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ЗМІСТ

ТЕОРІЯ ТА ІСТОРІЯ ДЕРЖАВИ І ПРАВА

UDC 340.342

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JUSTICE AS CATEGORY OF LAW

In the article some of the theories and principles of justice that exist in the legal and public management thought were considered. The paper deals with the legal doctrines of well-known law theorists such as O. Heffe and J. Rawls, in particular, the contract theory of law and justice, their common essential characteristics and their differences.

Key words: justice, ideas of distribution and retribution (equalization), social contract, concept of law in ethics, legitimization.

Problem statement. Today, Ukraine is going through a process of radical change in legal system and its adaptation to the new sociopolitical and economic realities. We need to seek out the principles and values of the new sociopolitical reality in Ukraine, which is based on European integration, globalized democracy, market and public society. The comparative law can play an important role in this process.

Analysis of researches and publications. O. Heffe and J. Rawls attained international reputation as they supported the idea of law on one hand and criticized legal positivism on the other hand. J. Rawls soil works of philosophy and jurisprudence folded views of Locke, Rousseau, and Kant. Rawls's works of philosophy and law are based on the ideas of Kant, Rousseau, Locke.

Paper purpose. Considering the abovementioned issues, the purpose of this article is to analyze the legal doctrine of justice of known theorists such as O. Heffe and J. Rawls.

Paper main body. The main idea of this study is to establish justice not only as categories of ethics, but also as category of law.

What is justice? Searching for answers leads us classical Roman and Greek law concept. Since the time of Aristotle (the 5th book of «Nicomachean Ethics») we distinguish two areas of application of justice: distributive and contributive (retributive).

In the first case we have a political society (the state), in the second — economic. In the economic society fair distribution provides that each gets his share according to his contribution. In such a way goes distribution of profits in a company so to say. In political society such benefits as power, posts, rewards, allowance and the like are distributed primarily. Therefore comparative or retributive justice regulates the existence of private (civil) society sector; distributive justice is intended to organize public (political) sphere. Both concepts are irreconcilable. And this irreconcilability turns out in the battle of ideologies and political movements. It should not go without mentioning the unsurpassed value of Roman theory of justice. Law and justice or the Romans are the same sort of thing. It is recognized that first law regulations arose from the recognition of private property rights, and that the laws of justice are the same objective and unamended as the laws of mathematics, as the main categories of private law are the property and contract, then obviously it becomes clear pursuance by Romans the contractual nature of law and justice. That's why, the essence of right and justice can be explained through the terms of contract best of all.

Contract unlike common promise has the legal power of agreement with three essential points. Firstly, the participants can choose whether they will join the agreement or not. The basis of the contract is the consensus of the parties, voluntary agreement, consensus. Secondly, in the case of consent the question is a mutual or reciprocal assignment of rights and obligations. Thirdly, after signing a contract, compliance with its conditions becomes legal obligation of each participant and noncompliance results in the application of appropriate penalties.

So, the essence of the contract is a mutual recognition of equality of services, i.e. the equivalence of which is given and adheres. The consequence of this fact is the recognition of equality of the parties who have entered into an agreement (act of purchase and sale, contract of lease, loan contract, etc.). Terms of the contract themselves are the law. Law arises out of the contract. Where a party breaches a contract, there maybe injustice, consequently the essence of justice forms the principle of equivalence. The equivalence formula sounds as «equal for equal» or «each according to his deeds.»

From classical Greek and Roman law comes up that justice can be better understood in terms of the contract. The concept of a contract is essential for understanding of justice. It can be argued that when we thoroughly describe the procedure of contract and all attendant phenomena, we can explain the essence of justice. Following the Greco-Roman tradition, the contract theory of law and justice is studied now by well-known law theorists such as O. Heffe and J. Rawls.

Firstly, they note that solution to problem of justice is impossible without a thorough critique of legal positivism.

In the terms of legal positivism the search for a concept or criterion of justice is meaningless. Legal positivism highlights only one side of the case, namely, that fairness of adopted decision is contradictive every time.

In the other areas we find the principles of conduct, the validity of which is hardly denied. Yes, undoubted, for example, is the principle of exchange. Here we deal with retributive or comparative justice. Principles, the validity of which almost no one has doubts exist in the field of behaviour; Think of the need to listen to the dispute to the opinion of the second party and to restrain from judgments about their own actions.

Principles of behaviour of this type are considered fair because they are subject to higher and undisputed principle of justice — fair play culture. The first minimum requirement of fairness is the prohibition of freewill. Both principles — fairness and the prohibition of freewill — are, by the way, the negative measures. Their content area is prohibition. You cannot summarize from this that the laws of justice in most cases are negative. Such norms of behaviour as a requirement to listen to the second party are the positive principles of justice and the same measure as demand of equal exchange [1, p. 246].

The abovementioned noncontradictory principles of justice in many cases give the opportunity to rebut ethic legal positivism. If the fundamental human problem concerns not distributional issues (as it is commonly believed), but exchange issues first, and secondly behavioural issues, then their decision could be found on the basis of uncompromising in this situation principles: the principle of equivalence of what is given and obtained, as well as fair play culture.

As for exchange, it is so important phenomenon of modern society, that this society can be called «exchangeable», as it does F. A. Hayek. Before that time K. LeviStrauss described contemporary culture as the culture of sharing — the results of labour, goods, services, genes, information.

Openness of society is determined by the intensity of the exchange. Where exchange takes place, there the violence as a method of obtaining the benefits recognized unjust, criminal. Those who enter into an exchange, by the very act of exchange recognizes as the second part equal. We can say that the exchange — this is the practical implementation of equality. Voluntariness and mutual consent — these are general signs of exchange.

Accordingly, the contract is a form of comparative, or commutative (commutativa change, exchange) justice. Contract is the unity of freedom and dependence on demands of another, and at the same time the other has the need in me. I embody my freedom thanks to another, and another embodies his freedom thanks to me. We're equal relative to the needs and freedom, and this equality claims the contract [1, p. 249].

O. Heffe considers that «only if in the legal and state system itself» is laid justice it can warn against legal positivism, and at the same time prevent the cynical conclusion that the law is a form of state power... Positive law itself should be determined on the basis of its role with respect to justice... Positive law can not be defined comprehensively without applying the concept of justice [1, p. 12–77].

The formula of the German law theorist of the priority of justice idea over positive law has been repeatedly used in the decisions of the Federal Court and

the Constitutional Court of Germany. These bodies in a number of its resolutions declared that the constitutional right is not limited to the text of the Basic Law, and also incorporates «some general principles that the legislator did not specify in a positive norm, that exists even «super positive» law that binds even a constituent power of the legislator.

Acceptance of the idea, according to which a constituent power can regulate all sphere in accordance with its wishes, would be return to the passed positivism; «extreme cases» are possible when the idea of the law must outweigh the positive and constitutional norms, and in accordance with these principles the Federal Constitutional Court is called upon to decide an issue of «constitutionality» [2, p. 148].

German legislator marks methodological significance of the social contract, the fact that the actual agreement is a fundamental concept of the theory of legitimation, and, consequently, the theory of justice. He notes that regardless of method of origin of a political community — through violence, through «organic development» or through agreement — theory of contract investigates the problem of the legitimacy of the state and legal forms of human cohabitation. Theory of legitimation focuses on the fundamental grounding of public enforcement policy.

Like the classic Roman theory of justice, according to O. Heffe, the contract has the legal force of the agreement, with three essential points. Firstly, the participants retain the right whether they will join the agreement or not. The basis of the contract is the consensus of the parties; the theory of agreement is essentially the theory of political legitimacy consensus. The word «agreement» suggests that one person «gets along», «peacefully coexists» with another, but is not opposed to him.

Secondly, in the case of consent this will concern transfer of certain rights and obligations, and, more often, this transfer is reciprocal (this may be the exchange of goods for services and vice versa, or exchange of both services and goods for money). Obviously, gift agreements are also possible, i.e. one-way transmission. Further, the contract is a legal figure, not only in private law but in public law as well. Speaking about the agreement, we can not, therefore, bring it all together to the economics. Agreements can be divided to intrastate and interstate, and such a special form of the contract as a delegation. Finally, the last. After signing the contract compliance with its terms becomes a legal obligation of each party, and noncompliance results in the application of appropriate penalties [1, p. 278–282].

Defending his theory of justice, J. Rawls noticed his theory is Kant's theory in essence because it admits the advantages of social contract theory of Locke, Rousseau, and Kant in spite of utilitarianism of Hume, Bentham and Mill. American scientist explores what free and fair society should be. «Justice, — he notes, — is the first necessity of social institutions, as truth — for the scientific system» [3, p. 28]. No matter how effective were not considered social institutions, if there was breach of justice, they need to be replaced.

Utilitarians aimed at the greatest prosperity for the greatest number of people. Eventually the result was the increasing dependence of the individual

from the society. J. Rawls strongly disagrees with such state of affairs when one person depends on another or social majority.

Following Kantian principles, J. Rawls refers to the principle of moral autonomy as he acknowledges members of this or that society not as concerned parties, but as free and intelligent creatures. «Parties reach social unity only as free, equal and intelligent creatures, because only they are aware of the circumstances that make the important principles of justice» [3, p. 42]. Provided that moral autonomy exists nobody wants privileges for themselves. The only possible choice — one that applies to all — is the principle of justice in the abstract.

According to J. Rawls, the grounding principle which forms the social structure is a contract. All morally autonomous individuals are parties who agree regardless of the circumstances, time and place. The subject of the contract is two moral principle of justice. The motive that determines the contract is associated with the need to face the difficulties and setbacks, the threat of which is well known to everyone.

The first principle of justice proclaims, «Everyone has an equal right to freedom, fundamentally compatible with the same freedom for others.» The second principle proclaims, «Economic and social inequality, such as wealth and power, which are fair only when they bring common benefit to everyone and compensate for losses of the most undefended members of society.»

The first principle justifies individual freedoms and requires equal codification of fundamental rights and obligations. The second principle focuses on the most benefit for the majority and excludes adjustment for sacrifice. This position resembles the position of utilitarianism, however J. Rawls is antiutilitarist. «The fact that some people are deprived, and others at the same time are full and happy, is probably useful, but unfair,» [3, p. 58] — he writes down. Social and economic inequality can be recognized only on condition when it improves state of ALL, not just some, or even majority of society.

The first principle of justice concerns individual freedoms — freedom of thought and conscience, freedom of speech and assembly, political freedoms. The constitution and laws should ensure effective use of these freedoms. It must be emphasized, not the absolute detachment and fundamental nature of freedoms of thought and conscience. «Individuals are not merely permitted or forbidden to do something; the government must be legally obliged not to interfere with the freedom of people to think for themselves.»

On the other hand, leaving free discontented people system dooms itself to self-destruction. It is possible to protect freedom by a system of rules that define the rules themselves. «In democracies, — writes J. Rawls — some political groups after gaining power, seek to strangle constitutional freedoms, there are also among those who teach in universities enemies of individual freedom» [3, p. 60]. The question arises: either you must be patient with dissatisfied? The answer of J. Rawls is as following: Justice should not require self-denial sacrifice, but when a constitution in force, there is no reason to refuse complaints of dissatisfied with freedom.

In «Theory of Justice» we find several formulations of the second principle of justice. According to the first, wealth, power, and second forms of inequalities are fair only if they contribute to the common benefit and for losses of the most undefended members of society.

According to the second formulation of the «social and economic inequalities should include : a) the maximum benefit for those who are in difficult circumstances, and b) open opportunities and equal conditions for all who are in similar circumstances.» In other words, inequalities have to be balanced in such a way that: a) they could be provided for benefit of everyone and b) prestigious posts became open and admissible to all».

The second principle of justice calls unjust forms of economic and social inequality, as long as they do not serve interests of the most undefended members of society. It thus corrects unbalance of favourable and unfavourable starting conditions. The existence of weak and sick people with lower profits is an obvious fact. The facts themselves are not good or evil. However, it becomes just or unjust, either of interpretation methods of these facts by different social institutions. And these institutions only then are right when considered what can be called the principle of distinction, according to which «the greatest expectations of those who occupy the highest positions to overlap with the expectations of those who occupy the lowest positions.»

In other words, if for the sake of a law to limit prospects of the most powerful members of society, and this restriction would be harmful for the weak members; the law according to J. Rawls would be unfair. However, the possible improvement of the position of the powerful members that will facilitate and improve the position of the weak members, must to be seen as fair. In the proposed limits of the principle of maximum minimorum, according to which not each inequality is possible, but only such inequality that maximizes the minimum. The true marker of maximization becomes, it should be noted, not the general social conditions, but, in a special way, the position of the weakest members of society.

Conclusions. In addition to above considerations, we consider that justice is usually associated with the term «distribution». «Each according to his deeds» — that's the classic formula of the idea of justice. It is universal, so the person when he wants to be fair should follow this formula in relation to others. Treat them according to their deserts. Justice has always been a problem. In a totalitarian state benefits and wealth are distributed. In a state of law — rights, freedoms and responsibilities are distributed. In today's civilized world justice means equal rights and freedoms for everybody. Public promotion is aimed at plenary confession of equal merits and freedom of each person. Many historical documents — political statement and memorandum — start with the postulate of equality. In the US Declaration of Independence it is stated that «all men are created equal.» In the Universal Declaration of Human Rights, which was adopted by the UN General Assembly in 1948, it is stated that «all men are born free and equal.» It is necessary to introduce the postulate of equality imperative: «treat others as you would treat yourself». This will be essence of the idea of justice, universal equality of people.

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СПРАВЕДЛИВІСТЬ ЯК КАТЕГОРІЯ ПРАВА

Резюме

У статті досліджено деякі теорії і принципи справедливості, що існують у правовій та державно-управлінській думці. Проаналізовано правові вчення відомих теоретиків права, таких як О. Хеффе і Дж. Ролз, зокрема договірну теорію права і справедливості, спільні сутнісні риси, які поєднують ці вчення, та їхні відмінності. Автор дійшов висновку, що справедливість у суспільстві пов'язана з поняттям розподілу.

Ключові слова: справедливість, ідеї розподілу і відплати (вирівнювання), суспільний договір, поняття права в етиці, легітимація.

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СПРАВЕДЛИВОСТЬ КАК КАТЕГОРИЯ ПРАВА

Резюме

В статье рассмотрены некоторые из теорий и принципов справедливости, которые существуют в правовой и государственно-управленческой мысли. Проанализированы правовые доктрины известных теоретиков права, таких как О. Хеффе и Дж. Ролз, в частности договорная теория права и справедливости, общие существенные характеристики, которые объединяют данные учения, и их различия. Автор пришел к выводу о том, что справедливость в обществе связана с понятием распределения.

Ключевые слова: справедливость, идеи распределения и возмездия (выравнивания), общественный договор, понятие права в этике, легитимация.

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IMPROVEMENT OF INTERPRETATION OF LEGAL NORMS AND CONTEMPORARY LAW ENFORCEMENT ACTIVITY

This article is devoted to the problem of improvement of interpretation of legal norms and law enforcement. The author revealed an interesting methodology of the hermeneutical analysis of legal texts. The article substantiates the possibility of creation of expert systems, which would be able to predict the potential ways of movement of the subject towards one or another aim in a particular regulatory framework.

Key words: legal interpretation, law enforcement activity, designing of legal situations, intuitive legal sense, new methods of cognition of reality.

Problem statement. The word «norm» originates from the Latin word «norma» in the sense of «guiding principle», «rule», «sample». In a broad sense a «norm» means a mandatory procedure, a mandatory rule, a binding model for copying, reproducing and imitating. In the latter case, the meaning of the word «norm» coincides with the meaning of the word «paradigm» (from the Greek word «paradeigma» — example, sample), which is used in linguistics, as well as in philosophy and sociology to refer to an exemplary theory or concept in case of solving tasks of a particular type.

The concept of legal norms is one of the most important categories in the theory of law. Any legal phenomenon is opened and revealed only in conjunction with the legal norms. A legal norm as a part of the system is characterized to some extent by the features inherent to the law. Therefore, it is possible to give a definition identical to the meaning of law in general [6, p. 78].

While considering a legal norm it can be found that it has a certain systematic-structural organization, because it consists of two interrelated components, such as: the first part of the norm defines the conditions, under which mutual obligations and claims between two parties appear, whereas the second part sets the obligations and claims themselves. These conventional rules consist of (1) determining the conditions of the rule application, and (2) setting the rule. Accordingly, each legal norm can be expressed in the following form: if → then. Wilhelmus Luijpen claimed that a man as a bearer of pre-reflective consciousness was originally characterized by the sense of justice, which was a basis of law [14, p. 161]. The implementation of this feeling (internal

existence) is the existence of law. E. Fechner tries to bring the establishment of ever-changing law from the subject who makes state-power decisions [2]. Werner Maihofer believes that a mind generates a norm of behavior (individual norm) in a particular life situation, designed for a specific role [15].

It is obvious that all these constructions are speculative. It is impossible to prove the normative sense of justice on the basis of a priori given subject, because priori knowledge «does not need» any proofs by definition. At the same time proponents of this conception also failed to connect a single life situation with a postulated universal initial beginning of the social being. Perhaps, in this regard, at the end of his life Edmund Husserl, who had established the school of phenomenology, understood that the subject itself was caused by the lifeworld (in the terminology of Martin Heidegger — Dasein, in which a man exists) [16, p. 17].

Alfred Schьtz and his followers point out that the social world consists of both objective and individual reality. Objective reality is presented by social institutions that provide the socialization of an individual and the reproduction in the form of social traditions. The world as an individual reality is a unique subjectivity of the individual and his ability to change (design) the social reality. This ensures the innovative reproduction of the society.

It should be noted that despite the fruitfulness of these provisions (which cover the status of the individual, the social institutions, the mechanism of the social reality changing, etc.), sociological & phenomenological school of law have not been formed and even no attempts to use these ideas in jurisprudence can be seen. Meanwhile, the main postulate of such a «inexisting» legal phenomenology might be the source of law theory (or the formation of law theory). The main attention should be focused on the development of a legal innovation and, moreover, on its acceptance by people (legitimation of innovations). Hence (from the analysis of the reproduction of social institutions by the representatives of sociological phenomenology) a general definition can be deduced: law is that people accepts as binding norms of behavior.

The heuristic value of this approach is obvious: it allows to explore important, traditional for the theory of law issues more deeply, and above all to look at the legal reality from a new (maybe, unexpected) angle. But it is possible to notice a substantial drawback of such an interpretation of law: whether everything adopted by people (especially under manipulability of public opinion by political consultants) can be considered as law? Is it possible to consider stable repeatability of public relations and perception of them as due as a criterion of law? At what «level» public bounds are? If according to Leon Petrazycki, «limits» of law are considered as a small group (it is quite common for the supporters of multiculturalism), should we recognize binding norms of the criminal community (mafia) as law? It seems that a generic notion of law should have a little bit more meaningful attribute, than legitimacy (recognition of anything by the population).

It is evident that the transcendental phenomenology of law lacks the concreteness of immanence, whereas the sociological phenomenology of law lacks

priori grounds, inherent to all legal phenomena. In our view, legal norms can claim to be legal only if they pass the historical selection.

A legal norm is a generally binding rule of conduct issued or authorized and protected by the state authority, expressing the will and interests of the people due to the material living conditions and being intended for the regulation of social relations. Any state-organized society can not do without the legal norms. But this is not the only phenomenon of law, and therefore its complete scientific definition requires clarification of the specific features (standards) peculiar to a legal norm [31, p. 365].

Analysis of researches and publications. Considerable attention to the development of the theory of justification of legal norms was paid by the scholars in the pre-revolutionary period (Nikolai Korkunov, Fedor Taranovsky, Gabriel Shershenevich etc). The theory was further developed in the works of Soviet scholars (Nikolay Aleksandrov, Mikhail Baitin, Peter Nedbaylo). The present stage of development of the legal norm doctrine requires not only further improvement, but also reconsideration of its important features and properties.

Paper purpose. Thus, the problem of justifying of legal norms, analyzed by the author, is perhaps the most complicated and at the same time the least developed topic of argumentation theory, logics and law. In this context the paper purpose is to study the process of interpretation of legal norms and contemporary law enforcement activity ant to give recommendations for its improvement.

Paper main body. Norms and values belong to the active use of language, which is directly related to human activity. There are two main schemes of the target justification of norms (values). The first one uses the concept of logical consequence, while the other one uses the concept of causality (causal link) [8, p. 289].

In general norms can be divided into the following groups: rules, including the rules of a game, grammar rules, rules of logics and mathematics, customs and rituals, etc.; norms that include state laws, decrees, directives, instructions, orders, etc.; technical or target norms, pointing out what should be done to achieve a certain goal (eg, «The house should be ventilated not to be stuffy»).

These groups of norms can be considered as basic. There are also a variety of norms, which occupy an intermediate position between the main groups. Several types of norms are of particular interest, such as: traditions and customs («You should respect the elders», «The Christmas tree is decorated for New Year's Eve», etc.); moral principles («Take care of your loved ones», «Do not be envious», etc.);

rules of ideal («A judge must be impartial», «Honesty is the best policy», etc.).

It is characteristic that despite their diversity and the problem of the authority of rules, norms of all types have the same structure. In the last 100 or so years the situation has changed. The concept of value, directly linked with human activities, was introduced in philosophy. Logic of norms and logic of values is forming gradually. The modern theory of argumentation or new

rhetoric began to form; it attempts to analyze the problem of objectivity of norms and values and describe the specific methods of justification, which are used in case of the active use of language.

Despite the progress made in research of justification of norms and values, issues related to the active use of language and giving an objective sense to them still remain unclear. Norms and values play a special role in human activity, in social sciences and humanities, and particularly in legal theory and practice. Norms and values are largely justified quite differently than descriptive statements. Values and norms as a particular type of values are essential elements of social and humanitarian theories. Moreover, certain values lie at the heart of social and humanitarian theoretical knowledge.

Social theory, and in particular the theory of law, analyzes society in the light of improving of conditions of human existence. Describing alternatives for further development of certain spheres of social life, or outlining a historical perspective for the whole society, social theory must criticize other possible ways. It cannot be achieved without value judgments. Human activity is not possible without norms and values. The sciences that study human society and that have an ultimate aim in streamlining and optimization of human activity, always set implicit or even explicit norms and standards and they are always based on certain values. The problem is not in elimination of norms and values that is basically impossible in these sciences, but in justification of objectivity of regulatory and valuation provisions.

The most important way is logical inference of one norm of the other norms. If any norm logically follows from the already established norms, it is justified and acceptable to the same extent as norms which are used as premises for its deriving.

Normative (deontic) logic deals with these issues. It should be reminded that it does not authorize logical transition from a purely descriptive (factual) parcel to normative conclusions. Norms can not be derived from the descriptions and descriptions can not be derived from norms.

Here is an example of logical description of a norm. It is assumed that someone unfamiliar with the existing customs in communication tends to deviate from the topic, speaks long, unclear and inconsistent. In order to convince him to change his style of communication, we can agree on a common «principle of cooperation» which requires making a verbal synthesis according to the adopted goals and the direction of the conversation. This principle includes, in particular, the maximum of relevance prohibiting to deviate from the topic, and the maximum of manner, requiring to speak clearly, concisely and consistently. Link to these maxims will be a rationale of the present obligation.

A complete statement of the relevant reasoning can be as follows. If you aspire to respect the principle of cooperation, you should not deviate from the topic in conversation and speak quite clearly, concisely and consistently. You must abide the principle of cooperation.

Therefore, you should not deviate from the topic of conversation, to say enough clear, concise and consistent. Both premises of this reasoning are norms, the conclusion is also a regulatory statement.

The simplest, but at the same time the most unreliable way of plausible justification of norms and values is incomplete inductive reasoning. Here is a general scheme:

S1 must be P.
S2 must be P.

_____

Sn must be P.
S1, S2,....., all are P.
All S must be P.

Here the first n parcels are norms (values), the latter parcel is a descriptive statement, the conclusion is a norm. Inductive reasoning is called «incomplete», as listed objects S1, S2,....., Sn do not exhaust the entire class of S objects. Example:

Suvorov must be steadfast and courageous.
Napoleon must be steadfast and courageous.
Kutuzov must be steadfast and courageous.
Suvorov, Kutuzov and Napoleon were generals.

_____

Each general must be steadfast and courageous.

The main conditions that allow improving legal norms are: accurate reflection of consistent patterns of development of the state and law in legal regulations; compliance with the requirements of morality and sense of justice; compliance with the requirements of systemic (non-contradictory) nature and other trends of the existing legal system while adopting new legal norms; taking into account general principles of regulation and management of social processes during lawmaking process.

Let us briefly summarize: a) legal norm can be defined as a coming from the state and protected by it generally binding rule of conduct, which entitles the participants of social relations and imposes legal obligations on them; b) legal norm is a general rule of conduct, i.e. a model, a standard of conduct for a man or a collective; c) legal norm is an abstract, generalized rule, the primary element of law as a system; d) legal norm is an injunction of the state authority; e) legal norm is a wide, multifaceted and, at the same time, specific due to its content phenomenon.

Legal norm is characterized by the unity, integrity, indivisibility. It is characterized by a certain structure, i.e. the specific layout of content, the link and the interrelation of its elements.

When analyzing the structure of the legal norm, it should be based on the philosophical understanding of the category. Structure is considered as a construction and an internal form of organization of the system, expressing the unity of the relationships between the elements as well as the trends of these relationships.

Traditionally it is deemed that the structure of the legal norm consists of three elements: hypothesis — an indication of the specific factual circumstances of life (events, people's actions, a set of actions), i.e. the factual elements which are to the provision come into effect; disposition — the «core» of the legal norm, i.e., an indication of the rule (rules) of conduct that should be abided by the subjects if they have been implicated in the conditions defined in the hypothesis; sanction — the type and the measure of the possible punishment, if the subjects do not comply with the requirements of the disposition, or encouragement for committing the recommended actions. Therefore, the purpose of sanctions is to encourage subjects to act in accordance with the requirements of legal norms.

The problem of the structure of the legal norm is one of controversial. Opinions of legal scholars are divided: one group of authors (Peter Nedbaylo, Victor Gorshenev et al.) believe that a legal norm consists of three elements, the other one (N. Tomashevsky, A. Cherdantsev) adheres to the bipartite system.

S. S. Alekseev offers with sufficient precision to distinguish logical rules and norms-regulations. If a logical norm contains three elements, then a norm-prescription can contain two parts, or the hypothesis and the dispositions or the hypothesis and the sanction.

In our opinion, the tripartite structure of the legal norm is an objective reality, an inherent attribute. However, attempts are made to further differentiate its elements. So, in the analysis of the prohibitions A. G. Bratko distinguishes not three, but four elements, since, in his opinion, the hypothesis has two elements: the hypothesis of the disposition (i.e., the hypothesis of the prohibition) and the hypothesis of the sanction. The result is such a structure of prohibiting norms: the condition of the prohibition is the prohibition, the condition of the sanction is the sanction.

Activity, aimed at adoption of statute and expressed in it legislator's will, is named interpretation. To provide methodologically transition from comprehension of the sense of law norm, explanation of its main point is the task of juridical hermeneutics. Such transition represents nothing else but a process of cognition, the result of which is finding the only right variant of interpretation of general enactments regarding concrete juridical situation.

The Romans understood the term «interpritatio» wider: it was used not only for interpretation of the law in the true sense of the word, but also for further development of the legislator's thought by means of analogy. Interpretation legally is final mental activity, for which famous rules are worked out. The set of these rules assumes the name of juridical hermeneutics. The lawyers of 18-th and beginning of 19-th centuries strived for building this hermeneutics as a special science. As Georg Friedrich Puchta noticed, for those who possess common sense, every science is hermeneutics; no abstract rules of hermeneutics could help in interpretation of law sense, if a person has no calling for it.

Corroborating legitimacy of treatment juridical norms as true or false propositions, V. M. Baranov endows them from the point of view of modal

logic with qualities of descriptive and prospective proposition that allows us to evaluate them. In our opinion, the validity of this interpretation is rather problematic. However, in terms of methodology, the problematical character of this interpretation is not a ban on it, but only indicates the status of this interpretation. Another thing, as in this case, is the truth or falsity of legal norms. Taking into consideration the above given, it is justified to assume that if the characteristic of legal norm as true or false is possible, then only in the context of modal or deontic logic and according to the rules of this logic. The thesis about the truth of the legal norms as their correspondence with social reality, of course, is not proved and the raising question itself remains insufficiently persuasive.

Legal norms are dual, descriptive-evaluative (descriptive-prescriptive) expressions. They contain a description of the areas of legal relations of life, and indirectly of those aspects of society, one manifestation of which is law. These principles prescribe the definition of the form of behavior; require the implementation of known values and ideals.

This contradictory unity of description and prescription is often broken and legal norms are given either descriptive or prescriptive interpretation. Controversy over the validity of these norms has been maintaining for a long time and now has not lost its sharpness.

Supporters of the extreme approach regard the legal norms as descriptions and are convinced that the concepts of truth and lies are attached to them in exactly the same or somewhat modified sense as the rest of the descriptions. An additional argument is often put forward: if the legal norms were not connected with the truth, no system of law could be justified and all such systems have proved to be equal.

This reference to the threat of relativism and subjectivism in law is clearly linked to the belief that objectivity, reasonableness, and thus scientific character are necessary to assume the truth, and statements that are not true or false, cannot be objective neither reasonable, nor scientific. This belief is a characteristic feature of the old-style theorizing gone in the past more than a century ago.

Supporters of the other, again, extreme approach, crossed out regulatory, projecting function of legal norms. The main is not their descriptive but prescriptive content, which excludes the supplement to these norms the concept of truth. At the same time to avoid relativism and be able to compare and evaluate the different legal systems, often instead of truth another concept is used. Its role is to be a sort of «substitute» of the truth in the field of law. In the capacity of these «surrogates» of truth the concepts of «efficiency», «relevance», «expediency», etc. have also been proposed.

None of these approaches to the truth of legal norms (principles) cannot be considered reasonable. Each of them is an attempt to break such contradictory descriptive-prescriptive unity as the norm of law (principle), and to oppose one side of it to the other.

The problem of justifying legal norms and principles is connected with the disclosure of their dual, the descriptive — prescriptive nature. Legal norms

and principles resemble a two-faced creature turned to reality with its regulatory face and to the values — with its true face. These norms and principles value the reality in terms of its compliance with the values, ideals, models and at the same time raise the question about the rootedness of this ideal in reality.

Thus, the problem is not to replace the good in the field of law by truth, and not to replace the good with something that would resemble the truth and connect, like it, law with reality. The task is to identify the relationship and mutual complement of truth and goodness, to establish their relationships and other legal categories [33, p. 207].

Realizing the legal norm, the individual learns it and for observance of this norm a strong-willed orientation is needed. The process of interpretation of legal norms is creative and, in fact, the law enforcer being a co-legislator creates a new norm, performing an act of summing up the general norm and the particular case.

However, the ABC of law, as A. A. Gaydamakin points out, sometimes does not keep up with the realities of the passage of time, and then blindly following this letter may lead to results similar to «strike in Italian».

«Sometimes the law from generation to generation
From grandfather to grandson goes;
And it was good, but than it turned
From benefaction into torment»

Furthermore, in the process of lawmaking frequent are errors, collisions. And then the spirit of the law, sense of justice come to the fore. And if this sense of justice with the spirit of law and natural law are in harmony, then the problem is solved and the law continues to be associated with justice. And if it is run by a man with a cynic sense of justice? Then it is better a robot… [3, p. 95]

In our opinion, the normative law as a whole is moving towards formalization and specification of its hypotheses and dispositions, and hence goes away from subjectivism and towards logic. Formal logic represents a huge opportunity for the development of testimony, extension versions, as evidenced by the development of expert systems of criminalistics, criminological and investigative purposes.

As to the opportunities of the formal projecting of legal situations, it is quite possible in the future to create expert systems that can calculate the trajectory of motion allowed to the actor to a particular goal in a given normative direction [28].

Unfortunately the logical tools of law can be used for various purposes, including the support of «a broad interpretation of the law», its free interpretation. We must learn how to express the spirit of the law in its letter. However, the creation of specialized systems for professionals with advanced, but not with an amorphous sense of justice is the question of the future.

Logical inference some norms of the other, already adopted, is an important way of theoretical justification of norms. Norm is a special case of the valuable relation between thought and reality. As such, they are a

special case of estimation. Legal norm — is a socially imposed and socially fixed estimation. The means, by which the evaluation becomes the norm, is the sanction, or «punishment» in the broadest sense, imposed by society on those who deviate from established their prescriptions. Legal norm — is rigidly fixed social assessments with well-defined sanctions. The idea that the norms are a particular case of assessments can be represented in different ways.

The idea particularly can be expressed in such a definition:

«Action A is binding» = «action A is positively valuable, and it is good that abstaining from this action entails punishment»

In this definition the norm «Action A is binding» is divided into two values: the positive value of the action and the positive value of punishment for the failure to comply with this action (abstaining from the action).

Norms as values, standardized through the sanctions, are a particular and rather narrow class of values. Firstly, the norms relate to human activities or things that are closely connected to the action, while the values may relate to any object. Secondly, the norms are directed in the future, while values can be applied both to the past and present, and to the phenomena that exist out of time at all.

The difference between the norms and other evaluations is associated with the sanction. Finally it has a social nature.

Logic of the norms comes from the idea that all norms, regardless of their specific content have the same structure.

Every norm has these parts or elements: content — an action which is the subject of the normative regulation; nature — obliging, authorizing or prohibiting norm; conditions of the application — the circumstances in which the action should or should not be committed; subject — a person or a group of persons to whom the norm is addressed.

Not all of these parts have an explicit expression in the regulatory statements. However, there is no norm without them.

Only three structural parts of the norm are usually taken into account in the logic of norms: the content, the nature and the conditions of the application. It is assumed that all the norms are addressed to the same subject, and belong to the same authority. It allows writing the norms in symbolic language without mentioning the subjects and the authorities of different norms. The analysis of the structure of norms given by the normative logic coincides basically with the ideas about the structure of norms that have long stood in the theory of law. In the legal interpretation any legal norm includes the disposition, the hypothesis and the sanction.

With regard to the legal norms the sanction is natural to be considered as a component of the norm. Although norms are an important element of social life, there is no clear and universal classification embracing norms of all kinds. There is no clear border between the norms and something that is included in norms. It suggests that the hopes for creating a natural classification of norms, like, for example, classification of plants or chemical elements, are unjustified.

Traditionally, law did not recognize other methods, besides formal normative (dogmatic) method. Therefore, it was thought that the jurisprudence is not obliged to take into account the volatility of social reality. It is known that people's conduct is connected to the existence of such social regulators, as the values and norms that are not always formally fixed, but, nevertheless, have quite a strong effect on the man and his behavior. Values and norms often exist independently from the behavior of individuals, although they constitute an integral part of a complex system of social reality. Changing of law and the evolution of society are mutually correlated. Legal norms can not be reduced to the preformation, the transformation of human nature. They vary according to the historical development of the social system. New legal theories appear only when society begins to change.

The concept of «norm» causes very different views, and the reproduction of the words does not guarantee the reproduction of meaning. Symptoms of changes in the perception of law can certainly be observed, they increase as the modern civil society is realized in a political revolution, industrialization and universal expansion [13].

An interesting characteristic of the three positions, reflecting these changes in «legal perception», was given by Niklas Luhmann. The first position concerns the opinion of Kant on «legal aspects of the problem of revolution». According to Luhmann, if we analyze Kant's views on this subject, we will see that they successfully contribute to the transformation of «the political monopoly into law basis and make possible not only to legitimate, but also to develop the legitimizing legal order». And further: «In the beginning obedience must be ensured, even regardless of the content of norms, and only then the power is able to limit itself. In this case there is rejection of single bonds of law and time, and the transition to the sequence of steps: first, the violence, then — law... It means that those who somehow affected by the revolution cannot longer rely on the legality of their expectations: it will forced to speculate on the success or the failure of the revolution. Action or omission — that is the question» [12].

The second position: the abovementioned problem is «to be normalized in the legal technology and dogma», where «legal solutions should always be compared with various resulting solutions.» Especially good-quality legal arguments are highlighted by intuition through focusing on results. It works not only for political arguments, but also for the characterization of dogmatic legal concepts, and for ordinary interpretation of legal norms. In Germany, this point of view was established in connection with theological, or functionality, methods of interpretation. Moreover, even such point of view was defended, according to which all the values, in the end, must be justified by their consequences. But here, «value» means that the future renders its decision on law and injustice, the future that we do not know and that we can only guess.

The third position concerns the sociological understanding of law. Moreover, the legal role of the social sciences is the most important topic of discussion in Germany. However, it lacks any possibility to find out the function

of norms and the sense of duty. Despite the huge number of works devoted to the consideration of the problem of sense, some of the important aspects of this problem, which are of fundamental importance, are not given sufficient attention. It is related, in particular, to the role of language in the expression and the formation of sense.

If according to Edmund Husserl (transcendental) consciousness of the subject plays the leading role in the creation of sense [5, p. 124], then, according to Ludwig Wittgenstein, the sense is generated not by the subject, but by certain socio-linguistic practice, which, however, should be done only by the subject. This is an extremely important observation: the subject is ineradicable from the sense, and at the same time the subject is «included» in the sense through the expression.

We can say that Husserl and Wittgenstein, moving in opposite ways, equally open the «subjective» dimension of sense. It allows concluding that the role of the expression and the role of the subject in the formation of sense is not accidental. It characterizes the «nature of the sense» and does not depend on any approach.

Senses can exist objectively regardless of the subject but they are always created by the subject and the language. There can not be the author outside the language and the subject. Thus, new sense has to go through the conscience of the subject and then embody in the speech to become the one it is. The sense appears as ideal objective formation. It is ideal as is unattainable for the conscience with the use of organs and senses and objective as the same sense can be revealed and understood by many subjects. At the same time the sense is the formation with which we deal directly in the process of knowledge.

From the standpoint of phenomenology the sense is constituted by the acts of conscience (acts of intention of the meaning). Revealing the machinery of constitution (i.e. the machinery of «formation of the sense») phenomenology determines ontological status of the sense: it exists as is constituted by the acts of intention of the meaning and exists only when is constituted. Moreover, this expression plays an essential part in constitution of the sense as not only communication but reasoning itself is carried out by means of expressions.

The fact that ontological status of the sense can be defined only through revealing the machinery of its formation is also demonstrated by K. Popper's conception. The sense gets its existence by means of its impersonation in the language. Thereby, only language owing to its opportunities procures entity of the sense for our thinking and further work of the thought and knowledge with various semantic formations.

Analysis of I. Kant's teaching on transcendental schematism of clear rational concepts [7, p. 67–310] with L. Wittgenstein's theory of logical form testifies that inner form (in Kant's teaching it is known as transcendental schema but Wittgenstein calls it a logical form) is an important conceptualizing and cognitive component. The inner form can act as peculiar symbolism which essence consists in spotting of fundamental principle, the law of gen-

eral mediation that determines the construction of the whole essence of the culture within the bounds of humanistic cognition. The inner form has huge opportunities as means of interpretation and can be considered as a special methodological procedure, scheme of interpretation directed towards finding and deciphering the essence [29, p. 11,15].

Law exists for us as a certain form that concerns the problem of intensity between the temporal and social dimensions and endures this intensity even under the circumstances of evolutionary growth of intricacy and complexity of the social structure. Form of law consists of the combination of two distinctions: modality of expectations «cognitive / normative» and «legal / illegal» [23, p. 124]. All the social applications of law function within this framework and intensify the subject sense.

Nowadays there is an objective necessity to improve legal interpretation of legal rules and law enforcement. Moreover, the optimization of these processes shall be based on the scientific data. However, it has recently become difficult to carry out research in the area of law [25, p. 125–128]. In turn, as Regelsberger remarks, not too many chapters can be found in the teaching of law where theory would lag behind the practice so far and knowledge would fall behind the skills as in the teaching on interpretation. In this case interpretation shares the fate of the human speech: a lot of people speak correctly without having any knowledge on laws of language. Difficulties are in the material, infinity of the aids and diversity of the application. Nowadays and in all preceding history there has not been any deficiency in attempts at giving the leading points of view mentioned here the nature of scientific principles. Special branch of theory of law was formed from them; however, dull and conventional attitude to the material did great harm to legal hermeneutics [26, p. 137–138].

Legal hermeneutics is the science on understanding and explaining the sense laid by the legislator into the text of legal act. A task of legal hermeneutics is to provide methodologically transition from understanding the sense of point of law to explaining of its essence. Such kind of transition is the process of cognition which results in finding the sole and correct version of interpretation of general precepts of law concerning concrete legal situation.

At the same time there are widely used such methods as linguistic, double and triple reflection (takes place when not only the text is interpreted but also its author and concretely historical situation) put into the context and other methods. Perspective of these methods is especially evident for making a new type of legal awareness as well as in such section of legal techniques as statutory interpretation [1, p. 40–47]. Today legal hermeneutics aspires to be independent within the boundaries of theory of law and state [30, p. 115–121].

The most interesting methodology of hermeneutic analysis of legal texts was worked out by the Italian philosopher and poet E. Betty. The philosopher was saying that there is the world of objective spirit, facts and human events, acts, gestures, thoughts and projects, traces and evidence of ideas, ideals and realizations. This entire world belongs to interpretation. Interpretation appears as the process the aim and identical result of which is comprehension.

The interpreter shall reproduce the real process of creation of the text by dint of reconstruction of the message and objectivization of intention of the author of the text.

Betty formulated four hermeneutic channels which are actively used in law:

1) canon of immanence of hermeneutic scale. In other words, reconstruction of the text must conform to the author's point of view. Interpreter does not have to bring anything from the outside; he has to look for the sense of the text, respecting dissimilarity and hermeneutic autonomy of the object;

2) canon of totality of hermeneutic consideration. Its essence is in the idea that unity of integer is explained through the unity of integer, but the sense of separate parts becomes clear through the unity of integer (hermeneutic circle);

3) canon of relevance of awareness. The interpreter cannot withdraw his subjectivity till the end. To reconstruct other people's thoughts, and works of the past, to return to genuine vital reality other's emotions it is necessary to correlate them with own «moral horizon»;

4) canon of the semantic adequacy of understanding represents a requirement to the author of the text. If the author and interpreter are congenial and are on the same level, they can comprehend each other. This is also the interpreter's ability to understand the purposes of the object of interpretation as his own in the literal sense of the word.

Hermeneutic method in law is to simplify the dialogue of legal cultures since legal concepts and categories (such as freedom, democracy, and liability) have different meaning in different legal systems. The usage of hermeneutic method is most productive in historical and legal research (not without reason E. Betty was the historian of law). At the same time you should not be waiting for hermeneutics to solve the problems it does not set itself and is not capable to solve: hermeneutics has a vocation to supplement but not to replace itself the existing methodology of law [9, p. 115–121].

General theory of awareness (hermeneutics) has accesses to almost all the stages and zones of legal regulation as they are mediated by the consciousness and comprehended by it when necessary. But this is a good reason for application of this science in general jurisprudence [22, p. 122–123].

Principles of hermeneutics can become an effective machinery of research, for example, reinterpretation, and distortion of the author's sense put into the one or another teaching. Interpretation of scientific texts, «understanding of awareness» is the «field» on which hermeneutics can do its best to show its productivity.

Thus, contemporary (neoclassical) methodology is widely used in jurisprudence with classical methodology [24, p. 83–87]. At the same time appropriation and usage of the knowledge of the other sciences take place by means of so-called juridization of the methods (cognitive means and methods) of other sciences and formation of new legal discipline at the intersection of law and interdisciplinary sciences.

Law on hermeneutics is reading: unity should be understood proceeding from the particular, but particular should be comprehended from the unity.

This rule was developed by ancient rhetoric, but hermeneutics transferred it from oratory to the art of comprehension at the early modern period. Here we face a problem of hermeneutic circle. If the process of understanding constantly moves from unity to a part and back to unity, the task of the partners in the legal dialogue is to widen the unity of clear sense by the concentric circles.

Activity directed to assimilation of law and expressed in it the will of the legislator is called construction — interpretation. Incidentally, Romans used the word «interpretation» which had wider sense: it tabbed not only the construction of statutes in its own sense but a further development of the cogitation of the legislator by using analogy. Certainly, statutory construction is a mental activity for which well-known rules were worked out. Total combination of these rules is called Legal Hermeneutics. The lawyers of the eighteenth and early nineteenth century desired for elevating the hermeneutics to the extent of the special science. As Puchta remarked, all the science is hermeneutics for the one who has common sense and any of the abstract rules of hermeneutics will not help to explain the sense of law if the person who illuminates it does not have any vocation to it developed by studying and practice. Windscheid on this matter observed exactly that «Legal Hermeneutics» is not a science which can be given but rather the art which should be studied.

Primarily, intercommunication of jurisprudence and hermeneutics is showed in interpretation of different forms and sources of law concerning the historical legal documents as well as legal acts valid at the up-to-date period. In our opinion, growing popularity of legal hermeneutics, primarily, is indebted to ontological approach to legal hermeneutics on the whole, H.-D. Gadamer and E. Betty who pointed out the community of historical, theological, philological and legal hermeneutics. The basis of this approach is formed by the fact that the gap between generality of law and concrete provision of law in the particular case can not be destroyed in its essence in view of abstractedness or banality of law. «The statute is general and that is why it can not be fair to each individual case» (H. Kehn). H.-G. Gadamer's approach to this problem by means of hermeneutic perspective gave rise to the whole tendency in contemporary philosophy of law. According to legal hermeneutics, the sense of law should be comprehended with consideration of every concrete situation. H.-G. Gadamer showed generality or universality of problem of awareness on a basis of extraction of one of the integrant moments of any use. From his point of view, for legal hermeneutics as well as for theological ones the strain existing between the given text (legal act or the good tidings), of one part, and the ones he gains as a result of its application in the concrete situation of interpretation (judgement or sermon), of the other part, is constitutive. It follows that to understand the text correctly in accordance with the claims he is pulling out we have to understand it in a new and different way in every given moment and in every concrete situation. In other words, awareness at this point becomes the application: it penetrates into the sense of one or another legal text and its application to the concrete case and does not represent two separate acts but the separate process.

Collision, conflict of interpretations between the legislator and implementer of law (an executing authority, a citizen) involves the legislator's initial concern to uniqueness of the text to his advantage. This is exactly what specific features of hermeneutics consist in.

We suppose that it is also necessary to connect hermeneutic method in understanding of law with existence of different legal cultures including national legal culture with personal view on the problem of human rights, legal state, separation of powers, local government etc. procuring real embodiment of ideas of freedom and justice conforming to our legal mentality and conditions of legal existence. Logic is to interpret irrational moments which are present in any legal culture [10, p. 175–176].

Any form of legal practice we would have not considered, they consist of combination of different interpretative estimations. In this comprehension law in its nature is completely hermeneutic phenomenon.

V. Lobovikov worked out a «discrete mathematical model of moral and legal aspect of human activity» [11, P. 259]. Mathematical structure modelling adequately the reasoning which is studied by formal logic and mathematical structure regulating adequately the behaviour which is studied by formal jurisprudence are essentially close (similar) mathematical structures. Having connected mathematical (natural law in its essence) method with formal logical (positivistic) methods it is possible to create mathematicized multipurpose system of natural law which he called the algebra of acts which can become a criterion for control of current legislation. Thus, it takes place the sophistication of concept of law and comprehension of its multidimensional phenomenon of human entity.

As the representative of «integral jurisprudence» D. Holl claims that the comprehension of law is not completed and it is possible to pick out a certain legal structure which does not include only principles of law but also the subjective legal experience of the participants of continuously changing reality [5, p. 741]. The representative of integrative jurisprudence makes a conclusion on necessity of including the value aspect determining the behaviour of a human into current legislation. The law shall express not simply real but fair, correct moral standards. Thesis «on humanity of law» which embodies the legal nature of a person can act as a distillation of this requirement.

The majority of authors engaged in hermeneutics were confined to repeating and commenting the rules of interpretation formed by Roman lawyers and remained in the Codex Justinianus having rarely done some amendments and additions. Very few people tried to study the process of interpretation but not as a whole, just in certain parts. It should be noted that the theory of interpretation of legal acts has the same meaning as logic or grammar. The theory of interpretation of laws is a methodological guide to realization of principle of management.

«If there are rules, Mill says, «which are subordinated to consciously and unconscientiously by each mind in each case when it concludes correctly, it is scarcely to prove that the man would rather follow these rules knowing them than not being acquainted with them...People had been discussing the proofs

and often correctly when logic was still not the science; otherwise it would have not become it. Just as they were fulfilling huge mechanical works not having understood the laws of mechanics. But there are bounds of the ones the mechanic can fulfil not knowing the laws of mechanics as well as the thinker can fulfil not knowing the basis of logic. Very few people with the help of extraordinary genius or acquired good mental techniques by chance could act not knowing the sources in the same or almost the same way as if they acted having adopted these sources. But the majority of people need to understand the theory of the one they are doing or follow the rules made for them by the people who understand theory [17, p. 12–13]».

The purpose of interpretation of laws is the revealing of true sense of legislative provision. Such kind of provision is the thought of legislator expressed in words.. Consequently, the art of interpretation of laws comes down to ability to understand the human speech. But everyone who deals with products of human mind invested into the form of the word has to possess this ability. It follows that the rules which are necessary for understanding another literary work shall be followed during the interpretation of laws. These rules are worked out by special branch of philology which is called hermeneutics and which deals with construction of theory of art to understand oral or writing speech. It stands to reason, that teaching on interpretation of laws is a special branch of this hermeneutics and that is why it is often called legal hermeneutics.

Thus, the material for working out the methods and rules of interpretation of laws should be primarily looked for in the data of philological hermeneutics. As the last one is depending in its conclusions on the number of sciences the subject of which is spiritual activity of a human especially his literary work, what the psychology, logic, grammar, stylistics, the history of language are etc., the lawyer not finding the necessary data for him in philological hermeneutics has to resort to above-mentioned sciences.

Further, the laws in force differ from the other literary works in some features. For example, they are intended for using in practice, form in their aggregate one liaison unit, and are issued in view of any practical purpose the achievement of which is desirable for the legislator, are based on some or other considerations of justice or purposefulness. These and other peculiarities of laws shall be taken into account and be used as material for modification of general hermeneutic rules and development of new ones.

At last, the legislator caring of his enactments to be understood correctly sets the rules and interpretations which are binding for the courts and citizens because they are the same as any other rules.

It is evident from the above-mentioned that material for construction of rules of statutory interpretation shall be adopted: 1) from philological hermeneutics and sciences it is based on; 2) from the analysis of characteristics of legislative regulations; 3) from provisions of law itself [32, P. 12].

Application of laws and other legal rules in practice is in enumeration of particular cases of life under the decisions which envisage them in general form. This enumeration has the form of syllogism in which the major premise

is a legislative regulation or a number of rules and minor one — factual circumstances of the given concrete case but the conclusion drawing from them with logical necessity gives an answer to the legal issue which has arisen and is to be solved.

Take for example that I. in consequence of fight with P. has damaged his street-clothes. The barrister who has been asked for advice by P. or the judge at whom he will make a claim against I. on compensation for damages will have to cope with civil laws and look for an article on the grounds of which it is possible to solve this case.

Having acted in such kind a way they will get the following syllogism.

The minor premise. I. has caused damages to P. by his acts to the amount of 250 UAH.

The major premise. In accordance with article 1166 of Civil Code of Ukraine, «Property damages caused by illegal decisions, actions and inactions to personal non-property rights of individuals or legal entities, and the damage caused to the property of individual or legal entity is made up for on all amounts by the person who caused the damage».

Conclusion. I. is obliged to pay P. 250 UAH.

As it is evident from this example, it is necessary to have two premises to build up a syllogism. But they are rarely given enough finished. They are usually to be obtained: the minor premise by means of legal analysis of factual circumstances of the given concrete case, the major one — by means of interpretation and logical development of legal rules.

At first, take a look at the way the minor premise is obtained.

Each concrete case springing up in life and demanding settlement under the legal rules consists of the major or minor amount of the elements. Some of these elements have legal significance as legal act connects the consequences with them: the other elements do not have the same importance being legally indifferent. Therefore, first of all, it is necessary to lay the case which is subject to solution into component parts and select the ones from them which have legal significance. The analysis of factual circumstances consists in it.

Take for example that P. asking the barrister for advice is telling him the following: «Yesterday at 10 PM having left the cinema and going to the restaurant to have supper we started arguing with him about the causes of the earthquakes and became so irritated that we started to be free with our fists and I. tore my suit jacket up by his left hand for which I paid 350 UAH to the tailor the other day. Is it possible to recover this amount from I.?»

First of all, in his story the barrister has to separate juridical elements from domestic ones which do not have legal significance to answer this question. Also, he has to determine the extent of damages P. suffered from and whether they were caused by a group or a person. Further, P. says that he was going from the cinema. It is also not important. If he had been going from the cinema or home, the legal essence of the case would not have changed. Similarly, the cause of the quarrel, infliction of damage by left but not the right hand, purchase of the suit jacket from the tailor but not somewhere else etc. Having eliminated all the domestic circumstances, the barrister would

fix upon the fact that I. has caused P. damages having torn the outerwear up. This is legal grain which lies in the story which has been told by P.; everything else is domestic husk which does not have any value in the lawyer's eyes. It is not hard to note that legal analysis is similar to medical diagnosis. Just as a doctor chooses from the number of painful symptoms the patient is complaining about only a few of essential ones and diagnoses a disease by them, the lawyer allots legal elements from domestic ones of the concrete case and constructs a legal incident from them.

After the concrete case which is to be solved has been analysed and thus the minor premise of syllogism has been got, the lawyer has to start looking for the major premise which conforms to it. The stage for searches shall be the favourable legislation which provisions are to be applied to this case. These searches can lead to either of two results. Sometimes the major premise is expressed directly in one or several provisions of law. It took place in the above-mentioned example where the issue on the compensation for damages caused by one person to the other one was solved directly by article 1166 of the Civil Code of Ukraine. It just remains to interpret the point of law in such kind of cases, i.e., to find out its real and exact sense. It is not rare when deliberate searches remain unsuccessful and there are no any provisions in the legislation which could be a finished premise. In such kind of cases the major premise shall be logically brought out from the existent rules. This method of gaining a major premise can be called a logical development of rules.

One operation of preliminary nature shall precede interpretation as well as logical development. Before the application of the found rule it is necessary to make sure that it is a genuine rule, i.e., has legal force, and ascertain its exact text. The criticism of the authenticity of the rules consists in it.

So, the application of laws in practice embraces four operations: 1) legal analysis of concrete cases which are to be solved; 2) criticism of authenticity of rules: 3) interpretation of rules; 4) logical development of them.

The first of these operations do not need a special research. To be able to distinguish legally material circumstances from purely domestic ones, it is necessary to be familiar with legal concepts but this acquaintance is gained by means of study of jurisprudence, i.e., legal education. There are no any special rules which are to be guided by while carrying out the legal analysis. There is only one general rule: «it is necessary to cast aside all the circumstances which do not have any significance from the perspective of current law».

It is ought to say the other thing concerning criticism, interpretation and logical development of regulations. These operations are incomparably complicated; they are to be carried out according to special rules, but it is possible to establish them by means of detailed research into the essence and distinctive features of each of the named operations.

Interpretation of rules of law includes two elements: elucidation — revelation of content (interpretation) of legal rules «for yourself» and explanation — unfolding of the content (interpretation) of legal rules «for the others». The interpretation is in special acts (they are known as interpretative).

Legal interpretation is a special cognition which is fulfilled with the purpose of practical realization of law.

The activity of the court and other law-application bodies on ascertaining the factual circumstances of the case also refers to special cognition in the area of law. Legal interpretation gains more important significance while application of law when it becomes a part of state-powerful activity of law enforcement bodies determining the necessary legal consequences during the solution of the legal case. Here the interpretation gains legally binding meaning and the element of explanation (interpretation) is not infrequently essential and it directly influences the legal regulation of public relations.

The role and the place of interpretation of law in life of society are connected with political regime and state of legitimacy. Under the totalitarian regime in the conditions of lawlessness the interpretation is often used in order to attach the arbitrary sense to the law in accordance with some or other political purposes and hence for random application of law.

The experience of hermeneutics gives us all reasons to believe that interpretation cannot be represented purely as logical and methodological procedure since it exists as diverse phenomenon on different levels of entity of the subject [27, p. 7–25].

In the opinion of F. Nietzsche, human reasoning always acts as «the interpretation according to a scheme we cannot get rid of» [18] and the value of the world turns out to be grounded in our interpretation. Criticizing positivism Nietzsche considers that there are no facts but only interpretations. We cannot ascertain any facts «in ourselves».

Nietzsche says that there is always an opportunity to offer new significances, «perspectives» and «methods» to lay the phenomena out by the particular measures. The world, as he claims, «does not have one sense but infinite senses».

In Panofsky's opinion, « the internal sense can be defined as uniting principle which is the basis and defines visible event, its type and intelligible significance and which even stipulates the form of internal event (Italics are mine — V. P.) [21, p. 5].

Panofsky's «perspective» is established exclusively by the subject similar to Kant's transcendental scheme or Cassirer's symbolic form. It reduces artistic phenomena to the strict, i.e., mathematically precise rule, but it makes this rule dependent from man, individual, ...since the manner of its acting is determined by arbitrarily chosen position of subjective point of view [19, p. 88]».

As Nietzsche indicates, the power considering the perspective is «the entity as the subject» [18, p. 298]. It should be noted that Panofsky is speaking about the «great transformation» from aggregate space to systematic, development of infinity category and desacralization of universe [20, p. 84–87].

Conclusions. Interpretation (legal hermeneutics) is as a culminating point, summit of legal activity. Legal interpretation is the activity which on the practical side is connected with completion of adjustment of vital relationships by law. Legal rules become ready for realization and practical effectuation as a result of interpretation.

Another thing is not the less important. Refined legal knowledge, experience, legal culture and legal art unite together and converge in unified focus in the interpretation. From this point of view, hermeneutics, i.e., the science and art of interpretation of legal terms and concepts is the kind of apex of legal skills, the culminating point of legal activity. That is why one of the most reliable indicators of high-grade work of professional lawyer is the level of professional training which lets him «immediately», fully and exactly interprets any laws and other legislative acts.

In essence, the activity which is quite often called the legal analysis consists in legal interpretation.

Legal interpretation represents itself in known sense as the process opposite the one which is fulfilled by the legislator while adoption of the statute. It is a sort of drawing an analogy with the excavation, archaeological developments — overburden operations when the layers of the ground are revealed layer by layer, not infrequently of the dead ground to reach the desired, sought-for object. The cogitation of the person who carries out interpretation (the interpreter) here goes from layer to layer of legal matter — from analysis of literal, linguistic text to analysis of legal dogma, legal features of rules of law and thereby to moral, social and other bases, backgrounds of prescriptions of law. All of these things are in order to establish actual content of legal determinations.

Legal interpretation reveals its high legal purpose and at the same time in the conditions of democracy, constitutional state, developed legal culture is not beyond the scope of legality. In the situation of totalitarian state, autocratic regime it is sometimes an expression of juridical casuistry, manipulation of law and legal categories and occasionally a direct violation of law in force under the pretext of interpretation and results in arbitrariness and lawlessness.

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ВДОСКОНАЛЕННЯ ЮРИДИЧНОГО ТЛУМАЧЕННЯ ПРАВОВИХ НОРМ І СУЧАСНОЇ ПРАВОЗАСТОСОВНОЇ ДІЯЛЬНОСТІ

Резюме

Аналізуються проблеми вдосконалення юридичного тлумачення правових норм і застосування законів. Розкрита методологія герменевтичного аналізу правових текстів. Обґрунтована можливість створення експертних систем, здатних прорахувати можливі траєкторії руху діючого суб'єкта до тієї чи іншої цілі у заданому нормативному напрямку. Визначено, що юридичне тлумачення — це діяльність, яка з практичного боку пов'язана із завершенням регулювання життєвих відносин законом. Юридичні норми в результаті тлумачення стають готовими до реалізації, до практичного здійснення.

Ключові слова: юридичне тлумачення, правозастосовна діяльність, моделювання правових ситуацій, інтуїтивне правове чуття, нові способи пізнання реальності.

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СОВЕРШЕНСТВОВАНИЕ ЮРИДИЧЕСКОГО ТОЛКОВАНИЯ ПРАВОВЫХ НОРМ И СОВРЕМЕННОЙ ПРАВОПРИМЕНИТЕЛЬНОЙ ДЕЯТЕЛЬНОСТИ

Резюме

Анализируются проблемы совершенствования юридического толкования правовых норм и применения законов. Раскрыта методология герменевтического анализа правовых текстов. Обоснована возможность создания экспертных систем, способных просчитать возможные траектории движения действующего субъекта к той или иной цели в заданном нормативном направлении. Определено, что юридическое толкование — это деятельность, которая с практической стороны связана с завершением регулирования жизненных отношений законом. Юридические нормы в результате толкования становятся готовыми для реализации, для практического осуществления.

Ключевые слова: юридическое толкование, правоприменительная деятельность, моделирование правовых ситуаций, интуитивное правовое чувство, новые способы познания реальности.

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MAIN TRENDS IN THE MODERN LEGAL INTEGRATION

The article analyzes certain aspects of the modern trends in the development of national legal systems in the conditions of the globalized society. It presents an overview of the challenges, changes, and perspectives concerning the ways for the legal integration. It is suggested that all this aspects relate to a «reset» of legal regulations, which is demonstrated through peculiarities of the development of national legal systems, the development and accomplishment of the ways of their convergence, improvement of the mechanisms of their interaction.

In terms of the development of national legal systems it is stated that the basic trends have been shown up through the maintenance of basic rights and interests of an individual; through ensuring democratic principles, strengthening a leading role of private law tools, etc.

As to the ways of the modern legal integration it occurs obvious that harmonization and its various forms and methods, acquisition of practices and principles of foreign national legal systems, the extension of national law over the territory of a foreign jurisdiction etc., contribute substantially to such integration. On the agenda there is also an issue of the future development of the so-called global law order.

Key words: globalization, legal integration, unification, harmonization, convergence, legal order

Problem statement. Nowadays a term «globalization» is commonly used to describe the increased flow of knowledge, resources, goods and services among nations. The term is sometimes defined as «the development of an increasingly integrated global economy marked especially by free trade, free flow of capital and the tapping of cheaper foreign labor markets»[1]. Globalization can also be described as a process by which the people of the world are unified into a single society and function together. This process is a combination of economic, technological, socio-cultural and political forces. The term is, however, often used to refer in the narrower sense of economic globalization, involving integration of national economies into the international economy through trade, foreign direct investment, capital flows, migration and the spread of technology. In a broad sense, globalization encompasses all spheres of life, leads to an intensification of cooperation between states and deepens their interdependence.

Globalization also brings fundamental changes in to the law and affects mainly the areas subject to legal regulation. In today's world the above men-

tioned and other processes, the relationship between people, organizations, and states are impossible without a clear and comprehensive legal regulation that maintains civilized relations.

The political opening of states, the technologies of communication, the expanded economic areas lead to increases in cross-national communication of dispersion of production system, transnational trade, global markets, mobility of people and businesses etc. These processes have both desirable and undesirable effects: for example, trade with legal goods profits as does trade with illegal goods; mobility of people is facilitated as is that of unwanted persons, etc. [2, p. 126–134]. All these leads to an awareness of the increasing role of laws, in general, in modern world that are designed to create a framework conducive to international exchange and at the same time to minimize risks [3, p. 205].

Due to the expanding transnationalization of activities legal questions that transcend borders arise more and more frequently. This is true of all law systems: national and international law, private and public law. For instance, in the context of private law, parties in different countries sign sales contracts, multinational enterprises form cartels that affect the world market, copyright violations occur in many countries simultaneously. Public law, in its turn, deals with cross-border cases when emissions damaging to the domestic environment are released from foreign territory, or multinational concerns divert profits to their subsidiaries located in offshore «tax havens». In the area of international law new problems arise in connection with transnational terrorism and global organized crime.

As a result of this increasing need for cross-border regulation, the traditional law of the nation-state is confronted more and more frequently with transnational activities that affect several states, engenders legal decisions that must be enforced in foreign territory and raises issues that can only be solved on a global level [4, p. 12–14]. Thus, the issue arises as to the transnational applicability of law and enforceability of law in foreign territory, and also to the need to cope with new global changes that overcome the regulatory capabilities of individual national states. The issue of the applicability of a national legal system to activities that are of transnational character arises in different law systems. In private law this issue is added by the additional problem — a conflict of laws situation. It is a common practice that international private law instructs courts, where the situation requires it, to apply foreign law. According to general rules of international law, states have authority to prescribe law with respect both to a conduct that takes place partially or entirely within its territory and to a conduct that has effect within its territory. Due to numerous global applicable systems it is often a case that more than one legal system may be applicable to one and the same activity, that not only are provisions regarding the applicability of law necessary, but also rules governing conflicts of law — rules that establish the priority of a particular legal system or that eliminate conflicting norms or values [5, p. 165].

Due to the fact that national legal systems differ from one another, the choice of applicable law can lead to advantages or disadvantages for the par-

ties involved. In practice this differences are exploited to avoid consumer or creditor protection provisions by using choice of law rules by the contractual parties (in private law), or evade domestic criminal legislature by transferring activities abroad (in public law). Examples of employment of «artificial connecting factor» with foreign legal systems may be used anywhere: in ecological sphere — the disposal of environmental contaminants in countries with minimal environmental protection standards; in financial sphere — the announcement by financial institutions of their relocation to another country with the view to avoiding more strict regulations in their residence country, etc. Considering these facts it is obvious that there is a need for clear jurisdictional and conflict of law rules for the various legal systems to prevent abuses of law and forum shopping.

Another challenge for a cross-border legal regulation is: how to make possible enforcement of national norms in foreign territory? It is evident that in most cases decisions of courts (criminal, civil, administrative) are enforced within their own territory and the enforcement of national measures abroad requires special legal regulations and implementation procedures. Naturally, not always these procedures are being put into effect without facing obstacles of subjective and objective character. Thus, an important task of the law in the global world is to guarantee that, where it is really necessary, regulations are not only nationally but also «transnationally» applicable and enforceable.

A further task of law in a global world includes dealing with large-scale challenges that are of common concern of several states. Such issues cover protection of security in the face of terrorism, protection of the climate, the arctic, financial markets, intellectual property in the Internet, as well as new international institutions and values such as, for instance, the financial interests of the European Union, the functionality of international tribunals, etc., whose very existence is a result of globalization. Accordingly, these new areas need common models and structures with which the solutions can be achieved.

Analysis of recent research and publications. There is no lack of scholarly attention to different fields of the issue. For example, general and particular issues of globalization, the role of law in modern integration processes, etc. were explored by prominent foreign and domestic law experts: Anufrieva L. P., Basedow J., Bakhin S. V., Boguslavskiy M. M., Vilkova N. G. Vishnjakov A. K., Dovgert A. S., Sieber W., Kabatova E. V., Kuznetsova N. S., Lebedev S. N., Lukashuk I. I., Makovsky A. L., Merezhko A. A, Onishchenko N. N, Parkhomenko N., Sadikov O. N., Skakun O. S., W. Tetley, Tikhomirov Y. A, Entin M. L. and other.

Paper purpose. The purpose of this research is to explore a leading role of law in modern conditions of the globalized society through the revealing of traditional and new legal forms of the convergence and interaction of national legal systems.

Paper main body. According to authorities' views the basics trends in the evolution of national legal systems under the modern conditions of the widespread integration are shown up in the following.

First of all, a priority is given to the maintenance of basic values of the modern society such as: material and spiritual needs of an individual, its well being, safety and protection of the rights and freedoms [8, p. 89]. Further on, among the head tendencies are considered: ensuring democratic principles in the public affairs' management; embodiment into a content of existing law universal moral principles and standards, and the ideas of justice and humanity; strengthening the rule of law principle, independence of judiciary systems, the constitutional control over the adoption of legal acts; increasing the authority of law, the judicial protection of human rights and interests [31, p. 138].

Specific attention in modern conditions is also paid to the legal regulation of environmental problems; expansion of the scope of legal regulation in the condition of arising new relationships in the fields of information technology, space exploration, numerous scientific research in medicine, etc. [2, p. 206].

In addition, methods of legal regulation have undergone some changes: in particular, the role of discretionary method, based on a free and fair expression of the will of people and organizations to enter into a legal relationship, is being strengthened [9, p. 55].

It is quite natural that the ongoing trends and significant changes in national laws have been formed as a result of the states' rethinking a role and a position of their national laws in the era of global changes, of an active approval of universally recognized legal principles and norms of international character, a positive legal experience of other countries, etc.

Among main recent achievements of the civil law reform in Ukraine, according to the opinion of prominent Ukrainian legal scholars and practitioners, is bringing back to the legal system of Ukraine principles, concepts and categories of natural law and an individual, which have gone the way of development from the Roman private law to the modern European law. Among new elements and selected trends in the development of private law in Ukraine there appears the rejection of «dualism» of private law, the results of convergence, harmonization and unification of the separate groups of norms in reliance with the relevant rules of universal international conventions and the EU law, etc. [10, p. 57].

This approach is reflected in provisions of various Ukrainian civil law rules and legislative acts. For instance, at the present stage of the development of private law under a new angle the traditional sources of civil law are regarded. Along with legal rules as a source of civil law other systems of normative control have been strengthening their position, and namely: the principles of natural law, civil law contracts, treaties, customs, judicial practice. This may be explained by different reasons: firstly, by the objective inability of laws to cover certain life situations; secondly, sometimes by incomprehensibility of certain rules; thirdly, by complex rules of interpretation of laws, lengthy procedure of adoption and making changes to laws, etc., as well as by the formation and development of civil society, in which there are non-state rulemaking centers [10, p. 60–61]. In addition to these causes the mentioned changes are seen as a consequence of the increasing role of the rule of law, democratiza-

tion of society, and, in many respects, the globalization of all aspects of life, the process of unification and harmonization of law, etc.

This tendency affected formation of many basic principles, included into the Civil Code of Ukraine, — the inadmissibility of willful interference with the private life of a person by state, state agencies and officials, as well as by any third parties, — that correspond to common humanistic approaches of the European Convention on Human Rights, which by virtue of its ratification by Ukraine became an integral part of its national law. In addition to this principle, the general framework of civil legislation of Ukraine consists of other principles: the inviolability of property; freedom of contract; freedom of entrepreneurship; judicial protection of civil rights and legitimate interests; fairness, good faith, reasonability [12, art. 3].

Legislative embodiment of the principles and other provisions of the national law as a whole suggest that the process of regulation of social relations, particularly in the field of private law, in modern Ukrainian society is focused on compliance with the basic standards characterized for a democratic society [7, p. 309]. All this taken together indicates that Ukraine in its further development is aimed at integration into the European and global social and legal space.

As mentioned above, globalization as a process started from the spheres of economy and technology, and now the process has affected all spheres of human life: economy, politics, strategy, information, environment, international law, etc. [13, p. 47]. Despite the fact that the most intense globalization processes take place in the economy and are exhibited in the formation of a common world economic space, the role of law in this process grows and is expressed in the reform of the existing legal principles of regulation of the economy, the development of a common legal language and the economic and legal categories, as well as standardized law governing economic relations, which serve as common to all states participating in international relations [13, p. 48].

In this regard, it should be emphasized that the first phase in the globalization process is considered to be the transition to the establishment of the global economic and legal order, which is characterized by a change in the leading role of the state in the economic sphere of life, transformation and rejection of some of its functions [13, p. 50]. It follows that, for example, some spheres of production, financial flows are beyond the control of individual states; the state's share in the creation of gross domestic product is reduced by transnational economic structures; currency regulation and financial control are weakened; a proportion of states involvement in foreign trade is considerably reduced, etc. [4, p. 78]. Under these conditions primarily private law tools play the dominant role: general importance of civil law, subsidiarity control techniques are steadily increasing [14, p. 562].

The second phase of globalization is called a coherent, active and relatively stable economic and legal relationship between states with the involvement of all legal forms of interaction (unification, harmonization, adaptation, approximation, standardization, implementation, and others), which have been stimulated by the development of modern international law [15, p. 64].

Thus, one of the most important trends in the era of globalization is also the increased role and scope of international law: the increase in the spheres of regulation of social relations by its rules, the active introduction into the legal systems of individual states its norms and principles. In the legal literature it is substantiated an idea that international cooperation of national legal systems, which is carried out in various forms, is a logical legal global phenomenon [16, p. 68].

Whereas in the past states in their development were more autonomous, independent, committed to protecting the domestic legal order from outside influence, aimed at regulating social relations by national law, today, in the conditions of the turbulent worldwide economic, integration, common challenges the modern states have been facing, international communication, information links between countries and regions, standardization of living conditions of individual states, strengthening care for the rights of an individual, the growth of transnational interests of humanity, etc., objectively highlight the need for convergence of legal systems [17, p. 12].

Integration trends are illustrated in different ways, for example, as it is mentioned above in this article, with the help of different legal methods and forms. Let us mention some of them, which are considered to be the most effective [11, p. 322].

Unification of law is considered one of the main methods of legal convergence, in particular, the unification of rules of substantive law. Under the unification as an instrument of achieving uniformity of legal rules [18, p. 17] is understood the creation in different countries' national legal systems of unified norms, intended to regulate the respective group of relations, which are going to replace the provisions of national law, thus creating a uniform legal space [9, p. 78]. When analyzing the evolution of forms of unification, the researchers identify two schemes of its implementation: spontaneous and purposeful. The first one was formed in the middle Ages in Europe under the influence of convergence and integration of economic activity in various areas of the human's life and, on this basis, the emerging need for international communication, relationships and interdependence between nations. It was carried out in the form of codified business practices and regarded mainly shipping trade area [19, p. 381]. The purposeful unification — specially organized activities for creation a single or unified legal regulation in the sphere of international relations — was formed fragmentarily in the end of the 19th century- throughout the 20th century, when unification covered almost all areas of international cooperation [20, p. 125].

Various institutional forms embraced this process, due to the length and complexity of the development of unified agreements, and, over time, a number of international organizations, activity of which was connected with a matter of unification, were established. These institutions include: The Hague Conference on Private International Law, UNIDROIT (the Rome Institute of Private Law), UNCITRAL (the United Nations Commission on International Trade Law), CMI (Comitй Maritime International), ICC (International Cham-

ber of Commerce), as well as a number of regional organizations and non-governmental organizations [14, p. 562].

Not less significant legal form of integration is implementation — purposeful organizational and legal activities of states, undertaken individually, collectively or through international organizations in order to ensure timely, full and complete implementation of international obligations adopted in accordance with international law [21, p. 122]. According to this definition, the implementation is considered as a preparatory stage of the application of norms. In many cases, subjects of international law directly in the international arena carry out the implementation. However, more often achievement of aims of international legal norms is possible only through their implementation within the state, by means of internal policy [22, p. 337]. As methods of implementation may serve incorporation, transformation, reception [23, p. 61]

In the era of the rapid transformation of international and regional law one of the leading legal integration tools is regarded *harmonization*. In jurisprudence there is no a common approach as to the definition and essence of the phenomenon. Harmonization is mainly considered as: 1) a publication of a legal framework, in compliance with which states word their domestic legislation (in this way the legal systems of different countries become closer, but do not reach complete uniformity); 2) an introduction of general legal principles, governing specific areas of public life provided that there is a space for states to preserve their own national legal regulation; 3) a process of concordance of states' and international organizations' views on the purpose and legal development priorities, actions, aimed at creating a common legal framework through the approximation of different national legislations, etc.

In most cases the appearance and use of the term «harmonization» and its related terms «unification», «convergence», «approximation» etc. is connected with the creation and activities of the European Union and the indication of the fact of correlation between the European law and national laws [23, p. 58].

Despite the obvious global trends to the «universalization» of legal regulation by the use of different methods and forms, in the course of this process, the autonomy and identity of various legal systems, especially their own legal experience, the established judicial practice, etc. should be recognized. Today, as experts see it, it is necessary to speak not about the total universal legal uniformity but rather of the maximum convergence of national legal systems, based on proven principles and norms that parties are free to adopt [9, p. 90]. There is also a view that it is more appropriate to address the question in a different way and to focus on the improvement of the «cooperation mechanisms» between national legal systems as a real and objective process of international collaboration [24, p. 54].

In practice, such cooperation mechanism can be implemented through a national regulation concerning the recognition of foreign agency decisions, decisions of foreign civil, criminal, administrative courts and arbitration institutions by means of administrative and legal cooperation [25, p. 528–529]. This coordination of national decisions and their legal enforceability in another system are unproblematic usually if two legal systems have similar legal

regulations. In contrast, the extension of the application of judicial decisions faces difficulties if is in «a conflict» with a law in the requested state: for instance, violates the «ordre public» [26, p. 518] or any other fundamental values of the other state. In this case the law of cooperation is characterized by certain reservations and exceptions.

For example, in the context of recognition of judicial decisions within the European Union's member-states an effective law of cooperation is possible only on the basis of legal harmonization and mutual trust. The discussion of the principle of mutual recognition of judicial decisions in civil and criminal cases illustrates the innovative capacity of European law, and also laws of non-member states, in the development of new forms of interstate cooperation [26, p. 345–346]. Here it is worth mentioning that this statement is also true of Ukraine [27].

In terms of the cooperation mechanism it should also be mentioned a creation of new hybrid institutions designed to improve cooperation between national agencies, for example: the agency Eurojust and the police agency Europol[1].

The mechanism of interaction between national legal systems may display itself through the process of borrowing the experience of the developed countries, the legal principles and norms of different branches of law. Such a method is relevant for Ukraine, since for obvious reasons Ukraine is in the beginning of the reformation of its legal order. To adopt it to requirements of the market economy it is of a vital importance to borrow ideas and principles from the experience of leading countries. It is recognized that this process not always can proceed smoothly and painlessly to any national legal system: the necessary condition to achieve a positive result in this case is that the borrowed from another legal system rules or institutions are fairly well understood in terms of their compatibility with the existing system in the host legal culture, its legal techniques traditions, jurisprudence and other important aspects that this legal system is made of. Also the possible consequences of the incompatibility of elected for the reception of foreign legal structures with existing national regulations need careful analysis. In those cases, when it comes to borrowing the basic principles and rules from relatively close legal systems, such as systems of civil law, and even in the field of private law, the processes of interaction between states are much faster.

As an example of such an interaction «mechanism» the DCFR (the Draft of Common Frame of References) can serve, a document that comprises of principles, definitions and model rules of European Private Law[2]. Advantages of this document are as the following. Firstly, it is a model of modern civil law, being the product of a pan-European civil law school and providing better control of the respective relations in a highly developed market economy

[1] Eurojust Annual Report 2013. — See at site: http://www.eurojust.europa.eu ; See about Europol at site: http://www.europol.europa.eu.

[2] Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). — See at site: http: //ec.europa.eu/justice/contract/files/European-private-law_en.pdf

and not «burdened» with any national dependence. Secondly, it embodied the principles of law and legal systems of institutions of both the civil and the common law, which testifies to their close interaction and thus meets the challenges of globalization. Thirdly, it is designed by an international team of professionals — leading European lawyers, free from political considerations, and focuses primarily on the interests of the professional community, and not the interests of individuals, agencies or departments, thus being «objective» regulator of relations in the sphere of private law.

Given the advantages of this document, its importance seems to be quite obvious for the development of modern Ukrainian civil law in theoretical and practical terms. Moreover, the document follows the continental tradition of codified law that is also inherent to our national civil law. The initial introduction and subsequent study of the provisions of the DSFR will help not only in the law-making activity, that is to say in the formulation of new or improvement of the existing civil regulation, but also in increasing the common legal culture of the Ukrainian legal community involved in the economic turnover. This is important especially in the current level of Ukraine's social development, which is aimed at reforming its national law in a spirit of global values of modern civilized society, which, in turn, represents one of the major global trends of modern law in general.

In conditions of a commonly defined policy international cooperation models are well situated to contribute to the solution of global problems. National law-making bodies can easily accept their regulations. Another advantage of the cooperation models is maintaining the national sovereignty of the participating states and thus supporting the principle of subsidiarity. Despite these advantages, difficulties may arise where there is a lack of harmonization and unity, including the reservations regarding the transnational implementation of national decisions, problems that arise due to the lack of agreement or to the difficulty of coming to agreement concerning global solutions, etc.

Considering the difficulties national cooperation models encounter in the coordination of different national legal orders it is worth to draw attention towards the one of the newly emerged trends in the development of modern law in planetary scale — interaction of international and domestic law, or to say more precisely: «blurring» the boundaries between domestic law and international law [8, p. 92].

For that reason in today's global legal academic community it is becoming increasingly popular a concept of a global legal order that is created basically on the convergence and achievement of uniformity of all legal systems, both domestic and international, on the basis of common norms, standards, legal principles [28, p. 86–87]. Thus, relatively speaking, a «subsystem» of the global legal order include: international law; national legal system; new norms, institutions, industries, regulating the relations of international, inter-regional economic enclaves, cross-border businesses and so on [28, p. 342].

Being closely related, these components still exist as independent parts of the global law. Experts predict that the basic tendencies of the future evolution of the legal systems will be their constant approximation to each

other and achievement of harmonious communication and cooperation in all spheres of life and regions of the world, taking into account the matching of needs and interests of different countries, their associations, individual regions, different groups, corporations, socio-economic structures, etc. [28, p. 343].

Trend towards global legal order are displayed in many ways: for example, international treaties and other documents utilize such new concepts as global law, global responsibility, global law enforcement, international crime, etc. Moreover, the adjective «global» is used not only in the field of law, but also in the areas of economic life, human and environmental security, etc.

It is hoped that the global legal order will act as an objective and fair normative and controlling system in the fight against the economic, financial, political and other interests of different states; as a tool protecting the weak and poor parties and the interests of the minority of population. It is also seen as a means of reconciling the needs and interests of different groups, corporations, social and economic structures; as a guarantor of harmonious communication and cooperation in all spheres of life and regions of the world. In this regard special significance is given to the comprehensive development of new forms of law, which are now being actively implemented in the legal regulation, primarily in the economic sphere: laws, programs, acts, doctrines, recommendations, framework laws, model acts, etc.

Another relatively «new» legal phenomenon on a global scale is represented by the «common European legal space», or the so-called European law [30, p. 19]. Component parts of this concept are distinguished as: rules of international law relating to the European states; judicially-created rules of the European Union states, which are the basis for the solution of concrete cases (these are the precedents of the European Court of Human Rights); states' national laws that have been adopted on the basis of international treaties concluded with other European countries and act as a form of implementation of international legal norms [30, p.38]. A typical example of the formation of the European law is the work of the European Union's bodies. Its acts are a part of the legal system of the member-states: they are the same for all the EU member-states and are binding in relations between entities within the states [30, p. 142]. The European Council and the European Commission, in accordance with the Treaty on the European Union, may issue regulations, directives, and decisions; formulate recommendations and give opinions [30, p. 129]. Regulations are mandatory for parties to the Treaty: aimed at harmonization and unification, they «advice» states on the purposes to be achieved, but at the same time give freedom to the individual states' establishments to choose on their own forms and methods of achieving them [31, p. 12; 32, p. 152]. Thus, here it is about a combination of mandatory and secondary regulations of the EU, and a priority of the unified law over national law and order of an individual European Union country.

In the process of its evolution and interaction with other legal systems the European law has passed a hard way of formation, and today it has acquired weighty importance as a separate «player» in the regulation of social relations:

it is separated from international law; mandatory character of its provisions is being strengthened, they are being increased in number, they cover more areas of relations (in the sphere of environment, culture, education, health, science, customs, defense, crime, etc.) between the EU states and other actors of the European integration ; it is correlated with national systems of the EU states on the basis of its direct action, integration into domestic law, and also through the full force of national judicial authorities [33, p. 215].

Formation of a global law order would be unthinkable without a gradual improvement of the system of legal procedures for resolving economic and other kind of international disputes and conflicts. In criminal matters, for example, there have been worked out measures of international responsibility for crimes against humanity, international terrorism, etc. Nowadays the question is about a search for new forms of international liability for crimes, for example, for economic crimes [6, p. 273]. Currently it is being heard proposals for the creation of a new international body — a geo-economic tribunal, a sort of international judicial panel, that would carry out examination of cases on economic aggression [28, p. 88 — 90]. Such calls are caused by the current practice of using unfair competition, dumping, monopolization, etc. to mitigate the economic and financial potentiality of competitors or «weak» players of the world market, etc. As the initiators of the idea suppose, the so-called geo-economic tribunal could constantly monitor the global economic processes and financial flows in the world; take measures to resolve conflicts, economic wars between economic entities; deal with complaints and claims of the states, etc., with regard to unfair distribution of the world's income, or imposition of onerous conditions of economic contracts etc. [28, p. 89].

Conclusions. The study suggests that in modern conditions of the globalized society new relationships in all spheres of human life have come into existence over the years, which poses a number of tasks to the international community, including legal challenges. It concerns the modification and «reset» of legal regulations in the new conditions, which is demonstrated through peculiarities of the development of national legal systems, the development and accomplishment of the ways of their convergence, improvement the mechanisms of their interaction. For emerged transnational activities globalization requires that the scope of application of national law be defined, that the cross-border enforcement of law be facilitated, that en effective regulatory system be crated. Along with the development and integration of national legal systems on the agenda is the question of the future development of the so-called global law order, which is intended to be objective and fair regulator of relations in terms of transnationalization and globalization.

Under these circumstances, it is quite obvious that harmonization and its various methods; acquisition of practices and principles of foreign national legal systems; the extension of national law over the territory of a foreign jurisdiction etc., are considered as tools, which contribute substantially to the integration. It is important to realize that the legal integration processes must be mutual and must not inhibit the identity and prospects of development of a national legal system.

Due to the intensification of the globalization process these calls have increasingly become a core issue for the global economy and society in the whole. As yet the realization of these requirements has brought about fundamental changes in the law of the world societies that have not only led to new legal regulations but have also led to fundamental changes in the legal control systems.

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ОСНОВНІ НАПРЯМКИ СУЧАСНОЇ ПРАВОВОЇ ІНТЕГРАЦІЇ

Резюме

Нові відносини у різних галузях людської діяльності, що виникають у сучасних умовах загальної глобалізації, ставлять до міжнародної спільноти низку запитань, включаючи правові. Це стосується проблем модифікації та «перевантаження» сфери правового регулювання, які проявляються через особливості розвитку національних правових систем, розвитку та реалізації шляхів їхнього зближення, вдосконалення механізмів їхньої взаємодії. Відносини у різних сферах транснаціональної діяльності потребують чіткого визначення сфери застосування національного права, полегшення процесу його «транснаціональної» реалізації, формування ефективної правової регуляторної системи. На порядку денному, поряд із розвитком національних правових систем та їхньої інтеграції, також стоїть питання про подальший розвиток так званого глобального правопорядку, який розглядається як справедливий та об'єктивний регулятор відносин в умовах «транснаціоналізації» та глобалізації.

Ключові слова: глобалізація, правова інтеграція, гармонізація, зближення, правопорядок.

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ОСНОВНЫЕ НАПРАВЛЕНИЯ СОВРЕМЕННОЙ ПРАВОВОЙ ИНТЕГРАЦИИ

Резюме

Возникающие в современных условиях всеобщей глобализации новые отношения в разных отраслях человеческой деятельности ставят перед международным сообществом ряд вопросов, включая правовые. Это касается проблем модификации и «перезагрузки» сферы правового регулирования, которые проявляются посредством особенностей развития национальных правовых систем, развития и реализации путей их сближения, совершенствования механизмов их взаимодействия. Отношения в разных сферах транснациональной деятельности «требуют» четкого определения сферы и границ применения национального права, облегчения процесса его «транснациональной» реализации, формирования эффективной правовой регуляторной системы. На повестке дня, наряду с развитием национальных правовых систем и их интеграцией, также стоит вопрос о дальнейшем развитии так называемого «глобального правопорядка», который рассматривается в качестве справедливого и объективного регулятора отношений в условиях «транснационализации» и глобализации.

Ключевые слова: глобализация, правовая интеграция, гармонизация, сближение, правопорядок.

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THE ARMENOPOULOS' SIX BOOKS AS A KNOWLEDGE SOURCE OF TORT LIABILITIES OF ANCIENT ROME IN EUROPE

In the article the historical and legal analysis of tort liabilities according to Roman private law and the Armenopoulos' Six-volume is carried out. It is specified that the Armenopoulos' Six-volume — the Manual Book of Laws (the XV century) was a source of knowledge of Roman private law on the Ukrainian lands (also Moldavian and Romanian). Also the history of expansion of the Armenopoulos' Six-volume on the Ukrainian lands, in particular in Bessarabia, is considered.

Key words: tort liability, public torts, private torts, Armenopoulos' Six-volume, Roman private law.

Problem statement. Today, no one has doubts about the value for national legal systems of Roman private law. Today no one asks oneself: why do we study the law of the state that doesn't exist — a dead law? This is predefined by the value of Roman private law for national legal systems.

National legal systems are based on the same general principles, legal culture, legal doctrine, legal traditions, authorized and unauthorized usages, etc. First of all they are a foundation of any legal system and family. They create a foundation and they fill every national legal system and legal family [1, p. 157–171]. These solid foundations of national legal systems were provided by Roman private law through its reception.

Traditionally, the reception of Roman private law is connected with direct and indirect (mediated) borrowing of its ideas and provisions. Direct reception occurs when ideas and provisions of Roman private law are perceived directly from primary sources of law of Ancient Rome. Indirect reception, on the contrary, is not a direct perception from primary sources, but through law of other states where this process has already taken place. To prove the fact of reception of Roman private law of direct kind is enough to compare the two legal systems: Roman and local. To prove indirect reception is much more difficult, as you need to ascertain a link between the provisions of Roman law and law of the first recipient country, as well as between the law of the first recipient country and the law of the next recipient country, discarding local

traditions of the first. As a result of direct influence of Roman private law the Byzantine legal system was formed. Legal systems of Western and Eastern Europe experienced the indirect influence of Roman law. In particular the formation and development of the legal system in Ukraine was carried out under the influence of Roman private law through the Byzantine, French, German, Polish, Czech, Austrian, Russian law (indirect reception). One of the sources of knowledge of Roman private law in the Ukrainian lands (also Moldavian and Romanian) was the Armenopoulos' Six-volume [1; 2].

Unlike other sources of knowledge of Roman private law in Europe, the Armenopoulos' Six-volumes can be considered as a law that recognized Rome Decrees as the law in these territories: « The local laws must be adhered to, but if not, then the customs, and if not, it is possible to apply the Rome Decrees» (I. (I) [1, p. 7]. That is, Roman private law represented the foundation of the legal systems of Ukraine, Moldova and Romania, not only due to indirect reception (the Armenopoulos' Six-volume), but due to direct (directly through the Rome Decrees).

Analysis of recent researches and publications. The value of Roman private law for national legal systems and its reception has been and is the subject of research of many scientists as in XIX century and in the Soviet period (P. Vinogradov, S. Muromtsev, P. Sokolovsky, V. Beck), so modern (E. Kharitonova, Z. Miller, V. Guteva, V. Goncharenko, R. Dostdar, P. Fedoseev, D. Prutyana, G. Puchkova, etc.). However, the Armenopoulos' Six-volumes are not considered as a source of reception of Roman private law in Europe, moreover — not even remembered. Apparently this can be explained by the lack of information about it in the textbooks on the history of state and law. The Armenopoulos' Six-volumes as a source of law was only in the works of L. Casso: «General and Local Civil Laws» (1896) and «Byzantine Law in Bessarabia» (1907) [2; 3]. However, the lawyer limited himself to study of its value as only local Bessarabian law source, even without analyzing its structure and content.

Paper purpose. In order to clarify the overall picture of the gradual development of law of the legal systems of Moldova, Romania and Ukraine for uncovering the general laws of Rome, which this development depended on, there is a need for a detailed analysis of the meaning and content of the Six-volume Armenopoulos. This is the historical value of this source of law; cause by definition of R. Iyering, the isolation is a deadly sin of peoples, as the supreme law of history is a communication [4, p. 6].

Paper main body. The Armenopoulos' Six-volume is also of interest in the context of the ideological, dogmatic and legal source of knowledge. Inheriting the idea of the Roman lawyers, in the Armenopoulos' Six-volume the system of obligations was the most developed. As it was noted by M. L. Duvernoy, the system of obligations was never developed to the same extent, as in Roman law [5, p. 19]. In fact, according to the scientist, for a proper understanding of the obligation concept, as opposed to the real rights law, the definition of liability from the Roman law should be the basic one [5, p. 19].

One of the first and the most complex institution of the law of obligations was the institute of tort liabilities, which were a legal form of society's reac-

tion to pathological processes, violations of private rights and interests. The study of value and system of tort liabilities, conditions of their appearance, subject composition in Armenopoulos' Six-volume, in comparison with the Roman sources, will allow us to make a conclusion about its value as a source of knowledge of Roman private law in Europe and the process of reception. Such reasoning predefined choice of the topic of this research.

To determine the influence of Roman law in Moldova and Romania (Wallachia) in the late middle ages is difficult because there are no legal digests and official texts. The Moldavian Prince Dimitri Cantemir recalled the reception of Byzantine law collections. In his short story «Description of Moldova» he noted that the Moldavian Prince Alexander I (Good), simultaneously with the crown from the Byzantine Empire, adopted the Greek laws, which were kept in the king's books, and from wide books chosen the laws, which is today the laws of Moldova [6, p. 16–17].

From the second half of the XVIII century, first in Romania (Wallachia), where Greek influence was stronger, and eventually in Moldova, there are judicial decisions made according to the provisions of the Manual Law Book (XV century), which went down in history as the Armenopoulos' Six-volumes, due to the author name Constantine Armenopoulos. It saved for six centuries value of legal source or judicial handbook on two European territories: in the Greek Kingdom and in Bessarabia province. For these territories it was printed in Greek, Latin, twice German, Moldavian, Russian languages, as other Byzantine digests either were completely forgotten, either was rarely opened by byzantists, and the compilation of Justinian ceased on the mainland to play the role of the applicable law document [6, p. 42].

For the basis of the Six-volumes, the author took «Prohiron», compiled under the Emperor Basil the Macedonian. «Prohiron» of Armenopoulos had almost no difference with the other texts of Byzantine law, while it lacks any independence or individuality of the author [6, p. 45]. Armenopoulos' work, wrote L. O. Casso, became the main legal manual for the Greek-Romanian people of the Balkan Peninsula, which contained preserved law of the previous periods [7, p. 6]. After the 1453 year, he was already known in the West; where it was seen as the last monument of law of already non-existent Empire.

Byzantine law was gradually penetrated into Moldavian life through the application in judicial practice. This reception was due not only to the need for additional norms, but also the glory of the Byzantine name, as in the West the compilation of Justinian was established thanks to the prestige of the Roman Empire. In addition, in Moldova in XVIII century the Greek language, in which was written compilation of Armenopoulos, became the official language as the Latin language on the West penetrated simultaneously to practice of law with the reception [6, p. 25].

Since the conclusion of peace between Russia and the Ottoman Porte (August 5, 1812 Russia annexed Eastern Moldavia or Bessarabia (Khotin, Bender, Cell, Ishmael, Ackerman and other commercial cities). In the Statute of the Region of Bessarabia (April 29, 1818) was indicated a need to follow customs and local laws in civil cases. There was the exception in this rule, that in all

civil cases, where claims and is responsible the treasury, it is necessary to apply the general laws of Russia. Criminal cases should be resolved under the laws of the Russian Empire [8, p. 11].

The laws of Moldavian rulers that were issued prior to 1812 and recognized by Russia were understood as local Bessarabian laws. However, such a law could be only the Collegiate Diploma of 1785 [6, p. 39].But the local population in Bessarabia continued to consider the usage as the main source of law, and the Basilica (Roman law) was seen as an auxiliary source. Therefore, the Supreme Council of the province of Bessarabia in 1826, considered as reference books the Armenopoulos' laws, that were used in the judicial practice for complementation and further development of local law, for which they have been translated into Russian language [6, p. 39].

By the Armenopoulos' Six books the realization of preventive-educational functions were charged on tort liabilities, which is clearly seen in the primarily wording of some of its rules: «if someone hurt or knocked out the eye of another, the other had to do the same, because it showed everyone his evil wrongdoing» (VI. 1) [3, p. 200]. That is the sanction for committing the offence evidences an «evil misdemeanor» of a person not only when applied to a particular offender, but when enshrined in law. In addition the sanction affects not only the offender, but also on all persons, educating the offender and preventing the commission of new offences.

Inheriting the Roman legal doctrine, Armenopoul in his Six-volumes authorizes honest revenge, which included such sentences as talion («talio»): «an eye for an eye, a hand for a hand» (VI. 1) [3, p. 200]. The talion system was acting at the cases of health or human life injury, robbery. However, in some cases, according to the tradition of decemviri, it was allowed to deprive people life under the circumstances stated by law. Thus, talion contained the idea of revenge and was a form of its manifestation. However, unlike blood (unlimited) revenge, about the talion was determined next: who has the right to revenge, methods and limits of its implementation.

With the talion system in the Armenopoulos' Six-volumes the system of compositions that has been already contained in the Laws of the XII tables was also applied: «Instead of punishment «an eye for an eye, a hand for a hand» to use property sanction in the form of deprivation of two third of an estate» (VI. 1) [3, p. 200]. That is, a composition was a private fine, which was paid to the victim, which should be met without the use of revenge. The choice of sanctions depended on the condition of delinquent: was wealthy, was applied a composition, if poor — then talion.

Thus, the implementation of preventive-educational functions of tort liability is seen also in authorization of talion system and compositions as characteristic features of the era.

Tort obligations entailed negative consequences of property character for the offender: compensation for inflicted harm. The use of such property sanctions resulted in the reduction or deprivation of offender's material goods to resume victim's property sphere: «If the body of the slave was damaged, then in addition to medical expenses and lost work time, it should be paid

the lost price of a slave» (VI. 1) [3, p. 200]. That is, tort obligations under the Armenopoulos' Six books performed restorative function. Thanks to the right-restoring function the responsibility of a private tort differed from liability of a public tort, to which also was typical a proprietary nature (e.g., public fines, confiscation of property of an offender).

According to the Roman tradition the legal consequences of offences were divided into public and private. *Public torts* were considered criminal offences against public order, which sometimes could encroach on the interests of an individual, so the perpetrators should be liable to public punishment in the form of the death penalty, deprivation of liberty or citizenship, corporal punishment, deprivation of property in favor of the state treasury and such. *Private torts* arose when the one has suffered from injury or loss, later were considered as a basis for the tort obligations to protect the property interests of an injured person. Respectively property satisfaction for committing of private tort got the victim, not the state. Thus protection was applied on the initiative of the victim: «Claims come from a treaty, amisconduct (fact — *from Greek*) or from an execution of smth.» (I. III) [2, p. 29]. Thus, the sources of obligations were only private torts.

Adhering to the Roman legal tradition on the Armenopoulos' Six books system of private delicts had a secluded nature, as them was an exhaustive list: theft (furtum), damage or destruction of other people's things (damnum injuria datum), offence (injuria).

Regarding theft they allocated two varieties of it(furtum): apparent theft (furtum manifestum) and implicit theft (furtum nec manifestum). So if the thief is caught at the scene, it was furtum manifestum. Conversely, if it is not caught at the crime scene, then — furtum nec manifestum. The Roman penalty for furtum (T. VIII.16) [9, p. 197] appears in the Armenopoulos' Six-volume: «who ever commits theft in the afternoon, if it is obvious, the thief is condemned to be paid in four, and if it is not explicit, then in two» (VI. V). Inheriting decemviri (T. VIII.12) [9, p. 196], for furtum manifestum was allowed punishment on the principle of talion — «kill in the crime scene». However, unlike Roman law, which gave the victim the right to choose the punishment of the offender, the right to apply such a sanction was granted on the condition that «the nigh thief cannot be pardoned without danger to a person» (VI. V) [3, p. 214].

The starting point of rules construction about tort liability resulting from damage or destroy of other people's things was the Roman Law of Aquilius: «...about all the laws regarding damages it was recognized that the most important is the Law of Aquilius» (VI) [3, p. 199]. The content of this law was extended to all cases of property damage (as things and human body). The amount of compensation was determined differently for damaged or destroyed items, as well as to human health damage or death.

According to the Roman tradition the great importance in the Armenopoulos' Six-volumes is provided to person's dishonor, which caused his mental suffering: «When there are two lawsuits, one of which is an important quantity and in the other it comes about dishonor, it is given the advantage of a

claim for dishonor» (I. III) [2, p. 30]. It should be noted that for the offense in the form of dishonor criminal liability was also established: «... the one who accused someone of committing a crime shall within two years prove his accusation otherwise disposes of the fourth part of the estate and is admitted as dishonest» (I. II) [2, p. 17].

Thus, the system of tort liabilities is not only based on common concept of tort, but on individual species. Therefore, for making claim about damage compensation or loss was necessary to move it to a separate tort. The compensation method of caused harm, the calculation of compensation amount of property damage depended on the assault objects of offender.

Tort liability (for damages) was considered as such that are not transmitted in legacy: «The theft claim does not proceed against heirs» (VI. V) [3, p. 213]. This situation was predetermined by the fact that violated property rights of the victim identity were defended by penalty claims. Accordingly, the application of them to the offender's successors was considered unfair so in Roman law (D. 47.1.1). However, the right to file a claim from a private tort passed to the heirs: «The lawsuit which an important punishment is followed, if initiated litigation, passes to the successors» (I. III) [2, p. 30]. Unlike tort claims, inheriting the idea of Roman lawyers, «a claim for return to the owner of things and claim to the one who ran the business, always passes to the heirs and against the heirs» (I. III) [2, p. 32].

The Armenopoulos' Six books considered tort liabilities as temporary: «Claims are not eternal, that is the same thing cannot always be asked, so there is a time limit after which any right of claim is terminated» (I. III) [2, p. 25]. That is, tort liabilities existed within the period of limitation, which according to the Roman tradition was equal to one year. For the occurrence of tort liabilities it was required to set the conditions that allow characterizing the behavior of the tortfeasor as an offence. These include presence of harm, wrongfulness of its infliction, relationship between cause (illegal job) and consequence (harm), guilty.

The starting point of tort obligations construction under the Armenopoulos' Six books was the presence of harm. Such conclusion can be drawn from the title of the book VI «Of the Harm and Loss», where it's talking about individual delicts. That is, the harm itself was regarded as a tort, inheriting this idea of the Roman jurists: «Noxia est autem ipsum delictum», the harm is itself a tort [10, p. 387]. Besides from the title of this book implies that in the Six books there is no distinction of the terms «injury» and «damages» (in Roman sources «harm» and «loss» was designated by the single term «damnum»).

Liability for harm caused by the offence had restorable and free nature. Primarily the tortfeasor was obliged to compensate the actual damage (losses): to return to the owner a dead animal (VI. V) [3, p. 215], to pay the cost of damaged or stolen items (VI. V) [3, p. 215], to pay the costs of the treatment of victims (VI. (I) [3, p. 200].

Loss of benefit was also recovered: «If body of the slave is damaged in addition to treatment costs lost work time is paid» (VI. 1) [3, p. 200]. If the

harm was caused to the owner as a result of theft, the thief was supposed not only to turn the stolen thing, but «the income received from it, even when there was no income» (I. XII) [2, p. 111].

Reflecting the ideas of the Roman lawyers, not only direct damages, caused to the direct object of assault, were recovered, but also indirect, caused to the victim as a result of the infringement of any other interests. So, «...if the damage is in the body of the slave, in addition to medical expenses and lost work time, had to be paid the price of a slave» (VI. 1) [3, p. 200]. That is, indirect harm is not identified with loss of profits. The main difference between these concepts was the object of encroachment: loss of profits when damage was applied directly to the object of infringement («lost time»), in the case of indirect harm suffered other interests of the victim, but linked to the direct object of infringement («lost cost slave» in the future from the sale of the slave).

According to the Armenopoulos' Six-volumes punitive damages were distinguished: «If wild or subdued animal will cause harm to other items (will not cause death or damage to health) you will be charged double price of loss» (VI. 1) [3, p. 199].

Thus, the damage caused by the offence according to the Armenopoulos' Six-volumes was recovered on the principle of full compensation, which consisted in giving the tortfeasor a duty to indemnify in full, to compensate the actual damages, lost profits, indirect damage (loss). The application of this principle allows the victim to compensate all the lost property goods. The laying on the tortfeasor of obligation to pay the penalty damage (loss) was based on the principle of high multiple liability, which provided tort liabilities with a penal character.

Unlike Roman private law, where lawyers emphasized the wrongfulness as a mandatory feature of the harm of tort (Aquila's law applies only «when slave were killed illegal» (9. 2. 3) [10, p. 393], according to the Armenopoulos' Six-volumes contains indication to wrongfulness only in one rule, formulated in a reverse form: «If someone saving his home from fire destroyed the house of a neighbor to prevent the fire from a neighbor's house to overturn on his house, he is not condemned as for an *illegal violation (italic — S. G.)* and shall not cover damages caused by the Law of Aquilius» (VI. 1) [3, p. 199]. Such an approach of the legislator can be explained referring to the content of the rule: «Must adhere to local laws, but if not, then customs, and if not, it is possible to apply the decrees of Rome» (I. (I) [2, p. 7]. And in the next rule on the harm or loss states that «of all the laws regarding damages the most important was recognized the Law of Aquilius» (VI. 1) [3, p. 199]. Thus, applying the content of Aquilius Roman Law it is possible to draw a conclusion about the belonging of wrongful acts «committed not accordingly to law, which means against the law, that is so, it seems the murder was committed in the presence of guilt» (Ulpian) (D. 9. 2. 5. 1) [10, p. 393] to the tort obligations conditions occurrence under the Armenopoulos' Six-volume. The main evidence of illegality was violation of the objective law norms and connection with the fault of tortfeasor.

Wrongful conduct had always been expressed in a concrete form, because it didn't exist outside. As in Roman private law, in the Armenopoulos' Six books wrongful conduct was expressed only in the form of action (delicta in commissione), which caused losses in the assets of the victim and harmful consequences in the sphere of moral relations.

Damage must be caused by the person directly (by direct influence of the person on the thing) by touch of body. If such an impact of the person on the thing was absent, also wrongfulness was absent, so it should be submit a claim for fact of injury and not on the fact of the tort. In this case, the person responsible for the damage was charged with the duty to indemnify not a real harm (damages) but a penalty harm (damages): «who struck or injured horse, have to pay twice, because it (*the horse, the animal — S. G.*) didn't cause harm by his body» (VI. 1) [3, p. 200].

Not any deviation from the requirements of law was recognized as illegal. For the Armenopoulos' Six books damage was not considered as one that caused in wrongful way in the cases of self-defense. Self-defense applies to such methods of protection that everyone had the right to apply for preservation of their own rights. Two ways of self-defense are distinguished: self-defense and extreme necessity.

Self-defense was used when the attack occurred on the person or on his property. Thus, the limits of its legitimacy were established: «Any person has the right to repel force by force, weapons by weapon» (I. XI) [2, p. 99]. According to Roman tradition, the legislator granted the right to go beyond the set limit by killing a thief in the night found at the crime scene: «Who killed the night thief was not subject to punishment only when he could not pardon him without danger to himself» (VI. V) [3, p. 214].The indication of condition of such sanctions for the thief was simultaneously the indication of lawfulness condition of self-defense: occurred when creating a real threat of harm and was applied only to the person whom the threat came from.

Inheriting the ideas of the Roman lawyers, the Armenopoulos' Six-volumes forbid the exercise of self-defense in the form of arbitrariness. The main difference between self-defense and arbitrariness was the fact that self-defense meant maintaining by the own power of the status quo in it infringement by other persons by means of resistance when it takes place the person's right violation. But arbitrariness was considered the restoration of status quo by own power, according to subjective law. To arbitrariness it was attributed the fulfillment of law requirements by removing debt, own things, any self-satisfaction. For example, «who takes without verdict forcibly from another his thing, he loses it forever; if a thing was alien, he returns the thing itself and its cost» (VI. (VII) [3, p. 222]; «who hurts or kills another man's ox or donkey, if he finds him at own field damaging to the crop, instead of returning the animal to the owner and to claim damages, he must return to the owner an ox for an ox, a donkey for a donkey» (VI. VII. 4) [3, p. 244]. The self-defense was considered as lawful action and the use of arbitrariness — illegal, so it was forbidden.

To eliminate the danger threatening injury was used such method of self-defense as extreme necessity. The issue of extreme necessity arose when

for protection of personal subjective rights the damage was applied to a third party. For example, «if someone saving his home from fire destroyed the house of a neighbor to prevent the fire from a neighbor's house to overturn on his house, he is not condemned as for an *illegal* violation and shall not cover damages caused by law of Aquilius» (VI. 1) [3, p. 201]. Thus, the act committed in extreme necessity was recognized as legitimate and does not qualify as a tort. The obligation on compensation of the harm caused to him didn't arise.

Closely related to extreme necessity was damage in general average, using modern terminology: «If to relieve tossing the goods are thrown away in the sea, the owners of the goods shall receive compensation and the ship itself is involved in a loss» (II. XI) [2, p. 237]. Characteristic features of general average were: 1) the donation was carried out with the intention to save the ship and cargo from a common danger; 2) the danger must be for the vessel and cargo total.

Shared between general average and extreme necessity was that they were carried out in emergencies to rescue both personal and third party interests from real danger. Unlike extreme necessity, losses by general average already give rise to obligations on compensation of the harm caused by lawful actions (and therefore were not delict). Such losses were distributed between the ship, freight and cargo, depending on their value.

Mandatory condition for the occurrence of tort liabilities was a causal link between the wrongful act and the deleterious effects, as in the Armenopoulos' Six-volume was provided reparation to the victim at the expense of those who violated the rights of another person. That is, the requirement of causality is expressed by pointing to the person causing the harm: «Who hurts or kills another man's ox or donkey, he must return to the owner an ox for an ox, a donkey for a donkey» (VI. VII. 4) [3, p. 244]; «whoever commits theft in the day… is liable to be paid in four…» (VI. V) [3, p. 213], and such as.

Following the ideas of the Roman lawyers, the Armenopoulos' Six-volume provided legal values for both direct and indirect causality between the wrongful conduct and its consequence. Direct causality occurred when in the chain of events that has been developing between the wrongful conduct and harm, there are no circumstances relevant to tort liability. In cases where between the wrongful conduct and harm there are circumstances which the law gives as important in deciding on tort liability (wrongful conduct of third parties, force majeure), there is an indirect causality. For example, «who struck or injured horse, have to pay twice, because it (*the horse, the animal — S. G.*) didn't cause harm by his body» (VI. 1) [3, p. 200]. That is, between the wrongful conduct of the person that struck or injured horse that has resulted in infliction of a horse, and the harm an indirect causality (mediated) is present, therefore there was a duty to indemnify on the fact of injury, not a tort. The sanction to guilty person that was used for damage depended on it: was charged with the duty to compensate the actual damages (losses) or penalty damages (losses).

Laying duty on someone who caused harm would be his fault (culpae) recognition. In Roman legal tradition, the fault in tort liabilities were treated as

the person's attitude to their behavior and its consequences, which manifested itself in the form of intent (dolus) or negligence (culpa). For the Armenopoulos' Six-volumes intent if implies a loss for another was defined as malice, anger of soul, deception or concealment (I. XII) [2, p. 103]. Therefore, even liable minors were held for intentional causation of harm: «Age does not help minors in crimes, i.e.: when they have used deception or concealed, and it is associated with damage to the other» (I. XII) [2, p. 103]; «Age helps a minor when the offence was committed without malice and not out of anger of the soul» (I. XII) [2, p. 103].

The lack of care and foresight fell under negligence. For example, the owner of the animals (dog, wolf, lion, etc.) were prosecuted in the presence of his guilt: «... doesn't leash on the road where people are walking or leash not so that he could not corrupt» (VI. 1) [3, p. 199]; «if someone shrugged his field and moved back his cattle, which caused damage to the neighbors, who did not reap the field, got 30 shots and made reparation for the cattle damage» (VI. VII. 5) [3, p. 246].

Negligent infliction of harm entailed the involvement of liable person only in the cases provided by law or contract between the parties. Unlike negligence, for willful harm causation responsibility always came for its causer. Even if in the contract the reservations about the lack of responsibility for the intent were made, according to the Roman jurist Celsius, such a reservation should be considered invalid, because of its contradiction to the principles of a good faith [11, p. 529]. We find confirmation of such a rule in other maxims of the Roman jurists: «No agreement shall not dismiss the responsibility of malice» (D. 2.14.27.3) [12, p. 279]; «if the transaction is performed that the victim will not sue with furtum or injuria, it is not enforceable as immoral; but if such actions have already been implemented, it is possible to enter into such a contract (for example, on payment of a thief of a certain amount to the victim as compensation for a tort)» (D. 2.14.27.4) [12, p. 279].

The above allows concluding that the form of guilt of harm causer mattered for the emergence of tort liabilities, and not just the finding of guilt. However, the form of guilt of harm causer did not affect the amount of compensation, as any harm causer's fault was reimbursed in full. On the model of the Roman sources, the Armenopoulos' Six-volumes enshrined the presumption of harm causer's guilt that had to prove that the damage was caused by the fault of third parties, due to the intent or force majeure circumstances.

To the Armenopoulos' Six-volumes not every individual was brought in harm liability caused by tort. In the list of incapable for responsibility persons there were minors and invalid persons. Therefore the ability of individuals to act as the debtor in tort obligations under the Roman legal tradition depended on its legal capacity, which in turn depended on three factors: 1) the status of freedom (status libertatis); 2) family (status familiae); 3) ability to understand the significance of their actions.

Minors were called «man to 14 years and a woman to 12 years from birth, which were under the care» (I. XII) [2, p. 99]. Therefore, the «minors never act participants in contractual relations, except when they are damaged or

they had obligations for their own mistakes or fraud of the other» (I. XII) [2, p. 107]. Freeing a minor from obligation to compensate damage under the Armenopoulos' Six-volume was imposed by the Roman tradition to persons under the care of whom was an infant: «Care was seen as the right and the power that is given to someone over a free man to protect him in childhood, or to preserve true wealth» (IV. HEE) [2, p. 184]. That is, the trustee compensated the damage caused by the wards, at the expense of his property (in general being likened to the father of the family). If the trustee was appointed the child's mother (if after the death of her husband there were children and if she didn't get married second time (I. XIII) [2, p. 112], it was not obligated to pay: «Mother, if you co-sign for her child, still enjoys accepts («no obligation to pay»), but if promised to pay a dowry, the law does not protect» (I. XIII) [2, p. 113].

On the Roman legal tradition the minor in juvenile age «close to adolescence (~14 years) is able to steal and to injury» (I. XII) [2, p. 116]. That is, the law did not associate the presence of the person's capability with the attainment of a specific age.

Always the adult (over 25 years) and the minor (aged 14 to 25 years) were brought to tort liability for damages. «Age does not help minors in crimes, i.e.: when they have used deception or concealed, and it is associated with damage to the other» (I. XII) [2, p. 103]. The only circumstance, liberated young person from the duty in tort was committing the crime «without malice and not out of anger of the soul» (I. XII) [2, p. 103]. Those «who did something from fear or violence and those who suffered something or received due to error or lack» (I. XII) [2, p. 106] were equaled to minors/

Responsible for damage caused by animals (dog, wolf, lion, etc.) were considered their owner. According to Roman tradition it was provided the noxal responsibility: «If a four-footed animal caused someone harm, he was given the right to sue for extradition of animals or compensation of damages» (VI. 1) [3, p. 199].

For the Armenopoulos' Six-volume the right to sue in tort was given to the trustee of a child and an incapable person, a minor and an adult. As for woman — the trustee Roman rule acted: «a woman may not file criminal charges, only when it comes to murder her parents, children, masters, who released her, their children and grandchildren and other relatives, against whom she can't testify» (I. XIII) [2, p. 112].

Minors had such a right if he applied to the court with the consent of the trustee, then his petition was met (I. XII) [2, p. 100].

Regarding the possibility for the slave to act as capable for responsibility person or victim, there are Roman ideas: «a servant is not subject to any of the claim»; «a slave cannot own thing, which is managed, as he could not have nothing»; «slavery is similar to the death» (I. XIV) [2, p. 120–121].

Conclusions. Thus, the ideas of Roman jurists on the institute of tort liabilities were reproduced in the content of the Armenopoulos' Six-volume. In the context of torts gaps in the legal regulation it was filled with the Law of Aquilius. This allows making a conclusion about the value of the Armenopou-

los' Six-volume as sources of knowledge of Roman private law about tort liabilities, as well as the Law of Aquilius as Roman legal source in vigor in Ukrainian, Moldavian and Romanian lands before 1862.

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ШЕСТИКНИЖЖЯ АРМЕНОПУЛА ЯК ДЖЕРЕЛО ПІЗНАННЯ ДЕЛІКТНИХ ЗОБОВ'ЯЗАНЬ СТАРОДАВНЬОГО РИМУ В ЄВРОПІ

Резюме

У статті здійснено історико-правовий аналіз деліктних зобов'язань за римським приватним правом і Шестикнижжям Арменопула. Вказано, що джерелом пізнання римського приватного права на українських землях (також молдавських і румунських) було Шестикнижжя Арменопула — Ручна книга законів (XV ст.). У роботі розкрито історію поширення дії Шестикнижжя Арменопула на українських землях, зокрема в Бесарабії.

Встановлено, що у Шестикнижжі Арменопула найбільш розробленою була система приватних деліктів, яка носила замкнутий характер, оскільки містила вичерпний їх перелік.

Вказано, що вихідною точкою побудови норм про деліктні зобов'язання внаслідок пошкодження чи знищення чужих речей був римський Закон Аквілія. Зміст цього Закону було поширено на всі випадки завдання майнової шкоди (як речам, так і тілу людини).

Ключові слова: деліктна відповідальність, публічні делікти, приватні делікти, Шестикнижжя Арменопула, римське приватне право.

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ШЕСТИКНИЖИЕ АРМЕНОПУЛА КАК ИСТОЧНИК ПОЗНАНИЯ ДЕЛИКТНЫХ ОБЯЗАТЕЛЬСТВ ДРЕВНЕГО РИМА В ЕВРОПЕ

Резюме

В статье осуществлен историко-правовой анализ деликтных обязательств по римскому частному праву и Шестикнижию Арменопула. Указано, что источником познания римского частного права на украинских землях (также молдавских и румынских) было Шестикнижие Арменопула — Ручная книга законов (XV в.). В работе раскрыта история распространения действия Шестикнижия Арменопула на украинских землях, в частности в Бессарабии.

Установлено, что в Шестикнижии Арменопула наиболее разработанной была система частных деликтов, которая носила замкнутый характер, так как содержала исчерпывающий их перечень.

Указано, что исходной точкой построения норм о деликтных обязательствах вследствие повреждения или уничтожения чужих вещей был римский Закон Аквилия. Содержание этого Закона было распространено на все случаи причинения имущественного вреда (как вещам, так и телу человека).

Ключевые слова: деликтная ответственность, публичные деликты, частные деликты, Шестикнижие Арменопула, римское частное право.

ПОРІВНЯЛЬНЕ ПРАВОЗНАВСТВО

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THE COMPARATIVE LEGAL ANALYSIS OF THE TRANSFORMATION OF THE GENERAL RULES ON THE ABUSE OF RIGHT AT THE LAW OF POST-SOVIET AND POST-SOCIALIST COUNTRIES

The genesis of the general rules on abuse of right at the legal frameworks of the USSR and other socialist states as well as their further transformation at the legislation of the post-socialist countries are investigated in the article. First of all rules of the Draft of the Civil Code of the Russian Empire of 1913 provided on the abuse of right as well as ante-revolutionary legal studies of Russian lawyers and their impact on the Soviet law are described. Further the genesis of the rules of the Soviet law of different periods provided for the exercise of legal rights and the discussion of the Soviet lawyers for this topic are covered. The impact of the Soviet law on the legal frameworks of a number of socialist countries of the Eastern Europe is reviewed. The comparative analyses of the changes of legal rules on the abuse of right of the post-Soviet and post-socialist countries have been fulfilled as well as a modern discussion of the lawyers of the post-soviet countries for this topic has been outlined.

Key words: abuse of right, proper exercise of right, limits of exercise of right.

Problem statement. A major challenge arising in the course of the law-governed state building is a deplorable fact that many people regard their rights provided by law as unlimited ability to make any arbitral legal impact on their own discretion. Such egoistic exercise of right may take inadmissible form known as an abuse of right. Wide extension of this form of exercise of right is observed by many legal scholars and may be indirectly evidenced also by the interest displayed by the legal community for this topic in recent 10–15 years.

Analysis of researches and publications. One should mention Volkov A. V., Gorbas D. V., Durnovo N. A., Yemelyanov V. I., Zaytseva S. G., Izbrekht P. A., Malinovskiy A. A., Naumov A. E., Porotikova O. A., Radchenko S. D., Filippov P. M. and Belonozhkin A. Y. among authors, who paid attention to the issues of abuse of right at the post-Soviet area.

It is our opinion that the problems of the wide extension of abuse of right practices are determined also by the fact that legislators of a number of post-Soviet countries have chosen insufficient model of the legislative regulation of this matter after they denied from the soviet paradigm of the proper exercise of right.

Paper purpose. It is the purpose of this article to investigate the transformation of the general rules on the abuse of right in the law of post-Soviet and post-socialist countries.

Paper main body. Whereas the soviet model of the regulation of the proper exercise of rights has been elaborated at the dawn of the Soviet epoch one has to start with the brief review of the legal regulation of the abuse of right matters in ante-revolutionary Russia.

So, at the turn of XX century the legal frameworks of the most of leading European countries of civil law or Romano-Germanic legal tradition has elaborated certain approaches for the issue of abuse of right, furthermore the newest for that moment codifications resolved that problem in different ways.

A draft of the Civil Code of Russian Empire *(«Российское гражданское уложение»* in Russian) has been elaborated at that time as well. Therefore a problem of a legislative prohibition of abuse of legal right was discussed among others.

First two draft versions of the Civil Code of 1899 and 1905 provided that a person which acts within limits of a legal right provided by law is not liable for damage done and did not stipulate general rule prohibiting the abuse of right (article 1066 of the Draft of 1899 and article 2602 of the Draft of 1905) [1, p. 434].

The prohibition of abuse of right was implemented only to the last draft version of 1913 in the following wording: 'a one who shall act within limits of the legal right provided by the law is not liable for damage done unless the right has been exercised with the only purpose to injure other person' (article 1174 of the Draft of 1913) [1, p. 434].

As one may see the draft of Russian Civil Code of 1913 has reproduced the approach of the article 226 of German Civil Code (*Bürgerliches Gesetzbuch* in German) [2]. However the draft of Russian Civil Code has never been adopted because of First World War, Revolution and Civil War in Russia.

Also, it should be noted that there was a case law for abuse of rights at Russian Empire commented by the contemporary legal scholars notwithstanding the absence of the legislative rules.

V. Domanjo is one of Russian legal scholars of that epoch who paid attention to the issue of abuse of right and we are informed of the ante-revolutionary case law for abuse of right due to his studies. He regarded that abuse of right lies in exercise which is not in line with purpose of law in general as well as purpose of this concrete right in particular [1, p. 435].

It is important to note that V. Domanjo emphasized connection between legal right and certain social function, upon that inconsistency between them amounts to the abuse of right.

I. Pokrovskiy was another one ante-revolutionary legal scholar commented abuse of right issues. In his judgment abuse of right constitutes a tort and «a fact that exercise of right is a mean of harm-doing does not in any way excuse in this situation, because legal rights are granted in order to fill legal interest of the entitled person but not to injure others» [3, p. 118].

The socialist revolution in Russia called into existence new legal order which was principally different from the one of the Russian Empire.

The Soviet law provided general rule that legal right is to be exercised according to its purpose. V. Gribanov, who was a leading soviet author in the field of the abuse of right specified this rule as a manifestation of the fundamental principle of the Soviet civil law that is a principle of accordance of the exercise of legal right with its purpose at the socialist society that is legal expression of the requirement to harmonize public and private interests at the society which builds the communism [4, p. 20–21].

That was clear at the times of the first Soviet codification of law. Thus, article 1 of the Civil Code of the Ukrainian Soviet Socialist Republic of 1922 [5] provided that civil rights are under the protection of Law unless they are exercised contrary to their socially-economical purpose. The article 1 of the Civil Code of Russian Soviet Federated Socialist Republic provided the same rule [6]. Whereas the legislator did not use the term «abuse of right» («злоупотребление правом» in Russian and «зловживання правом» in Ukrainian) many soviet lawyers regarded that the rule obliged to exercise right in accordance with its purpose is suited to prevent the abuse of right.

The contemporary soviet lawyers offered the controversial opinions for the aforesaid rule. Thus, Y. Kantorovich qualified it as a fundamental change of the traditional assumptions and essential dogma of the civil law [7, p. 9], whereas B. Rubinstein regarded that idea as an adopted from the «bundle of knowledge of the capitalist jurisprudence» [8, p. 83].

One must acknowledge that the soviet understanding of abuse of right in actual fact is closely associated to the theoretical construct of one ante-revolutionary legal scholar V. Domanjo.

Some time later, upon the end of the World War II there was an opinion that the rule of Art.1 of the Civil Code 1924 fade in importance because it has been implemented into the legislation solely and exclusively in order to prevent specific abuses peculiar to the transitional period of the New Economic Policy provided by the Soviet government at 1921–1928 [9, p.435; 10, p.267]. At the same time M. Agarkov regarded that exercising of right cannot be illegal and actions usually called as abuse of right are operated outside of its limits [9, p. 427].

M. Baru opposed that opinion and argued that term 'abuse of right' expresses really existing relations where entitled person exercises its right in improper way and it nevertheless carries a face of a legal act [11, p. 118], i.e. in fact grounded actuality of the rule of abuse of right in the context of the soviet society of that epoch.

One must emphasize that the abuse of right phenomena have been limited under the Soviet regime by few situations in the residential lease on the whole

which were often eccentric enough. As an example we may regard a situation where the landlord destroyed a part of the house where tenant lived in his absence after the claim for dispossession of the tenant has been rejected by the court [11, p. 118].

The codification of the Soviet law which took place at sixties of XX century held up the principle of exercising of legal rights according to their purpose. Thus, Article 5 of the Fundamental Principles of the Civil Legislation of the Soviet Union and Union Republics of 1961 [12] as well as Article 5 of the Civil Code of Ukrainian Soviet Socialist Republic [13] and Article 5 of the Civil Code of the Russian Soviet Federated Socialist Republic [14] provided the following identical provisions: «Civil rights are under the protection of law unless they are exercised contrary to their purpose in the socialist society at the stage of building of the communism. Citizens and organizations have to obey the law and respect rules of the socialist community life as well as moral principles of the society which builds the communism when they exercise rights and fulfill obligations».

As one may see ideologically neutral category of «socially-economical purpose of legal right» has been replaced by the ideologically tinged category of «purpose of legal right in the socialist society at the stage of building of the communism». Also proper exercise of right was tied with duty «to obey the law and respect rules of the socialist community life as well as moral principles of the society which builds the communism».

A vast discussion appeared among the soviet lawyers on the abuse of right matters namely resulting from the second Soviet codification of early sixties.

M. Samoylova highlighted that holder of right acts legally in all the situations where he exercises his right, so illegal exercise of right is impossible following the line of reasoning of M. Agarkov [15, p. 11]. As one may see aforementioned authors principally denied the very notion of possible illegality of acts of the person exercising its legal right.

On the contrary such authors as V. Riasentsev and S. Bratus regarded that exercise of right may be declared as illegal but assumed that the «exercise of right according to its purpose» category provided by the contemporary law is sufficient enough and opposed use of «abuse of right» term as a needless one.

V. Riasentsev regarded that «abuse of right» term emphasizes subjective aspect of entitled person's behavior much more than «exercise of right according to its purpose» category and does not clarify properly the essence of the social phenomenon in question [16, p. 8–9]. In the opinion of S. Bratus the use of «abuse of right» category might result in disregard for the rule of law as well as unwarranted expansion of the judicial discretion [17, p. 82].

V. Gribanov was the one who upheld the idea of «abuse of right» and wrote the first monograph with the investigation of this problem at 1973 [4].

In the opinion of V. Gribanov one may and one should use «abuse of right» category in order to describe certain kind of violation of law meaning injurious act committed by entitled person in the course of exercise of its right concerned with impermissible particular form within limits of the general pattern of behavior permitted by the law [4, p. 55].

V. Gribanov separated the categories of «limits of the legal right» and «limits of the exercise of the legal right». In his opinion the person which is going beyond the limits of right in other words exercising act which is outside of the content of the legal right in question commits delict and there is no abuse of right in this case.

So, the abuse of law takes place if a person acts within the limits of the legal right but beyond the limits of the exercise of the legal right, i.e. exercises acts included at the content of the legal right by improper way.

The category of the «limits of the exercise of the legal right» is a key notion of the V. Gribanov's concept. He discovers the aforesaid limits not only as a purpose of right according to the cotemporary legislation bur also as legal requirements for the entitled person, terms and order of exercise of right as well as nature and limits of means of enforcement and remedies of the right of entitled person. V. Gribanov regarded that breach of any of these criteria means breach of the limits of the exercise of the legal right and is an evidence of the abuse of right.

The V. Gribanov's theory asserted great influence over the genesis of the concept of the abuse of right. It may be regarded today as a parental for a number of modern theories of the abuse of right. Nevertheless it has some lacks and is subjected to the serious critics as a result.

Nevertheless the Fundamental Principles of the Civil Legislation of the Soviet Union and Union Republics of 1991 [18] developed the concept of the exercise of the right in accordance with its purpose but not the concept of the limits of the exercise of the right.

Article 5 of the Fundamental Principles provided that citizens and legal entities may dispose by the civil rights they have including right to protect them by their discretion to the extent that exercise of civil rights shall not injure rights and interests of other persons protected by the law. Citizens and legal entities have to respect moral principles of the society and rules of business ethics while they are exercising their legal rights. Civil rights are protected by the law unless they are exercised contrary their purpose.

One may see that rules mentioned above are ridden of an ideological bias. Fundamental Principles provides among criteria of proper exercise of right not only purpose of legal right but also respect of moral principles of the society and rules of business ethics as well as the very important criterion of non-infringement of rights and interests of other persons protected by the law.

So we may put in a nutshell the following essential features of the Soviet epoch legal rules in this field: there was no direct legislative prohibition of abuse of the legal right; there was direct legislative prohibition to exercise legal right contrary to its purpose that was thought of as a prohibition to abuse the right by some legal scholars.

The most important features of genesis of the doctrine of abuse of right of the Soviet epoch are the following: there was a discussion on the very possibility of the illegal exercise of rights as well as permissibility of the malicious exercise; there was a discussion on the necessity of the category of the abuse

of legal right; the concept of the «limits of the exercise of rights» has been developed.

The legislators of the socialist countries in general copied the soviet model of the legislative rules in this field.

Article 5 of the Civil Code of Polish People's Republic of 1964 [19] prohibited exercise of right contrary to its socially-economical purpose (*spoleczno-gospodarczym przeznaczeniem* in Polish) or to the basic rules of the community life (*współzycia spolecznego* in Polish). Acts like that are not regarded as the exercise of rights and are not under the protection of law. Aforesaid Article 5 has been entitled as «abuse of subjective right» (*nadużycie prawa podmiotowego* in Polish). One may see it resonates with the aforementioned idea of the soviet legal scholars that exercise of the legal right contrary to its purpose means abuse of right. The legislation of Yugoslavia concerned abuse of right as an exercise contrary to its purpose. Article 13 «Abuse of right» (*злоупотреба права* in Serbian) of the Law of Socialist Federal Republic of Yugoslavia «On obligation relations» prohibited exercise of rights contrary to its purpose provided or acknowledged by the law [20]. Article 4 of the Law of Socialist Federal Republic of Yugoslavia «On the Fundamental Principles of the Property Relations» provided the same prohibition for the same kind of improper realization of the ownership right and regarded that ownership right is to be exercised in line with the nature and kind of property [21].

Article 7 of the Preamble of the Civil Code of Czechoslovak Socialist Republic of 1964 prohibited abuse of right contrary to the interests of the society and other citizens as well as self-enrichment to the injury of citizens and society [22].

Article 5 of the Civil Code of Hungarian People's Republic of 1959 prohibited the abuse of rights an provided that exercising of any right directed toward an objective that is incompatible with the social function of that right shall be regarded as an abuse of rights, particularly if it would lead to damaging the national economy, harassing persons, impairing their rights and legal interests, or acquiring undue advantages [23].

One may see that the law of the socialist countries mentioned above stipulated principle of the purpose of legal right taken from the soviet law but unlike the legislation of USSR the term of abuse of right has been implemented at the *lex lata*. The crisis of the socialist system in the late eighties as well as the crash of the socialist camp and USSR followed after that drew forth a number of the reforms at post-socialist and post-soviet countries. The criteria of qualification of the abuse of right have been revised in the course of legal reforms.

The Preamble of Czech Civil Code qualified abuse of rights as an unsocial exercise has been disestablished whereas Part 1 of Article 3 was redrafted as the following: «exercise of rights and obligations has not to injure rights and legal interests of other persons as well as to be against good morals» [24].

The same rule is still in force in Slovakia [25], whereas the new Civil Code of Czech Republic has been adopted at 2012 and came into force at 2014 [26].

Part 1 of Article 6 of Czech Civil Code of 2012 obliges one to act honestly (*poctivě* in Czech), states at article 7 person that acts in the way provided by

the law is regarded as acting honestly and in good faith (*poctivě a v dobré víře* in Czech) and arranges at the article 8 that obvious abuse of right (*zjevné zneužití práva* in Czech) is not protected by law.

So the Czech legislator discovers abuse of right at its exercise performed not in the way provided by the law.

The new Civil Code of Hungary of 2013 prohibits abuse of right at Article 1.5 as well as the Code of 1959 but does not mention category of «purpose of right». According to Article 1.3 of the Code in exercising rights and in fulfilling obligations the requirements of good faith and fair dealing shall be observed. The requirements of good faith and fair dealing shall be considered breached where a party's exercise of rights is contradictory to his previous actions which the other party had reason to rely on [27].

Article 15 «Abuse of Right» (*Abuzul de drept* in Romanian) of the Civil Code of Romania of 2009 entered into force at 2011 [28] is a verbatim translation of the Article 7 of the well known Civil Code of Quebec [29] providing that no right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.

Also there is Article 1353 at the Civil Code of Romania providing that person is not obliged to indemnify for the damage caused by the exercise of right unless the abuse of right took place.

It is seen that Romanian legislator regards abuse of right as chicane and exercise of right in excessive and unreasonable manner, and therefore contrary to the requirements of good faith, following the authors of the Civil Code of Quebec.

At 1993 Article 6 of the Law of Bulgaria «On Obligations and Contracts» of 1950 has been revised and its new version provides that persons exercise their rights in order to satisfy interests and should not do that contrary to the interests of the society [30]. Article 289 «Abuse of Right» (*злоупотреба с право* in Bulgarian) of the Trade Code of Bulgaria of 1991 provides that exercise of right arose from the commercial deal is inadmissible if it has been done in order to cause damages of the other person [31].

Thus the abuse of right is understood in Bulgaria in the sense of the category of lawful interest and is regarded as chicane.

In general the legal frameworks of the post-socialist countries mentioned above have refused from the Soviet concept of the purpose of right. The same is not true at Poland and former republics of Yugoslavia. Article 5 of the Civil Code of Polish People's Republic of 1964 [19] prohibited exercise of right contrary to its socially-economical purpose or to the basic rules of the community life is still actual at contemporary Poland.

The old Laws of Yugoslavia «On Obligation Relations» and «On the Fundamental Principles of the Property Relations» prohibiting exercise of rights contrary to its purpose provided or acknowledged by the law as well as obliging ownership right to be exercised in line with the nature and kind of property still have effect at Serbian Republic [20; 21]. The identical laws have been entered into force by the Assembly of Republic of Macedonia [32; 33], by the

Parliament of Montenegro [34, 35], by the People's Assembly of Republika Srpska (the Serbian part of Bosnia and Herzegovina) [36, 37], by the Parliament Assembly of the Federation of Bosnia and Herzegovina (the Croatian and Muslim part of Bosnia and Herzegovina) [38, 39].

The Parliament of Croatia (Sabor) has adopted law [40] identical to the Law «On Obligation Relations» with the same rules on the abuse of rights (*zlouporabe prava* in Croatian). Nevertheless the Law «On the Ownership and Other Proprietary Rights» [41] on the contrast deeply varies from the old legislation of Yugoslavia and constitutes conceptually different act.

As for the abuse of right Article 31 of the aforesaid law directly prohibits chicanery (the owner is not empowered to use its rights with the only purpose to injure or to cause inconvenience) and does not use term «abuse of right».

The Parliament of Slovenia adopted 2 totally new codes provided the rules on the abuse of right (*zlorabe pravic* in Slovenian) namely the Code of Obligations (*Obligacijski Zakonik* in Slovenian) and the Code of Proprietary Rights (*Stvarnopravni Zakonik* in Slovenian). The aforesaid codes provide the following concept of abuse of right: rights are to be exercised in line with the fundamental principles of each code and according to their purpose, the fictitious exercise of right (*navidezno izvrševanje pravice*), i.e. exercise of right with the only or obvious purpose to injure (namely — chicane) is prohibited (Article 7 of the Code of Obligations, Article 12 of the Code of Proprietary Rights) [42; 43].

Also Part 2 of Article 7 of the Code of Obligations obliges the participants of the obligation legal relations to refrain the conduct which is complicating the performance of obligations by other persons while they are performing their own obligations. Part 1 of Article 12 of the Code of Proprietary Rights provides restriction of the rights of owners as well as other proprietary rights with the similar rights of other persons. As one may see the principle of the purpose of legal right dated back to the legislation of Yugoslavia and USSR is still topic in the legal frameworks of the countries of former Yugoslavia. It ought to be specially focused on the complex approach implemented by the Slovenian legislator to the issue of abuse of right.

Unlike the former Yugoslavian republics and Poland the post-Soviet countries refused outright the soviet approach in the field of the abuse of right. Consequently we may divide post-Soviet countries in some groups depending on the approach provided by the legislation in the field of the abuse of right.

Thus, Article 115 «Inadmissibility of the Abuse of Right» of the Civil Code of Georgia of 1997 [44] provides that civil right shall be exercised lawfully. Exercise of a right exclusively with the intention to inflict damage on another shall not be allowed. In this case we may see the prohibition of the classical canonical form of the chicane as well as use of the criterion of «lawful exercise of rights» which may be defined as a not too purposeful one for qualification of abuse of right.

The legislation of some post-Soviet countries provides the general rule for good faith but not for the prohibition of the abuse of right.

The legislation of Latvia is a briefest one in this field. Article 1 of the Civil Code of Latvia [45] of 1937[1] provides only that rights are to be executed and obligations are to be performed in good faith.

The legal regulation like this appears as a lapidary and clearly insufficient. Part 1 of Article 9 of the Civil Code of Moldova of 2002 obliges natural persons and legal entities participating in civil legal relationships to exercise their rights and perform their obligations in good faith, pursuant to law, contract, public order and good morals and provides that good faith is presumed unless proven otherwise [46].

The term «abuse of right» is used in the Civil Code of Moldova only at few special provisions on the prohibition of the abuse of rights by the tutor and usufructuary. Nevertheless the content of the notion of abuse of right is not revealed.

An advantage of the legislation of Moldova as compared to the legislation of Latvia is a clear presumption of the bona fide exercise of right as well as much more extended description of the attributes of the proper exercise of right. § 138 of the General Part of the Civil Code Act of Estonia[2] of 2002 [47] goes further and not only prescribes rights to be exercised and obligations to be performed in good faith but also provides a prohibition for the exercise right with the objective to cause damage to another person (i.e. chicane) as well as exercise right «in an unlawful manner».

Article 9 of the Civil Code of Turkmenistan of 1998 [48] in a like manner: obliges parties of the legal relations to exercise rights and obligations in good faith to do not injure other persons by act or omission (without mention of the purpose of act or omission); provides that court may dismiss a suit filed in order to protect rights if there is a breach of the requirements mentioned above; presumes that rights are executed reasonably and in good faith.

As we may see legislations of Estonia and Turkmenistan put requirement of a good faith together with a general prohibition of the abuse of right.

The most detailed regulation of the issue of abuse of right is provided by the legislation of Lithuania.

The Civil Code of Lithuania of 2000 [49] specifies the prohibition of the abuse of right among other principles of legal regulation of civil relations listed at Article 1.2 and contains extended Article 1.137 «Enjoyment and Exercise of Civil Rights and Performance of Civil Duties». The aforementioned article obliges persons to obey laws, respect rules of public welfare and principles of good morals, good faith, reasonableness and justice, while exercising their rights and performing their duties. Also there is an expanded description of the abuse of right as an exercise of right: in a manner or by means intended to violate other persons' rights and interests protected by laws; or to restrict other persons in their rights and interests protected by laws; or with the intent of doing damage to other persons; or where this would be contrary to the purpose of the subjective right.

[1] The old Civil Code of 1937 has been reissued at Latvia at 1992.

[2] Riigikogu (the Parliament of Estonia) has adopted the Civil Code of Estonia with several laws.

According to Part 3 of Article 1.137 of the Civil Code of Lithuania injury to other persons called by the abuse of right shall be the grounds for the implementation of civil liability. At the same time a court may refuse to protect the subjective right of which the person abuses. Part 5 of Article 1.137 amplifies aforesaid rule providing that civil rights shall be protected by the laws, except in cases when the exercise of these rights is inconsistent with their purpose, public order, good usages or the principles of public morals while Part 6 of Article 1.137 stipulates that a renouncement of exercise of a subjective civil right shall not abolish the civil subjective right, except in cases established by laws.

As one may see the Lithuanian legislator defines abuse of right through the alternative criteria of qualification likewise the way proposed by Article 3:13 of the Civil Code of Netherlands [50]. Put it in a nutshell it's an adequate and sound solution.

Also Part 4 of Article 1.137 provides prohibition of the exercise of civil rights in bad faith and with the intent of unlawfully limiting competition or in abuse of the dominating position in the market.

The legal frameworks of the rest of post-soviet countries (Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan, Ukraine and Uzbekistan) have the similar essential features of the legal rules provided for the abuse of right whereas divergences among them are insignificant: the prohibition of abuse of right is drafted as a prohibition «to exercise right with the purpose of inflicting damage to another person, as well as the abuse of the civil rights in other forms» (part.1 of the article 10 of the Civil Code of Russian Federation of 1994 [51], part 3 of the article 13 of the Civil Code of Ukraine of 2004 [52], paragraph 1 of the part 1 of the article 9 of the Civil Code of Belarus of 1999 [53], paragraph 1 of the part 1 of the article 12 of the Civil Code of Republic of Armenia of 1998 [54], part 1 of the article 16 of the Civil Code of Republic of Azerbaijan of 1999 [55], part 5 of the article 8 of the Civil Code of Republic of Kazakhstan of 1994 [56], part 5 of the article 9 of the Civil Code of Republic of Uzbekistan of 1996 [57], part 1 of the article 9 of the Civil Code of Kyrgyz Republic of 1996 [58], part 1 of the article 10 of the Civil Code of Republic of Tajikistan of 1999 [59]). However the law of Russia, Belarus, Armenia, Azerbaijan and Kyrgyzstan stipulates the exclusive intention of inflicting damage to another person whereas law of Ukraine, Tajikistan, Uzbekistan and Kazakhstan do not provide such regulations. Also Kazakhstani and Uzbekistani legislators as distinct of legislators of other post-Soviet countries specify exercise of right contrary its purpose among «the abuse of the civil rights in other forms»; the article of the Civil Code of the appropriate country devoted to the issues of abuse of right is nominated as a rule as «The Limits of Exercise of the Civil Rights» except for Uzbekistan and Kazakhstan; at most of post-soviet countries mentioned above the law provides regulations on the right of court to reject the claim of the person claim for the protection of the abused right, except for Azerbaijan and Ukraine as well as a clause on the presumption of the good faith of entitled persons exercising its right, except for Armenia and Azerbaijan.

The similarity of regulations of abuse of right in the legal frameworks of aforementioned countries is stipulated by the fact that legislators have taken rules of the Civil Code of Russian Federation as a model. Also it's obviously that Russian legislators followed V. Gribanov's concept.

The general rule for the abuse of right in the legal framework of Ukraine is Article 13 «The Limits of Exercise of the Civil Rights» if the Civil Code of Ukraine.

The aforementioned article: provides prohibition of exercise of right with the purpose of inflicting damage to another person, as well as the abuse of the civil rights in other forms (Part 3 of Article 13); obliges to refrain from acts injuring rights of other persons as well as prejudicing environment or cultural heritage (Part 2 of Article 13); obliges to abide the moral principles of the society in the course of exercise of right (Part 4 of Article 13); provides prohibition of exercise of right for the purpose of restricting the competition, as well as the abuse of the dominating position on the market and unfair competition (Part 5 of Article 13).

There are following specific features of the legislation of Ukraine in the field of prohibition of abuse of right as compared to the legal frameworks of other post-Soviet countries: the regulations of Part 1 of Article 13 of the Civil Code of Ukraine provides that person shall exercise civil rights within limits established by the contract or acts of civil legislation. As it was mentioned above articles of the Civil Codes of a number of post-Soviet countries are titled as «Limits of Exercise of the Civil Rights». Beyond a shadow of doubt that is a clear reference to the theory of the limits of exercise of rights of the Soviet scholar V. Gribanov, but legislators of the post-Soviet countries do not use term «limits of the exercise of civil rights» in the body of legislative rules. The Ukrainian legislator takes it a step further and provides direct legislative implementation of the theory of V. Gribanov. Nevertheless the Civil Code of Ukraine does not clear up how we should understand the limits of exercise of the civil rights; the regulations of Part 6 of Article 13 of the Civil Code of Ukraine providing that the court may oblige the person to terminate proved abuse of right. Such approach provides that injured person shall file the suit claiming person abusing its right to terminate unlawful conduct. It means that injured person sues as a plaintiff and wins an action in case if the abuse shall be proved. This way is totally different from the approach provided by the legislation of Russian Federation as well as a number of other post-Soviet countries stipulating that court may dismiss the claim sued in order to protect abused right. It means the reversed situation where abuser shall sue and lose if defendant proves the fact of abuse of right.

Thus the development of the legislative regulation of the problem of abuse of right at the post-Soviet countries has been subjected to the substantial changes of the following features: legislators have retreated from the purpose of the legal right as a leading criterion. It has been survived to the present day only at the legislation of Kazakhstan, Lithuania and Uzbekistan as one of alternative criteria; the category of abuse of right is directly provided by the legislation of most of the post-Soviet countries as well as a direct prohibition

of chicane. The only exceptions are the legal frameworks of Moldova and Latvia providing only obligation to act in good faith while exercising legal right; legislators of most of post-Soviet countries do not expand the content of the notion of abuse of right; civil codes of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan, Uzbekistan and Ukraine provides references to the category of «limits of exercise of right» proposed by the soviet legal scholar V. Gribanov but unfortunately do not expand the content of this category. The most striking instance of this trend we may see at the Civil Code of Ukraine.

One must admit the approach of legislators of the aforementioned countries as insufficient and contradictory because of reference to the self-contradictory theory of V. Gribanov without disclosure of the content of the notion of «limits of exercise of right».

A number of legal studies of the abuse of right issues have occurred in the recent years as a result of insufficient legal regulations in this field.

Some of legal scholars try to improve the theory of the «limits of exercise of right» [60; 61; 62; 63; 64], whereas other criticize it motivating that there is no reason to tease out artificial 'limits of exercise of right' different from the 'limits of right' [65; 66; 67]. So, it will be observed that there are attempts to promote alternative theories of the purpose of right [65], of legal interest [67], of semblance of legality [68]. Also one should note that some of authors in Russia try to validate a concept of a 'legal abuse of right' i.e. abuse of right interpreted as an admissible and lawful act [60; 67; 69; 70]. As one can see this discussion is far from the end.

Conclusions. So, one may summarize that the most advantageous approach related to the prohibition of the abuse of right among the post-Soviet countries has been realized at the legislation of Lithuania.

The reasons for this statement are the following: the prohibition of abuse of right is regarded as a fundamental legal principle; the content of the category of abuse of right is expanded through the alternative criteria of qualification; there is a rule providing that damage caused by the abuse of right is a ground for the legal responsibility; the court is empowered to refuse to protect the subjective right of which the person abuses if the exercise of these rights is inconsistent with their purpose, public order, good usages or the principles of public morals.

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ПОРІВНЯЛЬНО-ПРАВОВИЙ АНАЛІЗ ТРАНСФОРМАЦІЇ ЗАГАЛЬНИХ НОРМ ПРО ЗЛОВЖИВАННЯ ПРАВОМ У ПРАВІ ПОСТРАДЯНСЬКИХ ТА ПОСТСОЦІАЛІСТИЧНИХ КРАЇН

Резюме

У цій статті розглядається розвиток загальних норм про зловживання правом у правових системах СРСР і соціалістичних держав і подальша їх трансформація в законодавствах постсоціалістичних країн. Узагальнюються суттєві риси як регулювання проблеми здійснення прав, так і доктрини зловживання правами в радянський період. За результатами порівняльного аналізу норм радянського права і соціалістичних держав робиться висновок про серйозний вплив радянського права на правові системи соціалістичних держав з цього питання. За результатами порівняльного аналізу норм права постсоціалістичних держав робиться висновок про відсутність наступництва в підходах до правового регулювання проблеми зловживання правами в соціалістичний і постсоціалістичний періоди в більшості держав (крім Польщі та колишніх республік Югославії). Виявлено як оригінальні рішення законодавців, так і запозичення з правових систем інших держав. Відзначається важлива роль теорії меж здійснення прав радянського правознавця В. Грибанова у формуванні норм Загальної частини ЦК Російської Федерації про зловживання правом, а також — запозичення цієї конструкції законодавцями більшості пострадянських держав, включаючи Україну. Теорія меж здійснення прав характеризується як внутрішньо суперечлива, а підхід законодавців, заснований на відсиланні до категорії меж здійснення прав без розкриття її змісту, визнається незадовільним. Кращим варіантом правового регулювання цього питання визнається рішення, передбачене в правовій системі Литви.

Ключові слова: зловживання правом, належне здійснення прав, межі здійснення прав.

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СРАВНИТЕЛЬНО-ПРАВОВОЙ АНАЛИЗ ТРАНСФОРМАЦИИ ОБЩИХ НОРМ О ЗЛОУПОТРЕБЛЕНИИ ПРАВОМ В ПРАВЕ ПОСТСОВЕТСКИХ И ПОСТСОЦИАЛИСТИЧЕСКИХ СТРАН

Резюме

В данной статье рассматривается развитие общих норм о злоупотреблении правом в правовых системах СССР и социалистических государств и последующая их трансформация в законодательствах постсоциалистических стран. Обобщаются значимые черты как регулирования проблемы осуществления прав, так и доктрины злоупотребления правами в советский период. По результатам сравнительного анализа норм советского права и социалистических государств делается вывод о серьезном влиянии советского права на правовые системы социалистических государств по данному вопросу. По результатам сравнительного анализа норм права постсоциалистических государств делается вывод об отсутствии преемственности в подходах к правовому регулированию проблемы злоупотребления правами в социалистический и постсоциалистический периоды в большинстве государств (кроме Польши и бывших республик Югославии). Выявлены как оригинальные решения законодателей, так и заимствования из правовых систем других государств. Отмечается важная роль теории пределов осуществления прав советского правоведа В. Грибанова в формировании норм Общей части ГК Российской Федерации о злоупотреблении правом, а также — заимствование данной конструкции законодателями большинства постсоветских государств, включая Украину. Теория пределов осуществления прав характеризуется как внутренне противоречивая, а подход законодателей, основанный на отсылке к категории пределов осуществления прав без раскрытия ее содержания, признается неудовлетворительным. Лучшим вариантом правового регулирования данного вопроса признается решение, предусмотренное в правовой системе Литвы.

Ключевые слова: злоупотребление правом, надлежащее осуществление прав, пределы осуществления прав.

ЦИВІЛЬНЕ ПРАВО, СІМЕЙНЕ ПРАВО

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TO THE QUESTION OF FORMATION OF LEGAL POLICY IN PRIVATE LAW SPHERE

In the article the author studies the notion of private legal policy, defines it and describes its main characteristics and principles. A special attention is paid to the quality of the private legal policy and its purpose in Ukraine. The recommendations on improvement of the private law norm-making are done.

Key words: policy of law, private legal policy, legislative work, economy of law.

Problem statement. The legal system is a complex, multilevel phenomenon which has a hierarchical structure. In our view, the domestic legal system in order consists of certain macro-levels, which by convention can be named: *mathematics of law* (general concepts, formulas, and structures), *philosophy of law* (a set of methodological approaches to the possible development of legal system), and *policy of law* (specific targeted direction towards the development of a particular legal system in specific conditions)[1].

Among the sectorial kinds of legal policy, certainly the most important, in our view, is a private legal policy, as a kind of state policy, as a set of ideas, goals, objectives, methods, approaches, which focus on the development of private law regulation. This special situation of private-legal policy is primarily related to the fact that it determines the direction of development of private law (and therefore the most natural for an individual branch of law), and thus the issues of further effective regulation of private law relations, which are the foundation for the development of civil society. The private legal policy is the key to the protection of human rights and economic development in the state. And therefore to the formation, implementation and monitoring

[1] We have mentioned this approach in the pages of scientific literature: Стефанчук Р. Шляхи реформування цивільного законодавства: погляд на Захід та Схід / Р. Стефанчук // Право України. — 2009. — № 8. — С. 53–61.

of civil policy implementation (policy in the sphere of private law) should be given serious attention.[1]

Private law policy, like any social process, must have a *specific quality measurement*. Quality, as a scientific category, includes the following components: a) *purpose* (what is this policy for); b) *efficiency* (that is, by what means is this policy); c) *stability* (how much this policy will be sustained and long-term in time); d) *effectiveness* (the extent to which the goal and the money spent on the implementation of this policy are consistent with the results obtained). Unfortunately, today almost none of these components of civil policy did have a proper implementation and monitoring.

So, today there is no a clearly defined *purpose of private legal policy* and its fundamental principles and system of values and priorities. On the contrary, in some places the conquest of the developers of the Civil Code and the leading scientists in the field of promoting the interests of private, is undermined by «the state lobbying», which in spite of all attempts to secure the dominance of «public» interest on «private».

Analysis of recent research and publications. If the questions of mathematics and philosophy of law is object of serious scientific research, the policy of law in Ukraine is unreasonably ignored. Certain articles, which sometimes appear in periodicals, are a pleasant exception, in particular, works of V. I. Borisov [1, p. 305–312], V. Golina [2, p. 24–30], L. A. Muzika [3, p. 154–160], etc.

Paper purpose. The purpose of the article is to study the notion of private legal policy, to define it and to describe the mail characteristics and principles of it. Also we'll try to give recommendations on improvement of the private law norm-making in Ukraine.

Paper main body. It should be noted that the importance of the objective of private-legal policy should take us on its regularity. Inasmuch a normal private legal policy cannot proceed without purposeful and systematic legislative activities. At the same time, the realities of Ukraine are the following. According to the chief of the Main Legal Department of the Verkhovna Rada of Ukraine M. O. Tepluk: «... only in 1997 and 1999 the Parliament adopted a resolution on the General Plan of Legislative Work for these years, and in 2006 approved the Perspective Plan of Legislative Work of the Verkhovna Rada of Ukraine of the fifth convocation. As you can see, we can't speak

[1] By the way, in the Russian Federation, they have long been paying serious attention to this question, both at the theory of law level and at the level of legal policy in the sphere of private law (see: Российская правовая политика. Курс лекций [Текст] / Афанасьев С. Ф., Беляев В. П., Вавилин Е. В., Демидов А. И., и др.; Под ред.: Малько А. В., Матузов Н. И. — М. : Норма, 2003. — 528 с.; Правовая политика России: теория и практика [Текст]: монография / Под ред.: Малько А. В., Матузов Н. И. — М. : ТК Велби, Изд-во Проспект, 2006. — 752 с.; Проект концепции правовой политики в Российской Федерации до 2020 г. [Текст] / Малько А. В., Матузов Н. И., Шундиков К. В.; под ред.: Малько А. В. — М. : Дело, 2008. — 40 с.; Российская правовая политика в сфере частного права [Текст] : материалы «круглого стола» журналов «Государство и право» и «Правовая политика и правовая жизнь», г. Казань, Казанский (Приволжский) федеральный университет, 22 июня 2011 года / отв. ред. А. В. Малько, Д. Н. Горшунов. — М. : Статут, 2011. — 295 с.).

about a sufficient consistency. And now, we must be self-critical, there is no clear definition of priorities in this activity, and therefore occurs due to consolidation of efforts of public authorities in the process of preparation and elaboration of draft laws» [1].This assessment of a leading expert on these issues forces us to rethink the need for planning of legislative activities and definition of legislative priorities. Therefore, the change of chaotic introduction of legal acts must correspond to planned and consistent standard of project activities with clearly placed emphasis and priorities. Perhaps, if this approach had been designed, the formation of national legislation of Ukraine, we would not have started with the adoption of the Criminal code. As in all transitional legal orders the regularity begins establishing the rules of game on two levels of relations — horizontal (private, i.e. relations on a «man — man») and vertical (administrative, that is the relations on the scheme of «human — state»). So the first thing they should focus its efforts on was codifications in the field of private (civil) and public (administrative) law. And only after that they should have talk about the feasibility of reforms in the sphere of criminal law. The reform in the opposite direction that took place in Ukraine, speaks of the immaturity of society and the permanence of repressive measures for the normalization of social relations. Separately they should have paid attention to the fact that the conduct of systematic reform of financial legislation should go in a logical accompaniment with the reform of procedural legislation. Therefore, the planned legislative work is an important factor of the implementation of private-legal policy.

The regularity of prospective legislation directly depends on the availability of normal rules of lawmaking. It seems that causes no denying the truth of the phrase that was at the time expressed by the eminent French thinker J.-J. Russo, that half of the errors of mankind would have been spared if they have agreed to the terms. And really, before we start any new business, we must always clearly define the rules of our future games. And the fact that until now we do not have legislation that clearly governs issues relating to the content, structure, process of making those acts which should continue to regulate various spheres of public life seems strange. And it is so despite the fact that the urgency of this issue has been raised repeatedly in the pages of scientific media[2].

Several times this legal act under different names was considered and even taken by the Verkhovna Rada of Ukraine («On the Laws and Legislative Activity», «On Normative Legal Acts» and such as). But as in the famous fable: «... and things are there.»

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[1] Законодавчий процес — не скринька Пандори (інтерв'ю з М. О. Теплюком) // Юридичний вісник України. — 2009. — № 46 (750).

[2] See: Панов М. І. До проекту закону «Про нормативно-правові акти» // Вісник Академії правових наук України. — 1995. — № 4. — С. 139–163; Мірошниченко А. М., Попов Ю. Ю. Чи потрібен Закон України «Про нормативно-правові акти»? // Форум права. — 2009. — № 1. — С. 362–372; Косович В. Закон «Про нормативно-правові акти» як засіб удосконалення нормативно-правових актів України / В. Косович // Вісник Львівського університету. Серія юридична. — 2011. — Вип. 52. — С. 10–20 та ін.

It is quite clear that quality backbone work should not be based on the Rules of Procedure of the Verkhovna Rada of Ukraine, and primarily on a single backbone legislative act, which is based on the main provisions of the Constitution of Ukraine that should create a solid foundation for the formation of the joint and such that does not contain internal contradictions, system of legislation. This law should be directed to regulation and protection of public relations connected with development of normative-legal acts, adoption, and entry into force, state registration and accounting, and establish uniform requirements for norm-making technique for all subjects of law-making. It is particularly important for this legislative instrument to determine system, types and hierarchy of normative legal acts in order to avoid situations like those in which in spite of the decision of the Constitutional Court of Ukraine regarding the unconstitutionality of the institution of registration, the person could not exercise its rights because the registration was compulsory in a number of ministerial regulations and by-laws. Or a situation in which constitutional rights are limited by the laws of Ukraine, for example, by setting «minimum living wage» instead of «guaranteed minimum living wage», the actual leveling of those or other human rights because of lack of funding. In its ideal form the specified law should be «legal ABC» for all future legal acts. Therefore, we consider its adoption the number one task that needs to be solved urgently.

Another issue that is almost overlooked is the issue of the *«economy of law»*. We have had a«good tradition» when submitting any normative legal act to copy in the explanatory note the phrase that the implementation of this law will not entail additional expenses from the budget. However, today in Ukraine there is practically no legislation that is «moneyless» for their costs. And that's not taking into account that the development and preparation of bill also has a commercial price tag, not when talking about lobbying for a particular bill. Therefore, it seems important here to start in Ukraine an important component of legislative activity as the «economy of law». For example, instead of the foundations of economic theory, which today is studied in the vast majority of law schools, it would be appropriate to introduce the teaching of «Economic Rights»[1], or «Economic Analysis of Law»[2]. Because for the lawyer is no less important than the issues of fixation of legal norms is the question of its content, in particular: why this approach to the formation of the legal regime of property is more justified; why exactly such a legal fixation of responsibility for the compliance with the law will be most effective; why this tax rate should act in particular circumstances and the like.

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[1] It was already partly mentioned in national scientific literature, in particular: Джунь В. Методологічні питання дослідження господарського права / В. Джунь // Вісник Академії правових наук України. — 2010. — № 1. — С. 154–168; Володвик О. А. Особливості економіко-правового мислення або чому українські юристи не опановують економічний аналіз права / О. А. Володвик [Електронний ресурс] // Сборник тезисов Международной научно-практической интернет-конференции «Экономико-правовые исследования в XXI веке». — Режим доступу: http://www.hozpravo.com.ua/conferences/uchastnik/index.php?ELEMENT_ID=616. — Назва з екрана.

[2] An important book in this regard is the work: Познер Р. А. Економічний аналіз права [Текст] / Р. А. Познер; пер. з англ. С. Савченко. — Х. : Акта, 2003. — 862 с.

When talking about the *stability of legislative work*, unwittingly, we recall the best examples of legislative activity that exist in foreign countries. Always there is a logical question as to why the Constitution of the United States was able to overcome the bicentennial anniversary and always in the eyes of Americans and the entire world will be the bulwark of the state and democracy? And of course Napoleon was right who claimed to be forgotten all his victories and defeats, and the Civil Code, which also overstepped its bicentennial anniversary, they will always remember. On this background, the desire of the Ukrainian legislators to *perfect current legislation*, especially codified acts that are always all over the world are called to be a pillar of stability and higher systematization quality looks rather strange. And this is due not only to the fact that, for example, for such a long period of existence in the Civil Code of Ukraine were made almost 100 (!) changes and additions.

Well the first thing that strikes is of course the number. Analyzing this situation, we note that in philosophy there is a methodological principle of «Occam's razor» the essence of which is that one should not multiply entities without urgent need; we should not make laws only for their number and general accounting. Therefore, we believe that now is the time to take more responsibly to the issue of quality and stability of legislation in Ukraine. The time has come to understand that the number of laws is not always turns into quality. Sometimes it is vice versa, that the large number of normative mass and permanent changes and additions thereto may adversely affect the mission to become the one and uniform regulator of social relations.

But the question is not just about numbers. The fact is that when some of changes really were related to the need to improve the text of the Civil Code, the making of the vast majority of them are just not understandable to experts in the field of civil law. So, for example, remains a mystery the changes to the Civil Code of Ukraine introduced the trust as a special kind of property rights (Part 2 of Article 316 of the Civil Code of Ukraine). Questions arise on amendments to Article 268 of the Civil Code of Ukraine, according to which the limitation period does not apply to the requirement of the central executive power body managing the state reserve, concerning the performance of obligations arising from the Law of Ukraine «On State Material Reserve». Illogical changes are highlighted in Article 190 of Civil Code of Ukraine, which not only recognized the property rights quality of inconsumable things, but also set up between the notion of «property right» and «real right» the sign of identity, while ignoring such types of property rights as contractual, corporate, exclusive and other civil rights. The latest amendments to civil legislation also contain significant gaps. According to them, there is no deal now that may be contrary to the interests of state and society. If you think about all this horror, these changes actually legalize dominance of public over private interests. Henceforth, the state will have the right to challenge any contract, which, in its subjective opinion, does not correspond to its interests. It should also be noted that this «reform» returned confiscation, as a consequence of non-compliance of deal (which is now somehow again be cited as agreement) to the interests of he state and society. I would like to remind that

its absence in the previous version has always been considered a big victory for developers of the code on public intervention in the private sector. More alarming is the fact that still no one knows who the initiator was and who is responsible for these changes and why civil scientific community does not react to these ridiculous things that are directed at the destruction of civil law mechanism[1]? But it's important that everyone knows who is behind this or any other bill. The «quiet lobbying» should belong to the past. Everyone remembers the time when the project of the Civil Code was developing and we all knew who their developers were and who was responsible for the quality of this project. It is clear that it was an inviolable authority in the sphere of civil law. Today *there are actually no named bills*, the developers of normative legal acts and amendments to them, as a rule, are unknown, and like pests, hidden in the corners.

So to solve this issue it would be advisable to create a *Codification Council*, which could exist in the Parliament and to decide on the feasibility and appropriateness of consideration of a normative legal act on amendments and additions to the existing codifications and fundamental laws. This Council should consist of leading scientists, which would clearly show how «safe» and «qualitative» will be the adoption of relevant amendments and supplements and how much it will affect the general level of legal regulation.

Very bad deal in Ukraine is a question of *law effectiveness*, defined as a ratio of actual results of implementation of the law with its purpose. Schematically it is possible to display it as «the purpose — means — result».

When talking about the purpose of a law, it should be noted that every law has two objectives: general and specific. The general objective of any law is that it needs to be the main legal regulator of social relations, that is uniquely and uniformly to regulate the most important model of public relations. The essence of special purpose is somewhat different — each specific law should be the ideal regulator of a particular group of public relations. However, the law is only the first stage of its «life». Further practice will have to show how effective (or ineffective) its continued existence is. As far as social relations are a changing and dynamic thing, and therefore the legislator must, following general laws of social development, keep pace with the changes in social life that occur and affect the quality of legislative support.

Therefore, to determine the effectiveness of current legislation a constant monitoring[2] to identify issues of legal regulation and their operational de-

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[1] Although some of the work of the «scientific resistance» in some places still appear in the scientific literature, in particular: Сібільов М. М. Про необхідність збереження основних концептуальних положень чинного Цивільного кодексу України / М. М. Сібільов // Університетські наукові записки. — 2011. — № 2. — С. 74–80.

[2] The need for legal monitoring today is seriously discussed in scientific literature, in particular: Эффективность законодательства в экономической сфере: научно-практическое исследование [Текст] / Отв. ред.: Тихомиров Ю. А. — М. : Волтерс Клувер, 2010. — 384 с.; Жужгов И. В. Мониторинг правового пространства Российской Федерации [Текст] : монография. — Невинномысск: НГГТИ, 2010. — 168 с.; Арзамасов Ю. Г., Наконечный Я. Е. Концепция мониторинга нормативных правовых актов [Текст] / Ю. Г. Арзамасов, Я. Е. Наконечный. — М. : Юрлитинформ, 2011. — 208 с.

cisions should exist. Moreover, this monitoring should be based on known cybernetics principle of «feedback». This principle refers to the system supplying return signal for measuring the coefficient of performance (COP) of the system or to the proportionality of achieved results and the system itself. Extrapolating this definition to the plane of legislative activities, you should pay attention to the fact that it is a generalized practice of law-use can serve as a basis of «feedback» to the existing system of legislation.

This means that now is the time to seriously address the monitoring of law enforcement, to identify the effectiveness of current legislation. We should detect and dispose *blocks of «legal garbage»* that remain as Soviet legacy. It is not normal that in the twentieth year of independence, we have the Housing Code of the Ukrainian SSR (!) (1983), in which we continue «... putting into practice the Leninist idea of building a Communist society... consistently implement the program of housing construction developed by the Communist party». And such examples are many.

You should also pay attention to the fact that apart from cleaning the frank legislative anachronisms, you should focus on fixing the so-called «legal debts». So, for example, quite a few provisions of the Civil Code of Ukraine refer to legal acts, which are still not developed. Thus, in recent years, the absence of any law on compensation of harm to the victim of a crime required by Part 2 of Article 1177 of the Civil Code of Ukraine has attracted more attention. Also those legislative debts are important which are recognized as necessary for the proper functioning of applicable civil legislation (primarily a law on the harmonization of provisions of the Civil and Commercial Codes of Ukraine).

In particular some evident «misprints» should be removed from the Civil Code that are still in it. For example, Article 488 of the Civil Code of Ukraine contains an obvious error in view of the fact that Part 4 and 6 are absolutely identical in content. Part 3 of Article 1122 of the Civil Code of Ukraine which establishes a special condition of commercial concession, requires a logical conclusion and drafting, at the same time, its text is just logically incomplete. Specific questions on the content arise in respect of Article 1180 of the Civil Code of Ukraine, which defines the features of vicarious liability of parents and other individuals who have consented to the acquisition of full legal capacity of minors. However, it should be borne in mind that the Civil Code of Ukraine uses the term «receive» and «granting» full civil capacity, should also be coordinated within the code. On our conviction the attainment of full legal capacity occurs regardless of the wishes of parents or others. Therefore, this approach should be agreed and further in the text. In turn, the «provision», which should be included in this article, should be associated with this will.

So the work ahead is great. After all, the question of approval and protection of rights and freedoms is the main duty of the state. However, such liberal treatment of human rights is not conducive to faith in the legal state and civil society building. We probably need our own M. M. Speranski who would take the responsibility and managed to clean the «Augean stables» of

the modern civil law. Thus this issue should be addressed comprehensively. It's time to think about creating the Concept of Development of Civil Legislation and its implementation.[1]

Another problem of modern private law is that today, we should recognize that *we has actually completely lost inter-industry links in the field of jurisprudence*. We closed in our «branch apartments» and actually small track trends in the development of neighbors. The activity we're starting to be only in cases of a threat «to national integrity and security» to own «apartment industry». It was in the area of civil law, when fought off attacks of the «commercialists», and then struggled with the administrative agreement, then with a separatism tendency of «intellectuals» and the like. But the reason for this lies, I think much deeper. I still think that the main trouble is that in Ukraine, as in most post-Soviet countries, the theory of state and law has ceased to perform its basic function — to be a science of law and the only measure of branch law on its suitability and eligibility.

So, with unusually rapid development of national legislation, in the twentieth year of the independence of Ukraine we are unable to conduct a national discussion about the system of law. After all, this is the main! Not knowing where we are going, how can we effectively develop «our economy».

However, there is a chance for changes. But everything should be done carefully and gradually — from the Constitution of Ukraine. Personally I am a terrible enemy of «god-fearing» attitude to the Constitution of Ukraine. I found that the exclamations like «... but this is stated in the Constitution of Ukraine» are quite embarrassing. I think we should remember the Roman statement — «*errare humanum est*»! It appears that this approach basically helps to ensure that scientific researches, which always are designed to be the channel of development of national legislation, to carry prognostic and prospective nature, today, have largely a commentary tone, or worse are transcribing legal acts without the quotes or what is worse — they are a plagiarism of the first water. And so when we have the possibility of scientific analysis to improve some positions, with the scope of their more accurate understanding and correct application, it should be done.

Under Article 4 of the Civil Code of Ukraine, the basis of civil legislation of Ukraine is the Ukrainian Constitution. In turn, the Civil Code is determined as the main act of the civil legislation of Ukraine. And usually, given the hierarchy of normative acts, we are talking about the need to improve exactly the provisions of the Civil Code of Ukraine and to bring them into conformity to the Constitution of Ukraine. Such a process is even provided by the procedure for appeal to the Constitutional Court of Ukraine and the relevant decisions of unconstitutionality of some provisions of national legal acts or their interpretations.

However, analysis of the provisions of the Constitution of Ukraine suggests that it is predominantly public in nature and includes public norms

[1] The European Union (prepared in the academic Draft Common Frame of Reference), Kazakhstan, Russia demonstrate such experiences.

aimed at protecting the public interest. Thus private interest in the Constitution and its security and protection remain mainly outside the legal influence.

So today I would like to talk about a new approach that includes so much the «constitutionality» of the civil law, as a *«civil character» of constitutional legislation*. This, so to say, provides a «feedback» between civil technique and constitutional provisions, in which we could consider the private interest, the main provisions of the civil legislation, its specifics and peculiarities, so that in the period of reforming of the Ukrainian Constitution we can more clearly and correctly write and defend fixation at the constitutional level of private law provisions. This will be discussed further.

Thus, according to Part 2 of Article 5 of the Civil Code of Ukraine, the act of the civil legislation does not have retroactive effect in time, except in cases where it mitigates or cancels the civil liability of the person. There is no doubt that the proposed formula of retroactivity of act of civil legislation in general is correlated with the proposed more general formula of retroactivity of regulatory act, which is contained in Article 58 of the Constitution of Ukraine. However, it should take into account certain peculiarities of the civil law method of regulation and protection of public relations, which is built on the basis of legal equality and optionality. And therefore, if we make as a retroactive basis the fact of mitigation or cancelation of liability of a person, it should be remembered that this is solely at cost of the other side! And so, we are dealing with actual uncompensated infringement of the rights and interests of the other party. So apparently relevant provisions on retroactivity of the new edition of the Constitution of Ukraine must undergo significant changes.

Certain questions arise in connection with the application of provisions of Article 61 of the Constitution of Ukraine, concerning legal liability. Thus, according to Part 1 of this article stated that no one may be made twice criminally liable in the same way. However, in this context, a legitimate question arises about the possible application of penalty, other accessory penalties, and also compensation of moral harm.

In addition, in this context, it is established that the legal liability of a person is individual in nature. This provision is extremely valuable and correct. However, the civil law knows the features of harm made by two or more persons. And therefore this provision unequivocally can only be applied to shared responsibility. Whereas the application of joint and subsidiary liability, in our view, has certain peculiarities regarding the application of this principle.

Another provision of the civil law, which deals with civil liability, has specific questions about its relations with the constitutional principles. In particular, it's about that in some cases the size of the civil liability may be modified according to the material situation of individuals. Thus, according to Part 1 of Article 1186 of the Civil Code of Ukraine taking into account the financial situation of the victim and the person who caused damage, the court may decide on the compensation of its damage in part or in full. Pursuant to Part 4 of Article 1193 of the Civil Code of Ukraine the court may reduce the size of compensation of harm, caused to a natural person, depending on his

financial situation. However, according to Part 2 of Article 24, the Constitution of Ukraine clearly states that there can be no privileges or restrictions based on race, color, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, language or other signs. Moreover, the civil law, unlike, for example, law on social security, doesn't have character of social protection and regulates the relations between legally equal parties. So apparently it should also consider if we should form a system of privileges, or apply the European principle of definition of what are not privileges and restrictions.

Thus, according to Paragraph 1 of Part 1 of Article 92 of the Constitution, exclusively the laws define rights and freedoms of man and citizen, guarantees of these rights and freedoms, main duties of citizen. However, this approach does not account for the fact that these legal categories may be also contained in the agreements as it is mentioned in Article 6 of the Civil Code of Ukraine. Therefore, apparently, it should be now more accurately clarified that rights and freedoms (obligations) can be provided to the person (relied on) in accordance with laws or agreements.

The issues associated with the property also require certain adjustments. Thus, under Article 13 of the Constitution of Ukraine the land, its subsoil, air, water and other natural resources located within the territory of Ukraine, natural resources of its continental shelf, the exclusive (maritime) economic zone are the property of the Ukrainian people. Except the question that arises about how can be realized a right of ownership to the atmospheric air (which requires a corresponding adjustment of this article), we believe that the design of property rights of the Ukrainian people should be revised. The basis for the future constitutional allocation should be laid on the separation of ownership of state, communal (municipal) and private.[1]

Another issue that would fit into the overall palette is a question of studying of foreign experience. Despite the fact that in Ukraine there are ongoing work on the study and adaptation of national legislation to the legislation of the European Union, at the same time, we should recognize the fact that today a serious study of foreign experience of legal norms drafting and practice of its application is practically not carried out. Our knowledge in this area is largely limited to those truths which we received at lectures on international law or from certain available (usually published on the Internet) sources. In

[1] By the way, experts in the sphere of commercial law already have some achievements in this field (see.: Конституційні основи правового забезпечення економіки України (проблеми конституційної економіки) : зб. наук. матеріалів «круглого столу» (м. Донецьк, 2 лип. 2010 р.) / НАН України, Ін-т екон.-прав. дослідж. [та ін.] ; [редкол.: В. К. Мамутов (відп. ред.) та ін.]. — Донецьк : Юго-Восток, 2011. — 121 с.; Конституційні засади економічної системи України : монографія / В. А. Устименко [та ін.] ; за ред. д-ра юрид. наук, проф. В. А. Устименка ; Нац. акад. наук України, Ін-т екон.-прав. дослідж. — Донецьк : Юго-Восток, 2011. — 218 с., etc). At the same time, they essentially contradict civil law convictions, because they propose to return «collective property», promote the dominance of public over private interests, a return to the planned economy, the decrease in the value of the contract in economic relations and the like. And so this should encourage us, civilists, to creation of an alternative research project, and its settling.

Ukraine, we don't have translations not only of modern works of the world's leading lawyers, but even legal acts of foreign countries. Multiplying it all on lack of jurisprudence translation professionals and dictionaries of quality, we are practically in a state of «legal scientific vacuum», when we (with rare exception) «do not read them» and «don't publish our works at their place». It seems such a condition is not satisfactory. So we should begin immediate work on the translation of basic normative legal acts of the world, summarization and translation of modern works of foreign authors, exploring the latest scientific researches that happen in the world. It is also important to raise the level of knowledge of languages and computer literacy among experts in the field of law. Earlier, in the pre-revolutionary period, every scientist or other expert in the field of law knew necessarily 4–6 languages, but today these professionals are rare.

Conclusions. Therefore, there is a difficult road before us. But the road will strengthen only one who goes on it. Therefore, the formation of a systematic, logical and consistent legal policy should be a guideline, a road map that will give us the ability to restart our legal system.

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ДО ПИТАННЯ ФОРМУВАННЯ ПРАВОВОЇ ПОЛІТИКИ В СФЕРІ ПРИВАТНОГО ПРАВА

Резюме

У статті автор досліджує поняття приватноправової політики, визначає його та описує його основні характеристики і принципи. Особлива увага приділяється якості приватноправової політики та її цілям в Україні. Автор дійшов висновку про відсутність в Україні чіткої приватноправової політики. Ним було проаналізовано основні складові процесу її формування. Надані рекомендації щодо вдосконалення нормотворчості в цій сфері.

Ключові слова: правова політика, приватноправова політика, законодавча робота, економіка закону.

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Резюме

В статье автор исследует понятие частноправовой политики, определяет его и описывает его основные характеристики и принципы. Особое внимание уделяется качеству частноправовой политики и ее цели в Украине. Автор пришел к выводу об отсутствии в Украине четкой частноправовой политики. Им были проанализированы основные составляющие процесса ее формирования. Даны рекомендации по улучшению нормотворчества в этой сфере.

Ключевые слова: правовая политика, частноправовая политика, законодательная работа, экономика закона.

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THE ALTERNATIVE VIEW ON THE PROPRIETARY AND ITS OBJECTS FROM THE STANDPOINT OF CIVIL LAW THEORY, LEGISLATION AND PRACTICE

The paper deals with the modern concepts of property rights. It solves the problem of determination content of property rights; proves that property rights may be the objects of ownership. Inability of a traditional construction of property to serve a real civil circulation is proved. The conclusion that in a modern law order of Ukraine there are two types of the proprietary is made: the real property right the object of which is property material benefit, and not real property right the object of which is the property non-material benefit. The problem of the maintenance of the proprietary which is offered to be determined not by the list of powers, but by legal freedom of the owner is solved. It is proved that the proprietary is an exclusive property right, and its contents is elastic. Possibility of distribution of action of the proprietary to property rights is substantiated.

Key words: ownership; objects of proprietary rights; property rights.

Problem statement. The common notion on the proprietary leads it to a triad of the rights: possession, usage and disposition which can be applied only to a thing — a corporal subject which is admitted as the only object of the proprietary. In the domestic law this triad was offered by V. G. Kukolnik and fixed in law on the initiative of M. M. Speransky who, however, still then realized that this formula didn't settle the maintenance of the proprietary [1, p. 206–207]. Since then the proprietary is steadily treated as body of powers, however, to identify with them the proprietary as S. I. Arkhipov notices, means not to understand its essence; «any three or thirty three concrete powers can not replace the proprietary; it is impossible «to stick» the proprietary of them..., whereas it is possible to withdraw tens and hundreds concrete powers from the proprietary... and thus, it won't be identical to their sum; a secret of proprietary is not in number of its elements, but in a special quality which distinguishes it from other powers» [2, p. 454].

The traditional interpretation of the proprietary doesn't satisfy the requirements of a civil circulation, competence of the owner with regard to different objects, for example immovable and movable things, consuming and non-consuming, it significantly differs depending on properties and the social importance of the benefit. In reality the powers of the owner leave far beyond the specified triad, and the list of objects of the proprietary can not be long ago associated only with this thing.

Analysis of recent researches and publications. Despite that traditional views of the proprietary prevailed in science, the triad of the rights of the owner as unique was struck to doubt by classics of civil law (G. F. Shershenevich, K. P. Pobedonostsev, U. S. Gambarov, K. D. Kavelin). In Soviet times it was reinterpreted critically, in particular, by A. V. Venediktov, S. M. Bratus, V. P. Gribanov. There were made offers to add the content of the proprietary with the following powers: destruction of a thing, usage, management; consumption, destruction, modification, improvement, sale, exercise, transferability in rent or upon the security, etc. More fundamental change of the concept of the proprietary was offered by U. G. Basin; he applied the term «proprietary» in value of a generic term and allocated four types of the proprietary due to criterion of the object: on things («own by things»); on subject symbols of the property benefits; on current assets; incorporeal right [3, p. 38–39].

Paper purpose. A uniform template establishment of owner's competences in a standard design or in theoretical model brings to «a legal blindness so complicated legal phenomenon is treated according the schemes accepted for pins and pencils» [2, p. 458]. In this connection there is a necessity to find out a question of the content of the proprietary and special aspects of the objects from a position of modern legal science and practice, as it is the purpose of our work.

Paper main body. The concept of this scientist didn't find support in science; the concept of «owner» offered them as owner of immaterial property was especially critically apprehended. O. S. Ioffe denied it as «the owner isn't a generic indicator of all types of property, therefore in this concept there is neither general definition of proprietary, nor special character of those separate types that the author tries to bring under it» [4, p. 460–462].

In return, on these remarks we will note that in the mentioned sense concerning all objects it is necessary to consider the generic subject of civil law, and about property — the owner. Existence of such generic terms (property, owner) predetermines need in determination of patrimonial powers which we suggest to consider competence of possession which would mark the full power of the subject over rights of the object.

During the same period three theoretical models of the proprietary with different «social cores» were allocated. In elementary model the fixing component is such (norms about fixing of a proprietary to a person and reclamations of a thing from others illicit possession); in model of the split proprietary — a positioning component (norms which define the status of the owner and mediates a turn of objects of proprietary); in model with the separated management — components of management and positioning [5, p. 148–157].

Such change of views on the property right and now causes solicitude of some scientists. So, S. S. Alekseev pays attention to joint-stock property where the shareholder is the owner of exclusively certain share of the society capital, the rights on it lose the material nature and pass into the category of the relative. The property «disappears in the original form», being poured from material legal relationship in obligations, and loses value of the stabiliz-

ing factor of all economy. The scientist sees the only direction of development of the proprietary in ensuring harmony of the property material nature and its advanced organizational and legal forms. A condition of that is firm and indisputable recognition behind each fragment of social reality which applies to be called as property, its inseparability from concrete material object. «No matter in what image there is the property — the owner of securities, and the shareholder, and the owner of a stock bond, they all have to continuously remember that there are metallurgical complexes, other unique material, intellectual, cultural wealth behind all this «paper» things» [6, p. 61–62, 207, 223–224].

But, defending the need to preserve the material aspect of property, the author includes such elements to the objects of this right as: things, the immaterial benefits (in particular, honor, dignity of the person), objective results of authorship, invention, discoveries, means of an individualization, documentary or in any other way designated signs (securities), including «money carriers»; and also «property complexes as system which includes besides property also the personnel (that predetermines inclusion to the maintenance of the property right and the right of management)» [6, p. 55–59]. It is obvious that such list of proprietary objects isn't compatible to the settled triad of powers.

Failure of the traditional proprietary concept to serve requirements of a civil circulation through the example of shares is also proved by I. V. Spasibo-Fateeva according to whom, this concept answers the realities of the idea of the owner as the person who has the right of «property ownership» which parts both proprietary, and objects of incorporeal right [7, p. 32–35]. The same view of the corporate property right is expressed by V. V. Galov and A. S. Zinchenko: the object of the right of the participant is the exclusively cost value of the production capital, therefore it can't be the material; it is an absolute proprietary right which is complicated by a non-property element — the right of participation. Complexity of the property right in corporate bodies lies in fact, that both participants and the organization, have the same cost of property benefit as the object of rights. For participants of the body the object of rights is settled by this, whereas the body has the right and for real object — property in kind [8, p. 117]. Other functional aspect of the property relations from a position of these scientists is connected with the fact, that the participants have the rights and perform duties not for themselves but for the body and from its name; and in their actions the proprietary interest of this body to the production capital is exercised. This unique structure of property has no analogs in the classical forms and demands the enshrinement in the law: participants have to be allocated with an absolute proprietary on authorized capital and cost part of assets of the body [8, p. 118]. Such proprietary is exercised directly and through organizationally administrative relations which develop through implementation of the material proprietary by the body in the course of use of the production capital (real estate).

Certainly, the relations of corporate property are extremely specific and certify that the traditional proprietary needs revision. At the same time, in

our opinion, in the nature of the corporate property relations we can find elements of confidential property which allows using different options of legal designs, for example such as providing appointment the founder as the confidential owner. Such structure is suitable for explanation of the shareholders' not material absolute property rights and the material rights of the joint-stock company.

Generalizing views on the property right, O. M. Solovjyov allocates three approaches in science: 1) treating it as complete, fullest and unlimited material authority; 2) the comminution of rights that allows to consider several persons with different «pinches» of powers as owners of the same object at the same time; 3) traditional interpretation of the proprietary as universal model which includes a triad of rights which take out its contents. Considering the second of the named approaches unacceptable, the scientist defines the proprietary as «the fullest and unlimited subjective material right, which is legally provided to the owner possibility of exercising any action with the property (in particular — on possession, usage and disposition) voluntarily and irrespective of other persons' will, and the restriction of it is allowed and should be provided only in cases, provided by the law» [9, p. 49–53].

Thus, having approached the main conclusion about narrowness of legal interpretation of the proprietary through «possession, usage, disposition», the author, paying a tradition tribute, did not dare to reject these terms while forming a definition. Whereas realities of legal life dictate this need, as the existing relations of property leave far beyond such understanding of this legal phenomenon and provide subjects with powers, which do not fall within the standards of «possession and usage», but allocate owners with the fullest power concerning objects of their rights. Therefore, it is necessary to recognize that either in legal system there is some another right, near the proprietary, similar behind completeness of the powers over object, or the proprietary, which allocates the person with the highest power of rather property object, goes beyond material legal relationship, that seems more logical. And consequently, near the material property right there is not material property right which extends on those components of property, which aren't things.

In general the proprietary allocates the person with uncommon opportunities; it establishes total empery of the person over property object and is characterized by inexhaustibility of owner's powers. So, the proprietary should be considered as an exclusive right of the person, exercised over property, which he carries out on own discretion according to the law and the moral principles of society.

Freedom of the subject to carry out within the law any actions, significant from the legal point of view, concerning object of the right is embodied in the proprietary. Therefore S. I. Arkhipov proves a conclusion that the proprietary is a legal freedom of the owner, and not concerning a thing but in relation to other subjects, the main power of the owner he considers as the right of the person to act as the center of legal communication and individually legal regulation concerning a thing. The owner is «a decisive legal instance concerning a thing in the relations with other persons; his will shouldn't be defined by

the law from the position of its direction, statement and achievement of the objectives pursued by its interests; the law establishes only an external framework of its implementation» [2, p. 453–454].

In that we can see exclusiveness of the proprietary which lies in that: 1) the proprietary is the fullest authority for property object; 2) this right can belong only to the owner and cannot belong to other people at the same time; 3) the proprietary authorizes the subject to create for himself any powers within the law and the moral principles of society; 4) the owner is able to create the new subjective rights with narrower contents concerning the object and to allocate other subjects with them (the right of confidential property, a right of usage); 5) the content of the proprietary can't be defined by establishment of the exhaustive list of powers of the subject, it is defined by legal freedom of the owner. The proprietary according to its content is elastic and that means its ability to expansion (narrowing): the content of the proprietary is defined by legal freedom of the owner, types and volume of owner's powers depend on characteristics of object and specifics of legal status (mode) of a legal entity.

Such understanding of the proprietary according to the content embraces any powers and allows to include the various benefits in number of its objects, but, in our opinion, attempts to extend its action to the sphere of the non-property relations looks out not absolutely successful. For example, V. V. Galov and S. A. Zinchenko allocate such types of «proprietary»: 1) rights in rem, which objects are production products which get commercial property form; 2) property and non-property rights — concerning objects of the state and municipal ownership, which sphere of trading circulation defines completely not material, combination of material and not material and completely material principles of formation, implementation and termination of the proprietary; 3) non-property rights, which exist and are carried out in the sphere of the personal non-property benefits, and also physical and social wellbeing of the person; not material proprietary and material proprietary are defined in them [8, p. 28–29, 77–78]. Concerning such division, it should be noted that allocation of group «non-property rights» seems not absolutely logical, after all the name of specific concept completely coincides with the name of the second subspecies — «non-property rights»; and the name of the first subspecies indicates property nature of the right whereas the name of a concept claims that there is a speech about the not material rights. Thus, in both cases the principles of classification are broken.

Besides, these authors practically identify the proprietary with concept of subjective civil law which isn't true. We think that the system of objects of the proprietary has to be limited by the property benefits. In the context of a subject of our attention it is important which object of types of the proprietary these authors consider as a property right? They define proprietary as absolute property rights and think that this right as object of legal relationship is «the right for other rights». The content of such right («property ownership») is expressed through commodity competence of that measure by which this right is good [8, p. 37–39, 50].

The criterion of a division of the «right in rem» and «property» rights allocated the information carrier behind which each of these rights «is learned». For the right in rem it is a thing, and for a proprietary of property it is a document or other way of its fixing. These scientists represent the commodity and property party of the proprietary content through the powers: possession of the property benefit that is fixed on the information carrier; usage — in the form of the account as an asset in economic activity of the subject; disposition that allows the person to alienate or to decide destiny of a proprietary in a different way [8, p. 51]. In some way such image contradicts those statements of these scientists, where they deny identity of the right in rem and proprietary. Besides, the criterion of information reflection of a proprietary in the document isn't universal because there may also be subjective rights which are not affirmed in the document. And the information carrier is necessary for some types of «rights in rem», for example, in the form of the state registration of the rights for real estate.

Mistake in the mentioned concept is also referencing proprietary as an object to a type of the property right («an absolute property right»). Here authors mix different levels of these rights: «the subjective proprietary» is object of the property right whereas they consider it as a type of the last one. In a design «the right for a proprietary» object is not the first right (as V. V. Galov and S. A. Zinchenko wrote), but the second of these ones.

Thought that property rights can act as objects of the proprietary is expressed by many scientists, who explain it in that way: the law allocates property rights with properties of a thing, therefore recognizes them as objects of the proprietary (I. A. Gumarov [10, p. 80–84]); recognition as rights' object only the things is too narrow, because there also may be some rights for actions of other person (M. I. Braginsky [11, p. 124]); sale of property rights is a type of purchase sale, therefore the general patrimonial sign of the last one — meaning an object transmitted in property — is inherent to property rights (D. V. Murzin [12, p. 98]); «coming off» the obligations basis, the proprietary gains possibility of autonomous existence outside the primitive obligation, but in connection with it there is «an obligations quasything» (V. O. Lapach [13, p. 242–243]); object of the proprietary is undoubtedly the property right on a share in the authorized capital of the body (I. V. Spasibo-Fateeva [14, p. 12], I. A. Spasibo [15, p. 10]), etc.

Arguments of the opponents are mainly reduced to the next statements: it is possible to speak about the proprietary to property rights only conditionally, in aspect of the instruction on their accessory to a certain person (O. M. Lysenko [16, p. 78, 82]); the relevant provisions of the law are only reception of legal equipment which allows to apply norms which regulate purchase sale to commutative alienation of property rights (A. S. Yakovlev [18, p. 122–124]). L. O. Chegovadze notes that if there is «a proprietary on a property right», it is necessary to extend thing's signs to the last one, but physical transfer of rights is impracticable as they can be transferred only legally [19, p. 371–372]. Apparently, such argument does not make the proprietary on property rights impossible. Just as the subjective right is the phenomenon of

the ideal world so it is natural that legal actions are necessary for its transferability; thus they can be followed by the actual actions (delivery of documents which confirm existence of such right, and so forth). The question concerning physical transfer of a thing also shouldn't be considered unilaterally. After all one of the means of transferring goods to the purchaser under the contract is the delivery of the consignment or other title document (Par. 2 of Art. 334 of the Civil Code of Ukraine).

Denying possibility of existence of the proprietary on property rights, E. O. Krasheninnikov notes that if the proprietary to the right of claim is admitted then the debtor will be connected with the creditor by two legal relationships and will have two mutually exclusive duties: relative — to make a certain action, and absolute — to abstain from actions which would lead to the termination of the claim right. Implementation of claim stops the rights on it therefore violates the proprietary, and failure to meet requirement will violate a liability law of the creditor. Besides, recognition of the proprietary to the claim right will compel to consider retreat of the right as transferring of the proprietary on it [20, p. 31–32, 35].

However, writing out a design of «mutually exclusive» duties of the creditor, this scientist doesn't take into account the fact that they exist at the different levels of legal relationships, and the termination of the right of the claim by performance doesn't lead to destruction of the right as the debtor provides to the creditor a certain benefit which becomes object of the right. The author contradicts to himself, noting that «accessory of the claim right to a certain person eliminates all others from intervention in its coherence with the claim and in this sense it is absolute, and infringement of it allows the creditor to apply the same means of protection which are used at violation of the absolute rights». Further he loosens his position stating that «it is clear that transferring of the right means change of accessory of the right without change of its contents» [20, p. 35–36]. So it means that in imagination of the author «a condition of accessory» has absolute character, in contrast to the proprietary, and «change of accessory» is treated as alienation of the right.

In the question if property rights are objects of the property right, the position of the legislator is important. We will try to define it from the analysis of standards of the Civil Code of Ukraine. So, Par.1 of Art. 316 of the code establishes that the proprietary is the right of the personality for a thing (property). It is obvious that such specification is expedient only under a condition if the term «property» in value of set of things and property rights is used.

And the construction «the right of the personality for a thing (property)» allows both the right for any property object, and any right which can arise depending on characteristics of the object. Therefore, we could note that universal approach which answers realities of life more than views of traditional science is displayed in the law. If, in particular, there is not the situation of Par.1 of Art. 317 according which the owner has the rights of possession, usage and ordinances of the property which is possible only in reference to a thing.

It is necessary to keep in mind that the law recognizes property rights as a subject of various contracts, and public practice testifies that property rights are widely used in civil circulation. However, the law does not establish separate rules of their address. As far as rules of the things address are established in norms on separate types of contracts, the law extends them to all property objects. From a position of legal equipment it is most convenient to make it in the general norm which defines concept of property and proclaims property rights the material rights and a non-consuming thing as it is made in Art. 190 of the Civil Code.

Besides, the owner possesses the rights of possession, usage and ordinances of the property (Par.1 of Art. 317 of the Civil Code of Ukraine) that he carries out on his own discretion (Par.1. of Art. 319); the owner is able to make any actions which don't contradict the law (Par. 2 of Art. 319). The term «property», but not «thing» is applied in provisions of Articles 329, 347, 349 (about the termination of the proprietary), 355, 369 and others (about the general property) and so forth. Though some other norms give ground for a conclusion that objects of the proprietary are only things: so it is referred to a property apportionment from the general property in nature (Article 364, 366, 370, 371); about structure, quantity of property (Par. 3 of Art. 325); about the contents (Art. 322), risk of casual destruction and casual damage of property (Art. 323); about the transferability, delivery of property to the purchaser and so forth. Along with it, in line with Par.1 of Art. 658 right of sale of goods, by the general rule, belongs to the owner of goods; and property rights can be a subject of sales (Par. 2 of Art. 656); therefore the seller of a proprietary is the owner of this right.

And in some norms the proprietary on property rights is directly recognized. It is sure, according to Art. 27 of the Law of Ukraine «About Pledge» of October 2, 1992, pledge stores force if the property or property rights (a pledge object) become the property of the person. The right of rent or use of real estate which according the law on a mortgage is considered real estate (Par. 7 of Art. 5) which belongs to a mortgagor on the proprietary. According to P. 1 of Par. 2 of Art. 7 of the Law of Ukraine «About Mortgage Bonds» of December 22, 2005, mortgage assets which are the right of the claim for the liability of the debtor provided with a mortgage, belong to the issuer on the proprietary. The Law of Ukraine «About Depository System of Ukraine» of July 6, 2012 establishes in Par. 13 of Part1 of Art. 1 that the rights for securities are «the rights in rem for securities (the proprietary, others are defined by the law as the material rights)». Besides the rights for a security there are the rights in rem, and the rights behind a security are the rights which arise from the obligation (Par. 13 of Part. 1 of Art. 1). Thus, we have the proprietary to rights in personam in the law.

Synonymous position concerning existence of the proprietary on property rights the Supreme Court of Ukraine pronounced in resolutions of September 4, 2013 in civil cases No. 6–72t «civil case» 13 and No. 6–51 «civil case» 13 concerning contest of legitimacy of transferability on the security of property rights without consent of investors. The court notes that investors, who

completely fulfilled the obligations under investment contracts, are the owners of property rights on object of investment (construction) that is why the conclusion of the contract of pledge without their consent contradicts the law.

It means that recognition of property rights of objects of the proprietary has already taken place at the legislative and practical levels. There is only a question if any property rights are objects of the proprietary? It seems that objects of the proprietary have to be admitted as such an objectable property rights which give opportunity to get in property the benefits (things or money). These are property rights which are allocated with such attributes: a) they are the part of property of the person as its elements, b) they provide acquisition of real property (things, money) in property in the future (it is practically «the potential real benefit»), c) concerning them the person (the owner, a proprietor) is allocated with the property ordering independence — has the absolute right to dispose them. Two groups of the rights belong to them: 1) property rights on object-thing which will arise in the future (for example, property rights on real estate which construction is incomplete, property rights on object of investment); 2) property rights of the claim concerning payment of money, transferability of other estate in property. Object of the proprietary can be such property right which is in personam and in the future it will be transformed to the real benefit (thing).

Limited material rights are not the objects of the property rights and the precedents confirms this. So in Par. 33 of the Resolution of Plenum of the Supreme Court of Ukraine No. 13 of October 24, 2008 «About Practice of Consideration by Courts of Corporate Disputes» it is noted that the property contribution of the participant to authorized (made) capital is the object of the proprietary of society except for that cases when acts of acceptance and transfer and the provision of constituent documents of society don't provide cautions that a contribution of the participant to authorized capital are property rights, in particular, a right to use the property.

The impossibility of distribution of the mode of the proprietary to the limited material rights is connected with that that they are, firstly, indissoluble with things which have other owner; secondly, they can't be alienated without consent of the owner as long as the right owner doesn't have completeness of the power; thirdly, these rights have attributes of the absolute rights therefore concerning them there can't be a proprietary.

Conclusions. Summing up the results, it is expedient to note that achievements of the civil theory certify cardinal shifts in views on the concept of the proprietary, moving from the leading place idea of this right as to an exhaustive triad of powers of the owner concerning a thing. And the condition of the legislation and right applicable practice gives the ground for a conclusion that the proprietary in the modern world has been transformed according to scientific and technical progress and development of the economic relations that has led to formation of two types of the proprietary — in rem and not in rem.

The proprietary is the fullest authority of the personality for property; it is absolute civil law, an exclusive property right and it is also elastic according to the contents which is defined by legal freedom of the owner; types and

volume of powers of the owner depend on features of object and specifics of legal status (mode) of a legal entity. Property material benefits (right in rem) and property non-material objects, in particular rights of the claim (right in personam) can act as objects of the proprietary.

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АЛЬТЕРНАТИВНИЙ ПОГЛЯД НА ПРАВО ВЛАСНОСТІ ТА ЙОГО ОБ'ЄКТИ У СВІТЛІ ЦИВІЛЬНО-ПРАВОВОЇ ТЕОРІЇ, ЗАКОНОДАВСТВА ТА ПРАКТИКИ

Резюме

У праці розглядаються сучасні цивілістичні концепції права власності. Доводиться неспроможність традиційної конструкції власності обслуговувати реальний цивільний оборот. Обґрунтовується висновок, що у сучасному правопорядку України функціонують два види права власності: речове право власності, об'єктом якого є майнові матеріальні блага, та неречове право власності, об'єктом якого є майнові нематеріальні блага. Вирішується проблема змісту права власності, який запропоновано визначати не переліком повноважень, а правовою свободою власника. Доводиться, що право власності є виключним майновим правом, а його зміст — еластичним. Обґрунтовується можливість поширення дії права власності на об'єктоздатні майнові права.

Ключові слова: право власності, об'єкти права власності, майнові права.

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АЛЬТЕРНАТИВНЫЙ ВЗГЛЯД НА ПРАВО СОБСТВЕННОСТИ И ЕГО ОБЪЕКТЫ В СВЕТЕ ГРАЖДАНСКО-ПРАВОВОЙ ТЕОРИИ, ЗАКОНОДАТЕЛЬСТВА И ПРАКТИКИ

Резюме

В работе рассматриваются современные цивилистические концепции права собственности. Доказывается неспособность традиционной конструкции собственности обслуживать реальный гражданский оборот. Обосновывается вывод о том, что в современном правопорядке Украины функционируют два вида права собственности: вещное право собственности, объектом которого выступают имущественные материальные блага, и невещное право собственности, объектом которого являются имущественные нематериальные блага. Решается проблема содержания права собственности, которое предлагается определять не через перечень полномочий, а через правовую свободу собственника. Доказывается, что право собственности является исключительным имущественным правом, а его содержание — эластичным. Обосновывается возможность распространения действия права собственности на объектоспособные имущественные права.

Ключевые слова: право собственности, объекты права собственности, имущественные права.

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CHILD-SUPPORT ALIMONY AS THE ISSUE OF LEGISLATION AND PRACTICE

The article is devoted to issues about legislative regulation improvement on support maintenance by the way of alimentation of children which were adopted by other persons. There were made conclusions about the necessity of legislative consideration the possibility of deprivation of parental rights of one of the parent and adopter and alimony collection for child maintenance from both of them.

Key words: alimony, child support, adoption, deprivation of parental rights.

Problem statement. The aim of any social, legal state is child welfare and protection, first of all with the help of formation and improvement of legislation in mentioned sphere, and especially in the part concerning child support maintenance by the means of alimentation.

Analysis of recent researches and publications. The investigation of problems regarding maintenance (alimony) of family members is widespread among native scholars. These researches were performed by such scientists: Y. Chervoniy, I. Zhylinkova, Z. Romovska, L. Sapeyko, V. Croitor, Y. Novokhatska. These and other authors also paid attention to the issues of adoption. Despite the fact that the scientists' interest to legal problems of alimentation is not exhausted, many of these issues have not yet found its solution. Analysis of the legislation on child support by parents and adopters has many defects in the practice of its implementation. On-going nature of alimony relationship determines the possibility of reiterated appeals to the court with the suit for alimony, change of its size, terms of payments or exemption from them, as well as for other items related to effectuation of right on alimony and execution the maintenance obligations.. That's just the question of alimony «destiny» levied on parents in case of adoption, deprivation of parental rights left unattended legislator.

Paper purpose. Taking into account mentioned information, the issues about discharge of obligations on child support maintenance by the means of alimony payments for the child that has been adopted requires individual research. The purpose of this article is to highlight some of the results of such research.

Paper main body. Deprivation of parental rights as a specific and the highest sanction of family legal liabilities is characterized by complete cessa-

tion of legal relationship of the child with its parents and at the same time preserving the obligation of child financial support. In case of deprivation of parental rights, parents lose their hereditary right concerning the child, the right to receive child support from child and other rights. However, the child has certain rights, including the right to receive alimony, hereditary right, proprietary right or the right to use habitable dwelling, etc.

Taking into account the fact that deprivation of parental rights does not relieve parents from the obligation to support the child, along with deprivation of parental rights, the court may, upon request of the applicant or upon its own initiative, to decide the issue of levying maintenance for the child (Section 2, Art. 166 of the Family Code of Ukraine).

Thus, the right to receive alimony from parents ***certainly*** kept in the case of the child custody or care determination (Section 2, Art. 247 of the Family Code of Ukraine), placing in health institution, educational or other child care center, foster family (Par. 2, Art. 248, Par. 4, Art.256^3 of the Family Code of Ukraine), to children's community of domestic type (Par. 256^7 of the Family Code of Ukraine). ***And can be saved*** in case of child adoption. Considering the 1st part of Art. 232 of the Family Code of Ukraine regulations of the determination of this decision are left to the mind of the parent with whom the child is stayed.

Moreover, according to Part 1 of Art. 1183 of the Civil Code of Ukraine parents shall be obliged to indemnify for the damage inflicted by an infant in respect of whom they are deprived of parenthood within three years after being deprived of parental rights, unless they prove this damage is not resulted from their negligence of the parent obligations.

Thus, the obligations of a certain material support for a child, to which parents deprived of parental rights also remains after this. The Family Code of Ukraine establishes two alimony payment schemes by parents for child — voluntary and compulsory. Each of these schemes also has a gradation according to the factual circumstances of the relationship. Hereby in case of termination of child support rights the form of maintenance — in cash and (or) in kind — has an importance.

The difficulty of alimentary juridical relationships between parents and children is repeatedly increasing when we have to deal with parental responsibilities to provide maintenance for the child in case of adoption. But termination of alimony may occur in connection with adoption of child for the maintenance of which was collected child support since this indirectly mentioned in Part 1 of art. 232 of the Family Code of Ukraine. Such legislative uncertainty or diffidence causes a lot of judicial contest on alimony exemption of parent for the child, which was adopted. And dispose of this question entrust with the court.

According to Art. 207, 282 of the Family Code of Ukraine the adoption shall be the acceptance by the adopter in his/her family of a person as his/her daughter or son, such acceptance being effected based on the judicial decision, but in the event that adoption by a national of Ukraine of a child who is a national of Ukraine but resides outside the limits of Ukraine is made in

a consular post or diplomatic mission of Ukraine. Thereby, adoption is the adoption of an adoptive in their family the person, made by a court (legal act), which resulted between the adopter and his relatives, on the one hand, and the adopted and his descendants — on the other hand, appear the same rights and liabilities as between parents and children, and relatives origin.

Part 1 of Art. 232 of the Family Code of Ukraine provides occurrence of legal consequence for the adoption, namely — upon completion of an adoption, personal and property rights and responsibilities cease to exist between the parents and the adopted person, as well as between the latter and his/her relatives by origin. If a child is adopted by only one person, these rights and responsibilities may be retained upon the mother's wish whenever the adopter is a man, or upon the father's wish whenever the adopter is a woman.

Analyses of the mentioned reduce to two conclusions. The first one — the act of the law of adoption changes the subjective structure of parental juridical relationship — parents of an adopted person cease to be subject to parental rights and liabilities, and at the same time between the adopter and the adoptive establish legal relations that exist between parents and children. The second one — subjective structure can be not changed, but enlarged since parental rights and liabilities concerning to the child will be performed by both parents and adopters.

It should be borne in mind that in Art. 171 of the Family Code of Ukraine it is provided in respective cases to due regard to the child's views in deciding matters related to his/her life and also remember about the demands of Part 2 of Art. 218 of the Family Code of Ukraine about the necessity to inform the child on legal consequences of the adoption. Herewith, for the record of the adoptive mother, father requires the consent of the child who has reached 7 years, except under Part 4 of Art. 218 of the Family Code of Ukraine, namely — except if he/she lives in the adopters' family and considers them as his/her parents.

Thus, the need to inform the child about the legal consequences of adoption should be subject to the regulations of Part 1 of Art. 218 of the Family Code of Ukraine, which requires considering child's consent to be adopted. A child gives consent to the adoption in the form, which is consistent with his/her age.

Other words, taking into consideration mentioned requirements to inform the child, it should be informed about such a consequence as the preservation or termination of the right to receive its alimony. We believe that in this case the child should be informed that the realization of this right depends on the will of parents, with whom she/he lives. Indeed, as noted above, the termination or abandonment of alimentation obligations depends exactly on the will of one of the parents.

It should be noted that the adoption has resulted in more and inability restoration of parental rights if the child has been adopted and the adoption is not canceled or revoked by the court (Par. 2, Art. 169 of the Family Code of Ukraine). Imperative that the rules associated with the fact that «under the law on adoption the consent of parents which are deprived of parental rights is

not required and similar dispute could negatively affect the morale of the child and the adopters and hampered in their rights and interests with regard to legal effects of adoption (Art. 232 of the Family Code of Ukraine) [1, p. 499].

We believe that in the case of adoption of a child the rights on child support that is received from parents should be stopped.

Here are some arguments. First, according to Par.1, Art. 179 of the Family Code of Ukraine alimony received for a child is the property of the name of parent to whom they are paid, and should be used for the intended purpose. That alimony is exclusively intended use. However, we know that there is no mechanism to monitor the targeted use of alimony funds. Parents are not required to restore the integrity of evidence concerning the implementation of targeted spending in the interest of the child. However, today in Ukraine has already formed a wealthy stratum of society and child support can greatly exceed its expenditure needs and become an opportunity for abuse by unscrupulous parents.

Second, legislator left unattended the question of the termination of the right to child support in connection with the acquisition of the right to real estate, as foreseen in Art. 190 of the Family Code of Ukraine. We believe that there should be at least some reservations about this in Part 1, Art. 232 of the Family Code of Ukraine.

Third, actually the word «alimony» (from the Latin *alimentum* — food, maintenance) means advances in the cases determined with the law by one person on hold of other person who need financial assistance [2, p. 96]. Obviously, the child needs financial aid in any case whether or not this help is given by the parents, adopters or the state.

However, temporary assistance for the maintenance of the child by the state, provided in Part 8 of Art. 181 of the Family Code of Ukraine which is obtained without reasons, is the basis for the damages caused to the state, and the invalidity of receipt of child support by a parent is not even mentioned.

Fourth, the question of deprivation of parental rights of adopter remains uncertain in accordance with Art. 242 of the Family Code of Ukraine. The procedure and grounds of deprivation of adopter, which was recorded as a mother, father of adopted child, parental rights are the same as in the case of birth parents' deprivation of parental rights. Equally, there are consequences of termination of parental rights.

Thus, there are situations where a parent receives child support from one of parent and the adopter. This can be avoided by reviewing existing legislation regarding alimentation of adopted children.

For example, from Russian Federation laws, if one of the parents of the adopted child, before delivery of a judgment about adoption in court order, he according to Par. 2, Art. 120 of the Family Code of Russian Federation is exempt from taxes. This question is managing by the court at the request of the parent who must pay child's maintenance, as became final court decision of adoption, which is the absolute reason for termination of alimony payments.

However, the court decision of adoption does not relieve his father, which was charged with alimony by the court decision, from its subsequent pay-

ments, if the child is adopted by this parent in accordance with Par. 3 of Art. 137 the Family Code of Russian Federation were saved personal property and non-property rights and responsibilities. In that case, all issues related to the change in the amount of child's maintenance, exemption from the payments, should be considered by the court in accordance with the action proceeding at the request of interested parties.

There is a duty to keep own child stops after adoption in the legislation of Kazakhstan (Par. 2, Art. 69 of the Law of the Republic of Kazakhstan on marriage and family)[3].

According to the law of France the duty to provide alimony is kept between the adopted person and his father and mother. However, father and mother of the adopted child must provide maintenance only when it can not get maintenance from the adopter (Art. 367 of the Civil Code of France)[4, p.174].

With regard to international law, although Ukraine is not a party to most conventions in the field of adoption, let's turn to their standards. Thus, the European Convention on the Adoption of Children of 1969 provides that from establishing rights and obligations of the adoptive and adopted, lapse similar rights and obligations that existed between the adopted and his father, mother or other person or institution.

However, the law may allow that the spouse of the adopter retains his rights and obligations in respect of the adopted person if the latter is his (her) legitimate, illegitimate or adopted child.

In addition, the legislation may retain parents' obligations to provide financial assistance to the child, maintain, organize his life and provide a dowry if the adopter does not fulfill any of these duties [5].

Article 26 of the Convention for the Protection of Children and Cooperation in Respect of International Adoption of 1993 points that the recognition of adoption includes recognition of termination of legal relationship between the child and her mother and father, still exist if the adoption has the following effects in the contracting State in which it happened. If the adoption results to the termination of the legal relationship between the child and parents, once available, the child receives in the receiving state and any other contracting state where the adoption is recognized, the same rights arising from adoption, which took place in each such State [6].

Thus, the question of the conditions under which parents of adopted children may require maintenance from the other parent who is deprived of parental rights, needs to be addressed.

The Family Code of Ukraine does not contain articles that would identify all grounds for termination of alimony obligations to the child. The study of its text enables identification of only a few reservations about the termination of maintenance obligations, which are: suspension of the right to child support in connection with the acquisition of rights to real estate (house, apartment, land, etc) (Art. 190) and termination of the maintenance of adult daughter, son, who stopped education (Art. 199).

It is logical to predict that this is not all reasons that stop alimony relationship even without their legislative consolidation. For example, the termi-

nation of maintenance obligations as liabilities are inextricably linked with the personality of the payer and the recipient of maintenance is in connection with the death of the person who receives child's support, as well as those entrusted with the duty to pay maintenance.

We believe that the Family Code of Ukraine should include such a ground for termination of maintenance obligations as adoption. Such a rule requires judicial practice.

Thus, the claims for exemption from payment of alimony, alimony cease and exemption from debt for child support in connection with the adoption of a child, the maintenance of which they are levied, are common in litigation. Moreover, regardless of whether the adoption was carried out with parental consent for adoption (Art. 217 of the Family Code of Ukraine) or without parental consent (Art. 217 of the Family Code of Ukraine).

Often parents who are charged by the alimony, in their objections to the payment of maintenance complain that they were not informed about the adoption. Note that the courts are not required to report on adoption parents deprived of such children on parental rights.

Perhaps in that case if the parent has not been deprived of parental rights has given consent to the adoption, at the same time the question of waiver of obtaining maintenance must be resolved. This would, firstly, define the issue of child maintenance between former spouses, secondly, courts would be freed from unnecessary disputes, thirdly, would facilitate the registration of adoption as an act of civil status.

If the parent is not deprived of parental rights, the record of the state registration of birth and its origin remains.

At the same time, adopter has rights to be recorded as a mother, father and child court satisfies the following statement of adopter in the decision to adopt, if it is in the interest of the child (Art. 229 of the Family Code of Ukraine). According to Part 7, Art. 255 of the Family Code of Ukraine to amend the record of the birth of the adopted child or adult the copy of the judgment shall be sent to the state civil registration at the place of decision, in cases of adoption of children by foreigners — to the competent governmental authority. In the case when the adoptive parent is recorded as the child's father, corresponding record of the father must be annulled by a court respectively to Par. 1 of Part. 1, Art. 24 of the Law of Ukraine «On State Registration of Civil Status».

Thus, if one parent is not deprived of parental rights and recorded as the father of the child and the adoptive parent must be recorded as the child's father in accordance with the court decision, there is a conflict and a judgment cannot be enforced by state civil registration.

Conclusions. To summarize, the following conclusion can be shown.

It is required the legislating of such a ground for termination of maintenance obligations in respect of the child as its adoption if the court decides to record adopter as a father's, mother's child. We consider it is necessary to supplement the Family Code of Ukraine with separate article that would identify all grounds for termination of maintenance obligations.

Given the legislative strengthening of the right of the adopter to be recorded as a mother, father of a child, it is required to coordinate the regulation of the state registration of such acts of civil status as state registration of birth and parentage of the child.

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АЛІМЕНТИ НА УТРИМАННЯ ДИТИНИ ЯК ПИТАННЯ ЗАКОНОДАВСТВА І ПРАКТИКИ

Резюме

Стаття присвячена питанням удосконалення законодавчого регулювання утримання шляхом аліментування батьками дітей, які були усиновлені іншими особами.

За чинним законодавством позбавлення батьківських прав не звільняє батьків від обов'язку щодо утримання дитини, а при усиновленні одним із подружжя дитини іншого з подружжя вирішення питання про подальше утримання одним із батьків дитини залежить від бажання матері, якщо усиновлювачем є чоловік, або від бажання батька, якщо усиновлювачем є жінка. Це зумовлює значну кількість судових спорів про звільнення від сплати аліментів, про припинення стягнення аліментів та звільнення від сплати заборгованості за аліментами у зв'язку з усиновленням дитини, на утримання якої вони стягувалися.

На підставі аналізу судової практики, вітчизняного та зарубіжного законодавства в частині аліментування батьками усиновлених дітей, зроблено висновки про необхідність законодавчого врахування можливості позбавлення батьківських прав одного з батьків і усиновлювача і стягнення аліментів на утримання дитини з обох.

Ключові слова: аліменти, утримання дитини, усиновлення, удочеріння, позбавлення батьківських прав.

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АЛИМЕНТЫ НА СОДЕРЖАНИЕ РЕБЕНКА КАК ВОПРОС ЗАКОНОДАТЕЛЬСТВА И ПРАКТИКИ

Резюме

Статья посвящена вопросам совершенствования законодательного регулирования содержания путем алиментирования родителями детей, усыновленных другими лицами.

По действующему законодательству лишение родительских прав не освобождает родителей от обязанности относительно содержания ребенка, а при усыновлении одним из супругов ребенка другого из супругов решение вопроса о дальнейшем содержании одним из родителей ребенка зависит от пожелания матери, если усыновителем является муж, или от пожелания отца, если усыновителем является жена. Это влечет значительное количество судебных споров об освобождении от выплаты алиментов, о прекращении взыскания алиментов и об освобождении от выплаты задолженности по алиментам в связи с усыновлением ребенка, на содержание которого они взыскивались.

На основании анализа судебной практики, отечественного и зарубежного законодательства в части алиментирования родителями усыновленных детей, сделан вывод о необходимости законодательного учета возможности лишения родительских прав одного из родителей и усыновителя и взыскания алиментов на содержание ребенка с обоих.

Ключевые слова: алименты, содержание ребенка, усыновление, удочерение, лишение родительских прав.

ЦИВІЛЬНИЙ ПРОЦЕС, ГОСПОДАРСЬКИЙ ПРОЦЕС

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THE GROUNDS FOR REVIEW OF JUDGMENTS ON CIVIL CASES BY THE SUPREME COURT OF UKRAINE

The article is devoted to the questions of legal regulation of the grounds for review of the judgments in civil cases by the Supreme Court of Ukraine, whereas the analysis of the novels of civil procedure legislation of Ukraine has been made, particularly the Law of Ukraine «On Ensuring of the Right to a Fair Trial», relevant provisions of the Civil Procedure Code of Ukraine, existent judicial practice on mentioned questions, and theoretical discussions of scholars and leading specialists in the field of jurisprudence have been studied.

Key words: judgment, grounds for review of judgments, Supreme Court of Ukraine, civil cases, judicial practice.

Problem statement. According to article 355 of the Civil Procedure Code of Ukraine (hereinafter — the CPC of Ukraine), with amendments to the CPC, made by the Law of Ukraine «On Ensuring of the Right to a Fair Trial» of 12.02.2015 № 192-VIII, an application for review of judgments in civil cases may be filed only on the following grounds: 1) unequal application of the same provisions of substantive law by court (courts) of cassation, which resulted in making of judgments different in content in similar legal relations; 2) unequal application of the same provisions of procedural law by the court of cassation — in appealing the judgment which prevents further proceedings in case, or which was made with violation of rules on jurisdiction or with violation of competence of courts on civil cases; 3) when international judicial institution has established the violation of international obligations by Ukraine in considering the case by court; 4) inconsistency of judgment of the court of cassation with legal opinion on application of provisions of substantive law in similar legal relations laid down in the resolution of the Supreme Court of Ukraine.

The most important and effective mechanism of influence of the Supreme Court of Ukraine on judicial practice in civil proceedings is its realisation of powers on review of judgments on the grounds of unequal application of the same provision of substantive law in similar legal relations in the manner prescribed by procedural law by the court (courts) of cassation.

The presence of unequal application of the same rule of substantive law in similar legal relationships by the court (courts) of cassation can be proved if: the court (courts) of cassation unequally applied the same provision of substantive law in considering two or more cases; cases concern the disputes arising from similar legal relations; there are judgments different on content made by the court (courts) of cassation.

Due to the rather complicated hypothesis of legal provision the questions raise in practice as to whether unequal application of provision of law also involves the non-application of provision of law that was applicable in contentious legal relations (as a result, whether the relations in such case will be similar, which is a prerequisite for review).

Analysis of researches and publications. One should mention K. V. Gusarov, O. S. Tkachuk, Y. Romaniuk, I. Beitsun among authors, who pays attention to the issues of legal regulation of the grounds for review of the judgments in civil cases by the Supreme Court of Ukraine.

Paper purpose. Thus, the paper purpose is to study questions of legal regulation of the grounds for review of the judgments in civil cases by the Supreme Court of Ukraine making the analysis of the novels of civil procedure legislation of Ukraine.

Paper main body. The term «similarity of legal relations» has important legal significance because, as we know, the operation of the provision of law, which was applied by the court (or not applied by the court, but had to be applied) influences the relations. It is known that the doctrine of theory of state and law contains a separation of legal relations into sectorial, absolute, incremental, general, and specific, etc. As to such legal term as «similar legal relations», the specified term is not used in legal theory. In this regard, the question arises as to compliance with legal technique in drafting the law, which defines the basic methods and rules in formation of legal acts.

Apart from the abovementioned, there are also certain questions as to the term «judgments different in content», particularly, whether it means a reference to the provisions of procedural law governing the content of the judgment of the court of cassation (articles 345, 346 of the CPC), or in fact this term means only the difference in substantive law results of the court proceedings, and this is what was meant by the legislator [1, p. 111].

Unequal application of the same provision of substantive law in similar legal relations by the court (courts) indicates the incorrect application of this provision at least in one case of such application, but previously not known in what exactly. With that, the incorrect application of provision can exist as in all cases, as in some of them.

The unequal application of the same provisions of substantive law consists, in particular: in different interpretation of the content and essence of legal

provisions by the courts, which led to different conclusions on existence or absence of subjective rights and obligations of participants of corresponding legal relations; in different application of rules of competition of legal provisions in resolving collisions between them with regard to legal force of mentioned legal provisions, as well as their temporal, geographical and personal scope, i.e. different non-application of law that had to be applied; in different determination of the subject of regulation of legal provisions, particularly in application of different legal provisions for regulation of the same legal relations, or the extension of operation of provision on certain legal relations in one cases, and non-application of the same provision to analogous relations in other cases, that is a different application of the law, which did not have to be applied; in different application of the rules of analogy of law in similar legal relations (Par.6 of the Resolution of Plenum of the High Specialised Court of Ukraine for Civil and Criminal Cases of 30 September 2011 № 11 «On Judicial Practice of Application of Articles 353–360 of the Civil Procedure Code of Ukraine»).

Meanwhile, analysing the provision of Par. 2 of Art. 309 of the CPC, according to which the provisions of substantive law are considered to be violated or incorrectly applied, if there was an application of law, which does not apply to these legal relations, or there was no application of law, which had to be applied, it can be argued that the non-application by court of the provision of law that applies to relevant legal relations should be considered as its improper application.

Judgments in similar legal relations are those where the cause of action, the grounds for the claim, the content of claim and the factual circumstances established by the court are identical, as well as where there is the same substantive law regulation of contentious legal relations. The content of legal relations with aim to determine their similarity in various judgments of the court (courts) of cassation is to be determined by the circumstances of each case.

It is necessary to support the position of the judge from Ukraine of the European Court on Human Rights G. Y. Yudkivska about the fact that the role of the Supreme Court cannot be reduced only to the role of the court of the third or fourth instance, access to which should get every citizen. The society is not interested in the Supreme Court that accepts tens of thousands of judgments a year, which are impossible to analyse in depth due to the lack of time. The more such judgments, the easier is to get confused with them, and the courts of lower instances cannot apply its recommendations, explanations, and instructions. That is why the Supreme Court should be able to decide which cases it can take for proceedings with regard to its leading role in legal system and formation of legal culture [2, p. 18–19].

Thus, in legal literature until recently there have been active debates as to the need to expand the powers of the Supreme Court of Ukraine to review judgments in civil cases, particularly giving the right to the Supreme Court of Ukraine to review judgments on grounds of unequal application of provisions of procedural law [3, p. 342].

Often, the errors in applying the provisions of procedural laws by courts lead to non-correct resolution of the case, which may not always be corrected by the court of cassation. Entitlement of the Supreme Court of Ukraine in accordance with the Law of Ukraine «On Ensuring the Right to a Fair Trial» with the right of judicial review on the grounds of unequal application by the court (courts) of cassation of the same provisions of procedural law provides the Supreme Court of Ukraine with the opportunity to thoroughly check the legality of judgments and ensure the unity of judicial practice not only in the application of provisions of substantive law, but also of provisions of procedural law.

The absence of the power of the Supreme Court of Ukraine to ensure the uniform application of procedural law by the courts was an important aspect of the problem of ensuring uniformity of judicial practice. Instead, most violations of the right to a fair trial (Article 6 of the European Convention on Human Rights) concern the application of procedural rules. Furthermore, the unity of judicial practice and, accordingly, the principle of legal certainty must be provided both in the sphere of substantive law and equally in the sphere of application of procedural rules.

Unfortunately, over extended periods the Supreme Court of Ukraine was deprived of the right to review the judgments in case of unequal application of the provisions of procedural law by courts of cassation, even if it was a part of substantive law that led to a significant number of violations of the law remained uncorrected. Thus, refusing the application for review of judgment on the grounds of unequal application of the same provisions of substantive law by the court of cassation, particularly Article 82 of the Law of Ukraine of April 21, 1999 № 606-XIV «On Enforcement Proceedings», which has caused the making of judgments different in content in similar legal relations, the Supreme Court of Ukraine noted that «content-wise a specified provision is procedural in nature, as it provides for procedure for appealing the judgments, actions or inactions of officers of state executive service» [4].

In accordance with the practice of the Supreme Court of Ukraine the acts of the court of cassation, which particularly concern the determination of jurisdiction of court cases (i.e. on differentiation of civil and administrative cases), can be defined as those that evidence the unequal application of the provisions of procedural law by the court, and thus were not subject to review by the Supreme Court of Ukraine [5].

In view of the above, Y. M. Romaniuk [6, p. 10] proposes to introduce in Ukraine a so-called institute of prejudicial inquiry provided in certain European states. Thus, in France the court that hears the case on the merits may make an application on interpretation of the law to the highest judicial authority if the relevant legal question is new, quite complex, and arises in many cases [7, p. 30]. Legal opinions on the application of legal acts of the EU under prejudicial inquiries by domestic courts are also rendered by the Court of Justice of the European Union.

Introduction of the institute of prejudicial inquiry in Ukraine would provide the lower-level courts with opportunity to seek appropriate legal opin-

ions from the Supreme Court of Ukraine in case if the uncertainty in the application of the provision of law arises during court proceedings. It should be noted that the present state of legislation contains numerous unclear and contradictory provisions, and determines the thousands of analogous claims in the courts. In this regard, with the assistance of the institute of prejudicial inquiry it could be possible to resolve the issue of the application of the relevant provisions at the level of the courts of first instance without waiting until the case will get to the Supreme Court of Ukraine.

All of the above indicates the absolute reasonableness of amending the Law of Ukraine «On Ensuring the Right to a Fair Trial» fixing there the powers of the Supreme Court of Ukraine on review of judgments on grounds of unequal application of the same provisions of procedural law by the court of cassation — at the appeal of the judgment, which prevents further proceedings in case, or which was made in violation of the rules of jurisdiction or rules on competence of the courts to consider civil cases.

Another ground for review of judgments by the Supreme Court of Ukraine is the establishment of violation by Ukraine of its international obligations in deciding court cases, established by international judicial institution, whose jurisdiction is recognised by Ukraine. Typically, it is a decision against Ukraine by the European Court of Human Rights (hereinafter — the ECHR).

The important and complex problem in matters of application of ECHR practice by Ukrainian courts is relevant procedures and legal basis. The mechanism of this application consists of two methods: 1) direct application of the practice of the ECHR, which is limited to the provisions of the Convention and decisions of the ECHR on Ukraine; 2) use of legal positions of the ECHR in judicial practice of Ukrainian courts.

The special role in this mechanism belongs to the Supreme Court of Ukraine, which not only has to apply the practice of the ECHR (as the rest of the national courts), but also directly participates in the procedure of enforcement of judgments of the ECHR [8, p. 5].

The judgment of the European Court of Human Rights takes on real meaning for the person-applicant (recipient) only when the State-defendant, which violated the rights and fundamental freedoms, implements the directions of the ECHR, that is authorised state bodies make real actions to address those violations, pointed out by the European Court of Human Rights in its judgment. Different branches of state power may be involved in the process of implementation of such judgments.

According to Par. 1 of Art. 46 of the European Convention on Human Rights, the High Contracting Parties undertake to abide by final judgment of the Court in any case, to which they are parties. The enforcement procedure for these decisions in Ukraine is determined by the Law of Ukraine of 23.02.2006 № 3477-IV «On Execution of Judgments and Application of Practice of the European Court of Human Rights». As was rightly pointed out by G. Y. Yudkivska «the Supreme Court is entrusted with the greatest responsibility — to be the guarantor of the rights and freedoms of a person. The effectiveness of implementation of the Convention and of practice of the

European Court of Human Rights into national practice will depend on what the Supreme Court will signal to the courts of the first and second instances.

By changing the judgments of the lower courts, the Supreme Court not only fixes the errors and restores justice in a particular case, but also sets a precedent for future cases. The ECHR practice becomes a tool for uniform interpretation of provisions of national legislation by supreme courts in the light of the requirements of the Convention [2, p. 18].

Thus, the resolutions of the Supreme Court of Ukraine adopted on the results of review by the Supreme Court of Ukraine of judgments on the ground of violation by Ukraine of its international obligations in deciding the case, established by international judicial institution, whose jurisdiction is recognised by Ukraine, should be considered not only as the acts of individual legal regulation, by which the Supreme Court of Ukraine restores the violated right of applicant, but also, the Resolutions should be the acts of general impact on judicial practice, by which the Supreme Court indicates how the rules of the Convention shall apply to specific legal relations in view of the relevant decision of the European Court of Human Rights.

It seems that the precedency of the judgments of the European Court of Human Rights should not be seen only in terms of actually precedent character, that is, its qualification as precedents, but also in terms of general binding character. Generally binding character is a more significant feature of the European Court of Human Rights. For the practice of application of the ECHR judgments, precisely this aspect is more important and reflects the need for application of the ECHR judgments different in character. In addition, there is an obvious fact that in the modern legal doctrine, which reflects the actual state of legal practice in the states of Romano-Germanic legal family, the concept of well-established judicial practice is quite common. According to this concept, a number of judgments can be regarded as convincing proof of the correct interpretation of legal provision. A prerequisite of mentioned is the systematic practical application of legal provisions, which were formulated and used by the courts. This concept became a certain equivalent to Anglo-Saxon doctrine of operation of case law in Romano-Germanic legal family, and with the assistance of the mentioned concept the case law is applied in European countries [9, p. 286].

Based on the above it can be argued that the review of judgments in civil case on the ground of violation by Ukraine of its international obligations in deciding the case, established by international judicial organisation, whose jurisdiction is recognised by Ukraine, constitutes a realisation of the person's right to judicial protection of his rights and freedoms in civil proceedings, which are enshrined in international instruments; is a special case of fulfilment by Ukraine of its international obligations in the area of human rights and fundamental freedoms; is a method of taking additional measures of individual character to enforce the judgment of international judicial institution (recovery as much as possible of the previous status, which the person had before violation of the Convention (restitutio in integrum), is a realisation by the Supreme Court of Ukraine of function of directing Ukrainian judicial practice in matters

of application of the provisions of the European Convention on Human Rights and practice of the European Court of Human Rights when considering the cases in civil proceedings, and is a means of bringing the judicial practice in civil cases in line with international and European standards of justice.

The last ground for review of judgments by the Supreme Court of Ukraine is the inconsistency of judgment of cassation court with legal opinion on application of provisions of substantive law in the same legal relations set out in the Resolution of the Supreme Court of Ukraine.

Even before the adoption of the Law of Ukraine «On Ensuring the Right to a Fair Trial» Y. M. Romaniuk has expressed his concern that mandatory character of the resolutions of the Supreme Court of Ukraine has a declarative nature, since the inconsistency of judgment with legal opinion of the Supreme Court of Ukraine is not a ground for appeal. The author has proposed to provide for the possibility to appeal the court decision on the ground of its inconsistency with legal opinion of the Supreme Court of Ukraine. With that, according to Y. M. Romaniuk, it had to be established that the right to appeal might occur in cases where the decision was taken after the formulation of the legal opinion of the Supreme Court of Ukraine, and also if the legal opinion has been formulated immediately after judgment was made. For this, as pointed out by Y. M. Romaniuk, it is considered appropriate to add such ground to the list of grounds for review of judgments under the new circumstances [10, p. 9].

Conclusions. According to Par.4 of Art. 355 of the CPC the inconsistency of judgment of court of cassation with legal opinion on application of provisions of substantive law in the same legal relations set out in the resolution of the Supreme Court of Ukraine is currently defined as a separate independent ground for review of judgment by the Supreme Court of Ukraine.

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ПІДСТАВИ ПЕРЕГЛЯДУ РІШЕНЬ З ЦИВІЛЬНИХ СПРАВ ВЕРХОВНИМ СУДОМ УКРАЇНИ

Резюме

Стаття присвячена питанням правового регулювання підстав для перегляду рішень з цивільних справ Верховним Судом України, в зв'язку з чим здійснюється аналіз новел цивільно-процесуального законодавства України, зокрема Закону України «Про забезпечення права на справедливий суд», відповідних положень Цивільного процесуального кодексу України, існуючої з зазначених питань судової практики та теоретичної дискусії науковців та провідних фахівців в галузі юриспруденції.

Ключові слова: рішення суду, підстави перегляду рішень, Верховний Суд України, цивільні справи, судова практика.

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ОСНОВАНИЯ ДЛЯ ПЕРЕСМОТРА РЕШЕНИЙ ПО ГРАЖДАНСКИМ ДЕЛАМ ВЕРХОВНЫМ СУДОМ УКРАИНЫ

Резюме

Статья посвящена вопросам правового регулирования оснований для пересмотра решений по гражданским делам Верховным Судом Украины, в связи с чем осуществляется анализ положений гражданско-процессуального законодательства Украины, в частности Закона Украины «Об обеспечении права на справедливый суд», соответствующих статей Гражданского процессуального кодекса Украины, существующей по данным вопросам судебной практики и теоретической дискуссии ученых и ведущих специалистов в сфере юриспруденции.

Ключевые слова: решения суда, основания пересмотра решений, Верховный Суд Украины, гражданские дела, судебная практика.

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LEGAL REGULATION OF THE PROSECUTOR'S PARTICIPATION IN CIVIL PROCEEDINGS THROUGH THE PRISM OF THE CONSTITUTIONAL FUNCTIONS OF THE UKRAINIAN PROCURACY

The Article is devoted to legislative developments in the legal regulation of the prosecutor's participation in Ukrainian civil proceedings, as well as the implementation of the legal analysis of compliance of the prosecutor's participation in civil proceedings to the powers and functions implemented by the new Law of Ukraine «About the Procuracy», identifying problem areas and developing proposals for their solution.

Key words: prosecutor, procuracy's functions, prosecutor's participation in civil proceedings, representation of citizens' or the state interests in court, legal regulation.

Problem statement. The legal nature of the Prosecutor's participation in civil proceedings in the framework of the existing institutions of civil law and civil procedure is currently the subject of discussion. Adopted by the Supreme Council of Ukraine the new Law of Ukraine «About the Procuracy» [1] provides significant changes in the powers of the Ukrainian procuracy to fulfil its functions and makes changes to several legislative acts of Ukraine in order to bring them in line with the new functional model of the procuracy of Ukraine. Among them there are acts, containing the legal regulation of prosecutor's participation in Ukrainian civil proceedings. However, the legal analysis of these instruments raises a number of questions about the accordance of legal regulation of the prosecutor's participation in civil proceedings with its powers, implemented by the new law, so this requires more research.

Analysis of recent researches and publications. Problematic issue related to the processes of procuracy reforming is studied in the works of many scholars, including: E. M. Blazevski, Yu. M. Groshevoi, L. M. Davydenko, V. V. Dolezhan, P. M. Karkach, I. M. Koziakov, M. V. Kosuta, O. M. Litvak, I. E. Marochkin, M. I. Mychko, V. T. Nor, G. P. Sereda, V. V. Sukhonos, O. M. Tolochko, V. V. Shuba, P. V. Shumsky, M. K. Yakimchuk and others. A significant contribution to the development of theoretical and practical provisions for the prosecutor's participation in civil proceedings is made in the works of such scholars as: S. S. Bychkova, K. V. Gusarov, T. O. Dunas, M. V. Rudenko, S. Ya. Fursa, M. Y. Shtefan and others.

These works formed a significant scientific research base of the prosecutor's participation in civil proceedings; however, they were conducted through the

prism of the legal analysis of contemporary legal regulation of these relations. At the same time the legislative changes of the Ukrainian procuracy's activity legal regulation regarding the implementation of its constitutional functions and the resulted changes of the legal regulation of prosecutor's participation in civil proceedings require additional research and scientific understanding, as well as ongoing discussions regarding their validity and effectiveness.

Paper purpose. The aim of this Article is to highlight legislative developments in the legal regulation of the prosecutor's participation in Ukrainian civil proceedings, as well as analyzing the accordance of the legal regulation of the prosecutor's participation in civil proceedings with its powers implemented by the new law functions, identifying problem areas and developing proposals for their solution.

Paper main body. The prosecutor's participation in civil proceedings with the purpose of representing the interests of a citizen or the state in court is normatively regulated by Article 45 of the Civil Procedure Code of Ukraine (hereinafter — the CPC) [2], which regulates relations in the civil process participation of bodies and people, that were afforded the right to defend rights, freedoms and interests of others by law. According to Part 2 of this article for the purpose of representing the interests of citizens or the state in court, the prosecutor within the powers defined by law, goes to court with a claim (statement), participates in the proceedings on his claims, and may on their own initiative join a suit, that has been opened on the claim of other persons at any stage of its consideration, takes the appeal, appeal statement of judicial review by the Supreme Court of Ukraine on the revision of judicial decisions on newly discovered facts.

It should be noted, that this revision of this article is a fairly new. Because, before the amendment of the Ukrainian law of 20 December 2011 № 4176-VI «About Amendments to Some Laws of Ukraine Regarding Improvement the Order of Justice» [3] (became res judicata on 15 January 2012), the prosecutor was a part of a general list of bodies and persons specified in Part 1 of Article 45 of the CPC of Ukraine that in cases, specified by law, can apply to court with claims about protection of the rights, freedoms and interests of other persons or state or public interests and to participate in these cases.

In this regard, the question arises about the reason of such changes in Part 1 of Article 45 of the CPC of Ukraine concerning the definition of the prosecutor's place in the system of bodies and people, that were afforded the right to defend rights, freedoms and interests of others by law. Doctrines are attempting to explain these changes in legislation. These attempts, in particular, are reduced to the fact that the prosecutor is a special party in a civil process, and his involvement in civil proceedings due to the need of performing the function of representing the interests of a citizen or the state in court in cases determined by law. So, the function of representation of these interests in court is for prosecutors constitutional. In contrast, the interest of other state authorities (rather executive), local governments that were previously listed along with the prosecutor in Part 1 of Article 45 of the CPC of Ukraine, the civil process is very different. This interest is mainly

departmental in nature: they participate in cases by virtue of their official authority; may be joined by a court to participate in the case for presentation of findings on the performance of its powers (Part 3 of Article 45 of the CPC of Ukraine) [4, p. 24].

In such circumstances, the question about the validity of such legislative decisions remains open, taking into account the above features defining the functions of the procuracy in the judicial process unlike other public bodies. So, scientists claim that, as the function of the procuracy is determined at the constitutional level, appeals of the prosecutor to the court and participation in court proceedings should be regulated separately from other persons. Because prosecutor's participation in a civil trial is possible according to the general rule that in cases prescribed by law the court can contact the authorities and officials who are afforded to protect the rights, freedoms and interests of other persons or state or public interests by law (Section 2 of Article 3 of the CPC of Ukraine) [5, p. 82–3].

S. Bychkova on this occasion noted, that the legislature in Section 2 of Article 45 of the CPC of Ukraine for designation of specified forms of prosecutor's participation in civil proceedings is not correct to use the term «representation», as the prosecutor in any case does not become a procedural representative, including legal. In this regard, in her opinion, it is necessary to separate a prosecutor's participation in the case as officially acting in defense of rights, freedoms and interests of another person or state or public interests, and legal representation. Subject as aforesaid, the author proposes to designate corresponding functions of the procuracy and to use an alternative name — «participation of the prosecutor in court in order to protect the interests of citizens or the state», and to amend Part 2 of Article 45 of the CPC of Ukraine, as well as the relevant articles of the Law of Ukraine «About Procuracy» [6, p. 104–105]. We believe that this proposal is premature, at least before the revision of the Constitution of Ukraine [7] with regard to the regulation of the prosecutors' functions outside the criminal justice system.

Legal regulation of prosecutor's representation of citizens' or the state's interests in court was enshrined in the new law, which fundamentally changes the procuracy's representation of the interests of the citizen or the state in court, including, in civil proceedings, due to bringing the legislation of Ukraine in line with European standards of the prosecutor's activities outside the sphere of criminal justice.

Legal analysis of the new law allows us to claim that the constitutional function of the procuracy's representation of interests of a citizen or the state in court in cases is determined in Paragraph 2 of Part 1 of Article 2 of the new law and defined as representation of interests of citizens or the state in court in cases determined by this law. It is seen that under this formulation, the legislator has in mind the cases provided by the new law, and the manner of representation is determined by the norms of the procedural law taking into account Part 7 of Article 24 of the new law (determines the characteristics of the individual forms of representation of interests of citizens or the state in court), according to which the powers of prosecutors, provided by

this article shall be exercised exclusively on the grounds and within the limits established by the procedural legislation.

So, according to the amendments made by the new law, Part 2 of Article 45 of the CPC of Ukraine, the second sentence of the first paragraph, according to which the prosecutor must provide the court with documents proving the inability of a citizen to represent their interests independently, was excluded as the third paragraph was added to that part of article and it is said there, that the prosecutor applies to the court for representation of interests of citizens or the state in court (regardless of the form in which the representation) must justify the existence of grounds for making such representations specified in the Article 23[1]of the Law of Ukraine «About Procuracy». For representation of interests of citizens in court, the prosecutor must also provide proof of age failure, incapacity or limited capacity of the relevant citizen and written consent of the legal representative or the authority, which the law afforded the right to defend rights, freedoms and interests of such person, and also to represent this person. The failure of the prosecutor to provide requested proofs to the court for substantiating the grounds for representation of citizens' or the state's interests in court may cause consequences enshrined in the Article 121 of the CPC (the abandonment of the claim without movement, the return of the claim).

Under the new law, the prosecutor carries out representation of interests of the citizen in court (the citizen of Ukraine, foreigner or stateless person) if such person is not able to protect their violated or disputed rights or implement procedural powers through the failure of age, incapacity or limited capacity, and legal representatives or authorities afforded the right to defend rights, freedoms and interests of such person by law do not perform or improperly perform its protection.

In court Prosecutor provides representation of legal interests of the state in case of a breach or threatened breach of the interests of the state, if the protection of these interests is not performed or is improperly performed by a public authority, local government body or other entity of authority, whose terms of reference cover the appropriate authority and in the absence of such a body.

However, it is not permitted for the prosecutor to represent in court the interests of the state represented by public companies, as well as in cases related to the electoral process, referendums, the activity of the Supreme Council of Ukraine, President of Ukraine, the creation and operation of mass media, political parties, religious organizations, organizations engaged in professional self-government, and other public associations. Representation in court the interests of the state represented by the Cabinet of Ministers of Ukraine and the National Bank of Ukraine may be carried out by the General Prosecutor's office of Ukraine or regional Prosecutor's office only by written instruction

[1] Although the text of the law contains a technical error and mentions the Article 23 instead of the Article 25, which had that number in the draft law, but from the contents it is seen that we are talking about Article 23.

or order of the General Prosecutor of Ukraine or his first deputy or deputy in accordance with the competence.

Section 6 of Article 23 of the new law defined the rights of the prosecutor while representing interests of citizens or the state in court that he exercises in the manner prescribed by the procedural law and the law regulating enforcement proceedings. These rights include: the right to appeal to court with the claim (statement presentation); the right to join the case on the claim (request, view) of another person, at any stage of the proceedings; the right to initiate the revision of judgments, including in a case brought under the claim (statement, representation) of any other person; the right to participate in the trial; the right to file a civil claim during criminal proceedings in the cases and manner defined in the criminal procedure law; the right to participate in enforcement proceedings in the execution of the judgments in the case, in which prosecutor was representing the citizen or the state in court; with the permission of the court — the right to read the case materials in the court and the materials of enforcement proceedings, to make excerpts, get free copies of the documents, appeared in the case or enforcement proceedings. Rights of the prosecutor in civil proceedings, which he is exercising within the powers defined by law, are enshrined in the Part 2 of Article 45 of the CPC of Ukraine.

Legal analysis of the provisions of the new legislation allows us to claim that presenting the claim (statement) in the manner enshrined in the Article 45 of the CPC, the prosecutor among other demands from the content of these legal documents should require the demand of the prosecutor to the court for confirmation of the ground for representation. In addition to this, the prosecutor must provide the court with written consent of the legal representative or the authority, which the law afforded the right to defend rights, freedoms and interests of the person concerned, to represent this person.

During the representation of interests of citizens or the state in court, the prosecutor is entitled in the manner prescribed by the procedural law, to join the case brought under the claim (statement, representation) of another person, at any stage of the proceedings. However, you should pay attention to the content of the Part 2 of the Article 45 of the CPC of Ukraine, which specifies that the prosecutor may join the case that has been opened on the claim of other people at any stage of its consideration on his own initiative. Analyzing these powers, it should be noted that the provisions of the new law about accession of the prosecutor to the case at any stage of the proceedings is not consistent with the norms of procedural law (Par. 1 and Part 2 of Article 45 of the CPC of Ukraine), which establishes the right of a prosecutor to join the case at any stage of its consideration. On this occasion, scientists have noted that the entry of the prosecutor in the proceedings at any stage of its consideration does not mean it is right, for example, to join the case, which is considered, at the stage of judicial debate [4, p. 27; 8, p. 73]. According to T. A. Dunas and M. V. Rudenko, stages (phases) of consideration of the case should be considered as: proceedings in the court of first instance; appeals; appeal proceedings; proceedings in the Supreme Court of Ukraine; the proceeding on newly discovered facts; executive production [4, p. 27].

The prosecutor has the right to initiate a review of judicial decisions, including cases brought under the claim (statement, representation) of another person. Thus, by filing a complaint or an application for review of a judicial decision in a case in which the prosecutor did not participate, he thereby joins this case. The possibility of the prosecutor to join the case by the initiation of the review of judicial decisions is also provided by the Part 2 of the Article 45 of the CPC of Ukraine.

One of the representation forms of citizens' or the state's interests in court is participation in court cases. However, participation in court cases means not only participation in the trial, but also exercising prosecutors' powers, enshrined by the relevant procedural legislation. Thus, according to Part 2 of the Article 281 of the CPC of Ukraine the case statement on the provision of mental health care, compulsory or discontinuing the provision of outpatient psychiatric care, hospitalization forcibly is considered with obligatory participation of the prosecutor.

It should be noted that the new law defined a new concept of public procuracy outside the criminal justice system, which sets the powers of the procuracy to implement the functions of a representative office of interests of a citizen or the state in court in cases determined by law. To support this concept in Paragraph 5 of Section XII «Final Provisions» of the new law legislator made several changes in legislative acts of Ukraine in order to bring them into line with it. At the same time, the legislator made no changes to the provisions of Section 6 of Article 22 of the Law of Ukraine «On Psychiatric Care» [9], which enshrine that court cases on the provision of psychiatric care in forcibly dealt should be considered with obligatory participation of the prosecutor, clearly defining that the participation of the prosecutor in such cases is obligatory due to the exercising of the function of supervision of observance of laws during the execution of judicial decisions in criminal cases, as well as the application of other coercive measures related to the restriction of personal freedom of citizens. This conclusion can be reached by analyzing the changes made by the law to the Article 31 of this law, according to which the supervision of observance of laws in the provision of psychiatric care is exercised by the prosecutor through the exercising of powers for the execution of the constitutional functions of the procuracy of Ukraine, that is mentioned above.

According to Part 3 of Article 2 of the new law the procuracy cannot be assigned functions that are not provided by the Constitution of Ukraine. This raises the question of the legal nature of powers of the prosecutor in civil proceedings (in the context of the constitutional functions of the procuracy of Ukraine) to file a claim in court about annulment, if it is required the protection of rights and interests of the child, of the person declared legally incapable or of the person whose capacity is limited (Article 42 of the Family Code of Ukraine (the Civil Code of Ukraine) [10]; to appeal to the court with the claim about deprivation of the parental rights (Article 165 of the Family Code of Ukraine); to file a claim in court about deprivation of one or both parents parental rights or for the removal of the child from the mother and father without deprivation of parental rights (Article 170 of the Family Code

of Ukraine); to go to court with the claim about cancellation of adoption or annulment next to parents, adoptive parents, guardians, trustees, bodies of guardianship and guardianship, as well as an adopted child, under the age of fourteen years (Article 240 of the Civil Code of Ukraine).

The Law of Ukraine «About Procuracy» dated November 5, 1991 [11] among the powers of the prosecutor in exercising of prosecutorial supervision over observance and application of laws entitled the right of prosecutor to take legal recourse in cases afforded by law (Paragraph 3 of Part 3 of Article 20 of this law). According to the provisions of the new law, legal regulation of the right of a prosecutor to appeal to the court appears within the powers of the prosecutor in exercising his functions. In our opinion, with coming into legal force the new law, the norms of the family code of Ukraine, which provide the right to the prosecutor to appeal to the court in these categories of civil cases, should be practically applied concerning certain provisions regarding the representation of the interests of such categories of people, provided by the provisions of the new law, for example previous obligatory going to court, notification of the citizen and his legal representative or the authority and compulsory proving grounds for representation by the court and others.

In addition, according to the Law of Ukraine «On Amendments to Some Legislative Acts of Ukraine on Ensuring the Activities of the National Anticorruption Bureau of Ukraine and the National Agency for Prevention of Corruption» [12] Section III of the CPC is amended by Chapter 9, which regulates particular adversary proceedings on the recognition of unjustified assets and their recovery. In accordance with the provisions of this chapter, a claim of unjustified assets and their vindication is filed in the interests of the state by the prosecutor during the whole statute of limitations from the date the judgment of conviction against a person authorized to perform the functions of a state or local government came into force.

Therefore, the question arises whether the provisions of Chapter 9 of Section III of the CPC should be implemented in regard to the changes made by the new law in Part 2 of Article 45 of the CPC of Ukraine, concerning the obligation of the prosecutor, who applies to a court for the purpose of representing the state in court (regardless of the form in which the representation) to justify the existence of grounds for the exercising such representation, provided by the Part 3 of the Article 23 of the new Law. In our opinion, such legal regulation of the aspects of the adversary proceedings on the recognition of unjustified assets and their discovery, the legislator affords the right to appeal to the court of claims of such content only to the prosecutor, and therefore it can be assumed, that under such circumstances it is presumed that the prosecutor has the grounds to represent the interests of the state that exempts the prosecutor from the duty to substantiate the grounds of representing the interests of the state in this category of cases in court, because the prosecutor is defined as an authority whose jurisdiction includes authority for the protection of state interests in this area by the legislator.

Conclusions. Given the above, it is possible to come to the following conclusions: legal regulation of prosecutor's participation in civil proceedings boils

down to a legal definition of the prosecutor's powers for the execution of the representation of citizens' or the state's interests in court in cases, determined by law and the functions of supervision over observance of laws at execution of judicial decisions in criminal cases, as well as the application of other coercive measures related to the restriction of personal freedom of citizens; the cases of the representation of citizens' or the state's interests in court by the prosecutor are determined not only by the new law, as set out in Section 2 of Part 1 of Article 2 of the new law, but also in other laws, in particular, in civil proceedings — the provisions of the Family Code of Ukraine, Chapter 9, Section III of the CPC of Ukraine; there is a need for harmonization of provisions of analyzed above legislation, that regulate the relations, connected with the participation of the prosecutor in civil proceedings, with the aim of bringing them into line with the provisions of the new law, in terms of prosecutor's powers in discharging his functions, and thus bringing it into line with the principle of legal certainty; mentioned problematic issues require further research as they are significant due to the process of reforming of prosecution's powers outside the sphere of criminal justice and bringing them in line with European standards, in particular regarding to the participation of the prosecutor in civil proceedings.

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ПРАВОВА РЕГЛАМЕНТАЦІЯ УЧАСТІ ПРОКУРОРА У ЦИВІЛЬНОМУ ПРОЦЕСІ ЧЕРЕЗ ПРИЗМУ КОНСТИТУЦІЙНИХ ФУНКЦІЙ ПРОКУРАТУРИ УКРАЇНИ

Резюме

Положення нового Закону України «Про прокуратуру » містять новели у визначенні повноважень прокуратури України з виконання покладених на неї функцій та вносять суттєві зміни до низки законодавчих актів України з тим, щоб привести їх у відповідність до нової функціональної моделі прокуратури України, у тому числі до тих, які містять правове регулювання відносин щодо участі прокурора у цивільному процесі України. Правова регламентація участі прокурора в цивільному процесі зводиться до законодавчого визначення повноважень прокурора з виконання функції представництва інтересів громадянина або держави в суді у випадках, визначених законом, та функції нагляду за додержанням законів при виконанні судових рішень у кримінальних справах, а також при застосуванні інших заходів примусового характеру, пов'язаних з обмеженням особистої свободи громадян. Встановлено, що випадки представництва прокурором інтересів громадянина або держави в суді визначені не лише новим законом, як це зазначено у п. 2 ч. 1 ст. 2 нового закону, а й у інших законах, що викликає потребу в узгодженні норм законодавства, які регулюють відносини, пов'язані із участю прокурора у цивільному процесі, з метою приведення їх у відповідність з положеннями нового закону в частині повноважень прокурора з виконання покладених на нього функцій, а отже у відповідність до принципу правової визначеності.

Ключові слова: прокурор, функції прокуратури, участь прокурора у цивільному процесі, представництво інтересів громадянина або держави в суді, правова регламентація.

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ПРАВОВАЯ РЕГЛАМЕНТАЦИЯ УЧАСТИЯ ПРОКУРОРА В ГРАЖДАНСКОМ ПРОЦЕССЕ ЧЕРЕЗ ПРИЗМУ КОНСТИТУЦИОННЫХ ФУНКЦИЙ ПРОКУРАТУРЫ УКРАИНЫ

Резюме

Положения нового Закона Украины «О прокуратуре» содержат новеллы в определении полномочий прокуратуры Украины о выполнении возложенных на нее функций и вносят существенные изменения в ряд законодательных актов Украины с тем, чтобы привести их в соответствие с новой функциональной моделью прокуратуры Украины, в том числе к тем, которые содержат правовое регулирование отношений по участию прокурора в гражданском процессе Украины. Правовая регламентация участия прокурора в гражданском процессе сводится до законодательного определения полномочий прокурора по исполнению функции представительства интересов гражданина или государства в суде в случаях, определенных законом, и функции надзора за соблюдением законов при выполнении судебных решений в уголовных делах, а также при применении других мер принудительного характера, связанных с ограничением личной свободы граждан. Установлено, что случаи представительства прокурором интересов гражданина или государства в суде определены не только новым законом, как это указано в п. 2 ч. 1 ст. 2 нового закона, но и в других законах, что вызывает потребность в согласовании норм законодательства, которые регулируют отношения, связанные с участием прокурора в гражданском процессе, с целью приведения их в соответствие с положениями нового закона в части полномочий прокурора по выполнению возложенных на него функций, а, следовательно, в соответствие с принципом правовой определенности.

Ключевые слова: прокурор, функции прокуратуры, участие прокурора в гражданском процессе, представительство интересов гражданина или государства в суде, правовая регламентация.

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CHALLENGE AS A GUARANTEE OF THE PROTECTION OF RIGHTS OF THE PARTICIPANTS OF COMMERCIAL COURTS PROCEEDINGS

Based on analysis of national procedural law the analysis of the challenge as a guarantee of defense of rights for participants is carried out in the economic legal proceedings. Direct connection of the challenge and the level of protection of rights for the participants of economic process is examined in the article.

The right of the challenge of judge is an inalienable right of participants of the legal proceedings. It means that a person has the opportunity to express incredulity to a judge or other participant of legal proceedings, disagreement with his participation in the case.

In the Economic Procedural Code of Ukraine (hereinafter — the EPC of Ukraine) e, in contrast with other procedural branches, possibility of challenge is foreseen only for a judge and a court expert.

The possibility of challenge not only of a judge and of a court expert but also of defense counsel and representative, court clerk, prosecutor, specialist and translator will give the additional guarantees of defense of rights for the participants of process.

It is suggested to select the subjects of realization of separate procedural rights and to expand their circle.

Key words: challenge, economic trial, defense of rights, economic trial participants.

Problem statement. The equitableness of the litigation as a criterion of the proper court proceedings is provided inter alia by the legal institute of the challenge of a judge and other persons promoting justice. The reason is that challenge is a plea of distrust for the certain person because of doubt about its fairness and impartiality.

Analysis of researches and publications. Some perspectives of the challenge have been investigated by O. V. Anufrieva, V. G. Zaderako, A. T. Komziuk, H. A. Magomedova. The timeliness of the topic of investigation results from the fact that there are no investigations of the challenge at the commercial court proceedings.

Paper purpose. Neither of procedural branches of law of Ukraine defines the notion of «challenge». That's why a purpose of the article is an investigation of the institute of challenge as well as problems of its implementation at the commercial court litigation and offering of proposals for improvement of the legislation of commercial court litigation in this field.

Paper main body. One may find a number of definitions of the term of challenge depending on the alternative characteristics provided therein at

legal literature. The investigation of the dictionaries of the legal terms allows one to summarize that challenge may be understood as an institute of the procedural law and mean of securing of the fairness and impartiality of the court litigation providing removal of the person from the participation at the court proceeding because of its personal direct or indirect interest of the outcome of the case as well as the other reasons causing doubts of the impartiality of the person [1, c. 43]. So challenge as a procedural institute provides grounds for the person to be not admitted to take part at the concrete case.

The historical roots of the institute of challenge may be found as early as in Ancient Rome. The Roman law provided right of the defendant to challenge the judge in order to guarantee equitable decision as well as a general rule on the common approval for the choice of the trial juror by the parties.

There was a rule for the appointment of a judge on the basis of agreement at the early stage of the genesis of the Roman law. Parties agreed for a person of a judge and accepted to obey the future decision on their own free will. The right and procedure of the challenge of the judge (recusatio) have been provided as well. There were grounds for challenge and self-challenge.

At the current stage of the development of the procedural branches the independence and impartiality of the judges are guaranteed by the legal institutes of challenge, provided by the corresponding rules of procedure.

The investigation of rules of legislation and studies of legal scholars allows one to make conclusion on the main features and characteristics of the challenge.

Firstly the challenge is a mean securing fairness and impartiality of the court. The essence of this feature means that challenge is a plea of distrust for the composition of the court of trial or persons promoting justice on the grounds that there is doubt about their fairness and impartiality.

The challenge may prevent possible unjust and unfair proceedings in a case or falsification of evidences because of objective or subjective circumstances because the challenge is one of the instruments providing legality and validity of the court decisions. The challenge is designed to protect court and other participants of proceedings from the impact of the external forces.

Secondly the challenge is a merely procedural institute. The instruments of challenge are provided at the all of procedural branches of law as a guarantee of the equitable settlement of the dispute but there is no anything like challenge at any branch of material law.

It means that the challenge is necessary only for the legal relations with an impartial decision-maker person as a main actor.

Also one should pay attention to the fact that the legal institute of challenge is provided at all procedural branches of law. The laws of commercial, civil, administrative and criminal procedure provide legal institute of challenge. It stipulates the inter-branch nature of the aforementioned institute.

Thirdly the challenge is a right of the participants of legal relations but not the obligation. In concrete case the subject of challenge depending on its purpose and confidence in justification of statement about challenge decides a question about expedience of using such a right. The point of this feature is

that at presence of grounds, the challenge can both declared and not declared, if the subjects of the challenge will consider that these grounds will not interfere with impartial consideration of court decision. However, in order to protect the interests of the parties interested in fair court decision a law provides the institute of self-challenge that, unlike challenge, is obligatory condition for a judge at presence of grounds.

The fourth feature is that challenge must be motivated. Motivation of challenge is guaranteed by the list of reasons which exclude possibility of consideration of this case by particular judge or participation of this court expert in proceedings. In an economic procedural law list of grounds of challenge of the judge is inexhaustible, taking into account formulation «if other circumstances which raise doubts in his impartiality will be set». On the other hand, grounds for challenge of court expert in Par. 5 of Art. 31 of the EPC of Ukraine are more concretized because of the absence of the formulation «and other circumstances». However, such grounds of challenge as «personally, directly or indirectly interested in a result of consideration of case» are interesting also. In a statement about the challenge must be noticed concrete reference and demonstrated the possibility of influence of subjective factors on the decision of particular economic trial. A court, making decision about challenge of judge or court expert from the grounds of bias, personal interest, and others like that, can reject a statement, explaining that it is not motivated and groundless. Following specific feature: procedure of challenge has its own special, statutory mechanism. Every procedural law sets the order of realization of right to challenge, which must be followed to achieve the desired result — statement of the challenge and its satisfaction. A failure to comply in prescribed manner does not entail the legal consequences of statement of challenge.

Challenge procedure has several aspects.

I. Under Par. 4 of Art. 20 of the EPC of Ukraine writing form is obligatory for the declared challenge. It means that concrete real facts, which add a doubt about impartiality of judge (or judges) which examine a concrete case, must be recorded in writing. Like in accordance with Par. 6 of Art. 31 of the EPC of Ukraine written form is necessary for the statement of challenge of the court expert. By the information letter of the Supreme Economic Court of Ukraine «On Some Issues Raised in the Memorandums of Economic Courts of Ukraine in the First Half of 2009 about the Application of Standards of the Economic Procedural Code of Practice of Ukraine» dated 29.09.2009 № 01–08/530 it is set that if challenge is declared orally, an economic court must offer to the declarant to provide it in a writing form (at a necessity, giving to the declarant time for this purpose), and in the case of refusal of statement of challenge in such form — to continue its consideration in essence [2].

II. Challenge must be declared only on the certain stage — before beginning of dispute resolution, and after it — as an exception — only in case if a declarant learned about grounds of challenge after the beginning of consideration of economic trial in essence.

III. Order of consideration of challenge. In accordance with Art. 20 and Par. 7 of Art. 31 of the EPC of Ukraine a question about a challenge of the

judge is decided in a deliberative room by court in that complement, which considers a case; the resolution should be announced. Statement about a challenge for a few judges or composition of court is decided by a majority vote.

Instead, before (before the entry into legal force of the Law № 2453-VI dated 07.07.2010) quite another order was set in the EPC of Ukraine, according to which a question about a challenge of the judge was decided by the chairman of economic court or vice-chairman of economic court.

Because of presence of such changes in legislation the discussion about the appropriateness of changes was very heated. After all, in fact, adoption of such a challenge would be the same as a mistake of the judge (an unstatement of self-challenge before a challenge), which disgraces honor and dignity of the judge, diminishes an authority of judicial department and can cause unpleasant consequences in relation to the judge, sometimes even termination of powers. And that is why it is easy to predict the judge's decision about the challenge.

IV. The final procedural document on the results of the application about the challenge is the determination of the economic court.

The last feature of this institute is a presence of the special subjects. It should be noted that the subjects of challenge are appropriate to consider two aspects: subjects that can declare about the challenge, and subject which may be declared. For the first group there is the exhaustive list of persons, which have a right to declare challenge in procedural law. These lists are not subject to free interpretation and expansion. A right of the challenge of the judge is the inalienable right of participants of the legal proceedings. The right of the challenge of the judge means that the person has the opportunity to express incredulity to the judge or other participant of the legal proceedings, disagreement with his participating in case. There are such subjects of initiation of the challenge in the EPC of Ukraine (Par. 3, Art. 20): parties, prosecutor, participating in a trial, third persons which take part in a trial and use rights for a party (p. 1 art. 22 of the Code on Civil Procedure of Ukraine establishes the right of the parties on the statement of petitions and their arguments and considerations about all issues, including the right to a challenge). According to Par. 5 of Art. 31 of the EPC of Ukraine the challenge in a case can be declared by the sides and the public prosecutor, participating in case. We consider that the third persons, who have rights for sides, are the subjects of statement of challenge to a court expert. Information about inclusion of the declarants of challenge of the third persons is indicated in Par. 1.10. of the Resolution of the Plenum of the Supreme Economic Court of Ukraine № 18 dated 26.12.2011.

In relation to the subjects of the second group in the EPC of Ukraine, in contrast to other procedural branches, possibility of the challenge is foreseen only for a judge (Art. 20) and court expert (Par. 6 of Art. 31).

It should be noted that they are entitled to challenge only to that judge (chamber), in which they are participants. An important condition of the challenge of these subjects is their participation in the proceedings. So, it is impossible to challenge, for example, a judge, which works in the court, but does not

consider the particular case. The challenge of the judges who do not participate in the consideration of the particular case is not foreseen. And application for a challenge must be rejected. Similarly, challenge may be declared only for that court expert who takes part in a particular case as a court expert.

Let's analyze the subjects of the second group.

According to Art. 1 of the Law of Ukraine «On the Judicial System and Status of Judges» the judicial power in Ukraine in accordance with the constitutional principles of separation of powers is carried out by independent and impartial courts educated in obedience to the law [3]. This right is also presented in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 10 of the Universal Declaration of Human Rights, Art. 14 of the International Pact about Civil and Political Rights. Basic principles of the independence of the judiciary were also internationally accepted. They were adopted by the 7th Congress of UNO on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985, and approved in resolutions of the General Assembly of UNO 40/32 from November, 29, 1985 and 40/146 from December, 13, 1985. This act contains the section «The Independence of Courts» and in Par. 1 states that the independence of the judiciary is guaranteed by the state and stated in the constitution or laws of the country. All state and other institutions have to respect and support independence of the judiciary [4].

So, Art. 126 of the Constitution of Ukraine states that inviolability of judges' independence ensured by the Constitution and the laws of Ukraine. An influence on the judges in any way is forbidden in P. 2 of the same article of the Constitution.

Part 1 of Art. 47 of the Law of Ukraine «On the Judicial System and Status of Judges» states that the judges are independent in their activity. Realization of any actions is forbidden in regard to judges regardless of form of their display from the side of state institutions, establishments of local self-government, their public and official persons, establishments, organizations, citizens and their associations, juridical persons in order to prevent the execution of professional duties by the judges or to persuade them to the perversion of justice. It is forbidden to influence judges in any way at all time of their employment. Art. 47 of this Law also forbids the interference in the activity of judge in realization of justice and warns about the responsibility in case of violation of rules.

According to Par. 1.2.5 of the Decision of Plenum of the Supreme Economic Court of Ukraine «On Some Issues of Practical Application of the Arbitration Procedure Code by Courts of First Instance» № 18 from 26.12.2011 the right to the application about the challenge of the judge is one of the guarantees of justice objectivity and impartiality of the proceedings. As in Art. 6 of Convention for the Protection of Human Rights and Fundamental Freedoms basic judicial guarantees are stated. And a person can avail them during considering his case in a national court [5].

However, without the proper system of selection the judges it is impossible to provide independence of judicial branch of power, as a level of education of

judges determines the quality of the legal proceedings. Specific requirements for judges of commercial courts are not provided, and therefore the requirements for judges of economic courts are regulated by the Constitution and the Law of Ukraine «On the Judicial System and Status of Judges». The list of requirements for the judge depends on the department of the court, in which a candidate applies.

As a judge of a local court may be recommended a citizen of Ukraine not less than twenty-five years, which has a university law education and work experience in the field of law not less than three years, living in Ukraine for at least ten years and native language speaking.

Part 4 of Art. 64 of the law explains the meaning of the terms «university law education» and «work experience in the field of law». In particular, university law education is considered to be a law education received in Ukraine by the qualification level of specialist or master, as well as a law degree at the appropriate level of the qualification received in foreign countries and recognized in Ukraine in accordance with the law. Experience in the field of law is considered to be a person's experience as a specialist after receiving the university law education by the not less than professional qualification level.

It is important to note that, together with the requirements for judges there are some conditions for persons, which cannot be recommended as a judge (Par. 2, Art. 64 of the law). So, cannot be recommended as judge those persons, which have been recognized legally incapable or partly capable, or those which have chronic mental or other diseases that interfere with the duties as a judge, or persons with an outstanding conviction.

It is considered to be that the requirements for the judges are not only the requirements for the candidates for the post of judge. These requirements include the judge's rules and restrictions set for the judges after taking the oath. Par. 4 of Art. 54 of the law sets requirements for the judge to follow these duties: 1) timely, fairly and impartially consider and decide a case in accordance with the law, in compliance with the principles and rules of the court; 2) to comply with the rules of judicial ethics; 3) to show respect to the trial participants; 4) to observe the oath of judge; 5) not to disclose a secret information protected by the law, including the secret of the retiring room and closed judicial session; 6) to comply with the requirements and adhere to the restrictions stated by the Law of Ukraine «On Principles of Preventing and Counteracting Corruption» [6]; 7) to file annual income-tax, property, charges, obligations of financial character return (by April 1) in the form and manner established by the Law of Ukraine «On Principles of Preventing and Counteracting Corruption».

The requirement about a necessity of training at the National School of Judges of Ukraine is regulated in accordance with Par. 6 of Art. 54 Law of Ukraine «On the Judicial System and Status of Judges». For a judge appointed as a judge for the first time, such training should be annual and lasts for two weeks, and for a judge which holds a position of judge permanently — two weeks, but not less than once per three years.

Also there are the requirements about incompatibility the post of judges with other activities (Art. 53 of the Law). So, staying in position of judge is incompatible with employment in any other governmental authorities, establishments of local self-government and with a representative mandate. Also a judge shall not combine the activity with entrepreneurial or advocate activity, any other paid work (except for teaching, scientific and creative activities), as well as being a member of the government authority or employment in the company or organization for the purpose of making a profit. A judge can not belong to a political party or trade union, show favor to them, to participate in political actions, rallies, strikes.

Thus, the legislation establishes a list of requirements for the judges to ensure professionalism, independence and impartiality of the proceedings. Requirements are submitted both to the candidates in the judges of economic court and to the employed judges. Requirements for candidates for judge's post depend on the court level. An additional requirement for the judge of higher courts is a presence of large work experience in the field of law.

There is also a challenge of the court expert but not only challenge of the judge in the economic legal proceedings.

In accordance with Art. 7 of the Law of Ukraine «On Forensic Examination» forensic activities are carried out by state specialized institutions, as well as in cases and under conditions specified in this Law; and those court experts which are not employees of these institutions [7].

European continental theory defines the legal status of the expert as a judge's assistant; the Anglo-American theory defines him as a witness. Domestic legislation defines the legal status of an expert as an independent subject of the process that has its own procedural rights and duties that distinguish it from other subjects of procedural activities. We can see in this case, that a court expert in the economic proceedings is a person, promoting the administration of justice [8].

Completeness, correctness, validity and adequacy of the expert's opinion, as well as its independence and confidentiality are provided by a number of procedural rules and the so-called «expert oath» — warning that is criminally responsible for knowingly giving false evidence and refusal to fulfill obligations without justifiable reasons, and also by possibility of setting of the duplicative forensic examination. The guarantees of independence of the court expert and correctness of his conclusion are expounded in Art. 4 of the Law of Ukraine «On Forensic Examination».

Court experts in accordance with Art. 9, 10 and 16 of this law may be specialists having professional university education, educational qualification level not less than professional, trained and qualified as a court expert in a particular field, and registered in the State Register of Certified Court Experts. In accordance with P. 1, Art. 16 of the Law of Ukraine «On Forensic Examination», depending on the areas of practice they are conferred the qualification of the court expert with the right of a certain kind of examination. Awarding procedure for those court experts who are not employees of the state specialized institutes is determined by the order of the Ministry of Jus-

tice of Ukraine dated 09.08.2005 № 86/5 «On Approval of the Qualification Commissions and Certification of Court Experts» [9].

For getting the qualification of the court expert those specialists who are not employees of the state specialized institutes should have the appropriate university degree, an educational qualification level of not less than specialist, trained at research establishments of judicial examinations of Ministry of Justice of Ukraine, as a rule, in the zones of regional services, know methodical requirements and their actual use and know the forensic examination legislation.

After practical study those specialists who are not employees of the state specialized institutes and independently or as a member of a corporation are going to work as a court expert, should confirm their qualification and get the certificate of the court expert in the Central Expert Committee at Ministry of Justice of Ukraine.

According to Par. 4 of Art. 10 of the Law of Ukraine «On Forensic Examination» court experts mustn't use their powers for the purposes of obtaining illegal benefit or promising and offering such benefits for themselves or other persons.

According to Art. 11 of the law cannot be employed as a court expert the person who was found legally incapable by the court, or person with outstanding conviction, or with administrative sanction for corruption offenses over the year or disciplinary sanction as a deprivation of the court expert qualification.

In Art. 12 of the law established the duties of the court expert regardless of the type of proceedings. Court expert should examine case in depth and give an informed written report, as well as declare about the self-challenge if there are legal grounds of non-participation in the case.

So, we see that for subjects of the challenge in the economic process — for judges and court experts — there are specific skill requirements, requirements concerning incompatibility and other requirements that ensure and guarantee generally qualified, correct and impartial consideration of economic affairs.

Comparing the subjects of the challenge (self-challenge) in the economic process with other procedural branches, one can see that their list in the economic legal proceedings is most narrow. In criminal proceedings one can see challenge declared for investigating magistrate, judge or jury, prosecutors and investigators, trial lawyer and representative ad litem, specialist, interpreter, expert, court clerk. In civil and administrative proceedings the list of candidates for challenge is narrower: judge, court clerk, expert, specialist, translator [10; 11].

In the economic proceedings is not possible to challenge an expert because this member is absent in the EPCU standards; it is impossible to challenge prosecutor, court clerk.

The possibility of challenge of the counsel at law is interesting. In the Ukrainian legislation the institute of the challenge of the representative ad litem (defense counsel, counsel at law) exists only in criminal proceedings. According to the EPC, the Criminal Procedure Code of Ukraine (herein af-

ter — the CPC of Ukraine), the Administrative Procedure Rules the challenge of the representative ad litem is impossible. According to Art. 78 of the Criminal Procedure Code of Ukraine defense counsel has no right to be a person who participated in the same proceeding as another party, if he provides or has previously provided legal assistance to a person whose interests conflict with the interests of the person appealing with a request at aid and advice in legal matters; in the case of the expiration of the certificate of admission or its cancellation; if he is a relative or a family member of investigator, public prosecutor, complainant or anyone else from the composition of court [12]. The necessity of the institute of challenge of the trial lawyer for criminal proceedings is necessary for excluding cases of its possible orientation on preferred or simultaneous satisfaction during the proceedings in matters when interests don't coincide with interests of the defendant [13, p. 628].

A challenge of a defender effectively works in criminal proceedings at the present time. We will consider the positive and negative aspects of introduction of institute of challenge of trial lawyer in the economic proceedings.

Currently, in the economic process of resolve disputes in private law relations the responsibility for the objectivity of the representative lies on a side choosing the particular trial lawyer as their representative ad litem. As well as his impartiality is further provided by the contract, the Law of Ukraine «On Advocacy and Legal Practice» and the Code of Legal Ethics. Thus, according to Paragraphs 1, 3 of Part 1 of Art. 21 of the act, during the practice the lawyer is obliged to observe the oath of advocates of Ukraine and the rules of legal ethics, to notify the client about the conflict of interest without delay [14]. And according to Par. 2 of Art. 21 of the act it is forbidden for counsel to hold a position in defiance the client's will. For failure to perform legal duty a counsel will be responsible in accordance with Section 6 of the law.

In addition, an agreement sets out the obligations with counsel lawyer to represent parties on behalf and in its interests. And the breach of contract obligations as provided in the agreement will entail the legal responsibility of a counsel.

On the one hand, the legal essence of a counsel in the case is to act on behalf of and to represent the interests of the parties in the case. That is, in fact — to be that party whose interests he represents. And the parties, as is generally known, cannot be challenged, in fact exactly concerning their rights and duties there is a necessity of judicial trial. Thus, if a counsel is a relative of someone from composition of court, we consider that this judge should be challenged.

On the other hand, it must be admitted that the challenge is the way of customer's response in case of detection or suspicion of the interest of the counsel, and it will be an additional guarantee for a client.

We should not forget about the free secondary legal aid, as a client cannot influence on the assignment of counsel according to the Law of Ukraine «On Free Legal Aid».

Taking in consideration the above we consider that the possibility of the challenge not only of the judge and of the court expert but also of defense

counsel and representative, court clerk, prosecutor, specialist and translator will give the additional guarantees of defense of rights for the participants of process.

As mentioned above, together with the institute of the challenge the legislator provides the institute of the self-challenge. I. Y. Fridman, O. V. Batanov determine the self-challenge in the proceedings as the self-elimination of some participants in the criminal, civil and economic proceedings or the self-challenge of the criminal proceedings with the aim not to participate in the proceedings in cases where direct or indirect interests in the trial are present or there are the reasons to doubt in their objectivity, with an explaining of the reasons of this self-elimination [15].

Particularly, Art. 20 of the EPC of Ukraine states the duty of judge to declare about the self-challenge at presence of some grounds, which are also the grounds for the challenge.

The duty of the challenge of the court expert in the EPC of Ukraine is not set. However, we can find the legal regulation of the activities of the court expert in the special law «On Forensic Examination», which contains such an obligation. Thus, according to Paragraph 3 of Part 1 of Art. 12 of this law the court expert must declare the self-challenge if there are legal grounds of non-participation in the case.

This position is supported by Par. 13 of the Act of the Plenum of Supreme Economic Court of Ukraine «On Some Issues of Assignment of Forensic Examination» № 4 dated 23.03.2012, according to which «expert in accordance with Paragraph 3 of the first part of Art. 12 of the law has a right to declare about the self-challenge at presence of legal grounds that eliminate his participation in the case. Such grounds are provided, in particular, in the Part 6 of Article 31 of the EPC» [16].

Unlike the challenge, subject of the initiation of self-challenge can be only the person that has already been challenged (that is, according to the EPC Ukraine this is the judge or the court expert). Together with setting of a duty to declare about a self-challenge, the legislative lays a moral debt to recognize possible bias in the proceedings and to refuse to participate in it. A problem, as many scientists consider, follows exactly because of this feature of the challenge. In particular, L. Saykin and B. Gruzd noted the evidence that if the judge is really interested in the outcome of the case or if there are other circumstances causing doubts about his objectivity, fairness and the ability to examine the case in accordance with the law, he cannot deal with a matter without prejudice and will not declare its impartiality [17]. We consider that like from point of physiologic characteristics of a human the institution of the challenge will work, or rather won't work, in case with the court expert in the economic proceedings and in general for any person in any proceedings.

The grounds of challenge and self-challenge can be divided into objective and subjective. Objective grounds are clearly listed by the procedural law and in practice do not cause problems with the implementation, as opposed to the subjective grounds. In particular, the formulation of «the grounds» in Art. 20 of the EPC of Ukraine «other circumstances that cause doubt in his

impartiality», and in Art. 31 of the EPC of Ukraine — «personally, directly or indirectly interested in a result of the proceedings» creates an uncertainty. Such circumstances are not legal facts and often do not have documentary proof. A man, which brought to a judge many personal troubles, friend, long-time foe of father etc., can appear in sides of proceedings. Here we can see the moral barrier, which the judge must overcome, understanding the availability of the official duties. This is the ability to rise above personal interests in the name of honor of the profession and its own post or to declare about the self-challenge.

The difference between the challenge and self-challenge is an obligatoriness for the subjects of challenge. According to Par. 2 of Art. 20 of the EPC of Ukraine and Art. 12 of the Law of Ukraine «On Forensic Examination» the judge and court expert has no choice if there are grounds for a self-challenge, and absence the intention to challenge may lead to prosecution. According to the Law of Ukraine «On the Judicial System and Status of Judges» the Supreme Qualifying Commission of Judges of Ukraine and Supreme Council of Justice of Ukraine is engaged in the aspects of disciplinary responsibility of judges, where the violation of fair trial, in particular the violation of rules of the challenge (or self-challenge) is one of the grounds of application of such a liability (Art. 83, 85). In accordance with Art. 14 of the Law «On Forensic Examination» the court expert can be brought to the disciplinary, financial, administrative or criminal amenability.

Another difference lies in the implementation of the procedure. Particularly, the forms of statement of the challenge of judge are not provided by procedural law. So, it is enough to point about it in an appropriate act handed down in accordance with Part 5 of Art. 20 of The EPC of Ukraine, and in keeping with the requirements of the Art. 86 EPC of Ukraine. And in the event of examination of cases by several judges the adjudication may be preceded by a written statement to the judge with pointing the reasons of the challenge.

A statement of judge's challenge by submitting an application for the challenge was appropriate to the reform, when the chairman of economic court decided the question about the challenge. There was an application for a challenge as a procedural document that was the cause for the replacement of the judge in the case when the application is satisfied by the judgment of the chairman of the economic court. At present, we don't need to consider this application due to changes in the subject. However, the phrase in Art. 20 of the EPC of Ukraine «the judge must declare» suggests an idea that in keeping with the EPC of Ukraine such a statement should be documented. And in accordance with Paragraph 1.2.2 of the Resolution of the Plenum of the Supreme Economic Court of Ukraine «On Some Issues of Practical Application of the Arbitration Procedure Code of Ukraine by the First-Instance Courts» № 18 dated 26.12.2011 in the case of examination of cases by several judges there can be a written statement of the judge with the reasons of the challenge.

Conclusions. Thus, the institution of the challenge and self-challenge has three differences on the subject of the initiation, voluntariness and procedure of realization.

It should be noted that during the implementation of the mechanism of challenge and self-challenge as for the judge «suffers» subjective component of the procedure, as the judge must accept and consider its own challenge (self-challenge). It breaks the rules of subordination of participants of the economic proceedings. Indeed, in case of the self-challenge the subsequent consideration of its own statement makes no sense, since the decision about satisfaction of this application actually taken. On the contrary, in the case of initiation of the challenge of a judge one should not leave a single chance that the information in the application is unknown to the judge, who will consider this statement. And the satisfaction of the application will mean that the judge hasn't made a statement of challenge, although there were lawful grounds (that makes violation, the above mentioned). Thus, the logical next step from his side will be denial of the satisfaction of the application, and it can be appealed in higher authorities, where the personal interest of the judge will be excluded. On the ground of mentioned above it is useful to return to the previous edition of Par. 5 of Art. 20 of the EPC of Ukraine: «The question about the challenge of a judge should be decided by the chairman of the economic court or the deputy chairman of the economic court, which renders a determination within three days from the date of receipt of the application».

It is also necessary to summarize that one can notice the subjects of the implementing of certain procedural rights in the theory of procedural law. Trial participants don't have identical rights. Some of them have a certain range of rights, and others — don't have some or all of the rights that belong to the first category. For example, currently only plaintiff, defendant, third parties with their own requirements on the subject of the dispute, third parties without independent requirements on the subject of the dispute and the prosecutor have the right to the challenge, in accordance with the rules of the EPC of Ukraine. And only the judge and court expert have the right to the self-challenge. And the range of subjects of each group, at first, does not depend on each other, and secondly, these lists independently of each other may be widened or narrowed without changing the rights of subjects in another group in wide sense (right to the challenge and self-challenge).

In other words, the expansion of the range of subjects of the challenge by the adding, for example, the court clerk, the prosecutor, the representative ad litem (counsel) and an interpreter does not change the legal status of other trial participants, including the legal status of the prosecutor as the subject of the initiation of the challenge. The right to challenge of plaintiff, defendant, prosecutor and third parties will remain static.

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ВІДВІД ЯК ГАРАНТІЯ ЗАХИСТУ ПРАВ УЧАСНИКІВ ГОСПОДАРСЬКОГО ПРОЦЕСУ

Резюме

На основі аналізу національного процесуального законодавства здійснюється аналіз відводу як гарантії захисту прав учасників у господарському судочинстві. Обґрунтовується, що інститути відводу і самовідводу мають три відмінності за критеріями суб'єкту ініціювання, добровільності та процедури реалізації. Розглядається прямий зв'язок відводу та рівня захисту прав учасників господарського процесу. Також розглядаються суб'єкти та підстави для відводу, які закріплені в законодавстві та які відсутні у нормах Господарського процесуального кодексу України. Виявляється, що в ході реалізації механізму відводів та самовідводів відносно судді «страждає» суб'єктна складова процедури, оскільки суддя повинен прийняти та розглянути заяву про відвід (самовідвід) на самого себе, що порушує правила субординації учасників процесу при розгляді господарської справи в суді. Обґрунтовується, що не всі учасники процесу мають однакові права. Одні з них мають певне коло прав, а інші — не мають деяких або всіх прав, що належать першій категорії. Пропонується виділяти суб'єктів реалізації окремих процесуальних прав та розширити їх коло. Доводиться, що коло суб'єктів кожної групи не залежить один від одного, а вказані переліки незалежно один від одного можуть бути розширені або звужені без зміни прав суб'єктів іншої групи в широкому сенсі.

Ключові слова: відвід, господарський процес, захист прав, учасники господарського процесу.

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ОТВОД КАК ГАРАНТИЯ ЗАЩИТЫ ПРАВ УЧАСТНИКОВ ХОЗЯЙСТВЕННОГО ПРОЦЕССА

Резюме

На основе анализа национального процессуального законодательства осуществляется анализ отвода как гарантии защиты прав участников в хозяйственном судопроизводстве. Обосновывается, что институты отвода и самоотвода имеют три отличия по критериям субъекта инициирования, добровольности и процедуры реализации. Рассматривается прямая связь отвода и уровня защиты прав участников хозяйственного процесса. Также рассматриваются субъекты и основания для отвода, которые закреплены в законодательстве и которые отсутствуют в нормах Хозяйственного процессуального кодекса Украины. Оказывается, что в ходе реализации механизма отводов и самоотводов в отношении судьи «страдает» субъектная составляющая процедуры, поскольку судья должен принять и рассмотреть заявление об отводе (самоотводе) на самого себя, что нарушает правило субординации участников процесса при рассмотрении хозяйственного дела в суде. Обосновывается, что не все участники процесса имеют одинаковые права. Одни из них имеют определенный круг прав, а другие — не имеют некоторых или всех прав, принадлежащих первой категории. Предлагается выделять субъектов реализации отдельных процессуальных прав и расширить их круг. Доказывается, что круг субъектов каждой группы не зависит друг от друга, а указанные перечни независимо друг от друга могут быть расширены или сужены без изменения прав субъектов другой группы в широком смысле.

Ключевые слова: отвод, хозяйственный процесс, защита прав, участники хозяйственного процесса.

МАТЕРІАЛИ НАУКОВО-МЕТОДОЛОГІЧНИХ СЕМІНАРІВ З ПРАВОЗНАВСТВА

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THE INTERNATIONAL MECHANISM OF PROTECTION OF HUMAN RIGHTS

The Article researches the international mechanism of protection of human rights, including the classification of the international human rights organs and organizations, their legal status the advantages and flaws of the system of international human rights organs and organizations.

Key words: human rights, system of international human rights organs and organizations, international mechanism of protection of human rights.

The last decades can be characterized by the increased interest to the problem of implementation of human rights proclaimed in the international documents and treaties, growth of the political significance of international human rights laws, acceptance by more and more states of their human rights obligations. A lot of legal advances have taken place in the international human rights field in the last years. But, despite that, human rights organizations almost every day receive reports about massive violation of human rights in one part of the world or another and there is still a lot of work to do to stop or prevent these violations. The article is about international mechanism of protection of human rights — the activity of international human rights organs and organizations. The article offers the classification of international human rights institutions and investigates their competence and development.

The necessity of development of the science of human rights has been grounded in 1978 in the great collective treatise «The International Dimensions of Human Rights»: «the contemporary phenomenon of human rights demands that a genuine science of human rights be developed, the objectivity and rigor of which will vouch for the independence of human rights in respect of any particular school of thought or any particular interpretation of reality» [3]. But the problem of human rights has been subject to research studies in all times. Great work in this field has been conducted by such scientists as M. I. Abdullaev, A. K. Berger, H. J. Berman, A. G. Bereghnoe, V. Y. Bogdasarov, L. Bogoras, Teodor Van Boven, V. E. Chirkin, Menachem Elon, M. L. Entin, H. S. Homushev, B. Galy, M. D. Grubarg, K. Das, Rene David, V. A. Kartashkin, G. M. Kerimov, I. Y. Lischina, E. A. Lukashova, F. Lyusher, M. N. Marchenko, S. Marks, P. A. Мьllerson, B. Nazarov, B. C. Nersesyants, B. F. Newman, V. Novik, Karl Partch, Imre Sabo, L. R. Syukiyaynen, A. Tergel, L. N. Shestakov, T. A. Vasilieva, V. P. Vorobiev, I. A. Zevelev, and others.

The term «International mechanism of protection of human rights» means a system of international (inter-state) organs and organizations that act to implement the international standards of human rights and freedoms, or to restore human rights in case of their violation [8].

The system of International human rights institutions is variegated and complex. There are several grounds of classification: territorial basis (international or universal, the activity of which covers the whole world, and regional, which implement and protect HR in a certain region, there are European, African and American HR institutions); legal nature (there are judicial bodies and quasi-judicial bodies) [6]; legal basis of their establishment and activity (charters-based bodies, established on the basis of the UN Charter, and treaty-based bodies, established on the basis of the international HR treaties); scope of authority (organizations with unlimited authority that can consider any question in the HR fireld, and organizations with authority limited to a certain subject or region); kind of their activity (international HR bodies can conduct general monitoring, consider personal complaints, assess inter-State complaints, publish recommendations, do other kinds of activity); structure (collective or individual or, what is more important, do the members of the organization represent themselves or States they come from; there also combinatory institutions); terms of their activity (terminable and termless basis); status of their decisions (obligatory decisions or recommendatory decisions).

The basis of the universal mechanism of protection of human rights is the United Nations Organization (UN) founded in 1945. The UN Charter (26/06/1945) was the first in the history of international relations governmental multilateral treaty, which laid the foundation for a broad cooperation of States in the sphere of Human Rights. Item 3 of Article 1 of the Charter proclaims that the aim of the parties is to «achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human

rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion»[1]. According to the UN Charter the international mechanism of protection of human rights includes the following institutions: the Office of the High Commissioner for Human Rights, the Human Rights Council, which replaced the Commission on Human Rights (its first meeting took place on 19 June 2006), the Universal Periodic Review, Special Procedures.

The Office of the High Commissioner for Human Rights (OHCHR) works to offer the best expertise and support to the different human rights monitoring mechanisms in the United Nations system : UN Charter-based bodies, including the Human Rights Council, and bodies created under the international human rights treaties. Most of these bodies receive secretariat support from the Human Rights Council and Treaties Division of the OHCHR. The Human Rights Council and OHCHR are separate entities, as they were given the separate mandates by the General Assembly. Nevertheless, OHCHR provides substantive support for the meetings of the Human Rights Council, and follow-up to the Council's deliberations [2].

The Human Rights Council is an intergovernmental body, which meets in Geneva 10 weeks a year. It is a forum empowered to prevent abuses, inequity and discrimination, protect the most vulnerable, and expose perpetrators. It is composed of 47 elected United Nations Member States who serve for an initial period of 3 years, and cannot be elected for more than two consecutive terms. The Council's Membership is based on equitable geographical distribution. Seats are distributed as follows: African States: 13 seats, Asia-Pacific States: 13 seats, Latin American and Caribbean States: 8 seats, Western European and other States: 7 seats, Eastern European States: 6 seats. The current President of The Human Rights Council (10th Cycle) is Ambassador CHOI Kyong-lim[3].

The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all UN Member States. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed. The UPR was created through the UN General Assembly on 15 March 2006 by resolution 60/251, which established the Human Rights Council itself. It is a cooperative process which, by October 2011, has reviewed the human rights records of all 193 UN Member States. Currently, no other universal mechanism of this kind exists. The UPR is one of the key elements of the Council which reminds States of their responsibility

[1] Available from: http://zakon2.rada.gov.ua/laws/show/995_010

[2] Available from the UN official website: http://www.ohchr.org/EN/Pages/WelcomePage.aspx

[3] Available from the UN official website: http://www.ohchr.org/EN/HRBodies/HRC/Pages/Presidency.aspx

to fully respect and implement all human rights and fundamental freedoms. The ultimate aim of this mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur[1]. According to the time-table of consideration of national reports, the Report from Ukraine has been considered on the 14th Session of the Human Rights Council (October 22 — November 5, 2012)[2].

Special Procedures is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Special Procedures are either an individual or a working group. They are prominent, independent experts working on a voluntary basis, appointed by the Human Rights Council. Special Procedures' mandates usually call on mandate-holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, known as «country mandates», or on major phenomena of human rights violations worldwide, known as «thematic mandates». All report to the Human Rights Council on their findings and recommendations. They are sometimes the only mechanism that will alert the international community on certain human rights issues. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social. As of the 1st of November 2014 there are 39 thematic mandates (e.g. **Special Rapporteur on Adequate Housing, Working Group of Experts on People of African Descent, Working Group on Arbitrary Detention, Special Rapporteur on the sale of children, child prostitution and child pornography, Special Rapporteur in the field of cultural rights, Special Rapporteur on the right to education, so on)** and 14 country mandates (Belarus, Cambodia, Central African Republic, Cфte d'Ivoire, Eritrea, Democratic People's Republic of Korea, Haiti, the Islamic Republic of Iran, Mali, Myanmar, **the** Palestinian territories, Somalia, **the** Sudan, **the** Syrian Arab Republic).

On 18 June 2007, the Human Rights Council adopted resolution 5/1 entitled «Institution-Building of the United Nations Human Rights Council» by which a new complaint procedure was established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.

With the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), Special Procedures: undertake country visits; act on individual cases and concerns of a broader, structural nature by sending communications to States and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and expert consultations, contribute to the development of international human rights

[1] Available from the UN official website: http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

[2] The timetable available from the website: www.ohchr.org/Documents/HRBodies/UPR/UPRFullCycleCalendar2nd.doc

standards, engage in advocacy, raise public awareness, and provide advice for technical cooperation.

Special Procedures report annually to the Human Rights Council; the majority of the mandates also report to the General Assembly. Their tasks are defined in the resolutions creating or extending their mandates.

Besides the named charter-based organizations, the international mechanism of protection of human rights includes a system of so-called treaty-based organs.

There are nine core international human rights treaties, the most recent one — On Enforced Disappearance — entered into force on 23 December 2010. Since the adoption of the Universal Declaration of Human Rights in 1948, all UN Member States have ratified at least one core international human rights treaty, and 80 percent have ratified four or more.

Currently there are ten international human rights treaty bodies, nine of them monitor implementation of the core international human rights treaties while the tenth treaty body, the Subcommittee on Prevention of Torture, established under the Optional Protocol to the Convention against Torture, monitors places of detention in States parties to the Optional Protocol [2]:

1. Human Rights Committee (CCPR) monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols;

2. Committee on Economic, Social and Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966);

3. Committee on the Elimination of Racial Discrimination (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965);

4. Committee on the Elimination of Discrimination against Women (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999);

5. Committee against Torture (CAT) monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); there 's also the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987[1].

6. Committee on the Rights of the Child (CRC) monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000);

7. Committee on Migrant Workers (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);

[1] Available from the website: http://www.cpt.coe.int/en/about.htm

8. Committee on the Rights of Persons with Disabilities (CRPD) monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006);

9. Committee on Enforced Disappearances (CED) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006);

10. The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) established pursuant to the Optional Protocol of the Convention against Torture (OPCAT) (2002) visits places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

When we speak about the International Human Rights Law, we speak, first of all, about the Universal Declaration of Human Rights (UDHR) adopted on 10 December 1948 which for the first time in human history spell out basic civil, political, economic, social and cultural rights that all human beings should enjoy, the International Covenant on Civil and Political Rights (1966) and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (1966) and its Optional Protocol. These three international core human rights documents form the so-called International Bill On Human Rights. So, in this Article, we will consider the activity of the main, from our point of view, international human rights treaty bodies: The Human Rights Committee, founded upon the International Covenant on Civil and Political Rights, and the Committee on Economic, Social and Cultural Rights, founded upon the International Covenant on Economic, Social and Cultural Rights.

The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties.

All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of «concluding observations».

In addition to the reporting procedure, article 41 of the Covenant provides for the Committee to consider inter-state complaints. Furthermore, the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol[1].

The full competence of the Committee extends to the Second Optional Protocol to the Covenant on the abolition of the death penalty with regard to States who have accepted the Protocol.

The Committee meets in Geneva or New York and normally holds three sessions per year. The Committee also publishes its interpretation of the content

[1] Available from: http://zakon2.rada.gov.ua/laws/show/995_043

of human rights provisions, known as General Comments (Recommendations) on thematic issues or its methods of work. For example, there are General comments No. 19: Article 23 (The Family) «Protection of the Family, the Right to Marriage and Equality of the Spouses» of 27 May 2008, General comments No. 32: Article 14: «Right to Equality before Courts and Tribunals and to Fair Trial» of 23 Aug 2007; General comment No. 34 — Article 19: «Freedoms of opinion and expression» of 12 Sep 2011. The latest Comment is Draft General comment No. 35, Article 9: «Liberty and security of person» of 15 Dec 2014. (Totally there are 35 General comments/recommendations)[1].

In its general comments submitted in accordance with paragraph 4 of Art. 40 of the Covenant, the Human Rights Committee gives interpretation of the separate articles of the Covenant, and proposes measures to be taken by States to implement them. However, the Committee does not address recommendations to the states. For example, at one of its sessions, the Committee has interpreted the principle of equality and non- discrimination (Articles 2 and 3 of the Covenant), the right of the family to protection by society and the State (Article 23), and demanded that the States Parties take legislative and other measures to implement these positions. Only in recent years, the Committee, began to address certain comments to states.

So, the Committee is authorized to:

1. Examine the obligatory reports of the States Parties on the situation in the Human Rights field in these countries;

2. Publish General Comments on Articles of the Covenant;

3. Assess Inter-State Complaints[2];

4. Consider Individual Complaints Under the Optional Protocol.

The development of the international mechanisms of protection of human rights takes place in a large part due to the constant increase of authority of the international Committees. All of the treaty-based bodies from the date of their establishment were authorized to conduct general monitoring and assess inter-state complains. But gradually all of them start to consider individual complaints. And if before the year of 2000, only three of the nine treaty bodies were able to consider individual complaints, currently all the Committees have the authority to do this [7, c. 68]. For example, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, according to which the Committee on Economic, Social and Cultural Rights was authorized to consider individual complaints, came into force only on 5 May, 2013.

Though the creation of the mechanism of international monitoring for the implementation of the legal obligations that States have accepted in the field of human rights is considered to be one of the most significant achievements

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[1] Available from the UN official website:
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

[2] For more information about the work of the Human Rights Committee, read the Civil and Political Rights: The Human Rights Committee fact sheet Printed at United Nations, Geneva 11.05.2005 (PDF) //Available from: http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf

in the sphere of international regulation of human rights [9, с. 495], the monitoring activity of international institutions is not very effective in practice. The scope of activity of treaty based bodies is constantly expanding, the number of reports discussed and the amount of information received is growing. Thus many treaty based bodies duplicate the work of each other. For example, the Human Rights Committee considers such issues as the prohibition of discrimination and equality before the law, which are also discussed in almost all the other treaty based organs. It also considers matters that are observed by the different UN institutions. At the same time, States are obliged to submit reports not only to treaty based bodies, but also to the UN main and specialized institutions.

Another important reason for the low efficiency of treaty based international human rights bodies is insufficiency of their competence. None of the UN bodies can make decisions that would be binding for the states, because the nature their decisions is advisory [7, с. 67]. Difficulties also take place because many formulations of human rights norms are very general and do not have specific legal boundaries.

There is also a subjective reason: States do not submit their reports in time, do not respond to requests for additional information, falsify the statistics. Hundreds of different decisions, recommendations, observations adopted by both UN Charter and treaty based institutions are not fulfilled by States and there's no control over that, while different additional bodies are founded within the UN structure, new international treaties and optional protocols are concluded.

In this regard, it seems appropriate to make amendments to the existing international treaties, expand the sources of information and combine a number of treaty based bodies. As professor Kartashkin emphasizes, it's time to elaborate the Charter of Human Rights for the XXI century, that has already been proposed by him and the American professor Bertrand Gross [9, с. 508]. It is expected that The Charter of Human Rights for the XXI century must integrate all existing international UN treaties in this area, as well as introduce new norms and principles developed over the past years. Professor states that the development and adoption of this Charter is the only workable way to prevent creation of new international treaties-based bodies and duplication in their work, waste of the UN funds, various interpretation of the existing rules and principles of human rights. The adoption of a new Charter and the establishment of one and single human rights institution that would work on permanent bases but not from session to session, and providing it with the authority to take specific and binding for States solutions, would significantly improve the efficiency of the created system and provide better protection of human rights in the world [9, с. 509].

Besides the listed international or universal Human Rights organs and organizations, there are also regional mechanisms of protection of human rights.

Currently, 3 regional mechanisms of protection of human rights exist: European (based on the Documents of the European Council and European

treaties on human rights, the most significant of which is the European Convention on Human Rights and Fundamental Freedoms); American (based on the Inter-American Convention on Human Rights adopted at the Inter-American diplomatic conference in Costa Rica on November 20, 1969), and African (based on the African Charter on Human and Peoples' Rights, signed in 1981, that takes into account the specific problems of the continent and aims of the member States).

Here the European mechanism of protection of human rights will be considered, as the oldest and the most successful one, and also as the most interesting for us being the citizens of the European continent.

In Europe there are the following main institutions on human rights: The Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), The European Council Commissioner for Human Rights. The Organization for Security and Co-operation in Europe (OSCE), The Committee of Ministers of the European Council, The European Court of Human Rights, The European Commission of Human Rights, The European Committee of Social Rights, The European Commission for Democracy Through Law and some other commissions and sub-commissions.

The ODIHR is based in Warsaw, Poland. It is active throughout the OSCE area in the fields of election observation, democratic development, human rights, tolerance and non-discrimination, and rule of law. In April 2013, the Minister of Justice of Ukraine requested the Venice Commission (European Commission for Democracy Through Law) and the OSCE/ODIHR to comment on the text of the draft laws regulating parliamentary elections, including a draft law for holding repeat elections for the constituencies where results had not been established in the 2012 parliamentary elections. In July 2013, the Ministry of Justice provided additional amendments that include amendments to the following laws: (1) the Code of Ukraine on Administrative Offences; (2) the Law on Political Parties; (3) the Code on Administrative Proceedings, (4) the Law on the Information Agencies; (5) the Law on the Central Electoral Commission, (6) the Law on the Election of People's Deputies of Ukraine and (7) the Law on the Principles of State Language Policy. The Commission has considered the submitted documents and on its 96th Plenary Session adopted the «Joint opinion on the Draft Amendments to the Legislation on the Election of People's Deputies of Ukraine». The Venice Commission and the OSCE/ODIHR stated that they are ready to assist the authorities of Ukraine in their efforts to create a legal framework for democratic elections in conformity with OSCE commitments, Council of Europe and other international standards for democratic elections [4]. Among the latest documents of the OSCE Office for Democratic Institutions and Human Rights there is also the Interim Report of 14 October regarding the Presidential elections in Georgia that took place on 27 October, 2013.

On 21 March 2014, the Permanent Council of OSCE decided to deploy the Special monitoring mission of unarmed civilian observers to Ukraine. The Mission is being deployed following a request to the OSCE by Ukraine's government and was agreed by all 57 OSCE's participating States. The SMM

aims to gather information and report on the security situation, establish and report the facts, especially on specific incidents on the ground. The Mission monitors talk to various community groups — authorities at all levels, civil society, ethnic and religious groups and local communities. The monitors report their daily observations to the OSCE and its participating States [5].

The European Council Commissioner for Human Rights is an independent, non-judicial institution of the Council of Europe, mandated to promote awareness of, and respect for, human rights in the 47 member States. The present European Council Commissioner for Human Rights is **Nils Muiħnieks (**Latvia**). He was elected by the Parliamentary Assembly on 24 January 2012 and took up his position on 1 April 2012. He is the third Commissioner, succeeding Thomas Hammarberg (2006–2012) and Alvaro Gil-Robles (1999–2006).**

The most effective organ of protection of human rights is such regional judicial organ as the European Court of Human Rights.

On November 14,1950, in Rome, members of the oldest regional organization on the European continent — the Council of Europe — adopted the European Convention on Human Rights and Fundamental Freedoms[1]. The Convention contains only a part of human rights fixed in the Universal Declaration and the Covenants on Human Rights. However, the value of the European Convention is not only in stated human rights, but also in the mechanism of their implementation. This mechanism is unique, vital and developing [9, p. 514]. As the result of the development the Convention has been amended with Additional protocols and now covers almost all civil and political rights.

On the basis of that Convention two European human rights bodies were established — the European Commission of Human Rights (the Commission) and the European Court of Human Rights (the Court), which are empowered to consider complaints of both States and individuals. Any State Party may, complaint to the Commission that the other party violates a provision of the Convention (Article 24). The Commission is also authorized to consider complaints from individuals, non-governmental organizations and groups about the violations of their rights by other members of the Convention, if the unscrupulous State recognizes the competence of the Commission (Article 25). Gradually, all members of the Council of Europe have recognized the competence of the Commission and of the Court.

The Court is a unique phenomenon in international relations. The fact that the decisions of the Court are made by independent and impartial judges guarantees a fair hearing of the case. Such objectivity is not always inherent to other treaty based bodies, members of which are elected from among diplomats and government officials and often represent the interests of certain governmental political forces. Court's decisions are binding for member States, and their implementation is monitored by the Committee of Ministers of the Council of Europe.

[1] Available from: http://zakon2.rada.gov.ua/laws/show/995_004

Thus, the European mechanism of protection of human rights established in accordance with the European Convention on Human Rights and 11th Additional Protocol is, indeed, a supranational authority. Since it has been established, members of the Council of Europe had to review their stereotypes regarding the absolute state governmental sovereignty. The decisions of the Court that are widely used by judicial bodies in member States have a significant influence on the formation and the development of the doctrine of European law.

So, the European Court of Human Rights is a unique and the first in the history of mankind institution for the real judicial protection of human rights upon the complaint of individuals. But we must remember that its competence is limited to rights fixed in the European Convention on Human Rights, that is civil and political rights of people. At the same time, this mechanism is dynamically developing through the practice of the European Court of Human Rights. The Court «through a dynamic interpretation of the different Articles of the Convention, has gradually recognized substantive rights which may fall under the notion of «cultural rights» in a broad sense» [1], namely: Right to Artistic Expression, Access to Culture, Right to cultural identification, Linguistic Rights, Right to Education, Right to the Protection to Cultural and Natural Heritage, Right to Seek Historical Truth, Right to Academic Freedom [1].

The natural development of the European mechanism of protection of human rights is also the European Social Charter (opened for signing in October 1961 and revised in 1996) that guarantees people social and economic rights: rights to work, housing, health, education, employment, freedom of movement, non-discrimination and affirmative action and others. It also provides a system of monitoring over the implementation of these rights by member States. 42 of the 47 Council of Europe member States have ratified one of the two variants of the European Social Charter. In 1995, the Charter was amended with the Protocol on collective complaints, according to which the monitoring over the implementation of social rights is carried out by the European Committee of Social Rights. This Committee determines whether or not national law and practice in the States Parties are in conformity with the Charter (Article 24 of the Charter, as amended by the 1991 Turin Protocol. The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as «conclusions», are published every year. If a state takes no action on a Committee decision to the effect that it does not comply with the Charter, the Committee of Ministers addresses a recommendation to that state, asking it to change the situation in law and/or in practice. Under a protocol opened for signature in 1995, which came into force in 1998, complaints of violations of the Charter may be lodged with the European Committee of Social Rights which performs a monitoring function and has a competence to concern collective complaints (complains can be lodged by organizations against states that violate rights).

Human rights are also defended by other international and regional judicial organs. Most of them were established on the basis of international trea-

ties[1]. There is also a great number of other Human Rights organizations like Amnesty International, Human Rights Watch, Freedom House and others, that also contribute to the common protection of human rights.

Conclusion. The International mechanism of protection of human rights is variegated and complex. It is the result of a non-systematic law-making activity of international organizations which tried to bring the world in order after the World War II and to prevent grave and massive violations of human rights, rather than the result of a planned and premeditated development.

This mechanism includes a system of universal and regional human rights institutions. There are UN or CE charter-based bodies and international or regional treaty based bodies.

Most of the international human rights institutions perform a monitoring function over the state of implementation of numerous human rights laws regulations and over the general respect for human rights in States Parties to international treaties. Such monitoring is limited to observing member States reports and rare local checks. Some of such institutions consider individual complaints only for the purpose of getting knowledge about the general situation in the field of human rights protection in member States.

Some of the international human rights institutions have the authority to consider individual complaints about the violation of human rights and make decisions on them. But their decisions are not obligatory for member States.

The most effective mechanism of protection of human rights for the citizens of the European continent is the European Court of Human Rights. This mechanism is constantly developing through the practice of the Court which interprets the Convention and its Protocols considering the circumstances of a particular case and the demands of the present day.

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МІЖНАРОДНИЙ МЕХАНІЗМ ЗАХИСТУ ПРАВ ЛЮДИНИ

Резюме

У статті досліджується міжнародний механізм захисту прав людини, в тому числі: здійснена класифікація міжнародних органів та організацій із захисту прав людини, розкрито правовий статус окремих організацій, виявлені переваги та недоліки системи міжнародних органів та організацій із захисту прав людини.

Ключові слова: права людини, система міжнародних органів із захисту прав людини, міжнародний механізм захисту прав людини.

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МЕЖДУНАРОДНЫЙ МЕХАНИЗМ ЗАЩИТЫ ПРАВ ЧЕЛОВЕКА

Резюме

В статье исследуется международный механизм защиты прав человека, в том числе: проведена классификация международных органов и организаций по защите прав человека, раскрыт правовой статус отдельных организаций, выявлены достоинства и недостатки системы международных органов и организаций по защите прав человека.

Ключевые слова: права человека, система международных органов по защите прав человека, международный механизм защиты прав человека.

ПОЗА РУБРИКАМИ

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PRIORITIES OF INNOVATIVE DEVELOPMENT OF THE PROFESSIONAL MANAGEMENT SYSTEM IN UKRAINE

In the article some basic problems of innovative dynamics of Ukrainian management system development are reviewed. There were analyzed the basic elements of the structure of management system, the interaction of processes of management science and practice, the key problems of managerial professionalization. Some upgrading approaches of managerial activity professionalization in Ukraine were proposed.

Key words: management system, managerial decision, managerial team, interaction of the management science and practice, economic methods.

Problem statement. Nowadays management is one of the most important elements of the socio-economic system development. Managerial component, its effectiveness and structural quality are determining factors of economics and society strategic development. Responsibility, conferred on the modern managers, supposes their high-level vocational training and occurrence of innovative improvement mechanisms of their professional competencies. It is necessary to note, that nowadays in the postindustrial and innovative age of the society development manager's empiric experience is deficient. Yet significant role of the practical experience in the managerial effective activity is not rejected, but it determines the appraisal criterion of the practical experience value formation necessity. First of all, it is important to consider the organization competitiveness development, investment and innovative politics positions and approaches. Certainly, modern managerial activity level and its effectiveness criterion are determined by economic, scientific and educational development level of the society and state. Management is a part of the culture; it is influenced by national and international business traditions. It is impossible to transfer management from one cultural circumstance to the other without appropriate adaptation and herewith not to lose its socio-economic resultiveness. Thus, managerial activity quality is the result of the social, economic, cultural and historical society development.

Analysis of researches and publications. Considerable attention to the development of the theory of justification of legal norms is paid by many scholars. Among them: P. Drucker, S. Berkun, V. Kanke, A. Prigodgin, etc.)

Paper purpose. The purpose of the article is to review some basic problems of innovative dynamics of Ukrainian management system development, to analyze the basic elements of the structure of management system, the interaction of processes of management science and practice, the key problems of managerial professionalization, to propose some upgrading approaches of managerial activity professionalization in Ukraine.

Paper main body. *Basic problems of management development.* Nowadays historical and managerial analysis of the management professional system formation much signifies for the future management development specificity understanding. These researches have scientific and practical value, as they form integral and systemic view of the management professionalization processes by historical development principles.

It is difficult to talk about management, if there are not any definite and close definitions. Some management definitions are added up to the main activities areas enumeration and that's why they are overall, but not completed. There is always a wish to add something. It is evident that the definition is inaccurate, that leads to false ways of the management investigation. Therefore, general management conception determination in its logic interaction of science, analytics and practice is the most important managerial task. Peter Drucker, who is one of the most authoritative management researches in the XX century, has proposed the main management priorities (table 1).

Table 1

Basic management priorities by Peter Drucker [3, p. 28–30]

Management concerns only human.
Management is inseparable from the society culture.
Company is unsuccessful, if its employees do not have the common goal and values.
Management has to give an opportunity for the companies' and its employees' development.
Companies' activity must be based on data exchange and individual responsibilities.
Economic indices (i.e. final results) could not be viewed per se as the appropriate measure of enterprise's and management effectiveness.
Enterprise's activity real results appear only out of it.

Historical and managerial analysis structural logic supposes management identification in the socio-economic and business society activity system investigation. In turn, it points at the systemic management categories research necessity. Historical management backgrounds and their modern development dynamics are the main conditions of the management system formation understanding (table 2). These problems investigation gives opportunity to judge about the categories of management and its researches, objective management history and its main scientific schools, managerial process and management system basic elements and binding processes.

Table 2

Management system formation historical backgrounds

Market business mechanism formation
Industrial mode of production formation and development
Economics corporatisation and share capital systems expansion
Formation of the intellectual capital competitiveness system and managerial capital reproduction conditions

Management functions, methods and structure formation and development problems are the basis of the historical and managerial analysis. Thus, they are roots of management. These basic management elements have to be systemic, whereas separately each element is necessary, but not all that enough for the general management effectiveness. That's why the basic management elements investigation must be added by binding processes, which form and develop management as a systemic socio-economic phenomenon of the modern society. Thus, management researches suppose minute examination of functions, methods, structure and binding processes in their retrospective review.

Management research lasts during the entire managerial career. Naturally, professional management study must be structured and have stepwise filling with certain goals and tasks fixation. It is wrong to consider, that management basis study is the final stage of management learning. Management fundamental positions learning acts as the preparation process to the further management investigation on the advanced level and in the different specialization forms. So the accurate study of the fundamental management positions defines the managers' professional growth quality to the perspective. But also it is very important fundamental management knowledge content to have the scientific and practical conclusive conceptual basis and certain innovative development dynamics.

Nowadays we live in a new post-modernist human and society development age. We try to find their new possible interaction variants during the all spheres and directions of the professional activities innovative development. The managerial activity, which must be at the new level appropriate to the enterprise's competitiveness formation, has particular value. Mostly, we try to bind managerial professional activity development with old and new rational technologies and analytical methods. But this process does not correspond with a new level of the relevant companies' system effectiveness problems and tasks. There are many professional, educational and scientific business books, a lot of scientific works exist, and many specialists in management of the different specialization and training level continue universities. But there is a question: «Does this activity corresponds with new tasks and professional capacities level?» We think there are many problems called for systemic decisions. Especially it concerns the scientific and research basis innovative development of professional management system effective forms finding. Management investigations priorities must be given to the problems of human and managerial capital formation and development, especially to the enterprise's competitive intellectual capital.

The objective necessity of the enterprise's intellectual capital systemic formation and qualitative development becomes more important in the conditions of the innovative ways of economics' development and these processes maintenance by the effective managerial mechanisms search [4, p. 308]. The intellectual capital category is characterized by the knowledge conversion into the worth. But we have to admit that knowledge conversion process from the impalpable assets to the enterprise's competitive advantages was always the managerial problem of the new development quality. Nevertheless, the factor of enterprise's human capital intellectual and vocational capacities use is the most important market competitive factors in the modern conditions of effective management system development. Intellectual and professional quality of enterprise's human capital is the activity result and the management efficiency index. We will consider some features of intellectual capital from the management professional system point of view.

Intellectual capital must be structured. It has three main forms; they are human, organizational and consumer's capital. It is necessary to note, that intellectual capital effectiveness is determined by its structural accordance and effective functioning in all three forms. The main task of the modern management activity is ratio, correspondence and taxonomy parameters, formation and development dynamics of the enumerated intellectual capital forms finding. So, the management professional capacities specificity is considerably adjusted. The management subject-object interaction exceptionally between people becomes the basic and determinative conception of modern managerial paradigm.

The important condition of the intellectual capital managerial analysis is the terminological adjusting of such categories as intangible assets and intellectual property. Certainly, these categories are related, but they could not be used as convertible terms in the scientific analysis system. First of all, not all intellectual capital elements are intangible assets. For example, employees' unmodified knowledge (business features, qualification, vocational and human labour abilities) is the part of intellectual capital, but they are not intangible assets and could not be enterprise's intellectual property. Secondly, not all intangible assets are the enterprise's intellectual property objects. For example, managerial skills and leadership qualities could not be alienated from their carrier. And in that way is the enterprise's managerial staff personification is realized. Besides, not all technologies and methods of work could be licensed. Therefore, differentiation of the categories bound with enterprise's intellectual capital analysis is its primary quality basis and it characterizes managerial activity realization forms in modern conditions.

Such a category as managerial capital is one of the main characteristic of the intellectual capital managerial analysis. Undoubtedly, it is the most proactive and dynamic human capital part that is in constant and systemic professional development and is the driving force of the human capital's qualities enhancement [1, p. 187–195]. It is necessary to note, that organizational capital quality is determined by the managerial staff quality and their professional capacities and is the result of enterprise's management system activity.

So, we have to admit, that the leading element of the intellectual capital formation and development is the enterprise's management system.

Enterprise's intellectual capital formation is the systemic phenomenon. We need the adjusted and weighed managerial activity based on the fundamental innovations. Fundamental innovation analysis in management is possible only in the cases of management scientific research basis systemic formation and structured development. The empiric development ways are not the basic for the managerial staff enhancement. Empiric management development in the innovative economic conditions is archaic, as we need scientifically worked up methods and technologies of managerial activity realization. Management is a sphere of specific professional activity and scientific investigations. Enterprise's intellectual capital development necessity supposes systemic use of innovative economic, sociologic and psychological methods. The complex systems of personnel motivation is the particularly important object in management development. So we can say that motivation is the central part of management. We could not expect positive results, if the motivation mechanisms work negatively at all units and stages of the managerial process.

The requirement of intellectual capital adaptive forms effective development is the managerial staffs' professional training and education system. The character of innovative development supposes that management initiates all enterprise's employees' qualitative and innovative training. Especially, the expert appraisement of educational and professional training programs is needed. Education expertise must have two main components; they are appraisement by business sphere and by management science.

The essential problem of modern development is the management development level as the vocational system of knowledge and structural practical capacities. Particularly, management system contains necessary and professional activity sufficient level of economists, engineers, psychologists, lawyers, financiers and other specialists, which are equipped in the enterprise's professional and productive sphere. Management activity is determined by the managerial decisions effectiveness. Other specialists are called to create valuable data bank for the managerial decision making processes. Crisis appears when management does not cope with leading squad role, its decisions do not correspond with professionalism and capacities, motivation mechanisms do not work, that are the basis of strategic growth and progress. Company must be the single organism, where all kinds of resources are effectively engaged and integrally reproduced. Management priority is the human capital structural and functional quality. Particularly, the systematic managerial activities lead company to success. The main features of the human capital structural and functional quality are the following: sufficient and necessary human resources allocation in companies' structural and functional departments; adequate quality of enterprise's human resources functional education and professional capacities; adequate enterprise's personnel professional activity providing with resources; enterprise's staff rotation mechanism; professional education dynamics and flexibility from personnel responsibilities structural and functional changes position.

We have to note that enterprise's management system determines the quality of its development, responds for its market position and resultiveness, provides personnel motivation mechanisms.

Nowadays the main particularly deficit resource is managerial staffs' professional capacity. Hereat, the major part of managers say that they are the high-level professionals. But the society skeptically regards about their resultiveness, and so we have the problem of socially significant management idea humiliation and discredit. Management obligatory must have positive and socially significant result at the enterprise's level, as well as at the society level. In most cases we observe among the managers doubtful viewpoint about their professional abilities that we can name as professional position fullness syndrome. Managers think that they are specialists of the wide profile and they could occupy every managerial position. It is very negative tendency of the modern managerial practice development. *Mass entry of talentless managers to the managerial process is an example of managerial perception backwardness, which particularly characterizes lack of socio-economic relations development in society*. But it is only the one part of problem.

The second part of problem is bound with secondary of management science and those sciences related to it (economics, sociology, psychology). We mean that scientific knowledge is secondary to the existent practice. *Enough quantity of expert community members do not have conceptual viewpoint about the Ukrainian management system development, but what is worse that they do not want to have it, since they do not get accustomed to decide managerial problems and professionally specialize managerial activity.* In the XXI century when we are talking about the innovative economics development necessity, human resources professional capacities significance, «science — education — practice» system development, such approaches are wasteful and lead to waste of motivation to the progressive development in the society.

But the determining problem in Ukraine is the situation, when *there is not concord and understanding between acting politics, political parties and society for a long time*. Socio-economic country development problems are generated by the lack of managerial staff's professional capacity, especially in the government authority system. The well-known statement, that politics is the art of a compromise, could not be realized when everybody defends his own interests and hereat they do not have real professional and managerial content [10, p. 330–333]. Constant and long discussion without finding and realization of the positive innovative managerial mechanisms is not a democracy, it look likes as democratic development profanation.

Nevertheless, we lose time for historical development because of lack of management system development and sometimes because of absolute managerial staffs' ignorance. So we need to undertake measures of our society development difficult situation changing. The important role belongs to the management science that has to create Ukrainian economics innovative mechanisms and its integration to the world socio-economic space.

Modern education is the product of science development. Scientific systemic knowledge creates innovation that management realizes. Full innovative

cycle investment and managerial maintenance is the most important task of modern development. But the essential requirement is the novelty presence proposed by modern science, especially fundamental cycle.

Science and practice interaction mechanism. Taking into account the societies' demand for the movement to the innovation economics and knowledge management formation mechanisms it is necessary to concentrate management researchers' attention at the process of management science and practice cooperation with the qualitative stages of this development defining. Herein the most important question is the innovative cycle analysis. It should be noted some features defining the essence of this problem. They are following:

1. The process of management science and practice cooperation is multivendor and has qualitative stages of development. The process fundamental logical scheme of management science and practice is following: «isolation — cooptation — integration — organic synthesis». It should be noted that each stage is characterized both by the management scientific and practical development level as well as their certain cooperation mechanism. Each stage characteristics are necessary for the management professional system formation and development objectivity and its efficiency understanding. The process moves in such way that the first accidental and chaotic relations outgrow into the relations having integrative feature. Further the organic synthesis stage qualitative conditions are gradually formed. The practice becomes the continuation of the science and per contra.

2. Management science and practice cooperation mechanism formation process is defined by the analytical companies' activity. They are also called consulting structures. Consulting has its specific sphere of activity, namely it implements the searched scientific innovation management technologies into the practical managerial activity. Gradually consulting outgrows from the progress initiator into the active equity holder of the different innovative projects. Naturally, such state of affairs obliges consulting companies to create the high-qualitative goodwill owing to the professional capacity of the experts, consulters and other specialists and the consulting companies' management by itself.

3. The professional system of management is the innovation management research object. First of all, it supposes the basic management components development, particularly functions and functional technologies, methods and management tools, structure and organizational design and also modern communications channels. The innovation management investigation subject is the organizational human capital, literally technologies of the movement to the functional human capital which is the base of the goodwill's quality and the main competitive factor in the postindustrial society. Structural and functional capital defines the company as an organizational unity. Positive dynamics, a necessary rotation, competences levels, powers division specificity and an adequate resources provision are the structural and functional capital features. And it is the company's management efficient work result by itself.

4. It is necessary to define the difference between two similar at the first sight categories such as «innovation» and «novelty» with the purpose of the

researched events' essence clarification. Herewith, we need to draw the lines of these categories investment component with signing the terminal efficiency effect as the main management index. De facto novelty as the fundamental, analytical and practical investigations certain modeled result is formed in the form of the discoveries, inventions, managerial, financial and production know-how, marketing research results. But it is the intermediate result from the management efficiency point of view, after all it is important to implement the novelty, to transform it into the innovation form, that means to complete the innovative activity, to obtain the positive result and provide the innovation diffusion mechanism functioning. From these points the investment into the process of the novelty appearance does not provides the final result. It is necessary to invest the novelty implementation process. Therefore, management is called to provide the innovative progress fullness from the quality and investments completeness perspectives. When we are talking about innovation management the intermediate stages effectiveness is very important, but it is not sufficient for the final result obtaining. Herein, the organizational structural and functional capital sufficient and necessary quality is the final result. Naturally, this result does not have and is not able to have exact quantitative measurement, but in the moment's fixation conditions, i.e. the companies' market value defining, the goodwill's value (including the human capital) needs to have the absolutely particular qualitative index.

5. Management science and practice cooperation realization process progress consists in the conditions creation and transfer to the higher stages of «integration» and «organic synthesis». These stages objectively form movement to the innovative economics socio-economic conditions. The significant progress both of the management science and practice separately takes place in the social terms, as well as their cooperation mechanisms. But the thesis of the management science and practice development certainly in their interaction is priority. Naturally, in the conditions of the developed stages of integration and organic synthesis passing of first ones (isolation and cooptation) is enough shorter.

Management team functional activity. The modern conditions of all social spheres development suppose professionals' effective activity. All difficult problems could be decided in that case, when the professional teams are used. Each team member is the specialist in the certain activity sphere. Team leader is the different specialists' work coordinator, they consider problem solving process integrally, systematically and with innovative component. The core of the modern professional activity is the management team, which has to provide posed goals achievement quality, system and resultiveness [8, p. 120–126]. Management team structure and the practical staff filling process must be specialized in the certain way. We suppose managerial process specialization. Modern professional activity quality supposes a certain universality of knowledge and skills, but herewith special skills and knowledge are determinative. Professional knows and can do a lot, but he must do something better than others. Such an approach creates conditions for the qualitative managerial activity enhancement and its systematic innovative changes necessity. Thus,

professional capacities enhancement in management is possible only on the basis of managerial activity specialization development. Such specialization forms in management do not raise doubts both from science, as from management practice (for example, managerial staff dividing to the top, medium and law levels or line and functional ones). However, the harmony between management science and practice practically ends. Further deepening of management forms and levels in management has enough controversial character. Such a position creates barriers for the further management development in the sphere, analytics and practice.

Nowadays management is considered by means of its functions. That's why its primary specialization is occurred at the functions level. Each function has its own specified sphere of managerial activity. Herewith inner variant of functions classification determines approaches to management functional technologies allocation.

The position about administrative management functional specialization is especially disputable. The administrative management functions main feature consists in their orientation to the companies' line services activity. Particularly, line managerial staff must specialize at the companies' managerial process administration, innovative administrative functions development innovative mechanism formation at the management levels (vertical part) and functional services (horizontal part). Of course, managerial process should not considered as the firmly activity specializes system. So, line manager of any level has his own companies' strategic viewpoint, determines innovative approaches to the decision making process and personnel motivation. But his viewpoint of this problems practical use is in the frames of universal corporative behaviour line. Besides, the line manager task is to have professional capacities limit level in the functional services activity and their supervisors, but not carry out their work. For example, if the line manager faces the need to change personnel motivation system, he must entirely confide in the service managing personnel at the functional level. This functional service has systematically to backtrace new tendencies in the motivation science and practice development and accumulate professional data bank for the future companies' personnel motivation system transformation. It is necessary to underline that functional services must create more valuable data bank for the managerial decision making process. The line managers' task is to evaluate alternatives, make a decision and be in charge.

Management economic methods. Management methods are the managerial professional work instrument and propose number of effective managerial influence on the staff and organization in general with purpose of posed goals achieving. Management methods are the key management system element. They provide managerial activity qualitative features and affirm managerial staffs professional capacities. In the same time management methods learning do not provide with their use effectiveness. The real mechanism of management methods knowledge is very important. A lot depends on the manager's personality, enterprise's managerial work socio-economic conditions and different inner and external factors. Management methods are the result not

only of the empiric managerial experience systematization, but also the scientific and research management basis. They form special knowledge and skills potential distinguishing manager's profession from others. But one of the most important managerial activity features is the ability to use this potential in the specific practical conditions, initiating new managerial approaches and instruments.

At the same time we need management methods definition specification. There is a position, that management methods and labour methods are the same categories. But it is false. Labour method conception is bound with human activity, and management method conception is bound with impact on this activity. It is necessary to specify method definition, its interaction with laws, principles, management functions, organizational structure, that allows proving approaches methodology to the enterprise's personnel methods usage and enhancement. Management methods are one of the basic management system elements. Functional, structural, communicational and other managerial activities are realized by means of methods. Management methods usage composes the main managerial activity content.

The main element in the managerial activity description is the managerial process that represents management subject-object interaction at the feedforward and feedback channels in the frames of contour-management. *Contour-management is the set of indexes defined by the system of basic management conditions, enterprise's priority goals system and boundary conditions. Besides, the fact that subject-object interaction in management is the human interaction is the main.* So, management methods usage is realized in the personnel professional interaction.

At the same time, we have to notice, that personnel professional interaction must be functional and efficient and have structural component. In other words, we do not talk about simple personnel interaction, but about effective managerial interaction with accounting certain enterprise's present and future state.

Mostly method is understood as approach, device and mode of action. Management methods are the means of management subject influence on the collectives and separate employees with purpose of goal achievement. Basically, *management methods are functional or interfunctional means and approaches of the subject influence on the object organization in the frames of contour-management with purpose of effective goal achievement*.

We have to determine the ratio between management economic methods and economic methods by themselves. Economic methods are different per direction, influence and usage goal. Practically, all the economic science spheres propose their own methods of economic analysis and practical transformation at the macro and micro society levels. On the one hand, we can use all the spectrum of these methods as the real management resource. From the other, it is feasible to mark out those economic methods tightly bound with managerial process. If we analyze modern managerial process as the integral phenomenon, it is necessary to provide constant economic methods classification. Herewith, it is necessary to backtrace the market of new managerial technologies and

to use them in accordance with certain situation in the innovative activities' conditions.

We suppose that management economic methods have core character upon other methods on the score of following circumstances.

1. We defend the position that any uneconomic methods of influence on the enterprise's staff can lead enterprise to higher resultiveness only after economic methods usage. Uneconomic methods trends to increase productiveness, when organization has achieved certain activities' profitability level.

2. By the enterprise's economic development the unit weight of economic methods can be decrease, but these methods start to have more qualitative features. Hereat, their influence degree on the enterprise's resultiveness is priority (i.e. the unit weight decreases and the power of effective influence increases). It is the feature of high management economic methods effectiveness. When economic methods become more perfect they create favorable conditions of effective uneconomic methods usage in organization.

3. The first group of management methods with economic ones allocation as the basic is the primary concerning other two groups. This means that the first one is the base for more perfect personnel influence types building.

4. Economic methods priority is the permanent tendency for the large industrial production systems. The main economic methods enhancement dynamics take place in the large corporative production systems owing to management corporative nature.

5. Management economic methods are more perfect in the case, if their influence on the enterprise's staff is permanent tradition forming the public human behaviour pattern.

Managerial decisions. Effective management is characterized by efficient managerial decision making process. The managerial decisions' quality is defined by its modern and relevant and also their analytical basis. We do not have the recipes and light ways to make efficient managerial decisions. So we need to talk about separate companies' distinctions and priorities and its main development principles. For the managerial decision making we need systematically to create analytical base for companies' managerial decision making process professionally worked up and analytical mechanism of managerial process components. Besides, we should notice, that modern management considering cycle «research — analysis — practice» supposes professional activities' types specialization at each stage separately. Certainly, these stages need definite interaction level, but specialization gives opportunity to presume professional capacities' quality of managerial staff and specialists in management analytics. The «analysis» stage is a key from system management practice development viewpoint. So, it is necessary to organize and develop management consulting sphere.

We need to consider some basic principles of analytical management function in the decision making context.

The main point in the managerial decision making system is companies' real value creation and its future value formation. Management strategy and resultiveness is determined by companies' value increasing process. There-

upon, there is the building process of companies' balanced scorecard (BSC) and key performance indicators (KPI), which includes companies' value formation accounting value determining and creating factors. Thus, we say about the necessity of companies' profit and net profit reproduction analysis. Their extent and extensive reproduction possibility form companies' value increasing processes; it is the main management effectiveness index.

The main component of managerial decision making process resultiveness is the administrative measures at production costs formation system. Innovative dynamics of production processes component must provide the competitive production consumption price formation. Analytical evaluation of these processes considerably determines management effectiveness, as it creates data bank for professionally adjusted managerial decisions making.

It is a mistaken viewpoint that managerial personnel fully have to realize scientific, research, analytical and practical decision making stages. If we appraise situation in such a manner, thus managerial decision will not be made up. During the managerial decision making process line manager has to use necessary relevant data bank formed by specialists in the management research, consulting and practice spheres, which secure the managerial decision realization mechanism implementation. As a result, data and analytical bank of the managerial decision making process could not be only the certain problem or situation analysis result. Managerial decision is the professional capacities practical usage result by all this process members accordingly to the facts of the situation analysis. Herewith, line manager must have the necessary professional capacities level for the conducted works result evaluation per all three mentioned stages. Consequently, managerial staff's professional capacity needs the permanent renewal by means of professional education innovative forms development during their entire managerial career. It must be the essential basic principle of the modern management effectiveness.

We have to notice, that analytics both during the managerial decision making, as during entire managerial activity, is original binder between scientific, research and practical management activity. As it is known, particularly binding processes form the systemic activity. Nowadays the systemic activity organization necessity in management is the basic principle of modern management effectiveness and resultiveness. Systemic work in management supposes complex managerial analysis technologies usage and management team work. Thereupon, we have to create new technologies of situation, system, reproductive, structural and functional management analysis. Conceptual points of managerial analysis different types must be added by managerial activity realization innovative technology in the modern socio-economic development conditions.

Management scientific status. Management system must fully obtain professional features from the scientific, analytical and practical knowledge bases viewpoint [7, p. 39–46]. Management has to become a science in the best sense of the term. Ratio between economics and management (first of all, of business organization) look likes the ratio between physics and chemistry in the way that we are talking about relative sciences. Of course, we use many

economic categories and definitions in management, but also there are used categories from engineering, jurisprudence, psychology, sociology and so on. But in economics management problems are not reviewed. In management the great conceptual material is accumulated, which has to become its science. Management is near to the status of specific scientific branch and, maybe, it has got it. And hereat we have to take into account different science's types specificity. For example, mathematics is the formal science, physics is descriptive science, economics and management are axiological sciences. Axiological science's task is to form values composed during the human common vital activity [5, p. 25]. Values are the human creative work's product and they do not exist in nature.

Therefore, we cannot refuse science status to management because it does not look likes mathematics or chemistry is irrational. At the same time, inclusion of such categories as sub-science (management) and meta-science (management philosophy) qualitatively specifies scientific and research management bases positions comparing with economic science. These specificities form necessary bases for the management professional system development. Besides, management permanently strengthening his scientific positions is able to build valuably its qualification requirements system to all enterprise's specialists' activity, to guarantee educational systems expertise, to create effectively innovation cycle fullness in the conditions of scientific-technical progress [2, p. 131–137].

Management science crisis is predetermined by the natural human society development course. At certain stage the critical points appear, which signalize about problems appearance and need intervention with purpose of their quick solving. Critical points problems solving with the positive result is the scientific priceless experience for its further progress. Real science does not stand stark state. It always needs dynamics and experience to solve high-level crisis tasks with real professional knowledge increase. Innovation economics is impossible without three components, such as science development, education and professional education. And as any activity must be systemic, innovative and efficient, managerial accompaniment significance of mentioned processes cannot be overestimated.

Conclusions. The modern stage of Ukrainian socio-economic development is directed to innovative approaches to solving of the managerial problems of economic. Nowadays economics state, technical progress level, production material and technical base in many ways are determined by the state of management system. Nowadays professional management system development is a peculiar social state barometer.

The economic progress of the modern society is impossible without search, creation and implementation of economic development innovative models. Economics' innovative development way is utopia without qualitative fundamental science development. It is necessary to notice that progress absence in the economic politics system and management practice is concerned with fundamental researches law level in economics and management. If there is a long discussion history about fundamental economical science and its development

necessity, at best, there are different polar viewpoints about management as fundamental science, at worst, the discussion is absent. In the first case management is referred to economical science, and if management has something fundamental, it lies in fundamental economic researches specificity. In the second case management is the set of empiric sciences, but with basic economic components. And at last, there is a point of view that management is not a science, it is a practice or art. So in all cases we see one aspect that management scientific, research, analytical and practical bases are not acknowledged. As a result, management scientific works are universal. This circumstance negatively tells on the management professional scientific-research base formation and development and also on the managerial activity practice enhancement, especially of the innovative feature [9, p. 59]. There is nothing more practical, than innovatively and logically adjusted scientific theory. The main goal of such a science is scientific knowledge increase and innovative managerial practice development conditions formation with necessary appearance of such business system phenomenon as socio-economic resultiveness.

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ПРІОРИТЕТИ ІННОВАЦІЙНОГО РОЗВИТКУ ПРОФЕСІЙНОЇ СИСТЕМИ МЕНЕДЖМЕНТУ В УКРАЇНІ

Резюме

У статті розглядаються деякі базові проблеми інноваційної динаміки розвитку системи менеджменту в Україні. Проведено аналіз структури базових елементів системи менеджменту, процесу взаємодії науки і практики менеджменту, ключових проблем професіоналізації управлінської діяльності. Запропоновано ряд заходів для удосконалення процесу професіоналізації системи менеджменту в Україні.

Ключові слова: система менеджменту, управлінські рішення, управлінська команда, взаємодія науки і практики менеджменту, економічні методи менеджменту.

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ПРИОРИТЕТЫ ИННОВАЦИОННОГО РАЗВИТИЯ ПРОФЕССИОНАЛЬНОЙ СИСТЕМЫ МЕНЕДЖМЕНТА В УКРАИНЕ

Резюме

В статье рассмотрены некоторые базовые проблемы инновационной динамики развития системы менеджмента в Украине. Проведен анализ структуры базовых элементов системы менеджмента, процесса взаимодействия науки и практики менеджмента, ключевых проблем профессионализации управленческой деятельности. Предложено ряд подходов к совершенствованию процесса профессионализации системы менеджмента в Украине.

Ключевые слова: система менеджмента, управленческие решения, управленческая команда, взаимодействие науки и практики менеджмента, экономические методы менеджмента.

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