the implementation of guarantees of the independence of judges must be carried out considering the attribute of the relative selection of each type. The separation of each type of administrative procedure follows from the recognition of administrative procedures as a set of purposeful, sequential actions that are carried out within each type of administrative procedure.

The analysis of theoretical approaches to the classification of administrative procedures, considering the objective orientation of the classification, suggests that the relative separation of administrative procedures of different types is ensured by a difference in their content, namely:

- the difference - in the direction of implementation;
- differences in the subject of law enforcement activities;
- peculiarities of the subject structure.

The relative separation of administrative procedures is indicated in connection with the fact that the administrative procedures of different types are united by one intended purpose - to guarantee the independence of judges. At the same time, the presence of joint purpose-setting procedures does not exclude features of their content and, accordingly, certain differences in structure.

Among the guarantees of the independence of judges, whose law enforcement activities are carried out in the administrative and procedural form, and which differ in the direction of implementation, the subject, the subject structure, should include:

- procedures for applying the responsibility for appeals to non-enforcement of court decisions, for displaying disrespect for the court or the Constitutional Court of Ukraine;

- procedures for guaranteeing an effective system of safety fuses on the outcome of the trial (including procedures for ensuring that there is no interference with the system of automatic distribution of cases);
- procedures for proper consideration of the case and decision-making in the case;
- procedure for selection of judges, dismissal and termination of authority;
- procedure for appointing judges to administrative positions;
- procedures for bringing judges to justice;
- procedures for organizing the activities of courts;
- procedures for the functioning of judiciary and self-government;
- procedures for the application of measures of legal protection of a judge, members of his family, property.

An indication of the nature of the legal relationship in the area of implementation of the mentioned administrative procedures for the application of guarantees of the independence of judges should be chosen for the allocation of such types:

- negative;
- organizational (positive);
- personnel;
- procedural.

Negative administrative procedures, the application of which involves the effects of a negative (restrictive) nature are: the use of responsibility for appeals to non-enforcement of judgments, for disrespect for the court or judge; bringing judges to justice; application of measures of legal protection of a judge, members of his family, property.

Organizational (positive) are the procedures relating to the organization of the activity of courts and judges: appointment of judges to administrative positions; organizational support for the activity of courts; guaranteeing an effective system of safety precautions for the outcome of the trial; functioning of judicial self-government.

Personnel administrative procedures for the use of guarantees of the independence of judges are called procedures relating to the special procedure for selection of judges, dismissal and termination of authority. Although personnel administrative procedures can be considered at the first sight to organizational ones, the subject of their application is complex, since it concerns various aspects of staffing of the courts, including negative ones (in particular, the dismissal of a judge).

There are also procedural procedures - those relating to the proper consideration of and action by the courts. The above refers to the procedures of administrative courts' consideration of cases of administrative jurisdiction, as well as the consideration of an administrative offense by a judge.

Characteristics of such administrative procedures for the use of guarantees of independence of a judge as appropriate consideration of a case by a judge should be made taking into account the need to separate the procedures for the consideration of cases of administrative jurisdiction and procedures for consideration of a case of an administrative offense by a judge. This approach is conditioned by the recognition of the fundamental difference in the procedural forms of various types of administrative procedural legal relations - the procedural form of justice in administrative jurisdiction cases and the procedural form of consideration of a case of an administrative offense by a judge.

Among the features that distinguish justice from other types of state activities are: a) implementation only in specific ways, established by law; b) implementation with special order (procedure), detailed in the law; c) implementation only by a special body - a court; d) the adoption of a law of justice, which has a binding force [24, p. 11-13]. In the course of consideration by a judge of a case concerning an administrative offense, justice is not carried out and an act of justice is not accepted, as a ruling in an administrative offense has a different legal nature.

The content of proper consideration of a case by judge from the point of view of its application as a guarantee of independence of judges should be disclosed, based on the concept of fair trial as the basis for this guarantee.

In the scientific literature, there are several elements of the right to a fair trial: the right to access to a judicial procedure; the right to a fair hearing within a reasonable time by an independent and impartial tribunal established by law; the right to a public hearing; the right to participate in court proceedings, having equal opportunities with the other party, the right to question witnesses and others [25, p. 126].

Consequently, the requirement to exercise the right to a fair trial in administrative courts is directly related to the independence of the court, and therefore the issue of the administrative procedure of law enforcement activities regarding the implementation of the guarantees of the independence of judges must be disclosed, based on the characteristics of the existing procedures of judicial review of the case of administrative jurisdiction according to the criterion of compliance with the elements of fair trial.

I.E. Marochkin, revealing the essence of the realization of the right to a fair trial, pointed to the comment of experts of the Council of Europe of Parts 1,2, Article 55 of the Constitution of Ukraine, which established that the rights and freedoms of person and citizen are protected by the court. Everyone is guaranteed the right to appeal in court decisions, actions or inactivity of state authorities, local self-government bodies, officials and employees. Thus, the Council of Europe experts noted that this constitutional order is the basis of judicial control over administrative bodies [26, p. 276], and the appropriate judicial control procedures

that are carried out by a court in the consideration of a case of administrative jurisdiction, it is expedient to consider from the standpoint of procedures for the application of guarantees of independence of judges.

B.D. Hudz analyzed the essence of the administrative procedure for judicial control of the legality of administrative activities of executive authorities. The researcher substantiated the notion of the administrative procedure of judicial control, which was defined as «the order of consistently conducted procedural actions of proceedings in matters of administrative jurisdiction (administrative legal proceedings), and the procedural actions of the administrative court, the participants of the judicial administrative process are regulated by administrative procedural rules and constitute in aggregate the judicial administrative process. Consequently, proceedings in administrative jurisdiction (administrative jurisdiction) serve as a substantive filling of the administrative procedure for judicial control of the legality of administrative activities of executive authorities, thus creating conditions for the consistent, purposeful commission of actions by the court, other participants in the judicial administrative process» [27, with. 81-82].

Thus, the administrative procedure of judicial control exercised by administrative courts, when disclosing the essence of the right to a fair trial as a guarantee of the independence of judges, should be noted from the standpoint of the appropriate legal procedure. The application of such a procedure facilitates (creates conditions, ensures) the independence of judges and corresponds to a special place of the court in the system of state authorities.

The next guarantee of the independence of judges, the content of which is disclosed from the standpoint of the administrative procedure of law enforcement activities regarding the implementation of guarantees of the independence of judges, is the proper procedure for conducting cases on administrative violations committed by a judge is allocated. It is expedient to carry out the characteristic of this guarantee based on the peculiarities of this proceeding, in comparison with the procedures of proceedings in cases of administrative offenses committed with the participation of other entities of extrajudicial administrative jurisdiction.

The following features are highlighted by the scientists: 1) the jurisdiction of the court extends to cases of individual administrative offenses which have a high degree of social harm and encroach on social relations in the following spheres: occupational safety and health, provision and protection of property, industry, construction, sphere of use fuel and energy resources, agriculture and violations of veterinary and sanitary rules, transport and road economy and communications, protection of housing rights of citizens, housing and communal services services and amenities, trade, catering, services, finance and entrepreneurship, standardization and certification, public order and public safety, established management procedures; 2) cases of military administrative offenses and offenses related to corruption, as well as offenses committed by persons aged

from sixteen to eighteen years, are considered exclusively in court; 3) certain types of penalties are imposed exclusively by the court: the payment of an item that became the instrument of commission or the direct object of an administrative offense; confiscation of the object which became the instrument of commission or the direct object of an administrative offense; deprivation of the right to occupy certain positions or engage in certain activities; public works; corrective work; socially useful works; administrative arrest [28, p. 166-167].

In the context of guaranteeing the independence of judges, it should be noted that such an administrative procedure for the application of safeguards, which allows the judge to consider the case of an administrative offense promptly, fully, comprehensively, considering the peculiarities of procedural review. The implementation of such an approach determines the priority of the allocation of administrative procedures, the application of which is a condition for ensuring effective staffing of courts, aimed at the formation of a competent, professional judiciary corps.

Thus, the essence of proper consideration of a case by administrative jurisdiction of a judge as one of the guarantees of the independence of judges in the context of the allocation of administrative procedure for the application of law can be disclosed, based on two conceptual approaches: the concept of a fair trial by an administrative court, and also based on the concept of judicial control, which is carried out an administrative court in cases of administrative jurisdiction. The study of the peculiarities of the procedure for conducting administrative violations by a judge as proper, analyzed from the standpoint of guaranteeing the independence of judges, made it possible to indicate the need to prioritize the administrative procedures of personnel provision of the courts. Such an approach is due to the direction of staffing procedures for the formation of a professional body of judges who make decisions, including - in cases of administrative offenses that have a high degree of harmfulness, while adhering to the requirements of due process of legal proceeding.

Among the administrative procedures of law enforcement activities related to the implementation of guarantees of independence of judges are negative and organizational (positive) procedures.

The appropriateness of attributing such procedures as procedures for the use of liability for calls for non-enforcement of judgments, disrespect for a court or a judge; procedures for bringing judges to justice; procedures for the application of measures of legal protection of a judge, his family members, property to negative are based on the existence of negative (right of restrictive) consequences of their application, which determines the features of the relevant procedures.

The Code of Administrative Proceedings of Ukraine (hereinafter – CAP) provides for the application of measures of procedural coercion in order to encourage the persons concerned to comply with the rules established in court, to

faithfully carry out procedural duties, to stop abusing rights and to prevent the creation of unlawful obstacles in the implementation of legal proceedings: 1) prevention; 2) removal from the courtroom; 3) temporary seizure of evidence for trial by a court; 4) record; 5) a fine (Part 1 of Article 144, Part 1 of Article 145 of the CAP of Ukraine). The court shall rule on the application of such measures (part 3 of Article 144 of the CAP of Ukraine).

Article 185-3 of the Code of Ukraine on Administrative Offenses (hereinafter - CAO) provides for administrative liability for disrespect to a court or the Constitutional Court of Ukraine. In this article, CAO establishes administrative responsibility for: 1) disrespect of the court, expressed in a malicious evasion from the appearance in the court of a witness, victim, plaintiff, defendant or in abstention from these persons and other citizens to the order of the presiding judge or in violation of the order during the court session, as well as the commission of any actions that indicate a clear disregard for the court or established in the court rules (part one); 2) malicious evasion of expert, translator from appearance to court (part three); 3) non-fulfillment by the guarantor of the obligations imposed by the court during the proceedings on administrative cases concerning the detention and expulsion of foreigners and stateless persons (part four); 4) disrespect for the Constitutional Court of Ukraine, expressed in a malicious evasion from appearance to a meeting, a plenary meeting of the Senate, the Grand Chamber of the Constitutional Court of Ukraine or in the non-oversight of these and other persons at the order of the chairman or in violation of the order during such meetings (part five).

Negative procedures of the use of liability for the disrespect of a court or a judge, the application of measures of procedural coercion are administrative, as provided by administrative procedural law.

Problematic issues of bringing judges to responsibility require a separate scientific analysis. At the same time, it is advisable to indicate the existing scientific research on this problem: P.Z. Golobutovsky [29], O.V. Goncharenko [30], S.V. Kivalov [31], M.G. Melnik [32; 33], L.M. Moskvych, O.M. Ovcharenko [34], Yu.E. Polyansky [31, p. 257-280] and others. The powerful scientific achievement of researchers of the problem of bringing judges to responsibility is the theoretical basis, based on which further analysis of current problems needs to be made, taking into account the latest legislation, which consolidates the judicial reform. In addition, the legal nature of relations in the field of bringing judges to the following types of legal liability should be indicated: disciplinary, administrative.

The last subtype of negative administrative procedures is the procedure for the application of legal remedies for a judge, his/her family members, and property. In accordance with the Constitution of Ukraine, the Law of Ukraine «On the Judiciary and Status of Judges» dated 02.06.2016 No. 1402-VII, the Law of Ukraine «On State Protection of Court Workers and Law Enforcement Bodies» dated

23.12.1993 No. 3781-XII [18], other legislative acts of Ukraine provides state protection of judges and their family members (Article 140 of the Law of Ukraine «On the Judiciary and Status of Judges»); grounds, indications and procedure for the application of special security measures: a) personal protection, housing and property protection; b) the issuance of weapons, personal protective equipment and alert for danger; c) installation of the phone at the place of residence; d) use of technical means of control and listening of telephone and other negotiations, visual observation; e) temporary placement in places providing security; e) ensuring the confidentiality of data on security objects; g) transfer to another job, referral to study, replacement of documents, change of appearance, resettlement to another place of residence (Article 5 of the Law of Ukraine «On State Protection of Court Workers and Law Enforcement Bodies» of 23.12.1993 № 3781-XII). It is necessary to specify the Law of Ukraine «On State Protection of State Authorities of Ukraine and Officials» dated 04.03.1998 No. 160/98-VR [35]. According to Article 4, 6 of the said Law, the Constitutional Court of Ukraine is determined, inter alia, by the objects of protection; Supreme Court. In addition, according to Article 6, the protection of the President of the Constitutional Court of Ukraine is ensured; The Chairman of the Supreme Court, as well as members of their families who live with them or accompany them for the period of exercise of their authority.

Regulation of relations concerning state protection of courts, judges, members of his family, property is carried out by means of the application of an imperative method of legal influence, which is implemented through the application of coercive measures, including administrative ones. It should be noted that relations regarding the application of state protection measures are characterized by signs of administrative-legal relations: the emergence in the field of power and organizational activities; occurrence in connection with the activities of the public administration body; public-ruling character, etc.

Thus, the research of the negative law enforcement procedures regarding the implementation of the guarantees of independence of judges allows us to indicate the need to allocate three subtypes of procedures, each of which is characterized by particularity in the purpose of the subject of implementation. The common features of negative procedures are: the imperative method of regulating the legal relationship with their implementation, the negative (right restrictive) effects of their application. Legal relations in the field of application of these procedures are inherent in all the signs of administrative-legal relations, in connection with which the corresponding procedures are administrative.

The membership of the organizational procedures for enforcement activities regarding the implementation of the guarantees of the independence of judges in administrative procedures is conditioned, first of all, to the administrative and legal nature of procedural legal relations regarding their application.

Revealing the content of the legal nature of legal relations regarding the application of organizational procedures (appointment of judges to administrative positions, organizational support for the activities of courts, the guarantee of an effective system of protection of the influence of the outcome of the trial, the functioning of judicial governance and self-governance) should lead to the doctrinal position formulated by V.B. Averyanov, who noted that the decisive feature of administrative-legal relations is the nature of their regulation, which manifests itself in a specific purpose and legal consequences. Such a goal is to ensure the public interest, and the rules of administrative law in all cases, the regulation of relations with various actors of the state are the same [36; 37, p. 163].

In this context, the thesis formulated by V.V. Schepotkin regard to determining the purpose of the administrative procedure in the work of courts and judges, it is expedient to ensure the proper organization of the activity of courts, the independence of judges and the quality of administration of justice. Such a goal, according to the researcher, follows from international standards in the field of justice, in particular - from Opinion No. 1 (2001) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on standards for the independence of the judiciary and the immutability of judges. Administrative procedure in the activity of courts and judges V.V. Schepotkin sees as a determinant of establishing administrative-legal relations with the participation of courts and judges in the field of non-procedural activities of the court for the administration of justice on the basis of the principles of the rule of law and law [38, p. 18-32; 39, p. 30-31].

Thus, the administrative and legal nature of relations in the sphere of organizational procedures of law enforcement activity in relation to the implementation of guarantees of the independence of judges is based on: recognition of their public-law nature, focus on ensuring public interests related to the efficient organization of the activity of courts and judges. Unlike other administrative law enforcement procedures for the implementation of the guarantees of independence of judges, organizational procedures are out of court proceedings and are not connected with the proper procedure of consideration by the administrative court of cases of administrative jurisdiction, or proceedings in cases of administrative offenses committed by a judge or enforcement of coercive measures.

Analyzed administrative procedures of law enforcement activities in relation to the implementation of guarantees of independence of judges are allocated on the basis of a «broad» approach to the definition of the essence of such procedures, which provides not only the selection of those who complete the adoption of an individual legal act in relation to the judge, but also related to the provision of security activities.

At the same time, the application of the «narrow» approach to the definition of the administrative procedure of law enforcement activities in relation to the implementation of the guarantees of the independence of judges makes it possible to specify the list of administrative procedures, limiting them only to those that result in the adoption of an individual act regarding a judge as an official. That is why it is advisable to include the following in administrative procedures of law enforcement activity regarding the implementation of guarantees of independence of judges:

- procedure for the appointment, dismissal and termination of a judge's powers;
- procedure for bringing a judge to justice;
- procedure for appointing a judge to an administrative position;
- procedure for the application of measures of legal protection of a judge, members of his/her family, property.

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Chapter 9

Legal relations in public property use: dialog for exercise of public interest

Both public management functions and a present public interest are exercised when using public property. To prevent jurisdictional and non-jurisdictional disputes in public property relations it is necessary for a public administration activity to be based on the legal regime of public interests, covering: 1) normative-legal provision of social processes when using public property; 2) a social mechanism for the formation and exercise of public management (public interest provision through the tools of public administration activity; legal boundaries of public property use).

The legal nature of public property relations is manifested in normative-legal provision of social processes when using such property. We propose to focus on creating conditions for maintaining social dialogue as an institution of public administration and increasing social responsibility. Thus, Ukraine is a social and a law-governed state based on Article 1 of the Constitution ⁷⁰. In legal doctrine there is a dominant idea that a social state exists in the following manifestations: 1) an idea that has gained further development in socio-political concepts; 2) the constitutional principle enshrined at the level of law; 3) real practice of public administration activity in order to solve social problems of society, social groups and individuals⁷¹. That is why the provision of social dialog is determined by the necessity to facilitate socio-economic development of public property relations.

Accordingly, social dialogue is a process that includes all types of negotiation, consultations and information exchange, associated with the implementation of socio-economic policy and is of mutual interest⁷². Accordingly, a social dialogue can and should be implemented in relations of public property use. As a result, preconditions for the proper public property use and the development of society potential are created, considering the public interest and interests of the subjects of relevant socio-economic relations. First of all, it is about establishing a format for a social dialogue between social and economic participant's interests in relations of public property use through:

- Determination of key milestones of socio-economic policy concerning public property use;

⁷⁰ Конституція України : Закон України від 28.06.1996 № 254к/96-ВР : із зм. і доп. станом на 30.09.2016. Офіційний вісник України. 2010. № 72/1. Спеціальний випуск. С. 15. Ст. 2598.

⁷¹ Політологічний словник : навч. посіб. / за ред. М.Ф. Головатого, О.В. Антонюка. Київ: МАУП, 2005. С. 679.

⁷² Глосарій із трудового права та соціально-трудоових відносин (з посиланням на досвід Європейського Союзу). Київ: ВД «Стилос», 2006. С. 373.

- Joint use of public property by the subjects of relevant relations as bodies of social partnership, participation of private law subjects in management of such property for expansion of the social dialogue subject;
- Use of public administration activity tools aimed at maintaining a collective form of interaction on the public property use at the interstate, national, branch, regional and local levels;
- Conducting joint consultations, information interaction and monitoring the implementation of joint agreements with the aim of preventing or resolving disputes, implementing conciliation procedures using mediation, other cooperation models.

According to V. A. Krasnomovets, through effective social partnership, as an integral element of social policy, one can observe the role of social and human capital, the degree of society development, the level of management development⁷³. As a matter of fact, social dialogue in public property relations can maintain a balance between public interest and the interests of public administration, various social groups that use such property. On the basis of Article 3 of the Law of Ukraine “On Social Dialogue in Ukraine” the described social partnership should rely on such principles⁷⁴: lawfulness and the supremacy of law; independence and equal rights of parties; constructive interaction; voluntary acceptance of real obligations; mutual respect and compromise solutions; obligatory consideration of parties’ proposals; the priority of reconciling procedures; openness and transparency; obligatory compliance with the agreements reached; responsibility for fulfilling the obligations taken.

The above-mentioned principles of social dialogue regarding relations on public property use are agreed with European standards. The Lisbon Treaty regulated the EU striving to promote development and maintenance of social dialogue between its participants as independent and competent social partners⁷⁵.

In public property relations, maintaining social dialogue will ensure “flexibility” and balance of models of such property use. Based on research by American consulting companies Walker Information and Council on Foundations, it has been shown that the indicators of main activity are influenced by social factors and financial and economic factors⁷⁶. It is about strategic development of a social dialogue system in order to maintain economic and social balance, balance of interests, as well as steady increase of efficiency of public property use. Not less

⁷³ Красномовець В.А. Перспективи розвитку системи соціального партнерства в Україні. Фінансовий простір. 2013. № 4. С. 191.

⁷⁴ Про соціальний діалог в Україні : Закон України від 23.12.2010 № 2862-VI. Офіційний вісник України. 2011. № 3. Ст. 168.

⁷⁵ Свердлова Ю.О. Нормативно-правове регулювання соціальної політики Європейського Союзу. Науковий вісник ІМВ НАУ. 2013. Вип. 1. 128 с. URL: <http://er.nau.edu.ua:8080/handle/NAU/21217>. (Серія: Економіка, право, політологія, туризм).

⁷⁶ Гончарова І. Соціальна відповідальність як основа конструктивного діалогу суб’єктів соціального партнерства. Вісник ТНЕУ. 2012. № 2. С. 59.

important is the increase of social trust to public administration subjects, using public property, in relation to professionalism enhancement and human resources development.

We propose introducing a bilateral social dialogue format. The partnership relations between public administration and other subjects of public and private law should create the conditions for maintaining social and economic effect, developing the culture of social partnership when using public property, and strengthening social responsibility of social dialogue subjects. The described consequences can be achieved through normative-legal framework, harmonized with current socio-economic realities that influence the choice of methods for evaluation of social investment economic efficiency in relation to public property use, as well as relevant tools of public administration activity, in particular, financial and legal, organizational-economic, personnel and informational-analytical nature. In particular, this will allow: supporting socially responsible behavior of authorized persons; guaranteeing transparency and openness, observing the supremacy of law in public administration activity; creating organizational and economic conditions of relations taking into account the principles of social responsibility with the purpose of activating the social-partnership format of interaction and cooperation in public property use.

It is necessary to establish the basis for real provision of public interest in view of social partnership parameters of the contract at the normative level regarding public property as for social dialogue in public property relations. The above-mentioned principles can be implemented taking into account clear and accessible mechanisms of participation of authorized subjects in relation to public property as social partners. It is required to regulate in detail the principles of social dialogue in relation to public property use both in the framework of laws on social dialogue and property rights, in particular, on public property, and at the level of special norms concerning competence of public administration as well as other subjects of public and private law. It is about making changes on the participation of social partners, maintaining and expanding social dialogue, introducing national quality standards when using public property in the Labor Code (it is advisable to adopt the Labor Code with relevant provisions), the Civil, Land, Customs, Budget and Tax Codes of Ukraine, the Laws of Ukraine “On Social Dialogue in Ukraine”, “On Collective Contracts and Agreements”, “On State Social Standards and State Social Guarantees”, “On Standardization”, “On the Cabinet of Ministers of Ukraine”, “On Central Executive Bodies”, “On the State Property Fund of Ukraine”, “On the Antimonopoly Committee of Ukraine”, “On Local State Administrations”, “On Local Self-Government in Ukraine”, “On Civil Service”, “On Public Associations”, “On Management of State Property Objects”, “On Natural Monopolies”, “On Environmental Protection” and others.

The above mentioned changes should include mechanisms for ensuring and improving the quality of social dialogue, harmonization of national standards for social dialogue in relation to public property with European ones, introduction of a transparent procedure for the interaction of public administration with civil society institutions, natural persons or legal entities regarding joint use of public property, delegation of authority, etc. We consider it reasonable to establish a clear list and competence of social dialogue parties, to give a general meaning and procedure for the formation (conclusion, application and scope) of collective agreements on public property at the national, branch, regional and local levels. Accordingly, it is necessary to formulate standard forms on the structure and content of these agreements at the relevant levels.

Not less important is to develop a model for implementing social responsibility in public property relations. Corresponding changes should be made to the Criminal Code of Ukraine concerning criminal liability; to the Code of Ukraine on Administrative Offences - concerning administrative liability; Customs, Budget and Tax Codes of Ukraine - concerning financial and legal responsibility of authorized subjects in public property relations. As A. M. Kolot explains, this social responsibility is transformed from a purely socio-ethical one into the socio-economic category, showing the level of readiness of the subject to fulfill own obligations at optimal (from the standpoint of society) harmonization of interests of an individual, group and society in general⁷⁷. We should specify that it is essential to formulate criteria for bringing both public administration and authorized private law subjects to social responsibility as for strengthening of sanctions. The fundamental criterion in assessing the state of public interest satisfaction, achievement of planned or optimal economic results should be economic one. It is also necessary to consider moral-ethical and psychological criteria concerning public opinion about the appropriateness of implementation of public property legal regime and consideration of social needs as well as maintenance of public welfare.

It is worth noting that, the essence of relations on public property use is realized though the social mechanism of formation and implementation of public management. Such relations are aimed at exercise of functions of public interest provision through public administration tools (normative acts, administrative acts, administrative agreements, acts-plans and acts-actions) within the limits established by law for public property use. This allows implementing these instruments in a proper way based on tripartism concerning relations between public administration and other subjects of public and private law (legal entities and natural persons, representatives of civil society). In doctrine, this category means the active interaction of three parties (in particular through

⁷⁷ Колот А.М. Соціальний діалог як інститут підвищення соціальної відповідальності. Ринок праці та зайнятість населення. 2013. № 1. С. 23.

representatives) as equal and independent partners in an effort to find solutions to issues of mutual interest⁷⁸. In Europe, a national advisory and consultative tripartite body and several similar bodies are functioning in relevant areas in order to ensure social dialogue. In some cases, a tripartite body has the right to make decisions (Latvia, Lithuania, Poland, Slovakia, Hungary, and Czech Republic)⁷⁹.

Therefore, the role of state for ensuring social dialogue in public property relations includes creation of conditions for interaction of all authorized subjects and exercise of functions on property use, considering geopolitical and socio-economic peculiarities of current state of relations. The public administration subjects are simultaneously both holders of public authority and social partners. In order to maintain a balance of interests under the conditions of tripartism, it is necessary to regulate and implement negotiation procedures and information interaction of social dialogue parties. For example, in order to intensify cooperation with civil society institutions, according to O. Petroe, G. Osov and V. Varenitsa, it is necessary to create the National Committee on Civil Society under the Cabinet of Ministers of Ukraine⁸⁰. We tend to believe that the extension of the National Tripartite Social and Economic Council competence will be sufficient for the practical implementation of necessary public management and technological decisions to maintain proper and effective public property use. It is advisable to distinguish a separate area of activity of this body in relation to public property.

First of all, we suggest developing behavior patterns and activating the local interaction of social partners as for public property. Civil society representatives as well as public organizations concerned can be included in the specified authority as associate members (users, farmers, ecologists, etc.). Instead, one should consider the fact that the membership in such institutions in Europe is a compulsory condition for entrepreneurial activity (experience of Austria, Italy, and Germany)⁸¹. It is necessary to ensure the operational interaction of the National Tripartite Social and Economic Council with national commissions, profile ministries, banking institutions and other public and private law entities as for public property use, too. To do this, it is required to use the tools of public administration activity of joint action, to evaluate the results, to maintain a two-way communication on problems, complications, uncertainties in relations of public property use. The development of electronic interaction mechanisms to accelerate the process of information exchange (in particular, through a single portal) is advantageous.

⁷⁸ Глосарій із трудового права та соціально-трудоових відносин (з посиланням на досвід Європейського Союзу). Київ: ВД «Стилос», 2006. С. 407.

⁷⁹ Крещенко Н. Соціальний діалог з позиції країн ЄС. Віче. 2010. № 18. С. 24.

⁸⁰ Петроє О., Осовий Г., Варениця В. Сучасний стан та пріоритетні напрями державної політики щодо розвитку національної моделі соціального діалогу в Україні. Вісник Національної академії державного управління при Президентові України. 2010. № 3. С. 226.

⁸¹ Там само.

We consider it reasonable to detail administrative and procedural function of the tools of public administration activity in the area of maintaining social dialogue in relations of public property use. The social mechanism of formation and implementation of public management is manifested through interrelated social phenomena mediated by the state as a subject of management: needs - interests - goal - decisions - actions - results⁸².

In our opinion, the described system should rely on guarantees of the supremacy of law, independence and efficiency. Thus, relations on public property operate in an economic plane in accordance with the supremacy of law principle in relation to use of useful properties, fruits, products withdrawn from property or possession of a person⁸³. Public interest determines public property use. Functions of ensuring public interests in public property relations are carried out through the tools of public administration activity (normative acts, administrative acts, administrative agreements, acts-plans and acts-actions). As a result, a public procedure should function for managing and monitoring of exercise of authorized persons' competence as for such property.

Administrative acts and agreements, acts-plans and acts-actions in public property relations will be in line with public interests and the criterion of effectiveness of public property use under the condition of obvious appropriateness of acceptance and usefulness (substantiality, relevance to real circumstances, timeliness of adoption, complexity of action, taking into account authorized officials' qualifications and professionalism)⁸⁴. The listed public administration tools should provide high-quality and well-substantiated public management, considering reasonableness of property use, the importance of relations and usefulness of consequences during public interest exercise.

In other case, the legal attitude of the Supreme Court is that administrative law begins to operate in the context of adoption of illegal management decisions and implementation of actions by the subjects of state power that violate the rights and freedoms of natural persons or legal entities. Under these conditions, the institute of administrative proceedings (administrative justice) helps to ensure and exercise public interests, as well as to restore the violated law order⁸⁵.

As a result, legal limits of public property use are connected with implementation of administrative legal relations aimed at exercising the legal status of their participants, ensuring law order, exercising legal protection to meet

⁸² Калюжний Р.А. Публічний інтерес у адміністративному праві. Pojęcie interesu w naukach prawnych prawie stanowionym i orzecnictwie sadowym polskii Ukrainy. Lublin: Uniwersytet marii curie-sklodowskiej, 2006. С. 89.

⁸³ Гусь А.І., Карабін Т.О., Ленгер Я.І., Менджул М.В., Савчин М.В., Сюсько М.М, Черевко П.П. Правовий режим публічного майна об'єднаних територіальних громад / за заг. ред. Я.В. Лазура. Ужгород: РІК-У, 2018. С. 7–8.

⁸⁴ Калюжний Р.А. Публічний інтерес у адміністративному праві. Pojęcie interesu w naukach prawnych prawie stanowionym i orzecnictwie sadowym polskii Ukrainy. Lublin: Uniwersytet marii curie-sklodowskiej, 2006. С. 90.

⁸⁵ Постанова Верховного Суду у справі № 461/980/16-а від 17.04.2018 р. URL: <http://www.reyestr.court.gov.ua/Review/73500790>.

public or individual interests⁸⁶. It is possible to give as an example relations regarding the collection of funds from the Deposit Guarantee Fund for Natural Persons⁸⁷, because: 1) Law № 4452-VI is special in regulating legal relations and in accordance with this Law the Fund is a state specialized institution that performs functions of public management in the field of guaranteeing deposits for natural persons; 2) in this case the authorized person of the Fund carries out the powers on behalf of the Fund delegated by it to guarantee deposits for natural persons 3) relations on formation of a list of depositors who have the right to reimbursement of funds on their deposits by public law fund and approval of the register of depositors for guaranteed payments have a public-legal nature⁸⁸.

Therefore, we propose establishing the criteria for effectiveness and rational use of public property, taking into account quantitative and qualitative indicators of property use profitability or the amount of revenues to the state or local budgets, satisfaction of public interest in the form of maintaining or improving socio-economic and infrastructural indicators of community development in the Law of Ukraine “On the Management of State Property Objects” in Article 16 on monitoring the performance of public property management functions. This is, firstly, about strategic and tactical achievement of the public administration goal and tasks concerning public property use (positive public-management activity). Secondly, the adoption and execution of provisions of normative acts should be aimed at exercising of public administrative functions through administrative acts and agreements, acts-plans and acts-actions in order to satisfy public interest, to achieve balance of interests of the state and society, various social groups and individual citizens, authorized to use public property.

From the point of view of public interest, such a legitimate goal of public property management functions is related to the necessity to consider interests, in particular, concerning the control over property use in relation to common interests. A legitimate goal from a public interest point may require less than reimbursement of property full market value⁸⁹ (Decision in the case «James and other v. the United Kingdom»). In § 111 of the decision of the European Court of Human Rights in the case of “Beyeler v. Italy”, a legal position was established concerning the limits of interference in the rights based on the legitimate goal and objectives of restrictions for which they were established⁹⁰. It concerns legal

⁸⁶ Калюжний Р.А. Публічний інтерес у адміністративному праві. Pojecie interesu w naukach prawnych prawie stanowionym i orzecnictwie sadowym polskii Ukrainy. Lublin: Uniwersytet marii curie-sklodowskiej, 2006. С. 91.

⁸⁷ Ухвала Верховного Суду у справі № 820/11591/15 від 27.02.2018 р. URL: <http://reyestr.court.gov.ua/Review/72449269>.

⁸⁸ Постанова Верховного Суду у справі № 820/11591/15 від 12.04.2018 р. URL: <http://www.reyestr.court.gov.ua/Review/73500822>.

⁸⁹ Справа «James and Others v. the United Kingdom»: рішення Європейського суду з прав людини від 21.02.1986 р. № 8793/79. URL: <http://hudoc.echr.coe.int/eng?i=001-57507>.

⁹⁰ Справа «Beyeler v. Italy»: рішення Європейського суду з прав людини від 05.01.2000 р. № 33202/96. URL: <http://hudoc.echr.coe.int/eng?i=001-58832>.

qualification of objectives for establishing the limits of public property use in accordance with the law in each case. Actually and legally, participants to the relations of public property use are vested with the freedom of discretion to decide which purpose is legitimate.

That is, the legitimate goal of public property relations determines the necessity for establishment of a state-corporate economy, the main link of which should be a large inter-branch corporation⁹¹. According to E.V. Petrov such development is possible, considering logically connected categories: public law - public interest - public management - public administration - public functions⁹².

The category of “public interest” is a fundamental guideline for establishing the legitimacy of the goal of public property use. For example, in the case of “Former King of Greece and others v. Greece”, the European Court of Human Rights established the following circumstances of the case. The complainants, members of the royal family, stated that the legislative measure deprived them of ownership for certain lands in Greece. The Government claimed that legitimate interests of the state consist in the necessity to protect forests and archaeological sites within these estates. An additional argument was that the disputed legislation was associated with a great public interest in preserving the constitutional status of the country as a republic. The European Court of Human Rights noted that there was no evidence to support the Government argument as for the necessity to protect forests or archaeological sites. On the other hand, because the disputed law was adopted almost 20 years after Greece had become a republic, the state had to regulate a clear set of obstacles for its status⁹³.

As a result, exercising public interest in public property relations, public-service model of the state is introduced, based on organizational-legal coordination methods of public management, defining the objectives of activity and structure of public administration, as well as establishing rights, powers and ensuring the implementation of liability measures⁹⁴. The described process affects the transformation of public property relations in the area of formation and development of the public management mechanism within the limits of actual democratic institutions in the life activity of the state and society.

Public interest in public property relations causes negative and positive obligations of the state. In accordance with § 37 of the decision of the European Court of Human Rights in the case of “Carmel Saliba v. Malta” any interference in the right to peaceful possession of property by a public administration subject

⁹¹ Публічна власність : проблеми теорії і практики: монографія / під заг. ред. В.А. Устименка ; НАН України, Ін-т економіко-правових досліджень. Чернівці: Десна Поліграф, 2014. С. 33.

⁹² Петров Є.В. До питання про зміст категорії «публічна адміністрація». Південноукраїнський правничий часопис. 2012. № 3. С. 6–7.

⁹³ Справа «Former King of Greece and Others v. Greece»: рішення Європейського суду з прав людини від 23.11.2000 р. № 25701/94. URL: <http://hudoc.echr.coe.int/eng?i=001-59051>.

⁹⁴ Лєгеза Ю.О. Завдання та функції публічного управління у сфері використання природних ресурсів. Науковий вісник Міжнародного гуманітарного університету. 2017. Вип. 26. (Серія: Юриспруденція). С. 20.

should be lawful⁹⁵. Thus, any unlawful interference in owner's property rights is unacceptable. From the point of view of social justice, this can be achieved through proper exercise of the legal regime of public property and protection of violated, unrecognized or denied rights, freedoms and legitimate interests.

For example, in the case of "Belvedere Alberghiera v. Italy", the European Court of Human Rights found the unlawfulness of the refusal to return the land due to circumstances of the case. Thus, the complainant's land was expropriated with the aim of road construction. Later, the competent court cancelled the decision on expropriation, declaring it unlawful. However, as soon as the complainant requested a return of the land, the request was rejected. Thus, the national judicial authorities came to the unlawful conclusion that the transfer of ownership to the authority was irreversible⁹⁶.

From the point of view of public interest, it is necessary to create conditions for minimizing possible negative manifestations of public property unlawful use or unlawful inaction of authorized subjects of public administration. Thus, we propose, first of all, personalizing the measures of liability applicable to offenders and to specify sanctions on cases of corporate rights owned by the state in the authorized capital of economic organizations. It is worth noting that the first of the proposals requires strengthening of preventive-criminal dimension of liability. This can be achieved based on combination of coercive force of law provisions with public moral opinion in order to maintain the state of public law order and discipline.

Thus, the observance of public interest in public property relations allows achieving the priority objectives of public management. As O.V. Kuzmenko points out, that the reasons, conditions and result of such activity is manifested in the system of coordination mechanism of control, generalization of resources and effectiveness indicators⁹⁷. In such way, public administration in public property relations has a possibility to satisfy a public interest considering a common interest of society.

We support N.Ya. Borsuk's opinion that public property management is an administrative and procedural activity in exercising the competence of property owner in the public interest by publishing, first of all, acts-plans and administrative acts. It is a decision-making process regarding the acquisition (receiving), exploitation and sale of objects of public ownership, considering market, financial, budget, production, social, economic, environmental, scientific and technical criteria of effectiveness. The use of such criteria relates to normative-legal support

⁹⁵ Справа «Carmel Saliba v. Malta»: рішення Європейського суду з прав людини від 29.11.2016 р. № 24221/13. URL: <http://hudoc.echr.coe.int/eng?i=001-169057>.

⁹⁶ Справа «Belvedere Alberghiera S.r.l. v. Italy»: рішення Європейського суду з прав людини від 30.10.2003 р. № 31524/96. URL: <http://hudoc.echr.coe.int/eng?i=001-58834>.

⁹⁷ Кузьменко О.В. Правова детермінація поняття «публічне адміністрування». Юридичний вісник. Повітряне і космічне право. 2009. № 3. С. 23.

and depends on careful, thoughtful property use. The most important are two factors: normative-legal and human⁹⁸.

A key limiting factor for public management in exercise of the public property legal regime should be a principle of fair balance. Thus, the interests of a person who has suffered as a result of interference with the rights to property must take into account the interests of general public. Intervention can not impose excessive or disproportionate burden on the person⁹⁹. There must be a balance between public and private interests in order to prevent arbitrary interference that is not in compliance with the law. Thus, in the case of “Jahn and others v. Germany”, the European Court of Human Rights explicitly stated that exceptional circumstances, such as the unique context of Germany reunification, could justify the absence of any compensation to private law subjects as a result of interference in their property rights¹⁰⁰.

The proportionality of restrictions for public management in exercise of the public property legal regime is manifested in compliance with the requirements of Article 1 of Protocol № 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰¹.

The case of “Hentrich v. France” can be an example, where the complainant acquired land for which the state authorities subsequently wanted to exercise their preferential right. The state confirmed that the public interest in this case is to prevent tax evasion. The European Court of Human Rights concluded that withdrawal by the state should be predictable (arbitrary or selective). In the given circumstances of the case, the complainant experienced an individual and excessive burden which could be lawful only if he was denied in an effective appeal against the measure taken against him. There was violation of the fair balance that must be achieved between protection of ownership rights and requirements of public interest¹⁰².

Therefore, based on public interest, the lawfulness and effectiveness of relations on public property use depends on the practical necessity to extend the public property legal regime to the relevant property. Rational and well-substantiated use of public property determines positive economic,

⁹⁸ Борсук Н.Я. Організаційно-правове забезпечення управління комунальною власністю в Україні: автореф. дис. ... д-ра. юрид. наук: 12.00.07 / Державний науково-дослідний інститут Міністерства внутрішніх справ України ; Державний вищий навчальний заклад «Київський національний економічний університет імені Вадима Гетьмана», Міністерство освіти і науки України. Київ, 2019. С. 4–5, 7.

⁹⁹ Справа «Valkov and Others v. Bulgaria»: рішення Європейського суду з прав людини від 25.10.2011 р. № 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05, 2041/05. URL: <http://hudoc.echr.coe.int/eng?i=001-107157>.

¹⁰⁰ Справа «Jahn and Others v. Germany»: рішення Європейського суду з прав людини від 30.06.2005 р. № 46720/99, 72203/01, 72552/01. URL: <http://hudoc.echr.coe.int/eng?i=001-69560>.

¹⁰¹ Справа «Scollo v. Italy»: рішення Європейського суду з прав людини від 28.09.1995 р. № 19133/91. URL: <http://hudoc.echr.coe.int/eng?i=001-57936>.

¹⁰² Справа «Hentrich v. France»: рішення Європейського суду з прав людини від 22.09.1994 р. № 13616/88. URL: <http://hudoc.echr.coe.int/eng?i=001-57903>.

environmental, social and other consequences of planning, formation, acquisition of rights, use, change of properties or competence and restoration of capital, including:

- Development of public property market infrastructure convenient for users;
- Reduction of level of budget expenditures for effective public management of public property, as well as labor and material and financial expenditures;
- Attraction of investment and capital investments, which leads to increase of production potential of public property, increase in expected profit;
- Development of the state economy in general and the community, formation of competitive prices for services provided when creating acts-plans, as well as when concluding administrative agreements, implementing of acts-actions;
- Provision of sustainable development, improving social well-being, social and cultural and living conditions, and direct provision of vital functions of each individual territorial community;
- Reduction of the harm level caused to the environment, when using public property;
- Formation of deep substantiated and practically directed scientific and technical and informational support of the process of public property management.

Thus, as a conclusion, one can distinguish the following basic features of the relations on public property use:

- 1) Priority nature, the necessity for constant provision and protection of public interest;
 - 2) Considering the interests of the state and society in satisfying public interest; specialization and competence interrelatedness of all subjects of public management within the scope, on the basis and in the manner established by law;
 - 3) The balance of public management concerning correlation of subordination and coordination of public management of public property; the existence of a single and established management will to regulate vertical and horizontal management processes and behavior of participants to the legal relations; implementation of general and individual influence on public property relations.
- Public social orientation of relations taking into account the legal nature and essence of public property legal regime.

Thus, from the point of public interest in public property relations the state (through its bodies) with the specificity of a holder of coercive power¹⁰³ influences the legal relations which are public themselves. Such relations have the following peculiarities:

- 1) General:
 - Is a type of the legal connection and the result of parties' will;

¹⁰³ Тарановский Ф.В. Энциклопедия права. 3-е изд. Санкт-Петербург: издательство «Лань», 2001. С. 237.

- Specificity of personnel;
- Regulation by legal norms;

2) Institutional:

- Participants are holders of interdependent legal rights and obligation;
- Legal consolidation of subjects' behavior;

- A field of public management activity is clearly defined by legal limits, that is why the subjects have the right to act at their discretion within the scope of powers established (a limited list of powers when the principle of "it is possible only something that is allowed" acts);

3) Right-exercising:

- The norms are adopted and exercised on the principle of "command-execution", as well as by consent: the subject of making binding decisions is not primarily bound by the consent of the party to which they are addressed; public legal relations can occur voluntarily when entering into administrative agreements, delegation of authority;

- A positive obligation is typical, namely, imposing about a public duty to act in the prescribed direction in order to achieve the goal of public management (the obligation may be both general and have the value of a particular provision)¹⁰⁴;

- The protection of state in case of non-execution or improper execution of competence, ensuring the exercise by state coercion possibility¹⁰⁵.

In particular, the social orientation of public property relations allows interpreting the category of power as a necessary means of regulating social processes, which forms a unified, organizational and managerial will, corresponding to the public interest and ensures the creation of social order, democratic foundations of society life¹⁰⁶. This way, the protection of public interest takes place covering the state, general, or cumulative interest of a particular community. Thus, the following takes place: maintaining public order, taking into account the interests of state security in carrying out economic, social, environmental and other activities regarding public property; satisfying the interests of society and the state represented by executive power of Ukraine in exercise of public property legal regimes; legal protection of rights, freedoms and legitimate interests of representatives of civil society, private law subjects using public property, in particular, delegated authority; protection of the management order; exercise of public interests in various domains.

We should agree with R.A. Kaliuzhny, that in order to maintain the balance of interests, it is reasonable to consider the principle of interaction between the

¹⁰⁴ Харитоновна О. Поняття і ознаки публічних правовідносин. Вісник Академії правових наук України. 2002. № 1(28). С. 39–40.

¹⁰⁵ Иоффе О.С. Правоотношение по советскому гражданскому праву. Ленинград: Из-во Ленинградского ун-та, 1949. 144 с., с. 20; Лазур Я.В. Деякі особливості правовідносин у сфері реалізації прав і свобод громадян в публічному управлінні. Часопис Київського університету права. 2010. № 4. С. 130.

¹⁰⁶ Калюжний Р.А. Публічний інтерес у адміністративному праві. Pojecie interesu w naukach prawnych prawie stanowionym i orzecnictwie sadowym polskii Ukrainy. Lublin: Uniwersytet marii curie-sklodowskiej, 2006. С. 88.

responsibility of the state and the individual. Such procedure of exercise of interests is determined by legal norms limiting the scope of mutual non-interference. It determines the degree of person's freedom in the state as well as the powers of public administration to intervene the field of private interests¹⁰⁷. Therefore, through public administration tools, the principles of public-private partnership on public property should be formed, considering principles of the state and society life. Creating clear legal standards for public property use should be aimed at maintenance of social dialogue and welfare, public law order and security. Since participants' authority in public property relations are intrinsically connected with the public administration activities, then the consideration and resolution of disputes, as a rule, take place under administrative procedure (extra-judicial jurisdiction and administrative proceedings rules).

We should clarify that public property relations, in accordance with the practice of the European Court of Human Rights, go beyond the scope of civil rights and obligations in spite of the property effects they create¹⁰⁸ (§ 29 of the decision in the case "Ferrazzini v. Italy"). It is worth noting that in case of disputes in accordance with legal attitude of the Grand Chamber of the Supreme Court, the following can be included in administrative jurisdiction:

- Appeal against the decision of the City council "On granting permission for the issue of technical documentation on land management for the division and unification of land plots", according to which the Department of communal property and land relations of the Executive Committee of the City Council was granted the permission to issue technical documentation on the division of the disputed land plots with the aim of creation of two new landholdings without changing the intended purpose in favor of the territorial community of the city¹⁰⁹;

- Appeal against the orders of the Main Directorate of the State Agency for Land Resources to grant permissions for the development of land management projects as for land allotment for the purpose of transferring agricultural land to lease for farm management as a public legal dispute, since in these legal relations the defendant exercises the authorities to exercise power management functions¹¹⁰;

- Concerning the lawfulness of decisions of the Ministry of Justice of Ukraine issued in the form of orders about cancelling the decisions of the state registrar adopted by the Ministry of Justice of Ukraine as a result of examination of the

¹⁰⁷ Там само. С. 86.

¹⁰⁸ Справа «Феррацціні проти Італії» (Ferrazzini v. Italy): рішення Європейського суду з прав людини. № 44759/98. URL: https://zakon.rada.gov.ua/laws/show/980_167.

¹⁰⁹ Постанова Верховного Суду у складі Великої палати у справі № 539/3192/16-ц від 22 серпня 2018 р. URL: <http://www.reyestr.court.gov.ua/Review/76649361>.

¹¹⁰ Постанова Верховного Суду у складі Великої палати у справі № 536/158/16-ц від 28 листопада 2018 р. URL: <http://www.reyestr.court.gov.ua/Review/78376906>.

procedure for registration, since the dispute arose as a result of the Ministry of Justice exercise of power management functions¹¹¹;

- Concerning the demolition of self-constructed buildings on the claim of the body of the State Architectural and Construction Inspectorate, when the dispute is not connected with the material right, but is a public-law dispute, since it arose with the participation of the subject of authority implementing the power management functions given by law in disputable legal relations concerning the detection of the fact of self-construction and elimination of violations by demolishing self-constructed objects of urban development. Thus, the actions of the state architectural and construction control body are carried out by it as a subject of authority consistently and in a clearly defined manner. Such body is vested with control functions, issues the provision that is binding and may be appealed to the court. Since the actions concerning the issue of provision are public legal ones, then further appeal to the court with a claim for the demolition of a self-constructed object is determined by legal relations of a public legal nature and should be considered under the procedure of administrative proceedings. Appealing to the court with a claim to demolish the object of self-construction and motivating such claim by violations of architectural, urban, fire safety, sanitary or other similar rules and norms, the subject of authority does not act to protect own private rights and interests, but to protect the rights and interests of the community or an uncertain range of persons from possible violations of their rights and in order to prevent possible socially significant unfavorable consequences of violation of the relevant norms and rules¹¹²;

- Concerning actions of the State Architectural and Construction Inspectorate of Ukraine regarding the registration of a disputed declaration on the readiness of the object for exploitation with violation of the legislative norms regulating the activities of the defendant in relation to such actions. The dispute in the case does not concern the person's right of ownership to the property object, since the actions of the Inspectorate as the subject of authority in relation to the issue of a permit document; namely, solely power, managerial decisions and actions of the Inspection are subject to the research in this case. Since disputable legal relations arose in connection with the exercise of control functions by state power body in the field of urban development, this dispute should be considered under the administrative proceedings in order to find out and evaluate the lawfulness of such public authority actions, since the exercise of state control means a binding nature of the decisions taken in accordance with its results for the subordinated subject, which indicates the power management nature, and therefore the public-legal nature of such relations. Moreover, appealing with such

¹¹¹ Постанова Верховного Суду у складі Великої палати у справі № 820/3703/17 від 30 січня 2019 р. URL: <http://www.reyestr.court.gov.ua/Review/79834934>.

¹¹² Постанова Верховного Суду у складі Великої палати у справі № 826/12372/17 від 21 листопада 2018 р. URL: <http://www.reyestr.court.gov.ua/Review/78131268>.

claim, the subject of authority acts in this case in order to protect against possible violations of rights and interests of an indefinite range of persons and to prevent possible socially significant unfavorable consequences of violation of the relevant norms and rules, but not to protect private interests¹¹³;

- Concerning the evaluation of land and land plots in relation to verification of the lawfulness of actions (inaction), decisions of the Derzhgeokadastr and its territorial bodies carrying out public management functions, in particular, during the formation of data on the normative monetary evaluation of a separate land plot, the registration of such data in the form of an extract from technical documentation on normative monetary evaluation of land¹¹⁴;

- Concerning the appeal against a decision of the local self-government body on the establishment and change of the boundaries of settlements, when the district council acted not in its own or someone's private interests, but in order to carry out the prescribed power management functions, since the change of boundaries of settlements in the district does not concern the right of ownership or use of land plots of individual persons. The disputable decision of the local self-government body can not be considered as an executed act of individual action, since since this decision did not arise and could not appear material rights to land plots in natural persons and/or legal entities¹¹⁵;

- Appealing against a decision of a public authority or local self-government body to grant or refuse to grant a permit for the development of a land management project concerning the land plot allocation, provided that there is no valid material right to the disputed land plot. Such cases relate to administrative jurisdiction as arising from a dispute in the public legal relations concerning these relations, when one of its participants - the subject of authority exercises power management functions in this process or, by its results, powerfully affects a natural person or a legal entity and violates their rights, freedoms or interests within the limits of public legal relations. The emergence of disputable legal relations is determined by unlawful actions/decisions of the defendant, which, by virtue of the legislative provisions, belongs to its exclusive competence. Therefore, the lawfulness of such actions/decisions (inaction) of a local self-government body must be verified by an administrative court¹¹⁶.

Conflicts in public property relations to due to their complex nature may be characterized by jurisdictional heterogeneity. In public property relations,

113 Постанова Верховного Суду у складі Великої палати у справі № 826/4089/16 від 22 травня 2018 р. URL: <http://www.reyestr.court.gov.ua/Review/74537193>; Постанова Верховного Суду у складі Великої палати у справі № 815/2439/15 від 4 липня 2018 р. URL: <http://www.reyestr.court.gov.ua/Review/75287021>.

114 Постанова Верховного Суду у складі Великої палати у справі № 823/902/17 від 20 червня 2018 р. URL: <http://www.reyestr.court.gov.ua/Review/75133500>.

115 Постанова Верховного Суду у складі Великої палати у справі № 824/3130/14-а від 7 листопада 2018 р. URL: <http://www.reyestr.court.gov.ua/Review/77804960>.

116 Постанова Верховного Суду у складі Великої палати у справі № 346/2888/16-а від 6 лютого 2019 р. URL: <http://www.reyestr.court.gov.ua/Review/79776454>.

jurisdictional and extrajudicial disputes often arise in connection with the normative uncertainty of the features of these relations and the lack of clear limits to the property use established by law. Administrative courts have the priority jurisdiction in such cases. First of all, it is about disputes in relation to acquisition, transfer, termination of the right of ownership (use) of public property; public management in the field of exercise of the legal regime (establishment of boundaries of administrative-territorial units, distribution and redistribution of natural resources, maintenance of the state land cadastre, monitoring, control over the use, reproduction and protection of natural objects, etc.); legal provision of public property protection (from unfavorable natural and technological processes, in land conservation, etc.); allocation of budget funds to restore the deteriorated state of natural resources as public property; bringing to legal liability for violation of legislation, etc.

The legal attitude of the European Court of Human Rights regarding the definition of jurisdictional limits is based, first, on territorial and substantive criteria. According to the territorial criterion in the case of “Yonghong v. Portugal”, the possibility of extending jurisdiction on the territory under state responsibility in external relations was established¹¹⁷.

In the case of “Ilaşcu and others v. Moldova and Russia” the European Court of Human Rights has further specified the approach mentioned in a way that jurisdiction may arise in connection with the actions of authorities, has the consequences beyond the national territory. The obligations to ensure the rights and freedoms is based on the fact of control over the territory, regardless of forms of exercise: directly, using the armed forces or through a subordinate local administration¹¹⁸.

At the same time, territorial connection is not possible without considering the boundaries of the principles of *ratione personae*, *materiae* et *loci*, the field of action of normative acts. For example, in the case of “Affaire Parti Communiste Unifié de Turquie et autres c. Turquie” it is stated that the legal norm sets the limits of *ratione personae*, *materiae* et *loci*, without establishing any distinction between a type of norm or specific measures. States are responsible for observing the Convention for the Protection of Human Rights and Fundamental Freedoms within the “jurisdiction” in general, which is often carried out, first of all, through the Constitution (§ 29). In § 30 of the same decision of the European Court of Human Rights it is specified that it is not so important in this relation what is subject to application: constitutional norms or law norms¹¹⁹.

¹¹⁷ Справа «Yonghong v. Portugal»: рішення Європейського суду з прав людини від 25.11.1999 р. URL: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5646#{"itemid":\["001-5646"\]}.1-61886](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5646#{)”}.

¹¹⁸ Справа «Ilaşcu and others v. Moldova and Russia»: рішення Європейського суду з прав людини від 08.07.2004 р. URL: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886#{"itemid":\["001-61886"\]}.1-61886](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886#{)”}.

¹¹⁹ Справа «Affaire Parti Communiste Unifié de Turquie et autres c. Turquie»: рішення Європейського суду з прав людини від 30.01.1998 р. URL: [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-62691#{"itemid":\["001-62691"\]}.1-62691](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-62691#{)”}.

The unity of legal attitudes regarding the reference of public legal disputes concerning public property to administrative jurisdiction can be provided by considering the methodology of judicial hermeneutics. So, first of all, there should be a combination of historical, philosophical and actually legal philological dimensions of the judicial practice study. Later, according to the results of judicial hermeneutic interpretation the unity of legal attitudes of the judicial authorities of administrative jurisdiction should be ensured. An example of jurisdictional institutionalization of disputes concerning the public property use can be the provisions of the Constitutional Court of Ukraine on 01.04.2010 № 10-rp/2010¹²⁰, the Resolutions of the Plenum of the Highest Administrative Court of Ukraine “On Certain Issues of the Jurisdiction of Administrative Courts”¹²¹.

The practice of general courts of civil jurisdiction remains quite controversial. In particular, in clause 7 of the resolution of the Plenum of the Highest Specialized Court of Ukraine on consideration of civil and criminal cases “On certain issues of jurisdiction of general courts and determination of the jurisdiction of civil cases”, the legal and subjective criteria for consideration of these disputes under civil legal proceedings are indicated. A limiting criterion is determined for claims for: 1) recognition of decisions of the public administration bodies on the issuance of a permit for the production (development) of a land management project concerning the allocation of a land plot, its provision or transfer into ownership or use as invalid or non-solution of these issues; 2) the termination of the right of ownership or use of land, except for disputes provided by part one of Article 16 of the Law of Ukraine “On alienation of land plots, other objects of immovable property placed on them, which are in private ownership, for public needs or for reasons of social necessity”; 3) civil liability for violation of land legislation; 4) the return of unauthorized occupied land plots¹²².

In order to identify the administrative jurisdictional component of the hermeneutical judicial interpretation in considering and resolving disputes in the field of the public property use, it is also reasonable to refer to the criterion of public interest. Based on the presence or absence of the latter, it is possible to distinguish, the jurisdiction of the courts concerned in an appropriate manner. Speaking about the above attitude, we will support the doctrinal approach in which the publicity involves carrying out various activities to achieve social goals.

¹²⁰ Рішення Конституційного Суду України у справі за конституційним поданням Вищого адміністративного суду України щодо офіційного тлумачення положень частини першої статті 143 Конституції України, пунктів «а», «б», «в», «г» статті 12 Земельного кодексу України, пункту 1 частини першої статті 17 Кодексу адміністративного судочинства України: рішення від 01.04.2010 № 10-рп/2010. URL: <http://zakon1.rada.gov.ua/laws/show/v010p710-10> (дата звернення: 16.05.2019).

¹²¹ Про окремі питання юрисдикції адміністративних судів: Постанова Пленуму Вищого адміністративного суду України від 20.05.2013 № 8. URL: <http://zakon1.rada.gov.ua/laws/show/v0008760-13>.

¹²² Про деякі питання юрисдикції загальних судів та визначення підсудності цивільних справ: Постанова Пленуму Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ від 01.03.2013 № 3. URL: <http://zakon4.rada.gov.ua/laws/show/v0003740-13/print1378843214057257>.

The subject (the holder) is the social community as an organic whole, where the interests of the whole society (public interests) have the greatest degree of commonality. The basic needs of people are considered, and it is mainly determined by the necessity for social development. The connecting point is available external vital needs of society as a whole¹²³.

The scope of the public interest concept was different at different historical stages. In pre-classical sciences, the public was interpreted as a general interest that was wider than a private, associated with a particular person (Ancient Rome). During the modern period, a public interest existed in public law or in the system of law as a whole (R. Ihering, K. Nevolin). At present, public law is aimed at regulating relations that arise between the state and individual persons concerning the exercise of powers by public administration subjects¹²⁴. Therefore, in the modern period in the post-Soviet countries, public interest, first of all, was equated with the state, but it also covered the common interests of people as interests of various types of societies, associations (in particular, territorial), the interests of collective self-organization and self-regulation and self-government¹²⁵.

Public interest as a criterion for referencing the disputes in the exercise of the legal regime of public property to judicial administrative jurisdiction appears as a motivational position and an objective willful attitude of a person, group of individuals, society as a whole to phenomena and objects of the surrounding reality in such a way as to make possible the real use of the subject. This relation of social subjects involved in various public relations and interacting with other persons does not depend on the will of the subject(s), the source of which are real social needs and ways of their satisfaction¹²⁶.

The field of action refers to the material (economic), political and spiritual dimensions of public interest. Material interests are related to the production, distribution and use of material benefits. Political ones are related to the exercise of power, and spiritual - related to spiritual values, products of spiritual art¹²⁷. Public interest in public-social and territorial dimensions in relation to the exercise of the legal regime of public property primarily concerns political and material interests.

Thus, it can be stated that a clear delineation of the boundaries of administrative jurisdiction of public property relations allows carrying out public management in a proper way. In case of administrative jurisdiction, appropriate public administration tools and means of implementing a social dialogue are applied. In case of committing offences, non-execution or improper execution of the public administration powers, the unlawful use of public property by other

¹²³ Перепелиця М. Публічний інтерес як мета діяльності суб'єктів фінансового права. Вісник Академії правових наук України. 2009. № 2. С. 114.

¹²⁴ Банчук О.А. Публічне і приватне право: історія українських вчень і сучасність. Київ: Конус-Ю, 2008. С. 74.

¹²⁵ Тихомиров Ю.А. Публичное право: учеб. Москва: БЕК, 1995. С. 32.

¹²⁶ Задирака Н.Ю., Барікова А.А. Механізм розмежування підвідомчості земельних спорів між господарськими та адміністративними судами. Адміністративне право і процес. 2014. № 1(7). С. 152.

¹²⁷ Кряжнов А.В. Публичный интерес: понятие, виды и защита. Государство и право. 1999. № 10. С. 96.

subjects of public and private law, the relevant model of administrative justice should be applied. In view of the world globalization trends, such model should allow solving at least the overwhelming majority of public legal disputes as quickly and efficiently as possible.

It is reasonable to introduce a compulsory administrative procedure for appealing against decisions, actions and inaction of public administration subjects regarding public property in relation to compensation for damage. This will allow restoring the legal status of subjects of public property efficiently, considering public interest and the necessity to maintain social welfare. It is also possible to provide the administrative justice bodies in Ukraine with the competence to consult the Cabinet of Ministers of Ukraine and other central executive bodies on the adoption of management decisions regarding public property.

Chapter 10

Subject of the civil procedural law in the modern paradigm of law

One of the central concepts in the doctrine of civil procedural law is the concept of «litigant», the content of which has changed in accordance with the social and cultural conditions of a historical period of society's development.

The modern axiological paradigm of the legal thinking involves mainstreaming of the introduction of normative and value orientations in the development of the national legal system - provisions on the rule of law, the establishment and safeguarding of human rights and freedoms, which determines the need of the content' renewal of the key categories of civil procedural law.

The specific nature of the civil procedural law as a science, the field of law and the field of legislation has always been a significant influence of positivist approaches to the doctrine and practice of law-making and law enforcement. The participant in the trial is perceived primarily as a participant in civil procedural legal relationships. However, such an approach methodologically restricts the legal understanding of the participant in the judicial civil process as a possessor of procedural rights and obligations. In this case, there is a need to consider the legitimate interest of the participant, his ability to actively exercise his position in the administration of justice in civil jurisdiction cases. Such an approach also insufficiently takes into account the prevailing in modern legal science the idea of the universality of the rule of law, the rule of human rights, in particular, as a participant in the civil process; does not allow to form an adequate theoretical basis for ensuring the improvement of civil procedural legislation in accordance with the requirements of the present.

As a result of the aforementioned, a number of the complex problems of legal regulation of procedural forms arose. In particular, there is a lack of a unified perception of the principles of procedural legal relations, which led to gaps in the determining the procedural status of participants in individual proceedings and procedures, the lack of an established position regarding the characteristics of the representative as an independent procedural figure and the level of his/her independence, and other urgent issues.

The case-law of the European Court on Human Rights is an evidence of the urgency of the development of human rights guarantees in the judicial process, in particular the right for a proceeding within a reasonable time. This conclusion follows from the recent adoption of numerous decisions against Ukraine, in which the European Court on Human Rights stresses the inadmissibility of violations of

these and other rights related to the administration of justice. Among these decisions, particular attention should be paid to the following: «The Case of Dyachenko and others v. Ukraine» [1], «The Case of Viktor Nazarenko v. Ukraine» [2], «The Case of Kovalenko and others v. Ukraine» [3], «The Case of Zelentsov and others v. Ukraine» [4], etc.

Thus, it is a relevant problem of the allocation of a legal phenomenon, the content of which reflects the objectification of a direct connection between its legal nature and moral and social values. In the civil process, such a phenomenon is a subject of civil procedural law, which is considered from the standpoint of the generalization of the legal properties of an abstract legal education in recognition of the ascending principle of its functioning, socio-humanitarian value orientations.

Problems of the civil status of a person in a civil trial were examined by scientists at all stages of the historical development of civil procedural law: during the Russian Empire, the Soviet era, modern Ukraine.

Among the first researchers should mention: E.V. Vaskovskii [5], T.M.Yablochkova [6], A.H. Holmsten [7], E.O. Nefedyev [8] and others. Significant contributions to the perception of the categories of «civil procedural legal relationships» in general and «participant in civil procedural legal relationships» in particular, as well as related categories, are the researches of such scholars of the Soviet era as S. N. Abramov, T. E. Abov, V. M. Argunov, O. T. Bonner, D. P. Watman, A. P. Vershinin, M. A. Vikut, R. E. Gukasyan, M. A. Gurvich, A. A. Dobrovolsky, V.A.Elizarov, P. F. Elysainkin, I. M. Zaitsev, O. P. Kleinman, A. F. Kozlov, L.F.Lisnitskaya, V. K. Puchinsky, M. K. Treushnikov, D. M. Chechot, K. S. Judelson. Among the contemporary scientific developments regarding the participants in the civil process, it is worthwhile to highlight the work of such researchers as S.S.Bychkova, Yu. V. Belousov, O. V. Bobrovnik, O. V. Hetmantsev, D. G. Glushkov, K. V. Gusarov, I.O. Zhurba, V.V. Zaborovsky, D.V. Ivanchulynets, T.O. Dunass, O.V.Kolisnik, V.V. Komarov, G.Z. Lazko, J. Ya. Melnyk, I M. Lukin, I. A. Pavlunyk, G.O.Svetlichna, D. M. Sibilov, I. Yu. Tatulich, A. A. Timoshenko, A. I. Ugrinovskaya, S. A. Chvankin, N. O. Chuchkova, MM Yasinok, N. G. Yatsenko, M. I. Stefan and others. The issue of the participation of a person in a civil judicial process inevitably touches on other institutions of civil procedural law. In this aspect, reference should be made to the works of N. L. Bondarenko-Zelinskaya, A. V. Hetmantseva, D. D. Luzpenkik, V. V. Komarova, V. A. Kreutor, P. I. Radchenko, J. M. Romanyuk, N. Y. Sakari, V. I. Tertishnikov, G. P. Timchenko, O. S. Tkachuk, I. V. Udaltsova, S.Ya.Fursi, T. A. Tsvina, M. I. Shtefan, M. M. Yasyuka. The multidimensional nature of the subject of scientific analysis has led to an address to the achievements of scientists in the field of civil law: S. M. Berveno, I. V. Venediktova, J. V. Zavalna, A.O.Kot, E. O. Michurin, Z. V. Romovskaya, S.O. Slipchenko, I.V. Top-Fateyev, M.O.Stefanchuk, R.O. Stefanchuk, E.O. Kharitonov, V. L. Yarotsky, as well as scientific researches in other branch legal sciences. The categories of persons in

law, the legal status of a person, human rights, and the rule of law have received widespread attention in the works of well-known domestic and foreign scientists in the field of the theory of law and philosophy of law, such as S.S. Alekseev, S.I. Arkhipov, M.V. Vitruk, S.P. Holovaty, M. M. Marchenko, P. M. Rabinovich, S.O. Komarov, A.V. Petryshyn, M.V. Tsvik and others.

Questions of the civil procedural status were given considerable attention in the work of researchers from abroad countries (T. E. Abov, G. O. Abolonin, O.B. Abrosimov, D. Kh. Valeev, G. T. Yermoshin, G. L. Osokin, I. L. Petrukhin, N.O. Chechina, D. M. Chechot, T. V. Sakhnov, M. S. Shakarian, V. V. Yarkov), as well as leading European civilization theoreticians (J. A. Jolovich, M. Kappelletti, M. Storm, M. Taruffo, A. Zukerman, J. Hazard).

The relevance of the issue of a subject of civil procedural law leads to the necessities of:

1) determination of the proper category, which designates and characterizes the phenomenon of the participant in the judicial process in the civil procedural law; the formation of the theoretical positions concerning it taking into account the current state and trends of the development of this branch of law, the modern paradigm of legal thinking;

2) characteristics of the modern role of the natural-legal approach in the legal regulation of the legal status of the subject, the justification of the defining nature of this approach to reflect on human rights as a source of formation of the field of civil procedural law;

3) determining the prospects for the development of the institution of the subject of civil procedural law.

Based on the established in the doctrine of civil procedural law approaches to the disclosure of the content of the category «participant in civil procedural legal relationship», other related categories it can be argued that there is a need to formulate a broad covering content of the category «subject of civil procedural law, clarification its essence and characteristics of its contents.

1. Characteristic of the genesis of the conceptual foundations of the civil procedural status of the subject of civil procedural law and their development in the context of the modern paradigm of law.

The relationship between the social content and the legal form of the morphological construction of the legal structure of the category «subject of civil procedural law» is manifested through its humanist-oriented elements, which are leaked from the concept of human-centeredness and manifest themselves in the characteristic features of the dynamics of procedural phenomena. The natural legal principles of the categories «subject of law» and «subject of civil procedural law», their comparison on a qualitatively new methodological level, taking into account the specifics of the field of civil procedural law, indicate the interrelation

of these categories, their interdependence and relations in the broad sense of both general and special. Static provisions on the right to a fair trial (access to a court, independent and impartial court, established by law) raise the issue of the development of guarantees for the participation of a person in the consideration of his/her case, as well as guarantees of judicial activity. Therefore, a person should be considered not only as a participant in the procedural legal relationship, but in a broader sense - as a source (subject) for improving the field of civil procedural law. Comprehensive implementation of the principles of the rule of law and the principle of legitimacy in the current legislation forms the basis for establishing and effectively improving the human rights guarantees in civil legal proceedings. In this case, the clarification of the essence, content, elements of the rule of law in civil justice must be carried out based on a substantive approach to its understanding with the definition of the priority of human rights its substantive element. The modern paradigm of legal understanding of the subject of civil procedural law is based on the concept of human-centeredness, which follows from the necessity of penetration of natural-legal approaches into the national doctrine of civil procedural law. The specified due to the perception of the subject of civil procedural law as a multidimensional phenomenon, which in the end emphasizes the socio-legal value of the subject as the starting point of civil procedural legal relationships. The use of the doctrinal provisions of the theory of law regarding the levels of influence of law allows us to indicate that the content of the category «subject of civil procedural law» is wider than the category «participant in the civil process». The category «subject of civil procedural law» provides for consideration of a person, in particular, as a potential participant in civil procedural legal relations, which in turn leads to the allocation of a separate category of guarantees of the participation of a person in a civil trial.

Identifying attribute (the possibility of distinguishing a subject from among other subjects); legal will (the ability to make legal decisions and implement them); a set of legal relations and legal relations with other persons in connection with the administration of justice; legal consciousness (the presence of certain legal feelings, emotions and their integral nature in the subject of civil procedural law); the active character of «creation» and the application of law (as a rule, the active behavior of a person in the process, as well as the definition of it as the subject of formation of the field of civil procedural law); socio-legal value (the meaning of person as a starting point for the emergence of legal values); personality is the properties (aspects) of the subject of civil procedural law as a legal phenomenon. List of attributes (aspects) is open. The presence of the selected and other attributes (aspects) of the subject of civil procedural law allows to indicate the multidimensional nature of the relevant legal phenomenon. Characteristics of the civil procedural status of the subject of civil procedural law, the definition of its structure, disclosure of the peculiarities of the civil procedural legal status of

individual participants in the judicial process as subjects of civil procedural law provides for the consideration of their functions performed in court proceedings. Discussion issues of the modern doctrine of civil procedural law are: the independent character of the procedural representative as a participant in the judicial process; the peculiarities of the legal status of the participant in the litigation in non-invasive proceedings and procedures; delimitation of the procedural status of some participants in the trial; the realization of natural-legal scientific approaches as the basis for further improvement of the procedural status of the subject of civil procedural law in general.

The case-law of the European Court on Human Rights is one of the sources of penetration of the natural-law approaches in the national doctrine of civil procedural law. It traces the provision of regulatory value to the ideals of legal regulation, which are conditioned by its existential sources. One of such ideals is the requirements of legal predictability. Legislative perception of the practice of the European Court on Human Rights testifies to the recognition of the need for them to expand the natural law approaches in law enforcement and law-making. Thus, the practice of the European Court on Human Rights affects the implementation of the principles of natural-legal regulation in the field of civil procedural law and asserts the person as a source of ways to improve the guarantees of the participation of a person in civil proceedings.

The broad nature of the category «subject of civil procedural law» makes it impossible to apply the established doctrinal approach to the characterization of its civil procedural status, which provides for the allocation of elements of such status only of rights and duties (powers). Therefore, it is necessary to consider a different approach, in which the following should be distinguished: civil procedural norms; civil procedural legal personality; procedural rights and obligations (powers); the principles of civil procedural law. At the same time, the provisions on the forms of protection of rights, freedoms, legitimate interests as the object of regulation of civil procedural law determine the pronounced purposeful nature of the legal personality of all subjects of civil procedural law. Provisions on the legal status of a person in a civil proceeding directly affect the definition of guarantees of its implementation. The rule of law directly reflects the position of the subject in the legal system in the part covered and determined by it. Consideration of the subject of civil procedural law as a system-creating for the field of civil procedural law phenomenon and the relevant legal category, which it designates, provides for the allocation of conditions and guarantees for the realization of the right to a fair trial. That is why it is allocated to the procedural aspect of the subject of civil procedural law. In this case, civil procedural legal personality characterizes the possibility of the subject to acquire civil procedural rights and obligations in civil procedural legal relations, to take actions aimed at the emergence of these rights and obligations.

In the principles of civil procedural law, the natural-legal component of the content of the legal status of the subject of civil procedural law finds its expression. Similarly, the norms of civil procedural law can not provide elements of the procedural status of the subject of civil procedural law without principles, considering their mutual molding effect. Therefore, the principles of civil procedural law must be defined as an element of the civil procedural status of the subject of civil procedural law. Legal liability, however, should not be attributed to the elements of the procedural status of the subject of civil procedural law. It should be considered as a guarantee of the implementation of the specified status. Within the framework of civil procedural legal relations, legal liability is limited to its positive aspect as the duty of a person to exercise his procedural rights in good faith and to perform procedural duties. Such liability should be regarded as civil procedural.

Among the conceptual foundations of the civil procedural status of the subject of civil procedural law it is advisable to allocate civil procedural legal interest, the realization of which takes place within the framework of the implementation of the corresponding subjective rights. This approach deprives the category of «legitimate interest» of independent significance as an element of procedural status. Legitimate civil procedural interest is partially covered by the category «subjective civil procedural law» and can not be implemented outside the civil procedural legal relationship. Therefore, the category «legal procedural interest» is determined by the direction and the limits of the implementation of the procedural status of the subject of civil procedural law.

The structure of the subject of civil procedural law can be applied during the characterization of the physical, legal entity, as well as the state as such entities. The structure in question includes the common features of all these types of subjects of law. The key value of the individual (person) as the subject of civil procedural law is that the person acts as the spokesperson not only of his own will, but also of the will of the legal person, the state (represented by authorized officials). Under such conditions, the application of natural-legal approaches to the settlement of the status of subjects of civil procedural law is actualized. At the same time, characterizing the subjects of civil procedural law, the principle of the rule of human rights is of key importance.

In legal literature in the structure of the system of law distinguish sectors, sub-sectors, institutes, norms of law. Classical fractures of the institute of law are the following: a specific, defined object of legal regulation, or a specific task of the existence of a particular legal institution; autonomous character of one institute of law with respect to other institutions; specific means of influencing the object of legal regulation; the ability to form their own terminology within a particular institution.

It is advisable to point out that the legal regulation of subjects of civil procedural law meets all the above-mentioned features. Thus, the specific general task of the norms regulating the issues of these subjects can be determined by establishing their procedural status. The principles of determining the procedural status (for example, its structure, the composition of rights and responsibilities, the provisions on civil procedural legal personality, etc.) to a large extent do not depend on changes in such institutions, such as judicial decisions, civil jurisdiction, evidence and evidence, etc. You can also specify the use of specific means of influencing the object of legal regulation by establishing these rights and responsibilities, determining the list of participants in the case, etc.

The introduction of large-scale changes to the Civil Procedural Code of Ukraine dated March 18, 2004, No. 1618-IV (hereinafter referred to as the CPC of Ukraine) [9] clearly demonstrated the possibility of using within its legal terminology the subjects of civil procedural law that does not significantly affect the development of other institutes of civil procedural law.

All the above mentioned suggests the possibility of identifying a subject of civil procedural law as a separate institution of this branch of law.

II. Court as a subject of civil procedural law

Unlike other participants in the litigation, the court is the bearer of the judiciary; a subject submitted to the requirements for a high professional level. The ascending nature of the legal status of a judge in relation to civil procedural law is due to the special status of the court in the system of subjects of civil procedural law, the nature of the relationship and mutual influence of the court on the actual field of civil procedural law, as well as its individual subjects. The court is the subject of public authority, and, therefore, its statutory competence corresponds to its functional purpose, unlike private law subjects, the basis for determining subjective rights of which can be considered a legitimate interest. Describing the court as a multidimensional phenomenon from the standpoint of the subject of civil procedural law, it must be recognized that its identifying property stems from the possibility of applying a general approach, according to which the ascension is human-centered. That is, recognition of the identifying property of the court by the basic characteristic is a necessary condition for determining the court by the subject of civil procedural law, considering its peculiarities. In this, the influence of the rule of law on the characterization of the court as a subject of civil procedural law manifests itself. In addition, such influence can be traced at the level of implementation of the court of its powers, primarily functional. Thus, the court applies this principle when considering civil cases (Article 10 (1) of the CPC of Ukraine), and in particular, the requirement of a fair balance between the public interest and the specific subjective interest protected by the court in the issuance of a court decision (principle of proportionality). Procedural guarantees of the

proper administration of justice should be characterized as a sectoral manifestation of general guarantees of legal legality. They are a consequence of the functioning of the court as a subject of civil procedural law, which determines the need for proper maintenance of its activities and indicates the possibility of considering the court as a subject of formation of the field of civil procedural law. Such safeguards include: means of procedural coercion, powers of the presiding judge to maintain order in the court session, the secret of the consultative room, separate institutes of civil procedural law (procedural time limits, legal fees, etc.), etc.

The procedural status of the court when considering a case in the court of first instance and this status when considering a case in proceedings for review of a court decision are related as general and special. The specificity of the consideration of the case in the proceedings for review of the court decision, the special requirements of the court reviewing the court decision, determine the specific features of the court as a subject of civil procedural law in proceedings to review the court decision. Therefore, the courts of the first, appellate, cassation courts are the court in the broadest sense as a subject of civil procedural law. The element of the civil procedural status of the court as a subject of civil procedural law are the principles of civil procedural law, which provides for the definition of such principles and considering their specificities in non-invasive proceedings. However, such proceedings are subject to such general principles of legal proceedings as discretion, competition, procedural equality, publicity, etc. Some exceptions are only procedural and individual proceedings, as well as separate proceedings in matters related to the execution of court decisions.

The question of formation of a court composition with the participation of jurors arises. The problem is determined not only by the differences in the determination of the quantitative composition of the court in different areas of the judiciary (one professional judge and two jurors in civil proceedings, two professional judges and three jurors in the criminal), but also the need to ensure that the procedural competence of the jury is consistent with their procedural functions. Among the options for solving the problem, one can propose to exclude from the jurisdiction of the jury powers relating to the award of a judgment with the preservation of all other guarantees associated with participation in the trial. The issue of the composition of the court is also relevant when considering certain categories of civil cases. So, choosing an approach to determining the composition of the court for consideration of the investigated category of cases, it is necessary to proceed from the fact that due to the above complexity of the establishment of circumstances, and also that public control in such cases may be due to participation of representatives of mass media, expediency of participation of people's assessors in their consideration it is questionable. On the other hand, it is also inappropriate to introduce compulsory collective review of all cases

concerning the protection of the rights of an indefinite number of individuals in the three professional judges, as not all cases concerning the protection of the rights of an indefinite number of persons may have the above-described problems. Therefore, the most optimal is the definition in the CPC of Ukraine of specific categories of cases on the protection of the rights of an indefinite number of persons, for consideration of which a collective court composition consisting of three professional judges is envisaged.

Axiomatic is the theoretical approach to the recognition of the diversity of tasks of the court, which involves solving them not only the dispute about the right, but also the implementation of other guarantees of human rights and freedoms (the consideration of the cases in the order of non-response proceedings and procedures). In this regard, in order to clarify the legislative consolidation of the court's task, in accordance with the tasks actually performed by it, it is expedient to amend the Law of Ukraine «On the Judiciary and Status of Judges» dated 02.06.2016 No. 1402-VIII [10] by supplementing the article 2 sentences of the following content: «In the cases stipulated by law, the court implements other guarantees of human rights and freedoms».

The discussion on the nature of the writ proceedings (whether the relevant activity of the court can be a court of justice) is currently not closed. The decision of the case in the order of writ proceedings can be taken as an alternative to justice.

Consequently, in spite of fundamentally different functions of the court in non-invasive proceedings, a multidimensional approach to the definition of a court as a civil procedural law entity can also be applied to non-existent proceedings, with the exception of procedural and individual proceedings, as well as separate cases in matters concerning issues resolution, related to execution of court decisions.

III. Participant in the case and representative as a subject of civil procedural law

The interest of the participant in the case as a materially interested person in obtaining a proper judicial protection of his rights has a systemic influence not only on the progress of the proceedings in a concrete case, but also in the broad sense of the development of civil procedural law as a branch of law and legislation, development of the doctrine of civil procedural law. A legal entity as a subject of civil procedural law must be considered as a generalized form of a subject of civil procedural law in its institutional aspect. Such a generalized form contains elements of the subject, which are inherent in all subjects of civil procedural law: legal personality; procedural rights and obligations; guarantees of procedural rights.

To the category of «participant in civil procedural legal relationship», this approach can be applied from the standpoint of scientific knowledge. Participant in civil procedural legal relationship can be defined by a legal person, which is in

inseparable unity with the concrete person - its bearer. Lack of capacity for a person in a particular case does not mean the inability to consider it as the subject of law. The above affects only the possibility of personal implementation of himself as a subject of civil procedural law in the relevant legal relationship. Therefore, civil procedural empowerment is an optional element of the procedural legal personality of a participant in a litigation process.

The state as a subject of civil procedural law, like a legal entity, is also a generalized form of the corresponding legal attributes (aspects), separated from their specific carrier. On the other hand, in contrast to the legal entity, the state participates in the civil process for the sole purpose of serving the right, securing human rights and freedoms, and other purposes defined by the understanding of it as a democratic, social and legal one. Defending its subjective rights, in particular property, is also covered by this appointment. It is its decisive feature as a subject of civil procedural law. A person expressing the will of the state in a particular procedural legal relationship is a specific individual authorized to do so under the law. Thus, the state as a participant in civil procedural legal relations can be represented as a specific legal personality. The above refers to the participation of the state in the civil process as a party and in the case of seeking protection of the rights, freedoms and interests of other persons.

The application of the general approach to the recognition of the multidimensional nature of the subject of civil procedural law to the characteristics of the representative allows to assert the existence of independent procedural interest, which forms the basis for the implementation of appropriate opportunities in the process; independence of decision-making within the powers granted to him; his independence as a participant in a specific civil procedural legal relationship. The procedural representative as a subject of civil procedural law operates on the basis of the procedural competence proper to him, which is conditioned by the purposeful nature of the participation of a representative in the civil process. The main area of the participation of a representative in the civil process, which is urgent for a decision, concerns the clarification of legal requirements to it. The indicated indicates the absence of a single theoretical basis for the perception of the procedural representative, including as a subject of civil procedural law. One of the gaps in the legal regulation of the participation of a representative in a court proceeding is the lack of proper constitution of the right of a person to have a representative when participating in certain types of proceedings and procedures: restoration of lost litigation; solution of procedural issues related to execution of judicial decisions in civil cases and decisions of other bodies, officials; judicial review of execution of court decisions. In addition to the above, the actual direction of further research is to work out the concept of «conflict of interest» as the basis for the impossibility of the representation of one person accomplices.

Depending on the nature of the participation in the trial (potential or actual), subjects of civil procedural law can be divided into two groups: 1) participants in the trial (court and staff of the court, participants in the case and representatives, other participants in the trial); 2) all other persons who can influence the formation of the field of civil procedural law by their activities (for example, representatives of civil procedural law science, practitioners, etc.). The above systematization proceeds from the legal understanding of man as the central subject of civil procedural law. Understanding of a person as an ascending concept for the definition of a subject of civil procedural law determines the key role of human rights in disclosing the content of this category. Person is primarily the subject of these rights. However, this is only a «common part», which characterizes it as a subject of civil procedural law. «Special part» can be considered those properties that are determined by a specific civil procedural status (court, party, witness, etc., or any other entity that affects the development of the field of civil procedural law). Consequently, the notion of «subject of civil procedural law» in its content goes beyond the actual field of civil procedural law.

Thus, the subject of civil procedural law should be defined in active and passive aspects on the criterion of the nature of influence on the formation of the field of civil procedural law. An active aspect involves the ability of the subject to influence actively - by committing certain actions, making decisions, not necessarily - within the consideration of a case. This may be: the issuance of acts defining the procedural form of consideration of civil cases or influencing the resolution of specific procedural issues; appeal in the manner prescribed by law to the state authorities with issues that directly affect the functioning of the court process; informal communication with representatives of the legal community, etc. The passive aspect involves the influence of the subject of civil procedural law on the formation of a given industry because of the presence of this subject in the legal reality, the need to consider his interests in the implementation of legal regulation. Such a person may also be an incapacitated person or a person with limited capacity. In addition, such a person can identify any person whose interests are subject to judicial protection.

It is necessary to recognize the well-grounded position of the legislator on the possibility of the prosecutor to take part in the case at any stage of the trial, as well as to challenge the decision of the court of first instance, regardless of participation in the consideration of the case in this court. In order to determine in the CPC of the time periods for which proceedings are suspended in the event of the parties turning to the mediation during the proceedings, it is necessary to amend paragraph 1 of Article 251 of the CPC of Ukraine, in particular paragraph 5, after the words «resolving a dispute with the participation of a judge» to supplement with the following words: «, the address of the parties to the mediation».

Persons in whose interest's non-infringement proceedings and procedures are in the best interests of the parties are parties to such cases, although the court decision, which is made after the outcome of their consideration, does not determine their material rights and obligations. Applicants and interested persons should be included in the circle of subjects of civil procedural law with the recognition of certain features due to the purpose of the appointment of proceedings and procedures. The expediency of supplementing the existing classification of persons involved in the case by way of civil proceedings, the criterion of the nature of interest is substantiated. An additional subgroup of such persons should be identified by the participants in the trial in non-invasive proceedings and procedures provided for in Sections 6-10 of the Civil Code of Ukraine (resolution of procedural issues related to the enforcement of judgments in civil cases and decisions of other bodies (officials), judicial control over enforcement court decisions, proceedings in appeals against decisions of arbitration courts, appeals against decisions of international commercial arbitrations, etc.). In these proceedings, it is advisable to call these persons the applicants and the interested persons accordingly. Relations in non-invasive proceedings and procedures are civil procedural, since relations between the court and the persons concerned have a structure and features of civil procedural legal relations. Procedural safeguards for the participation of persons in legal proceedings should be extended to the activities of individuals in these proceedings and procedures. The construction of the civil procedural status of the subject of civil procedural law may also be extended to court and to participants in proceedings and procedures. At the same time, it is necessary to consider the peculiarities determined by the tasks of the considered proceedings and procedures.

IV. Other parties to the trial as subjects of civil procedural law

Officials of the court, as a result of which legal civil procedural facts arise, constitute in aggregate the broad concept of the court as a subject of civil procedural law. Such officials are the judge (people's assessor), the secretary of the court, the court administrator. Covering the concept of a court as a subject of civil procedural law assistant judge does not correspond to the nature of the assistant judge's office, because performance of official duties does not provide for procedural legal facts. Therefore, it is expedient to exclude him from the circle of other participants in the trial, as defined by the CPC of Ukraine. To do this, it is necessary to amend the CPC of Ukraine, in particular:

- a) to exclude from article 65 the word «assistant to a judge»;
- b) article 66 shall be deleted.

The basis for the procedural legal personality of the secretary of a court session, the court administrator is their competence as persons who hold civil

service positions in court and through their activities create procedural legal facts. Therefore, they can be regarded as subjects of civil procedural law. A witness, expert, translator, specialist, expert on law matters should be considered in the civil process as individuals with a general status, but who, on the basis of the circumstances specified in the law, acquire a special legal status and whose activity in the court has the purposeful nature which is the basis of their procedural legal personality. A person present in the courtroom during an open trial of a civil case can not be considered a special subject of civil procedural law. However, such a person presents the subject of this branch of law with a general position as having a potential ability to influence its formation. The activity of an expert on law matters has a formative influence on the guarantees of his participation in the case, and, consequently, on institutes of civil justice. This is also characteristic of other participants in the process: a witness, an expert, a specialist, an interpreter. Therefore, legal guarantees must be recognized as an integral part of these subjects of civil procedural law. The structure of the persons under consideration as subjects of civil procedural law is similar to the structure of other subjects and contains the general and special parts. The determination of the procedural rights of an expert in the field of law should be based on ensuring his capabilities: providing explanations for the conclusion, participation in the court session. Notwithstanding participation in a case on the part of one of the parties, the expert in the field of law should be considered as not interested in the outcome of the case consideration by a person. The above should be considered as a starting point for further improvement of its procedural status, in particular, with regard to specification of the criteria for admission to participation in the case.

The widespread use of the hermeneutic approach to the natural legal legal understanding of the subject of civil procedural law allows to state the key influence of their activity on determining the directions of improvement of the principles of their activities, their main functions, tasks, rights and responsibilities, and therefore - the status in the process as a whole.

Other participants in the litigation process in reviewing court decisions and in other proceedings and procedures as subjects of civil procedural law have a multi-dimensional content, like their content in the lawsuit. However, on such a content directly affect the functional features of these proceedings. In particular, one can not say about the right to change the basis or subject of proceedings in the proceedings on review of a court decision or the possibility of concluding an amicable settlement in the process of issuing a permit for the enforcement of an arbitration award. Unlike the activity of an expert, the activity of a public authority involved in a case for the submission of a conclusion in the exercise of its powers, it is expedient to include in the administrative form of protection of subjective private rights. It is necessary to join in the position of scientists regarding the inexpediency of consolidating the conclusion of the subject of public authority to

fulfill their powers as an independent separate source of evidence in the civil process. The legal structure of these participants as subjects of civil procedural law is like such a design in the proceedings.

The basic guarantees of the proper participation of other participants in the civil process in non-invasive proceedings are insufficiently enshrined in procedural legislation, which impedes the development of unambiguous practice of their participation in the court proceeding. The main insufficient guarantees are: the distribution of responsibilities for evidence between the parties to the case; distribution of legal expenses incurred by the person concerned in connection with the involvement of the said persons in the civil process; procedural deadlines to be applied in connection with the involvement and participation of the said persons in the civil process; the consolidation of their procedural rights, as well as other guarantees, which are determined by the civil procedural form of proceedings in the courts of the first and higher courts. In order to develop the guarantees of the proper fulfillment of their procedural obligations by other participants in the trial, amendments to paragraph 1 of Article 264 of the CPC of Ukraine should be amended by adding paragraph 9 thereof, which reads as follows: «Are there grounds for reimbursement to the participant in the court proceedings of damages caused by improper execution by another participant of the court process of their procedural duties».

The problem of the application of the newest procedural institutes (court fines, electronic evidence, claims (applications), etc.) in non-invasive proceedings and procedures is to actualize the conduct of scientific research in order to disseminate the general provisions of civil procedural law.

The general object of civil procedural legal relations is the protection of subjective private rights, freedoms, legitimate interests through the administration of justice. In this case, it has a purposeful influence on the existence (occurrence, development, termination) of each particular civil procedural legal relationship. Therefore, despite the definition of a special object for each such relationship, it can be argued that there is a general object regarding all civil procedural legal relationships. The stated concept of the object of civil procedural legal relationships is characteristic of legal relationships that arise between the court and the persons involved in the case. However, as is known, in the legal literature, according to the criterion of legal entities, also distinguish between service and auxiliary civil procedural legal relations that arise between the court and other participants in the process. An example of such legal relationships is the relationship between a court and a witness, in which the witness has the duty to testify, and the court has the right to receive them. It is necessary to agree with the generally accepted position on the constitutional nature of the witness's duty to testify in a case, thus assisting the court in the administration of justice. The indicated can also be extended to other participants in the civil process: an expert,

a specialist, a translator, a person who provides legal assistance. At the same time, fulfillment of the specified duty and realization of the specified right should be in the procedural form defined by the law. In particular, the requirements for the procedure for questioning the witness are established, in particular, by Article 230 of the CPC of Ukraine: as regards the interrogation of each of the witnesses separately (part 1), the prevention of witnesses to the courtroom, which has not yet been questioned (part 2), an explanation by his witness procedural rights (part 3), etc.

The implementation of each of these requirements involves the emergence, change, termination of the relevant civil procedural legal relations. Thus, the witness has the right to explain to him by his trial his procedural rights, and the court has an appropriate duty. As a result of the implementation of such legal relations, the witness's knowledge in his procedural rights is achieved. This can be considered as the object of the above procedural legal relationship. On the other hand, such an understanding of the object of the specified service-auxiliary relationship can be called narrow. His disadvantage is the lack of consideration of the purpose of the questioning of the witness and the purpose of the proceedings as a whole.

The proper fulfillment of all the statutory requirements for participation in the civil process of other participants in the civil process is an important condition for the possibility of putting the results of the participation of such persons in the motive part of the court decision, and therefore, in order to achieve the ultimate goal of their participation, to establish the circumstances of the case. This can achieve the ultimate goal of legal proceedings - the protection of subjective rights, freedoms, legitimate interests. It is for the achievement of these purposes that the procedural activity of the court and other participants of the civil process in the course of realization of civil procedural legal relations should be directed. Therefore, we can mention the allocation not only of a special, but also the general object also in the service and auxiliary legal relations. Such a conclusion can also be applied to legal relationships with other participants in the process, except for the witness (expert, translator, specialist).

Consequently, we will support the current concept of allocating a general and special object of civil procedural legal relations, as well as the allocation of such a relationship of such a kind as a civil service civil auxiliary procedural legal relationship. It is advisable to define a narrow and broad understanding of the object of civil procedural legal relations. In the narrow sense, the object of civil procedural legal relations should be determined by a court decision on a particular procedural matter (content aspect), which is formalized by a court order, which must be issued in compliance with the requirements of the law (formal aspect). In the broad sense of each civil procedural legal relationship, in addition to the above (special object), it is expedient to allocate as a general object - the protection of

rights, freedoms, legitimate interests through the administration of justice. It has a guiding character in relation to each civil procedural legal relationship.

Such an approach can also be applied to the characteristics of the object of service and auxiliary civil procedural legal relationships. A special object of these relations is the implementation of legal safeguards provided for by law. Thus, during the interrogation of a witness such guarantees may include: impartiality of a witness (part 2 of Article 230 of the CPC of Ukraine), the knowledge of a witness in his procedural rights (part 3 of Article 230 of the CPC of Ukraine), etc. The general object, as well as in other civil procedural legal relations, is the protection of rights, freedoms, legal interests through the administration of justice.

Conclusions. Summarizing the above, it can be noted that the study allowed to solve the scientific problem of determining the essence and content of the subject of civil procedural law as a legal phenomenon, its theoretical foundations, based on the modern human-oriented paradigm of legal thinking and taking into account trends in the field of civil procedural law.

The system-forming significance of natural-legal approaches, compared with positivist ones, was established, as in the content of the category «subject of civil procedural law» in the civil procedural law, as well as in determining the directions of development of civil procedural law as a science, the field of law, the field of legislation. Thus, when consolidating the content of the category «subject of civil procedural law, «the human-centered approach determines the consideration of its legal properties (aspects), which constitute the legal personality of the subject of civil procedural law. Along with this, the subject of civil procedural law is defined as the upward category for establishing directions for the development of civil procedural law as a science, law, industry. Natural-legal approaches serve as the basis for resolving such issues as: the legal status of the subject of civil procedural law; guarantees of participation of the indicated subject in the court proceeding. The perception of the position of the European Court on Human Rights should be considered one of the important means of penetrating natural-legal approaches to the national doctrine of civil procedural law, the formation of a national doctrine as part of the definition of the subject.

The principles of further improvement of the provisions concerning the subject of civil procedural law: development of natural-legal approaches in legal scientific researches of subjects of civil procedural law; improvement of legal guarantees of proper participation in the civil process of subjects of civil procedural law. In this regard, the relationship between the principles of the rule of law and the rule of law in civil procedural law is of fundamental importance. The rule of law principle is the basic principle for determining the civil procedural status of the subject of civil procedural law. The significance of the positivist approach in the settlement of the civil procedural status of the subject of civil procedural law is determined by the public and legal nature of civil procedural law, the need for the

existence and implementation of a civil procedural form of administration of justice. The subject of civil procedural law can be considered an institute of this branch of law, since it is characterized by both established, general features of the institute of law, and specific: the nature of norms, the principles of determination, the means of influencing the object of legal regulation.

The subject of civil procedural law is defined as a set of legal properties of a person that exist objectively and can be implemented in civil procedural legal relations. The definition of the dynamic aspect of the subject of civil procedural law implies the consideration of the existence of a legal possibility for acquiring the status of participant in civil procedural legal relations, in connection with which there are two stages of transformation of the status of the subject: as a person potentially able to enter into civil procedural legal relations and a participant in civil procedural legal relations. Construction of the design of the subject of civil procedural law allows to take into account and recreate in each of the aspects (properties) of the subject of civil procedural law the specificity of the legal nature and social purpose of each of the participants in the civil process, based on a higher level of legal generalization. Application of the system-functional approach has allowed to define a range of such properties: individualization; legal will; a set of legal relations and legal relations; legal consciousness; active character of «creation» and application of law; social and legal value; legal personality.

The legal structure of the subject of civil procedural law provides for the allocation of its general and special part. The general part contains provisions on human rights and freedoms. A special part is defined by elements that reflect the specifics of specific subjects of civil procedural law: the functional purpose of a particular subject or the purpose for which he exists (for example, the administration of justice - in relation to a court); citizenship; legal guarantees of activity; structure of the legal status of the subject of civil procedural law. The influence of the development of the doctrine of civil procedural law on the formation of the theory of subjects of civil procedural law is conditioned by: the close relationship between the subject of civil procedural law and its institute with other institutions of civil procedural law; the meaning of the subject of civil procedural law as a system-building category regarding the doctrinal basis of civil procedural law. Directions of such influence are: the basic provisions concerning the objectives of the civil procedural law subjects; elements that directly characterize these subjects; elements of legal status of subjects of civil procedural law. However, the category «subject of civil procedural law» plays an important role in shaping the field of civil procedural law as the key concept underlying it, affecting all the principles and institutions of civil procedural law.

The structure of the civil procedural status of the subject of civil procedural law, consists of the following components: civil procedural rules; civil procedural legal personality; the principles of civil procedural law; civil procedural status of

participant in civil procedural legal relationship (procedural rights and duties (powers)). The guarantee of the proper implementation of the civil procedural status of the subject of civil procedural law is a positive civil procedural liability as a duty to properly use procedural rights and to fulfill procedural obligations. The basis of the procedural legal personality of the subject of civil procedural law is the function performed by him in the civil process (for example, the administration of justice - in relation to the court).

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Chapter 11

Forms of the indirect regulation of the economy: modern approaches to the determination and application

The public-service character of the activity of state bodies reflects the ideology of a human centralism, corresponds to the constitutionally fixed content and direction of the state's activity, which is defined by human rights and freedoms and their guarantees. The specified determines the need to define the forms of indirect regulation of economic relations, which contributes to the development of the system of state guarantees for the implementation of the constitutional right to entrepreneurial activity, effective protection of the economic interests of the state, establishing the legal possibility of alternative choices of participants in these relations of behavior within the law. Such a legal possibility is realized, in particular, in permits, administrative agreements, administrative services that ensure social freedom and human activity, the implementation of the principle of «everything which is *not forbidden* is *allowed*».

The above theoretical positions serve as a model for using forms of indirect regulation of economic relations. The practice of their use indicates that there are, at least, such problems as:

- the presence of the considerable body of normative legal acts of various legal force, regulating the permit activity on various subjects of implementation;
- the necessity of the development of the legislation on administrative services, the current state of which is characterized by the validity of the Law of Ukraine «On administrative services», which envisages adaptation to its norms of legislation in the field of permitting activities and the requirements of regulatory legal acts regulating related relations, in particular, administrative liability, procedures provision of administrative services and others;
- the need to justify the legal basis for the application of administrative agreements, including the procedures for concluding, termination.

1. Problems of the definition of the subject of permit activities

Permit activity is carried out in many directions and provides for the issuance of permit documents in various forms. Among the directions of the mentioned activity in the field of economy, the following can be noted:

- 1) compliance with sanitary norms and regulations (provision of conclusions, permits, certificates, sanitary passports [1]);
- 2) trade (granting of a commercial patent [2]);
- 3) observance of customs legislation (granting of permits [3]);

4) confirmation of the quality of food and non-food products, including determination of radiation quality (conclusions, permits, approvals, certificates [4, 5, 6, etc.] are given);

5) observance of environmental legislation by economic entities (provision of permits, conclusions, limits, approvals, licenses [7, 8 and others]);

6) observance of legislation in the field of energy saving, operation of power grids (documents of permissive character, conclusions of the state expert examination on energy conservation [9]);

7) provision of housing and communal services (confirmation of conformity, certification, licensing [10]);

8) construction (conclusions, permissions, passports [11] are given) and others.

In spite of the effect of the Framework Law of Ukraine «On the Permit System in the Sphere of Economic Activity» [12], which defines the legal and organizational framework for the functioning of the permit system in this area, it should be noted that the subject of the so-called «permissions» is extremely wide, and their number and the list of forms is so cumbersome, requiring a fundamental revision. This problem still loses its relevance.

An attempt to streamline relations in the area of granting permits (obtaining permits) is carried out by adopting by-laws, at least at the level of decisions of the Cabinet of Ministers of Ukraine, and instructions of local state administrations. The Register of documents of permissive nature, which is implemented in the form of a unified automated national system of collection, accumulation, protection, registration and provision of information on the issuance of permits, refusal to issue them, reissue, issue of duplicates, cancellation, is facilitated by the organization of information and monitoring of permits.

The abovementioned indicates the need to determine a unified approach to the regulation of permissive relations in the field of management, which will allow to answer the difficult question about the extent of limiting the imperative impact on the field of management. On the one hand, the state, by establishing and controlling compliance with the requirements for granting permits, thus performs the function of protecting citizens from low-quality goods and services. On the other hand, the excessive expansion of the list of activities requiring the issuance of permits constrains the development of entrepreneurship, since the latter is an independent, initiative, systematic at its own risk of economic activity of business entities (entrepreneurs) in order to achieve economic and social results and profit (Article 42 of the Commercial Code of Ukraine [13]).

II. Administrative service. Problems in determining the nature and content

The doctrinal work on the problem of the essence of administrative service is logically connected with the problem of permissive activity. Most researchers of

the problem referred to the administrative services and permit activities, licensing, registration (O.V. Kuzmenko [14, pp. 270-271], T.O. Kolomoets [15, pp. 240], I.B.Koliushko, V.P.Tymoshchuk, S. L. Dembitskaya, Yu.M. Ilnitskaya). Academician V.B. Aver'yanov, referring to the etymology and meaning of the term «service», emphasized that the service is an activity that is carried out with the purpose of consolidating the obligations of the state to individuals and legal entities, in particular those that are aimed at legal registration of the conditions necessary to ensure the proper realization of their rights and interests protected by law [16, p.379]. The scholar pointed out that the notion of activities related to the provision of services as «public service» (from the «serve-serve») and pointed out the content of such activities - the creation of conditions under which individuals or legal entities are capable of effectively implementing and protecting their rights, freedoms and legitimate interests. To the subjects of services delivery were assigned state and non-state bodies [16, p.269].

Consequently, the scientist did not identify the administrative service with permission or other positive action of the authorized state authorities, in particular - registration, licensing, etc.

The legal construction of the term «administrative service» consists of a universal legal category - «service» and categories «administrative». The content of the category «service» affects the perception of the administrative service from the point of view of consolidating the mutual rights and obligations of both the subjects of their provision and the services of consumers. Category «administrative» refers to the sphere of social relations, within which the service is provided - managerial, organizational. Such an essence of administrative service determines the circle of subjects of their provision - the executive authorities, local self-government bodies, and their officials.

The genesis of such a legal construction indicates the gradual introduction of a term in the legal doctrine and legislation, which indicates the nature of the relations within which the service is delivered, beginning with the term «managerial», and subsequently - «executive», «executive-obligation» (V.B.Aver'yanov), «public», «state» and «municipal» (Concept of development of the system of providing administrative services by executive authorities) and, finally, «administrative» as a service provided in public relations.

Interesting is the fact that in 1938 Ernst Forsthoff analyzed the problem of managing the provision of public services [17, p.180]. Thus, the scientist introduced into the scientific circle the relevant category, which indicated a new quality of government - from the imperative, binding to the dispositive.

Consequently, the term for the introduction of administrative services into the field of public-law regulation is rather long, and the need to form a doctrinal approach to the essence of administrative service - important in both social and in

the state sense, taking into account the reproduction in this term of change of priorities in the public-law regulation the activities of the state, its bodies, officials.

III. Methodology for determining the essence of administrative contracts: problems of formation

With regard to the necessity of forming a methodological approach to the essence of an administrative contract, one can first point out the individual nature of scientific research of the respective direction. Among the contemporary scientific works can be noted works K.K. Afanasyeva, R.A. Kuibids, S.M.Olkhovskaya and others.

Although the notion of an administrative contract is contained in almost all textbooks on administrative law, however, in Ukraine, at the level of the doctoral dissertation, a corresponding analysis was made by Zh.V. Zavalna [18]. Academician notes that in the works of domestic and Russian scientists the problem of using the contractual form in relation to coordination and interaction – V.B. Averyanov, O.P. Alohin, V.D. Bakumenko and others; Concerning the organization of joint concerted action of state bodies – A.A. Aksenov, G.V.Atamanchuk, A.L. Dudnikov, V.A. Kruglov, V.M. Pleshkin, A.M. Suprunenko, V.V. Tsvetkov and others; when researching the problem of delegation of authority - O.A. Somova, S.K. Dryakhlov, I.G. Machulskaya and others [18, p.8-9]. Among the works of Russian researchers, performed at the level of PhD theses on administrative law, it could be mentioned the scientific achievements of N.V.Balitskaya, AM Kolokoltseva, I.Yu. Sindeeva and others.

The legal nature of administrative contracts is due to the fact that they arise in those areas where administrative-legal relations are formed, and their purpose is the realization of public-legal interests. They are applied within the competence of the subjects of authoritative power.

Among the legislation regulating the sphere of public relations, only the Code of Administrative Procedure of Ukraine (hereinafter referred to as the CAP of Ukraine) defines the notion of an administrative contract (clause 16, part 1 of Article 4. [19]. The application of the norms of the CAP of Ukraine is carried out in a wide circle issues related to the protection of rights and legitimate interests in public-law relations. However, the legislation in the field of administrative contracts was formed earlier than the adoption of the CAP of Ukraine, which is why there is confusion not only in the application of certain concepts. When resolving disputes arising from the conclusion of administrative contracts, it is necessary to proceed from the administrative and legal nature of this agreement, to distinguish it from the economic, legal and civil-law nature, which, of course, extremely complicates and delays the process of protection of rights and legal. Thus, in some cases, if the case comes to the economic court, and one of the participants is an authority with authority, it is transferred to the administrative court or decide in the manner prescribed by the CAP of Ukraine, despite the fact that it is the subject of the

dispute. With the adoption in December 2017 of the CAP of Ukraine in the new edition, the problem of delineation of judicial jurisdictions was not eliminated.

With regard to the delineation of judicial jurisdictions, there are legal positions of the highest judicial authorities. Thus, in the Resolution of the Plenum of the Supreme Administrative Court of Ukraine dated May 20, 2013, No. 8 «On Certain Issues of the Jurisdiction of Administrative Courts» [20], it was indicated that judges should be referred to the legal doctrine regarding the division of the right to public and private. However, in resolving the issue of opening a proceeding, the judge should not carry out a theoretical analysis, along with an analysis of the current legislation. The abovementioned Resolution of the Plenum of the Supreme Administrative Court of Ukraine did not become invalid, despite the current other higher judicial body - Administrative Court of Cassation of the Supreme Court.

R.A. Maidanyk brings the opinion of N.S. Kuznetsova regarding criteria for determining jurisdiction, where it is necessary to proceed not only from the subject structure of the legal relationship, but above all from the subject matter. If the subject of consideration is the private rights of an individual or business entity to the disputed property, such a dispute shall be subordinated to the civil or commercial courts [21, p.173; 30].

The above opinion is formed on the basis of the doctrinal provisions of the science of civil law. However, based on the conceptual provisions of the theory of administrative law in relation to the signs of administrative and legal relations, in the case of resolving a dispute in the field of economic activity with the participation of state and other bodies that are not economic entities, the following criteria for delimitation of judicial jurisdiction with the classification of the specified category can be proposed disputes to the jurisdiction of administrative courts. These criteria should apply only in complex with:

- a) a dispute with the participation of a state body or local self-government arises in relation to the actions of the subject of legal authority in connection with the performance of its administrative functions and functions of legal protection of public order;
- b) relations related to the implementation of the subject of legal authority may arise at the initiative of any of the parties;
- c) the activity of the subject of the power of attorney does not require the consent of the other party.

IV. The concept of the application of indirect forms of economic regulation.

The problem of the application of indirect forms of economic regulation has two interrelated sides. On the one hand, there is a need for a clear definition of groups of social relations in the field of economic activity, which are the subject of administrative and legal regulation. On the other hand, it is necessary to form a

conceptual approach to the limits of the use of forms of indirect regulation of economic relations.

First of all, it is necessary to identify groups of social relations in the field of management, which are the subject of administrative and legal regulation.

In scientific researches on administrative law, the subject matter of the search consisted mainly of scientific approaches regarding the criteria of the measure and degree of state intervention in the sphere of management (L.R.Gritsaenko, AS Lastovt'kyj, V.P. NAGRABELNY, N.O.Saniachmetov, and others). To this end, proposals were made for the use of priority mechanisms of administrative and legal regulation:

- openness of the formation of the state policy on support and development of entrepreneurship by means of coordination of interests of all interested parties, use of feedback mechanisms;
- flexibility of the system of priorities and various forms of state support for national entrepreneurship;
- taking into account national and historical features, especially at the regional level;
- simplification of the government regulatory procedures, especially for small businesses;
- mandatory determination and consolidation of a permanent source of state budget allocations aimed at the development of entrepreneurial activity;
- coordination of activities and a clear separation of powers and responsibilities of public authorities directly involved in the issues of support and development of national entrepreneurship at the state, regional and local levels;
- use of property of inefficient and insolvent enterprises that are in state ownership as sources of resource support for small and medium-sized businesses;
- improvement of the accounting system and state statistics of entrepreneurship;
- consistency and unbiased measures to support and develop entrepreneurial activity;
- organization of systematic scientific research and an effective propaganda campaign aimed at stimulating entrepreneurial activity in Ukraine [22, p.13-14].

The list of the above suggestions on the use of the primary mechanisms of administrative and legal regulation shows the actual absence of the idea of specific measures and means of administrative regulation, in connection with which the provisions themselves, in many, declarative content.

Thus, the analysis of the first provision on the openness of the formation of a state policy on support and entrepreneurship development by coordinating the interests of all interested parties, the use of feedback mechanisms allows us to indicate that it is, rather, a declaration, a general direction of state policy in the field of entrepreneurship, which needs to be detailed. To implement it, it will be

necessary to find an answer to a number of questions: what does «openness» mean to public policy, what means «openness» will be provided to, which authorities will be empowered to ensure such «openness», who will be legally responsible for violations the requirements for ensuring the «openness» of the state policy, how the interests of the parties and parties, and so on will be coordinated. The same can be fully attributed to the «flexibility of the system of priorities and the versatile forms of state support for national entrepreneurship».

The problem of determining the criteria for the degree and degree of state intervention in the field of economy is really important, but it is unlikely that it can be solved, since the sphere of economic activity itself is not a constant phenomenon. It is dynamic, complex and its development depends on many factors, including political ones. All these factors can not be taken into account, because it is impossible to solve a scientific problem with many unknown and unpredictable parameters. It is advisable to carry out scientific research in a different direction. Thus, it is possible to identify specific spheres of economic activity, which are the subject of administrative-legal regulation and require the use of adequate measures and means of state influence, including - and inherent in the dispositive method of regulation.

The concrete four groups of social relations that arise in the economic sphere and are the subject of administrative-legal regulation, are determined on the basis of an analysis of the essence of administrative-legal relations and the content of administrative and legal regulation.

The first group is relations related to the regulation of economic activity in order to ensure the rights and interests of citizens, based on the constitutional provision that the rights and freedoms of man and their guarantees determine the content and direction of the state (part 2 of Article 3 of the Constitution of Ukraine [23]). They refer to the relations of registration, licensing, patenting, standardization, certification, granting of permits (in the terminology used in the current legislation). These relations are classified as administrative-legal on the basis of their compliance with the features of administrative-legal relations: 1) consist in the sphere of positive management activity; 2) have a public-law nature; 3) connected with the implementation of organizational and regulatory activities of authorized state bodies; 4) may arise at the initiative of any subject, but the consent of the other is not compulsory; 5) the violation of one of the parties of his duties entails responsibility not to the other party, but to the state.

The second group consists of relations related to the implementation of the norm of part 4 of Article 13 of the Constitution of Ukraine, which states that the state protects the rights of all subjects of property rights and economic management, the social orientation of the economy. Not all relations within this group are administrative-legal. By regulating economic activity, the state, in particular, also applies financial policy instruments - investment, taxation,

budgetary, currency regulation. Administrative-legal relations are distinguished in terms of quota system, state regulation of prices and tariffs, application of norms and limits, antimonopoly regulation. The reason for such a conclusion is the position of the theory of administrative law that administrative-legal relations are formed, as a rule, in a special sphere of public life - public (state and self-government) management, and, first of all, in connection with the exercise of power by the executive authorities - distribution functions.

The third group of relations in the field of economic activity, which objectively require administrative-legal regulation, constitute control relations. In some ways, streamlining of the control of economic activity was facilitated by the adoption of the Decree of the President of Ukraine dated 23.07.1998 № 817/98 «On Certain Measures to Deregulate Business Activity». But the practice of its application showed that the problem of optimization of control activities in order to eliminate unnecessary interference in the field of business, this legal act did not completely eliminate. This is indicated by the practice of appealing the decisions of the controlling bodies in the judicial and extrajudicial order, as well as the recent activation of legislative activity in the direction of limiting the use of control measures or setting their limits. In 2018, a number of subordinate regulatory acts were adopted, the effect of which is to unify control and supervisory activities in the field of economic activity. In particular, the mentioned refers to the Resolution of the Cabinet of Ministers of Ukraine «On Approval of Methods for Developing the Criteria for Assessing the Risk of Economic Activities and Determining the Periodicity of Planned Measures of State Supervision (Control), as well as Uniform Forms of Acts, which are drawn up on the basis of planned (unscheduled) measures of state supervision (control) is also attached» from May 10, 2018. № 342, Letter from the State Regulatory Service dated April 10, 2018 № 3683/0/20-18 with appendix. This indicates the need for further search for ways to optimize control activities in the field of management.

To the *fourth group* of relations in the field of management, which are the subject of administrative-legal regulation, is classified as a jurisdictional activity. Without denying the thesis about the need to improve the administrative responsibility of individuals for violations of the rules in the field of management, the greatest attention from the part of the scientists needs the problem of administrative liability of legal entities, since in this area most of the violations are committed by legal entities. An integral part of this problem is the question of determining the legal nature of administrative and economic sanctions established by Article 239 of the Commercial Code of Ukraine, since it is necessary to improve the legal protection of the constitutionally established right to entrepreneurial activity and the prohibition to be prosecuted otherwise than on the basis and in the manner prescribed by laws. The jurisprudence on economic and administrative affairs testifies to the existing legal uncertainty of the grounds and procedure for

the application of certain administrative and economic sanctions and, as a result, violates the rights of citizens, the legitimate interests of legal entities, economic entities.

Apart from the four groups of public relations mentioned above, the administrative-legal relations in the field of corporate rights management of the state are allocated. Administrative-legal relations in the field of management of corporate rights of the state are connected with the implementation of the external management activity of authorized bodies of executive power: the definition of those spheres of business that are subject to corporatization by the state; application of registration, licensing, patenting, certification, standardization, issuance of permits; control over the activities of an entity in whose statutory fund the state has a certain share of ownership; application of compulsory measures to violators of mandatory rules in the field of corporate rights management of the state; ensuring legality; protection in administrative courts.

In order to solve the problem of establishing the subject of licensing activities, it is advisable to refer to the Constitution of Ukraine, namely, the norms of Articles 3, 17, 42. Article 3 of the Constitution of Ukraine is the basal, which stipulates that human rights and freedoms and their guarantees determine the content and direction of state activity. The state is responsible to a person for his activities. The assertion and guarantee of human rights and freedoms is the main responsibility of the state. Among the functions of the state, Article 17 of the Constitution of Ukraine establishes the provision of economic and information security, protection of the sovereignty and territorial integrity of the state. Article 42 enshrines the right of everyone to entrepreneurial activity, not prohibited by law, providing state protection of competition in entrepreneurial activity, preventing abuse of a monopoly position on the market.

Thus, the Basic Law enshrines the priority of human rights and freedoms. Along with this, the state's activity in ensuring the implementation of the right of everyone to entrepreneurship involves ensuring national security.

Proceeding from these constitutional norms, the following various areas of entrepreneurship are subject to the use of various permissions by the state:

- a) aimed at monopolization of the market of goods and services;
- b) have a risk of negative impact on the national, including economic, security.

The first type of business relations is regulated by the Laws of Ukraine «On Antimonopoly Committee of Ukraine», «On Protection of Economic Competition», «On Protection against Unfair Competition», «On Foreign Economic Activity», «On Consumer Rights Protection», bylaws adopted from separate issues of development of competitive relations.

These regulatory acts provide for the granting by the Antimonopoly Committee of Ukraine or its administrative boards of permits for concerted actions, concentration, as well as relevant preliminary conclusions.

If the relations in the field of antitrust activities of the state are regulated by a number of relevant legislative acts - not only antimonopoly but also those aimed at protecting economic competition, then the legal regulation of the spheres of entrepreneurship that risks the negative impact on national security does not provide for several normative legal acts, but it is carried out by a sufficiently large number of laws and bylaws. Moreover, there is a need to establish the very sphere of entrepreneurship, which may pose a risk of negative impact on national security.

Areas of management that have a risk of negative impact on the national, including - economic, security and therefore require the use of permits by the state appropriate to include: a) permits in the field of operations with weapons, war materials, explosive materials and substances, potentially toxic substances (Resolution Cabinet of Ministers of Ukraine of October 12, 1992 № 576, which approved the Regulation on the permit system and other regulations); b) permits in the field of nuclear energy use (Laws of Ukraine «On Permits in the Field of Nuclear Energy Utilization», «On the Use of Nuclear Energy and Radiation Safety», and others); c) permits in the field of sanitary and epidemiological welfare of the population (Laws of Ukraine «On ensuring sanitary and epidemiological welfare of the population», «On the safety and quality of food products», a number of subordinate normative legal acts.

The above list of areas of management that have a risk of negative impact on national security is not closed. There is no complete list for today that would be defined at the level of legislative acts, and relevant research in this area is practically not implemented, or certain problems are revealed in studies of a wider issue [24, 25]. Therefore, a clear definition of those spheres of business that risk the negative impact on national security requires further scientific research.

One of the approaches to solving this problem is the appeal to the Law of Ukraine «On National Security of Ukraine» [26]. Article 1 of this Law determines that national security is the protection of state sovereignty, territorial integrity, democratic constitutional order and other national interests of Ukraine from real and potential threats. Under the national interests, they understand the vital interests of man, society and the state, the realization of which is ensured by the state sovereignty of Ukraine, its progressive democratic development, as well as safe living conditions and the welfare of its citizens. Threats to national security are defined as phenomena, trends and factors that make it impossible or complicate or make it impossible or difficult to realize the national interests and preserve the national values of Ukraine.

Based on the normative definition of threats, one can agree with the thought of I.V. Soloshkina on the following types of entrepreneurial activity as an object of

licensing activity: 1) is related to operations with weapons, ammunition, explosives, 2) affects monopolization of markets, 3) is related to the use of fuel and energy resources, 4) is connected with the safety of food products, 5) innovations, 6) information security [27, p.7]. In the list below, this kind of entrepreneurial activity as food security needs to be expanded. Taking into account the above arguments it is expedient to include in the list of types of entrepreneurial activities related to the provision of public health and activities that will negatively affect the state of the environment.

Consequently, to the final list of types of business that require the issuance of permits, it is expedient to include activities:

- related to operations with weapons, ammunition, explosives,
- which affects the monopolization of markets,
- related to the use of fuel and energy resources,
- related to the provision of public health,
- that negatively affects the state of ecology,
- associated with innovations
- related to the information security.

In order to ensure the development of the system for providing administrative services, it is necessary to: optimize the procedures for administrative services in so far as minimizing the applicant's participation in such procedures; establish the criteria for the payment of administrative services; to ensure the awareness of persons applying for administrative services in the procedures and terms of provision; unify service delivery standards.

However, the doctrinal level requires a substantiation of the provision on the definition of the essence of the administrative service. In this context, it is advisable to take into account the achievements of scientists regarding:

- identification of persons who apply for the provision of administrative services as service consumers (in particular, V.P. Tymoshchuk [28, p. 116]);
- a positive social effect of the activity on the provision of administrative services, aimed at satisfying the rights and interests of the persons who applied, reflecting the results of the administrative act (Yu.M. Il'nitskaya [29, p.177]);
- direction of the duty of the state to private persons on the legal registration of the conditions necessary for the proper realization of their rights and interests protected by law (G.M. Pisarenko [30, p.8]);
- use of the term «administrative authority» to indicate the subject of the provision of administrative services (S.L. Dembitskaya [31]);
- definition by the subjects of the provision of administrative services of executive bodies, local self-government bodies, and their officials (V.V. Petyovka [32]);
- is a «positive» individual act adopted in order to meet certain interests of individuals or legal entities (O. Lukhtergandt [33]).

The abovementioned and other researchers of the problem of the essence of the administrative service noted its declarative character and correspondence with the public-service character of the direction of management activity.

Without denying, in general, against scientifically valid approaches, it is advisable to form the perception of an administrative service from the standpoint of taking into account the essence of the basic category of «service», which is disclosed in civil law. I.V. Zhilinkova noted that the service is considered a certain intangible benefit provided by one person (the executor) and consumed by another person (customer) in the process of committing an executor of certain actions or certain activities [34, p.399].

From this definition of the concept of a service one can draw a conclusion on the consumer quality of the service, due to which the person who consumes the service acquires certain intangible benefit. In the administrative-legal relations, the consumer quality of services is manifested in the activities of executive authorities, local authorities, their officials as providers of services to assist the consumer in obtaining a certain permission, creating conditions for the consumer's legalization of the administrative service of a certain right by obtaining a permit, registration or other actions. This approach takes into account the transformation of priorities in the administrative-legal regulation of relations in the field of economics, objectively introduces the dispositive principles of state power.

With regard to administrative contracts, it should be noted that they are already quite actively used in the field of economic activity. They can be classified into:

- contracts in the field of state property management (for example, Typical general agreement on the transfer of authority to exercise the functions of corporate rights management by the State to the competent authorities [35]),
- procurement contracts (according to the Law of Ukraine «On Public Procurement» [36]);
- contracts for the provision of certain services (property or physical protection, contract of carriage in public transport, etc.);
- contractual form of delegation of authority and others.

Zh.V. Zavalna allocates the following three groups of administrative agreements: on the regulation of coordination relations; change of powers; regulation of relations in the budgetary sphere [18, p.259-328].

However, current legislation does not provide for the definition of forms of administrative agreements, general rules and procedures for their conclusion. Such relations need to be resolved at the level of a separate Law, which may be the Law «On Administrative Contracts». The title of this Law is exactly this, unlike the proposed Zh. V. Zavalna. The title of the draft law «On the contractual regulation of administrative relations» [18, p.391], since proposed by Zh. V. Zavalna.

The banner name contains the doctrinal category - «administrative relations», which requires additional interpretation by the law enforcers.

Conclusions. The analysis made it possible to note the following.

The need for a doctrinal analysis of the problem of the use of forms of indirect regulation of the economy is due to the primacy of human-centeredness in the activities of state bodies, which determines the stimulation of social activity of a person, provided that the state's interests are assured, which relate to sustainable economic development, and the welfare of the population.

The legal possibility of alternative choice of economic relations between the behavioral options within the law, which is typical of the discretionary method, is realized, in particular - through such forms of indirect regulation as permits, administrative agreements, administrative services.

Modern problems of the use of the dispositive method through the appropriate forms of public law in the field of economics are due not to the disadvantages of the current legislation, but to the lack of established doctrinal provisions on the subject of the permitting activity, the content of the administrative agreement, the essence of the administrative service.

Thus, the permit activity applies to many business areas and is implemented in various forms of permit documents: permits, certificates, conclusions, approvals, etc. The effect of the norms of the Law of Ukraine «On the permit system in the field of economic activity», as well as some by-laws, does not eliminate the need for the elaboration of a doctrinal approach to streamlining the permissive relations in the field of management, the application of which will be the theoretical basis for the formation of legislation aimed at guaranteeing the proper realization of constitutionally entrenched right man and citizen for entrepreneurship. Solving this problem will create the conditions and doctrinal basis for the answer to the complex question about the degree of limitation of imperative influence on the sphere of management. The problem of the essence of the administrative service is logically related to the problem of permissive activity, since such a logical connection is defended both in theoretical approaches substantiated by scientists and in the current legislation. Granting the right and imposing a duty on the state bodies to provide administrative services is in line with the public service orientation of state activities, which was noted by academician V.B. Averyanov. The substantiated scientist's provisions about the essence of administrative services require further elaboration taking into account the content of the basic category «service». The necessity to carry out doctrinal analysis of the essence of the administrative agreement is due to the single nature of scientific research on this issue, on the one hand, and the legal uncertainty of the form, procedure of conclusion, legal consequences and the order of termination of its action.

The criteria of delineation of the court jurisdiction with the allocation of disputes in the sphere of economic activity with the participation of state and other bodies that are not economic entities are proposed to the jurisdiction of administrative courts, which should be applied in aggregate: a) a dispute with the participation of a state body or local government arises in relation to the performance of their managerial functions and functions of legal protection of public order; b) relations related to the implementation of the subject of legal authority may arise at the initiative of any of the parties; c) the activity of the subject of the power of attorney does not require the consent of the other party.

Two mutually related aspects of the problem of the use of forms of indirect regulation of the economy are identified: the definition of groups of social relations in the field of economic activity, which are the subject of administrative-legal regulation and the formation of a conceptual approach to the limits of the application of forms of indirect regulation of the economy.

There are four groups of social relations that arise in the economic sphere and are the subject of administrative-legal regulation: 1) relations related to the ordering of economic activity to ensure the rights and interests of citizens - registration, licensing, patenting, standardization, certification, granting of permits (in the terminology used in the current legislation); 2) relations to ensure the protection of the rights of all subjects of ownership and economic activity, social orientation of the economy - the procedure for quota, state regulation of prices and tariffs, the application of norms and limits, antimonopoly regulation; 3) relations in the field of control; 4) relations in the area of administrative jurisdiction of the resolution of public-law disputes arising in the field of economic activity. Separately allocated administrative-legal relations in the field of corporate rights management of the state.

Among the conceptual foundations of the use of permits as forms of indirect regulation of the economy, priority was given to the subject of permissive activities. The basis of the allocation of the subject is proposed to lay the rules of the Constitution of Ukraine (Articles 3, 17, 42), as well as the Law of Ukraine «On National Security of Ukraine». Relying on the norms of the Basic Law, it is noted that the use of various permissions by the state is subject, first of all, to the following areas of entrepreneurship: a) aimed at monopolization of the market of goods and services; b) have a risk of negative impact on the national, including economic, security. The last group of business areas that require the issuance of permits are: activities related to operations with weapons, ammunition, explosives; which affects monopolization of markets; connected with the use of fuel and energy resources; connected with the provision of public health; which negatively affects the state of ecology; associated with innovation; relates to information provision.

It has been established that in order to ensure the development of the system of providing administrative services it is necessary to: minimize the applicant's participation in the procedures for providing administrative services, clearly define the criteria for the payment of administrative services, establish regulatory guarantees for informing people about the timing of the provision of administrative services, unify the procedures for the provision of administrative services and reproduce them in the relevant standards .

Despite the existence of a sufficiently large number of scientific papers devoted to the essence of administrative services, there is a need to continue research in this direction. It is noted that in the administrative-legal relations the consumer quality of services manifests itself in the activities of executive authorities, local authorities, their officials as subjects of providing services to assist the consumer in obtaining a certain permission, creating conditions for the legalization by the consumer of the administrative service of a certain right by obtaining permission, registration or other actions.

It is indicated that administrative contracts are actively used in the field of economic activity. They are classified in: contracts in the field of state property management, procurement contracts, contracts for the provision of certain services, contractual form of delegation of authority, and others. The expediency of drafting and adopting a draft Law «On Administrative Contracts», in which the concept and content of a contractual form of regulation of public-legal relations - an administrative agreement, would be reproduced.

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Chapter 12

Distinctions of mediation within alternative administrative dispute resolution

The dynamic development of society requires a modern-day lawmaker's response. It's well known that the existing judicial system in Ukraine is costly and long-lasting. Analyzing the current system of justice, it is seen that it does not carry out its assigned tasks. Legislation of Ukraine requires the creation of a new institute - an entity for alternative dispute resolution. This institute is closely connected with the basic principles and functions of mediation, but it also has completely different characteristics. Considering the administrative and legal status of a subject of alternative dispute resolution - it should be noted that there is taking place a process of its formation and inclusion of new entities in the institute, which are related to an alternative solution of a public legal dispute. Lately, Ukraine is actively seeking alternative ways of dispute resolution, which will be applied in almost all categories of public and private disputes.

The partial borrowing of mediation distinctions in resolving administrative conflicts is interesting. However, for the full functioning of this system, it is necessary to consolidate the procedure at the legislative level, since today there are only unsuccessful attempts to introduce mediation in the form of drafts of the Law of Ukraine "On Mediation", projects for the implementation of mechanisms for the alternative dispute resolution into the judicial system, discussions at roundtables, conferences etc. It should also be noted that some elements of alternative dispute resolution in Ukraine have existed for a long time; for example, in Ukraine, from June 2008 till December, there remained in force a Joint Program of the European Commission and the Council of Europe 2010 called "Transparency and Efficiency of the Judicial System of Ukraine" responsible for the implementation of a pilot project on mediation in resolving administrative disputes in court. This experience was extremely useful, since the citizens' appeals resulted in a high percentage of cases that ended with the reconciliation of the parties through the application of the judicial mediation procedure. To the disadvantages of an alternative conflict resolution there must be attributed the fact that they have neither meaningful nor procedural certainty.

Despite these projects, there are several problem points in Ukraine due to the lack of a single legally established system of entities for alternative dispute resolution.

The administrative and legal status of entities for the alternative dispute resolution has a problem, since one party of the conflict is a representative of

public authority. The specific subjective structure of the administrative-legal dispute causes practical difficulties in implementation. This is due to the relations of power and subordination, wherein the parties a priori are not equal; this creates practical difficulties in finding a compromise, since the representative of the authority usually doesn't show the willingness to make concessions to natural or legal persons. The psychological impact, which affects one of the parties, should also be noted. This also goes for the sense of power that other party possesses. In this case, it is extremely necessary to have a clear position on the management of the subject of power, legislative provision, and the extension of powers for negotiation. Insofar as, according to Art. 19 of the Constitution of Ukraine, the bodies of state power and bodies of local self-government, and their officials are obliged to act only based on the limits of authority and in the manner provided by Constitution and laws of Ukraine.

So, the representative of the government is limited in his actions; this problem requires legislative regulation with a direct indication of the right of the state body to settle the dispute with the help of subjects of alternative dispute resolution. A representative of the government should be able to assume responsibility and take certain actions before a private individual in resolving the dispute, negotiate with him/her and show greater variability in the exercise of power. Despite the fact that administrative disputes are recognized as subjects to mediation and included in the scope of mediation, - the relevance of this issue is confirmed by the lack of direct approval of legislative changes in draft laws to effectively implement mediation in administrative disputes.

It should be noted that classical mediation is not peculiar to disputes between a representative of the government, since the principle of initiative and voluntary participation of participants in this procedure is inherent to it. Therefore, speaking about the regulation of administrative legal disputes, it is advisable to consider a separate system, which consists with subjects of alternative dispute resolution. It is such a system that will allow the public authority to regulate conflicts in an extrajudicial manner in order to satisfy the interests of the state and ordinary citizen.

The rapid resolution of disputes arising in the course of the implementation of public administration will help to fulfill the main duty of the state - to ensure the rights and freedoms of man and citizen. The legislator has to regulate the data of the legal relationship in a such way that the usage by entities of the alternative dispute resolution should become one of the main instruments within the competence of the subject of authority.

However, only one settlement of the mediation procedure at the legislative level will not be enough to promote and extend this procedure in resolving administrative disputes. We can turn to the experience of some post-Soviet countries, where laws on alternative dispute resolution have already been

adopted. It is obvious that the process of distribution of these methods is inadequately slow.

Before the state there is a problem not only of legislative provision of the mechanism for the functioning of alternative dispute resolution, but also the provision and control of the implementation by the parties of the agreements set forth in the agreement. It is extremely important for the parties of the conflict to understand the responsibility for the decision and show a willingness to implement it.

Particular attention needs to be turned to the training of the subjects of the alternative dispute resolution, since it is necessary to professionally exercise the impossibility of pressure on the negotiators, to adhere to the principle of equality and legality.

According to USAID experts, it is crucial to ensure the quality of services provided whenever administrative authorities propose or agree on alternative dispute resolution methods, when judges advise the parties to submit the dispute to alternative consideration or when advocates advise their clients. The quality of alternative dispute resolution is also necessary to ensure the credibility of the general public to this process. In order to ensure the principles of equality and impartiality, as well as the rights of the parties, - neutral mediators, conciliators, negotiators or independent arbitrators - should not be state officials or employees and should not work part-time in state bodies. Member States should try to provide adequate training programs for neutral mediators and, in view of the differences in curricula, to develop common standards for such training. Neutral mediation training programs should include, at least, the following:

- principles and objectives of alternative methods of resolving disputes between administrative authorities and private parties,
- the attitude of neutral mediators to work and their professional ethics,
- the signs, stages and objectives of each method - mediation, reconciliation, settlement through negotiation and independent arbitration,
- cases of expediency, structure and progress of each alternative dispute resolution procedure between administrative authorities and private parties,
- the legal basis of various alternative methods of resolving disputes between administrative authorities and private parties,
- skills and methods of communication and negotiation,
- skills and methods of various alternative methods of resolving disputes between administrative authorities and private parties,
- role plays and exercises in sufficient quantities;
- peculiarities of various alternative methods of resolving disputes between administrative bodies and private parties,

- assessment of knowledge and competence of the person undergoing training [1].

Adoption of special legislation that will regulate the scope of alternative dispute resolution is not a comprehensive condition for the successful implementation of these procedures. Important in this context is the creation of realities in which the appeal of the parties to the conflict to alternative dispute resolution will be advantageous for them, and the final agreement will be executed and guaranteed by the state. This agreement is obligatory in writing and signed by all parties. At the request of at least one of the parties, it may be notarized. In this way, the parties will have a responsibility and a duty to perform.

In order to ascertain the impossibility of applying classical mediation in administrative matters, one should have a deeper understanding of the concept and essence of mediation.

In the legislation of foreign countries, here are the most widespread principles of mediation:

- Volunteerism, that is, making an informed decision by the parties involved in the process, about the application of such an alternative dispute resolution procedure, and the possibility to refuse participation at any stage, with any pressure on the parties to be banned (the word "voluntary" emphasizes that the decision can not be the result of external coercion or active persuasion of anyone in the need for a particular direction of action - it should not be the result of the active influence of the will of another person, but only the result of the choice of the subject, Based on full information about the situation);
- Equality of the parties - the parties have equal rights during mediation, there can be no privileges or restrictions on grounds of race, color, political, religious or other beliefs, sex, ethnic or social origin, property status, residence, language or other grounds;
- Neutrality of the mediator - the mediator must perform his duties impartially, based on the circumstances of the case, considering the views of the parties and not imposing on the parties a certain decision, which is made solely by mutual agreement of the parties;
- Confidentiality - the information received by the mediator during the mediation is confidential and can not be disclosed without the prior consent of the parties (process participants must be sure that the information they have provided will not be used against them afterwards) [2].

V.B Cherevatyuk., K. L Kiruk. consider that the procedure of mediation can be clearly structured into five main stages:

1) the preliminary stage, which consists of the preparatory stage mentioned above, and the stage of individual meetings (at this stage, the mediator examines the positions of the parties to the conflict and ensures their mutual communication);

2) the opening stage - at this stage, there is a gradual establishment of direct communication between the parties, its stages are explanations of the parties, as well as an outline by each of the parties about their position in the dispute, clarification of the reasons for the dispute and the motivation of the parties in the dispute, clarification of the parties' positions, division of the general essence of the dispute into separate components, and conclusion;

4) the middle stage - involves a joint search for solutions to the dispute; this stage consists in identifying the priority issues, clarifying the undisclosed interests of the parties, defining the common principles and interests of the parties in the dispute, discussing and finding mutually acceptable ways of resolving the dispute, and seeking consensus. This is the stage, wherein a "brainstorming" takes place, during which the parties express and record any ideas, even incredible ones at first glance, which are relevant to their problem, and after generating solutions the parties group them in accordance with topics and interest groups;

5) final - the conclusion of an agreement, which is prepared exclusively by the parties, contains reciprocal actions and after its final formulation is checked for admissibility and opportunity of execution and justice, signed by the parties [3].

A German mediator F. Y. Memel notes that there are two possibilities for legalizing a mediator's status in judicial mediation: either to give the mediator, as a judge, an assignment to perform functions of justice, or to offer mediation as part of the administrative activity of the courts. If the mechanism is chosen, wherein the mediator acts as a part of justice and acts as a judge to whom an assignment is given, then direct powers established by law are required for this. In fact, there are full grounds in favor of qualifying judicial mediation as another area of legal proceedings, and, using this mechanism, it is also possible to complete a legal dispute (by concluding an amicable settlement in court, which is recorded by a mediator or a statement of recall or recognition of a claim on the basis of an "out of court" consent attained at the table mediation). However, if there is no such legislative arrangement, one can take another route and consider mediation as part of the administrative activity of the courts. In this case, the mediator does not serve as a judge [4].

According to most scholars, mediation "is a procedure for the active participation of a neutral party in the conflict, which has the authority of all conflicting participants and makes efforts for a mutually beneficial settlement of the dispute. The mediator can not give advice, the decision is always taken by the people who came to him for help "[5].

Some experts say that mediation is "the negotiations between the parties with the participation and under the leadership of a neutral third party, an intermediary who has no right to make a binding decision for the parties" [6]. Other ones note that mediation is the resolution of disputes by entities with the support of an uninterested person, deprived of the opportunity to consider and

resolve the dispute [7]. Lawyers argue that the term "mediation" means that the process of reconciling the parties through their voluntary desire to begin negotiations with the participation of a third person, namely the mediator who helps to resolve the dispute, and only in this case, mediation may be regarded as an alternative way of settling disputes [8]. Experts believe that mediation is mediated by the law of a third party who does not have the competence to resolve the dispute substantially. Also, the notion of mediation is defined as a process "in which an uninterested, impartial, skilled person helps the parties involved in conflict to achieve a mutually acceptable settlement. The mediator helps the parties reach an agreement by facilitating and directing communication between them, helping them obtain relevant information and making the right choices. Responsibility for reaching an agreement rests on the parties themselves; the mediator has no authority to solve problems instead of the parties" [9].

D. Kovaliova defines the main task of the mediator as follows: "The mediation procedure is because the parties with the participation of the mediator should come to a consensus and achieve a mutually acceptable agreement. Such procedure is not litigious. The mediator is not an arbitrator, representative of any party to the dispute or mediator between the parties, doesn't have the right to decide as to the dispute. He only helps to resolve the dispute, helps the parties to the dispute in the course of the debate to reveal their true interests and needs, find a solution that satisfies all parties to the conflict" [10].

By communicating with the parties and setting up the right questions with a professional mediator - it is possible to identify the true interests of the parties and find a win-win consensus for all parties.

P.P. Shevchuk notes that "alternative ways of resolving administrative disputes do not encroach upon the functions of state administration, which do not distort the essence of state power powers, but improve them, compensating for the formalities inherent to them. They are successfully used in many countries and receive the necessary legislative regulation" [11].

A.N. Prizhennikova considers that "the procedure of mediation can be applied in the course of consideration of tax disputes, on issues of appeal of unlawful decisions and actions of state authorities or local self-government bodies and their officials, actions (or inaction) of civil servants, disputes that arise in the process of employing citizens on civil service, its passage, dismissal, etc., disputes between citizens and managing organizations, disputes over violations of pension legislation, disputes concerning housing privatization, etc." [12].

According to M.M. Lazarenko, one of the main problems of the establishment of mediation in Ukraine is the lack of a clear understanding and a unified view on how mediation should be "embedded" in the Ukrainian legal system. It is widely believed that mediation should be considered as part of the proceedings, and that it should be conducted by a judge who received the order.

Proponents of this development model believe that judicial mediation is intended to improve the functioning of the legal system and propose an alternative way of resolving a dispute, which avoids factors such as the length and cost of the trial, its possible overlapping, the overload of courts, and so on. On the other hand, quite a lot of specialists point-blank deny the expediency of absorbing the existing system of justice mediation procedures. They insist that the provision of mediation services is a normal commercial activity. Commercial, or, as it is called, a market mediation – is a process, wherein the reconciliation of parties is carried out by a specially prepared mediator, whose services are paid for by the parties [2].

Distinctions of paying for mediation services require a legislative support. Opinions of scholars vary on who should pay for mediator services: whether it's the party that initiates an appeal to the mediator, or it should be in equal parts between the parties in the negotiations or must be financed from the state budget. In addition, an important issue is whether the mediator is to carry out its business commercially or on a royalty-free basis. Some scholars are convinced that the activity of the mediator should be like the free help of lawyers whose activities are paid from the state treasury. In cases that do not provide free assistance to citizens, such expenses will be charged to a natural or legal person.

I.M. Sopilko notes, that in the course of development, the number of unlawful encroachments on the media and personal information, namely on personal data, is constantly increasing. Accordingly, such actions pose a threat not only to state and collective interests, but also to the interests of individuals [13]. That is why the important advantage of mediation lies in the confidentiality of the negotiations.

For reasons that impede the significant development of mediation, there belong primarily the following:

- imperfect borrowing of international experience, limited range of legal relations, which may be subject to the mediation procedure;
- mediation services are more appealing in countries where appeals to the court are financially costly and inaccessible to a large number of people;
- no delimitation of the tasks and functions between mediators and lawyers; lack of support for the judicial system in the development of mediation.

The question remained unsolved – the closure of proceedings regarding the bringing of a person to administrative liability in connection with the expiration of the time of imposing an administrative offense [14]. That is why, it's necessary to foresee the suspension of terms of bringing the person to administrative responsibility at the time of negotiation of the subject of extrajudicial settlement of disputes.

Classical mediation offers reducing the burden on the judicial system, so judges deal with the most complex cases, where the agreement between the negotiating parties is impossible. Therefore, most scholars promise to introduce compulsory mediation at the stage of preparatory proceedings. Since, at this

stage, the most probable reconciliation of the parties is possible. Obligation, in this context, means not passing the entire mediation procedure, but only the parties' request to the mediator at the stage when the case is being prepared for trial. However, this approach has serious shortcomings. For example, the duty to appeal to the mediator is compulsory and instead of the useful purpose of the legislator - the settlement of the dispute - will lead to a formal delay in the trial.

Cherevatyuk V.B., Kiruk K. L. note that mediation is an alternative way of resolving a dispute, which is a structured negotiation process, carried out with the help of an independent, neutral and qualified mediator (mediator), which helps the parties to the dispute on their own, on a voluntary basis, to reach an agreement to resolve a dispute that will be in the interests of each of the parties to the dispute. Mediation does not focus on finding and proving the rightness of a particular party. Mediation is intended to intensify the potential of the parties to the controversial legal relationship, inducing them to independently search for the possibility of eliminating the dispute on mutually beneficial conditions for the preservation of business relations. The mediator is responsible for organizing the negotiation process and facilitates the search for a mutually acceptable solution [3].

According to Lazarenko M.M., mediation is a very important tool in resolving disputes, which will help to unload the judicial system and make it more effective. This is because it is expedient to introduce a judicial model of mediation into the Ukrainian judicial system. After all, the introduction of a mediation court form does not exclude the introduction of an out-of-court mediation as well, and the parties to the dispute must independently decide which mediator to turn to - to the court mediator or to the extrajudicial (commercial) mediator. Judicial mediation can become another one, an additional alternative among methods of resolving disputes. Moreover, having a positive experience in conducting judicial mediation in foreign countries, where judicial and extrajudicial mediation exist side by side, it is inappropriate to talk about the ineffectiveness or inappropriateness of introducing judicial mediation in Ukraine. But first of all, it should be noted that the mechanisms for resolving disputes are a serious issue, and even more so, if they are applied in one of the three branches of state power – a judicial one. So, the development and implementation of judicial mediation in the Ukrainian judicial system should be approached very seriously and responsibly, with the obligatory involvement of specialists from those countries, where judicial mediation is a widespread, effective and well-established instrument for resolving disputes [2].

Analyzing the legal nature of alternative ways of resolving disputes, one can emphasize the following features: the use of alternative methods is possible, both with the introduction into the existing judicial system, and with the use as an alternative to judicial review. For the full implementation of the out-of-court settlement of administrative disputes, comprehensive legislative support of the

peculiarities of the functioning of the entities of the extrajudicial settlement of disputes is necessary.

It should also be noted that the effectiveness of judicial mediation has also been proven in Ukraine through two pilot projects supported by the European Commission and the Council of Europe: "The procedure for the selection and appointment of judges, their preparation, disciplinary action, division of cases and alternative dispute resolution" and "Transparency and efficiency of the justice system in Ukraine ". Within the framework of these projects, several measures were implemented in Ukraine to introduce one of the methods of alternative dispute resolution methods - mediation – into the system of legal proceedings of Ukraine. In particular, with the participation of experts from the Council of Europe, four courts were designated for the implementation of these projects: the Vinnytsya District Administrative Court, the Donetsk Appellate Administrative Court, the Ivano-Frankivsk City Court, the Bila Tserkva Town Court of Kyiv Region, where an experiment on the use of mediation lasted for two years during consideration of administrative, economic and civil cases [15].

By the Decree of the President of Ukraine "On the Strategy for the Reform of the Judiciary and Related Legal Institutions for 2015-2020" it is seen that among the first-rate reforms to be implemented in the state, special attention is paid to judicial reform, aimed at establishing a high-level rule of law at the levels of legal culture in society, the activities of all subjects of social relations on the basis of the rule of law and the protection of human rights and freedoms, and, in the event of their violation, - at their just restoration within a reasonable time . At the same time, analyzing the current system of justice, it is noted that it does not fulfill the tasks set before it at the proper level. At the same time, factors of such situation include absolutisation of the principle of the extension of jurisdiction of the courts to all legal relationships, imperfect procedural instruments to protect the rights and interests of individuals, including the undeveloped system of alternative methods of dispute resolution. Therefore, it is concluded that one of the main objectives of such reform is to increase the efficiency of justice by expanding the ways of alternative (extrajudicial) dispute resolution, in particular, through practical implementation of the mediation and mediation institution, introduction of effective procedural mechanisms to prevent cases being considered in the absence of a dispute between the parties, and studying expediency of the introduction of judges of the peace[16].

"Ukraine became a member of the Council of Europe on November 9, 1995. On September 26, 1995, the Parliamentary Assembly of the Council of Europe adopted a positive conclusion on the application of Ukraine for joining the Council of Europe. The Committee of Ministers of the Council of Europe adopted a resolution on Ukraine's invitation to become a member of the organization "[17].

"On March 21, 2014, Ukraine signed the Partnership and Cooperation Agreement between the European Communities and Ukraine, which allows the transition from partnership and cooperation to legal integration and bringing national legislation to European standards" [18].

The Convention for the Protection of Human Rights and Fundamental Freedoms has been ratified by the Law of Ukraine No. 475/97-BP from 17.07.97. In accordance with Article 6.1 of the Convention, as interpreted by the European Court of Human Rights, the member states of the Council of Europe are obliged to ensure the rights and freedoms enshrined in the Convention to all who are in their jurisdiction. [19]

The European Union, the world community are considering the use of alternative dispute resolution as an important part of the measures designed to provide people with free access to justice.

At the Third Summit of the Council of Europe, the Heads of State and Government decided "to make full use of the Council of Europe's capacity to develop standards" and "to contribute to the implementation and further development of the legal treaties of the Organization and the mechanisms for cooperation in the field of law." A decision was also made to "assist Member States in the fair and rapid administration of justice and in the development of alternative dispute resolution".

In the light of these decisions, the European Commission on the Efficiency of Justice (CEPEJ), which Charter states that "promoting better implementation of the international legal instruments of the Council of Europe in relation to the efficiency and justice of jurisdiction", included in its priorities a new type of activity designed to enable effective implementation Council of Europe treaties and standards related to alternative dispute resolution.

The most authoritative organizations in the international arena promote the use of alternative dispute resolution procedures. The Universal or Regional Convention on Alternative Dispute Resolution is absent, regulation is carried out through acts of so-called soft law.

Therefore, the Working Group on Mediation (CEPEJ-GT-MED) was established to increase the influence of the Recommendations of the Committee of Ministers in member states, such as:

- Recommendation No. R (81) 7 of the Committee of Ministers of the Council of Europe to Member States on measures to facilitate access to justice on 14 May 1981;
- Recommendation Rec (98) 1 on mediation in family matters of 21 January 1998;
- Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe to the Member States of the Council interested in organizing criminal mediation of 15 September 1999;

- Recommendation Rec (2001) 9 on alternatives to litigation between administrative authorities and individual parties (administrative cases) of September 5, 2001;
- Recommendation Rec (2002) 10 on mediation in civil matters of 18 September 2002;
- Resolution of the Economic Social Council of the United Nations of May 4, 1999 "Development and implementation of measures for mediation and restorative justice in the field of criminal justice";
- Resolution of the Economic and Social Council of the United Nations of July 24, 2002 "Basic Principles of Application of the Program of Restorative Justice in Criminal Matters";
- Directive of the European Parliament "On Certain Aspects of Mediation in Civil and Commercial Disputes" dated May 21, 2008;
- The European Code of Conduct for Mediators of 2 June 2004 was developed by an initiative group of practitioners representing more than 30 European organizations dealing with alternative dispute resolution with the support of the European Commission and adopted by Conference in Brussels on 2 June 2004;
- The UNCITRAL Model Law on International Commercial Conciliation (UNCITRAL) model developed by the United Nations Commission on International Trade Law (UNCITRAL) in 2002.

Based on the above-mentioned Recommendations, the Committee of Ministers on Mediation issues, on 7 December 2007, adopted the guidelines and specific measures aimed at ensuring their effective implementation, in particular:

- Guideline No. 13 for better implementation of the existing Recommendation on Mediation in Criminal Matters;
- Guideline No. 14 for better implementation of the existing Recommendation on Mediation in Family Matters and on Mediation in Civil Matters;
- Guiding Principles No. 15 for better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and individual parties;

Member States need to work on the study and adaptation of the Recommendations to the provisions of national law. Firstly, the legislator needs to assess the impact of existing in the state of alternatives to litigation between administrative authorities and private parties to comply with existing practices in member states. However, Member States are different from each other in terms of introducing alternative dispute resolution between administrative authorities and private parties, "primarily due to the presence of the following barriers:

- states did not realize the potential utility and effectiveness of alternative dispute resolution between administrative authorities and private parties;

- as a result, they did little to clarify administrative authorities the benefits of alternative models for resolving such disputes that could lead to non-traditional, effective and rational results;
- distrust of courts to the development of out-of-court alternatives to a court settlement of disputes in the administrative area;
- lack of awareness of various alternative dispute resolution methods in this particular area;
- absence of specially trained neutral mediators in this area;
- a small amount of scientific research alternatives to resolving administrative disputes in court "[1].

In view of these obstacles, the working group has developed non-binding guidelines but should assist States Parties in implementing the Recommendation on alternatives to litigation between administrative authorities and private parties.

Directive 2008/52 / EC concerning some aspects of mediation in civil and commercial matters is of considerable interest in terms of improving the legal conditions for pre-trial settlement of commercial disputes using the mediation process. Recognizing the accessibility of justice, one of the fundamental principles of the legal area of freedom, security and justice, the Council of the EU has initiated the application of both judicial and pre-trial methods for resolving disputes, including the use of media services. In order to use mediation in the country, there should be legislation regulating this process. The Directive states that the provisions relate to mediation in the settlement of international legal disputes, but this is not an obstacle to their application at the national level. The directive is recommended for use in civil and commercial matters, except for disputes in which the parties are not entitled to make independent decisions under the laws of the country.

According to Directive 2008/52 / EC, mediation, depending on the subject of initiation and the grounds for implementation, may be:

- initiated by the parties to the dispute;
- as a result of a proposal or a court hearing;
- in order to comply with the law.

Thus, in accordance with Directive 2008/52 / EU, the procedure for pre-trial mediation may be voluntary or compulsory in accordance with Clause 1, Article. 5 that a judge, on the basis of the set of circumstances of the case, has the right to invite parties who argue to resolve the conflict through an intermediary and participate in the information session if such sessions are held and are readily available. An important emphasis on introducing alternative ways of resolving disputes in the justice system of the state is made in international legal documents. In particular, paragraph 3 of the Recommendation of the Committee of Ministers of the Council of Europe No. R (81) 7 on measures to facilitate access to justice of 14 May 1981 recommends that Member States introduce measures aimed at

facilitating and, where possible, encouraging reconciliation of parties, as well as a friendly settlement of disputes before or after the commencement of the proceedings. Recommendation CM / Rec (2010) 12 of the Committee of Ministers of the Council of Europe to Member States on judges: independence, effectiveness and responsibilities of 17.11.2010, paragraph 39, points to the need to promote "the application of alternative dispute resolution mechanisms", and Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe to Member States on measures to prevent and reduce excessive workload in the courts of 16.09.1986 suggests examining the feasibility of including in the judicial policy of the Member States the task of "taking measures to facilitate access to alternative methods to resolve disputes and improve their effectiveness as a procedure that can replace judicial proceedings "(paragraph IV).

After conducting monitoring studies, studying and analyzing the achievements of some of the leading countries in the field of mediation, the Council of Europe invited Ukraine to take some steps towards reforming its legal and regulatory framework. In particular, it refers to the recommendations and guidelines that were set out in several documents, among which domestic law disputes are relevant recommendations for mediation in civil matters.

Within the framework of the "Transparency and Efficiency of the Judicial System" program, implemented under the auspices of the Council of Europe, pilot projects were implemented on the development of mediation in Ukraine. Four courts (Bila Tserkva Town Court of Kyiv Region, Vinnytsya District Administrative Court, Donetsk Appellate Administrative Court, Ivano-Frankivsk City Court) were selected to participate in the program. Based on this, mediation technologies have been worked out. Parties to the mediation process in these courts became such subjects of power as the tax administration, the administration of internal affairs, state administrations, and others. In Vinnitsa District Administrative Court, 28 cases were handed over to mediation for 5 months, mediation was conducted in 26 cases, of which 18 cases were successful [2].

In general, an approach based on voluntary principles is currently predominating in continental Europe. It consists in the fact that the appeal to the mediator is voluntary and carried out without any coercion, with his own expression of will. In countries of common law, this principle has not come to fruition because of the lack of understanding by business representatives of the benefits of out-of-court conflict resolution.

It should be noted that the modern procedural law of most European countries allows the possibility of combining traditional justice and alternative dispute resolution procedures. One example of such an association is judicial mediation with the participation of a judge. Unlike the conclusion of an amicable settlement outside the judicial mediation procedure, the settlement of a dispute with a judge involves the achievement of an agreement between the parties based

on their interests in a dispute involving a qualified mediator (judge), and such an agreement is not always drawn up in the form of a settlement, at that time as a trial can be completed, for example, in connection with the refusal of the plaintiff from the claim [15].

The first attempts to make the mediation procedure mandatory were made by the courts of Great Britain and the United States. However, this did not bring the desired effect, as the parties and their representatives considered the pre-trial settlement of the dispute as one of the obligatory bureaucratic procedures, which was necessary to go further for the adoption of the case before the court. Since the beginning of the 2000s, the British courts began to apply new procedural rules. They should have encouraged the parties to resort to any alternative procedure for resolving their disputes, as a rule, to assist the intermediary before proceeding with the trial "[20].

Today in Netherlands there is a "Mediators Federatie Nederland" mediation that acts on the principles of professionalism and disinterest. An appeal to a mediator in the Netherlands is voluntary, as a result of the application - there is a written mediation agreement. In this country, too, the high efficiency of concluding a reconciliation conflict can be traced.

In France, "the mediation procedure is governed exclusively by the current Code of Civil Procedure" [21]. The mediation procedure in a given country can be applied to the whole or part of the dispute. The length of consideration is up to three months but may be extended once for three months at the request of the mediator. The issue of termination of the mediation procedure is to be resolved only in a court session with the participation of all parties. A mediator may be a court appointed by both a physical person and a legal entity. If the mediator is a legal entity, his representative proposes to the judge a candidate who will provide mediation on behalf of the relevant legal entity. The judge, at the request of the parties, establishes a mediation agreement, which is executed as a separate procedure [22].

The German Law "On Supporting Mediation and Other Procedures for Out-of-Court Settlement of Conflicts" (Gesetz zur Förderung der Mediation und Verfahren der außergerichtlichen Konfliktbeilegung) is progressive [23]. Interestingly, in this country, mediation can be divided depending on the initiator: the will of the parties, the proposal of the court, the lawyer's proposal.

In Italy, the Italian legislation on mediation is based on Act No. 5 of 17 January 2003 on mediation for corporate and insurance disputes. According to this Law, if in the agreement of the parties or if the internal documents of the corporation provides for a mediation procedure, the court has no right to consider the dispute until the parties have mediated. The law also confirms the powers of public and private organizations with experience of successful work in the field of dispute settlement, to provide organizational support for the mediation procedure,

provided that they are registered with the Ministry of Justice. The failure of the party to mediate and its unfairness in negotiations is considered when a court makes a decision on the distribution of costs for the trial [24].

In Austria, the mediation procedure has its own peculiarities. Interestingly, when applying for a mediator, the limitation periods are stopped at the time of the mediator's case.

In India, the most authoritative representatives of the community involved in the resolution of conflicts involved the so-called "panchayati bodies". Settlement of disputes is carried out on the basis of moral and religious principles and internal social norms based on them. But in Kyrgyzstan in 2002, the Law "On the courts of the elders" was adopted [25].

In Israel, the mediation procedure is legalized in legislative acts, in particular: Article 79 (Gimel) of the Judicial System Act 1984; the resolution to the law on the judicial system (mediation) -993; Article 99 (Alef) -99 (iodine-Alef) regulations on the civil procedure. In this country, there is a fixed order of signing the agreement, the rights and duties of the mediator are fixed. An informal meeting is a part of a civil procedure that provides preliminary information on mediation to the parties to the conflict and how to resolve it in pre-trial manner. The purpose of the informative meeting is to introduce the opponents of the civil action to the media procedure [24].

Thus, the Article 79 (Gimel) of the Judicial System Act (unified version) - 1984, gives the right to court with the consent of the opponents, lodge a claim for resolving the conflict through mediation procedures. In particular, this article defines the powers of the mediator and his duties in relation to the court. According to the article there were decrees issued to determine the status and powers of the mediator.

In China, the Law "On People's Mediation" came into force, where the law regulates the resolution of disputes among citizens at a minor level. The main structures that carry out mediation are: committees for people's mediation, established at the committees of the rural (urban) population; committees for popular mediation created by enterprises and institutions; committees for people's mediation of volost and quarterly departments; committees for national or regional mediation mediation [20]. The use of mediation in China is exemplary in its success with the Chinese philosophy that encourages reconciliation.

In some countries (Lithuania, Belgium, Malta, Spain), common alternative dispute resolution systems were adopted. These systems allow any public authority to use alternative dispute resolution procedures, as appropriate.

Lithuania offers an example of a general system for out-of-court settlement of administrative disputes, which allows plaintiffs, with the exception of several cases, to choose at an initial stage between court and extra-judicial way of resolving a case.

In Belgium, the 2005 Mediation Act applies to all types of mediation, including administrative disputes. Public organizations may conclude mediation agreements in the event prescribed by law or by a decree issued by the Council of Ministers. It also discusses the question of obtaining authority from authorities in accordance with the internal procedure for the participation in the mediation procedure. Mediation can be applied in the case of consideration of issues of administrative sanctions for minors under the age of 16 years, before applying sanctions, the state body should implement the mediation procedure. The Law on Municipalities stipulates that municipalities may apply mediation procedures in case of violation of established municipal rules, which entails application of administrative rules. If mediation is successful, then the competent administrative authority has the right to mitigate the sanction.

In Malta, each ministry was obliged to create an office whose purpose would be to assist in resolving disputes between individuals and government departments within the competence of the ministry.

In Hungary, the Act, in accordance with the general rules of the administrative procedure, provides that, if the nature of the case so allows, the administrative authorities, before deciding, must initially try to reach an agreement between the parties concerned. If the attempt is successful, the administrative authorities approve the agreement and include it in its decision.

Spain has established the basis for regulating the applicability of administrative disputes, which is achieved through negotiation. It is established that public authorities may conclude various types of agreements, settlements or contracts with the parties under private or public law, provided that they do not conflict with the judicial procedure or relate to matters that are not subject to settlement by the parties and cases that have a public interest. [26].

Exploring various types of mediation in foreign countries, M. Polischuk proposes to consider three main models:

- 1) private (extrajudicial) mediation, which is characterized by complete independence from the process of consideration of a dispute by a court;
- 2) judicious mediation, for which there is a certain coordination with the court process, but separating the procedure of mediation from the court as an institution;
- 3) mediation within the court process, for which there is a local and personal connection with the court and actions, which are realized within the limits of consideration of a case by a court [27].

Most Western European countries have created special bodies - multifunctional courts, where employees are considering the situation and, together with the participants, define a conflict resolution scheme that includes, if possible, a mediation procedure. Although some European countries remain,

where there is no regulatory regulation of out-of-court dispute resolution procedures.

Summarizing the above, one can conclude that the dynamics of the recent development of alternative ways of resolving disputes in various spheres of activity has been traced. Non-judicial regulation of disputes is becoming an extremely popular way of settling a legal dispute around the world. These innovations have significant advantages over traditional litigation. Of course, Ukraine needs to borrow foreign experience and bring domestic legislation in line with European standards.

But, for the use of mediation in resolving public disputes, there are few problematic issues that can not be solved by amending the draft law of Ukraine "On Mediation". However classical mediation has several distinctive features from out-of-court regulation of administrative disputes. That is why it is expedient to speak about a separate system of subjects of extrajudicial settlement of administrative-legal disputes with clear authority for conducting negotiations and signing of a contract agreement.

The legislator should not try to implement the procedure of mediation in administrative disputes, but - to implement a comprehensive legislative support of the entities of extrajudicial dispute resolution.

It should be noted that the Institute of subjects of extrajudicial settlement of administrative-legal disputes is a complex legal system, which has a clear structure and is aimed at the rapid termination of the administrative-legal dispute.

Exclusion of the corruption component and making it impossible to misuse its position is important in our country. Another important factor is the possibility of filing a complaint about actions or inactions of the subject of an alternative (out-of-court) dispute resolution.

It is not correct to try to apply classical mediation in administrative matters. In this category of cases it is advisable to introduce a special entity for alternative (out-of-court) dispute resolution, which in its activities will use the hybrid conciliation procedure. It is necessary to legislatively establish the administrative and legal status of subjects of alternative dispute resolution. An out-of-court dispute settlement entity may conduct negotiations in administrative matters. During this proceeding, the proceedings are suspended.

Also, the limitation period and the time period for bringing a person to administrative liability are also suspended for the time of negotiations between the subject of alternative dispute resolution. Important aspects of the agreement between the parties are set out in writing, signed by all parties and affixed by the seal and signature of the subject of alternative dispute resolution. It is also important in the cases of administrative violations to foresee a period of implementation of the agreements and responsibility for its non-fulfillment.

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Chapter 13

Proceedings in administrative courts in tax disputes as a guarantee of the legality of public administration activities: foreign experience and suggestions for Ukraine

The protection of the rights and freedoms of citizens, the rights and legal interests of legal entities in tax legal relations in Ukraine is carried out by administrative courts. The main task of administrative proceedings is to ensure the effectiveness of the protection of violated or disputed rights and legal interests of the subjects of authority and other individuals and legal entities who apply to the court. On the one hand, the Code of Administrative Justice of Ukraine (hereinafter - CAJU) is an innovative, progressive legislative act that fixes the most effective judicial method of settling disputes in the form of lawsuit proven by international practice. In particular, the principles of administrative litigation are mostly similar in content to principles of civil and economic processes such as the adversary of the parties; dispositivity (optionality); equality of all before the law and the court; provision of appeal and cassation appeal of court decisions; mandatory execution of court decisions. On the other hand, it provides for the application of procedures that are new for judicial administrative jurisdiction in Ukraine, and also provides for the use of terms that are provided only in CAJU, and there is still debate among scientists about their nature and content. These factors lead to the emergence of problems in the enforcement of law, and their solutions mainly depend on the quality of scientific support for the process of updating the current legislation and the practice of its application.

In their scientific studies, scientists have analyzed mainly the general issues of the implementation of judicial administrative jurisdiction, (V.B Averyanova, Y.P.Bityak, R.S. Melnik, O.M. Pasenyuk, Y.S. Pedko, V.V. Reshota and others), issues relating to the search for ways to ensure proper procedures for the consideration and resolution of disputes arising from tax legal relations (A.Y. Buchik, E.A Usenko and others). However, the existing scientific works have not solved most of the problems relating to the protection of rights in tax legal relations by means of judicial administrative jurisdiction, and the constant development of legislation, as well as the recent judicial reform, determine the relevance of further research activities.

As an excursion into history shows, in parallel with the proliferation of the sphere of state regulation and state intervention in various spheres of public activity, it became necessary to limit the competence of the state and government in the tax sphere and to form effective guarantees preventing violation of rights

and freedoms by state institutions. Methods of ensuring justice in the actions of the state on taxes developed in several different directions.

There is almost no indication of limiting the tax will of the sovereign, which could be compared with modern ideas of administrative justice in the ancient historical chronicles. In Roman law, a civil suit (*actio*) was understood as the procedural action by which a person (claimant, actor) requires judicial protection against a recognized adversary (defendant, *reus*) in order to force the latter to recognize the right that the claimant asserts and to behave accordingly [1, p. 34].

In the Egyptian notes, carried out during the period of Greco-Roman rule, there are separate references to laws that provided for restrictions for individuals, such as codes of administrative offenses. The Chinese emperors created the Censorate, which revised and controlled the tax activities of numerous Chinese officials, starting from the time of the Qin dynasty (221-206 BC). In many respects, the Censorate resembled a prosecutor's office and performed similar tasks. Of course, neither one nor the other organization was intended to guarantee a fair official's attitude to the tax rights of citizens. They were a means of exercising control over numerous government units and a means of ensuring a certain degree of consistency in their work [2, p. 53-54].

As G.S. Zhuravleva and A.S. Stetsenko noted, during the Middle Ages legal tax restrictions of absolute monarchies of Europe were introduced as a result of conflicts with the church, rebellions of nobles, whose requirements are reflected in the Magna Carta, and the emergence of German custom law, in which the doctrine originated that the sovereign is not above the law and can be prosecuted for his actions. These fundamental principles were primarily manifested in the provisions on the protection of property and personal freedom and contributed to the introduction of restriction mechanisms, especially through judicial decisions. The rise of the theory of liberal democracy in the 18th-19th centuries consolidated the ideas of limitations and responsibility of government for its actions, creating the basis for administrative justice mechanisms, which appeared later [3].

During the development of European states, at the beginning of the 18th century, executive tools were developed to ensure the tax liability of various bodies. In 1713, in the Swedish-Finnish law, the office of ombudsman was introduced for the first time, his competence was mainly related to the supervision of the legality of the activities of government representatives and the implementation of human rights activities in the field of tax collection.

The end of the XVIII century was the deadline for the introduction of modern methods of achieving the goals of administrative justice to ensure the realization of tax rights of taxpayers. This was the period of the Great French Revolution and the founding of the Council of State (*Conseil d'Etat*). This period is characterized by the recognition of the distinction between public and private relations and the need to introduce a separate institution, the functions of which should include

supervising the observance of public rules by the authorities. During the 19th century, the Council of State was also developed as a judicial body responsible for revision of actions of the state, and as its (state) advisory body on legal issues. During this period, it has developed mechanisms for judicial control over the activities of state institutions, which form the basis of the system of judicial review in France today. It was the French model of administrative justice that had a great influence on the development of institutions with similar functions, including in the tax process in European countries and the whole world.

The 60s, 70s of the XIX century were distinguished by the formation of administrative courts in the territory of Baden and Prussia. At that time, the German judicial oversight system was formed for public administration actions, which reflected the influence of the French dualistic judicial system. During the same period, the first attempts of general courts in England and the United States to re-examine the administrative actions of the authorities to collect taxes using traditional common law were done. Some European countries also used the courts of general jurisdiction to verify the actions of the executive authorities in the field of taxation, namely the Netherlands and Belgium, although other aspects of the approach adopted by the French Council of State were also used [4].

Key elements of modern administrative justice were developed in the United States and Western Europe in the middle of the 20th century. In many ways, this was a reaction to the extension of the tax regulatory powers of the authorities. This aspect of the activities of the authorities reinforced the importance of mechanisms for reviewing and confirming the legitimacy of those actions of the authorities, as a result of which private firms or individuals suffered significant financial losses or received substantial profits due to unjustified tax policies.

In the United States the Administrative Procedure Act was adopted in 1946. It determined the basic decision-making procedures of state agencies and the procedures for judicial review of these decisions.

The Basic Law for Germany adopted in 1949 determined the main elements of the German system of administrative justice, in which the emphasis was on the rights of citizens, including tax in relation to the government and the process of judicial support of the realization of these rights. The English courts and the French Council of State continued to develop their own practice in tax matters in the same period.

For an independent Ukraine, the legal consolidation of administrative justice took place with the entry into force of the Code of Administrative Proceedings of Ukraine in 2005. This regulatory act fixed the tasks, principles of administrative proceedings, judicial administrative jurisdiction, procedures for exercising the right to appeal to an administrative court, the procedure for reviewing court decisions and proceedings in certain categories of cases of administrative jurisdiction. A new version of the CAJU was adopted in 2017, the harmonization of court procedures

with civil and economic proceedings was carried out, and features of the procedural consideration of administrative jurisdiction cases were provided.

Judicial practice shows that in order to protect the rights and legitimate interests of a person by an administrative court, the fact of violation of a person's rights or legal interests at the moment of going to court is a required prerequisite. The mandatory conditions of violation of the human right of a person is a change in the state of his subjective rights and obligations, that is, the termination or impossibility of exercising his right and / or the occurrence of an additional obligation.

In this case it is a real or alleged violation of subjective rights or the legitimate interests of a citizen. Consequently, here arises the situation in which one of the parties to administrative legal relations thinks that its subjective rights and legitimate interests are violated or impaired by the actions of the other party. The other party does not recognize such violation. In this case, an administrative-legal dispute arises (dispute on administrative law) between a citizen and a public authority.

The term "public law dispute" is interpreted and used by CAJU in defining the concept of "case of administrative jurisdiction" (administrative case). The new version of CAJU provides for an expanded statement of provisions on the types of public law disputes (in comparison with the similar norm adopted in 2005. However, the essence remains unchanged - a dispute in the sphere of public-law relations, in which the subject of authority is an obligatory participant [5].

Article 283 of the new edition of the CAJU provides for the peculiarities of the proceedings on the application of the authorities of Revenues and Duties [5]. However, despite the update of the CAJU, the problems of legal regulation of the resolution of such disputes remained. Thus, the CAJU establishes a general procedure for appealing against the actions of the authorities of Revenues and Duties in accordance with Article 19 of the CAJU, when the basis of an appeal to an administrative court is a public-law dispute, the parties to which are the plaintiff and the defendant. In the case of the appeal of the authorities of Revenues and Duties to the administrative court, another form of appeal is provided - an application, and the basis of the appeal is not a public-law dispute. Such an application is filed in the framework of the implementation of functions of the authorities of Revenues and Duties stipulated by law in the tax field. This raises the general problem of the compliance of the procedures provided for by Article 283 of the CAJU with the tasks of administrative court proceedings established by Part 1 of Article 2 of the CAJU. Thus, the task of administrative legal proceedings is "a fair, impartial and timely resolution by the court of disputes in the sphere of public-law relations with the goal of effectively protecting the rights, freedoms and interests of individuals, the rights and interests of legal entities against violations by the subjects of authority" Article 2 CAJU [5]). It is necessary to highlight one

more inconsistency of the current legislation - a terminological one. The subject of appeal to the administrative court under article 283 of CAJU are the authorities of Revenues and Duties, although their competence concerns the tax sphere.

The term "authorities of Revenues and Duties" is used in the Customs Code of Ukraine. The "central executive body that provides the formation and implements of the state tax and customs policy, Custom and customs posts" are the bodies (authorities) of Revenues and Duties (item 34-1 part 1 article 4 [6]). That is, the Customs Code of Ukraine provides for the functions in the customs sphere, but not in the tax sphere for authorities of Revenues and Duties. Tax Code of Ukraine of 02.12.2010 № 2755-VI (revised on 01.01.2017) defines the rights of regulatory authorities (Article 20) [7].

If we look through the judicial practice of administrative courts in cases of administrative jurisdiction on appeals from the bodies of Revenues and Duties, then from 2017 to the present, 3828 decisions have been taken.

An administrative claim most accurately reflects the peculiarities of the procedural form in resolve of a public law dispute. Recognition of the existence of an administrative claim also opens up the possibility of applying in the administrative process such innovations as the possibility of third party's participation in the proceeding (even on the side of an official whose action or inaction led to a lawsuit sue); provision to the parties of all claim remedies for the protection of rights (such as rejection of a claim, change of its basis or subject matter, counterclaim, etc.); the possibility of concluding settlement agreements and etc. The grounds for filing an administrative claim are legal facts on which the claimant substantiates his claim to the defendant. Usually, the basis of a claim is a legal composition, that is, a collection of legal facts, which is the actual basis of a claim. In addition to the actual, the legal basis of the claim is important, that is, the need to indicate in it the violation of the law or another legal act. The content of the claim is constituted by those specific substantive claims of the claimant to the defendant, which arise from the disputed material public-law relationship, and about which the administrative court must deliver a decision.

However, in cases involving the appeal of the authorities of Revenues and Duties, another form of appeal is provided - an application. The application, by its nature, is not a document containing information about certain claims of the party. Consequently, several questions arise. First, the expediency of considering the question of the form of appeal of the authorities of Revenues and Duties to the administrative court. Secondly, the question arose whether the establishment of disputes on the appeal of the revenue authorities corresponded to the administrative proceedings.

Modern law enforcement activity of administrative courts has proved the existence of issues which resolution requires the quick improvement of the doctrinal provisions of the theory of administrative law and the process. This refers

to the following legislative terminological novelty, the doctrinal basis of which still needs to be developed, despite the rather active research activity. This refers to such terms as “public law dispute”, “subject of authority”, “administrative contract”, “public service”. Taking into account the novelties of the doctrinal content of the category “management” with the introduction of the public service component into it, there is a need to specify the term “managerial function”, which is key to defining a certain subject as authoritative in the sense envisaged by CAJU.

Returning to the study of international experience in litigation on tax disputes, it is advisable, first of all, to point out that the creation of the Court of Justice of the European Union (Court of Justice), the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms, the establishment of the European Court of Human Rights (hereinafter - the ECHR) became extremely important events for the development of administrative justice in Europe. A solid legal base of administrative justice and a growing volume of jurisprudence, which consists of the decisions of the ECHR regarding the EU member states is the achievement of the European Union.

Since 1971, the ECHR has taken a number of decisions regarding the interpretation of Article 6 (1) of the Convention in application of it to the administrative decisions of the signatories of the Convention. The Law of Ukraine “On the implementation of decisions and the application of the practice of the European Court of Human Rights” [8] was adopted in 2006, its norms were widely applied after the judicial reform with the adoption of the new Law of Ukraine “On the judicial system and status of judges” in 2016 and the update of procedural codes in 2017.

Pointing the impact of ECHR decisions on tax dispute resolution procedures, it is necessary to highlight a number of basic decisions relating to the Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with the protection of taxpayers' rights.

In particular, P. A. Selezen' identifies the following legal positions of the ECHR [9]:

1. Recognition (the ECHR) of right of states to impose taxes and fees at their own (Part 2 of Article 1 of Protocol No. 1 to the Convention). "Tax collection will only violate the human right to peaceful ownership of their property if it places a significant burden on the taxpayer or undermine his financial situation" [10].

2. The concept of “property” acquires particular importance for the claimant as to the recognition of the presence of a certain amount of his civil rights or in order to protect his property right (in accordance with the Article 6 of the Convention and Article 1 of Protocol No 1 to the ECHR).

3. The basic legal positions of the ECHR include: the principle of unobstructed use of property; the principle of certainty of deprivation of property; the right of the States Parties to control the use of property in accordance with the interests

of society (paragraph 61 of the decision in the case of “Spornog and Lönnroth v. Sweden” [11]). These basic legal positions of the ECHR are also related to taxation.

4. As for state interference in the right of ownership, it should be recognized legitimate only if the following conditions are met: the achievement of such interference is a legitimate goal in the public interest; proportionality of intervention; maintaining a balance between the requirements of the interests of society and the necessary conditions for the protection of the fundamental rights of the individual.

Pointing to the impact of ECHR decisions on resolving disputes arising from tax legal relations, it is necessary to note such decisions, which contain an indication of proper control over the interference of an authoritative subject in human rights, ensuring the quality of the law (its availability, predictability, establishing the limits of discretionary powers (administrative discretion), adherence to the principle of legal certainty, namely, adherence to the principle of *res judicata* (finality of a court decision) [12]. It is these legal positions that follow from the decision of the European Court of Human Rights in the case of “Klass and Others v. Germany” of September 6, 1978 [13, p. 113-115], in the case of “Cruzleir against France” of April 24, 1990 [14, p. 669], in the case of “Ponomarev v. Ukraine” of April 3, 2008 [15].

It is also necessary to point out that according to L. V. Trofimov and N. A. Kuts, the decision of the ECHR on tax matters: directly affect the implementation of legal proceedings in Ukraine, the practice of resolving disputes, including tax matters; form a high legal culture of individuals paying taxes, representatives of state authorities of Ukraine, judges; became the root cause of the introduction in Ukraine of the procedure for the examination of draft laws and other legal acts for compliance with the provisions of the European Convention on Human Rights [16].

Key principles of administrative justice, including the resolve of tax disputes are contained in the resolutions and recommendations of the Council of Europe to the implementation of decisions of the ECHR by the member states [17; 18].

Today, most modern European countries have specialized administrative courts which review the decisions of the authorities on tax disputes. These courts are the “legacy” of the French system and the Council of State, created in the early nineteenth century; they are firmly rooted in the legal culture.

In continental systems, appeals against decisions of the authorities must be brought to administrative courts, which include the courts of first instance and the courts of appeal. In most cases, decisions of the highest administrative court are not appealable.

In France, despite the strong historical precedents associated with the activities of the State Council, there are certain types of administrative cases, which, according to the law, must be considered by civil or ordinary courts [19, p. 3-4]. Currently, there are courts of first and second instance subordinated to the

State Council. The question of jurisdiction in France is decided by the Conflict Tribunal (Tribunal des Conflits), which determines whether the administrative or the ordinary court should consider the case. [2, p. 61].

The French system provides for a basic consideration of the facts and questions of law in the administrative courts of first instance, although such proceedings are almost always conducted on the basis of written presentations. The court, as an investigative body, may require the parties, including the administrative body, to provide the court with additional information and answers on its questions.

M.I. Tsurcan spoke about the "narrowing" of the State Council's powers in connection with the introduction of the three-linked system of administrative justice after reforming the French system of administrative justice in 1987, in accordance with the Law of December 31, 1987. Appellate administrative courts were created as an intermediate instance between administrative courts and the State Council. Their jurisdiction includes the review of court decisions of administrative tribunals within territorial jurisdiction. The jurisdiction of the administrative court of appeal also includes cases on the appealing decisions of prefectural bodies (since 2005) and cases on the excess of powers of authority (since 1989). These courts are characterized by the immutability of judges, the impossibility of moving them without their consent. Decisions on complaints are taken by the chambers, and in some cases by the plenary sessions [20].

Further consideration by the Council of State involves the independent decision-making by the government commissioner (commissaire du gouvernement), who prepares recommendations, in which he expresses support or objects to an administrative court ruling (and may also speak in favor of returning the case to court for further investigation). Usually, though not always, this recommendation is accepted by the State Council.

The structure of the system of German administrative justice is more like the American model than the other European systems, such as French or English. Specialized administrative courts with the authority to annul state acts existed in Germany since the 19th century, but now the existing structure is hierarchical in nature, going up from constitutional provisions to the administrative regulations and laws regarding specific bodies and issues [21, p. 327-328].

The current Constitution of Germany provides for the distribution of powers between the legislative, executive and judicial branches of government, the judicial branch is authorized to decide on the constitutionality of legislation, and on the consistency of the executive's act with the intentions of the legislators. Paragraph 40 of the Law on Administrative Procedure establishes the right to apply (even in tax disputes) free discretion, on the basis of compliance with its purpose and without going beyond the limits established by law. The task of this law is to regulate the order of activity of administrative bodies. At the same time, it provides

citizens or enterprises with the right to participate in the process of making an administrative decision in the form of the right to submit applications, be heard and participate in discussions.

In other words, citizens or enterprises will not be confronted with the fact of a final decision being delivered but should be able to submit their thoughts or suggestions as early as the administrative authority's search for a decision. In the event of non-compliance with this, citizens can exercise the right to appeal to an administrative court. In accordance with clause 114 of the Administrative Courts Regulations, the court, in the case of a claim filed by a citizen, also checks whether "an administrative act is unlawful, rejected or not extradited, because the administrative authority went beyond the limits of free discretion provided for by law or used the authority to act at free discretion in a manner that is not in accordance with its purpose." [22].

In Germany, administrative tax matters acts require specific justification with reference to the law. Administrative authorities are guided by two principles. According to the first, no administrative act should contradict the relevant law; according to the second, a specific legal basis is necessary for a positive realization of administrative powers. So, there is little space for the actions of the authorities that do not have a convincing justification in a particular law. The definition of the "legality" of administrative acts is the main objective of the judicial review process.

In Germany the administrative courts of first instance have the right to conduct a complete re-examination of cases involving tax disputes brought before them, including conducting their own investigations and collecting new evidence. At the same time, almost no attention is paid to the decisions of the body. The courts of the second and third instance are limited only with the review of legal issues. It should also be noted that in addition to the general administrative courts, there are special courts in Germany for the consideration of labor disputes, cases concerning social security and financial matters; and they all deal with issues that are essentially in the field of administrative law [2, p. 67-68.].

Austria has one of the oldest and most stable administrative and legal regimes in Europe, which was established in the XIX century. The administrative code describes procedures for handling disputes by authorities, incl. tax matters, both at the level of individual subjects of federations (lands), and at the federal level. Appeals against the decision of these primary authorities should be submitted to the administrative tribunals - either independent or those that function as the highest division of the body. A review of the decision of the court of first instance, made on the basis of the facts, as well as complaints about non-compliance with laws or procedures may be the subject matter of proceedings in these tribunals. There is a one-tier administrative court that considers appeals against decisions of administrative tribunals [23].

Austrian law allows individuals to appeal to this court only after the end of the consideration of an appeal on tax disputes at the level of administrative tribunals (that is, if all means of administrative legal protection have been exhausted). The consideration of appeals by administrative tribunals satisfies the requirement of Art. 6 of the European Convention on Human Rights on the need to consider administrative cases in two instances, although Austria is discussing the feasibility of creating an administrative court of first instance that would consider complaints at an early stage. The jurisdiction of the Constitutional Court includes conflicts between the general courts and the administrative tribunals or the administrative court, as well as disputes between itself and the administrative court [2, p. 70-71].

The Netherlands recently conducted a large-scale audit of administrative law, adopting a new, comprehensive code in 1994, which has already become a reform model for some developing countries. This Code recognizes the relevance of both the written and unwritten principles of law in deciding on the “legitimacy” of administrative actions, but introduces elements of what is called “proper administration”, which were not mentioned in the previous code. In addition, the Code establishes homogeneous procedures in the framework of the settlement of disputes, including on tax matters, as well as in the framework of the settlement of disputes related to the implementation of tax functions by the government. This allowed the abolition of several special administrative laws in the field of taxation.

Belgium has one of the most expressive traditions of judicial review of administrative decisions by ordinary courts in the continent, but it also created administrative courts that are part of the executive branch of government, including the Council of State, which is authorized to repeal administrative acts.

The current administrative model for the consideration of a tax dispute in the countries of Anglo-Saxon law, primarily in the United Kingdom and the United States, is characterized by the existence of a system of administrative tribunals that play the major role in it. Accordingly, the name “quasi-judicial model of administrative justice” comes from the system of administrative tribunals that perform quasi-judicial functions [24].

For example, in the United Kingdom (United Kingdom of Great Britain and Northern Ireland), the administrative justice system is rather different than in the continental systems - there appeals against decisions of certain agencies are considered by specialized administrative judicial bodies - tribunals [25, p. 59].

Despite the supremacy of parliament, the United Kingdom also has a historical tradition of supervising the courts to see whether the actions of the executive branch are outside its jurisdiction. In theory, when the courts restrict the actions of the executive branch, they embody the will of the parliament, stating that the corresponding action (decision) was made in excess of the powers provided by the legislation (*ultra vires*). Thus, the courts are separated from the

executive function of the government, but in the field of administrative law they implement the rule of parliament.

Judicial review of tax disputes is carried out by the Administrative Chamber of the High Court. Appeals against the decision of this court are filed in ordinary courts of appeal. In the UK, when considering ordinary appeals, a first-level appellate court re-examines the initial case, and the judicial authorities established to deal with administrative appeals actually retrial the case. However, the grounds for filing a complaint with the courts of the United Kingdom are limited to much narrower issues related to determining whether the authority exceeded its authority or acted solely in accordance with its Rules. The court is not authorized to determine the correctness of the essence of the decision of the authority.

These conceptual differences are quite vague in terms of practical application in the field of management, especially when compared with other European countries. Parliament passed general laws that define administrative procedures, and specific laws that provide for specific procedures, including on appeals to government agencies, and also created various administrative agencies and judicial bodies. In addition, as a member of the European Union, the United Kingdom must comply with the decisions of various bodies - components of the EU mechanism, which impose external restrictions on the supremacy of parliament in some branches related to administrative law.

In the United States the administrative justice is based on the fact that these institutions exist under the bodies of the executive branch - agencies and are included in the structure of these departments. Although most appeals in administrative cases in the United States are filed in courts of general jurisdiction, there are several specialized courts that deal with certain types of administrative cases, including tax issues.

The United States Tax Court is the only judicial body that has jurisdiction to handle complaints about tax arrears without prepayment and to consider subsequent claims for reimbursement. Therefore, this court is the main body of civil litigation in tax matters at the federal level. The tax court is vested with judicial, but not legislative or administrative powers. The purpose of its creation by the Congress was the interpretation and application of laws on domestic state revenue in the event of a dispute between taxpayers and the government. By settling such disputes, the court partially exercises the judicial power of the United States of America [26].

The US federal administrative law also provides for appealing to the courts the rules and regulations of the authorities, either at the time of their adoption or when the authority applies them in the process of complying with the requirements of laws (enforcement proceeding). On the other hand, some state administrative and procedural laws provide for revision of regulatory acts by a special committee of the state legislature for their compliance with laws that

provide for appropriate powers (enabling laws). Judicial review is not allowed, with the exception of emergency cases of appeal in the proceedings for the enforcement of legal requirements.

So, it would be more accurate to call the American approach to the system of administrative courts the American “models” that have much more in common with European systems than it seems at first glance, and which offer a significant amount of diverse experience that can be very useful for countries in which its own unique system of administrative courts is still developing and creating. This also applies to Ukraine.

Over the past 20 years, countries that have founded new, democratic institutions, abandoning socialist legal systems, have radically reformed their administrative and legal regimes. Below we will discuss a few countries that have developed new or revised old procedures related to the adoption of decisions by state bodies and active judicial review of these decisions.

Thus, Poland continues to use the Administrative Procedure Act 1960, which has been substantially amended to bring it in line with new concepts of administrative responsibility. In 2004, the Supreme Administrative Court was created, its purpose is to consider appeals against decisions of administrative courts of first instance in accordance with the amendment to the Polish Constitution (of 1997). Prior to this, there was only one administrative and judicial instance. During 1995-2000 the Supreme Administrative Court was the highest authority in administrative cases, although it could also consult with the Constitutional Court on certain issues [27].

In the summer of 2002, a set of laws were passed; they marked the beginning of the reform of the courts of administrative jurisdiction. In particular, these “The Law on the Arrangement of Administrative Courts” of July 25, 2002, “The Law on Proceedings in Administrative Courts” of August 30, 2002 and “The Enactment of Laws - the Law on Arrangement of Administrative Courts administrative courts ” of August 30, 2002 [28].

The reform of the administrative courts of Poland regarding the appeal to the administrative court for the consideration of the tax dispute provides for a number of innovations. In particular, the structure of administrative courts has been changed and consideration of administrative cases in courts of two instances is provided for. Thus, the system of administrative courts will be headed by the Supreme Administrative Court.

The competency of the latter will include:

- 1) consideration of complaints against decisions of the voivodship administrative courts, adopted in the first instance;
- 2) a summary of judicial practice in administrative cases;
- 3) resolving disputes about the distribution of powers between local governments, as well as local governments and state administrations;

4) consideration of administrative cases that are under its jurisdiction on the basis of separate laws, in the first instance.

The creation of voivodship administrative courts is envisaged on the basis of the local cells of the High Administrative Court. These voivodship administrative courts will consider all administrative cases at first instance, with the exception of those that fall under the jurisdiction of the High Administrative Court [29].

In Hungary, the administrative justice system continues to function as it has been for decades. Despite the talk about the need for reform, significant changes have not occurred. There are no separate administrative courts, although there is an administrative section in the Supreme Court, and there are administrative chambers in local courts. Complaints against administrative decisions in the tax area should be filed with local, district or city, courts. Legal appeals are reviewed by the Appellate Court Administrative Section. The Supreme Court may review the final decisions on administrative cases if violations of the law are alleged, and there are doubts about the uniformity of court practice or the consistency of the decisions of the Supreme Court.

In December 2006, Bulgaria adopted a new Administrative Procedure Code. Now it introduces a system of administrative courts of first instance in the framework of activities related to the country's accession to the European Union. Complaints against decisions of administrative bodies can be filed with administrative courts regardless of whether the decision was appealed at the highest level of the administrative authority that made it. The administrative court may review the circumstances of the case that have been submitted to the authority, and in addition, has the right to take into account the new information. The decisions of the administrative courts can be appealed to the Supreme Administrative Court, which in certain narrowly defined cases can also consider appeals.

Slovenia has one administrative court, which decides on almost all complaints against decisions of administrative bodies. You can file appeals to the Supreme Court against its decisions. The 1997 Law on Administrative Disputes regulates judicial procedures, and the 1999 Law on Administrative Procedures regulate the actions of administrative bodies. The one who disputes the decision of the administrative authority must first appeal to the second instance within the framework of this authority, and only then can file a complaint to the administrative court, unless otherwise provided by law. The Supreme Court is vested with the initial jurisdiction over the appeal of certain state rules, as well as regarding electoral disputes, lawsuits filed by the council of judges or the council of staff against judges or prosecutors [30].

Lithuania has created a new system, which consists of five regional administrative courts, as well as municipal, regional and national commissions for

the settlement of administrative disputes. Lithuania created the Supreme Administrative Court in 2001.

The new Latvian Law on Administrative Procedure was adopted in 2001 and was entered into force in 2003. 2004 was a year of great success for Latvia; together with nine other countries of the so-called second wave, she became a member of the European Union. Among the positive trends in the country, which had a decisive influence on Latvia's accession to the EU, we should name: planning, coordinating and monitoring of the approximation of legislation to European standards, effective implementation of improved legislation through the reform of management institutions and the use of progressive strategic and administrative methods [31]. According to the Law on Administrative Procedure, a new three-tier system of administrative courts was entered into force in the country in February 2004. The new law is quite multifaceted: it regulates both the actions of administrative bodies and the issues of judicial review of their actions.

Estonia took the model, very similar to the German one, as the basis for its Administrative Procedure Act 2002, setting standards for appealing specific administrative acts. Administrative courts were reformed in 2001 in accordance with the new Code of Administrative Procedure. It has established four administrative courts of first instance, which do not have jurisdiction over administrative offenses; also, it clearly defines their powers. Appeals against decisions of administrative courts are filed in two of the three regional district courts that have administrative chambers. They analyze the actual circumstances of the case and the legal decisions taken, considering, if necessary, new evidence. Appeals against these decisions are considered by the Administrative Chamber of the Supreme Court.

Conclusion. So, in foreign countries, the administrative justice is the guarantor of the protection of the subjective rights of citizens. The emergence and establishment of administrative justice for the protection of tax rights and freedoms of tax payers were based on factors of a socio-historical and objective-legal nature.

Firstly, the administrative justice as the factor of the protection of tax rights and freedoms arose at the turn of a public formation with its priorities and values and at the turn of the transition to a new socio-economic and political structure, during which the main purpose of administrative justice was not fully understood, and its nascency was justified by the theory of separation of powers from the point of view of separation of the executive power from the judiciary, but not reasonable cooperation with an appropriate redistribution of its own functions for the safeguarding and protection of the rights and freedoms of citizens.

Secondly, administrative justice as a subject of protection of tax rights and freedoms in tax disputes was created with the relevant objectives of an objective and legal nature in each of foreign countries.

Thirdly, in different countries, which, in particular, belong to various legal systems, there are distinct systems of protection of the parties in tax disputes. In some countries, these disputes fall within the jurisdiction of administrative courts (as in Ukraine); in others - specialized tax courts have been created; in third countries tax disputes are considered by civil (ordinary) courts. Ukraine should adhere to the principle of assigning tax disputes to the jurisdiction of administrative courts.

Fourth, the following provisions should be attributed to the problematic issues of the administrative decision in the field of tax disputes in Ukraine:

a) the expediency of considering the question of the form of appeal of the authorities of Revenues and Duties to the administrative court;

b) there is also a question about the compliance of the task of administrative court proceedings with the establishment of disputes sued by the authorities of Revenues and Duties .

The most acceptable approach as to the modern ways to solve the problem of improving the claim procedure for the protection of rights, freedoms and legitimate interests in administrative courts is the development of administrative law and process, particularly in such categories as “administrative process” and “judicial administrative jurisdiction”.

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Chapter 14

The concept and features of an administrative service in the field of educational activity

Legislative processes of implementing European standards of good governance in the domestic state administration determine the relevance of constant scientific research in order to update the theoretical basis of the means and methods of state administration in various fields, including the field of educational activity.

One of the priority functions of the state is the function of providing administrative services. Even the possibility of the existence of this trend has been denied in the national doctrine of administrative law for a long time due to the dominant idea of the authoritative and controlling nature of the state, but not the servicing one. However, the renewed perception of the main point of public administration, taking into account the European integration processes, caused by these processes, requires a new vision of the activity of public authorities, including the provision of administrative services.

The analysis of normative acts regulating the provision of administrative services in the field under investigation testifies to the existence of the problems of regulating the relevant activity at a rather high level. Their character suggests that perceiving the legal nature of the activity for providing administrative services as the authoritative one has not been completely overcome by the legislator yet. Thus, the National Strategy of the Development of Education in Ukraine for the period up to 2021, approved by the Decree of the President of Ukraine № 344/2013 dated June 25, 2013, [1], envisages the optimization of educational authorities, decentralization of management in this area; redistribution of functions and powers between central and local educational authorities as the priority trends for identifying the ways of modernization of the education management system. Instead, today there is a priority of the principle of centralization in organizing administrative service provision in the field of educational activities. Thus, the provision of most of these services is concentrated within the competence of the Ministry of Education and Science of Ukraine as a central executive body, one of the tasks of which is the implementation of state policy in education (Paragraphs 1, 3 of the Regulation on the Ministry of Education and Science of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine № 630, dated October, 16, 2014 (hereinafter referred to as the Regulation on the Ministry of Education and Science of Ukraine) [2]). There are other problems of providing the

indicated services, in particular caused by the inconsistency of legislation, which determines the procedure of licensing in the field of higher education [3].

The problem of organizing the provision of administrative services by public authorities in general, and such types of services in the field of educational activities, in particular, has not been sufficiently investigated in scientific papers so far. The subject of such studies is mainly the provision of administrative services by bodies specially created for this purpose (e.g., centers for the provision of administrative services) or their provision in the certain areas of public relations (e.g., urban planning activities) [4]. Modern scholars emphasize the need to perceive the state administration in general and the legal nature of activities for providing administrative services from the point of view of servicing principles of their implementation. The necessity of perceiving the activity for providing administrative services as a holistic legal phenomenon in the national juridical system is emphasized [5, p. 1]. Therefore, it is necessary to update the existing scientific achievements in relation to the doctrinal basis of the organization of public authorities' activities for providing administrative services in the field of educational activities.

It is necessary to note the specific character of an educational activity as a subject of providing administrative services. For instance, among these peculiarities are:

- the subjects of public law (mainly not individuals, but legal entities);
- the educational activity as an object of providing administrative services, which combines not only the activity for providing educational services, but also its organization and guarantee of its implementation;
- the importance of providing educational services of proper quality in the aspect of sustainable development of the state and realization of the right of citizens to education.

Therefore, the investigation into the specifics of organizing administrative service provision in this field has to be carried out at the level of basic concepts, in particular – the concept of an administrative service and identification of its specific features.

The provision of administrative services is a separate functional direction of the public authority' activities with its special features. In terms of philosophy and law the abovementioned features are specified by the peculiarity of the concept of “service”. Therefore, the further research should be conducted considering the content of this concept.

In the etymological sense, a service is defined as an activity to meet a particular need. The importance of this activity can be either in the activity itself, or be manifested in the development of certain benefits in order to meet this need [6].

Legal literature keeps the aforementioned accents of understanding the concept of a service. A service is considered as a certain activity or an action having a beneficial effect [7, p. 236]; an activity that is a public benefit due to its beneficial effect, but is not directly related to the creation of a certain useful material object as a result of its implementation, and the indicated effect determines the existence of the consumer value of this service [8, p. 256].

The essence of such category as “service” is clearly reflected in publications in the field of management. In particular, the crucial feature of the service is that it is sold not as its material result, but as an intangible object, a specific activity [9].

The expressive servicing nature of the activity for providing a service has resulted in the thoughts expressed by several scientists in the theory of administrative law about the inadmissibility of understanding the activity of the public authority as a “service” because this activity is incompatible with the notion of “power” [10, p. 12]. The concept mentioned above shows that the traditions of positivism, as well as the approaches to strict centralization and the priority of power over a person in scientific research are preserved to a certain extent. Such approaches should be updated in accordance with the latest trends in the development of public authority. The basis for them can be the Provisions of Part 1, Article 8 of the Constitution of Ukraine, according to which a person, their rights and freedoms, honor, dignity and safety are recognized in Ukraine as the highest social values. The scientists from some foreign countries (e.g., France) support aforesaid position and indicate the possibility of providing services not only on a market basis (paid by the consumers themselves), but also on a budget basis [11].

In the context of the consumer nature of the provision of administrative services, a special attention is drawn to O.P. Riabchenko’s position, characterizing the consumer quality of the indicated service. The researcher points out the value of providing administrative services for assisting a person to implement their legal right, interests, or acquire a certain subjective right [12, p. 36]. By assessing this position, it may be indicated that public authority performs certain administrative functions as a result of the provision of an administrative service, and therefore these characteristic needs discussing. However, one should indicate its correspondence to the current trends in the development of public authority in Ukraine in general and the competences of the bodies of public authority in particular. The current legislation defines the administrative service as an activity related to the issuance of various types of permits, but this term requires changing and can be a promising direction for further investigations.

The literature also mentions the private component in the nature of an administrative service, which is expressed in the possibility to distinguish its consumer quality. From this point of view, there is a need to criticize scientific approaches, based exclusively on the public component of the category of an “administrative service” [13].

Thus, historically, the concept of a service appeared in the field of market relations and reflects private relationships. However, today this concept extends to the sphere of public activity prescribed by law.

In the science of administrative law, the activity of service provision is denoted by various terms such as: “administrative service”, “public service”, “state service”, “municipal service”, etc. But the category of “administrative service” has got the most widespread use in the field of scientific research, as well as the legislative consolidation.

So far, a lot of complex studies have been performed devoted to the essence of the administrative service both as a whole, and with regard to certain spheres of its provision. V.V. Petiovka investigates the problem of the place of the administrative service in the administrative law and its essence [14]. The problem of providing administrative services by the local government administration has been investigated by S.L. Dembitska [15], Zh.V. Zavalna, O.O. Ilnytska [16], H.M. Pysarenko [17] and others. The profound analysis of these and some other studies allows indicating the change of priorities in the corresponding activities of public authority from the regulatory ones to the activities facilitating the implementation of subjective rights, freedoms, and legitimate interests [14, p. 106]. Other researchers insist on the necessity for perception of the activity to provide administrative services as a specific function of the state [16].

The starting point for this study is the definition of the administrative service given by the Law of Ukraine No. 5203-VI “On Administrative Services” dated September 6, 2012 (hereinafter referred to as the Law of Ukraine “On Administrative Services”) [18]. According to Part 1 of Article 1 of the Law, an administrative service is defined as a certain activity of public authority that is carried out in the manner prescribed by the law. Not disputing about the appropriate level of legislative technique for the formulation of this concept and the high theoretical level of its elaboration, it is necessary to indicate several drawbacks of the concept. First of all, there is the lack of reflection of a servicing nature of the activities of public authorities. In fact, according to the existing formulation, the administrative service can include any activity of a body of public authority that corresponds to the features specified in the term. Instead, only the indicative nature of the activity is indicated. At the same time, the authoritative nature of the activity is emphasized, as a result of which its servicing nature is not sufficiently reflected, as well as there is a general change of priorities in the activities of public authority. In addition, according to the aforementioned definition, the result of the provision of administrative services is not the activity of the body of public authority in relation to its provision, but a certain act to the body, which reduces the idea of the service, where the main value is mainly the activity. The concept of “authoritative” is also controversial for determining the nature of the activities of the relevant bodies in providing the administrative

service. After all, there is the possibility that the recipient of the administrative service may not use its results, which may be quite legitimate, for example, when the permits (permissive documents) are received as a result of the administrative service. In addition, the declarative nature of the relations between the body receiving the service and the body of public authority can be ceased at any time by the body receiving the service, which does not correspond to the essence of the authoritative activity. The aforementioned points reveal the importance of further investigation into the definition of the concept of an administrative service.

The analysis of the existing key scientific studies shows the disunity of scientists' opinions about the essence of permissive activities of the bodies of public authority. For instance, they are indicated to be mainly permissive services, but not the administrative ones. To prove this the following arguments are given: the reason for the introduction of certain types of services is the need to ensure the security of the state activity when granting certain permissions; the result of the relevant service is the provision of a specific administrative act; their essence is the activity of the public authority, aimed at providing this act [10]. This point of view is supported by V.B. Averianov and V.V. Kolpakov, who distinguished the permissive nature of the activity which is referred to as "provision of administrative services" in scientific literature. The result of this activity can be various permitting documents: permits, certificates, etc. [19; 20; 21].

Thus, categories "permissive" and "administrative" are very similar. However, an administrative service is a wider concept, since its results include not only the issuance of permits, but also the implementation of registration actions, the content of which goes beyond the actual nature of the permissive activity. On the other hand, the results of the permissive nature after receiving administrative services cannot be denied as well.

O. Liukhterhandt supports the narrow concept of an administrative service, which includes positive acts of public authority having an individual action, and the purpose of their acceptance is satisfaction of certain individual interests. In this case, the scientist excludes from the concept of the administrative service the body of public authority, directly related to the enactment of this act: the issue of a certain arbitrary document (material service), the issuance of monetary support in cases provided by law (financial service) [22, p. 27]. Supporting the accuracy in determining the narrow content of an administrative service, it must be noted that both the decision-making and the issuance of relevant documents, money, etc. form the essence of an administrative service, since, as it has been mentioned above, its ultimate goal is to satisfy the interests of the person who asked for this service. The recipient of the administrative service is interested, first of all, in obtaining the relevant documents, money, etc., and not only in making a decision by public authority.

The final formulation of the concept of an administrative service as a starting point for this study requires considering the existing scientific approaches to the identification of the features of the administrative service. At present, the approaches of V.P. Tymoshchuk and T.O. Kolomoets can be considered as a model.

According to the statements, proposed by V.P. Tymoshchuk, the following features of the administrative service can be determined. The purpose is to create conditions for the individual to realize their legal rights, freedoms and interests, ensuring their implementation. The reason: an administrative service is provided solely on the request of an individual. The subject of the provision of an administrative service is the body of public authority. The method of provision is exercise of authority. The definiteness of the competence on providing a specific administrative service is only a specific subject of public authority. The result of providing an administrative service is a decision, action (inaction) of the subject of its provision (administrative act). The availability of a specific recipient of an administrative service is a clearly defined individual or a legal entity [23, p. 119]. While supporting V.P. Tymoshchuk's conclusions, it should be noted that they allow highlighting some problematic issues in the practice of applying administrative law, in particular, by courts. Thus, the result of the provision of an administrative service is an administrative act, which is a decision on the provision of an administrative service. At the same time, this act does not have a direct value for the recipient of the service. It is a specific permissive document that is valuable – a decision, a registration, etc., carried out for implementing the administrative act. In this case, if the recipient of the service wishes to exercise their right to apply to the court with a complaint, there is a question about the object of the appeal. Can a permissive document be this object? Neither the provisions of the current legislation nor the theoretical positions give an unambiguous answer to this question. In our opinion, the object of the appeal in this case should be the administrative act (decision) on the issuance of a permissive document. The permissive document, in case of recognition of this act as illegal, should lose its legal force automatically. However, this question needs further investigation both from the theoretical point of view and from the point of view of legal practice.

This viewpoint is supported by T.O. Kolomoets, who distinguishes the similar features of administrative services and adds some additional ones: the exclusive way of providing – the exercise of authority; the regulation of the right to receive a specific administrative service exclusively at the legislative level; the absence of the need to address various subjects of public authority in the process of obtaining an administrative service [24, p. 240].

The analysis of T.O. Kolomoets's position allows us to draw attention to certain problematic issues concerning the legislative regulation of providing administrative services. We agree that there is no legally defined list of specific administrative services provided by public authority. Taking into account the

specific purpose of their provision – creation of the conditions for the implementation of subjective rights, freedoms, legitimate interests, considering the known constitutional provisions regarding the role and significance of human rights in the modern development of the national legal system, with the aim of creating legislative guarantees of the implementation of relevant subjective rights, – the relevant legislative act has to be issued.

The legal literature also indicates V.B. Averianov's position, according to which the special feature of an administrative service is the fact that the person-recipient has the right, but is not obliged to use the result of administrative service provision (e.g., whether to implement a specific permissive document). In addition, a unified character of the administrative service is emphasized, which is related with the lack of personal communication between the recipient of the administrative service and the representative of the authority, given the typical nature of the actual circumstances of the case and the need for their confirmation in each particular case [23, p. 120].

The servicing nature of the activity for providing an administrative service is also advocated by V.V. Petiovka by describing certain functions of public authority, which are implemented by them in the process of administrative service provision, in particular – the permissive ones. The researcher points out the following features of an administrative service:

- it is not the activity itself but its result;
- the activity has both authoritative and servicing nature at the same time;
- it is directed to meet the need for obtaining certain documents (permits, certificates, etc.);
- the inadmissibility of the identification of this activity with the implementation of managerial functions by public authority [25, p. 4; 14, p. 12]

The expressed opinions regarding the features of an administrative service, in general, do not raise any comments, except for the statement regarding the authoritative nature of the activity of administrative service provision, which was pointed out by V.B. Averianov. This is evidenced not only by the voluntary nature of the use of the results of administrative service provision by a person. There are repeated instances today when administrative services are provided by bodies that do not belong to the body of executive power. These are some commissions (National Commission for State Regulation in the Energy and Utilities Area; National Commission for State Regulation in the Area of Communication and Informatization; National Securities and Stock Market Commission; National Commission for State Regulation of Financial Services Markets). At the same time, there are no grounds to believe that their powers regarding the provision of these services are delegated.

The problem of providing administrative services in the field of educational activity involves the analysis of the problems of administrative legal relations in this area in general. Therein, the scientific studies of the following researchers are worth mentioning: A.B. Lys, who investigated the general provisions on providing people with public services by public authorities and local self-government bodies [26]; O.M. Bukhanevych, who investigated the problems of introduction of electronic administrative services, as well as problematic issues of the definition of an administrative service [27; 28].

The theoretical basis for generalizations is also represented by the scientific works on providing administrative services in certain spheres of public life. We should note the studies of such scientists as: R.V. Boiko, who studied the problems of providing administrative services by the bodies of executive power on the supervision of labor protection [29]; S.V. Hazarian and D.V. Verkhohliad, who studied the problems of providing administrative services in the field of education by local government [30]; L.I. Paraschenko, who studied the issue of administrative services in secondary education [31] and others.

Despite all the studies mentioned above and some others, the relevance of the coining a single agreed concept of an administrative service in the field of educational activities still remains not only in terms of its practical value, but also due to the lack of appropriate studies at the theoretical level.

The analysis of the current legislation of Ukraine provides an opportunity to identify the Ministry of Education and Science of Ukraine as the main subject of the provision of administrative services in the field of educational activities. At the same time, the features of the relevant activity also spread to the activities of some other subjects such as: local government [30, p. 6], the State Service for Mining Supervision and Industrial Safety of Ukraine [32] (administrative services related to occupational safety) and some others. Therefore, the elaboration of a single theoretical basis for the provision of the indicated services is the necessary grounding in the proper organization of their provision.

Thus, the problems of providing administrative services in the field of educational activity are not investigated at the proper level. Practically there are no studies in such areas as: the activity of administrative jurisdictions in this area in general and the role of the judicial authorities in resolving public disputes in this area, in particular, the organization of educational activities, the exercise of control over the proper implementation of educational activities. The scientific studies in the provided field of administrative services can be divided into the following groups: basic doctrinal character, for example, with regard to the meaning of the term of an administrative service and its features; the studies devoted to separate peculiarities of legal regulation of educational activities; provision of administrative services by certain bodies of public authority in the field of educational activity.

The study provides grounds for some preliminary conclusions about the significant features of administrative activities in providing the same services in education. Firstly, the educational activity as an object of providing administrative services within its limits is limited to the administrative activities of public authorities in this area with regard to the provision of administrative services. Secondly, it is necessary to indicate the priority character of the interests of the person who applied for administrative services in the field of educational activity. It is due to its servicing character and it reflects the democratic foundations of modern society and government activity of the state, in particular, through the provision of administrative services. Thirdly, one of the fundamentals of the modern system of providing administrative services in the investigated sphere is to minimize the participation of the subject of obtaining an administrative service in the procedure for its receipt, despite its legal nature as a public authority, reflecting the servicing nature of the activity on administrative service the provision.

The study provides an opportunity to formulate the features of the administrative service in the field of educational activities and to indicate its essence. These are: the servicing nature of their provision; implementation solely on the request of the person concerned; the recipient of the administrative service is the person who exercises their right to engage in the entrepreneurial activity, e.g. providing educational services.

The specificity of educational activity as an object of providing administrative services is determined by its dualistic character. On the one hand, it is the sphere of the constitutional right realization of a person to carry out entrepreneurial activity. On the other hand, it is realization of the right to receive educational services with the strategic significance of ensuring the quality of education for the existence and development of the state. Therefore, it should be noted that there is a need for the balance between the certain control to achieve this goal, on the one hand, and the inadmissibility of creating artificial barriers and bureaucratic barriers to the implementation of educational activity, on the other hand.

By noting the importance of these conclusions regarding the nature of the administrative service and the importance of educational activity as a subject of its provision, including the subject of further research, the need to supplement these findings should be noted, as they do not fully characterize the subject of providing this type of service and the specifics of the activity as a subject of their provision. This leads to the consideration of other scientific studies, e.g. on issues adjacent to the concept of an “administrative service”. There are the following ones in the doctrine of administrative law: “public service”, “state service”, “municipal service”, etc. [33]. Relevant scientific developments are adjacent to the study on the essence of the administrative service, which allows to perform the specified tasks.

The doctrinal basis for our study are the papers of the following scientists: V. B. Averianov, K. K. Afanasiev, O.M. Bandurka, O.M. Bukhanevych, V. Harashchuk, N. Hnydiuk, I. Holosnichenko, O.V. Dzhafarova, Yu.M. Ilnytska, I.B. Koliushko, T. O. Kolomoiets, V. K. Kolpakov, R.O. Kuibida, Yu. Kuts, V. P. Tymoshuk, M.M. Tyshchenko, Yu. Sharov.

As it is rightly noted by several scientists, under the conditions of democratization of the activities of public authorities, the provision of administrative services turns into an exception to the power of activity of these subjects on a certain standard of service principles of their functioning [5, p. 1]. Therefore, today the activities of public authorities aimed at providing administrative services to the population should be perceived as a service activity in its legal nature.

This becomes more relevant in the context of the influence of European tendencies on the activities of public authorities genesis, the development of the mechanism of legal regulation, in particular, regarding the definition of the mechanisms for the implementation of human rights. Given the interconnection of the institutes of administrative law as a single industry, it changes the legal nature of the administrative law.

Therefore, the need to create a flexible (in accordance with the public request), effective, human-oriented system of administrative services is conditioned by the current development of state-building in Ukraine. Such system should be in line with the European standards for the activities of public authorities, as well as it should be economical in terms of using budget funds. Thus, the elaboration of the administrative and legal foundations of the activities of public authorities in the field of providing administrative services in education is conditioned not only by the lack of theoretical study, but also by the close relationship between this system and the general system of public administration, the need to provide high-quality administrative services in this area.

The abovementioned points leads to the need to give in-depth attention to the category of “service” in order to clarify its essence. It should be noted that this concept was explored in the theory of both public and private law. Given the subject and scope of this study, it is necessary to investigate the essence of the concept of “service” in the doctrine of public law.

One of the most stable ideas is the position of E.O. Leheza, who understands the public service as a certain activity of public authority aimed at satisfying a particular public interest. On the other hand, it is noted that such an interest consists in solving the issue on the merits of a specific statement of an individual or a legal entity in relation to the issuance of an administrative act (making a decision, issuing a permit or license, etc.). The ultimate goal of such activity is determined by the creation of conditions for the realization of the subjective rights

of the person. It is emphasized that such activities are financed exclusively by public funds [34, p.11].

Investigating the position of I. V. Venediktova concerning the formulation of the concept of “public service”, presented by Yu.Yu. Abramenko, we can conclude that the scholar has identified such features as: social significance; clear regulation by law; representation of a certain activity of authorized entities; the individual orientation of the service, the dependence of its provision on the will of a particular consumer; an unlimited range of potential recipients of an administrative service; the direction of its provision to create conditions for the implementation of subjective rights, freedoms, legitimate interests [35; 36].

L. Mitskevych identifies the following features of a public service: the subject of the provision is the state apparatus; servicing character of the activity; sphere of provision –organization of population’s life providing (urban development, transport sphere, etc.); the embodiment of public administration, which has a positive character; public service is a function of a public authority (state authority, local government, state or communal property); the directness of interaction with the recipient of the administrative service [37].

The upward category in relation to the concept of “public service” is the concept of “management service”, because it is broader in content as well as basic in relation to it.

The Decree of the President of Ukraine No. 810/98 dated July 22, 1998 “On Measures for the Implementation of Administrative Reform in Ukraine” approved the Concept of Administrative Reform, according to which one of the priorities in the activities of public authorities is the creation of an effective system for providing citizens with quality management services, which should be based on the new ideology of the activities of these entities. Such services should be aimed at creating conditions for the citizens to realize their subjective private rights, freedoms, legitimate interests [38]. Along with management services, the concept of “public service” can be noted, the peculiarities of which are connected with the subject of their provision – municipal authorities, as well as the object of provision – the territorial community. That is, it is supposed to provide such services by local self-government bodies. It should be noted that the Concept is characterized by terminological diversity in relation to the definition of the term “service”. Thus, “state” services, “state (managerial)” are defined. Essentially these categories are combined with the concept of “state-management services”. It is indicated that there is no single definition for these types of services, which has caused a controversy in the positions of scientists [10].

The essence of management services is determined by I. B.Koliushko, who carries out the classification of services provided by public entities. The states that services are divided into two groups: “managerial” and “non-government”. The criterion for division is the imperious nature of the subjects of provision:

management services are provided by the subjects of power, and non-state - state and municipal institutions and organizations. Along with this, the scientist highlights: government services are provided by executive authorities, institutions, organizations; and municipal services are provided by local self-government bodies, municipal institutions and organizations [39,p. 31].

The investigated categories became the basis for determining the widespread concept of “administrative service” today, in relation to which it can be argued that its essence covers “state” and “administrative”, “municipal”, “state-management” services, etc.

The basis of modern understanding of the concept of a public service is the study of V. B. Averianov. Describing such a phenomenon as the provision of services in the activities of public authorities, the scientist pointed out the following features: public-service character; the establishment of obligations of the state to the private individual, in particular, in cases where such activity is aimed at creating the conditions for the implementation of the persons by their subjective rights. The scientist also emphasized the possibility of using different terminology in relation to the designation of the public character of such a service: “managerial”, “executive” [40, p. 379].

By dividing the public and private nature of the notion of an administrative service, one can state that private is associated with the duty of the state to implement the means provided for by law for the realization of the subjective rights of the person (therefore, the corresponding activity is called – the service), and the public character is to apply envisaged subjects of their competence, determined by the legislation. It is precisely this that the terms “managerial”, “executive” are defined in determining the nature of such service.

Public services may also include features of certain types of public services covered by such categories as “public administration services” [41]. The legal literature states that the following activities are carried out through the implementation of activities related to the provision of such services: the implementation of the regulatory function of the public authorities; provision of feedback between the subject and the object of public administration; ensuring stability in the implementation of public authority through the implementation of tasks and regulatory functions of the public administration [41].

The state service is considered in legal literature as a concept that combines administrative and managerial services. It can be pointed out that the concept of administrative service reflects the “organizational” side: the presence of a certain mechanism, established in the manner prescribed by law; realization in the order provided for by law for the purpose of the person's subjective rights determined by the legislation. “Essential” side of the state service includes a certain function of the state body, a certain direction of its activities [42, p. 12].

In the context of this study, the position of V. B. Averianov attracts attention, who points out the connection between the administrative nature of a public service, since it involves managerial influence on relations involving not only citizens but also state institutions, in particular in the field of education. The scientist also points to the need to distinguish between the concept of public service and municipal services, depending on the type of source of funding for their provision [43, p. 125].

From the elaborated scientific positions one can conclude that there are the following defining features in the field of public relations: it is aimed at creating conditions for the implementation of subjective rights, freedoms, legitimate interests; the relevant activity is carried out strictly on the basis, in cases and within the limits of acts of a legislative nature; the result of such a service is the relevant actions and / or documentation regarding the implementation of subjective rights, freedoms, legitimate interests. However, this list of features is a general one and does not adequately reflect the nature of the public service as the basis for determining the administrative service as the subject of this study. In order to clarify the range of these features it is advisable to turn to legal research, directly devoted to the definition of the characteristics of public service.

V. Kosmidailo outlines the following features of public service: the subject of provision is a government body, another state structure; the source of financing for the provision of activities – the state budget; the leading factor in the provision of these services – the tasks and functions of the state, defined by the current legislation; the form of securing the result of the provision of the service – an act of the authorized body; normative securing of guarantees of obtaining the result of the corresponding service, including the presence in a provision or other normative act concerning the activity of the subject of the service provision of a separate provision that provides for the provision of the specified service by such authority; the presence of a clearly defined recipient of the service is a specific person; place of service – location of the subject of its provision; regulation of the range of public services definition in the legal acts of the list of specific types of services provided by a certain subject of public authority; the recipient of the provision of the public service is a person specified by law who has applied for its provision; inadmissibility of discrimination – unification of requirements for all recipients of services; fixing of the provision – the need to make each service provided to the Register of State and Administrative Services [44].

Despite the grounds for determining these characteristics, some of them cause a desire to discuss or are not sufficiently defined in the legal literature. Firstly, this refers to the basis for the provision of the service, such as its payment or gratuitousness. In our opinion, the provision on the distribution of the duty on the implementation of the conditions for the implementation of subjective rights directly to the state should lead to the free provision of public services. But in some

cases, in order to prevent unwarranted requests for their receipt, other abuse in this area is appropriate to introduce a certain payment for their provision requests.

Another understated provision is the subject of such a service. A state authority or other state institution as such a body does not cover the possibility of the provision of these services by the delegated authorities by the subjects, in particular – the centers for the provision of administrative services, permit centers.

Such a feature as the implementation of the tasks of public administration in the provision of public services also has a fairly broad sense. A specific public service is provided by a clearly defined public authority with its clearly defined competence and can not go beyond its bounds. Thus, the corresponding service is provided within the limits of the realization of the tasks and functions of the state as a whole, but within the general tasks and functions of the relevant entity.

Thus, one may indicate that the notion of “state service” reflects the ascending source of its provision – the state. The indicated feature can be considered as the ascending one to the definition of all other features. The of “administrative” reflects the mechanisms of implementation of the corresponding subjective rights, freedoms, and legitimate interests.

In this aspect, the position of some researchers regarding the definition along with state, administrative, municipal services such as social and economic attracts attention [77]. For this position, the following should be indicated. The common thing in terms of state, administrative, managerial, municipal services is the public nature of the subject of their provision. In the same position, the services may also be private in nature, e.g. by the subject of provision. Thus, audit services in the field of business are provided in a large number of cases by economic entities. Consequently, the given classification is based on different criteria. Therefore, in our opinion, in order to divide the services into public and private ones, the criterion for the subject of their provision has a defining nature (e.g. a public authority (local government) or an individual).

In the scientific literature there are positions on the allocation of other criteria for distinguishing these services. Thus, O.O. Sosnovyk points to the necessity of assigning to the competence of the subjects of state power only those services that it is impossible or inappropriate to provide by private entities [45, p. 26]. The decisive difference between private and public relations is the nature of interest, which is realized within the framework of these relations: in private relations, the consequences of realizing the relevant interest relate exclusively to the subject of its realization. In the public relations, interests are realized, which concern a wide range of persons. Proceeding from the fact that as a result of carrying out activities related to the provision of public services the interests of the state or the territorial community are realized, it can be argued about the implementation as a result of the provision of a public service of public interest. On the other hand, the category of nature of interest, realized as a result of the

provision of the service, is quite complicated for use in the conditions of the current development of the domestic legal system. After all, the realization of any private interest to a greater or lesser extent always influences the realization of public interests. In this regard, the position expressed during the discussion of the White Paper on services and the adoption of the Services Directive, in the experience of the European Union, during the 2000s is indicative. In particular, there are two types of "public services" (in translation - public or public) –services of "general interest" and services of "general economic interest" [46]. The first type includes utilities (water, energy, health services, educational services, etc.). The same type includes administrative and management services. Services of general interest include telecommunication, gas supply, electricity, transport services, postal services. Services that are classified as state-owned can not be provided by private entities on market terms, the provision of which is exclusively the prerogative of the state. [47] All of these services are considered necessary from the point of view of ensuring the quality of life of people and the cohesion of European society as a whole [47].

Consequently, it may be noted that despite the implementation of the provision of services of general interest to a large extent private interests, these services are treated as "state". This indicates the expediency of maintaining the main criterion for the division of services into "private" and "public" entities of their provision. The indicated also determines the application of the relevant legislation regarding the regulation of the provision of such services.

The impossibility of providing certain types of services within the framework of market relations predetermines the question of the quality assurance of the provision of these services. Unlike services provided by private actors, the public sector lacks such a guarantee of quality of provision of the relevant services as the competitive basis for their provision. In this connection, the provisions on the public-service nature of activities related to the provision of administrative services set out in this subsection necessitate the need to match the result of the provision of an administrative service to a recipient's request, in particular, and to a particular sphere of public life in general.

In this regard, the relevance of V. V. Tsvietkov becomes relevant on principles of public administration. The scientist emphasizes the need to highlight such principles not only democratic principles of its implementation, but also, in particular, efficiency and competence. In addition, the need to decentralize management is emphasized. Such conclusions are formulated in the aftermath of the study of theoretical, practical and methodological problems of public administration and democracy in general. At the same time, the scientist formulates the notion of functional performance of the apparatus of the state, the main criterion is the degree of conformity of forms, methods, structure, level of managerial influence on the tasks and requirements of different spheres of life of

society [48, p. 318]. The above provisions are also fully applicable to the criteria for the provision of administrative services in the field of educational activities. For example, the continuity of the educational process imposes appropriate requirements also on the provision of the specified services, which stipulates specific requirements for transparency, predictability of results, reasonable timeframes, etc.

The study provides grounds for the formulation of the concept of an administrative service in the field of educational activity, as well as the definition of its characteristics. Such service should be considered as an activity carried out by the authorized public authorities in the field of educational activities, through the consistent implementation of administrative procedures determined by regulatory acts and aimed at realizing interest in the provision of educational services and implemented in an orderly manner.

The priority task of providing administrative services in the field of educational activities is to ensure the proper functioning of the relevant sphere, which should be achieved through the implementation not only of the democratic principle of the provision of these services but also of competence and efficiency. The criteria of this efficiency are the correspondence of the forms and methods of managerial influence in providing administrative services to the current state of the sphere of educational activity as an object of management.

The analyzed scientific developments in the field of administrative law, administrative process, and public administration allow us to supplement the previously mentioned features of administrative services in this area. The following features should be considered as the additional ones:

- the purpose of provision – to ensure the quality of the provision of educational services;
- the subject of activities related to the provision of these services is the part of the educational activity, which is the provision of educational services;
- the subject of the provision is an authorized subject of public authority (mainly the Ministry of Education and Science of Ukraine, bodies of local self-government);
- normative nature, which ensures the regulation of the powers of public authority to provide administrative services at the level of law.

This follows from: 1) the constitutional provisions regarding the activities of public authorities on the basis, within the limits and in the manner prescribed by law; 2) the significance of activities related to the provision of administrative services as a means of realizing legitimate interest in the implementation of educational activities. The effective way of solving this problem is the adoption of the Law of Ukraine, which should regulate the list of administrative services in the field of educational activities; the list of subjects of public authority authorized to

provide such services; the distribution of these services among the areas of competence of these entities.

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Chapter 15

Open educational resources as sociocultural paradigm and their regulation from the point of view of Ukrainian copyright law

This paper is aimed on (i) providing of the general description of the sociocultural paradigm, (ii) determination of students' needs on getting educational materials in the electronic form in contrast to paper form, and (iii) analysis the authors' copyright of such materials, as well as (iv) granting rights to third parties (University and students) for the further use and disposal of such educational materials. We have reviewed the legal grounds for transfer of intellectual property rights to works, including the option of transferring such rights through public licenses.

Research methods are set of methods and techniques of scientific knowledge that allow analysing the problems of Open Educational Resources in Ukraine. In this study we used (i) a sociological method to show a reality of sociocultural paradigm of Open Educational Resources; (ii) a logical-semantic method to study materials and to define a conceptual apparatus used for a survey, and (iii) comparative methods for analysis of the legislative acts.

The scientific novelty of this paper constitutes a due confirmation of the needs described above by statistical data with applicable references on Ukrainian copyright law.

Conclusions. The results of the survey have confirmed the students' needs on obtaining free educational materials in electronic form from the University, where they are studying. Nowadays Ukrainian legislation does not provides for rules on the sociocultural structure and legal regulation that could satisfy this need. First, Ukrainian copyright law requires mandatory obtaining of the written permission from the author of the work to dispose of his/her work. Second, as of now, the use of public licenses is unlawful. Thus, Universities have to change their statutory and internal documents (for obtaining proprietary intellectual property rights and its free transfer to users) and formulate the basic policy on the management of intellectual property rights with lecturers and students. Authors conclude that an adoption of amendments to the Civil Code of Ukraine on introduction of electronic form of the contracts for public non-exclusive licenses could resolve the problems and regulate the gap mentioned above.

Open Educational Resources (OER) got an incredible popularity in recent years. UNESCO emphasizes the special role of Open Educational Resources and defines OER as “the materials used to support education that may be freely accessed, reused, modified, and shared” [1]. They must be freely available under an open license that allows free access, use, processing, reuse and distribution without restrictions or with minimal restrictions. Open Educational Resources include different materials, e.g. full courses, curriculum materials, tutorials, videos, tests, software, and any other tools, materials, or technologies required to provide access to the knowledge.

“Educators are creating a world where each and every person on earth can access and contribute to the sum of all human knowledge” as stated in The Cape Town Open Education Declaration [2]. These words are summarizing the potential of information technology in the near future and revealing the possibility of gaining new knowledge and education. We are on the cusp of a global revolution in teaching and learning, as continues on in the Declaration. Educators all over the world create rich collections of educational materials on the Internet, open and free for every user. More than ten representatives of Ukrainian universities have signed The Cape Town Open Education Declaration.

Open Educational Resources, as copyrighted works, are defined in two meanings: in the narrow sense, as a work in which the scientific and pedagogical information is intended to be disseminated; in the broad sense, as an objectively expressed, new result of the intellectual creative activity of the author, in which scientific and pedagogical information is expressed in the form of works protected by copyright law. The main features of open educational resources as an object of copyright are as follow: creative nature, novelty, objective form of expression. The obligatory condition for the use of copyright objects that have not been transferred to the public domain during the production and distribution of works is the conclusion of appropriate agreements on the disposal of intellectual property rights in the copyright object or the definition of copyright terms in the contracts for the creation and dissemination.

Education in general and Open Educational Resources in particular are one of the most important factors and conditions for the formation of an individual in society. Therefore, it is important that they are high quality and correspond to a certain level of society development and its basic cultural values. Eduard Rubin, a public figure and businessman, said that education is a socio-cultural phenomenon. At his opinion, “we need to talk about what we want to see students and alumni, with what skills and knowledge they must graduate from universities. We must think about how harmonious and developed we want to see our world, our society and what role in this should play higher education” [3].

In short, the university reform, in his opinion, should be discussed in its connection to the human and social values. Therefore, that is the reason why the proper legal provision of the education industry is so important.

The importance of Open Educational Resources and innovations in higher education is reflected in the rules of the Law on Higher Education. Article 65 herein states that “scientific, technical, and innovation activity in higher education institutions is an integral part of educational activity and is carried out with the aim of integrating scientific, educational and production activities in the system of higher education. The main purpose of scientific, technical and innovative activity is the acquisition of new scientific knowledge through research and development and their focus on the creation and introduction of new competitive technologies, types of equipment, materials, etc. to provide innovation education of a society, training of specialists of innovative type” [4].

Thus, there are reasons for the use of Open Educational Resources, and the formations of innovative education at the legislative level are at place. The issue here is the implementation of these provisions, because modern society is developing based on innovative approach to many spheres of life. However, without proper reforms, these provisions will not be implemented in practice. The urgent need for reforms in the education system is also noted in the government’s documents, which state that “...the reform of the educational sector is extremely important. The training of the younger generation determines the future of the State. Obviously that Ukrainian education today does not correspond to the modern demands of the person and society, nor to the needs of the economy, nor to world tendencies. That is why the reform envisages a systemic transformation of the sector, the main objective of which is the new high-quality education at all levels: from elementary school to higher education institutions. The main task of education should be the formation of conscious, socially active citizens, able to provide economic growth and cultural development of the country. In the field of science, the reform is intended to put an end to isolation and stagnation in the field of research, to formulate a request for qualitative training of researchers and qualitative developments in the field of fundamental and applied sciences, to bridge the gap between research and the implementation of their results, to integrate higher education and science of Ukraine into the educational and research space of the European Union” [5].

This document outlines the main directions of the reform of the education industry, which is impossible without the use of innovations and achievements of scientific and technological progress in the information sphere, which can also be regarded as innovations within the framework of this research.

In these conditions, the development of innovation is becoming more and more continuous and gradual. But the scientific justification for their implementation and implementation requires professionalism, specialist

knowledge and skills [6]. However, “the specificity of innovations in higher education is due to the fact that they, firstly, always contain a new solution to the current problem in the field of higher education; secondly, their use leads to qualitatively new results of educational activity, and thirdly, their introduction causes qualitative changes in other components of the unified higher education system” [7].

Obviously, that knowledge is money. The whole world pays for studies, for books, for courses and teachers. For a long time, an access to knowledge had only the selected one, and only for the past hundreds of years the situation has changed to the opposite, when the goal is to provide access to education for everyone, regardless of gender, age and nationality.

The first example, which comes to mind, is a library. This is a place where everyone can get a book. This is a free and timely service - get a book for use, and before the Internet, it was the only affordable way to access knowledge - to use the book as a bearer of knowledge. We can say that there was a simple calculation, when one book was equal to one user at the same time. We would like to recall for the basic principle of copyright, that the transfer of ownership on a material object does not affect the transfer of copyright to the work, and vice versa. Here, copyright should have the broadest sense, when you have neither moral nor proprietary intellectual property rights to the work. The thesis about the non-transfer of moral rights is clear, since the issue on non-transfer of the proprietary rights is not always obvious. In other words, the transfer of rights to a material object (for example, a book) does not mean the acquisition to the buyer of the rights to use the work contained in the work. Moreover, when the users got access to e-books, the issue of differences in the possession of copyrights on the work and ownership of the object has become actuality again.

Internet provides new opportunities for education. In general, there are two types of learning (or, in other words, access to knowledge) and distributing educational materials: Blended Learning and Online access. We have identified two such types based on the amount of on-line information.

Wikipedia defines Blended Learning as “an approach to education that combines online educational materials and opportunities for interaction online with traditional place-based classroom methods. It requires the physical presence of both teacher and student, with some elements of student control over time, place, path, or place” [8]. Nevertheless, it is stated that Blended instruction is reportedly more effective than purely face-to-face or purely online classes.

With respect to online education, Massive Open Online Courses (MOOCs) is the unique instrument and it defines as the free online courses available for anyone to enroll. Nowadays, MOOCs such as edX.org, Coursera, Udacity are widely used in the world. In general, with some exceptions, they are free to enroll.

For instance, Coursera's mission is to provide universal access to the world's best education. We believe strongly in preserving free speech and expression for our learners as well as academic freedom for our partner institutions and instructors [9].

The world-known MIT (Massachusetts Institute of Technology) has been the pioneer who opened free the distribution of its educational materials when MIT launched the Open Course Ware Initiative. According to information provided in Forum on the Impact of Open Courseware for Higher Education in Developing Countries, it was "the university's plan to make materials from approximately two thousand courses freely available for use by faculties and students everywhere. [Spokesperson] stressed that this is neither an MIT education nor distance learning, but a publication of course content for use as a resource" [10].

MIT has founded edX - a nonprofit, open-source learning destination offering online courses from more than 100 member institutions, composed of both leading global universities and colleges, and a diverse group of prominent organizations from around the world [11].

There are number of available courses with the variety of subjects. Such popularity and wide distribution may be an answer on respective demand from students. For instance, Coursera represented on 2018 that 40 million learners from around the world joined Coursera, and 4.8 million people have earned a Coursera's course certificate [12]. But how many students complete courses? Statistics' data presents that the current average completion rate for MOOCs is approximately 15% (as of June 2015) [13].

There are Ukrainian MOOCs - Prometheus, Vumonline, which provide for alike services. We are mentioning these services to show that they are available in Ukraine. Nevertheless, Ukrainian universities do not use these services on the regular basis for educational purposes.

Another way for distribution of education materials is direct mail. Given that all students have e-mails, sending educational materials to them is the easiest way for lecturers. Based on this background, authors performed a sociological survey to determine the current situation in Ukraine. We asked students of one famous University located in Kyiv (on no-name basis). The poll showed that students desire to obtain (i) free educational materials from the University (ii) in electronic form. It should be noted that in order to describe such materials, authors called them as "educational" rather than "studying" materials to inform respondents about the lack of a pedagogical component in the relationship between the University-teacher-student and to emphasize that it is about getting knowledge.

Accordingly, authors provided a general description of the sociocultural paradigm as well as a regulation of the University's lecturers copyright on their educational materials and analysed options for granting rights to third parties (University and students) for the disposal of such materials. The legal requirements

for the transfer of the rights to the work, including through public licenses, are also under this research.

Analysis of the recent publications. Legal issues on disposal of intellectual property rights are widely analysed by researchers who studies the civil law of Ukraine – by Bazilevich V.D., Dzera O.V., Dovgan G.V., Luts A.V., Kharitonov Y.O. and many others; the intellectual property rights – by Dmitrishin V.S., Drobyazko V.S., Oryluk O.M., Stefan O.O.; and problems of disposal of intellectual property rights through public licenses – by Zhilinkova O.V., Zerov K.O., Kharitonova O.I. and other.

Tuition of qualified personnel is an urgent task that worries both Universities that teach students, as well as enterprises, where such “specialists” later go to work. Society today is also paying a lot of attention to teaching methods, critically examining methods and offering new ones that involves modern technologies and achievements. It is obviously that students used to google information. That is why books and any paper media are less convenient on a question of the availability and speed of the search in comparison to electronic online resources.

Results

Based on the core principles of the Open Educational Resources and anticipating essential increase in implementation of OER concept in Ukraine, this survey shows that there are two ways on providing students with educational materials: by sending by e-mail (direct mail to the student), or by providing the student with an individual access to a document posted on a University’s website or on a special educational platform.

For a purpose of this paper, an educational material means a literary work with a scientific and educational nature, which is aimed to students’ acquisitions of the knowledge of the particular discipline and activation for their independent work with the information contained in such educational materials.

The European Commission has supported the Virtual Mobility Pass regarding recognition of learning through Open Educational Resources and massive online courses (MOOCs). It is stated that assessments in the “Learning Passport” can be documented in such a way that it can be considered a qualification of higher education”. The single European online education certificate will engage more students from different countries to have “western” education [14]. This is a good opportunity given that according to Sloan Consortium, blended courses and programs, are defined as having between 30 % and 79 % of the course content delivered online. “Face-to-face” instruction includes those courses in which zero to 29 % of the content is delivered online; this category includes both traditional and web facilitated courses. The remaining alternative, online courses are defined as having at least 80 % of the course content delivered online [15].

On 2017, four Ukrainian universities launched a “pilot project” with implementing the blended learning and it showed that the combination of online courses with classroom classes (“face-to-face” classes) increases the efficiency of education on 35% [16].

The analysis of data recording medium is out of scope herein since this issue does not effect on the result of the survey. It is presumed, that anyone needs an access to the text and it should be under author’s permit not depending the media. Since the intellectual property rights and the ownership of the material media do not depend on each other, the authors of this paper do not researched the issue on the transfer of the initial educational material recorded on material media (CD-ROM, CD-I, flash memory).

Ukrainian copyright law regulates the issue of granting permission to use another's work. European Union legislation also regulates this issue. In particular, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [17] (paragraph 29 of the Preamble) set forth that “unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides”.

Our interest in conducting such survey was based on the fact that numerous world studies indicate, in general, the positive perception of both mass open online courses and distance learning in general. Thus, the following advantages are mentioned: providing additional opportunities for obtaining additional knowledge or experience and knowledge from an experienced teachers or experts, including located on other countries; gaining access to such knowledge at a convenient time, especially for those who combine learning with the work or upbringing of a child [18].

A number of questions were raised before the students, which, in general, gave researchers answers on two basic questions: (1) whether there is a need for students to obtain educational materials from the University in electronic form (for free of charge basis); and (2) can the student, who received such materials, independently carry out any actions (to copy and transfer to other persons)?

We will further review each question and respective answers in more details.

Question 1. Obtaining educational materials by students from the University

128 respondents – students of the Law Faculty of the University of Kyiv (on confidential basis) took part in sociological survey. They were asked several questions to understanding the basis need of students on getting educational materials. The multiple choises were the form of provided answers.

As researchers have predicted, an approval was given to the first block of questions: 69% of the respondents agreed that the University should provide educational materials for free. As to the form of such materials, the survey showed the following: 42% of the respondents chose the form of submitting materials “exclusively in electronic form”; 50% - believes that the form of educational materials is not important, 24% - paper form. Indeed, it’s convenient and much faster just to download such educational materials than make notes from the textbook or at the lecture.

A contract (with certain exceptions) is a legal ground between University and a student. According to clause 5 of Article 62 of the Law of Ukraine “On Higher Education” [4], students have the right to use University’s libraries for free, as well as information funds, educational, scientific and sports facilities. This is a fairly general provision, and on the one hand, it does not say anything about the University's obligation to provide educational materials on free of charge basis and, accordingly, does not differ paper and electronic materials. 68% of the respondents said that the educational materials should be provided by the University for free (no additional remuneration or licence fees).

Ukrainian legislation is in a process of permanent changes, including one related to new approach to distribution of education materials. For instance, in January 2019, a new rules, which defines the procedure for providing textbooks and manuals for secondary education and pedagogical workers, were adopted [19]. This rule attracts attention to the fact that in addition to the usual, that is, paper, textbooks, it states provision of electronic textbooks on free of charge basis (in pdf format). Another innovation is the expansion of the number of people who enjoy the right to receive such textbooks is free of charge: persons studying in the technical schools and higher education institutions (colleges) were added to the list along with pupils (studied in school).

Legislation of Ukraine does not contain any special rules regarding the creation and disposal of intellectual property rights between the University (as an employer) and the lecturer (as an employee). There is an exception if the University is financed from the state or local budgets, or the lecturer received a separate grant (in this case, grantee receives all intellectual property rights to the results of the work). Thus, in general, the issue of the creation and further disposal of intellectual property rights is used to be solved individually at Universities in the framework of the current legislation of Ukraine.

Only few of Ukrainian Universities (educational and research institutions) have adopted their internal documents - a special policy on regulation questions and the procedure for the creation and disposal of intellectual property rights at the University. Currently, there is a tendency to expand this practice and spread it to all Ukrainian Universities. Moreover, at the end of 2017, a Program of Co-operation between the Ministry of Economic Development and Trade of Ukraine

and the World Intellectual Property Organization for 2018-2019 [20] was approved. This Program provides for the introduction and implementation of the National Intellectual Property Policy Project at Ukrainian Universities and academic institutions based on the documents issued by the World Intellectual Property Organization and considering local features. As expected, a model document will be prepared. Such document will contain general provisions on the issues of the creation of intellectual property rights by employed lecturer and disposal of intellectual property rights to Universities (as an employer). Each University may use such model document to draft and adopt its own version. Thus, the model document positions' will be of a recommendatory nature and each University will be able to discuss its provisions with its employees and make any changes and additions that it considers necessary.

On the other hand, the legal relationships between the student and the University and the University and the lecturer are regulated by the legislation of Ukraine. Civil law and special legislation of Ukraine on intellectual property establish the legal principles of copyright protection of authors and recognize the authors' personal moral and proprietary intellectual property rights. The general rule recognizes the author's exclusive right to authorize the use of his/her rights to the copyright work and, accordingly, to prohibit such use. Simultaneously, there are cases when the law allows the use of the copyright work without the permission of its author, provided that they do not harm the use of the work and will not unreasonably restrict the legitimate interests of the author.

It is allowed to freely reproduce copies of the work for purpose of study. According to paragraph 2 of Article 23 of the Law of Ukraine "On Copyright and Related Rights" [21] is allowed (without the consent of the author or right holder) reprographic reproduction of published articles and other small works, as well as excerpts from written works with or without illustrations, provided that: a) the volume of such reproduction corresponds to the stated purpose; b) the reproduction of a work is a single occurrence and is not systematic in nature, to be made by educational institutions for studying in classes. Since the mentioned law contains a restriction on the volume of reproduction ("small articles") and contains a restriction on systematically copying of educational materials, thus, we think the University has no right to provide students with educational materials based on this legal provision without the permission of the author or a right holder.

Accordingly, we can say that the lecturer here is the author of educational materials, who owns the copyrights of the works (this article does not analyze the situation of co-authorship and/or the creation under order, as well as cases of creation of a work financed by state budget funds or separate grants).

Thus, another approach provided and specified in paragraph 40 of the Preamble to the European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. It is

stated that “with the exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives”. The legislation of Ukraine does not contain any restrictions or exceptions that applies in legal relations with entities of a non-commercial nature.

In accordance with the Civil Code of Ukraine [22], the author of a literary work has personal non-proprietary (moral) rights and proprietary rights in his work. Thus, Article 423 of the Civil Code of Ukraine provides a general description of personal non-property (moral) rights, which are specified in laws. Such rights are (1) the right to recognize a person as the creator (the author, performer, inventor, etc.) of the object of intellectual property rights, (2) the right to interfere with any breach of the right of intellectual property that is capable of damaging the honor or reputation of the creator of the object intellectual property rights; (3) other personal non-proprietary intellectual property rights established by law.

Article 424 of the Civil Code of Ukraine lists the proprietary rights of an intellectual property: (1) the right to use the object of intellectual property rights; (2) the exclusive right to authorize the use of the object of intellectual property rights; (3) the exclusive right to interfere with the unlawful use of the object of intellectual property rights, including prohibiting such use; (4) other proprietary rights of intellectual property, established by law.

Thus, only the author of educational materials can grant permission (license) for the University to use such educational materials, including for transfer to the students, in a manner and volume as set forth in such permission.

As a rule, the use of the works is allowed worldwide. Ukrainian law allows to define the territory or limit it to Ukraine, for instance. If educational materials are in Ukrainian, we think that such limitation is justified.

Another important question is one related to payment for such use. Current legislation of Ukraine leaves the question on payments for use of intellectual property work at parties' discretion. Payments for use (including, the particular amount and payments' terms) or free of charge use are essential part of the relevant agreement (license) on disposal of IP rights and should be agreed by the parties [23, p.170].

The issue of payment for the use of a literary work without the author's permission raises an important issue about the risks of recognizing the use of educational materials as a violation of the copyright of the author. This question is out of scope of this paper but requires to be separately analyzed.

Question 2. The further disposal of the educational materials by the students

The authors of this paper focused on the issue of how students are aware and understand what they can do with the educational materials they received, including afterward actions. Two questions were asked to determine herein.

The first question was whether students should be able to download (and save) such materials to their own computers. It was specified, that these are not just texts but also materials for distance learning, such as are provided on the Coursera website. 49% expressed their support for providing educational materials, and 39% stated that this was unnecessary, access to educational materials exclusively was enough. The remaining 12% indicated that it does not matter.

Upon receiving the results of the survey, the authors of this paper realized that Coursera was not a good example for this question, because according to Coursera's Terms of Use, while accepting it, user is getting a limited, personal, non-exclusive and non-exclusive license. User may download materials from Coursera for personal non-commercial use only. The use of Coursera does not give the user the rights of material or intellectual property to materials [9]. Therefore, formally, this example does not correspond to the task that was posed by the authors of the paper.

According to Article 424 of the Civil Code of Ukraine and Article 15 of the Law of Ukraine "On Copyright and Related Rights", the author has the exclusive right to authorize or prohibit the use of the work. Use of someone else's work is permitted through the conclusion of a contract (or the issue of a license), which, in a mandatory manner, must be made in writing. Therefore, in accordance with the general provisions of Ukrainian legislation, a student must have permission of the author of the work (in this case, the lecturer) to dispose of this work, including for the transfer to third parties. In other words, there is a non-exclusive license to use a work with the right of sublicense. From the practical point of view, the design of such a document for each student, lecturer and discipline seems an impossible task.

Thus, we can conclude that the current legislation of Ukraine on copyright establishes that for the lawful disposal of someone else's work, it is necessary to meet the following conditions: the provision of a written (not oral) permit (in the form of a license or a license agreement) to each (identified) user.

The second question relates to the identification of intellectual property rights that students receive regarding the further disposal of such educational materials: whether they can forward such educational materials to third parties and whether such an action requires a permit from University. The students' answers were distributed as follows: 49% answered that they can dispose of educational materials at the University's permission, 42% - without permission; 9% answered that they did not receive the right to dispose of educational materials.

From the legal point of view, the use of someone else's work requires the permission of the author (or another right holder). Law envisages the exhaustive list of permitted use of someone else's work without the permission of the author. In addition to the above-mentioned right to use works without the author's

permission for a purpose of study, without the permission of the author (or another right holder), it is allowed to freely reproduce copies of the work for personal purposes or for the family. However, this right does not apply to copying books and the computer programs (Article 25, paragraph 2, of the Law of Ukraine “On Copyright and Related Rights”).

This corresponds with provision set out in paragraph 34 of the Preamble to Directive on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Namely that “the possibility providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings”.

It should be remembered that the copyright law goal is to promote the development of creativity by recognizing author’s copyright and giving him/her the opportunity to use such intellectual property rights at his/her discretion. Including, making profit. Or without profit, but to achieve social goals. This constitutional right is recognized in most countries of the world, including in the Constitution of Ukraine. Given that moral rights may not be assigned or transferred, the author exclusively decides how to implement them. If a person wants - he issues a book and sells it for money. Or if he wants to, he provides an open and free access to his literary work. Following this example - by posting the text of the book on the Internet.

The issue of disposal of such rights is not only the issue of disposing of intellectual property rights. This question is much wider. For example, in terms of education, the right on academic freedom applies.

Academic freedom defined in Clause 1 of Article 1 of the Law of Ukraine “On Higher Education” as the independence and freedom of participants in the educational process during their pedagogical, scientific-pedagogical, scientific and/or innovative activity, carried out on the principles of freedom of speech and creativity, the dissemination of knowledge and information; which allow them conducting the scientific research and use of their results based on listed ground rules. Thus, in general, academic freedom means the right of lecturers and researchers to develop their field of knowledge and express their professional views without fear been suppressed or dismissed. Every researchers and lecturers enjoy the freedom of research, in the publication of their results, in the freedom to choose the form of submission of material to students.

This issue is regulated by law and in accordance to inter-universities’ treaties. For example, The Carta of Universities of Ukraine, adopted in 2009, includes open access to information, with the exception of legislation stipulated by the law, including scientific information through the development of open electronic archives (university institutional repositories), open electronic journals of

Ukrainian universities and the ability to freely maintain relationships with colleagues in any part of the world [24].

In practice, lecturers purposefully mark the educational materials created by them, with a copyright sign (c), when he/she wishes to benefit from any use this work [25]. It is possible that a lecturer, on the contrary, wishes to distribute his/her work freely and free of charge, and wants to allow anyone freely use this work without giving everyone separate permission to use. In order to realize this “desire”, public licenses are introduced and widely used all around the globe. For literary works, the most common are the Creative Commons licenses. The current six versions of the license (current version 4.0) include a combination of the following conditions: the attribution of authorship (provided in each of the six licenses), the prohibition of commercial use, the prohibition of the creation of derivative works and the requirement to distribute the work under the same conditions. Creative Commons licenses in Ukraine do not have a legal basis, as they are not explicitly envisaged in the legislation and contradict the requirement for a mandatory written form of the intellectual property rights license agreement (license).

Draft Law No. 7539 on Amendments to Certain Legislative Acts of Ukraine regarding Regulation of Copyright and Related Rights [26] was proposed to Ukrainian Parliament on 1 February 2018 and it was adopted in first reading. This Draft Law provides for, among other things, important amendments to the Civil Code of Ukraine. It was proposed to add a new article on setting up the electronic form of contracts for public non-exclusive licenses. The proposed wording, if adopted, will legalize the possibility of using public licenses in Ukraine, because today the failure to comply with the written form makes them null and void [27, p.201].

Public licenses are convenient legal tool that can be effectively used both for a physical medium (paper textbook) and electronic one. Implementation of the public license principles to the Ukrainian legislation would allow the lecturer to permit anyone to use educational materials in electronic form. Getting back to the Creative Commons example, we believe that the most effective for the lecturer would be use of the Creative Commons Attribution-Non-commercial-Free 4.0 International (CC BY-NC-ND), which means: individuals can only download and share a work with others, with obligatory attribution of authorship, without the right to make changes and use for commercial purposes [28].

Speaking about future development of education sphere, it is worth mentioning that on 2018 at the Third International Forum Innovation Market, the Center for Technology and Innovation Support (TISC) was presented. The Center is a first blink of future TISC’s network in Ukraine, and it is based on the National Intellectual Property Office, newly created state institution authorized to manage intellectual property matters in Ukraine [29]. It was announced that the Center for

Technology and Innovation Support was implemented with the assistance of the World Intellectual Property Organization, which will advise and provide access to patent information to inventors and innovators.

Another good example of concentration and further introduction of innovations is the launching of the communications platform “House of Innovation”, which involved researches, businessmen and startups. “Our goal is to come to grips with the information gap problem of those, who have ideas, and entrepreneurs, who are in search of interesting investment projects. We strongly believe that Ukraine will soon become advanced country and will be one of the first to introduce innovations on its market. Despite all the difficulties, we deem it necessary to seek ways to make rapid implementation of innovations and to strengthen our business environment. We shall come together and work together to make it happen” declared at the site. Within this platform, participants are looking for answers as science, business and government can be useful to each other [30]. Their facilities are used for different promo events, including on educational purposes by lectures.

These and other examples show the current state of potential and vision for proper reforming of the education system in Ukraine, but there is no clear political will of the State, the Ministry of Education and Science of Ukraine, and universities, in particular, towards the introduction and use of innovations in university's education.

Conclusions and perspectives for further studies

The results of the survey confirmed the students' need to receive free of charge educational materials from the University, which in general reflects the global trend (for instance, the concept of Open Educational Resources). Nowadays, the Ukrainian legislation does not contain a sociocultural framework, which would apply to this need [31, p.320] and the relevant provisions under Ukrainian legislation, which could resolve this situation. Ukrainian law set forth two basic rules, namely, it requires obtaining written author's permission as a condition of work's disposal; and it provides for the nullity of the application of the public licenses (alike Creative Commons).

If Universities wish to provide students with educational materials, they at least must to change their statutes and internal policies. In particular, such policies must contain formulation of the basic provisions on intellectual property rights over literary works created by the scientific and/or pedagogical workers. The issue on disposal of the intellectual property rights over such works to the students must also be reflected in the University's policy. Based on formal law approach, the “destiny” of the intellectual property rights on educational materials must be solved individually with each lecturer.

That is a reason why adoption of amendments to the Civil Code of Ukraine regarding the establishment of electronic form of contracts for public non-exclusive licenses may become a mechanism of legal regulation that addresses the problems described above and will become a “trigger” in making the educational materials more accessible to Ukrainian students.

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Chapter 16

Informatization of university education as a condition for innovative development

Innovation progress replaces scientific and technological progress, which determined the rapid development of technology and material culture of mankind. It is characterized by the priority of intellectual property inherent in the knowledge society, which is associated with the future progressive development of civilization.

The main features of the "knowledge economy" or "intellectual economy" are the functioning of economic systems based on the exchange of modern knowledge and the replacement of traditional labor (the superiority of intellectual skills over technical ones), the predominance of activities based on creativity in the personal working process, as well as the transformation of the traditional (technological) social production into an innovative one, which applies knowledge as a decisive economic resource [15].

Innovation activity is identified with the development of high technologies, which results in competitive goods and services. Objects of innovation activity are: innovative programs and projects; new knowledge and intelligent products; production equipment and processes; infrastructure of production and entrepreneurship; organizational and technical decisions of an industrial, administrative, commercial or other nature that significantly improve the structure and quality of production and social sphere; raw materials, means of their extraction and processing; commodities; mechanisms of formation of the consumer market and marketing of commodity products.

Accordingly, the strategic priority directions of innovation activity in Ukraine for 2011-2021 are as follows: development of new technologies of energy transportation, introduction of energy-efficient, resource-saving technologies, development of alternative energy sources; development of new technologies of high-tech development of the transport system, rocket and space industry, aircraft and shipbuilding, armament and military equipment; the development of new technologies for the production of materials, their processing and connection, the creation of the industry of nanomaterials and nanotechnologies; technological renewal and development of the agro-industrial complex; introduction of new technologies and equipment for high-quality medical care, treatment, pharmaceuticals; widespread use of cleaner production and environmental protection technologies; development of modern information, communication technologies, robotics [27].

Only an innovative person can provide an innovative type of progress and become successful in all areas of public life. It is characterized by an innovative type of thinking and an innovative culture that is being implemented and reproduced in innovation activities. It is such a person who can live in a constantly changing environment, is able to perceive changes and transform them, and also to create innovative products: new ideas, knowledge, technologies. In the globalized world, problems of self-knowledge, self-realization and professional growth of a young person are exacerbated. Strengthening integration processes brings up the demand for academic and educational mobility. The role of knowledge, which becomes the basis of everyday life, significantly increases the possibility for the individual to make optimal decisions. At the same time, the effective functioning of the scientific and educational branches is ensured by the implementation of human-centeredness as one of the key approaches in the formation of innovation personality [9].

In such conditions, university education becomes a key factor in the innovative development of society, an important means of forming the spiritual and intellectual sphere of a new generation of Ukrainian citizens, which constitute the potential of innovative social development. The realization of this task largely depends on the state's recognition of the priority of the educational sector [2].

The modern stage of society's development is characterized by increased integration of science and education, large-scale involvement of new knowledge. Conditions are created and there is a need for a combination of scientific and educational activities, deepening international cooperation, expanding the participation of scientific institutions and educational bodies, scientists, educators and students in international projects. At the same time, the strategic goal of state policy is to ensure the innovative development of domestic science and education, competitive in the international market of intellectual educational services [4].

Systemically, the problem of finding mechanisms for providing innovative development of science and education in Ukraine as a priority of the state was reflected in the National Strategy for the Development of Education in Ukraine for 2012-2021, adopted in 2011. According to it, the most important priority for the state is the upbringing of the person of an innovative type of thinking and culture, the design of the acmeological educational space taking into account the innovative development of education, the demands of the individual, the needs of society and the state.

The development of scientific and innovative activities in education, the improvement of the quality of education on an innovative basis is a necessary condition for ensuring sustainable democratic development of society, consolidation of all its institutions, humanization of socio-economic relations, and the formation of new personal reference points of life.

One of the main reasons for the inhibition of innovative development of science and education in Ukraine at the beginning of the XXI century lied in the fact that most of the regulatory acts exhausted their regulatory resources and did not meet the goals of personality formation with an innovative type of thinking, a highly skilled professional, mobile and competitive in the labor market and intelligent services. In its turn, it becomes a powerful stimulus for the radical renewal of the legislative framework for innovative educational activities [1].

Problems of the normative and legal provision of modernization of university education were discussed at the parliamentary hearings on the topic "Legal support of the reform of education in Ukraine", which took place in December 2015. The adoption of the Law of Ukraine "On Higher Education" as the basis for the creation of a new legislative and normative field of the functioning of education and science was noted as significantly positive. At the same time, it has traditionally been stressed on the insufficiently systematic and complex nature of measures for the formation of a coherent state policy in the field of education (petty regulation of the current activity of educational institutions, the formal nature of legislative changes, the need for modernization of financial and economic mechanisms of their activities, elimination of central and regional authorities from solving urgent educational problems, insufficient scientific validity of educational strategy, cumbersome and unbalanced management education system, the lack of an effective system of quality assurance, competitive environment in the education system, responsibility for the poor quality of educational services, general conditions to attract investment in education, autonomy in operating assets, equipment, land).

It was noted that the Law of Ukraine "On Education", most articles of which were adopted in 1996, was incomplete with the objectives of innovation development, as well as the problems of implementing the Law of Ukraine "On Higher Education" (in particular, regarding the creation of the National Agency for the Quality Assurance of Higher Education, the Harmonization of Norms legislation on the licensing of educational activities, clear definition of licensing conditions for the training of specialists in the educational and professional degree of the junior bachelor, developed by higher educational institutions of the new educational programs in the absence of standards for higher education, ensuring financial autonomy of higher education institutions, etc.) [32].

In practice, the proper implementation of other normative legal acts that provide innovation in the scientific and educational sector is not ensured. The National Framework of Qualifications, approved in 2011, has not been used for a long time by authorities, educational institutions and representatives of the labor market [33].

In view of this, scientific interpretations of the legislative provision of innovation development move from the plane of imperfection of the regulatory

framework to the level of effectiveness of its implementation. Thus, V. Bakhrushin determines the inertia of the previous development of the educational system and the problems of implementation as the factors of negative tendencies in the higher education area. The scientist identifies several groups: excessive expectations; imperfection of the law itself; slow updating of the regulatory framework for education; absence of changes related to other laws and subordinate normative documents; the reluctance of a large part of the educators to do something for themselves to improve the state of higher education [34].

Therefore, important principles of state policy in the area of innovative development of science and education remained declarative, not supported by specific responsibilities (for example, promotion of sustainable development of society, state support of educational, scientific and technical as well as innovation activities, accessibility of higher education). The Law and the by-laws do not define the indicators of the quality of the state's functions in managing the innovative development of the scientific and educational sector. There remained unmatched academic, financial, organizational autonomy of scientific institutions and higher education institutions and norms that ensure their practical implementation.

A sufficiently wide legislative framework did not provide for the implementation of regulatory functions of the innovative development of science and education. That is why the main mechanisms for implementing the strategy identified an update of the regulatory framework, which included the preparation of new regulatory acts and the improvement of the existing ones. First of all, it is the development and adoption of the Code of Laws of Ukraine on Education, the Laws of Ukraine "On Higher Education", "On Vocational Education" as well as amendments to the legislation on the development, approval and implementation of the national qualifications framework; the order of formation of the state order for the training of specialists with higher education, the methodology of scientifically based forecasting of the labor market, taking into account the programs of development of the branches of the economy, the creation of legal and economic mechanisms for stimulating employers and investors regarding their participation in strengthening the educational and material base of the education system, the development of vocational and technical higher educational establishments and the restoration of the country's labor resources, improvement of the legal and regulatory framework on priority areas for the provision of life sciences schools, etc. [14].

Therefore, the strongest incentive for a radical renewal of the legislative framework of the scientific and educational sector was the adoption of the Law of Ukraine "On Higher Education" in 2014, which established the legal, organizational, financial principles of the functioning of the higher education system in order to create conditions for an organic combination of education with science and production, with the purpose of training specialists for high-tech and innovative

development of the country, self-realization of the individual, ensuring the needs of the society, the labor market and the state in qualified specialists. The priorities of state policy in the higher education area are the promotion of sustainable development of society through the preparation of a competitive human capital and the creation of conditions for life-long education, international integration of the higher education system of Ukraine into the European higher education area, provided that the national higher education school maintains and develops the achievements and progressive traditions, state support of educational scientific and technical and innovative activity of higher education institutions, in which conditions are created. A combination of organic education in science and industry for the purpose of training for high-tech and innovative development, self-identity, the needs of society and the state of the labor market for qualified specialists [19].

Innovation activities of the university are considered to be aimed at the creation and implementation of innovative products and services. Several of its main types are distinguished: the implementation of fundamental and applied scientific research, the development of its own infrastructure of innovations, the launch of the results of its own research activities on the market, the development and implementation of integrated projects and programs of innovation development; teaching innovative activity for teachers, researchers, postgraduates, doctoral students, applicants, students as a factor of reproduction of innovative personnel; educational innovation activity (creation of innovative courses, trainings) [31].

Innovative University in modern conditions is, above all, an institution of higher education, teachers, students and postgraduates who are able to realize their innovative work, to implement the results of their research and development in the economy by setting up new enterprises [7].

In practice, the innovative activity of the institution of higher education remains separate from other activities, which confirms the analysis of strategic directions of development of leading domestic universities. For example, the main task of Taras Shevchenko National University of Kyiv is educational, research, and innovation activities, which in turn is positioned with projects that have commercial potential and adapted to the requirements of the European Enterprise Network (EEN). These are proposals for the following scientific areas: biotechnology, energy, ecology, information and communication technologies, nanotechnologies and new materials, socially important and industrial supply of scientific and technical services that can be provided by the staff and laboratories of the university. These are mainly technological and business proposals, events devoted to the development of a technology transfer system [3]. One of the leading areas of innovation activity of the NTUU "I. Sikorsky Polytechnic Institute" in Kyiv is the support of the innovative ecosystem Sikorsky Challenge (INESC), which provides the selection, attraction and training of creative people to found

their own business and startups, help for the participants in the search for investors and advancement [5].

In the Kyiv National Economic University named after Vadym Hetman, innovation activity is identified as one of the strategic goals and directions of innovation activity. Innovative educational activities include the improvement and harmonization of curricula, the development of new curricula, curricula for bachelor's and master's degrees, in particular foreign languages, the creation of a new generation of interdisciplinary research education programs, and the improvement of the system for forming the competencies of the bachelor's and master's levels on the basis of their harmonization with professional standards, employers, development of a system of "lifelong learning" for graduates of different years and their support in professional growth after graduation from the university, improvement of normative materials regulating the organization of educational activities at the university, increasing the flexibility of educational training at the university and improving the selective component of curricula, preparing joint educational programs with educational partners and foreign students, increasing academic mobility of students and teachers through their participation in international and national business forums, educational and methodological conferences, promotion of graduates' employment through the conclusion of trilateral agreements between the university, graduates and employers, the introduction of modern teaching methods based on information technologies, support of existing forms of education through distance technologies, as well as the development of new forms of knowledge acquisition, the development of the institution's repository of the university, connection of specialized periodicals of the university to the world of science-computer databases, creation of an information platform for the exchange of knowledge "digital University ", to enable students to use their own computer devices in the educational process. [22]

The strategic directions of the development of the National Aviation University determine the priorities of its development as an innovation center of the aviation-space industry, ensuring the quality of educational activity at the university as a condition of its competitiveness, which is achieved through the application of innovative management. An important factor in the University's innovation development is the creation and operation of a single integrated information environment as a set of information infrastructure, software and hardware, methods and procedures [29].

In order to optimize innovation activity of higher educational establishments, scientific institutions and manufacturing enterprises during 2015-2016, the project "Innovation University - an instrument of integration into the European educational and scientific space" was launched on the basis of the Uzhgorod National University. Based on the analysis of the European and world experience

of higher education innovation it provides for the development of the concept of the formation of an innovation university of European type, the development of mechanisms for effective cooperation between science and production, the development of innovative technologies and teaching methods in universities, the introduction of innovation experience through collaboration with manufacturing enterprises and scientific institutions of European countries, practical implementation of innovative domestic and foreign technological developments and technologies [6].

Therefore, the priorities of the innovative activities of the powerful universities, the leaders of the university science, are the deployment of effective educational and scientific activities, which will result in a specialist-innovator, as well as modern technologies, the introduction of which will ensure the receipt of competitive goods and services. Under the separation of university science from academic one and in view of the systemic problems of material and technical provision of the educational industry, the development of innovation activities of universities, even the most powerful ones, encounters a lot of obstacles in its path. In addition, the concept of innovative educational activity as a leading activity of the university remains unclear.

The promising direction of developing innovative university education is the introduction of business universities; their scientific and production potential makes it possible to commercialize the received innovative products and services. Voucher university education, which is effective at the expense of flexible financing mechanisms, is also quite innovative.

Research institutes that provide integration of innovative, educational and scientific components become a powerful factor in the development of innovation in the system of higher education. According to the researchers of the outlined problem, the research universities themselves will become the main link in the innovative training system of highly skilled personnel in conditions of changes and growth of competition. This, in turn, will contribute to the structural transformation of the economy and the transition to innovative production models, as well as to stimulate the growth of the demand of specialists of the scientific and technological industry in Ukraine.

The following main criteria to be met by research universities are distinguished: the proportion of funds received by the university on a competitive basis for the implementation of fundamental and applied research exceeds 50% of the total budget; innovative content and methods of teaching students; involvement in the educational and research process of foreign teachers; the innovative structure of the university, which includes both the educational environment and research enterprises, where the technological introduction of the results of innovation activities and the production of innovative products and services [7] are carried out.

One of the first higher educational institutions in Ukraine, which began to form the content of the research university, became NTUU "Kyiv Polytechnic Institute named after I. Sikorsky". In 2007, the Regulation on a pilot project "Research University of the National Technical University of Ukraine" Kyiv Polytechnic Institute "was put into operation. This project envisaged the creation of a new model of a higher educational institution of a research type and the search for mechanisms for the integration of science, education and innovation as well as the implementation of innovation activities in Ukraine [5].

To a large extent, due to the experience of the most powerful higher educational institutions, the formation of the legislative framework for the functioning of research universities began. Its basis was the Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Regulations on the Research University" (2010), which determined the procedure for granting the national university the status of a research institution, the basic principles of its activity, the peculiarities of personnel provision, financing, material support of scientists and pedagogues, the rights and responsibilities of the research university, which is defined as a higher educational institution with significant scientific achievements, conducts research and innovation activities, with ensures the integration of education and science with production, participates in the implementation of international projects and programs. With this provision, on the one hand, the main purpose of the research university is determined by the creation of an innovative environment that is directly related to innovation activities. On the other hand, educational activities are separated from scientific and innovation ones, which, in general, corresponds to the above-mentioned tendencies of the formation of innovation activity in university education.

The legal framework for the development of research universities is outlined in the Law of Ukraine "On Higher Education" (2014). The main priority in granting such status is the contribution of the university to the development of the state in certain areas of knowledge based on the model of the combination of education, science and innovation, and promoting its integration into the world of educational and scientific space [19].

The analysis of the peculiarities of the development of innovation activity shows that one of the important factors of its activation is the wide informatization of all branches of social life, which manifests itself in the dissemination of network logic and network principle of organization both in production processes and in everyday life and culture [15] as innovative university education is impossible without the widespread use of information and communication technologies.

The following main directions of informatization of education are determined: modernization of material, educational, methodological, information base of education on the basis of ICT and creation of service centers for its maintenance; formation of students' informational culture in the conditions of society's

informatization; increasing the efficiency, accessibility and quality of education through the integration of ICTs into the University's educational process; provision of information security of the educational information environment; improvement of the system of managing the institutions of higher education by means of ICT [12].

At the same time it is ICT in the educational process that allows the teachers to focus on the research and creative skills as a condition for their future innovative professional activities.

In 2005, the State Program "Information and Communication Technologies in Education and Science", which was designed for 2006-2010, was approved. Its purpose was broad introduction of information and communication technologies in order to create conditions for the development of domestic education and science, increase of efficiency of public administration, ensuring the realization of the rights to freely search, receive, transmit, produce and disseminate information. The priorities of the state policy in the area of information technologies are determined not only to establish production of high-tech products, in particular, computer programs and information products that meet the highest international standards, as a condition of innovation development of the economy, but also focus on the preparation of education at different levels of IT- professionals and skilled users.

The program was aimed at taking certain steps in addressing the current problems of informatization in two main areas. Firstly, this is an increase in the general information literacy of the population, the development, implementation and legalization of software tools, the protection of copyright of authors and developers, training and retraining of personnel, the development of information security systems for the operation of networks and information resources.

Secondly, special attention was paid to informatization of the educational branch. In particular, it was the provision of educational institutions with modern information and communication equipment, the introduction of IT technologies in the educational process and scientific research, access to national and world information resources, the involvement of network technical resources to ensure the connection of scientific institutions and educational institutions to the Internet, technology development for distance and lifelong learning. The emphasis is placed on the necessity of expanding the network of electronic libraries of educational bodies and scientific institutions, building up the infrastructure of the scientific and educational telecommunication network (URAN), which should unite domestic educational and scientific institutions and ensure their integration into a single European educational and scientific space, in particular, through GEANT Research Network.

The program ensured technical means and network equipment for the amount of more than UAH 10 million, provision of licensed software, creation and

upgrading of local networks and connection to the Internet provision of institutions of higher education, scientific and methodological institutions for 2006-2010 [23].

An important result of its implementation was a pilot project for the creation and implementation of software tools for the implementation of current and final control of students' achievements, the bank of certified distance education courses, software for distance learning systems, the creation of a system of distance learning for retraining and advanced training of scientific and pedagogical employees.

The basic legislative act that determined the direction of informatization was the Law of Ukraine "On the Basic Principles of the Information Society Development in Ukraine for 2007-2015". Strategic goals of the development of the information society were defined: acceleration of development and introduction of the newest competitive ICTs in all spheres of public life (economy, activity of state authorities and local self-government bodies); development of the national information infrastructure and its integration with the global infrastructure; state support for new electronic sectors of the economy (trade, provision of financial and banking services, etc.); state support for the use of the latest ICT by the mass media; protection of citizens' information rights, especially regarding the availability of information, protection of personal information, support of democratic institutions and minimization of the risk of "information inequality"; improvement of legislation on the regulation of information relations; improving the state of information security in the use of the latest ICT [26]. At the same time, the key factors in ensuring computer and information literacy of the population are the development of an education system that focuses on the use of the latest IT as a means for the formation of a fully developed personality, as well as the introduction of education in nation-wide information systems.

The introduction of ICTs should help improve the quality and accessibility of educational services, increase access to national and world information electronic resources, create new jobs, improve the living standards of the population through economic growth, human rights and freedoms, equal quality access to education, the provision of social protection of vulnerable groups of the population, integration of education, science and culture of Ukraine into the global cultural, educational, scientific and technical information space.

The promising direction of informatization of the educational-scientific branch is the introduction of Grid-technology, that is, a geographically distributed information system that combines information resources of different types and provides effective collective access to them within the framework of virtual organizations. This technology is used to fulfil a variety of scientific and organizational tasks that require significant computing resources.

Grid technology provides global integration of information and computing resources on the basis of network technologies and special software and provides access to geographically distributed information and computing resources (individual computers, clusters, information repositories and networks).

The subjects of information interaction are united in virtual organizations (consumers and resource owners) to achieve a common goal. This infrastructure gives researchers an access to high-performance computing resources 24 hours a day regardless of their geographic location [11].

Europe's largest Grid-system for research support (EGEE), which combines national, regional and thematic Grid-developments, is the largest in the world. The Grid-segment of the National Academy of Sciences, which combines the information resources of academic research institutions, functions in Ukraine.

In 2007, the National Grid Infrastructure was launched on the basis of the National Scientific and Educational Network of URAN to provide nationwide virtualization of distributed computing resources of various types (processors, data warehouses, networks, unique equipment) capable of supporting the livelihoods of state structures, scientific and educational organizations, industrial corporations. The result of the project is the creation of a high-quality national Grid infrastructure that supports collaboration services in the European scientific area and contributes to the creation of a knowledge-based information society economy. The project includes academic institutions and universities of Ukraine (in particular, the National Technical University "Kyiv Polytechnic Institute", Kharkiv National University of Radio Electronics, Lviv National Technical University "Lviv Polytechnic", Zaporizhzhya National Technical University, Donetsk National Technical University, Dnipro National Mining University). Representatives of the national university science received a unique opportunity for remote access to the world's repositories of scientific data, as well as the possibility of sharing computer technology and advanced equipment [16].

In 2009, the Cabinet of Ministers of Ukraine approved the State target scientific and technical program for the implementation and application of grid technologies for 2009-2013. Its purpose was to create a national grid infrastructure that provides grid technology implementation, development of specialized software and training of relevant professionals.

National grid infrastructure should integrate into the European global grid infrastructure resource centers, grid nodes, fiber-optic high-bandwidth communication channels, specialized software and information resources that meet information security requirements. It was envisaged to provide the possibility of applying grid technologies for the scientific research and the integration of domestic scientific institutions and universities into the world scientific space, participation in modern experiments and the elaboration of their results, discussion of scientific issues in virtual forums. It will facilitate the

intensification of international scientific and scientific-technical cooperation by attracting users of national grid infrastructure to international virtual communities, maximally meeting the needs of scientific and educational institutions in computing resources, scientific and technical as well as social integration of Ukraine into the European Union.

The program determined the mechanisms for creating a system of training and retraining of specialists on the issues of introduction and application of grid technologies, the establishment of training centers and the development of training programs, the organization of seminars and workshops on the issues of grid computing [24].

Nowadays the Basic Grid Center of the Ukrainian National Grid, which provides management and coordination of works on support of national grid infrastructure, resource centers, grid sites for provision of services (distributed computing, access to distributed databases and software) technological and operational coordination of the work of grid sites with the requirements of European and international grid infrastructure has been created and has been functioning [30].

In April 2010, in order to ensure effective formation and implementation of the state policy of in scientific and technical as well as innovative activity and technologies transfer the State Committee for Scientific and Technical as well as Innovative Activity was founded. It became the successor of the Ministry of Education and Science in providing for the implementation of state policy, in particular, in the innovation area. In July 2010, the State Committee of Ukraine on Science, Innovation and Informatization was formed on the basis of the State Committee of Informatization and the State Committee on Science and Technology and Innovation Development.

In 2011, the Presidential Decree approved the provisions on the State Agency for Science, Innovation and Informatization of Ukraine (State Institute of Informatics of Ukraine), which became the central executive body; its activities were directed at the implementation of state policy in the area of scientific and technical as well as innovation activities, technology transfer, informatization, formation and use of national electronic information resources, creation of conditions for the development of the information society.

Its main functions were to determine the generalization of the practice of applying legislation on informatization and innovation, developing proposals for the improvement of legislative acts, acts of the President of Ukraine, Cabinet of Ministers of Ukraine, organization of forecasting and analytical research on trends in scientific and technical as well as innovation development, determination of priority directions of science and technology development, innovation activity, analysis of the effectiveness of scientific and technical, innovative activity, transfer technologies, granting the status of a national scientific center to research

institutions and higher education institutions of the fourth level of accreditation, participation in conducting state scientific and scientific-technical expertise of innovative projects and informatization projects, implementation of state registration of innovative projects, competitive selection of innovative projects, formation of a database of innovative programs and projects, international innovation programs and projects, in implementation of which domestic state-owned enterprises within the framework of international innovation cooperation are involved [25].

One of the directions of the development of innovative university education is the development of a distance education system. Its basis is pedagogical and information technology of distance learning. Moreover, both of these components are focused on IT technology. The pedagogical component determines the peculiarities of the interaction of the educational process subjects with the use of telecommunication connection and the methodology of individual work of students with structured learning material. The information component includes technologies for the creation, transmission and preservation of educational materials, organization and support of the educational process of distance learning through telecommunication. An important place in the organization of distance learning is given to the national telecommunication network for the institutions of science and education of Ukraine with the access to the Internet (URAN network), created within the framework of the National Informatization Program [8].

According to Art. 3 of the Law of Ukraine "On Education", applicants of all levels of education, including higher education, have the right to access scientific and informational resources (Internet, electronic textbooks and other multimedia educational resources). The modern electronic textbook is an electronic educational publication with a systematic presentation of educational material that corresponds to the educational program, contains digital objects of various formats, ensures interaction. Article 9 of the Law "On Education" institutionalizes the distant form of education as an individualized process based on the indirect interaction of the distant participants in the educational process and involves the formation and maintenance of an information environment that operates on the basis of information and communication technologies. Information technology on the basis of modern software is considered an important means of effective management of educational-scientific process at the university and ensuring the quality of education (Article 41) [35].

Today, the digital competence of a graduate of a higher law school is an important component of their professional competence. For instance, in the educational process of the Law Faculty of the National Aviation University, electronic textbooks are used effectively; it ensures the activation of students' learning and cognitive activity, boosts their performance on the basis of the

formation of skills and abilities of professional activity, gaining experience in solving legal problems in specific situations.

Thus, the interactive e-textbook on judicial rhetoric "Agon" provides an opportunity to organize practical classes using interactive learning methods ("brainstorming", "brain attack"), to conduct competitions in oratory skills. The electronic textbook on discipline "Tax Law" contains an interactive course with lectures on legal regulation of taxes and duties, which are a part of the tax system of Ukraine. Training programs-simulators (computer programs - gaming systems that simulate real events of the legal area) are especially effective for the formation of practical skills and abilities of future lawyers: a business game on the discipline "Banking Law" that simulates the mechanisms of legal provision of bank loans, processes of drawing up real loan agreements taking into account all rights and obligations to a specific loan agreement; computer game "Legal consultation", which allows to work out dialogical communication acts (legal counseling); Role Playing Game from the discipline "Civil Process" using the computer program "League-law", which simulates a court hearing on civil cases, reproduction of typical situations and specific methods of consideration and resolution of legal cases by playing game situations, the active participation of the entire group in realizing the objectives of the class. Virtual laboratories ("Virtual Forensic Laboratory") provide the ability to work out the skills and abilities of the future professional activities in a virtual environment.

Computer systems for monitoring and evaluating academic achievements enable the teacher to organize effective and objective control and evaluation of the level of formation of subject and professional skills [36].

Practical tasks with the use of electronic resources ("Liga-Law", electronic law libraries "Pravoznavec", "Pravo", "Zakon") are effective means of forming the digital competence of future lawyers. The use of the information and legal system "Liga-Law" enables students to develop skills in solving legal practice tasks that involve working with regulatory information, timely account of changes in the legal framework, optimal information search, analytic work with documents, processing large arrays information, mastering algorithms for finding the right information. This functional platform is a collection of computer legal systems that contain legal information, expert comments, systematic thematic collections of documents, and provide users with analytical tools for analyzing information.

Future lawyers can work out the ability to create and maintain collections of documents, categories and classifiers, comments on them; establish links between documents, get acquainted with various background information; create statistical surveys and reports; work with the current normative base and create their own databases [37, p. 148-151].

Thus, the use of educational and managerial technologies based on modern multimedia and hardware tools is an integral part of the functioning of an

innovative higher education institution. Accordingly, one of the priority tasks of higher legal education is the formation of information and communication competence of the student as an important component of the professional competence of a lawyer. Its solution is ensured through the use of electronic teaching aids and educational electronic resources in the educational process for the training of prospective lawyers.

The strategy of innovation development of Ukraine for the period up to 2030 envisages creation of favorable conditions for the development of the innovation sphere, attraction of investments into innovative activity, the subjects of which are scientific workers and legal entities representing them, in particular, institutions of higher education. Important factors in the innovative development of society are the provision of the state support for the creation and effective functioning of elements of innovation infrastructure in higher education institutions, increasing the number of information events in order to disseminate the experience of successful start-ups and innovative projects.

It is relevant to create methodological materials for universities on the organization of innovation activities, the deployment of a training system for the provision of innovation infrastructure [28].

Today, in general, the basic legislative field of informatization of higher education has been formed and the innovation activity of universities is deployed. However, according to the researchers of this problem, the development of normative and legal support of this process (in particular, further theoretical and legal research, development and implementation of relevant normative acts, state and sectoral plans for the development of informatization of education) remains relevant. [10]

An important step towards the formation of a modern information environment in Ukraine as a component of a united European educational space is the deployment of electronic libraries in universities. They not only provide access to scientific and pedagogical staff, doctoral students and students to national and international information resources, but also personalize the achievements of a particular scientist, motivating their personal development.

Therefore, one of the factors of the development of innovative university education is the introduction of information and communication technologies, the effective use of which is projected to the general level of information society.

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Chapter 17

Evidence admissibility in criminal proceedings and criminal liability for violations of the evidence obtainment procedure

One of the main criminal proceedings issues appears to be the institution of evidence, its sources and the procedure of dealing with them. It is quite incompletely, contradictory and imperfectly presented in Art. 84, Art. 93 and others of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine) [9]. At the same time, the application of the criminal liability for violations during the evidence obtainment procedure will assist in solving the fundamental problems of evidence admissibility into the stated procedure.

Part I of Art. 84 of the CPC of Ukraine outlines the evidence concept quite superficially and doesn't reflect the fundamental and additional legal evidence properties. Some evidence properties are explicated in the context of other proof problems according to Arts. 85-90 and others of the CPC of Ukraine. These Articles deliberately point out false grounds for the recognition of certain information as evidence. For instance, some testimony and expert opinions are not correctly nominated by the procedural evidence sources in Part 2, Art. 84 of the CPC of Ukraine, as the testimony, in fact, presents the peculiar way of evidence transfer from personal sources to an investigator, a court or other criminal proceedings subjects. Expert opinions are one of the evidences supply forms in criminal proceedings, obtained through the material and personal sources studies by an expert or some other relations or phenomena. Also, the expert opinions may be obtained by means of documents study using whatever special knowledge except the legal one. The mentioned knowledge therefore becomes more professional than special for an investigator, a judge, as well as for other subjects, conducting the proceedings.

These and other drawbacks concerning the evidence properties and nature, such criminal procedure law scientists as S.A. Kyrychenko [4, pp. 169-170] and many others [2, pp. 20-22; 10, pp. 134-140; 15, pp. 169-173, etc.] tried to correct. They offered the innovative evidence essence comprehension, their fundamental (significance, legality, admissibility, high quality, authenticity) and additional (consistency, sufficiency) legal properties as well as the proof problems closely connected with these.

In addition to these national researches, the national and foreign practice gave the great number of acquittal sentences, passed by courts considering only strictly formal reasons, to the world. For example, in 1961 Ohio police searched Mapp house, where the criminal was present, according to the police. They didn't

inform the above-mentioned female citizen about the search and found the pornographic photos collection among her things, violating the state legislation. Based on those facts, Mapp was initially convicted, but later acquitted by the United States Supreme Court after filing an appeal. The United States Supreme Court ruled that the evidence had been illegally obtained by the police and couldn't be used as her guilt proofs infringing the legislation concerning the pornographic photos collection storage [18].

A new CPC of Ukraine was adopted in 2012. It has greatly intensified the focus of the domestic judicial practice concerning the use of the foreign courts practice; mainly it concerns the European Court of Human Rights (hereinafter referred to as the ECtHR). The same demands are outlined in Part 2, Art. 8 of the CPC of Ukraine, due to which the rule of law in criminal proceedings is applied considering the ECtHR practice. The similar situations concerning the acquittal verdicts rendering appeared and became widespread. Many of these cases and their legality arguments are also outlined in A.V. Panova's candidate thesis. In particular, the author additionally substantiates the legitimacy of the evidence recognition practice as inadmissible because the evidence has been obtained before adding the information about the committed criminal offences into the Uniform Register of Pre-trial Investigations. Also, this scholar considers the necessity to recognize the evidence as inadmissible, obtained after the pre-trial investigations expiry term due to Part 8, Art. 223 of the CPC of Ukraine norms [13, p. 104]. This, in fact, is deemed to be illegal and contravenes the norms contained in Part 2, Art. 3 of the Constitution of Ukraine. The mentioned Supreme Law norm obliges the state and its bodies to confirm and guarantee the rights and freedoms of all the citizens. In this case, both the defendant and the complainant interests are taken into account, the legal status of the latter being infringed by the above-mentioned acquittal verdicts, rendered on the basis of purely formal procedure law violations. The court, thus, doesn't undermine the authenticity of the information obtained in such a way. Those reasons justify the necessity to improve the existing innovative vision of the nature and evidence properties, the admissibility of such information as an evidence for the proof, the criminal liability application for the evidence obtained.

Y.I. Lantsedova suggested a brandnew solution to define the evidence concept and properties. She has scrupulously analyzed the existing 27 evidence assessment assignments and 17 similar evidence verification assignments and concluded that an integrated evidence assessment may only have the right to define such basic legal properties as each and every evidence significance, legality, admissibility, high quality, and such additional legal properties as sufficiency and consistency [10, p. 172].

Having used the above stated results, S.A. Kyrychenko offered a new version of the first two Article Parts of the CPC of Ukraine on evidence [4, pp. 169-170], and

O.S. Tuntula developed this approach on the comprehensive adjustment of all the actions, evidence and sources [15, pp. 169-173]. It was further improved as it appeared obvious and necessary to differentiate one more fundamental evidence legal property named authenticity [2, p. 41-45, etc.]. Later, our national scholars proved the viability of only three fundamental evidence legal properties – significance, high quality and authenticity, while the admissibility might be considered only as the result of evidence assessment. If a person violates the legality demands in obtaining evidence, the criminal liability is presupposed to punish the wrongdoer. But the stated circumstances shall not lead to inadmissibility of such an information and its ability to be used as evidence, provided that the information is significant, of high quality and authentic [11, pp. 33-34, etc.]. Currently, this point of view also reserves some further developments, particularly regarding certain norms and criminal liability application procedure for the violations during the information obtaining procedure.

However, the above presented results of the court practice show that this approach can not solve the problem at the moment. In a point of fact, such fundamental legal property as legality, i.e. the information obtaining, stipulated by the CPC of Ukraine, so to say, without the use of fraud, threats or violence, or omitting any other substantial infringements of the subject's legal status, makes it impossible to recognize these facts as evidence and to admit them as such into the proof process.

As a result, we have already outlined a brandnew point of view about the indispensability to define only three fundamental evidence legal properties such as significance, high quality and authenticity. Also, we have already introduced a slightly different understanding of the last two properties.

The examples of the judicial practice regarding the recognition of evidence as inadmissible only due to some formal grounds and therefore the acquittal verdicts rendered based on those formal grounds, give the opportunity to assert the illegality of such verdicts covering all the situations where the formal violations of the pre-trial investigation procedure took place. Definitely, just the formal infringements themselves don't give reasonable grounds to doubt the authenticity of the evidence obtained. In such cases the investigator and the prosecutor shall be held liable for the above mentioned infringements, however, these infringements can not be considered the ones permitting the recognition of the obtained information inadmissible as evidence with regard to the indicated cases, especially taking into account their overall value of evidence in comparison to all the other evidence with regard to the case.

For the last few years the jurisprudence expresses an opinion that only three fundamental evidence legal properties prove their right to exist instead of the above mentioned five fundamental evidence legal properties [2, pp. 20-22; 11, p. 28, etc.] – significance, high quality and authenticity. The information is considered to

be of high quality if it doesn't contain meaningful contradictions and makes it possible to conclude univocally, also, if the information is obtained either without substantial infringements of widely recognized expert methodology or without the recognized in the due manner expert methodology. We argue the admissibility as the fundamental evidence property. It matters only when assessing the evidence as a whole. And it looks quite reasonable and persuasive when transforming the admissibility from one of the fundamental legal properties of each and every evidence into decisions having to be made relying onto the overall value of certain information. More importantly, this information has to be verified regarding the existence of all those fundamental legal properties in it, without which the information can not be deemed as evidence and therefore can not be included into the proof process as evidence.

In this regard it should be specified that, firstly, the admissibility, in fact, depends on the assessment, including the examination of each and every piece of information in order to find this inherent unity of all the fundamental legal properties in it. We would strongly recommend bearing in mind that currently only significance, authenticity and high quality are considered [3, pp. 31-32; 11, pp. 33-34].

Secondly, we have suggested herein the detailed instructions how to employ evidence in the proof process together with some other pieces of information. The following issues should not be proved in the criminal proceedings: a) the provisions of a specific legal act; b) a well-known or prejudicial fact, which, however, may be used directly in the decision making process along with evidence; c) a paranormal phenomenon, that is the one that contradicts the well-established laws of nature or just can not be explicated. Theses points are deemed to be underpinned in the following manner: the provisions of a specific legal act may also be used in the proof process along with evidence, providing they comply with the competition or collision standards, also, generally known facts and/or prejudicial facts and/or presumptions, if the main subject of the criminal proceedings doesn't doubt the significance and/or authenticity of such facts. The notion *main subject* presupposes the person liable for the direct, objective, comprehensive and complete clarification of all the criminal offence circumstances (e.g. an investigator, a head of the investigative department, an investigating magistrate, a judge, etc.).

Cardinal developmental changes are still to come into the sphere of evidence, the nature of legality and evidence admissibility as fundamental legal properties presenting such information. Also, Art. 86, Art. 87, Art. 90 of the CPC of Ukraine must be reconsidered concerning the issues of evidence inadmissibility recognition. The aforementioned articles of the CPC of Ukraine indisputably recognize the information obtained violating the procedure set by the CPC of Ukraine, or significantly infringing the legal status of the criminal proceedings subjects, inadmissible for the proof process as evidence. Currently, one has to

admit that the tendency of recognizing the information inadmissible if it was obtained in the above stated manner, shall be applied only if the information obtaining, occurred either without complying with the procedure set by the CPC of Ukraine or omitting it, also, substantially violating the legal status of criminal proceedings subjects, disturbs the subject of the stated proceedings. In other words, the person handling the proceedings doesn't have the opportunity to make sure that this information is authentic enough. At the same time, persons guilty of non-compliance with the evidence obtaining procedure or of obtaining it in a manner that significantly infringes the legal status of the criminal proceedings subjects, shall bear such a legal liability that will guarantee the minimal level of such instances.

The type of liability, whether it would be criminal or any other legal liability, totally depends on the factual circumstances of the evidence obtaining. The attention therefore is paid to the character of the infringements when obtaining the evidence: were they infringing the procedure set by the CPC of Ukraine or the rights and fundamental freedoms of the criminal proceedings actors? And were those infringements really significant or mainly formal? First of all, special attention shall be drawn towards the existence of some peculiar norms in the sphere of the criminal authority abuse, malpractice or power abuse regarding the crime commitments against justice. These norms include:

- coercion to testify while being questioned by the prosecutor, investigator, or the Operational Search Department public officer. These coercion measures are of an illegal character, that's why the aforementioned persons are held liable due to Part 1, Art. 373 of the Criminal Code of Ukraine [8];

- if these illegal actions took place along with the use of force and violence, but without the torture traits, then the aforementioned persons would be held liable due to Part 2 of the same Article.

It's worth emphasizing here that the head of the pre-trial investigation body is considered to be the subject of this crime, if he examines the witnesses by himself, and therefore performs the functions of an investigator.

Any other person can commit the above described crimes having agreed previously with the aforementioned persons or because of their tolerance. The criminal liability in this case is calculated according to the level of the accompliceship with the subjects of a crime (Art. 373 of the Criminal Code of Ukraine).

At the same time, due to quite narrow and very imperfect disposition version of the current Article, such criminal actions can not take place while obtaining information from a personal source when conducting the investigative experiment, presentation of a person or things, or a person's corpse for identification. Such criminal actions even can not take place while conducting

searches and the whole range of many other investigative (search) actions, directly or indirectly related to obtaining the evidence from this or that personal source.

Taking into account these reasons, coercion to testify not only during the examination (simultaneous examination of two or more persons, cross-examination), but during any other investigative actions violating the procedural law norms, has to be qualified, if supported sufficiently, pursuant to Art. 365 of the Criminal Code of Ukraine. Such socially dangerous actions should be regarded as premeditated wrongful acts committed by a police officer. These wrongful acts are considered to exceed the rights and powers granted to the police officer if they have definitely injured the rights guaranteed by the law, the citizens' interests, state or public interests, legal person's interests.

If coercion to testify possesses the torture traits, then the actions of a guilty person should be qualified due to the total number of crimes set by Art. 365 and Art. 127 of the Criminal Code of Ukraine. Art. 127 of the Criminal Code of Ukraine includes the norm prescribing the liability for the torture, the grounds permitting it. The torture in this regard means the intentional use of utmost violence, that causes severe pain and suffering, both physical and mental, battery, torments or other violent actions in order to force the injured person or another one to perform acts contradicting their will. Also, the torture aims at getting some information or confession, and at punishing the injured person or another one for the actions performed by this person or another one, or for the actions this person or another one is suspected of performing. Also, the torture targets at frightening or discriminating the injured person or another one.

The norm on the torture prohibition is of international character and is provided for by Art. 3 *Prohibition of Torture* of the Convention for the Protection of Human Rights and Fundamental Freedoms. Pursuant to it no one shall be subjected to torture or to cruel, inhuman, degrading treatment or punishment [5].

At the same time, according to the decisions of the ECtHR on the case *Denmark, France, Norway, Sweden and the Netherlands v. Greece (Greek case 1969)* the Commission singled out the following stages of the prohibited treatment:

1. Tortures: inhuman or degrading treatment aimed at getting information or confession or punishing.
2. Inhuman treatment or punishment: such a treatment that intentionally causes severe mental or physical sufferings and considering the stated circumstances can't be justified.
3. The treatment, degrading the dignity, behavior or punishment; the treatment, humiliating impertinently one person in the presence of others or forcing the person to act against him/her personal will or personal beliefs [19].

In case *Ireland v. The United Kingdom (1978)* the Court amended each of three stages of the prohibited treatment considering the demands set out in Art.3 of the Convention for the Protection of Human Rights and Fundamental Freedoms:

1. Torture: inhuman treatment, committed intentionally and causing extremely serious and severe sufferings.

2. Inhuman treatment or punishment: causing severe mental and physical sufferings.

3. The treatment, degrading the dignity, behavior: humiliation intending to cause the victim's immense feeling of fear, sufferings and the sense of personal deficiency. Such humiliation also intends to disparage the dignity of a victim, and, if possible, break his/her physical or mental resistance [16].

Consequently, when prosecuting persons responsible for violating the evidence obtaining procedure using the torture, the precedents practice of the ECtHR and the Convention for the Protection of Human Rights and Fundamental Freedoms shall be used.

In this respect, it would be highly recommended to employ the definition of the notion of torture, set out in Part 1 of Art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Pursuant to this international regulatory act, torture is deemed as any act intentionally causing severe pain and sufferings, physical or mental, to any person in order to receive some information or confession from this person or from the third person, to punish him/her for the acts he/she or the third person has committed or for the acts he/she is suspected of committing, and also, to frighten or compel him/her or the third person, or any other reason based on the discrimination of any kind, when such pain or sufferings are caused by public officials or any other persons, being presented officially, either because of their incitement, or with their knowledge of, or with their tacit consent. This notion does not include pain or sufferings, having arisen from purely legal sanctions, integrally existing along with sanctions or caused by them incidentally [6].

There are a number of norms in the Criminal Code of Ukraine providing for the criminal liability for unlawful actions regarding the evidence obtainment procedure in criminal proceedings (e.g. Art. 374 of the Criminal Code of Ukraine *Violation of the Right to Protection*, Art. 364 *Abuse of Power or Authority*, Art. 365 *Excess of Power or Official Authority by an Employee of a Law Enforcement Agency*, Art. 366, *Work-related Counterfeit*, Art. 367 *Work-related Negligence*, etc.) [6].

A purely formal violation of the evidence obtainment procedure may lead to the disciplinary liability of the criminal proceedings main subject if these violations were committed, inter alia, after the expiry date of the pre-trial investigation, although, some investigative actions were preplanned till the expiry date, but were not carried out due to the investigator's heavy workload or due to some other similar reasons. And, other similar cases may lead to the disciplinary liability of the criminal proceedings main subject.

Problematic issues may also arise when applying the norms of the Law of Ukraine *On the Procedure for Compensation of Damage Inflicted on Citizens by*

Unlawful Acts of Bodies Fulfilling Operational and Investigative Activity by the Bodies of the Pre-Trial Investigation, Prosecutor's Office and Court which, on the other hand, need some kind of optimization [14].

As a matter of fact, such an approach will allow excluding the instances of rendering acquittal verdicts or forcedly soft verdicts by the courts. This may become possible due to prohibition to admit some facts as evidence regarding purely formal grounds for the violations of their obtainment procedure or if the evidence was obtained substantially violating the legal status of the criminal proceedings actor. A. V. Panova brings numerous examples of such situations [13].

In particular, the ruling dated August 20, 2015 concerning the case № 667/4011/15-k Komsomolsky District Court of Kherson found the protocol to be inadmissible evidence regarding such grounds. In accordance with Part 2, Art. 237 of the CPC of Ukraine the dwelling inspection is conducted in compliance with the rules provided for the dwelling search or any other person's possessions. Art. 234 of the CPC of Ukraine regulating the search procedure specifies that the search shall be conducted based on the investigating magistrate entry. The court found unreasonable the prosecutor's reference onto the notice of the apartment owner allowing to conduct the search of his/her apartment. The court substantiates such a decision by stating that the law doesn't provide for the owner's consent to conduct an inspection or a search of an apartment. According to Art 233 of the CPC of Ukraine such consent is only possible if the dwelling was penetrated by another person, thus it doesn't exempt the prosecutor and investigator from the responsibility of petitioning to the investigating magistrate to conduct the search or inspection of the apartment. According to the demands set out in Part 2 of Art. 240 of the CPC of Ukraine, the investigative experiment, conducted in a dwelling or any other person's possessions, shall be carried out only with the voluntary consent of the person owning it, or on the basis of the investigating magistrate entry being petitioned by an investigator and conformed with a prosecutor, or by a prosecutor, being considered in due order provided for consideration of petitions for conducting a search of a dwelling or other persons possessions. At trial the accused explained that he/she hadn't agreed to conduct the investigative experiment in his/her apartment and the prosecutor's reference onto the existence of a written notice to conduct an inspection of an apartment in his/her case is deemed unreasonable. The court found the investigative experiment's protocol inadmissible [13, p. 55].

Hence, the court refused to admit the information obtained while inspecting the apartment and during the investigative experiment as evidence. The court underpinned its decision by declaring that there was not any prior judgment entry to conduct the aforementioned actions according to Part 2, Art. 237 and Part 2, Art. 234 of the CPC of Ukraine, irrespective of the fact that the owner agreed to conduct the inspection of his/her apartment, as such consent might serve as basis

only in case of penetrating the apartment or other person possessions according to Art. 233 of the CPC of Ukraine. Moreover, the apartment owner didn't allow conducting the investigative experiment in it at all pursuant to Part 5, Art. 240 of the CPC of Ukraine.

A.V. Panova analyses the grounds for recognizing the information inadmissible as evidence also within the framework of violating the essential terms of the permission to conduct specific investigative actions. To support this, the author brings a vivid example of conducting the search or inspection of some other person's apartment or possession than has been stated in the judgment entry on granting the respective permission. For example, the panel of judges of the Appellate Court in Kyiv oblast recognized the prosecution evidence inadmissible by the judge entry dated January 1, 2014 with regard to Case № 361/7678/2013r-k. The court supported its decision by showing that some essential terms violations of the investigating magistrate permission took place, significantly infringing the rights of the accused. In accordance with Arts. 234-235 of the CPC of Ukraine the dwelling or other possessions search (the vehicle also belongs to this according to Art. 233 of the CPC of Ukraine) is carried out on the basis of the magistrate court entry, which among other things shall include the exact dwelling or other possessions address, that have to be searched. However, the investigating magistrate entry to search the dwelling where the accused lives doesn't contain any information allowing to search any other possession, e.g. a car. Thus wise, the fact of finding drugs in the car itself can not indisputably prove they belong to the car owner, considering that drugs were seized violating the above stated norms, and the car owner isn't the accused, but absolutely another person. Regarding the foregoing the panel of judges stated that there are not any persuasive evidence proving that the methadone and opium being seized during the search belong to the accused [13 pp. 58-59].

In the same aspect, this author provides the arguments and practical examples regarding the recognition of information inadmissible:

- the information obtained beyond the one-month period of the courts entry on the permission to search the dwelling or other person's possessions in accordance with Clause 1, Part 2, Art. 235 of the CPC of Ukraine;
- obtaining information while conducting an investigative action or action applying the measures ensuring the court proceedings being held at the place other than stated in the investigating magistrate entry, etc [13, c. 58-59].

Also the national and foreign practice is widely considered, including the practice of the ECtHR concerning the unconditional admission of information obtained through torture or other use of violence as evidence, where the prohibition of the latter, on one hand, is of absolute character and has no exceptions or arguments. On the other hand, recognizing such information as

inadmissible evidence special attention should be paid to *circumstance influence on to evidence authenticity and accuracy when obtaining it* [13, pp. 63-75]:

- Part 2, Art. 11 and Clause 2, Art. 87 of the CPC of Ukraine [9];
- Art. 28 and Part 2, Art. 64 of the Constitution of Ukraine [7];
- Art. 5 of the Universal Declaration of Human rights [1];
- Art. 7 and Art. 10 of the International Covenant on Civil and Political Rights [12];
- Art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. [6];
- Art.3 of the Convention for the Protection of Human Rights and Fundamental Freedoms [5].

In this regard it seems reasonable to highlight that there is no need to put an emphasis both on the authenticity and accuracy of the information obtained violating these or those norms of the procedural law as well as other legal acts including the ones using violence, fraud and other illegal methods. The authenticity of information also includes its accuracy.

The accused person shall bear the responsibility for the above mentioned violations and for the evidence obtaining when the substantial infringements of the widely recognized expert methodology took place or when the use of expert methodology not recognized by set procedures occurred, bearing at the same time high quality features. The accused person must bear such kind of responsibility that is able of preventing committing such infringements of the evidence obtaining procedure.

But in this respect, if the main subject of the criminal proceedings doesn't challenge the authenticity of the information obtained violating the norms set out in the CPC of Ukraine, including the norms of Arts. 86-90 and others of this Code, or essentially violating the highly recognized expert methodology or using the expert methodology not recognized by set procedures, and also if the main subject doesn't challenge the evidence significance and high quality concerning the absence of internal irretrievable contradictions, so then such information shall be admitted as proper, authentic and of high quality to the proof process. Such situations shall not lead to the recognition of such information as inadmissible evidence only because of formal grounds that give rise to the acquittal verdicts rendering based on violating the evidence obtaining procedure.

Due to these formal reasons several acquittal sentences have recently been passed. In particular, on November 26, 2014 Mykhailivskyi District Court of Zaporizhzhia oblast rendered an acquittal verdict with regard to Case № 321/954/14-k, proceedings № 1-kp/321/102/2014, regarding the pre-trial investigation of some episode without including the information about this episode into the Uniform Register of Pre-trial Investigations and without appointing the prosecutor and investigator to this episode. On December 24,

2014 Orihivskiy District Court of Zaporizhzhia oblast rendered an acquittal verdict with regard to Case № 323/3329/15-k considering the corresponding grounds, proceedings № 1-kp/323/245/15, considering the corresponding procedure of a person's search, seizure and inspection of the improvised weapon.

Another example demonstrates how Korosten city District Court of Zhytomyr oblast passed a judgment entry with regard to Case № 279/5103/13-k, dated September 10, 2013, finding the information, contained in the expert summary and designated after the expiry term of the pre-trial investigation, inadmissible as evidence [13, p.104]. Regarding the similar grounds, Novomyrhorod District Court of Kirovohrad oblast rendered a verdict on September 9, 2014 with regard to Case № 395/414/1-k, proceedings № 1-kp/395/41/2014, found the information, obtained by the defendant after the expiry term of the pre-trial investigation, inadmissible as evidence [13, p. 103-104].

However, A.V. Panova set out these issues only descriptively and not only failed to resolve them but supported the eligibility of the aforementioned and other acquittal sentences of courts, infringing, in fact, the norms set out in Part 1, Art. 3 of the Constitution of Ukraine. Nevertheless, in our opinion, the state shall recognize, provide and even more importantly, restore the legal status first and foremost of the injured person. And the acquittal verdicts rendering under the above presented circumstances infringed the legal status of the injured person as the party to the criminal proceedings most of all. As a matter of fact, the afore expressed reasons and numerous practical examples inspired us to explore the main basic properties of evidence in criminal proceedings deeper, to scrutinize it and to come to the following conclusions. First of all, the above stated examples straightforwardly demonstrate the incompetence and/or the corruptness of the judges, as the significant infringement of the pre-trial investigation procedure, established by the CPC of Ukraine, that may be regarded as the basis for recognizing certain information as inadmissible evidence in a particular case, is deemed to take place only when some doubts appear concerning the authenticity of the information obtained during the pre-trial investigation, as emphasized by the ECtHR decision in Case *Prada v. Germany*, dated March 3, 2016. It is specifically underscored by means of this case that *nothing indicates the police acted unfairly herein or with the intention of violating the formal procedure*. Regarding the information declaring the presence of evidence (narcotic drugs herein) and the possible doubts concerning its authenticity, the Court asserted that the parties do not deny that the drugs were really detected in the applicant's dwelling, being used exclusively by him. Also, the appellant didn't contradict the expert's summary. The Court therefore sees no doubt as to the authenticity of the evidence. In this regard, the ECtHR came to the conclusion that considering such circumstances the trial was fair, and therefore the violations of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms don't take place [17].

If one applies the above mentioned decision of the ECHR to all the considered practical examples, it can be noted that the formal violations of the pre-trial investigation procedure that happened to be, do not give grounds to doubt the authenticity, significance and high quality of the evidence obtained, and therefore the investigator and the prosecutor shall bear the responsibility for the above stated violations. Also, in our opinion, an expert conducting an expertise and violating the widely recognized expert methodology while doing it, or using the expert methodology not recognized by set procedures shall bear the responsibility. However, these infringements can not be considered the ones giving grounds to recognize the evidence obtained as inadmissible evidence in the stated cases, especially taking into account its overall value along with other evidence in the case.

Practical examples demonstrating the evidence recognition inadmissible, vividly confirm the relevance of the proposed implementation of the continuous procedural documentation of work with evidence sources concept, long before the introduction of the new edition of the CPC of Ukraine in general and Art. 214 of the CPC of Ukraine in particular. Further improvements of this norm include first of all the admission to criminal proceedings of all inspection types and personal evidence investigation, and the prosecutor's sanctions permitting, all the other procedural actions aimed at receiving the sufficient number of evidence affirming the presence or absence of the crime features in the case, or circumstances excluding the case proceedings. This approach grants the opportunity to improve the concept of the continuous procedural documentation of work with personal and substantive evidence sources, before starting the criminal proceedings (after finding such sources), a range of actions, set out by the CPC of Ukraine and containing the sufficient level of procedural guarantees affirming the authenticity of the evidence obtained, will be available [10, pp. 192-193].

This problem continued its existence after the adoption of a new CPC of Ukraine in 2012. Special attention should be drawn to the fact that this Article of the CPC of Ukraine refers to the submission of a statement or a report exactly on a committed criminal offence. And, therefore, when adding such information into the Uniform Register of Pre-trial Investigations one has to make sure that the criminal offence is being committed and not the wrongs, although this criminal offence may contain the features of the wrongs. To answer this question one shall assign and conduct the expertise, which is not only prohibited till adding the information into such register, but even presupposes certain forms of liability for such acts being committed by a prosecutor or any other public officer.

Consequently, even nowadays the scientific statements keep their topicality, as such state of affairs in practice leads to a great number of complications, infringements, and even falsifications of material sources or their procedural documentation. For example, the so-called preliminary study of the substances

similar to drugs is conducted. And very often such a study totally changes or destroys the substances. A criminal case is brought before the court relying upon the results of this study. Finding the drugs becomes the legal cause of action, and after that the expertise is appointed, which will definitely show the false results as the object of the expert research has been totally changed or absent at all [10, pp. 63-64]. The similar legislatively unresolved situations remain in many other cases as well, when without appointing and conducting the expertise before adding the information into the Uniform Register of Pre-trial Investigations, it appears impossible to decide whether some object, device or mechanism, especially self-made, belongs to a certain type of weapon, the degree of physical damage caused, and therefore whether there are some reasons to assert the features of the criminal offence, etc.

Analyzing some other grounds for recognizing certain information as inadmissible evidence, one has to point out some drawbacks of the legislative approach and the appropriate judicial practice, and some author's vision of grounds and limits of employing the hearsay information as evidence. For instance, the Appellate Court of Odesa oblast, by judgment entry, dated June 11, 2015 with regard to Case 520/14721/13-k excluded the hearsay evidence from the trial court sentencing analysis explaining this by stating that such evidence was not agreed with the parties and therefore is inadmissible [13, p. 145].

Likewise, the Appellate Court of Vinnytsia oblast by judgment entry, dated September 24, 2015 regarding Case № 127/11102/14-k stated that the lawyers appeal complaint was assiduously proved. The lawyer demonstrated that by providing arguments of the complainant guilt, the trial court unreasonably referred to the witness evidence, who was the complainant mother, as she didn't witness the above-mentioned events herself and testified from her daughter-in-law or other person hearsays. Pursuant to Part 1, Art. 97 of the CPC of Ukraine the court may admit the hearsay evidence if the parties agree to admit it as evidence. The proceedings documents assert that the party didn't agree to it. Considering the above mentioned, the court can not consider the witness evidence and shall exclude this evidence from the verdict as reference to prove the accused guilt of a crime he/she is charged with [13, p. 145].

However, the above pointed out legislative approach and the appropriate judicial practice infringe the professional accomplishment of the law enforcement activity each type, including the judicial activity dealing with criminal cases reviews and considerations [11, p. 33; 15, pp. 19-20, pp.155-156, etc.]. The position outlined, by A.V. Panova [13, p. 145] stating that the dependence of hearsay evidence admissibility on the parties positions is deemed to reveal the parties consent in criminal proceedings, and realizing the adversary proceeding principle, contradicts, to our mind, the more balanced and deliberate offer to replace the herein stated principle with the principle of the objective truth.

Regarding the above stated, one should concluded, that the previously expressed [2, pp. 20-22; 15, pp. 169-173, etc.] options of the precise defining the essence and the evidence fundamental and additional legal properties, need some kind of improvement to consider:

- the admissibility not as the result of evidence fundamental legal property, but as the result of assessment, including the information control considering the inherent unity of only three evidence fundamental legal properties such as significance, authenticity and high quality. Regarding this, one has to dwell upon only such previously suggested admissibility constituents as the provisions of a certain legal act and/or generally known facts, and/or prejudicial facts, and/or presumptions along with the evidence;

- the high quality of information if it doesn't include the inherent contradictions, making it impossible to create the univocal internal belief of the criminal proceedings main subject;

- the legality and one another component of the prior comprehension of the evidence high quality. And this component is deemed as only such violations of evidence obtaining procedure leading to the appropriate legal responsibility of the guilty person (investigator, judge, expert). And at same time it is considered to be an obstacle to use such kind of information as evidence if the specified evidence obtaining procedure has not lead to the appearance of the main criminal proceedings subject doubts concerning the significance, high quality and more importantly, the authenticity of the information presented.

In view of the foregoing, such a version of the article titled *Evidence, Its Properties, Sources, Subjects, Procedure and Obtaining actions, and Forms Operating them* of the CPC of Ukraine seems to be the most reasonable, which would legislatively protect the following provisions:

1. Any information about the fact in general or its component in particular is considered to be an evidence if obtained by means of material or personal sources of that type of information on condition that the evidence will acquire the inseparable unity of such fundamental legal properties as significance, authenticity and high quality during the assessment process including the verification. And only due to these grounds the information might be included into the proof process as evidence. This kind of evidence can also be used in the proof process if it acquires such additional fundamental legal properties as consistency and sufficiency all together to make certain interim or final procedural decisions by the main criminal proceedings subject (the investigator, the head of the investigating department, the investigating judge, the panel of judges, the judicial chamber, the joint chamber, the Supreme Court Grand Chamber).

2. Evidence fundamental legal properties are explicated in the following way:

2.1. Information is seen to be significant if by using it one can confirm or rebut the legal fact (circumstance) of the fundamental, special or partial proof subject or proof fact as the interim thesis of this proof subject.

2.2. Information is seen to be authentic if it properly ascertains the circumstances of the fundamental, special or partial proof subject and that:

2.2.1. Pertinently reflects both the circumstances of the criminal offence acts (event, phenomenon) preparations and/or commission, or of the criminal offence acts (event, phenomenon) concealment as well as any other acts (events, phenomena) or the features and properties of things, documents or human beings.

2.2.2. Improperly reflects the circumstances of the above stated legal facts due to remote, meteorological, educational, psychological, physiological and other peculiarities of its perception by the personal source. It also improperly reflects the process of memorizing, storing, reproducing and transmission of information about the above-mentioned legal facts to criminal proceedings main subject.

2.2.3. Properly explicates the reasons of the improper legal facts presentation stated above.

2.2.4. Appears to be proper or improper but deliberately false, and in this regard the evidence acquires the appropriate authenticity considering the case on providing such deliberately false evidence or such deliberately false expert findings.

2.3. The information is considered to be of high quality if doesn't contain any meaningful contradictions and gives opportunity to come to a firm conclusion.

2.4. The coherent whole of evidence is such the whole of evidence in which one evidence doesn't contradict another one, and the existing contradiction might be eliminated by stating the authentic arguments supporting one evidence and the false arguments supporting another evidence.

2.5. The sufficient whole of evidence is such the whole of evidence that by means of general assessment can create the main criminal proceedings subject clear internal belief (without external factors of influence) enabling to currently accept certain interim or final procedural decision in case.

2.6. The provisions of a certain legal act adhering to the rules of their competition or collision solution if necessary, may be used in the proof process along with the evidence. And the generally known facts and/or prejudicial facts and/or presumptions, if the main subject of the criminal proceedings doesn't doubt the significance and/or authenticity and/or high quality of such facts may also be used in the proof process along with the evidence.

2.7. The criminal proceedings proof process includes:

2.7.1. Clarifying the nature, succession and other consistent patterns of work with personal and material sources of evidence.

2.7.2. Planning, organizing and versioning of work with the sources.

2.7.3. Ascertaining the sources of such information by gathering material sources and/or using personal sources.

2.7.4. Evidence obtaining by investigating the material sources and/or direct or indirect communication with personal sources.

2.7.5. The evidence assessment and control to consider its admissibility as evidence on condition that this kind of information is significant, authentic and of high quality, is consistent and sufficient together with other evidence to make certain decisions to deter criminal offence.

2.7.6. The use of evidence to make certain interim or final procedural decisions.

2.7.7. Documenting the procedure and circumstances of finding out the material sources and involving the personal sources, also the procedure of obtaining such information, its assessment and use as evidence while making certain interim or final procedural decisions.

3. The investigator (including the head of the pre-trial investigation body) and the judge (panel of judges) have the right to obtain evidence. The expert and the active search officer have the right to obtain information too, but only as an exception provided for by Part 2 of the current Article, conducting investigative actions:

- 1) registering the full confession of committing criminal offence;
- 2) obtaining the oral statement or a written notice of committed criminal offence or its preparation;
- 3) detention and examination of the persecuted;
- 4) examination of the personal source;
- 5) personal sources face-to-face examination;
- 6) notice of charges and examination of the suspect;
- 7) evidence control and/or evidence detailing of the suspect, the injured, the complainant or witness, present at the place of the committed criminal offence, or any other place significant for the case;
- 8) experiment with the presented personal sources and without them;
- 9) presentation for ordinary, counter or group identification of the persecuted, the injured, the witness, other personal source, material evidence;
- 10) survey (inspection, personal research) of the committed offence place, region, premises, vehicle, person's corpse, the alive person body, other material sources;
- 11) person's corpse exhumation;
- 12) study of the document;
- 13) the search of premises, region, vehicle, personal source;
- 14) the material sources seizure;
- 15) arresting the funds, other property and transfer it to the storage;
- 16) means of communication control;

17) announcing the accused, the defendant search;

18) obtaining the patterns of an expertise and of similar judicial actions.

4. If the process of evidence obtaining needs involving certain special knowledge, the main criminal proceedings subject assigns the expertise and the expert conducts it, and if the covert measures need to be conducted, the main criminal proceedings subject assigns the expertise and the active search officer fulfills the appropriate task.

5. Survey (inspection, personal search) of the criminal offence place, or any other place (region, premises, vehicle), significant for the case. And the prosecutor's sanctions permitting, any other procedural action out of the above stated (investigative, judicial, expert) may be conducted before adding the information concerning real or hypothetical criminal offence being prepared, endured or having been committed already, into the Uniform Register of Pre-trial Investigations on condition that one cannot obtain the sufficient whole of evidence regarding the presence or absence of criminal offence features with regard to such kind of actions, or considering the circumstances excluding the proceedings with regard to the case.

6. Material sources including the audit and inspection certificate, etc, may become the main subject of criminal proceedings possession via their vindication, or in case of their voluntary delivery and obtaining from natural and legal persons. Such evidence obtaining becomes possible due to personal or expert investigation of material sources or/and studying them within the framework of procedural investigative or judicial actions.

7. The main criminal proceedings subject has the right to obtain evidence by means of any natural or legal person's assistance, including the defense lawyer or prosecutor, via:

1) the voluntary delivery of the significant material sources for this very case, belonging to them;

2) providing information about the hypothetical or actual location of those material objects or persons that may presented as material or personal sources correspondingly with regard to this case;

3) if the natural or legal person took part in criminal proceedings then he/she may assist by putting questions or filing the motion to improve the process of obtaining such information directly and/or the appropriate court proceedings procedure.

8. The investigator presents evidence (grants the possibility to perceive the nature and features of such kind of evidence and its obtaining procedure to the criminal proceedings participants) producing the investigative action record, the judge, the investigative judge, the panel of judges, the judicial chamber, the joint chamber, the Supreme Court Grand Chamber present evidence producing the judicial hearing register, experts or the panel of experts produce the expert

findings, the general assessment and the evidence use is fulfilled by the main criminal proceedings subject in cases provided for by the Code in the form of:

8.1. Decree to provide an order to conduct certain procedural action (covert measures);

8.2. Decree to assign another subject to conduct certain procedural action (covert measures);

8.3. Decree to eliminate the law violations, reasons and conditions favoring the criminal offence commitment;

8.4. The investigator's or prosecutor's decrees to adopt any procedural decision provided for by the code, and the judge's decree (panel of judges) to adopt any interim procedural decision;

8.5. The verdict of guilty or the acquittal verdict;

8.6. The judge's entry (panel of judges) on another final case solution;

8.7. The motion of the interested person to accept certain procedural decision by an investigator, prosecutor or judge;

8.8. The mentioned person's complaints against the actions, including the decisions of the main criminal proceedings subjects;

8.9. Subject's appeals authorized by the code;

8.10. Subject's cassation complaints;

8.11. Applications to review the judicial decision due to newly found circumstances and exclusive circumstances.

Herein, it is deemed reasonable to underscore that the investigator, the head of the pre-trial investigation body and the prosecutor with regard to the direct conduct of the pre-trial investigation shall not be considered the party to the criminal proceedings due to Clause 19, Part 1, Art. 3 of the CPC of Ukraine as it seems unreasonable.

After all, the afore stated provisions contradict the norms, first and foremost of the Part 2, Art. 9 of the CPC of Ukraine, under which the prosecutor, the head of the pre-trial investigation body, the investigator shall research the criminal proceedings circumstances fully, comprehensively and impartially, detect the circumstances accusing the suspect, and the circumstances acquitting the suspect, the accused, and also to detect the circumstances commuting the punishment of aggravating it, to assess them in a due manner, and to provide the arrival at the legal and impartial procedural decisions.

In our opinion it should be prohibited to oblige the persons, belonging to the prosecution to reveal the circumstances, acquitting the subject or commuting his/her punishment.

The position of the Part 2, Art. 9 of the CPC of Ukraine seems to be more correct, pursuant to which the investigator, the head of the pre-trial investigation body, the prosecutor regarding the possibility to directly conduct separate procedural actions, the investigative judge and the judge shall be recognized the

subjects of the criminal proceedings conduct. The defense lawyer and the prosecutor, performing the function of the state prosecutor shall be considered as the parties to the proceedings. In this respect the function of the procedural leadership shall switch over from the prosecutor to the head of the pre-trial investigation body (inquiry, pre-trial investigation).

Y. Lantsedova suggested her own solution how to correlate between the evidence nature and evidence fundamental and additional legal properties and the admissibility of such kind of information that shall be considered only as a result of this evidence assessment. S. Lyhova developed this vision of a problem dwelling upon the firm realization of some specific types of criminal and other legal liability for violating the evidence obtaining procedure. These both points of view don't seem to be absolutely exhaustive and comprehensive, they don't insist on the finality of these solutions, but just create the appropriate theoretical and legal basis to elaborate the conventional approaches with regard to the process of wide and comprehensive scientific discussion.

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Chapter 18

Constitutional and legislative restrictions imposed upon the private detective activity subjects while exercising their duties

The concept of a private detective activity has long been used as an effective means of human rights protection, citizens and legal persons legitimate interests protection in the civilized, democratic, developed society, where the compliance with the constitutional norms and human rights is deemed to be the fundamental value. The concept of a private detective activity is embodied in practically all EU countries and democratically developed countries of the world. The functioning of this concept allows eradicating the factual monopoly of the state law enforcement system.

The monopoly of the state law enforcement system generates the destructive negativism and the deformation of public morality in real life. Nowadays, it seems to be obvious that the formation of a private detective activity, its lawful legalization and functioning in Ukraine are reckoned to be an irreversible process.

The main duty of a state is considered to be the creation, development and provision of an operative and effective mechanism to the fundamental rights and freedoms of man and the citizen (Art.3 of the Constitution of Ukraine) [1p. 3].

Today realities require introducing the current social and legal institutions of the structures and elements providing the national law enforcement development and formation, aimed at promoting further implementation of constitutional norms and principles into the state legal practice, and also the Constitution of Ukraine establishment, building the mutual trust and responsibility between man and the state. The worldwide recognized private detective activity institutes as the time-tested institutions and as one of the most effective ways of human rights protection, the rule of law consolidation and the democracy development, have to facilitate the above-mentioned points.

This issue has become currently topical after the adoption of the new Criminal Procedural Code of Ukraine and regarding the pivotal pre-trial investigations reforming. A new criminal process ideology requires the cooperation between the law enforcement agencies and private persons. The law enforcement agencies shall refuse from a certain part of the monopolies, impeding their work tremendously and shall not characterize them functionally, in favor of the private process participants. Moreover, by involving the private participants to the criminal process, one can significantly enhance the international image of Ukraine

as the country capable of creating all the necessary conditions for the real protection of citizens' rights, freedoms and legitimate interests [3, p. 5].

Although, the sufficient quantity of the draft legislation, elaborated and submitted to the Parliament existing, the business entities detective activity conduct and the detective services provision haven't been legislatively supported in Ukraine, but instead they started being studied and researched by the law enforcement activity scientists and experts.

Such national and foreign scholars as V. M. Zemlianov, A. Ie. Ivahin, Iu.A.Karmazin, V. I. Kurylo, I. V. Leonenko, P. Ia. Pryhunov, O.V. Punda, A.I.Frantsuz, etc. have been dealing with the organizational and private detective activity conduct issues. At the same time, the results of their research make it possible to get a clearer vision of the legal regulation peculiarities of certain private detective activity aspects and contribute to the gradual formation of the appropriate institute regarding the national legislation.

The majority of legal studies concerning the private detective activity aren't of a complex character; they are only limited to the general spectrum of the private detective activity and the existing draft legislation analysis regarding the aforementioned.

Therefore, currently there is no legal regulation of the private detective activity concept in Ukraine, and hence, there is no major prerequisite to organize and implement the latter.

Article 3 of the Constitution of Ukraine declares that an individual, his life and health, honor and dignity, inviolability and security shall be recognized in Ukraine as the highest social value. Human rights and freedoms and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State [1].

Consequently, it appears to be extremely undemocratic and inhumane to deprive the citizens of the right to appeal to private detective structures to investigate or solve versatile personal issues non-prohibited by law (by means of civil, administrative, commercial or criminal proceedings). Otherwise, the individual has no choice and sees only one possible way out – to appeal to the law enforcement agency – the police, the security agency, the prosecutor's office and others.

In this regard, the adoption of the regulatory legal act, regulating the private detective activity and conduct in Ukraine are deemed to of paramount importance. On the other hand, when the private detective activity subjects carry out their responsibilities, temporary restrictions of the constitutional rights and freedoms of man and a citizen might become possible.

Thus, for example, Clause 8, Part 1, Art. 13 of the draft legislation states that private detectives, private detective companies (agencies) have the right to take

photos, to make film shots, to videotape, to make audio records while conducting the private detective (search, investigative) activity, and also, to use other technical means, not causing damage to life and health of citizens, the environment. They shall have the right to search offices and other premises, having the written consent of these premises' owners. Besides, Clause 8 of the same Article sets forth that the subjects of the private detective activity are allowed to conduct the external surveillance outdoors, in public places and in transport [2].

The afore mentioned private detective actions as well as the majority of other actions carried out by the private detective activity subjects are covert (confidential). Confidentiality in this case means non-obviousness, concealment of private investigative actions, the need to conceal the private investigative actions carried out, from persons not taking part in them, but first and foremost, from the detective activity objects [3, p. 554].

Article 32 of the Constitution of Ukraine asserts that no one shall be subjected to interference in his private life and family matters, except when such interference is stipulated by the Constitution of Ukraine. The collection, storage, use, and dissemination of confidential information about a person without his consent shall not be permitted, except for the cases determined by law and only in the interests of national security, economic welfare, and human rights [1].

Thus, taking covert photos, making covert film shots and audio records, videotaping the persons checked (Clause 8, Part 2, Art. 13 of the draft legislation) by employing special technical means and collecting information using other covert methods of work aimed at obtaining information, interesting to the client, the private detective is, one way or another, forced to infringe the citizens constitutional rights and freedoms within the framework of his/her professional activity.

Considering the great number of private detectives and private detective companies (agencies), that will definitely appear after the adoption of the legislative act concerning the private detective activity in Ukraine, it would be quite challenging to exercise the due supervision and control over the national legislation observance by the private detectives and detective agencies in order to deter the violation's of citizens rights to privacy.

Today, the private detective activity is viewed as one the most powerful branches in all the civilized countries of the world, creating, therefore, a serious competition to the state law enforcement agencies. Moreover, such countries as France and the USA, where the private detective activity emerged in the middle of the XIX century, gradually created their own *private search schools* with their specific rules and methods of the investigative work. In this regard, it seems reasonable to study the experience of private detective institutions creation and functioning, in particular, in France, the USA and Great Britain.

In authors' opinion, the use of British experience might be of huge practical importance in this area of study. As at the beginning of the XXI century there were several large and a lot of small detective agencies in the country. The total number amounted to about 2000 detectives, working at numerous private detective agencies of the country. Eventually, the market of the private detective services appeared to be unregulated, and the number of citizens becoming the fraudsters' victims rose increasingly.

Today there are a lot of private investigative agencies in Great Britain. At the same time, nearly 10 000 private detectives work without license in the UK, despite the serious control. Individuals, having no necessary skills, government-recognized qualification and field-specific education often mislead customers, discrediting the private detective activity. Taking into account the above-mentioned facts and circumstances, all private detective bureaus of the UK were joined together to form a strictly regulated and diversified system named *The Association of British Investigators* in 2013.

In 2013 Theresa May announced that: *"It is vital we have proper regulation of private investigators to ensure rigorous standards in this sector and the respect of individuals' rights to privacy"*. This statement by Theresa May on July 31, 2013 became crucial for the further development of the private detectives' institute in Great Britain [4].

In France, about 300 private investigative bureaus were registered officially, but besides them, there are more than one hundred 'unofficial' detective offices, called the *Surveillance Service*, the *Surveillance Bureau*, etc. Canada provides the 'whole army' of the private detectives working solely, and more than 200 private firms, engaged in investigative business [10, p. 15].

The Convention for the Protection of Human Rights and Fundamental Freedoms, also known under the informal title as *the European Convention on Human Rights* (hereinafter referred to as the *Convention*), is considered to be one of the main documents of the Council of Europe. This international treaty was signed on November 4, 1950 and entered into force on September 3, 1953.

Ukraine ratified the European Convention on Human Rights only on July 17, 1997, and the document entered into force on September 11, 1997.

On the one hand, the Convention secures to everyone within its jurisdiction the rights and freedoms defined in Section I of this Convention (the right to life, the right to liberty and security of person, the right to a fair trial, the right to freedom of thoughts, conscience and religion, the right to respect for the private and family life, etc.), and on the other hand, the Convention lays upon the High Contracting Parties the responsibility to secure to everyone the rights and freedoms, mentioned above, within their jurisdictions. Each and every resident of any European Union country may appeal to the European Court of Human Rights

(hereinafter referred to as the ECtHR) if he considers his/her rights and freedoms, defined by any of the Convention articles, were violated.

Pursuant to Part 1, Art. 8 of the Convention everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Part 2, Art.8 of the Convention).

Art. 7 of the Charter of Fundamental Rights of the European Union, 2000, declares that *everyone has the right to respect for his or her private and family life, home and communications*, the wording is practically the same as that of Part 1, Art. 8 of the Convention. At the same time, the provisions of Art. 8 of the Charter, in comparison to the Convention, are considered to be progressively new, regarding the protection of personal data. Also, this article defines the basis of the right to privacy involving the issues of obtaining and disseminating the information about the person, his/her personal data.

To understand the meaning of this or that term, one has to use the ECtHR judicial practice. The ECtHR has broadly interpreted the provisions of Art. 8 of the Convention, and therefore, the new social relations fall under its protection from time to time. Further, the national judges of the EU member states and of the countries applying for the EU membership settle the cases referring to the appropriate ECtHR interpretations.

Before defining the notion of privacy, one should consider its essence (nature). It is assumed that there is such a sphere of individual's life, where he/she has the right to stay alone and to be left alone, and no one shall interfere into it without the individual's permission. Thus, the ECtHR judge (B. Zupanchych) explained the approximate nature of this right by stating that: "Sovereign Incognito is the Privilege of Robinson". These incognito boundaries are determined by means of the following criteria:

1. *The discretion of the persons themselves* – an individual has this exclusive right to decide what personal space (the distance that separates him/her from another people) is comfortable for him/her. Such person's discretion is based on the principle "there is no violation if anything is done with the victim's consent". The private life of an individual becomes public when the individual discloses the personal information freely and overtly. Thus, for example, when a person tells a story of her life on television, it becomes available practically to everyone, but the dissemination of such information via the social networks (Facebook, Twitter, etc.) among the friends will mean that the information is accessible only to them.

2. *The probability of staying alone.* The legal basis for the protection of privacy upholds the idea that a person can reasonably expect from the society to get an opportunity to be left alone. However, no one can rationally rely on being left alone, if he unlawfully harms another person or society and this should be considered as a certain limit, crossing which the privacy may be restricted. The constitution of each law-governed state sets forth the norms prohibiting the use of power to restrict the rights and freedoms of other people. That's why the offender is assumed to waive his right to inviolability of his/her private life to the extent it determines the severity of the crime, committed by him/her.

3. *The existence of a well-supported public interest.* The private life of a person sometimes gets certain public interest, and that's why the information about him/her may not only be collected but even published. Such cases may be related either to the event itself (for instance, the relatives' statement about the person's disappearance) or to the social status of a person, due to which certain circumstances of this person private life (for example, the compromising contacts of the politician) become known to the public, as this person has great influence on the public life. In the theory of law the individuals able of attracting public attention are called *public persons* and there are two types of them:

1. Public persons in the broad sense are those persons who hold an appropriate post: politicians, public officers, as well as famous athletes, TV presenters, prominent entrepreneurs.

2. Persons who have temporarily obtained the status of public persons are those persons who have attracted public attention for a short period of time, being forgotten by the society later on (for example, the victims of the road accidents). Actually, anyone can record the information intended to satisfy the reasonable public interest. Thus, it is necessary to refer to the source providing the appropriate information. For instance, under the Law on Media of the Republic of Latvia, the person's consent to a committed offence is not needed, if this offence was witnessed, and the recorded photos, videos or sounds can be provided, even if they were made in the persons dwelling or private ownership. In this case, preventing and detecting the offences present the great public interest, and therefore the collection of some information regarding the offender is justified. However, the private detective should realize that he/she has the right to trace the information only if he/she has acted as a journalist or, at least, as the private person, accidentally finding himself at the scene, otherwise, his /her actions being carried out exclusively to the benefit of the client will be regulated by a special law.

Consequently, the right to personal life is, above, all, the right to have informal conversations with other people. Individuals themselves choose their friends or just acquaintances; choose what to talk to their relatives, acquaintances or friends about. And at the same time, the individuals have to sure that their personal information will not revealed to the public authorities. Privacy itself coves the

whole spectrum of family life, friendship and relationships with relatives, the home-style of everyday life, intimacy and other personal relationships, preferences, sympathies and antipathies.

The right to privacy means the possibility to control the personal information, to deter the disclosure of the intimate information, the possibility granted to a person and guaranteed by a state. The right to privacy involves the inadmissibility of surveying the person, listening and recording the personal conversations at home or in public places, including telephone conversations, except for the cases set by the law.

The right to privacy also means the inviolability of the dwelling. After all, the person has the right to solitude in her own dwelling or in a rented one, the right to a free choice of residence and to free movement, the right to freedom of literary, artistic, scientific and technical creativity. Personal papers, drawings, etc. are also considered to be inviolable.

The right of a person to private life also means the right to have confidential communication with other people, in particular, the right to the privacy of correspondence, telephone conversations, telegraphic and other correspondence, and the state shall guarantee the confidentiality and inviolability of the postal correspondence and telegraph messages.

The private life also includes the marriage, childbirth, adoption, divorce, division of property, family budget, disposal of property and cash deposits.

The private life also comprises certain personal and family confidential information, reported to medical workers, lawyers, priests, law enforcement officers, notary workers, etc. That is to say, that all the types of the privileged information (medical, lawyer, correspondence, adoption, etc.) are regarded to be the right of the citizen to privacy [5, pp. 101 - 105].

The notion of *family life* should be interpreted as a kind of private (personal) life. The European Court of Human Rights interpreting the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the notion of *family life* doesn't confine the latter only to relations between people based on marriage, but may encompass other family relationships.

Above all, the provisions of the Convention protect the interests of the biological family, made in accordance with the national peculiarities. The term *family life* may include the relations between the brides on condition they have lasted for a long period of time. The relationships among relatives may also be nominated as *family life*. First of all, it concerns the relations between parents and children (legitimate or illegitimate). Even if the children do not live with their parents, they still are in relations being defined as *family life*. Also, this notion covers the relations between family members, i.e. brothers and sisters, grandparents and grandchildren, great-grandparents and great-grandchildren,

nephews and uncles, etc. So, the provisions of Art.8 of the Convention on family life are applicable of:

1. Family having legal status, as well as other family ties;
2. The rights of the spouse;
3. The right to communicate with relatives;
4. Paternity examination;
5. Deprivation of paternal rights;
6. Taking children from their parents without deprivation of paternal rights;
7. Custody and guard [6].

The principal of proportionality as the main criterion to define the protected democratic values of a private detective (investigative) activity.

The Proportionality principle assesses the protected values and defines which of them overwhelms in a particular situation.

The application of the proportionality principle covers three criteria, and one has to prove the compliance with them, applying this principle:

1. The choice of the tool. One has to answer positively to the question concerning the ability of the appropriate tool to help in reaching the desirable legitimate goal and to consider the benefits of the actions done. If an act, violating the private life cannot help in reaching the desirable legitimate goal in principle, than such a tool shall be considered the one violating the proportionality principle.

2. The necessity of the tool. At this stage one has to decide whether it's regarded possible to reach the desirable legitimate goal using another tools, allocating the same amount of resources and minimizing the interference into the person's private life at the same time.

3. Balance. At this stage one has to decide whether the person's rights are violated much more than necessary to reach the desirable legitimate goal. The more the predicted harm is, the more important the target should be. The Decision of the Constitutional Court of the Republic of Latvia of September 19, 2002 may be symbolically considered as the endpoint of such a balance. This decision asserts that the very nature and essence of the rights and freedoms cannot be denied by the restrictions. For instance, the installment of the eavesdropping device by a private detective in the bedroom is likely to be treated as above the endpoint, not meeting the balance requirements.

Legitimacy warranty in using the information and results of the private detective activity

The legal literature interprets the **legitimacy** as the legal regime of social relations, ensuring the strict and firm compliance with the law and regulatory acts. Such legitimate legal regime allows creating the effective means of control over

the strict and firm implementation of legal requirements, further functioning in the society. And those guilty of committing offences are sued.

The legitimacy warranties in their broadest sense are explicated as the system of generally social and specially social (legal) conditions, means and methods enshrined in the current legislation and aimed at ensuring the rule of law (legitimacy regime).

The legitimacy warranties in a more narrow sense are explicated as the objective and subjective terms and means, aimed at ensuring the most favorable conditions to implement the legal requirements and control their implementation, detecting the offenders and hold them liable.

Therefore, on the one hand, the legitimacy may be regarded as the principle of the state activity, forcing public authorities, other natural or legal persons to act in compliance with the law, and on the other hand, it may be regarded as the system regime of relations between citizens, public and other non-governmental entities, local governance and the bodies representing various branches of public authority.

Considering the private detective activity (hereinafter referred to as PDA), the legitimacy warranties are a system of conditions and means ensuring the strict and firm implementation and compliance with the law by the PDA subjects.

The main provisions of the PDA legitimacy warranties are set out in the Constitution of Ukraine (Articles. 29, 30, 31, 32, and 36), the Convention on Human Rights (Art. 8) and in the Law of Ukraine *On Private Detective (Investigation) Activity* (Draft law of Ukraine dated December 28, 2018 under consideration).

Pursuant to Art. 19 of the draft law on *Warranties of the Private Detectives Carrying out the Private Detective (Investigative) Activity*, the professional rights, honor and dignity of citizens, carrying out the private detective (investigative) activity are protected by law. It is prohibited to interfere with the activities of private detectives, to demand the private detectives professional privileged information.

Thus, the following components of the legitimacy warranty carrying out the PDA are singled out:

- 1) professional rights, honor and dignity of citizens, carrying out the private detective (investigative) activity;
- 2) private detective activity as type of entrepreneurial activity;
- 3) private detectives professional privileged information.

According to Art. 19 of the draft law *the professional rights, honor and dignity of citizens, carrying out the private detective (investigative) activity are protected by law. It is prohibited to interfere with the activities of private detectives, to demand the private detectives professional privileged information.* However, herein one doesn't touch upon the private detectives safety issues, or the personal protection of their relatives (family members) and trustees (confidants). Personal safety shall

be deemed as ensuring life and health safety, protection of PDA subjects' property, members of their families and trustees.

In this case, there is a significant gap in the draft law on private detective (investigative) activity. At the same time, the personal safety warranties of the law enforcement employees and the human rights bodies, members of their families are enshrined in the relevant legislative acts.

Thus, for example, Art. 28 of the Law of Ukraine *On the Security Service of Ukraine* stipulates that the Security Service of Ukraine officers are the representatives of the authority, act on behalf of the state and under its protection, performing their duties. Their personal inviolability, honor and dignity are protected by the legislation.

Close relatives of the Security Service of Ukraine officers are also under protection of the state. Offences committed against the close relatives of the Security Service of Ukraine officers, performing their functions, shall entail liability, established by law.

Persons assisting and advancing the Security Service of Ukraine as well as the pensioners of the Security Service of Ukraine are also under protection of the state.

The confidentiality of relations is guaranteed to persons assisting and advancing the Security Service of Ukraine. The disclosure of information concerning such relations as well as other offences committed against these citizens and members of their families, performing their functions of state security, shall entail liability, established by law [7].

Clause 6, Art. 23 of the Law of Ukraine *On the Bar and Practice of Law* states that "life, health, honor and dignity of an attorney and of his/her family members and their property are under protection of the state, and any encroachments thereupon shall entail liability established by law" [8].

Chapter XV of the Criminal Code of Ukraine *Crimes Against The Authority of Governmnet, Local Government or Associations of Citizens* includes the whole range of regulatory acts providing for criminal liability for threads of murder or violence made in respect of a law enforcement officer, or his close relatives (Art. 345), willful destruction or impairment of the property owned by a law enforcement officer or his/her close relatives (Art. 347), trespass against life of a law enforcement officer or his/her close relatives (Art. 348).

Chapter XVIII of the Criminal Code of Ukraine *Criminal Offences Against Justice*, provides for criminal liability for threats of murder, violence made in respect of a defense attorney or legal agent, and also their close relatives (Art. 398), willful destruction or impairment of property owned by a defense attorney or legal agent or their close relatives (Art. 399), trespass against life of a defense attorney or legal agent in connection with their activity related to the administration of justice (Art. 400).

On May 14, 2015, the current Criminal Code of Ukraine was supplemented by Article 348-1 *Trespass Against Life of a Journalist*, providing for criminal liability for murder or attempted murder of a journalist life or his/her close relatives life in connection with his/her official duties, and these crimes shall be punishable by imprisonment for a term of nine to fifteen years [9].

The private detective undergoes quite serious risks when performing his functions, sometimes even more serious than a journalist or a lawyer, as they are public figures, as a rule, compared to the private detective, mainly obtaining information using the confidential methods of work. The activity of a private detective in many respects is similar to the activity of law enforcement workers, although much more limited in power. Consequently, in case of disclosure by a person being checked (the object), the private detective risks not only to lose his reputation, but even his/her life and health, as the behavior and further actions of the object can't be foreseen at the moment of disclosure. In the vast majority of such situations the conflict is inevitable, and the negative consequences, experienced by a private detective (from abusive language to physical violence and even the use of weapon) are versatile.

Taking into account the above stated facts, it would have been reasonable to amend the Criminal Code of Ukraine by appropriate regulatory acts providing for criminal liability for trespass against life, health and property of the private detective activity subjects and their close relatives after the adoption of the Law of Ukraine 'On Private Detective (Investigative) Activity'.

It has already been noted that the vast majority of actions carried out by the private detective activity subjects are of confidential character. Confidentiality in this case means non-obviousness, the need to conceal the private investigative actions carried out, from persons not taking part in them, but first and foremost, from the detective activity subjects [3, p. 554].

The principle of covertness (conspiracy) appears to be one of the core principles of the investigation. And investigation is indisputably an integral part of a private detective activity. The private detective conducts all the investigative actions covertly, thus, ensuring the conspiracy. It's necessary to ensure the client's security, as well as the private detective's security. Also, it's important to conceal the flow of information or its change. The process of obtaining information from semi-legal (particularly illegal) sources should definitely be confidential as the legislation prohibits collecting information about natural persons [10, p. 160].

So, Part 2, Art. 11 of the Law of Ukraine *On Information* declares that it is prohibited to collect, store, use and disseminate confidential information about a person without his/her consent, except for the cases determined by law, and only in the interests of national security, economic welfare and human rights protection. Confidential information about a natural person includes, inter alia, the

information about his/her nationality, education, marital status, religion affiliation, health, as well as address, date and place of birth [11].

Anyway, the individual's consent to collect certain personal information is obligatory. Of course, when the client asks the private detective to find some information about the competitor, the private detective will definitely fail fulfilling such a task, on condition he doesn't receive the background papers. That's why the aforementioned Article of the Law of Ukraine *On Information* in current situation is predetermined to being violated by the private detective activity subject. Conspiracy means that the competitor shouldn't be aware of being the subject of collecting information by someone, under no circumstances. The confidentiality is achieved by using legends and covert measures, passive technical means of masking, camouflaging special technical means [10, p. 161].

Thus wise, we have attempted to show that it is completely impossible to conduct investigative activity, aimed at obtaining personal information, without using some special technical means by a private detective. Accordingly, it seems impossible to avoid violating the law regarding each and every particular case.

Art. 32 of the Constitution of Ukraine asserts that no one shall be subjected to interference in his private life and family matters, except when such interference is stipulated by the Constitution of Ukraine. The collection, storage, use, and dissemination of confidential information about a person without his consent shall not be permitted, except for the cases determined by law and only in the interests of national security, economic welfare, and human rights [1].

According to the decision of the Constitutional Court of Ukraine. №2-rp / 2012, dated January 20, 2012, information regarding private and family life of an individual shall be any information and/or data concerning relations of non-property and property character, circumstances, events, relations etc. related to an individual and members of his or her family except for information envisaged by law which concerns person holding an office related to performance of authorities of state and local self-government, administrative functions. Such information regarding an individual is confidential. The same decision of the Constitutional Court points out that "it is impossible to define absolutely all types of behavior of an individual in the sphere of private and family life since private and family rights are a part of natural human rights which are inexhaustible and are implemented in various and dynamic relations of property and non-property character, relationships, developments, events etc. The right to private and family life is a fundamental value necessary for full prosperity of an individual in a democratic society and is considered as a right of an individual to autonomous life independent from the state, bodies of local self-government, legal and natural persons" [12].

Similar restrictions on the prohibition of interference with the private life of individuals are defined by other legislative acts of Ukraine.

For instance, the Civil Code of Ukraine (hereinafter referred to as the Code) explicates the essence of the right to inviolability of personal and family life as one of the types of personal non-property rights by stating that a natural person, on its own, shall determine his/her personal privacy and the possibility to familiarize other persons with it. Also, a natural person shall be entitled to keep secret the circumstances of his/her personal privacy (Articles 270, 271, 301 of the Code). A natural person cannot abandon personal non-property rights, and cannot be deprived of them (Part 3, Art. 269 of the Code) [13].

The personal life of a natural person is deemed to be his/her behavior in the sphere of personal, family, domestic, intimate, social, professional, business and other relationships outside the scopes of social activity, which is carried out, in particular, when the person performs functions of the state or local self-government bodies.

Family life governs personal property and non-property relationship between spouses and other family members, which is carried out using the principles defined in the Family Code of Ukraine (hereinafter referred to as the FC of Ukraine) [14].

Pursuant to Part 4, Art. 4 of the FC of Ukraine everyone has the right to respect for his/her family life. There shall be no interference in one's own family life except as prescribed by the Constitution of Ukraine (Part 5, Art. 5 of the FC of Ukraine). Family relations are regulated concerning the right of privacy inherent in their parties, their right to personal liberty and arbitrary non-interference in their family life (Part 4, Art. 7 of the FC of Ukraine) [14].

At the same time, the criminal procedural legislation of Ukraine provides for the possibility of limiting the relevant constitutional and legislative provisions in the following cases: 1) when it is necessary for the interests of national security, economic welfare, human rights, as well as for the prevention of disturbances or crimes; 2) these cases shall be envisaged by the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine), that is the codified procedure for limiting the right to inviolability of private dwelling [15, p. 69]. In other words, the possibility to employ the appropriate covert investigative (search) actions with the mandatory permission of the investigative judge to conduct them by the pre-trial investigation bodies is discussed.

According to Part 4, Art. 258 of the CPC of Ukraine, interference in private communication implies an access to the contents of communication providing that the communicants can reasonably expect their communication to be private. The following shall be the types of interference in private communication: 1) audio, video monitoring of an individual; 2) arrest, examination and seizure of correspondence; 3) collecting information from telecommunication networks; 4) collecting information from electronic information systems.

M. Ie. Shumylo reasonably points out that communication is deemed to be private if the information is transmitted and stored under such physical and legal conditions, which guarantee the protection of information to the communicants from being interfered by other persons. The physical conditions capable of securing protection from interference into communication are considered to be its place and time, chosen by persons, the form of communication (verbal, tacit, written, graphic), the form of information exchange (direct or indirect – letters, wrappers, parcels, postal containers, telegrams, material media to transfer information among individuals), technical means of wire and wireless communication, means of writing, creation of graphic images, data encryption and storage, etc. [3, p. 572].

The legislator has also established the rules guaranteeing unauthorized disclosure of the received information in the field of criminal proceedings. It shall not be used beyond the scope of criminal proceedings. Everyone who has become aware of such information is obliged to prevent its disclosure [15, p. 69]. The criminal proceedings actors (witness, injured, civil plaintiff, civil defendant, counsel, attesting witness, judge, investigator, prosecutor, operational search department worker, etc.) are hold liable for violating the above mentioned rules due to Art. 387 of the Criminal Code of Ukraine.

To conclude, it should be stated once again that the corresponding restrictions of the constitutional rights shall be allowed only due to the following reasons: 1) the emergence of a threat to the interests of national security, economic welfare, human rights; 2) prevention of disturbances or crimes; 3) mandatory regulatory acts set by criminal procedural legislation of Ukraine; 4) mandatory leave of court. Moreover, only the state executive power bodies, provided for by the law, may be the subjects to restrictions of the constitutional rights, specified above, but not the subjects of private detective activity.

Thus, taking covert photos, making covert film shots and audio records, videotaping the persons checked (Clause 8, Part 2, Art. 13 of the draft legislation) by employing special technical means and collecting information using other covert methods of work aimed at obtaining information, interesting to the client, the private detective is, one way or another, forced to infringe the whole range of the regulatory legal acts of the national legislation.

Currently, the acquisition or use of special means to obtain information poses serious problems and causes a lot of complaints.

Being mentioned above, the investigative actions, committed by a private detective are mainly confidential (secret, covert) and, thus, special technology being used by him in the course of his/her professional activity shall have certain characteristics (be of small size, be camouflaged to look like different household appliances, etc.). The criminal law science defines such means as special

technology for secret obtaining of information (Art. 359 of the Criminal Code of Ukraine).

Special technology for secret obtaining of information are technical means, equipment, facilities, devices, appliances, samples and other species intentionally designed, elaborated, developed, upgraded, programmed and adapted to fulfill the task of secret obtaining of information. For instance, such means include, in particular, special means for the secret: 1) reception and registration of audio information (directed microphone, radio locking device, etc.); 2) visual surveillance and documenting (small camera, miniature telescope, night-vision device, capable of image registration, etc.); 3) examination of objects and documents (portable X-ray device, universal unlocking tools, etc.); 4) penetration into the premises, vehicles, other objects and their inspection (radio set to be worn covertly, nonlinear locators and radars, universal unlocking tools, etc.); 5) control over the movement of vehicles and other objects (radio direction-finder, equipment for silent recordings and chemicals reproducing the traffic route of the vehicles under control, miniature sensors, etc.). Special technology may be camouflaged to resemble the household appliances or non-camouflaged [16, p. 1029].

Many of the above listed special technical means are used by the private detective activity subjects while performing their professional duties. Thus, it turns out that the private detective activity subjects seriously violate the current criminal law of Ukraine.

Therefore, nowadays, there is a rather controversial and dangerous situation for the private detective activity subjects. Considering the aforementioned provisions, private detectives are deemed to be quite dangerous offenders and the persons checked – their victims, are in no way protected from unauthorized interference in private communication. Of course, such a statement is an absurd, and therefore, this situation requires an immediate legislative settlement.

Summarizing the above mentioned, it seems reasonable to underscore great significance of the issues considered. Taking into account the latest amendments and supplements proposed by the Verkhovna Rada Committee on the legislative support of the law enforcement activity, it may be stated that the legislators haven't paid thorough attention to the issues of proper control and supervision of the lawfulness of the special technical means use and covert methods of work by the private detective activity subjects. This may lead to numerous violations of the constitutional rights and freedoms of the citizens (the checked persons) while conducting the private investigative operations. The future of the private detective activity looks quite obscure, complicated, controversial and even dangerous unless the stated problems are solved. To avoid such misunderstandings in the nearest future, one has to solve all the controversial issues of the private detective activity sector assiduously, thoroughly and rigorously while the regulatory process is still in action.

The main precondition for the proper private detective activity is, first and foremost, the legislation, defining the arrangement and conduct of the private detective activity. Unfortunately, the detective activity and the provision of the detective services by business entities haven't received the proper legislative support till this moment in Ukraine. But it has already drawn the precise attention of the acknowledged law enforcement services scholars and professionals to this challenging issue. Although, the level of the scientific research regarding the legal regulation of the detective and law enforcement services still remains quite insufficient and not properly studied.

The formation of a private detective activity in Ukraine is an irreversible process. This is to be certified by the development and submission of several bills on detective activity to the parliament of Ukraine. These bills identify the main grounds to perform the detective activity, a list of services to be provided by the subjects of this activity, control and responsibility for performing it. Artificial and continuous deterrence in legalizing the detective activity causes irrecoverable harm not only to the private detective subjects, already existing at the Ukrainian market and those wishing to engage in such kind of business, but to the interests of the citizens who need such services as well as state interests and image of Ukraine on the international arena. Therefore, the need to adopt the Law On Private Detective (Investigative) Activity in Ukraine is of vital importance.

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Chapter 19

Some obstacles of undertaking Advocacy practices in Ukraine

The principle of competition in criminal affairs provides legal methods of securing one's juridical interests for each side of the argument. Theory of criminal process developed quite a few advantages for the defending side that should allow attorney to execute his professional commitments on a sufficient level. Advocate's practice proves that unfortunately, it is not always the case that sound theoretical concepts are finding their way into real life, and the law is executed in a foreseen manner.

For a long period of time, advocacy didn't have real power, when the competition principle existed only on paper, but with every day the institute of Advocacy becomes a powerful system, which is able to execute mutual requests, which is proved by the resistance from legal enforcement bodies, who forget that by violating attorney's rights, they violate law, which exists to protect.

To main factors that obstruct advocacy can be related those, which are tangled with series of unregulated statements on legislative level, physical obstruction of attorney's actions, commitment of crimes against attorneys, which are related with their professional actions, intimidation, psychological obstruction etc.

Despite the law-stated, science-justified guarantees of advocacy, in practice, there are systematic occurrences of violation of rights for legal support, including the one from law-enforcing bodies.

In part, this is related to obstruction of allowing attorney to defend his client's rights. For example, in case of arresting a person (when the invitation of attorney happens through the third person), some, so-called "invited lawyer" visits him and gets all the necessary information needed for investigation, while the officially invited attorney can't get access to his client due to various reasons. When facing such practices from law-enforcing bodies, attorneys advise their clients to use passcode to reveal "fake" lawyer.

Also, attorneys admit that they have to use different tools to provide security for themselves, attend self-defence lessons because of non-singular cases of threat to theirs life and health. That is why we have a case, where "the defender" has to defend oneself [18].

There is another problem of lacking sufficient investigation of physical violence towards attorneys, such cases rarely end up on the Judge's table, and

decisions of courts in similar cases quite hard to find in the register of cases, conducted by court.

For example in case #214/6983, only after intervention of the judge of Saksagansky local court of city Kryvyi Rig, this case was entered into The only state register of court decisions of violating art. 397 of Criminal Code of Ukraine. The case was related to violating the suspect's rights for legal help during the rummage by the detective and prosecutor on 17.10.2016. Similar case took place in Zaporizhzhya, where investigating judge of Energodar's city court approved attorney's complaint with regards to case #316/759/16-k, and required police's chief to input facts to The only state register of court decisions and commence pre-court investigation. Similar cases in attorney's favour were approved in Poltava region – case #539/743/17, Odesa region - #501/3609/15-k and 501/2382/16-k etc. [7].

There are also cases of obstructing attorney's actions directly in the courtroom. For this matter, on 7th February 2018, the investigating judge of Pechersk local court in Kyiv, adjudicated the case of not allowing attorneys to participate in the court's session, despite that they have provided all required documents which proved their stance [1].

Given facts allow for the grounds to conclude the existence of criminal violations and investigation of those, which are based on systematic obstructions of professional rights and guarantees of advocate's practice.

The delegation of the International Commission of Jurists, which carried out the observation mission in Ukraine from 20 to 22 June 2014 for assessment of the legal profession independence received consistent testimony of the attacks on lawyers that range from intimidation to the use of firearms against them.

Several lawyers were subjected to physical and verbal attacks by individuals or organized groups. Such assaults also took place in court.

These persecutions take place in the context of legislative innovations aimed at regulating the legal profession and have significant implications for freedom of association and functioning as bar associations as civil society. But legal developments were often proposed without consultation with lawyers. Such an approach complicates effective application of legislation in the professional practice of lawyers.

It is worrying that violent attacks on lawyers sometimes unreasonably attributed to extremist right-wing radical groups. The result is the impunity of criminals, despite the existence of evidence and specific criminal law provisions to protect lawyers.

Law enforcement agencies often do not investigate such cases in a quick and impartial way, even when known perpetrators of a crime.

Such attacks on lawyers often linked to the protection of clients in politically sensitive criminal cases and undermine the ability of lawyers to perform their

duties and protect the human rights of their clients free from intimidation, interference, harassment or improper interference.

Howsoever according to international human rights law the state should take measures to protect the safety of persons, of which public authorities know or should know that they are under threat, and should provide independent, prompt and thorough investigation of any attack on the life or persons physical integrity.

The main provisions of the United Nations emphasize the importance of the independence of lawyer associations in ensuring independent and equitable justice. Such associations should be institutionalized legally and practically independently from all external actors, including government, other executive bodies, parliaments, and to be outside of the private interests also [22].

Another factor that hinders lawyers' practice are internal conflicts and misconceptions of the environment, roots for which are found in deficiency of Ukraine's legal system: lacking of regulations and ambiguity of national's laws in any legal-related practices in particular.

A single, free market of juridical services that exists in EU countries is a reference point for becoming of democratic institute of advocacy in Ukraine. An impulse for this was an adoption of act "On the Bar and Legal Practice" in 2012, a predecessor for which was a soviet act of 1992 "On advocacy". However, there are a lot of uncertainty in applying something new – conflicts, misunderstanding, power games etc. are inevitable and moreover, they impede functioning of institutes in an effective, rational and in adherent manner.

Current Ukrainian legislation provisions that advocacy is an independent professional activity of an lawyer, and Ukrainian Bar – is a non-governmental, self-ruled institute, which facilitates defence, agency and other types of professional juridical assistance, as well as regulates organisation and advocacy practices in terms that are defined by law.

In accordance to the act «On the Bar and Legal Practice» issued 19 November 2012, The Ukrainian National Bar Association was found – this is the all-Ukrainian non-governmental non-commercial and non-profit professional organization that unites all of the advocates of Ukraine with the aim of ensuring the implementation of the objectives of legal profession.

According to the mentioned act, the local Qualification and Disciplinary Commissions were required to hold a lawyer's conference in all 27 regions in Ukraine. These conferences were required to form local bar self-government bodies, election of the heads, as well as elections of delegates for participation in Constituent Congress of Advocates of Ukraine and candidates' nomination to Ukrainian National Bar Association.

At this very moment, the conflict emerged. In several regions, including Kharkivska, Zakarpatska and Donetska, a few premature meetings were held as an

informal gathering of lawyers, which was not provisioned by law. During these meet-ups, certain Qualification and Disciplinary Commissions set quotas on lawyers' participation in local statutory conferences – an additional requirement, not provisioned by law. Such kind of meetings were held simultaneously in few regions.

As a result, the amount of lawyers, which could participate in local conferences or election, and for this matter, could be elected themselves to bar self-government bodies, was limited. A lot of lawyers protested against these quotas as unlawful. For instance, the head of Higher Qualification and Disciplinary Bar Commission of Ukraine, publicly condemned those and called to cancel such meetings [23].

Grounds for this were numerous facts regarding violation of disciplinary actions against Ukrainian lawyers, as a result of which, Qualification and Disciplinary Commissions made a decision to withdraw their right to conduct lawyer's practice. Among these violations, the majority of disciplinary acts were opened after adoption of 2012 Ukrainian Act "On the Bar and Legal Practice", which provisioned establishment of Ukrainian National Bar Association and conducting election to its' ruling bodies. After adoption of this act, two alternative groups of lawyers announced creation of legitimate national bar association, as provisioned by law. Both of them had name "National Bar Association". After some time, one of those was officially recognized by the government and publicly registered thereafter.

As mentioned in ICJ's report, subsequent disciplinary actions were directly or indirectly linked with lawyer's participation in "alternative and extraordinary lawyers' congresses", that were held without permission of official Ukrainian National Bar Association. Some proceedings were also linked to absence of lawyers on meetings, organised by newly-formed self-governed bodies, which are state-registered according to the new law. However, state's legal system and institutes of this profession must facilitate protection of lawyer's against intimidation, victimization or interference and inadmissibility of abuse of disciplinary actions. All sanctions against lawyers' disciplinary violations should be corresponding to committed violations[20].

What is the current state? After 5 years, according to Ukraine's mission from 4-8th March 2019, International Commission of Jurists calls Ukrainian government to apply quick actions to grant physical safety for lawyers and prosecution of the people, who are responsible for a series of attacks.

Barriers to legal defence activities, physical harassment occur when legislative innovations aimed at regulating the profession of lawyer and having significant consequences for the freedom of association and the functioning of both lawyer associations and civil society are not form finalized. The legislative novelties are under discussion and heated discussions between the National

Association of Attorneys of Ukraine, international experts, legal commissions, the Ukrainian Helsinki Human Rights Union, regional human rights groups, the advocacy community, etc.

According to the Constitution of Ukraine, the foundations of the organization and activities of the advocacy are determined exclusively by the laws of Ukraine (Article 92.14.14 of the Fundamental Law of Ukraine).

In accordance with the Constitution of Ukraine, for the provision of professional legal assistance in Ukraine there is an advocate. Independence of the Bar is guaranteed. The principles of the organization and activity of advocacy and the exercise of advocacy in Ukraine are determined by law.

Considering the adoption of the Draft Law N 9055 «On the organization and practice of the profession of advocate» of September 6, 2018, under the terms of which it is defines the legal principles of the organization and activity of the Bar in Ukraine, the procedure for acquiring the right to exercise advocacy, suspending and terminating the right to exercise advocacy, it is determine the organizational forms of advocacy, guarantees of advocacy practice, peculiarities of the status of a lawyer in labor relations, in the Public service and in the service of local authorities, principles of lawyer's self-government, etc. Currently, in the Draft law, the main unresolved issues that have become the subject of conflicts, not only in the scientific environment, but also among practicing attorneys, are follows:

- Access to advocacy as a profession (with regards to job experience, taken internships, course of passing the qualifying exam and appeal of it, the context of attorney's oath and the course of emitting the certificate of the lawyer).
- Rights and guarantees of attorney's profession (with regards to defining the workplace of the lawyer, provision of execution of the right to file the solicitor's request and receive a reply, denying to use category "power abuse", course of rummage of lawyers, notification of suspicion of criminal offense, as well as attorney's access to courtroom and law-enforcing units).
- Disciplinary charge of attorney (with regards to grounds of applied charges, types of disciplinary charges, course of charging and guarantees of possible appellation of disciplinary charges).
- Attorney's rights in the workforce relations (with regards to combining advocacy with the work at governmental bodies or any other legal body, as well as service in local self-governed bodies).
- Self-governing advocacy (with regards to granting proper functioning of the various forms of this body) [6].

In this way the serious risks of obstructing advocacy in Ukraine are tightly related with unregulated aspects in this legal branch.

Despite quite progressive legal acts in advocacy practice, the cases of unlawful actions against lawyers only became more frequent. It is obvious that executive lawyers are specialists which defend rights of others. However, as

practice shows, sometimes even highly specialized individuals are stunned by attacks of the law-enforcing bodies. Especially considering the fact that the majority of lawyers are specialized in civil and business branches, not in the criminal area. They are professionals in the legal realm, but the overwhelming part of them aren't specialized in criminal law. At the same time, no one is insured from any procedural actions targeted at themselves, and you don't have to be participant of the crime. It is enough that law-enforcers frequently mistake attorney for his client. And with the first opportunity, they practice arrests as a method of pressuring attorney for his/her active legal stance.

One important component in opposing the obstruction of advocacy is a tangible implementation of mechanisms of punishing violations of advocacy's ethics.

E.V. Vaskovsky explains specifics of attorney's profession, which is unlike any other: «Attorney has to be in the realm, which is full of unseen obstacles, that is totally unknown for any other liberal profession... any other occupation doesn't provide such moral indulgence as advocacy. Being an expert in law, attorney can legally execute any tricks, any cunning» [14, p. 464].

We agree with Vaskovsky's opinion that «judges and prosecutors are placed in the same position», that's why he believes that attorney's behaviour – is objective indicator of his moral qualities, it manifests itself through the complex of his actions, which have moral meaning, in part through the existence of ethical feelings, knowledge, tendency to give moral judgement of one's actions, acting morally – in a faithful manner. Advocacy opens a wide range of abuses of different kind. Attorney, who has a reputation of pettifogger and uses all of his arsenal for his client to win, not only won't be unlicensed, but will in turn attract bigger client base [14, p.464].

For these reasons, it is in attorney's interest to be unfair in his actions, which means that advocacy is a thin and dangerous domain, and more than any other profession requires build-up and proper execution of the job-related ethics.

As The head of the Higher Qualification and Disciplinary Bar Commission V. Zagariya points out, the most typical violation is acceptance of the case by attorney, but total abandoning after the receipt of money – switched-off phone, ignores letters and calls, misses in the courtroom (90% of complaints). There is a problem of evidence in such cases, including the record of agreement between two counterparties. In such case the Higher Qualification and Disciplinary Bar Commission investigated all related materials, recordings, interviewed witnesses and passed the decision to apply the most severe sanction – withdrawing licence for advocacy[8].

However, such materials are pre-judicial, unarguable and the fact that the attorney-violator has to pay back the deposit, according to requirement of p.2 p.1 art. 571 of Civil Code of Ukraine, is just and undoubtful. On the other hand – it is a

sanction. Later, the appeals of increased tariffs of the lawyer and demands to return the favour arise.

As a separate category of disputes, the qualification-disciplinary commission of the Bar Association is trying to remove it from the scope of disciplinary proceedings, since, as V. Zagariya considers, «... they relate to the field of civil-law relations: there is a contract, there is a list of services described, there is a demand to return the money. We are not the court, we can not interfere in the civil law relationship between a client and a lawyer. And, as a rule, we deny satisfaction of such complaints»[8].

Besides that, from the practice of the work of the qualification-disciplinary commissions of the advocates, the main complaints are those about the failure of the attorney to perform their professional duties, to receive a compensation without providing legal services or to provide them not in full or inadequate quality of the latter, admission of conflict of interest, failure to comply with professional lawyer's duties, in particular, failure to appear in court for conducting investigative actions, improper conduct in court, submission of knowingly false and fraudulent documents, delaying consideration, pressure on witnesses, advocacy incompatibility with other activities and so on.

Does the activity of a lawyer always correspond to moral attitudes? Does the lawyer ask himself the question: "Why should I try to alleviate the fate of the person who committed the most serious crime, and when there is absolute certainty that he has committed it and the mitigating circumstances are absent?" It is generally acknowledged that the lawyer has no right to lie, but in this case, he can support his client, support his false statements in the arguments, if he does not wrongly assess the actual facts proving guilty or be quite about them. [15, p. 62].

In the legal literature, there are statements that the lawyer is not entitled to help the defendant to conceal or distort the truth [2, p. 506]. Quite interesting and practical, in our opinion, is the point of view of M. Barshchevsky: «The defender must speak not the whole truth, but the truth» [2, p.283].

But when he is silent about the truth that has become known to him from the words of the defendant, isn't he helping to conceal it? Is this a way out of a situation where a lawyer uses evidence that allegedly serves the client's interest but is not credible?

The constitutional principle of the presumption of innocence refers to the interpretation of the inevitable doubts as to the guilt of a person in favor of the accused, but does this mean that questionable evidence can be used to prove innocence?

Y. Kisil strongly argues that doubting the authenticity of evidence can not and should not serve as grounds for refusing its use in protection. Otherwise, the adversarial process would get rid of its legal and moral significance [13, p. 506].

From the standpoint of A. Levy and A. Popkin, such a statement is not without contradictions, since in this situation, the internal conviction of the lawyer and the use of such dubious evidence as the matter of his conscience, his psychological state and professional beliefs are not taken into account. It turns out that the defender is compelled to sometimes conflict with his conscience and act immorally [15, p. 59].

A.A. Guseinov noted that within the framework of institutional ethics "moral requirements are ensured by a rational organization of activities within the framework of social systems, which allow with a greater predictability to guarantee a morally important social result" [10, p. 472].

Professional ethics rules for lawyers, which mainly oblige lawyers or prohibit them from certain actions, are not artificially invented obstacles that complicate the work of lawyers, but also provide the quality of work for them, making them more and more sought after and successful. Because of this, financial independence is achieved. This is also due to the high status of the appointment of a lawyer and advocacy in general.

Objective prerequisites for the implementation of this obligation are: the presence of peculiar conditions for the implementation of moral regulations. The significance of these conditions is, that the consequences of compliance or non-compliance with one or another requirement for the behavior of a lawyer, which determine the extent of his responsibility to a particular person with whom he interacts and to society in general; the presence of special, inherent in the profession of the lawyer situations regulated by specific norms of morality; features of the content of professional duties as an ethical category and the principles on which its' implementation must be based [3, p. 121].

In accordance with the Law of Ukraine "On Advocacy", one of the following disciplinary punishments can be applied for committing a disciplinary offense by a lawyer: 1) a warning; 2) suspension of the right to practice advocacy for a term from one month to one year; 3) for lawyers of Ukraine - deprivation of the right to practice advocacy with the following exclusion from the Unified Register of Advocates of Ukraine.

It should also be noted that in relation to the disciplinary liability of lawyers there is a presumption of innocence. An attorney is personally liable for violation of the Rules of Advocate's Ethics before the client [17, p. 28-32].

However, far from all of these principles are observed by lawyers while performing their professional duties, and sometimes they violate them, and that is especially unacceptable, they do not bear any responsibility for it.

Thus, it is quite common in the professional environment of the court to accept a client's order from a lawyer who is not competent in this area without warning the client about it, as well as conducting a parallel number of cases by a

single lawyer, which leads to unprofessional, ineffective and unfair treatment and settlement of these cases.

For example, in the act of 26 June 2011, the Pecherskiy District Court of Kyiv City, admitted that “lawyer, by abusing his rights, prolonged the court review, heedless of the legal order of the court, with his own replicas disrespected the judge, violated the order of the court’s listening. Also, Kiev Court of Appeal had established (act of 15 February 2013) that” lawyer..admits unethical, and in some cases, frankly cynical and insulting statements about the legal incompetence of the court, the prosecutor of the case, which expresses on the raised tones in the presence of the defendant, other persons, free listeners, representatives of the media, expresses threats to write complaints ..., carries out unreasonable delay of the trial through unwarranted failure to appear in the court, statement of unsubstantiated petitions, lengthy and repeated interrogations of witnesses, which testifies abusul of their rights and violation of the rules of the law of Attorney’s ethics, ignorance of the provisions of the current criminal-procedural law and gross and systematic disrespect for the court [5, p. 1].

Consequently, for violating the Rules of Advocate's Ethics, measures of disciplinary liability may be applied to a lawyer in accordance with the procedure provided by the current law on advocacy, as well as acts of the National Association of Advocates of Ukraine.

In our opinion, the guaranty for adhering to the rules of advocacy’s ethics is the provision that a lawyer may be prosecuted for violating the Rules of Advocate's Ethics by his assistant, trainee or member of technical staff and the responsibility of the head of a law office or a lawyer's association for failing to comply with the provisions of the Regulations lawyers' ethics, as well as for taking them decisions which result in violation of the Rules of Advocate's Ethics.

In connection with the important and responsible role, that is assigned to a lawyer, he must act in accordance with certain professional and ethical criteria, moreover, the requirements posed to a lawyer are much higher than those usually related to the average citizen. This is confirmed by the principles of the activity of a lawyer, which are covered in the current legislation of Ukraine. Thus, the Law of Ukraine "On Advocacy" formulates the following principles of advocacy:

- rule of law;
- legality;
- independence;
- confidentiality;
- avoiding conflicts of interest.

The same principles in the overwhelming majority form the fundamental principles of advocacy as stated in the General Code of Law for Lawyers of the EU Member States adopted by the delegation of the twelve participating countries at a plenary meeting in Strasbourg on October 28, 1988, and subsequently amended

in plenary meetings of the Council of 6 December 2002 and May 19, 2006. This document also includes the Explanatory Memorandum, which was updated on May 19, 2006, which contains comments on each article of the General Code of Conduct for lawyers in the EU countries, including to each of the proclaimed principles. In particular, this Code outlines eight general principles of the profession of lawyer:

- independence;
- trust and personal integrity;
- confidentiality;
- respect for the rules of conduct of other lawyers 'associations and lawyers' unions;
- incompatible activities;
- self-promotion;
- client's interests;
- limitation of the lawyer's liability to the client [12].

Similar provisions are also laid down in the Charter of Fundamental Principles of the Work of European Attorneys, adopted on November 24, 2006 by the Council of Bar Association and the Union of Attorneys of Europe. It contains ten principles that guide European lawyers in their work.

These principles are the basis of all national and international rules governing the conduct of European lawyers. Respect for them is the basis for the exercise of the right to protect the rights, freedoms and legitimate interests of a person and a citizen in a democratic society. These principles include the following:

- the independence of the lawyer and the freedom of the lawyer to represent the client's case;
- the right and duty of a lawyer to observe confidentiality with regard to client cases and the right to respect for professional secrecy;
- avoiding conflicts of interest between different clients or between a client and a lawyer;
- dignity and honor of the profession of the advocate, high moral qualities and good reputation of a separate lawyer;
- devotion to the client;
- fair treatment of clients in relation to the payment of fees;
- professional competence of the lawyer;
- respect for colleagues in the profession;
- respect for the rule of law and the fair administration of justice;
- self-regulation of the profession of lawyer [26].

Part of the principles proclaimed by the Charter have not yet been reflected in the national legislation of Ukraine. The Law of Ukraine "On Advocacy" establishes certain guarantees of the principle of independence in advocacy.

In particular, Art. 22 of the Law contains a prohibition to disclose information constituting a matter of lawyer's secrecy, Art. 23 - the prohibition of any interference with advocacy.

The principle of the independence of the lawyer has also been reflected in international legal acts and regulations of individual countries.

For example, the principle of independence as a basic principle of the professional activity of a lawyer is included in the General Code of Law for Lawyers of the European Communities, which is fixed as follows: the tasks performed by a lawyer in the course of professional activity require his absolute independence and the absence of any influence on him, connected first of all with his personal interest or pressure from the outside.

The principle of procedural independence of a lawyer to represent a client's case is also enshrined in the Charter of Fundamental Principles of the Activity of European Attorneys. The commentary to the Charter states that the content of this principle is that the lawyer must be free - politically, economically and intellectually - in carrying out his activities in counseling and representing the client [26].

The Basic Provisions on the Role of Lawyers adopted by the 8th United Nations Congress on the Prevention of Crime in August 1990 ensured that the proper protection of human rights and fundamental freedoms requires that everyone has the appropriate opportunity to use legal assistance provided by professional lawyers. The document also emphasizes the role of professional associations of lawyers in protecting their members from persecution, unreasonable restrictions and attacks, and the duty of the government to provide lawyers with the opportunity to carry out their professional duties without intimidation, obstacles, troubles and inappropriate interference. The principle of independence was enshrined in the International Code of Ethics of the International Bar Association (IBA), which states that attorneys must maintain their independence in the exercise of their professional duties. Lawyers with an independent practice or practicing in a partnership should, as far as possible, abstain from engaging in another profession or business if such employment compromises their independence.

The principle of procedural independence of advocacy is enshrined in the national legal acts of different countries. These include:

- Internal rules of the Paris Bar Association;
- Regulation No. 1 of the Code of Professional Conduct of Lawyers of England and Wales;
- Comprehensive rules of professional ethics and responsibility of the Spanish Bar Association in 1987;
- Typical rules of professional conduct of lawyers (USA) [24, p. 202].

The principle of moral perfection has also been reflected in international regulations and regulations of individual countries. Thus, in the General Code of

the rules for lawyers of the EU states, the trust relationship between a lawyer and a client can arise only in the absence of the latter doubts about the integrity and integrity of the lawyer specifically [4, p. 9-11.].

And in the Charter of Fundamental Principles of the Activity of European Attorneys, this principle is formulated as dignity and honor of the profession of the advocate, high moral qualities and a good reputation of a separate lawyer. The essence of this principle is that, in order to gain the trust of clients, third parties, courts and states, the lawyer must prove that he is worthy of such trust.

In our opinion, the subject of the lawyer's secret are the questions from which a citizen or legal entity require a lawyer, the essence of advice, consultation, explanations and other information that are obtained by a lawyer in the exercise of his professional duties. Non-disclosure information includes all information that has become known to a lawyer in connection with the provision of legal assistance, the implementation of protection and representation, for which there is no consent of the client to its disclosure. The recommendations of the Committee of Ministers of the Council of Europe of 25 October 2000 on the freedom to exercise professional advocacy have indicated that all necessary steps should be taken to ensure that the confidential nature of the relationship between a lawyer and his client is properly protected, lawyers must comply with professional secrecy in accordance with national legislation, internal regulations and professional standards. Any non-compliance with the principle of professional secrecy without proper consent of the client must be duly punished [11, p. 197].

According to Article 22 of the Law of Ukraine «On Advocacy», the lawyer is required to keep the lawyer's secret. It is prohibited to disclose information constituting a matter of lawyer's secrecy and to use it in their own interests or in the interests of third parties. The solicitation of the information by the lawyer and the interrogation of him as a witness on matters constituting a lawyer's secret (Article 23 of the Law) are prohibited.

The data of the pre-trial investigation that has become known to him in connection with the performance of his professional duties, the lawyer can disclose only with the permission of the investigator or prosecutor. Lawyers guilty of disclosure of information are liable under Art. 387 of the Criminal Code of Ukraine.

The client often perceives the lawyer as a judge, and from this the problems begin. Customer hides information, trying to justify in the eyes of the lawyer, openness is replaced artificially. To avoid this, the trust must become the basis of the relationship with attorney by client [25, p. 187].

One shall not go to extremes, however, how to assess a possible complete satisfaction or dissatisfaction with the complete requirements of the customer? Among the lawyers there is even a saying: the worst enemy of the lawyer is his client. According to the Law of Ukraine "On Advocacy" the client - natural or legal

person, state, public authority, local authority, in the interest of which the advocacy is performed.

The Law of Ukraine "On Advocacy" sets the grounds for denial to conclude an agreement on the provision of legal assistance: a lawyer, a lawyer's office or a lawyer association is prohibited from entering into an agreement on the provision of legal assistance in the event of a conflict of interest.

Such requirements for the activity of a lawyer as honesty and decency relate primarily to relations with the client: to resolve the case by lawful methods, not to resort to deceit, blackmail or threats, to play by their own - legitimate, honest, fair - rules, because by answering analogically to dirty and non-legal methods, the lawyer will not be different from who used such methods first [16, p. 19].

Also, the principle of confidentiality - the preservation of lawyer's secrecy - is implemented, and if the execution of an order can delay the disclosure of confidential information, the lawyer must refuse to conclude a contract for the provision of legal aid. The Law of Ukraine "On Advocacy" stipulates that the Bar Association of Ukraine carries out its activities on the principles of the rule of law, independence, democracy, humanism and confidentiality.

At the same time, the lawyer is entitled to collect information about facts, that later can be used as evidence in civil, economic, criminal cases and cases of administrative violations when carrying out their professional activities.

In exercising these rights the lawyer must strictly adhere to the requirements of the current legislation, use all the means envisaged by the law to protect the rights and legitimate interests of citizens and legal entities and has no right to use his powers to the detriment of the person in whose interests he accepted the order [21, p. 83].

Consequently, a lawyer who acts within the limits of the current legislation, adhering to the rules of lawyer's ethics, the principles of the lawyer's activity is morally and legally protected, and therefore can influence the legal means for violations of his rights due to the obstruction of his activities.

Knowledge of a lawyer is one of the most powerful means of protecting both oneself and the client. The ability to prove in court that evidence obtained illegally, including the violation of the right to legal assistance, is inadmissible as an overriding instrument for the advocacy of justice.

Among the solutions to the problems, we have outlined the strengthening of the role of advocate's self-government (since the community of lawyers is capable of solving problems that individual can not cope with the old system), the development of effective mechanisms for protecting lawyers, and the actual prosecution of guilty people for interfering with the activity of the defender to legal liability.

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Chapter 20

Criminal law protection of pregnant women from obstetric aggression (by materials of NGO “PRURODNI PRAVA UKRAINA”)

In recent years, there is an international recognition of that the fact that the issue of human rights is also to be resolved in the sphere maternity care. A view from the point of view of human rights (human rights-based approach) is a valuable tool for understanding the global problems of maternal mortality and morbidity, prenatal mortality of children, as well as the responsibilities of governments on provision of accessible to all citizens assistance under time of delivery. The human rights perspective also helps to understand the dynamics that arises between brides and provide them with medical services, understand the medical problems interference and abuse.

Across the world many women experience disrespectful, abusive, or neglectful treatment during childbirth in facilities. These practices can violate women's rights, deter women from seeking and using maternal health care services and can have implications for their health and well-being.

The mandate of the United Nations Special Rapporteur on violence against women, its causes and consequences was established in 1994 by the (then) Commission on Human Rights and requests the Special Rapporteur to *“recommend measures, ways and means at the local, national, regional and international levels to eliminate all forms of violence against women and its causes, and to remedy its consequences.”* Pursuant to this mandate, the Special Rapporteur, Ms. Dubravka Šimonović has identified the issue of mistreatment and violence against women during reproductive health care and childbirth as the subject of her next thematic report to be presented at the 74th session of the General Assembly in September 2019 [1].

Mistreatment and violence against women during reproductive health care and facility-based childbirth is a serious violation of women's human rights which occurs across all geographical and income-level settings [2]. In a statement published in 2014, the World Health Organization reported that disrespectful and abusive treatment occurs during childbirth in facilities and includes *“outright physical abuse, profound humiliation and verbal abuse, coercive or unconsented medical procedures (including sterilization), lack of confidentiality, failure to get fully informed consent, refusal to give pain medication, gross violations of privacy, refusal of admission to health facilities, neglecting women during childbirth to suffer life-*

threatening, avoidable complications, and detention of women and their newborns in facilities after childbirth due to an inability to pay”[3].

It is worth pointing out that in terms of medical and law status, a pregnant woman is a special subject of medical care. The Law of Ukraine "Fundamentals of Ukrainian Health Law" states that a patient is a natural person who has applied for medical assistance and / or who is provided with such assistance. However, this definition does not reveal any special features of a patient that will allow it to be distinguished from other participants in medical-legal relations. Science, practice, and international treaties do not provide a unified understanding of the concept of a patient. N. Kosolapova define the concept of a patient as a person who has applied to the medical institution of any form of ownership or to a doctor of private practice for obtaining diagnostic, medical, preventive care regardless of whether he is ill or healthy [4,42]. It is worth pointing out that this definition can be taken as a basis, but it has several shortcomings.

First of all, in spite of the consent of the patient, in many cases, there are exceptions provided by law (for example, the patient is a baby, or in the case of an emergency hospitalization or forced treatment).

A separate allocation of diagnostic, medical, preventive care is also well-founded. Such allocation reasonably serves to distinguish a medical patient from a sick person. In practice, there are also difficulties with understanding the difference between a sick person and the patient. First of all, this difference consists in the fact that the sick person is one (for example, a baby), and the rights of the patient are other persons – his or her parents. The second case is the situation when the patient turns to a doctor for a preventive or counseling service and has no illness. Particularly significant such a distinction is when determining the status of a pregnant woman as a patient. After all, in the normal gestation course, a woman is not sick and has no diagnosis. Pregnant in this case also does not require treatment, but only pregnancy follow-up. That is, the definition needs to be supplemented by the phrase "or to pregnancy follow-up".

Therefore, it can be assumed that the patient is a person who has applied (or on behalf of which the authorized persons applied for) to the medical institution of any form of ownership or to a doctor of private practice for obtaining diagnostic, medical, preventive care or to pregnancy follow-up regardless of whether he is ill or healthy.

According to the Constitution of Ukraine, health care in Ukraine is free of charge. The official costs that women are to pay based on the legislation include only the prices for certain tests and the price of the private postnatal room at the maternity hospital. Nevertheless, it is usual in the Ukrainian health care system that pregnant women give informal payments to obstetricians in advance to be present at their labor and birth personally. This question is devoted to many studies [5, 6, 7, 8].

International human rights bodies and experts have addressed some of the types of mistreatment and violence, however, they have focused on a limited number of issues and their analysis of those issues has largely failed to consider the broader context in which mistreatment and violence occur.

The right to an informed decision is a fundamental right in healthcare is based on the right of every person on autonomy over his own body, as well as on the right to personal inviolability. When medical professionals recommend medical intervention or treatment, they have a legal obligation to inform the patient about the risks and benefits of the full spectrum opportunities available to a specific healthcare consumer services. So the consumer of health services has a right on a basis factual data, evidence-based medicine, individualized recommendations, and in support of the environment, to adopt a truly informed decision - that is, has the choice: to accept a doctor's recommendation or reject it based on personal needs and values.

NGO “Prurodni Prava Ukraina” is a public organization on human rights in the field of pregnancy, childbirth and maternity. Mission: Promoting and ensuring human rights in the field of maternity and humanizing the system of maternity care in Ukraine. Objective: To create conditions under which each woman can live and give birth as she has decided, while feeling respect for herself and her choice, as well as support if necessary. NGO “Prurodni Prava Ukraina” prepared a monitoring report on human rights in childbirth in Ukraine – 2016. According to Human Rights in Childbirth National Report [9] the 2015 Survey of over 3 500 women has shown that 76% of women said that they have been informed at the antenatal clinic on the matter of tests and monitoring procedures, while another 20% said that they were not. Moreover, 59% of women said that they had enough time and information in order to decide on informed consent, while 41% responded that they did not have enough time and/or information for doing that.

The 2016 survey among the mothers has, however, shown that 70-75% of women claimed to have not given their informed consent during antenatal, intrapartum and postpartum care. This discrepancy might be due to the difference in the responding audience in the two surveys, distinct formulation of the question or the dynamics that could have occurred in the social reality. In any case, even though the exact number of women who lacked proper exercising of their right to informed consent is not known, it is clear that a significant portion of women had their right to informed consent violated.

According to the law, medical facilities have to provide courses for pregnant women where they can get information about pregnancy and birth. And some facilities indeed have those courses. However, they present the information through the lens that women have to strictly follow their doctor's instructions because they know best what is good for those women. The information in those courses is provided in a one-sided manner, according to the medical perspective

on the process of birth. For example, they teach that amniotomy should always be done at 5 cm of cervical dilation. Psychologists often teach these courses, and even if they are aware of the alternative views they are supposed to teach the official perspective, otherwise they might lose their job.

The majority of women have no idea of informed consent and the possibility to have an influence on their birth. When women hear about those things at non-hospitals-based childbirth education events they are usually very surprised and no one knows the particularities of informed consent procedure. A frequent reaction is a doubt that they can make the right decision without education and knowledge. The second concern is that doctors may get offended if they (women) disobey and as a result, they are afraid to not be provided with the full amount of medical services.

Such information is not generally available, although some non-governmental initiatives try to produce such materials. Even though information about options and interventions during pregnancy and childbirth exists, antenatal clinics do not carry it in a printed form and rarely mention it to mothers.

The perspective on childbirth promoted in media and Internet forums is that a layperson is incompetent in matters of birth and only a doctor can tell what is good and what is bad. Only the information that is presented by doctors matters for the media. Even false information given by a doctor is seen as relevant. In contrast, even a valuable and proven information suggested by a non-doctor is seen as less important.

According to Human Rights in Childbirth National Report, over 62% of respondents indicated that they got no printed information about their rights on Informed Consent either in antenatal clinics or in maternity hospitals. Some printed information was provided in antenatal clinics (24%), in sanitary inspection rooms (14%), and in delivery room (11%). The largest percent (58%) of women that learned about informed consent did so from the documents supplied by obstetricians. 10% of respondents were provided with some printed leaflets where the right for informed consent has been clarified.

The Ukrainian legislation obliges doctors to obtain informed consent before conducting any medical interventions. In turn, pregnant and birthing women are granted a right to refuse giving their consent for such an intervention. However, in practice such informed consent is mostly seen as a formality, just as another signature to be obtained as the woman enters a maternity hospital.

Notably, the name of a doctor is often blank on this form. A doula reports that when medical personnel was asked how a woman can sign such a form if she neither saw a doctor, nor knows his/her name, the response was that “this is a standard form and the doctor for this woman’s labour is not assigned yet”.

It is also often practiced asking for woman’s handwritten refusal form during active labour. A doula reports being present at a breech birth where a woman was

forced to write a text dictated by a doctor while she was pushing lying on her back if she wanted to birth without oxytocin. As she was managing this task, the doctor has cynically commented: "And please, write legibly".

The current legislation of Ukraine in the field of medical activity is based on the established international medical doctrine the right to a patient's right to informed voluntary consent as a precondition for any medical intervention. Whole a number of international instruments, including the European Charter of Rights Hospital Patients (1979), Patient Rights in Europe (WHO, 1993), the European Charter of Patients' Rights (2002), secure patients' rights to information, informed consent and voluntary selection when receiving health care. Except the right to an informed decision is also provided by the article 5 of the Convention on Human Rights and Biomedicine: "Any intervention in the field of health may only be carried out after the volunteer and informed consent of the person concerned".

From the above it can be concluded that the rights of women in childbirth are currently not sufficiently protected. One of the main problems is the lack of an effective mechanism to protect such rights in practice. To help the activists in solving these issues, the NGO "Pruradni Prava Ukraina" issued a collection entitled "The rights of women in childbirth and their realization in Ukraine" [10, p.3]. The collection distinguishes the following women's rights in childbirth:

- The right to own a body
- The right to information
- The right to health
- The right to privacy
- The right to freedom of movement
- The right to respect and respect
- Right to support
- The right to equal treatment
- The right to freedom from torture.

However, despite the specifics, medical law continues to consider pregnant as a patient, and pregnancy as a diagnosis. This approach is controversial and needs to be clarified. At the same time, the approach according to which the pregnant woman has all the rights of the patient when she is in a medical institution has its own advantages.

To help pregnant women there are people with special legal status - doula. In Ukraine, the services of the doula are becoming more and more popular. A doula is a person who provides emotional and physical support to women during her pregnancy and childbirth. Doulas are not medical professionals. They don't deliver babies or provide medical care. A certified doula has taken a training program and passed an exam in how to help pregnant women and their families during this exciting but challenging experience. As needed during women labor and delivery, she will help women communicate with the medical team. A doula doesn't replace

nursing or other medical staff. She doesn't examine women, take measurements, or do other clinical tasks. Doulas and midwives are not a synonyms. While most people think they have similar functions, doulas and midwives have different training, duties, and certifications. Not all doulas go through a certification process. If a doula seeks certification training, it usually includes didactic training and assisting during live births. A midwife is a trained medical professional and can be a woman or man. They play a key role during the birthing process. Some midwives are registered nurses, while others have a bachelor's degree with specialized training. Midwives can manage postpartum hemorrhage and more complications than a labor and delivery nurse. Midwife care centers focus on promoting natural birth, detecting complications, and using emergency measures when needed. A credentialed midwife is authorized to work in any setting, including health clinics, hospitals, or the home.

Since doula has no medical rights and responsibilities, it is also possible to speak of responsibility beforehand from the point of view of law only in the case personal medical information (PHI) should be shared unless the client has given her express consent.

The premise for doulas is pretty simple. If a patient is injured in the course of treatment by doctors, nurses, doulas, or other health care providers, he or she may have liability for errors made by the provider during the course of treatment. They also can have liability for failing to take action when they should have. It might sound straightforward and simple but proving liability is not simple at all. A litigant has to prove a number of factors based on the medical malpractice statutes in the state which has jurisdiction over the claim. Various states use differing methods for establishing fault and determining liability, measuring percentage of fault, calculating damages and capping monies awarded as damages.

The European Charter of Patients' Rights was drafted in 2002 by Active Citizenship Network in collaboration with 12 citizens' organizations from different EU countries. Ukraine is not yet a signatory to this charter but should gradually approach its standards on the path to European integration. The European Charter of Patients' Rights [11] states 14 patients' rights that together aim to guarantee a "high level of human health protection" (Article 35 of the Charter of fundamental rights of the European Union) and to assure the high quality of services provided by the various national health services in Europe:

1. Right to preventive measures. Every individual has the right to a proper service in order to prevent illness.
2. Right of access Every individual has the right of access to the health services that his or her health needs require. The health services must guarantee equal access to everyone, without discriminating based on financial resources, place of residence, kind of illness or time of access to services.

3. Right to information Every individual has the right to access to all information regarding their state of health, the health services and how to use them, and all that scientific research and technological innovation makes available.

4. Right to consent Every individual has the right of access to all information that might enable him or her to actively participate in the decisions regarding his or her health; this information is a prerequisite for any procedure and treatment, including the participation in scientific research.

5. Right to free choice Each individual has the right to freely choose from among different treatment procedures and providers based on adequate information.

6. Right to privacy and confidentiality Every individual has the right to the confidentiality of personal information, including information regarding his or her state of health and potential diagnostic or therapeutic procedures, as well as the protection of his or her privacy during the performance of diagnostic exams, specialist visits, and medical/surgical treatments in general.

7. Right to respect of patients' time Each individual has the right to receive necessary treatment within a swift and predetermined period of time. This right applies at each phase of the treatment.

8. Right to the observance of quality standards Each individual has the right of access to high quality health services based on the specification and observance of precise standards.

9. Right to safety Each individual has the right to be free from harm caused by the poor functioning of health services, medical malpractice and errors, and the right of access to health services and treatments that meet high safety standards.

10. Right to innovation Each individual has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations.

11. Right to avoid unnecessary suffering and pain Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness.

12. Right to personalized treatment Each individual has the right to diagnostic or therapeutic programmes tailored as much as possible to his or her personal needs.

13. Right to complain Each individual has the right to complain whenever he or she has suffered a harm and the right to receive a response or other feedback.

14. Right to compensation Each individual has the right to receive sufficient compensation within a reasonably short time whenever he or she has suffered physical or moral and psychological harm caused by a health service treatment.

In the study "Ukraine through the prism of the European charter of patients 'rights'" [12, p. 52-55] concluded, that the highest estimates of the realization of the rights of the patient were recorded on the following rights: "The right to privacy and confidentiality" (0,55); "The right to file complaints" (0.44); "Right to prevent

unnecessary suffering" (0.33); "The right to consent" (0.21). The lowest estimates of the realization of the rights of the patient were recorded on the following rights: "The right to compensation" (-0.31); "The right to qualitative help" (-0.14); "The right to use modern technologies" (-0.10). The most consolidated assessments of expert groups are recorded in the right: "The right to information" (0.02); "Right to compensation" (0.08); "The right to prevent unjustified suffering" (0.12). The least consolidated assessments of expert groups are obtained by the right: "The right to security" (0.63); "The right to file complaints" (0.41); "The right to respect the time of the patient" (0.40).

The right to agree in acceptance of medical aid has been determined by the groups "Administrators" and "Key Persons" and 2 by groups "Patients Organization" and "Patients". In the expert group of health care providers, the following were highly appreciated indicators like: "Awareness of the essence of the procedure" (0.89 and 0.93); "Awareness Risk" (0.84 and 0.93); "Awareness about the benefits of this method" (0.57 and 0.48) and the very existence "Approved forms for obtaining informed consent of the patient" (0.55 and 0.52). In addition, "Key Persons" (0.70) more often believe that last year was not cases of violations of patients' consent were registered than "Administrators" (0.50). The minimum score in this group was the indicator "existence of newsletters for patients in more than one language" (-0.58 and -0.59).

In the "Patients" group, only one positive assessment of the indicator was recorded "Subscription form of consent to manipulation after clarifying their substance" (0.38). All other ratings are negative. In general, on the sum of all expert assessments, the exercise of the right to consent of the patient has high level (0.21), consistency of ratings - average (0.26). "Administrators" (0.46) and "Key Persons" (0.44) are inclined to evaluate its implementation positively, "Patients" (0.08) - rather positive, and "Patient organizations" (-0.16) - negatively.

As the main conclusions, it should be noted that the observance of patients' rights in Ukraine is at a low level. The level of respect for the rights of patients in the Ukrainian system of protection health compared with the EU looks exactly the opposite and the picture is reminiscent of inverted pyramid. For example, in the health care system of Ukraine are not fulfilled patient's fundamental rights. This is the right to access medical care, the right to the use of modern technologies, the right to quality medical care and the right to compensation, including medical errors, etc.

Obvious is the fact of non-observance in practice of a whole range of legal acts related to pregnancy and childbirth. Often, written rights are not secured, or additional rights are required for the observance of these rights. Therefore, the field of maternity care is a field for work in the field of law, rule of law, and counteraction to corruption.

Bohren M. A. et al. (2015) indicates that “qualitative findings were organized under seven domains: (1) physical abuse, (2) sexual abuse, (3) verbal abuse, (4) stigma and discrimination, (5) failure to meet professional standards of care, (6) poor rapport between women and providers, and (7) health system conditions and constraints. Due to high heterogeneity of the quantitative data, we were unable to conduct a meta-analysis; instead, we present descriptions of study characteristics, outcome measures, and results. Additional themes identified in the quantitative studies are integrated into the typology” [2].

The prevention and elimination of disrespect and abuse during facility-based childbirth [3] is a priority task. Every woman has the right to the highest attainable standard of health, which includes the right to dignified, respectful health care. Many women experience disrespectful and abusive treatment during childbirth in facilities worldwide. Such treatment not only violates the rights of women to respectful care, but can also threaten their rights to life, health, bodily integrity, and freedom from discrimination. This statement calls for greater action, dialogue, research and advocacy on this important public health and human rights issue.

Ensuring universal access to safe, acceptable, good quality sexual and reproductive health care, particularly contraceptive access and maternal health care, can dramatically reduce global rates of maternal morbidity and mortality. Over recent decades, facility delivery rates have improved as women are increasingly incentivized to utilize facilities for childbirth, through demand generation, community mobilization, education, financial incentives or policy measures. Reports of disrespectful and abusive treatment during childbirth in facilities have included outright physical abuse, profound humiliation and verbal abuse, coercive or unconsented medical procedures (including sterilization), lack of confidentiality, failure to get fully informed consent, refusal to give pain medication, gross violations of privacy, refusal of admission to health facilities, neglecting women during childbirth to suffer life-threatening, avoidable complications, and detention of women and their newborns in facilities after childbirth due to an inability to pay. WHO proposes the following measures to improve the situation:

1. Greater support from governments and development partners for research and action on disrespect and abuse
2. Initiate, support and sustain programs designed to improve the quality of maternal health care, with a strong focus on respectful care as an essential component of quality care
3. Emphasizing the rights of women to dignified, respectful health care throughout pregnancy and childbirth
4. Generating data related to respectful and disrespectful care practices, systems of accountability and meaningful professional support are required

5. Involve all stakeholders, including women, in efforts to improve quality of care and eliminate disrespectful and abusive practices. "Ending disrespect and abuse during childbirth can only be achieved through an inclusive process, involving the participation of women, communities, healthcare providers, managers, health professional training, education and certification bodies, professional associations, governments, health systems stakeholders, researchers, civil society groups and international organizations. We call upon these entities to join in efforts to ensure that disrespect and abuse is consistently identified and reported, and that locally appropriate preventative and therapeutic measures are implemented" [3].

At the same time, despite the high quality of monitoring of these issues by the above-mentioned NGOs based on modern technologies, among the proposed ways of protecting the rights of patients, very little attention has been paid to criminal law mechanisms. Despite the fact that all proposed mechanisms to improve the situation of prevention of obstetric aggression are effective, however, without a certain state coercion in this area can not be avoided.

Otsyatsya determines that the role of protective function of criminal law among other functions of criminal law is defined. The historical preconditions of forthcoming and development of penal prohibition are studied. The concepts of "task" and "purpose" of the criminal law are analyzed with the aim of a comprehensive study of the category of "protective function of criminal law". The interrelation of these categories is ascertained. Suggestions concerning the improvement of the norms of the Criminal code of Ukraine are given, namely the introduction of the new structural part of the Criminal code of Ukraine - the preamble that would serve as legal filter for nonsystematic, unnecessary changes to the Criminal Code, which do not reflect the development of society [13, p. 7].

Criminal law protects people and society from the most dangerous encroachment. The criminal sanction is unique a phenomenon that actually provides both the functioning of the legal system as a whole and so on fulfillment of the social purpose of criminal law. The design of criminal sanctions is one of the most important theoretical and applied issues of criminal law, and the proportionality of sanctioning the severity of a criminal act is one aspect justice of criminal law. The main core of the principles of criminalization: the non-admissibility of the prohibition, the procedural possibility of prosecution, the completeness of the crime, the proportionality of sanctions and the saving of criminal legal repression. Therefore, not all offenses in the medical field, but just the most harmful, correspond to the principles of criminalization.

Crimes committed by healthcare professionals in connection with their professional activities can be conventionally divided into the following:

- crimes against the life and health of the person (the patient);
- crimes against the rights of the person (the patient);

- crimes in the field of economic activity in medical practice;
- crimes in the sphere of circulation of narcotic drugs, psychotropic substances, their analogues or precursors;
- Other crimes committed by medical professionals in connection with their professional activities.

Criminal law protection of pregnant women includes such criminal acts: professional misconduct causing infection of a person with HIV or any other incurable contagious disease (**Art. 131**), disclosure of information on medical examination for HIV or any other incurable contagious disease (**Art. 132**), illegal abortion (**Art. 134**), illegal medical practice (**Art. 138**), failure of a member of medical profession to provide help to a patient (**Art. 139**), improper performance of professional duty by a member of medical or pharmaceutical profession (**Art. 140**), violation of rights of a patient (**Art. 141**), illegal experimentation on a human being (**Art. 142**), violation of procedures prescribed by law with regard to human organs or tissue (**Art. 143**), forcible donation of blood (**Art. 144**), unlawful disclosure of confidential medical information (**Art. 145**).

However, in addition to these attacks, the level of danger for criminalization have a number of other unlawful actions.

The most relevant and somewhat new factor for both medical law and criminal law is the study of obstetric violence (obstetric violence) issues in the legal plane. So far, this term is not fixed at the normative level, it exists only in science and in practice, and is a promising area of scientific research. However, the phenomenon itself is not new, and at the same time quite widespread. That is, obstetric violence is a problem of modern medicine, for which legal methods should be used.

Obstetric violence is interpreted as "the assimilation of the body and reproductive processes of women by medical personnel in the form of inhumane treatment, forcible medication and pathology of natural processes, including the loss of women's autonomy and the right to freely make their own decisions about their body and sexuality, which adversely affects the quality of their later life women, both physical and emotional. " For the first time, Russian physician Victor Radzinsky, who published the book *Obstetric Aggression* in 2011, spoke publicly about violence, that is, aggression. Of course, in the legal plane, the concept of obstetric violence should be considered somewhat narrower, and within the framework of criminal law, attention should be paid only to the most dangerous aspects of this phenomenon.

"Informed consent" (***Informed Consent Form Template***) is the procedure by which a subject voluntarily confirms his participation in a particular clinical trial after familiarization with all relevant studies that may influence its decision. Informed consent is documented by signing and dating forms. In accordance with WHO recommendations, such consent is included: **the person has read the**

foregoing information about procedure, he or she has had the opportunity to ask questions about it and any questions.

Except for legally authorized involuntary treatment, patients who are legally competent to make medical decisions and who are judged by health care providers to have decision-making capacity have the legal and moral right to refuse any or all treatment. This is true even if the patient chooses to make a "bad decision" that may result in serious disability or even death:

- To document that person have been given the option of obtaining a recommended treatment or test and have chosen not to, doctor may be asked to sign an Against Medical Advice (AMA) form to protect the health care provider from legal liability for not providing the disputed treatment. Refusing a test, treatment, or procedure does not necessarily mean that you are refusing all care. The next best treatment should always be offered to anyone who refuses the recommended care.

- If, because of intoxication, injury, illness, emotional stress, or other reason, a healthcare provider decides that a patient does not have decision-making capacity, the patient may not be able to refuse treatment. The law presumes that the average reasonable person would consent to treatment in most emergencies to prevent permanent disability or death.

- Advance directives and living wills are documents that doctor can complete before an emergency occurs. These legal documents direct doctors and other healthcare providers as to what specific treatments you want, or do not want, should illness or injury prevent you from having decision-making capacity.

The ability to give informed consent is governed by a general requirement of competency. In common law jurisdictions, adults are presumed competent to consent. This presumption can be rebutted, for instance, in circumstances of mental illness or other incompetence. This may be prescribed in legislation or based on a common-law standard of inability to understand the nature of the procedure. In cases of incompetent adults, a health care proxy makes medical decisions. In the absence of a proxy, the medical practitioner is expected to act in the patient's best interests until a proxy can be found.

According to the definition, the attention of lawyers should attract such aspects of obstetric violence (aggression) as a violation of the right to informed consent for medical manipulation; violation of medical protocols by excessive interference with the natural process of childbirth without need. Violation of the right to informed consent to medical manipulations is also widespread - for example, many women point to violent injections, unnecessary drops, interns' examination without a consent, etc. At the same time, a special place is the issue of violation of medical protocols through excessive interference with the natural process of childbirth without need. This question has not been sufficiently investigated at the level of science and practice, although it is already over. This is

due to several factors. First of all, an unreasonably narrow interpretation of article art is being circulated among investigators and medical workers. 139 and 140 of the Criminal Code.

So, in practice, doctors have certain fears that if they do not make a lot of manipulations, including those not needed, then they can be blamed for Art. 139 of the Criminal Code for the failure to provide without a valid reason the sickness benefit to a medical professional who is obliged, in accordance with the established rules, if he is knowingly aware that this can have grave consequences for the patient. That is, from the objective side of this crime can be concluded only through inactivity. That is, the very formulation of consequences as "that can have serious consequences for the patient" (or may not have, since the actual occurrence of the consequences is not foreseen, simply speaking about their potential possibility) generates a well-founded doubt in the medical worker.

After all, potentially any act or omission in relation to a woman who has given birth can have grave consequences for her or her child. And, in order not to be accused of illegal inactivity, the medical officer mistakenly believes that he must take all possible actions (necessary and unnecessary) in order not to have grounds for prosecution under Art. 139 of the Criminal Code. The same applies to the informed consent of the childbearer - as being intimidated by the responsibility for inactivity, the medical officer may actually neglect the procedure for obtaining an agreement on such actions (since there is no separate criminal liability for ignoring this order), fearing their liability for inaction.

It is precisely these motives (along with the fact that more manipulations are often considered by the woman and her relatives as the basis for the illegal remuneration of health care workers in a larger scale, that is, the peculiar appearance of work before the client, which is dangerous for the client himself) often underlie unreasonable medical care interventions in the process of childbirth. After all, it is easier for them to do unnecessary, so to speak "with the stock", than then justify for the fact that something was not done.

However, carrying out medical manipulations without evidence, and / or in violation of the principle of informed consent is a gross violation of the medical ethics and the Fundamentals of the Ukrainian legislation on health care. And although in practice, Art. 140 of the Criminal Code often treat unreasonably narrowed-that is, in the context of non-commissioning of actions for the benefit of the patient, rather than committing unnecessary actions and / or committing acts in violation of the principle of informed consent, there are no scientific grounds for such an interpretation.

Therefore, unnecessary medical intervention from the point of view of law can be a crime. In fact, such a legal provision of medical care can not be called proper. The same in case if actions such as unnecessary medical intervention cause serious consequences, they have all the signs of improper performance by the

medical professional of their professional duties as a result of the careless or insubordinate treatment of them, and fall within the qualifications given in Art. 140 of the Criminal Code.

But, at the same time, as in Art. 140 is talking about the real consequences (and not potential, as in Article 139 of the Criminal Code). Therefore, for doctors of art. 140 of the Criminal Code is still a weak deterrent against obstetric aggression, although potentially this norm is intended to protect patients, including from excessive medical interventions. Considering the above, the protection of the rights of the child from obstetric aggression is now in need of additional protection by criminal justice means.

An effective step could be to introduce into the Criminal Code Art. 139-1 of the Criminal Code, which would entail responsibility for violating the rights of the patient by conducting medical manipulations without the written consent of the patient, with a punishment, co-coordinating with the stipulated in Art. 139 of the Criminal Code. Such changes will help to balance the current situation and help to overcome medical and obstetric aggression.

From the foregoing it is possible to draw the following conclusions:

- In recent years, there is an international recognition of that the fact that the issue of human rights is also to be resolved in the sphere maternity care. Science and practice began to distinguish between patient and sick person.
- Protection of pregnant women from obstetric aggression and the quality of health services is the subject of interest of many NGOs. The collected statistics of NGOs and their conducted studies testify to the general dissatisfaction of patients with the quality of medical services.
- To help pregnant women there are people with special legal status - doula. In Ukraine, the services of the doula are becoming more and more popular. A doula is a person who provides emotional and physical support to women during her pregnancy and childbirth. Doulas are not medical professionals. Since doula has no medical rights and responsibilities, it is also possible to speak of responsibility beforehand from the point of view of law only in the case personal medical information (PHI) should be shared unless the client has given her express consent.
- Obvious is the fact of non-observance in practice of a whole range of legal acts related to pregnancy and childbirth. Often, written rights are not secured, or additional rights are required for the observance of these rights. Therefore, the field of maternity care is a field for work in the field of law, rule of law, and counteraction to corruption. At the same time, despite the high quality of monitoring of these issues by the above-mentioned NGOs based on modern technologies, among the proposed ways of protecting the rights of patients, very little attention has been paid to criminal law mechanisms.
- Criminal law protection of pregnant women includes such criminal acts: professional misconduct causing infection of a person with HIV or any other

incurable contagious disease (**Art. 131**), disclosure of information on medical examination for HIV or any other incurable contagious disease (**Art. 132**), illegal abortion (**Art. 134**), illegal medical practice (**Art. 138**), failure of a member of medical profession to provide help to a patient (**Art. 139**), improper performance of professional duty by a member of medical or pharmaceutical profession (**Art. 140**), violation of rights of a patient (**Art. 141**), illegal experimentation on a human being (**Art. 142**), violation of procedures prescribed by law with regard to human organs or tissue (**Art. 143**), forcible donation of blood (**Art. 144**), unlawful disclosure of confidential medical information (**Art. 145**).

- So, in practice, doctors have certain fears that if they do not make a lot of manipulations, including those not needed, then they can be blamed for Art. 139 of the Criminal Code for the failure to provide without a valid reason the sickness benefit to a medical professional who is obliged, in accordance with the established rules, if he is knowingly aware that this can have grave consequences for the patient. That is, from the objective side of this crime can be concluded only through inactivity. That is, the very formulation of consequences as "that can have serious consequences for the patient" (or may not have, since the actual occurrence of the consequences is not foreseen, simply speaking about their potential possibility) generates a well-founded doubt in the medical worker.

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Chapter 21

Family Law in Ukraine and EU countries

Social and economic rebirth in Ukraine and in the world necessitate the study and further development of legal regulation of family relations. Questions of family relationships in the economic, socio-cultural, moral and ethical terms are the most relevant, since they form the basis for the formation and development of society as a whole. The mentioned issues are given important attention in the science of family law. The family has an influence on the development of society, the moral health of the nation and is one of the factors of increasing social activity of the population. The family lays the foundations of the character of man, his attitude to work, moral, ideological and cultural values.

Aspect of family relations, which is an indicator of the level of cultural development of society. In a democratic society, the emergence of a strong, spiritual and morally healthy family is of paramount importance. Therefore, further research needs a mechanism for regulating family law in Ukraine and EU countries.

The research on family law issues is devoted to the research work of T.V.Bondar¹²⁸, V.A. Vatrash¹²⁹, Ye.M. Vorozheikina¹³⁰, G.O. Lozova¹³¹, R.P.Manankova¹³², G.K. Matveeva¹³³, M.V. Menzhula¹³⁴, I.E. Revutskaya¹³⁵, V.A.Ryasentsev¹³⁶, N.D. Shimin¹³⁷, O.A. Yavor¹³⁸.

In European countries, in particular in Hungary, Slovakia, Poland, Germany, Italy, France and the United Kingdom, the issues of family law are devoted to the

¹²⁸ Бондар Т.В. Сімейне право в системі права України / Т.В. Бондар // Приватне право. – 2013. – № 1. – С. 129-134.

¹²⁹ Ватрас В.А. Поняття «сім'я» у сімейному праві України / В.А. Ватрас // Форум права. – 2009. – № 1. – С. 83-91.

¹³⁰ Ворожейкин Е.М. Правовые основы брака и семьи / Е.М. Ворожейкин. – М.: Юридическая литература, 1969. – 160 с.

¹³¹ Лозова Г.О. Законодавче визначення сім'ї та шлюбу / Г.О. Лозова // Університетські наукові записки. Часопис Хмельницького університету управління та права. – 2006. – № 1 (17). – С. 119-122.

¹³² Мананкова Р.П. Правовой статус членов семьи по советскому семейному законодательству / Р.П. Мананкова; под ред. Б.Л. Хаскельберга. – Томск: Изд-во Томск. ун-та, 1991. – 232 с.

¹³³ Матвеев Г.К. Советское семейное право / Г.К. Матвеев. – М.: Юридическая литература, 1978. – 240 с.

¹³⁴ Менджул М.В. Систематизація принципів сімейного права в Україні / М.В. Менджул // Порівняльно-аналітичне право. – 2016. – № 1. – С. 110-112.

¹³⁵ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Ціверситет короля Данила. – Івано-Франківськ. – 2018. – 207 с.

¹³⁶ Рясенцев В. А. Семейное право / В. А. Рясенцев. – М. : Юридическая литература, 1971. – 293 с.

¹³⁷ Шимин Н. Д. Семья как общественное явление : Опыт социал.-филос. анализа / Н. Д. Шимин. – Воронеж : Изд-во Воронеж. ун-та, 1989. – 188 с.

¹³⁸ Юридичні факти в сімейному праві України: усталені підходи і новітні тенденції: монографія / О.А. Явор. – Х.: Право, 2016. – 352 с.

work of such scholars as Andrew Nizhelevsky¹³⁹, Tibor Pap¹⁴⁰, R. Frank¹⁴¹ [14], Katharina Boele-Woelki¹⁴², Nina Dethloff, Werner Gephart, Stephan Meder¹⁴³

Relationships between a man and a woman and parents and children are important family-legal relationships; to the subject of family law, they include the emergence of marriage, its termination, social relations arising in connection with marriage relations and blood relations between people, as well as legal rules governing the relations between parents and children¹⁴⁴.

The family is investigated in scientific thought as a sociological and legal phenomenon. The family of scientific positions of sociology is considered as a small social group of people, coupled with marriage, family relationship, adoption of children in the family for education, common life, mutual moral responsibility and support.

In accordance with the sociological approach to family definition, in legal science there are two areas of legal research: the family only as a social category; family as a socio-legal category (Table 1).

The first direction of legal research is that «the subject of family law is considered not the family, but specific persons (spouses, children, parents)». At the same time, the social component, which is characterized by a wide range of criteria that characterize the family and determine the differences in the existence of families, is of paramount importance.

The family in the social aspect is understood as «a specific form of social life of people, due to the economic system of society, based on marriage or kinship, including the whole set of relationships (between husband and wife, parents and children, between different generations), which are based on the common the diverse activities of its members, in which realized as the needs of society (in the physical and spiritual reproduction of the human person, in ensuring the normal common life of people in the field of personal life), and on peoples of the individual (intimate relationships, in family personal happiness)»¹⁴⁵

The second area of legal research is that social relations are governed by the very right, despite the fact that the family is a social category. Therefore, family relationships acquire a legal content and become a legal relationship that gives the family a legal status.

¹³⁹ Nizsclilovszky E. A családjogi rendjének alapjai. Budapest. 1963. 487 o.

¹⁴⁰ Pap T. A magyar családi jog. Budapest, 1976. 207 o.

¹⁴¹ Frank R. Germany: family law after reunification. *Journal of Family Law*. Volume 29. 1990-1991. 335-347 p.

¹⁴² Boele-Woelki K., Dethloff N., Gephart W. Family law and culture in Europe: developments, challenges and opportunities. Cambridge, United Kingdom: Intersentia, 2014. 360 p.

¹⁴³ Meder S. Familienrecht : von der Antike bis zur Gegenwart. Köln : Böhlau, 2013. 278 p.

¹⁴⁴ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Цніверситет короля Данила. – Івано-Франківськ. – 2018. – 207 с.

¹⁴⁵ Сімейне право України : підручник / за ред. Ю. С. Червоного. - К. : Істина, 2004. – С. 21

Consequently, scientists interpret the legal concept of the family as: the circle of individuals, the common life of individuals, the association of persons, organized community, the totality of individuals. There are various scientific views on the form of association, which emphasizes the social aspect of the concept of «family». In the legal sense of the family it is expedient to consider as a legal connection between individuals. The use of the concept of «legal connection» emphasizes the content load, which points to the family as a legal category and delimits the legal definition of the family from the sociological. The legal relationship is the legal relationship that arises between the members of the family on the grounds determined by law. Such a link consists in the donation of individuals who constitute the family, the mutual rights and obligations associated with their law.

Table 1

A comparative analysis of the concept of «family»
(compiled by the author)

Definition	Keywords			
	category	foundation of creation	goal	result
Ye.M. Vorozheykin ¹⁴⁶				
the common life of the persons arising from the marriage, the close relationship of birth, adoption, and other legitimate grounds for the purpose of the birth and upbringing of children, the common management of the economy, the establishment of relations of intimate or spiritual closeness and causes corresponding personal and property rights and duties	common life of people	marriage, close affinity, adoption	the birth and upbringing of children, the common management of the economy; establishing proximity relations	personal and property rights and obligations
G.O. Lozova ¹⁴⁷				
association of persons based on marriage, blood ties, adoption or other forms of taking children for education, as well as on other grounds which are not prohibited by law and do not contradict the moral principles of society and which associates their members with the commonality of life and intimate relationships, as well as mutual rights and obligations	association of persons	marriage, blood relatives, adoption, other forms of taking children for education	community life and intimate relationships	mutual rights and responsibilities

¹⁴⁶ Ворожейкин Е.М. Правовые основы брака и семьи / Е.М. Ворожейкин. – М.: Юридическая литература, 1969. – 160 с. – С. 13.

¹⁴⁷ Лозова Г.О. Законодавче визначення сім'ї та шлюбу / Г.О. Лозова // Університетські наукові записки. Часопис Хмельницького університету управління та права. – 2006. – № 1 (17). – С. 119-122.

RP Manankova ¹⁴⁸				
small social group (association, union of persons), based on marriage, kinship, adoption and other forms of adoption of children for upbringing, related to common life, as well as family rights and responsibilities	union, union of persons	marriage, kinship, adoption, other forms of taking children for education	common of life	family rights and responsibilities
GK Matveev ¹⁴⁹				
association of persons based on marriage or kinship, connected with each other by personal and property rights and obligations, moral and material community and support, common household management and upbringing of children	union of persons	marriage, kinship	moral and material community, support	personal and property rights and obligations
VO Rysantsev ¹⁵⁰				
circle of persons connected with the rights and obligations arising from marriage, family, adoption or other form of adoption of children for education, which is intended to promote the strengthening and development of family relationships on the principles of morality	union of persons	marriage, blood relatives, adoption, other forms of taking children for education	strengthening and developing family relationships with respect for the principles of morality	

The next component in the understanding of the concept of «family» is the specification of the grounds on which this type of association of individuals is formed. Such grounds are marriage, kinship, adoption and separate forms of placement of children deprived of parental care (adoption of a child for upbringing in a family)¹⁵¹.

The concept of "family" in legal science contains a number of features that distinguish this concept from other social and legal institutions. Signs of the family are: common life; common habitation and everyday life; the existence of mutual rights and responsibilities; management of a common household; mutual moral and material support.

The family law of Ukraine and its realization in practice require consideration of the specifics of family-marital relations:

1) marital and marital relations arise not from the usual legal facts, characteristic for civil legal relations (for example, unilateral transaction, contract), but from such peculiar legal facts, such as marriage and family relations, motherhood and fatherhood, adoption and patronage. At the same time, from

¹⁴⁸ Мананкова Р.П. Правовой статус членов семьи по советскому семейному законодательству / Р.П. Мананкова; под ред. Б.Л. Хаскельберга. – Томск: Изд-во Томск. ун-та, 1991. – 232 с.

¹⁴⁹ Матвеев Г.К. Советское семейное право / Г.К. Матвеев. – М.: Юридическая литература, 1978. – 240 с.

¹⁵⁰ Рясенцев В. А. Семейное право / В. А. Рясенцев. – М.: Юридическая литература, 1971. – С. 45.

¹⁵¹ Шимин Н. Д. Семья как общественное явление: Опыт социал.-филос. анализа / Н. Д. Шимин. – Воронеж: Изд-во Воронеж. ун-та, 1989. – С. 88.

these facts there are not only personal non-property relationships (for example, with respect to the upbringing of the child), but also property (alimony obligations of the spouses, between parents and children).

2) marital and marital relations are mostly personal and legal (marriage contracting and dissolution, marital status, parents and children, rights and duties of parents regarding the upbringing of children), and then - property: general and separate (in the Ukrainian court it is called private personal property of a spouse and a spouse), whereas civil law prevails in property relations, while individuals occupy a marginal place;

3) marital and marital rights and obligations are generally inalienable, «non-negotiable» (both personal and property rights and obligations), that is, they can not be transferred to other persons; they can not be sold or bought, given or bequeathed.

Family law – a set of legal rules governing family relationships. Family law regulates personal non-property and property relations that arise between spouses, other family members, and others like that. In addition, the family law of Ukraine regulates the relations of adoption (adoption), guardianship, guardianship, patronage, and so on.

The subject of family law are:

- 1) relations arising in connection with the marriage;
- 2) personal and property relations between family members;
- 3) personal and property relations between other relatives;
- 4) relations arising from the placement of children deprived of parental care

¹⁵².

The first group of relations: relations are aimed at establishing or terminating family rights. The basis for establishing a relationship is: the process of creating a family (registration of marriage) or termination (dissolution of marriage). The rules of family law mediate relations related to the emergence and termination of marriage, as well as the recognition of marriage invalid.

The family law contains the rules that establish the procedure and conditions for marriage, the procedure for its registration, the legal consequences of engagements, the conditions and procedure for termination of marriage, recognition of it as invalid, etc.

The second group of relations: property and personal relationships between family members - spouses, parents and children. The law regulates the relations that arise between spouses regarding their personal rights (the right to change the name during the registration of a marriage, the right to jointly resolve all issues of family life, the upbringing of children, etc.). There is a wide range of property relations of the spouses in need of a legal settlement (joint and separate property

¹⁵² Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 7

of the spouses, commission of their rights, use, disposal, etc.). Family law also includes a variety of personal and property relations between parents and children (the rules of family law regulate the relationship between parents and children in respect of maintenance, the relationship between parents and children with respect to their property and the management of the property by minors).

Legal norms regulate personal and property relations between other family members and relatives – the relations of grandparents, grandfathers and great-grandfathers with their grandchildren and great-grandchildren in relation to communication and protection of the rights of grandchildren. The subject of legal regulation is also the relations between other persons - brothers, sisters, stepmother, stepfather and children in the field of upbringing and protection of children¹⁵³.

The subject of family law is personal non-property and property relations arising from marriage, kinship, adoption, guardianship and care, adoption of a child in the family for education, and other reasons not prohibited by law, and which do not contradict the moral principles of society and are based on the equality and property independence of their participants.

The method of family law is a collection of means, methods, methods by which the legal influence on volitional behavior of participants in family relations is exercised. In law, two general methods of legal regulation are distinguished: dispositive and imperative (Table 2).

Table 2

Methods of legal regulation in family law

Method	Essence
Purview method	coordination of goals and interests of participants in public relations (when they themselves are free to make decisions about participation in these relations); the subjects of law have the opportunity to establish rights and obligations not directly foreseen by legal requirements directly for themselves
Imperative method	coordination of goals and interests of participants in social relations on the basis of subordination; predominance of duties, restriction of the initiative of subjects of legal relations with regard to changes in the provisions of legal regulations; prevailing acts of one-sided expression of will

Under current conditions, in Ukraine, the method of regulating family relations can be defined as a dispositive method. Dispositive method - a set of tools, techniques, methods through which the legal impact on the relations of equal entities, the situation of which is characterized by mutual coordination of goals and interests and which in the process of interaction meet their own

¹⁵³ Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – 90 с. – С. 7

interests is exercised¹⁵⁴. The content of dispositive and imperative methods primarily consists of those elements of the legal matter, which express the ways of legal regulation: permission, prohibition and positive commitment.

We have analyzed the ways of legal regulation that determine the scope of permissible behavior of participants in family relationships (Table 3).

Table 3

Ways of legal regulation in family law¹⁵⁵

Method	Essence (way of expression, example)
Permissions	<p><i>Mode of expression: direct and indirect.</i></p> <p><i>Examples of direct permissions:</i></p> <ul style="list-style-type: none"> – the spouse has the right to conclude an agreement on granting maintenance to one of them, in which to determine the conditions, amount and terms of payment of alimony (Article 78 of the Family Code of Ukraine) (FCU)¹⁵⁶; – parents have a preferential right to other persons for the personal upbringing of the child (Part 1 Article 151 FCU); – parents have the right to self-defense of their child, their daughters and their son (Part 1 Article 154 FCU), etc.
Prohibitions	<p><i>The way of expression: formed specifically, categorically.</i></p> <p><i>Examples of prohibitions:</i></p> <ul style="list-style-type: none"> – in a marriage, persons who are relatives of a direct line of kinship, a brother and sister, a cousin and a sister, a native ancestor, an uncle and nephew, a niece (ch. 1, 2, 3, Article 26 FCU) can not be among themselves; – Forcing a woman and a man to marriage is not allowed (Part 1 of Article 24 FCU).
Positive commitment	<p><i>Way of expression: encourage participants in family relationships to positive actions, stimulate their legitimate behavior.</i></p> <p><i>Examples of positive obligations:</i></p> <ul style="list-style-type: none"> – parents are obliged to keep the child until he reaches the age of majority (Article 180 of the FCU); – the guardian, the trustee is obliged to educate the child, take care of her health, physical, mental, spiritual development, to ensure that the child receives a full general secondary education (Part 1 of Article 249 FCU)

It is characteristic for family law that sanctions imposed in civil law apply to cases of non-fulfillment of prohibitions, established by family-legal norms.

The method of family law, like any other method of legal regulation, is determined by the ratio (advantage) of each of these methods of legal regulation.

¹⁵⁴ Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – 90 с. – С. 9

¹⁵⁵ Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 8,19.

¹⁵⁶ Сімейний кодекс України [від 10.01.2002 № 2947-III]. [Електронний ресурс]: [веб-сайт]. – Режим доступу: URL: http://zakon2.rada.gov.ua/laws/show/2947_14

The basis of the process of legal regulation of family relations are the rules of objective law, which establishes permits, prohibitions and positive obligations. However, the right as a regulatory regulator acts through the subjective rights and obligations of participants in family relationships¹⁵⁷

Legal regulation of family relations is carried out by providing individuals with subjective family rights and obligations and the use of coercion (the possibility of applying legal coercion (preventive action norms)). Forcing, as a way of legal influence on family relations, is complementary, since they are aimed at ensuring the rights given to subjects, the fulfillment of their duties and the observance of prohibitions, that is, they have a law enforcement function.

The main factors that determine the essence of the family law method in Ukraine are:

- legal equality of participants in family relations;
- independent property status of their participants;
- dispositive nature of family law rules;
- specificity of consideration of conflicts in the family sphere.

The basic principles of family law are those leading ideas and provisions that define the essence of family law, the core that combines individual rules and institutions of family law into one whole. Principles of family law integrate the dominant ideas in society regarding the values of the family, which reflects the requirements that are enforced by material and procedural safeguards:

- state protection of the family, motherhood, fatherhood;
- equality of participants in family relations;
- inadmissibility of state or any other interference in family life;
- the priority of family upbringing;
- regulation of family relationships by agreement (agreement) between their participants;
- priority of protecting the rights and interests of children and disabled family members;
- observance of family relations of justice, conscientiousness, reasonableness, in accordance with the moral principles of society;
- voluntary marriage union
- definition of a marriage concluded only in the state registration body

Requirements to the principles of family law are: normativity, stability, generalization, abstraction, fundamentalism¹⁵⁸.

By the criterion of normative-legal certainty, the principles of family law can be divided into the following groups:

¹⁵⁷ Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 9,10.

¹⁵⁸ М.В. Систематизація принципів сімейного права в Україні / М.В. Менджул // Порівняльно-аналітичне право. – 2016. – № 1. – С. 110-112.

1) absolutely defined principles: state protection of the family, childhood, motherhood and fatherhood; equality of participants in family relations; limited nature of legal regulation of family relations; regulation in accordance with the moral principles of the society);

2) relatively well-defined principles: the priority of family upbringing; freedom of dissolution of marriage under the control of the state; resolving intra-family issues by mutual agreement of participants in family relations; provision of mutual moral and material support to the participants in family relations, etc. ;

3) the principles of the legislation are not defined: the duration of existence of family relations and individual family rights and obligations; humanity; proportionality; legitimate expectations of participants in family relations.

Family relations are social relations regulated by the rules of family law ¹⁵⁹.

Family relationship is a consequence of the application to specific relations in the field of marriage and family norms of marriage and family law.

Signs of family relationships are:

- a specific subjective composition
- long lasting character
- inalienability of rights and obligations
- the possibility of subjects of family relationships to act as participants at once several family relationships

The subjects of family relationships can be: firstly, only individuals; and secondly, only those individuals who are married, have a blood relationship or have adopted an adoption relationship.

List of subjects of family relations in Ukraine:

- marriage;
- parents, children, adopters, adopted;
- woman, grandfather, great-grandfather, great-grandfather, grandchildren, great-grandchildren;
- native brothers, sisters; stepmother, stepfather, stepchild, stepchild.

Types of family relationships:

- legal relations between members of the family (internal family legal relationships);
- legal relatives who are recognized as family, although they arise outside the family (external family legal relationships).

Inner family law-loved ones are those that arise between members of the same family. For example, the relationship between spouses, parents and children living in the same family is related to common life and mutual rights and obligations.

¹⁵⁹ Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 18.

Externally, legal relationships can be considered between individuals who made up the family earlier or were not at all members of the same family, but are bound by such rights and obligations that are inherently family-related. These are the ultimate legal relations of the ex-spouse, legal relationships between the child and the father (mother), with whom the child never lived together, legal relationships between grandchildren and grandparents, children who do not live together, etc.

The basis of family relationships are non-personal personal relationships. In family law, personal rights are not property-related, but they occupy a major place in the entire system of legal relations..

Family relationships are long lasting. This feature is determined by the purpose of legal relationships. Thus, registration of a marriage has the purpose of creating a family, the existence of which is supposed, in principle, for the entire life of the marriage; parental legal relationship regarding the upbringing and detention of children.

There are family relationships that are limited in time, but they are characterized by a certain continuity. For example, parental rights and responsibilities for the upbringing of children continue until the child reaches 18 years of age¹⁶⁰.

One of the peculiarities of family legal relations is that the subjects of these relations can be only citizens, and not legal persons.

For family law characterized by the lack of purely absolute legal relations. By the nature of the protection of the legal relationship can be divided into three groups.

Group 1 – relative rights, but which is characterized by the absolute nature of protection from encroachments by all other persons. This is the right of individuals to raise children, and in the absence of parents, the right of other legal representatives.

Group 2 – absolute rights with some features of relative legal relationships. These include the rights of the spouses to their common property, which are absolute when the case applies to all other persons, but they also have a relative character when they are considered as a joint right of the owners with which the intimate relationships of the spouses exercising this right are inextricably linked.

Group 3 – relative legal relationships that have no signs of absolute protection. There must be non-personal personal rights that arise in marriage on the basis of marriage and limited only to the other spouse. This category also includes alumni obligations. Family law relationships arise, change and cease as a result of various specific life circumstances. For example, the birth of a child leads to the emergence of a set of rights and responsibilities of parents and children.

¹⁶⁰ Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 19.

Legal facts – these are specific life circumstances that cause the emergence, change or termination of family law relationships¹⁶¹. Legal facts in the family law are allocated to certain types 1.

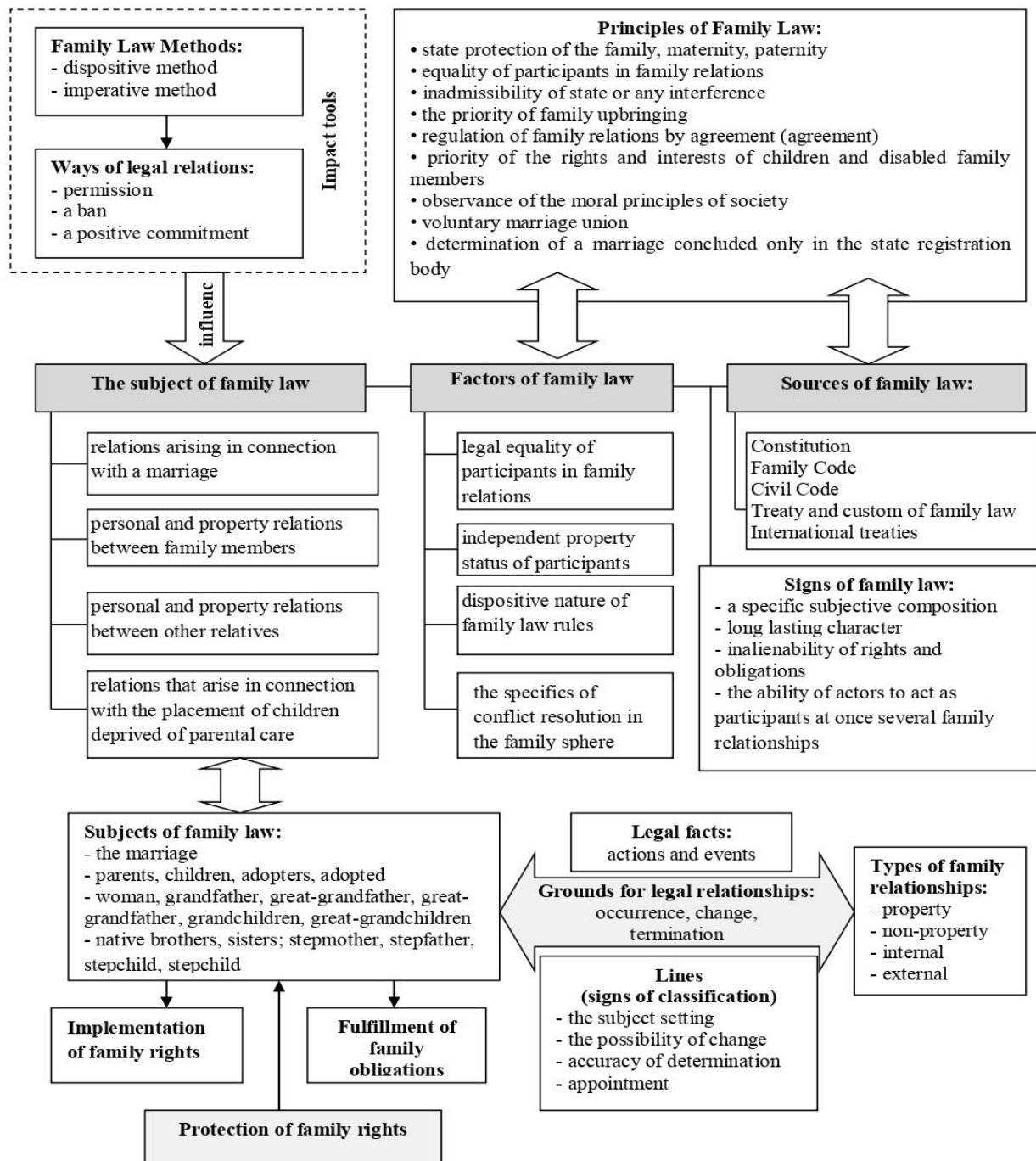


Fig. 1. The main components of the mechanism for the implementation of family law (compiled by the author)

¹⁶¹ Кобзева Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзева, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 20.

Depending on the degree of the condition of the occurrence of a legal fact from the person of the person, the legal facts fall on:

- legal actions;
- legal actions.

Legal acts - these are legal facts, which are based on the will of the participants of the family relationship. Actions are lawful and unjustified.

Rightful actions include actions that comply with family law and do not violate the rights and interests of participants in family relationships. Right-wing legal actions in the family law are based on:

- legal acts (transactions, administrative acts, judgments);
- legal acts.

Non-remedial actions recognized as being in conflict with the norms of family law violate the rights and interests of participants in family legal relationships (non-payment of alimony, illegal taking away of a child from parents, non-fulfillment of a contract, etc.).

Legal events are the specific circumstances of life that do not depend on the waves of participants in family relationships (absolute events) or partly depend on it (relative events). In family law, legal proceedings include, for example, the birth of a child or the death of a person.

2. By legal consequences, legal facts in family law are assigned to:

- law-making (legal facts that cause the emergence of family law relationships);
- law enforcement (legal facts that change the family legal relationships that already existed);
- law-enforcers (domestic legal relations also cease due to the onset of certain legal facts).

3. In the long run, legal facts in family law are assigned to:

- disposable;
- long time

4. In the composition legal facts in family law are assigned to:

- simple (a simple legal fact consists of one vital circumstances, the availability of which is sufficient for the emergence, change or termination of family ties)
- complicated (complex legal fact presupposes the presence of such legal action or action, which has a number of features).

The next component of the mechanism is the realization of family rights. The realization of family rights is a process of satisfaction of one's own material and spiritual needs on the basis of the legal possibilities that she has. The realization of family rights may take place in actual or legal ways.

Family rights are closely related to family responsibilities. Subjective family duty is a form and a measure of the proper behavior of a person. The members of

the family relations carry out their duties in various ways. In most cases, through active activities: parents are obliged to raise and retain their children; one of the spouses under certain conditions is obliged to provide maintenance to the other spouse; patronage teacher is obliged to provide the child with housing, clothes, food and create conditions for her education and development. All these are examples of active fulfillment by persons of their family responsibilities¹⁶².

In some cases, the fulfillment of family responsibilities, on the contrary, consists in being kept from active actions. For example, a guardian does not have the right to interfere with the communication of the child with her parents and other relatives; one of the parents with whom the child lives does not have the right to interfere with the parents, who live separately, in bringing up the child, etc. Thus, it is precisely the failure of active actions in these cases to mean the lawful conduct of a person and, as a consequence, his implementation of his family duty.

Protection of family rights and interests. A person has the right to protect his or her family right in the event of his violation, non-recognition or disputing.

The subjective right to a family right to protection is the lawful provision of the possibility for an authorized person to use law-enforcement means for the restoration of his violated right or his recognition¹⁶³.

There are two basic forms of protection of family rights:

- 1) Jurisdiction;
- 2) non-rigid (self-defense).

Jurisdictional form of protection is the activity of authorities authorized by the state to protect family rights and interests of participants in family relations. The bodies that carry out such protection include: the court, the bodies of guardianship and guardianship, the notary and the prosecutor.

The basic form of protection of family rights is judicial. According to Part 10 of Art. 7 FC of Ukraine¹⁶⁴, each participant in family relations has the right to judicial protection.

Family rights protection is also provided by the guardianship and guardianship authorities.

Functions for the protection of family rights are also exercised by the prosecutor. The prosecutor has the right to apply to the court with a claim on the recognition of marriage ineligible (Article 42 FC); deprivation of parental rights (Article 165 FCU); the taking of a child without deprivation of parental rights (Part

¹⁶² Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 20.

¹⁶³ Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 22, 23.

¹⁶⁴ Сімейний кодекс України [від 10.01.2002 № 2947-III]. [Електронний ресурс]: [веб-сайт]. – Режим доступу: URL: http://zakon2.rada.gov.ua/laws/show/2947_14

2 of Article 170 of the FCU); canceling an adoption or declaring it ineligible (Article 240 FK)¹⁶⁵.

Non-individual form of protection of family rights is an action of an actual nature committed by a participant in a family relationship to protect his or her rights and interests or the rights and interests of another person without reference to the relevant jurisdictional bodies.

The IC of Ukraine introduces a special indication that parents have the right to self-defense of their child (Part 1 Article 154 SC).

To implement the mechanism of family law, the term is important. The term in the family law is a certain period or time point with which the legal consequences are connected.

Terms in the family law can be classified according to the following criteria:

1. Depending on who the terms are set, family law distinguishes between:

1.1 legal terms – the lines covered in the regulations;

1.2 contractual terms – terms that are independently determined by participants in legal relationships;

1.3 time limits specified by the other bodies specified in the FC of Ukraine.

2. Whenever possible, the pages that have changed in agreement are distinguished by:

2.1 imperative – the terms clearly defined by law and not subject to change with the consent of the parties;

2.2 dispositive – terms that although envisaged by law, but may be changed with the consent of the parties.

3. For accuracy, the terms are set to:

3.1 absolutely definite – provide for the exact moment or period of time with which the legal consequences are associated;

3.2 clearly defined – have less precision, but also associated with a certain moment or a period of time;

3.3 uncertain - they have a place once, if, on the basis of the essence, the legal relationship has a time interval, but they are not defined by law or contract.

4. By appointment, the terms are assigned to:

4.1 term of exercise of rights – the terms during which a person may exercise due entitlement;

4.2 Terms of protection of civil rights are the terms during which the person whose right is violated may apply to the competent state bodies for the compulsory protection of their right¹⁶⁶.

¹⁶⁵ Сімейний кодекс України [Від 10.01.2002 № 2947-III] [Електронний ресурс]: [веб-сайт]. – Режим доступу: URL: http://zakon2.rada.gov.ua/laws/show/2947_14

¹⁶⁶ Кобзєва Т. А. Сімейне право України : навчальний посібник / Т. А. Кобзєва, В. С. Шапіро. – Суми : Сумський державний університет, 2015. – С. 20.

The protection of the rights and interests of subjects of family law is reflected in the indicator of the ratio of registered divorces and marriages (Table 4, Figure 1).

Table 4

Information on registered marriages and divorces in Ukraine ¹⁶⁷

	2000	2005	2010	2011	2012	2013	2014	2015	2016
Registered marriages, ths.	274,5	332,1	305,9	355,9	278,3	304,2	295,0	299,0	229,5
Registered divorces, ths.	197,3	183,5	126,12	182,5	168,5	164,9	130,7	129,4	130,0

The indicated indicator for 2000 – 2016 has decreased from 71.9% to 43.4%, which is a positive trend. By absolute value, this indicator is significant, that is, by 2016, the proportion of registered divorces, compared to registered marriages, was 43.4% (Fig. 2).

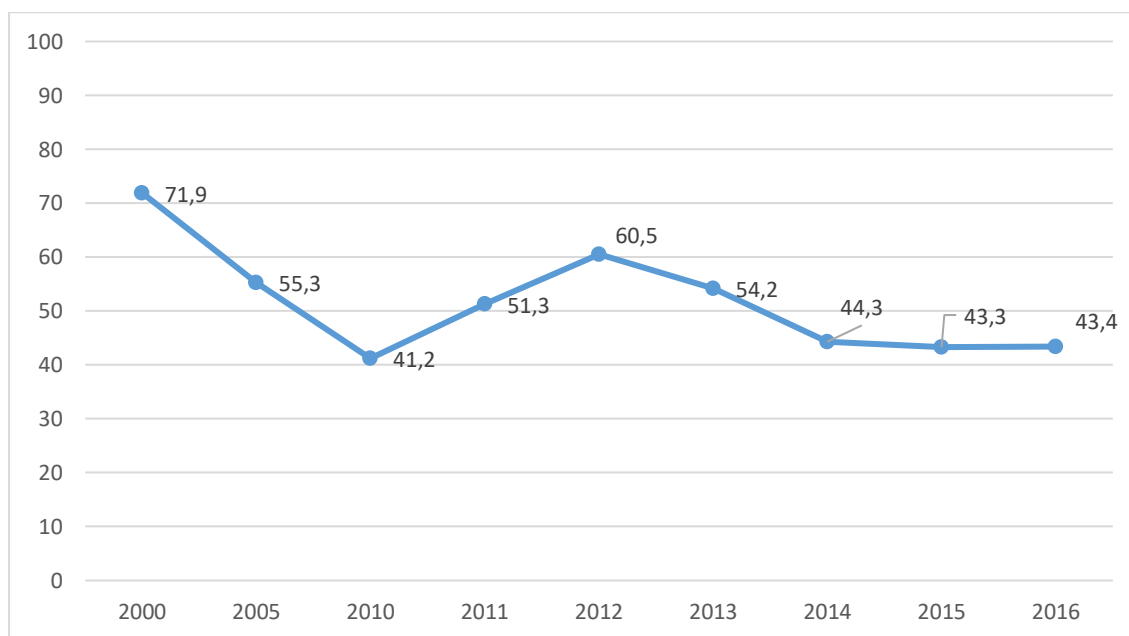


Fig. 2 The ratio of the number of registered divorces to the number of marriages in Ukraine,% (calculated by the author)

After signing the Association Agreement with the European Union, Ukraine has committed itself to ensure the gradual adaptation of national legislation to EU law. In our opinion, the experience of states regarding family law that became members of the EU is extremely valuable.

¹⁶⁷ Статистичний щорічник України за 2016 рік / Державна служба статистики України / за ред. І.Є. Вернера. – Київ, 2017. – С. 21.

Today, harmonization of family law in the European Union takes place. In particular, it has a special profile body – the Commission on European Family Law (hereafter - ENPI), which brings together scholars from different European countries and whose task is to organize work on the creation of a single family law in Europe. This Commission has developed the «Principles of European family law», which recognizes the importance of familiarizing with the current trends in the convergence of family law in Europe, the interpretation of national legislation, the improvement of family law¹⁶⁸.

The reception of the Roman private law provisions in Ukraine and the EU member states took place in different ways, but its study has a direct bearing on both the history of family law of Ukraine and the history of family law of the EU member states.

We note the current trends in the development of legal regulation of family relations:

- change of family model in general;
- the development of the issue of the creation of a family by the same-sex partners, which has become a significant change in the approach to understanding marriage as a union between men and women;
- Harmonization in the field of legal regulation of family relations, convergence of legal systems.

Revutsky I.E. determines the grounds for the creation of a family under the legislation of Ukraine and the legislation of the EU member states.

The first group of legal grounds for creating a family: the legal basis for creating a formal family (marriage, registered partnership, quasi-marriage registered union (same-sex marriage), adoption, adoption of a child in the family by family forms of placement of orphans and children deprived parental care (foster family, family-type orphanage))

The second group of legal grounds for the creation of a family: the legal basis for the creation of a family of the actual nature (affinity, residence of one family of men and women, marriage between which was not registered)¹⁶⁹.

Understanding and legal regulation of marriage as the basis for the creation of a family in Ukraine and the legislation of the EU member states (Germany, France, Poland and Hungary) has no significant differences, since it is based on the reception of the Roman private law provisions. Such signs of marriage as a combination of men and women and the focus on reproductive function are today

¹⁶⁸ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Цніверситет короля Данила. – Івано-Франківськ. – 2018. – С. 39.

¹⁶⁹ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Цніверситет короля Данила. – Івано-Франківськ. – 2018. – С.7.

the most vulnerable and are gradually replaced by features inherent in the approach when marriage is seen as a means of satisfying primarily the needs of the individual than the individual needs of the family, the family, humanity.

Revutskaya I.E. defines the registered partnership as «an alliance of two equal and independent persons of different or one sex, aimed at creating a family and concluded in accordance with the procedure established by law»⁴².

Although a registered partnership with a family law position should be considered as the basis for the creation of a family, it can not be equated to marriage or actual marriage.

Today there is an institution of marriage in Ukraine and the issue of the establishment of the registered partnership institute is being discussed.

By signing the Association Agreement with the European Union, Ukraine has finally consolidated the pro-European orientation and readiness for the introduction of European standards in the field of law.

Regarding the legal regulation of family relations by the national legislation of Ukraine and the EU member states at the present stage, in the vast majority of European countries, family relations are regulated by civil codes, in particular the relevant sections of the book I «Persons» of the Civil Code of France, book IV «Family Law» Civil Code Germany The same approach was eventually introduced in Hungary, where, until March 2014, when the Civil Code of Hungary, which contains Book IV «Family Law» came into force, until March 2014, family relations were regulated by a separate law. At the same time, in some countries, the approach adopted in the law of Ukraine remains when the family relations are regulated by a separate legal act. As an example, Poland can be called, where family relationships are regulated by the Code of Family and Guardians¹⁷⁰.

The family law of the EU is objective and the territory of its action is limited to the territory of the EU, which includes the territories of the EU member states. Since the EU is a kind of supranational education, it can be said about the supranational nature of EU law.

Family law of the EU should be understood as the supranational family law of the EU member states, which defines common principles of legal regulation of family relations and provides a unified approach to addressing the issue of belonging to a family in the conditions of natural differences in the regulation of family relations by the national law of the EU member states¹⁷¹.

¹⁷⁰ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Цніверситет короля Данила. – Івано-Франківськ. – 2018. – С.70.

¹⁷¹ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Цніверситет короля Данила. – Івано-Франківськ. – 2018. – С.71.

Today, the understanding of the family, both in sociological and legal terms, can vary from country to country depending on national traditions, mentality and legislation. And if at the household level these differences are not of fundamental importance, then in the legal aspect of the question of belonging to the family can significantly affect the amount of rights and responsibilities of a particular person [8, p.75]

Legislation of the EU member states does not usually contain the concept of a family, but is limited to indicating the subjects of family relationships.

Thus, in Book IV, Family Law, the civil law of Germany ¹⁷² refers only to spouses, parents and children. There is no definition of the concept of a family in it.

In the FC of France, the concept of the family is also not disclosed, but members of the family are indicated repeatedly. Thus, in particular, Art. 370 speaks of members of the natural family to cousins ¹⁷³.

The Code on the Homeland and Care of the Republic of Poland ¹⁷⁴ defines a fairly narrow circle of family members: spouses, parents and children.

Book IV «Family Law» of the Civil Code of the Hungarian Republic (§ 4.1) states that the law protects marriage and family. There is no clear definition of the family in Hungarian law. The fourth amendment to the Hungarian Constitution on the protection of family and marriage complements article (L) by the definition that: «The basis of family relationships is marriage, as well as the relationship between parents and children» Fellows are not recognized by the family, although for their common child each parent is a family, but the parents themselves are not essentially family members.

The Hungarian Constitution regulates the importance of protecting the family institution and its extension¹⁷⁵.

As far as EU Member States are concerned, it is also advisable to refer to EU legislation. It should be noted that the issue of the family, or, more precisely, family members, in the EU legislation is mainly contained in acts regulating immigration policy and migration.

First of all, Directive 2003/86 / EC of the European Parliament and of the Council of 22 September 2003 «On the right to family reunification»¹⁷⁶ should be

¹⁷² Bürgerliches Gesetzbuch (BGB) [Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 2 des Gesetzes vom 17. Juli 2017 (BGBl. I S. 2513) geändert worden ist]. URL: <https://www.gesetze-im-internet.de/bgb/BGB.pdf>

¹⁷³ Code civil des Français [Version consolidée au 27 juillet 2017]. URL: <https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000027431993&idSectionTA=LEGISCTA000006136117&cidTexte=LEGITEXT000006070721&dateTexte=20170727>

¹⁷⁴ Kodeks rodzinny i opiekuńczy. Dz.U. 1964 nr 9 poz. 59. Ustawa z dnia 25 lutego 1964 r. URL: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640090059>

¹⁷⁵ Schanda B. A jog lehetőségei a család védelmére. URL: <http://ias.jak.ppke.hu/hir/ias/20122sz/09.pdf>

¹⁷⁶ Directive 2003/86/EC of the European Parliament and of the Council of 22 September 2002 on the right to family reunification. // Official Journal. – L 251/12. 03.10.2003. P. 0077-0123. URL: http://www.integrim.eu/wp-content/uploads/2012/12/Directive-2003_861.pdf

mentioned first. Chapter 2 «family members» in Art. 4 stipulates that family members include: spouses; juvenile children, including adopted (this applies to both common children and children of only one of the spouses). In addition, for the purpose of family reunification, one can refer to such family members as relatives of the first degree of kinship and single adult children.

Another EU directive containing the concept of family members is Directive 2004/38 / EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ¹⁷⁷.

According to Art. 2 of the said Directive, the members of the family of a worker-citizen of the Union are:

- husband (wife);
- a partner having a Union citizen worker registered partnership in accordance with the law of a Member State if the host State recognizes a registered partnership as equivalent to a marriage under the conditions provided for by the legislation of the host Member State;
- descendants of the employee and his spouse (s) or partner who are under the age of 21 or dependents;
- uplink relatives in the worker and his spouse or partner's dependence.

Consequently, this Directive somewhat extends the concept of family members. It should be noted that the criteria for granting a person the status of a family member are sufficiently clear and provide an opportunity to uniquely establish the status of a person as a family member. ¹⁷⁸.

The main criterion for the existence of a family is the fact of the existence of legal grounds for its creation. It is based on the presence or absence of such grounds that one can also conclude that a person belongs to a family.

Legal grounds for the creation of a family are legal facts or a set of legal facts that the law links to the emergence or change of the status of a family member and a complex of rights and obligations associated with such a status, legitimate interests and guarantees of their realization.

The legal grounds for creating a family can be divided into:

- the legal basis for the creation of a formal family (marriage, registered partnership, quasi-marriage registered union (same-sex marriage), adoption, adoption of a child in the family by family forms of placement of orphans and children deprived of parental care (foster family, family-type orphanage);

¹⁷⁷ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC// Official Journal. L 158. – 30.04.2004. – P. 0077-0123.

¹⁷⁸ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Цніверситет короля Данила. – Івано-Франківськ. – 2018. – С.90.

– legal grounds for the creation of a family of actual character (affinity, residence of one family of men and women, marriage between which was not registered)¹⁷⁹.

Among the areas that require attention in the implementation of harmonization of EU member states in the field of regulating family relations, the creation of a European family union model is based on grounds other than marriage. One of the most common ground in EU member states is a registered partnership¹⁸⁰

The main reason for creating a family is marriage. The most acute issue of modernity is the attitude of legislators from different countries to the physiological sign of marriage and attempts to escape from its original understanding as a union between men and women. In other aspects, the understanding and legal regulation of marriage as the basis for creating a family in Ukraine and the legislation of the EU member states does not differ significantly.

A scientific and theoretical analysis of the concept of «family» in legal science is carried out, comparative analysis of the concept «family» is presented considering the specificity of family-marital relations.

The essence of the concept of «family» is analyzed in such directions as: the key category, the basis of creation, the purpose, the result.

The theoretical and methodological aspects of the concept «family» are researched. It is analyzed the official statistical information characterizing protection of rights and interests of subjects of family law. The trends of marriage and divorce as a family law are determined. The conclusion is made on the need to ensure the principles, guarantees of family law in civil, criminal, administrative aspects. The problem of interpreting the concept of "family" in the social and legal sense is researched.

¹⁷⁹ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Цніверситет короля Данила. – Івано-Франківськ. – 2018. – С.123.

¹⁸⁰ Ревуцька І.Е. Правові підстави створення сім'ї за законодавством України та країн – членів ЄС: порівняльно-правова характеристика: дис. на здобуття наукового ступеня канд. юридичних наук. спеціальність 12.00.03 / І.Е.Ревуцька. Приватний вищий навчальний заклад Цніверситет короля Данила. – Івано-Франківськ. – 2018. – С.174.

Chapter 22

Institutional and legal supply of human rights for access to environmental information in Ukraine

This chapter analyzes the institutional component of access to environmental information. The author has analyzed the basis of law implementation, has defined shortcomings and prospects of the development of the national legislation of Ukraine in the field of access to environmental information. The author has also determined the opportunities for the development of the institutional component of the right to access to environmental information and has suggested some methods to improve the effectiveness of this institute.

Article 34 of the Constitution of Ukraine guarantees to everyone the right to collect freely, to store, to use and disseminate information orally, in writing or in any other way, of their choice.

The legal aspects of access to environmental information were dealt with by such scientists as: V.Andreiytsev, G.Balyuk, A.Getman, V.Gordeyev, I.Karakash, N.Kobetska, V.Kostytskyi, S.Kravchenko, V.Kutuzov, M.Krasnova, N.Malysheva, A.Popov, E.Poznyak, I.Sukhan, Y.Shemshuchenko, M.Shulga and other prominent scholars.

Improving the institutional mechanism for ensuring human rights for access to environmental information is one of the most important directions of European integration of Ukraine. Inconsistency of the state institutional policy in the field of environmental protection is among the important problems.

Therefore, we propose to investigate the institutional component of ensuring the human right to access to environmental information in the context of European integration of Ukraine.

The purpose of this article. To analyze the issues of institutional and legal protection of human rights for access to environmental information under the conditions of European integration of Ukraine.

Presentation of basic material.

The legal regime of information on the state of the environment (environmental information) is determined by the laws of Ukraine and international treaties of Ukraine. The Supreme Soviet of Ukraine (Verkhovna Rada) has agreed to be bound by these treaties.

At the national level, the legal regime of environmental information is determined by the Constitution of Ukraine, the Laws of Ukraine: "On Environmental Protection", "On Information", "On Access to Public Information", "On Citizens' Appeals", as well as other laws and by-laws. It is important that the norms regulating access to environmental information are also contained in the specialized natural resource law.

To ensure the integrity and consistency of the institutional mechanism in this area is an important issue of exercise of the human right to access to environmental information [1]. A prominent role in ensuring the human right to access to environmental information belongs to the state due to its fulfillment of its tasks and functions, as well as its ability to ensure the implementation and realization of legal norms.

T.G. Kovalchuk points out that from the theoretical and legal point of view, the institutional and functional support for the effective use, reproduction and protection of agricultural lands should be considered as an integral part of the mechanism of legal provision of effective use, reproduction and protection of land of this category, the content of which is to be enshrined in the legal acts of the bodies in the field of efficient use, reproduction and protection of agricultural land and determination their legal power in this sphere [2].

L. Melnichuk rightly points out that this, in turn, necessitates the formation of a proper institutional mechanism, which includes dissimilar elements that ensure the effective functioning of the state-management system. At the same time, it must be admitted that the existing institutional system does not ensure proper formation and implementation of state policy in Ukraine, which necessitates the creation of an effective set of institutions and institutes, accordingly, improvement on a scientifically sound basis [3].

First of all, let us consider the terminology of definition. The Ukrainian legal dictionary defines the institution as a form of organization, regulation of social life, activities and behavior of people; a set of social norms, patterns of behavior and activities [4]. Order No. 62 "On Approval of the Methodology for Determining the Criteria for the European Integration Part of the State Target Programs" of March 16, 2005 determines that institutional provision is the formation of new or reorganization (improvement) of existing institutions (structures), as well as actions concerning personnel training for the purpose of organizational support the activities of these institutions and the process of European integration as a whole. Institutional provision of human and citizen rights and freedoms is a multi-level system of state bodies, local authorities and civil society institutions involved in the direct support of human and civil rights and liberties [5].

It is important that even the most detailed rules do not guarantee the performance and effectiveness of policies - work practice, principles of transparency and general culture are of high value [1]. Formally, the institutional

and organizational provision of human and civil rights and freedoms does not differ remarkably from its counterparts in the EU member states [6]. However, in practice there are a number of differences that have emerged on the historical and socio-cultural level.

According to I.Suhan, the institutional system contains the following elements: the national institutional system of Ukraine and the international institutional system of Ukraine. Therefore, ensuring the right of citizens to have free access to information on the state of the environment is a mutually coherent set of authorized entities and their activities to ensure the right of citizens to have free access to information on the state of the environment [53 -54.7].

L. Melnichuk distinguishes two levels of institutional support: the state level and the level of the region [3]. Taking into account the peculiarities, we believe that this division is also appropriate for the correction of the mechanism of administrative and legal provision of human rights for access to environmental information in the conditions of European integration of Ukraine.

In general, public administration in the field of environmental protection is carried out by the President of Ukraine, the Cabinet of Ministers of Ukraine, the Council of Ministers of the Autonomous Republic of Crimea, local councils and executive bodies of village, settlement, city councils, state bodies responsible for environmental protection and use of natural resources and other government agencies in accordance with the current legislation of Ukraine.

Taking into account doctrinal approaches to the classification of bodies conducting management in the field of ecology, T. Kovalchuk distinguishes the system of bodies that perform management in the field of efficient use, reproduction and protection of agricultural land.

1. System of bodies of general competence: Supreme Soviet (Verkhovna Rada) of Ukraine, Verkhovna Rada of the Autonomous Republic of Crimea, President of Ukraine, the Cabinet of Ministers of Ukraine, the Council of Ministers of the Autonomous Republic of Crimea, MDA.

2. The system of state bodies of special competence: a) the governing organ of inter- departmental management and control - the Ministry of Environmental Protection and its structural divisions; b) the body of special resource management; c) the body of specialized branch management.

3. Bodies of local self-government (oblast councils, Kyiv and Sevastopol city councils, district councils, city district councils, village, settlement, city councils).

4. Bodies of internal economic management: general meeting of members of organizations, business partnerships - joint-stock companies, limited liability companies, board of enterprises, heads of agricultural enterprises, farms, directors of state agricultural enterprises, who accept local acts in this area [2].

5. Public administration [2].

I. Sukhan, in turn, offers the following division: 1. The Verkhovna Rada of Ukraine; 2. President of Ukraine as the head of the state; 3. Cabinet of Ministers of Ukraine; 4. Ministries and other central executive authorities. In particular, the Ministry of Environmental Protection, the State Ecological Inspection of Ukraine.

6. Local executive bodies. In particular, local state administrations and other local executive bodies. 6. Bodies of local self-government, in particular, village, town and city councils, region and oblast councils, which operate on the basis of the Law of Ukraine "On Local Self-Government in Ukraine".

7. Commissioner of the Verkhovna Rada of Ukraine for Human Rights (Ombudsman).

8. International organizations, in particular: UN, Council of Europe, OSCE.

9. NGOs.

10. International non-governmental organizations, in particular, Greenpeace, Freedom House.

11. Courts that administer justice and may decide on ensuring the human right to access to environmental information.

12. Advocacy.

13. Prosecutor's Office.

14. Mass media.

15. Legal entities and individuals [55-56.7].

In our opinion, the role of the Ukrainian Parliament Commissioner for Human Rights, and in the long run, the Information Commissioner in Ukraine, is more significant.

According to I. Sukhan, the international institutional system includes authorized actors operating on the basis of international law of Ukraine, and provide administrative legal protection of human rights on access to environmental information, and can update relevant information [166,7]. The state level is represented by a set of higher and central bodies of state power, a special place among which is the Verkhovna Rada, which, according to its status as a single legislative body, is called to create a legal basis in the sphere of public administration of regions' social development [3].

The Verkhovna Rada of Ukraine is the legislative body of Ukraine, where all legislative work is concentrated, including the area of human and civil rights and liberties provision, as well as issues on the international treaties ratification [6].

Art. 85 of the Constitution of Ukraine determines that the powers of the Verkhovna Rada include: introduction of amendments to the Constitution of Ukraine within the limits and in accordance with the procedure provided for in Section XIII of this Constitution; the appointment of an all-Ukrainian referendum on matters specified in Article 73 of this Constitution; definition of the principles of domestic and foreign policy; approval of national programs of economic, scientific and technical, social, national and cultural development, environmental

protection; approval, within two days from the moment when the President of Ukraine applies, decrees on the announcement of certain localities as environmental disaster area; providing the law with consent to binding international treaties of Ukraine and denunciation of international treaties of Ukraine; etc.

Law on Environmental Protection in Art. 13 stipulates that the exclusive competence of the Verkhovna Rada of Ukraine in the field of regulation of relations regarding the protection of the natural environment in accordance with the Constitution of Ukraine includes: definition of the main directions of state policy in the field of environmental protection; approval of national environmental programs; approval of decrees of the President of Ukraine on the announcement of certain areas by areas of emergency ecological situation; resolution of other issues in the field of environmental protection in accordance with the Constitution of Ukraine.

Statement of the Verkhovna Rada of Ukraine "On Implementation of Ukraine's Euro-integration Aspirations and Conclusion of Association Agreement between Ukraine and the European Union" of February 22, 2013 determines that the Verkhovna Rada will intensify its activities in adopting laws aimed at adapting Ukrainian legislation to the legislation of the European Union, which are envisaged by the relevant National Program of Adaptation of Ukrainian Legislation to the Law of the European Union, approved by the Law of Ukraine of March 18, 2004 No. 1629-IV. That is, the main directions of the state environmental policy are determined by the Verkhovna Rada of Ukraine. The further realization and effective implementation of the adopted legal acts are of great importance. We should point out that it is possible to identify some shortcomings of legislative activity such as imperfect laws lawmaking, antinomy of norms, the conflict of economic and environmental interests.

In accordance with the Constitution of Ukraine, Parliamentary oversight of the observance of constitutional rights and freedoms is exercised by the Commissioner for Human Rights of the Verkhovna Rada of Ukraine and field representatives. The Verkhovna Rada Commissioner for Human Rights is the institution of extrajudicial protection of human rights and freedoms [6].

In modern science a peculiar Euro-integration direction of research is being formed, the main purpose of which is to develop the scientific principles of adaptation both doctrinal provisions as well as the normative code of domestic administrative legislation to European principles and standards [8]. One of the urgent questions facing the Ukrainian society in the European integration process is the introduction of information ombudsman institute or information commissioner in Ukraine. The main issues of this problem are: lack of a clear definition of the body authorized to consider appeals for violations of the right to access to public information; insufficient level of independence of the Ukrainian

Parliament Commissioner for Human Rights; the body to handle the appeals has no authority to make binding decisions [p. 95, 9].

As of October 2016, the Ombudsman of the Verkhovna Rada of Ukraine on Human Rights fulfills the function of the controlling body for ensuring access to public information. It is important to point out that the functions of controlling access to information go against the principles of the national human rights institution activities, which adversely affects the effectiveness of ensuring the right to information [10]. It also contradicts the very principle of the Ombudsman's work: to provide recommendations that are optional for enforcement [11].

It is important that there are significant problems in the effective work of the Ombudsman Institute in Ukraine. In order to ensure its effective work, regional representatives should act. Though, this network is only being formed, [p. 308, 12]. Among the strengths of the Commissioner's implementation of such a function is the following: the Verkhovna Rada Commissioner for Human Rights has a protected status; has wide possibilities for conducting investigations; is aware of the need for change [p. 95, 12].

In Ukraine, the Ombudsman's Institute appeared with the adoption the Constitution of Ukraine in 1996. The detailed regulation of the functioning of the Commissioner's institution was carried out at the level of the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine on Human Rights" [p. 280, 13].

In general, a common European practice involves the introduction in the state a post of the Commissioner for Protection Personal Data [14, p. 272].

The creation of such an institute has not only a practical component, but also an important theoretical approach to understanding the process of government reorganization. Considering foreign experience, there are four main types of supervisory bodies at the global level:

1. Information Commissioner (Great Britain, Slovenia, Serbia, Hungary, Scotland);
2. Commission or Institute (Mexico, France, Portugal);
3. Ombudsman with supervisory powers (Sweden, Norway, Bosnia and New Zealand);
4. Other bodies (South Africa, Turkey) [15, p. 47]. Consequently, the question arises as to what form the institution should take in Ukraine.

The need to improve the governance structure is evident, but scientists and practitioners have different views on how to improve it. From our point of view, it is possible to distinguish two main approaches:

- The first approach is to provide additional powers and resources to the Ukrainian Parliament Commissioner for Human Rights in this area. Representatives of this approach consider to create a separate Institute of Information

Commissioner in Ukraine is inappropriate, and emphasize the need to provide more authority and resources to the Ombudsman.

- The second approach is based on the need to establish an Information Commissioner institute in Ukraine that would be competent to work with two rights: access to public information and protection of personal data [16]. The process of creating such an institution can not be rapid, there is a need for a detailed study of the foreign countries experience and the creation of a basis [11]. Here again, there is a divergence of vision: the first view is based on the need for amendments to the Constitution of Ukraine, while the other one proposes amendments to the law, and possibly the creation of a separate law.

In general, such an institution should be based on the following principles: the speed of reaction, the obligatory nature of the orders, the punishment for non-compliance with the regulations [17]. Timeliness, efficiency, broad powers of investigation should be included as important features. [art. 95, 9]. The legal, operational and financial independence of such a body is extremely important [p. 47, 15].

The powers of such an authority usually include: receipt and consideration of complaints from request subjects; order to provide information that is imperative in nature; monitoring statutory compliance; instructions to public authorities regarding the interpretation and enforcement of the law, as well as training of civil servants; raising public awareness and advice; recommendations on changes to existing legislation and proposed bills [p. 48, 15]. The reduction of bureaucratic procedures, their simplification and the reduction of the costs of doing business with the government on key issues for both public authorities and businessmen [p.75, 7].

Therefore, such a body should be based on the principles of independence, openness, publicity and transparency. Decisions and controls should be performed in the short term, which, in our opinion, is based on the reduction and simplification of bureaucratic procedures. Such body has the right to appoint employees independently, should have enough resources to work in the regions, a hotline is desirable. It is important to create a department that provides training and educational activities in the community, the issue of cooperation with the public is also significant. In the long run, the Institute of Information Commissioners is interbranch, and should include specialists who work in various fields of law.

The successful establishment and effective functioning of the Information Commissioner's Institute requires the revision and adoption of new doctrinal approaches to the question of the effectiveness of such a task, it also requires a certain doctrinal re-estimation of the social role in the functioning of public authority and mission of administrative law as a whole. For this purpose, one should proceed from the fundamental constitutional formula: "Human rights and freedoms and their guarantees determine the content and direction of the state's

activity" (Article 3 of the Constitution of Ukraine), which means subordination of the activities of all state and legal institutions of society to the needs for the realization and protection of human rights, their priority over other values of a democratic, legal, social state [8]. Definitive characteristics in the interpretation of administrative law should be not only "managerial", but "law enforcement" and "human rights" functions. Such an approach should contribute to a radical change in the direction and functions of the executive branch, focusing it, first of all, on the needs and interests of man, and not on the needs of the state apparatus and the interests of its employees. Consequently, we can conclude that the issue of the creation of this institution (a joint body for the protection of personal data and access to public information) raises a number of theoretical and practical tasks. The creation of such a body touches on acute issues of legal realities and requires careful study of Ukrainian legislation.

The important role plays the President's Institute, which is responsible for nation-wide policy, priorities of Ukraine's development, and consequently, defines the main directions of the state's advancing in the area of socio-economic growth of the regions [3].

The President of Ukraine is a guarantor of the observance of the Constitution of Ukraine, the rights and freedoms of man and citizen, and can effectively ensure the protection of rights and freedoms through his powers (veto right, access to legislative initiative, issuing decrees and orders, appeals to the Constitutional Court of Ukraine) [6]. The affiliation of the head of state to the institutional mechanism of state administration of social development of the regions is also determined by his legal status as the guarantor of the constitutional rights and freedoms of man and citizen. Ensuring that the President of Ukraine exercises his powers is imposed on the relevant structural units of the Presidential Administration of Ukraine [3]. Art. 102 Constitution of Ukraine determines that the President of Ukraine is a guarantor of state sovereignty, territorial integrity of Ukraine, observance of the Constitution of Ukraine, human and civil rights and freedoms. Art. 106 Constitution of Ukraine determines that President of Ukraine represents the state in international relations, carries out management of foreign policy activities of the state, negotiates and concludes international treaties of Ukraine. The central place in the system of bodies that carry out state administration of social development of the regions is occupied by executive authorities. The supreme body in their system is the Cabinet of Ministers of Ukraine [3].

Art. 113 Constitution of Ukraine determines that the Cabinet of Ministers of Ukraine is the supreme body in the system of executive bodies. The main directions of the activity of the Cabinet of Ministers of Ukraine regarding the rights and freedoms of man and citizen are the immediate implementation of the norms of the Constitution and laws of Ukraine, presidential decrees; ensuring the conduct of state policy in various spheres of life, including the legal sphere [6].

Art. 116 Constitution of Ukraine determines that the Cabinet of Ministers of Ukraine: ensures state sovereignty and economic independence of Ukraine, implementation of the internal and external policy of the state, the implementation of the Constitution and laws of Ukraine, acts of the President of Ukraine; takes measures to ensure the rights and freedoms of man and citizen; ensures financial, pricing, investment and tax policy; policies in the areas of labor and employment, social protection, education, science and culture, environmental protection, environmental safety and nature management. The Cabinet of Ministers of Ukraine, within the limits of its competence, issues resolutions and orders that are mandatory for execution (Article 117 of the Constitution of Ukraine).

The law of Ukraine “On Environmental Protection” in Art. 17 determines that the Cabinet of Ministers of Ukraine in the field of environmental protection: realizes the environmental policy defined by the Verkhovna Rada of Ukraine; provides development of state target, interstate ecological programs; coordinates the activities of central bodies of executive power, other institutions and organizations of Ukraine in matters of environmental protection; and organizes ecological and environmental education of citizens; manages foreign relations of Ukraine in the field of environmental protection.

Government committees on social policy and humanitarian development and on European, Euro-Atlantic integration, international cooperation and regional growth have been formed to ensure the effective implementation of the government powers, executive authorities coordination, including the implementation of state policy in the area of regions social advancing.[3].

Ensuring the formation and implementation of environmental information policy is carried out by a number of sectoral ministries and other central executive bodies that, within the framework of their core competences, long-term strategies and / or state target programs, determine the priorities of sectoral policies which by some means or other influence the social development of the regions in the country [3]. Particularly noteworthy is the Ministry of Ecology. The law of Ukraine “On Environmental Protection” in Art. 20 determines that the competence of the central executive authority, which implements the state policy in the field of environmental protection, includes: ensuring the formation of the state policy in the field of environmental protection and the use of natural resources; organization of monitoring of the environment, creation and maintenance of the network of the national ecological automated information and analytical system for ensuring access to environmental information, the provisions of which are approved by the Cabinet of Ministers of Ukraine; implementation of international cooperation on issues of environmental protection, studying, generalization and dissemination of international experience in this field; organization of fulfillment of Ukraine's obligations in accordance with international agreements on

environmental protection issues; establishment of the procedure for providing information on the state of the environment; etc. The central executive body, which ensures the formation of state policy in the field of environmental protection, also performs other functions, defined by the laws of Ukraine.

It is important to point out that today the Ministry of Environmental Protection is characterized by closure and systematic non-compliance with the goals and directions of activity, indicative activity, which does not correspond to the real situation in Ukraine. An important problem encountered in the Ministry of Environmental Protection is the ineffective system of state supervision in the area of compliance with environmental legislation. The current level of sanctions and penalties is very loyal and, as experts point out, is insufficient to comply with current legislation [18].

In 2003, at the Ministry of Environmental Protection, the Aarhus Information Center was established within the framework of the Ukrainian-Danish project "Assistance to Ukraine in implementing the Aarhus Convention", from 2004 till 2013 it was the Aarhus Information and Training Center, since 2013 it has been transformed into the Aarhus Information and Education Center [19]. This center: provides information and communication opportunity for dialogue of the public and state authorities in the development of environmentally relevant decisions; organizes and holds public consultations, public hearings, conferences, seminars, round tables on the development of legal acts, plans, programs on the environment issues; conducts information and educational trainings for civil servants, representatives of local self-government, environmental NGOs and mass media; participates in the implementation / provides organizational support / management of international and national projects on implementation of the provisions of the Aarhus Convention, the Espoo Convention, environmental training and education for sustainable development. At the center, a Coordination Council was set up, consisting of representatives of the Ministry of Natural Resources of Ukraine, the Public Council under the Ministry of Natural Resources of Ukraine, the State Ecology Academy of Postgraduate Education and Administration, non-governmental organizations, international organizations and foundations [18].

At the regional level, public administration is represented by local executive authorities and local self-government bodies. In turn, the system of executive bodies consists of local state administrations and executive bodies of local councils. In accordance with the provisions of the Law of Ukraine "On Local State Administrations", the mentioned bodies within the respective administrative-territorial unit ensure the implementation of state and regional programs, the implementation of other powers provided by the state and delegated by the respective councils [3]. Executive power in the regions and districts, cities of Kyiv

and Sevastopol is carried out by local state administrations (Article 118 of the Constitution of Ukraine).

According to E.Goryan, local self-government bodies are special because, firstly, they are formed directly by territorial communities and carry out functions and powers of local self-government on their behalf and in their interests, and secondly, they combine the features of civil society institutes and public authorities. The activities of local self-government bodies to ensure the rights and freedoms of citizens are carried out in the following areas: 1) creating conditions (economic, organizational, political) for the most complete and unimpeded realization of citizens' rights; 2) carrying out work on the prevention of violations of the citizens' rights; 3) the provision to citizens material and spiritual wealth provided for by the rights and freedoms [6].

According to Art. 119 Constitution of Ukraine local state administrations in the relevant territory ensure: the implementation of the Constitution and laws of Ukraine, acts of the President of Ukraine, the Cabinet of Ministers, and other bodies of executive power; law and order; observance of the rights and freedoms of citizens; implementation of state and regional programs of social economic and cultural development, environmental protection programs, as well as powers delegated by the respective councils.

The law "On Environmental Protection" in Art. 15 specifies that local councils are responsible for the state of the environment in their territory and within their competence: ensure implementation of environmental policy of Ukraine, environmental rights of citizens; approve local environmental programs; organize the study of the environment; etc.

According to Art. 140 Constitution of Ukraine local governance is the right of a territorial community - residents of a village or a voluntary association in a village community of residents of several villages, settlements and cities - to independently solve local issues within the framework of the Constitution and laws of Ukraine. The peculiarities of the implementation of local self-governance in the cities of Kyiv and Sevastopol are determined by separate laws of Ukraine. Local government bodies representing the common interests of territorial communities of villages, towns and cities are regional and oblast councils. They may be provided with separate powers of executive authorities by law.

At the same time, in the sphere of managing social processes of regional systems, there is, as a whole, a high degree of centralization and a strong line of command, as well as a conflict of powers between executive authorities and local self-government bodies. In this situation, it is necessary to implement a decentralized government reform, which, under domestic conditions, involves the transfer of significant powers and budgets from state bodies to local self-government, taking into account the principle of subsidiarity [3].

In spite of the existing contradictions and problems of the institutional environment in the area under study, in Ukraine the organizational-functional structure of public administration has been formed in general [3].

A specific platform for facilitating effective interaction between state bodies and local self-government bodies in terms of working out an optimal model for the development of local self-government, territorial organization of power, implementation of reforms in the area of decentralization of regional growth management, and solving problematic issues of regions livelihoods is the Council for Regional Development as a Presidential advisory body of Ukraine.

It is important to note that the law "On Access to Public Information", adopted in 2011, defined environmental information as a public necessity and imposed the obligation to grant access to it not only to subjects of power, but also to business entities that possess such information. At the same time, private actors often deny this duty in practice.

Public organizations can also take part in the management of the environmental protection industry if such activities are provided for by their charters, registered in accordance with the legislation of Ukraine.

Since the beginning of the 1990s, two main regular environmental reports are published annually: The Environmental Statement is submitted to the Cabinet of Ministers for approval by the Ministry of Environmental Protection, and then to the Parliament for information, and the Statistical Yearbook - Environment. In addition, several annual reports on specific environmental issues are published [20].

Conclusions. Thus, there is a very effective system of institutional mechanism for ensuring human rights for access to environmental information in Ukraine. However, there are still issues over authority, declarative norms. It is important to note the need to implement the Information Commissioner's Institute.

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