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# ТЕОРІЯ І ПРАКТИКА ПРАВОЗНАВСТВА

# THEORY AND PRACTICE OF JURISPRUDENCE

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**Abstract**
*Civic initiatives that manifest themselves in the legitimate form of electronic petitions (initiatives) in different countries of the world are attracting more and more attention. This is especially true in times of social crisis. The war in Ukraine has become one of the most powerful factors influencing civic activity in both Ukraine and Latvia. A significant number of civic initiatives have emerged as a result of the war. The very content and focus of this activity has changed significantly under the influence of wartime challenges, which requires a separate scientific analysis. These circumstances have actualised the authors' research in this area. This article is the first attempt to study the experience of Latvia and Ukraine in the field of electronic petitions in the context of the war in Ukraine. The purpose of the article is to examine the role and influence of civil society actors on the justification of legislation, or ratio legis, in the legislative processes of Latvia and Ukraine during the crisis caused by the Russian war in Ukraine. To achieve this goal and solve the tasks stipulated by it, the following scientific methods were used: systematic, formal legal, comparative legal, analysis and synthesis, generalisation and critical analysis. The authors have studied Ukrainian and Latvian legislation defining the procedures for publishing electronic petitions and collecting signatures in their support. The analysis shows that during the first two years of the war in Ukraine, the public initiative platform ManaBalss.lv (MyVoice) in Latvia received 165 proposals on wartime issues. Of these, 49 initiatives were published that met ManaBalss.lv's quality criteria. Among them, 10 reached the legally required threshold of signatures and were submitted to the parliament (Saeima) or the respective municipalities as collective submissions. Two of these collective submissions were implemented, in particular, an amendment to the legislation legally obliging employees of state institutions to be loyal to the Republic of Latvia and its Constitution was introduced. The study also examines the history of the 2019*

*collective submission to the Saeima demanding the demolition of the grandiose Soviet-era Victory Monument, which is protected by an international agreement. The study also includes the Ukrainian experience of civic activism, such as the initiative to legalise same-sex civil unions. It has acquired a new vector of relevance due to the war in Ukraine. This initiative was aimed at creating legal grounds for informing de facto spouses about the injury, captivity or death of the other partner, as well as exercising rights related to the death of a partner. The study revealed the targeted, persistent influence of individual and organised public figures or social entrepreneurs on the current state of legislation in the areas that have proven to be most sensitive to the challenges of war. The study of synergies, especially between civic and political entrepreneurs, aims to improve understanding of the mutually constructive work of policymakers and strengthen democracy. A properly conceptualised and practical experience-based mechanism of digital civic participation contributes to achieving this goal. This area is promising for further research.*

***Keywords:*** *policy entrepreneurs; civic entrepreneurs; electronic petitions; public initiatives; e-participation in legislation; ManaBalss.lv; ratio legis; war in Ukraine.*

# Громадські підприємці та «Ratio Legis» під час війни Росії в Україні: на прикладі електронних петицій в Латвії та Україні

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**Анотація**

*Громадські ініціативи, що проявляються в легітимній формі електронних петицій (ініціатив) у різних країнах світу, привертають до себе все більше уваги. Особливо це спостерігається в часи кризових соціальних загострень. Війна в Україні стала одним із найбільш потужних чинників впливу на громадську активність як у самій Україні, так і в Латвії. Насамперед тут з'явилася значна кількість громадських ініціатив, спричинених війною. Сам зміст і спрямованість цієї активності значно змінилися під впливом викликів воєнного часу, що потребує окремого наукового аналізу. Зазначені обставини актуалізували розвідку авторів у цій царині. Пропонована стаття є*

*першою спробою дослідити досвід Латвії та України у сфері електронних петицій в умовах війни в Україні. Її метою є дослідження ролі та впливу суб'єктів громадянського суспільства на обґрунтування законодавства, або ratio legis, у законодавчих процесах Латвії та України під час кризи, спричиненої вторгненням росії в Україну. Задля досягнення поставленої мети та вирішення зумовлених нею завдань використано такі наукові методи: системний, формально-юридичний, порівняльно-правовий, аналізу та синтезу, узагальнення й критичного аналізу. Досліджено українські та латвійські законодавчі акти, що визначають процедури оприлюднення електронних петицій і збору підписів на їх підтримку. У результаті проведеного аналізу визначено, що протягом перших двох років війни в Україні платформа громадських ініціатив ManaBalss.lv (MyVoice) у Латвії отримала 165 пропозицій з питань, зумовлених воєнним часом. З них було опубліковано 49 ініціатив, які відповідали критеріям якості ManaBalss.lv. Серед них 10 досягли законодавчо встановленого порогу підписів і були подані до парламенту (Сейму) або відповідних муніципалітетів як колективні подання. Два з цих колективних подань були реалізовані, зокрема, внесено поправку до законодавства, що юридично зобов'язує працівників державних установ бути лояльними до Латвійської Республіки та її Конституції. Також досліджено історію просування колективного подання до Сейму від 2019 р. з вимогою знести монумент Перемоги радянських часів, який охороняється міжнародною угодою. Крім того, проаналізовано український досвід громадянської активності на прикладі ініціативи легалізації одностатевих цивільних союзів, яка набула нового вектору актуальності через війну в Україні. Саме ця ініціатива була спрямована на створення правових підстав для інформування фактичного подружжя про поранення, полон або смерть іншого партнера, а також на реалізацію прав, пов'язаних зі смертю партнера. Проведене дослідження виявило цілеспрямований, наполегливий вплив окремих та організованих громадських діячів або громадських підприємців на поточний стан законодавства у сферах, що виявилися найбільш чутливими до викликів війни. Вивчення синергії, особливо між громадськими та політичними підприємцями, спрямовано на покращення розуміння взаємно-конструктивної роботи органів, що формують політику, та зміцнення демократії. Належним чином концептуалізований і заснований на практичному досвіді механізм цифрової громадянської участі сприяє досягненню цієї мети і є перспективним для подальших досліджень.*

***Ключові слова:*** *політичні підприємці; громадські підприємці; е-участь у законотворчості; електронні петиції; громадські ініціативи; ManaBalss.lv; ratio legis; війна в Україні.*

## Introduction

### *Legal grounds and boots on the ground: expanding current "ratio legis"*

Eager individuals and organisations, analysed in this research, use favourable situations to expand the legal scope, participating via digital

means and with the assistance of legislators in the further development of laws. This ensures better adaptation of certain norms to their underlying purpose and meaning, or the *ratio legis*.

In the terms of political science, various policy entrepreneurs, including civic entrepreneurs and political entrepreneurs, use windows of opportunity that emerge in the institutionally defined environment, specifically within legislation, to achieve their broadly defined entrepreneurial "profits". For civic entrepreneurs, these "profits" encompass civic and societal rights and norms while for political entrepreneurs, they translate into political capital. These categories are not mutually exclusive, and the roles of the actors can overlap; for example, a political entrepreneur may be driven also by a civic motivation [1].

Regardless their typology, policy entrepreneurs seize windows of opportunity to link their proposed solutions to identified problems [2]. However, problems are not self-evident; policy entrepreneurs are enabled or limited by how problems are defined and how these definitions influence agenda-setting and policy making [3]. Acting as problem brokers, policy entrepreneurs "sell" or actualise and problematise the policy-making issues or in our case – legislative problems, presenting them as tangible and solvable problems, rather than mere "conditions" or institutionalised states of affairs, which exist despite their suboptimal perception by certain actors or social groups.

In the third chapter, *inter alia*, we will delve into how a civic actor seized the onset of the Russia's war in Ukraine to reactivate and problematise the public display of post-Soviet symbols associated with Russia. These symbols had persisted in the "conditions" state of affairs for decades. It is important to note that the successful policy entrepreneurs often possess the characteristic of convincingly brokering existential necessity for a change, thereby expanding the current legal scope and rationale of *ratio legis*.

In Latvia, it goes back as far as the creation of the sovereign state in 1918 at the end of World War I. Latvia is among the first states to enshrine women's suffrage in its Constitution (Satversme). Regardless the accuracy of historic claims by political entrepreneurs, like, Latvian social democrats, it is noteworthy that in Latvia the question of the establishment of the state itself, i.e., an existential necessity, was closely intertwined with the issue of universal suffrage.

Arguably, this laid the legal foundation for an expanded *ratio legis*, especially within constitutional rights, challenging the prevailing conservative legal rationale both internationally and in Latvia. The establishment of a

democratic and lawful state in Latvia in the early 20th century under the military threat right after the WWI, required the involvement of women in parliamentary processes. However, the comprehensive resolution of women's rights, including the right to seek divorce, full legal capacity in contractual matters, and the autonomy to choose their place of residence, awaited windows of opportunity and a more profound development of *ratio legis* over an extended period [4]. The emancipation of women in the field of public law in Latvia as an existential sovereign necessity, occurred much faster than women's emancipation in the field of civil law.

Similarly, the legalisation of same-sex unions in Ukraine during the wartime represents a compromise on achieving full marriage equality [5]. Arguably, the move is driven by an existential necessity and an expanded *ratio legis*, with civic entrepreneurs playing a significant role through a digital civic petition on the Presidential petitions' webpage [6].

To comprehend the phenomenon of civic actors achieving legislative change on the wartime issues or at least enhancing it by means of digital petitions, two research questions are posed:
1) in what legal and political context these civic initiatives originated and where perceived by the legislators and officials in the decision-making process?
2) Did these civic initiatives arguably contribute in the further development of laws by expanding the *ratio legis*?

The hypothesis of this research posits that civic actors function as civic entrepreneurs, leveraging the situation of Russia's war in Ukraine as a window of opportunity to expand the legal scope of existing norms, i.e., *ratio legis*, and to bring about desired legislative amendments.

**Literature review**

To understand the tradition of studying entrepreneurial actors striving for institutional, policy, and legislative changes, John W. Kingdon's conceptualization of policy entrepreneurs serves as an excellent starting point. In contemporary scholarly work within this field, J.W. Kingdon's influence is pervasive, even if not explicitly cited, as seen in this research. Additionally, this study briefly incorporates insights from another seminal author in the study of institutional change and institutionalism theory – Peter A. Hall [7]. In the context of this research, which focuses on democratic agility in response to existential challenges, particularly in relation to efficient legislation and the rule of law, the literature on self-defensive democracy (in German: *Wehrhafte Demokratie*) is indispensable. Therefore, the inclusion of perspectives from Peter Niesen [8] and Paulien de Morree [9] in this research.

## Materials and Methods

To analyse the abovementioned and other digital civic petitions' cases, the following terms are used in this research:
– Digital or e-participation refers to public involvement in the digital democracy environment, where citizens contribute their concerns, needs, interests, and values to shape parliamentary legislation;
– Policy entrepreneurs: Individuals who allocate resources to advocate their proposals or address specific issues, playing a crucial role in attracting attention from influential individuals and linking solutions to problems within the realm of politics;
– Civic entrepreneur: An individual or an organization that seizes opportunities to influence policy outcomes in the interests of society;
– Political entrepreneur: An individual politician or a political party that takes advantage of opportunities to influence policy outcomes and gain political capital;
– Political capital: Representative or reputational capital, or both, referring to parliamentary rights, legislator attributes, political productivity, and consistent policy positions signalled to the electorate;
– *Ratio legis* – Reason for the law. The policy rationale or underlying purpose of a specific norm, rule, treaty or act of legislation that ensures its application in accordance with the entire system, so that it seamlessly integrates into the overall functioning of the legal system, both in terms of its content, purpose, and meaning, as well as its application.

Due to the limited research on the overall effectiveness of e-participation in legislation and the unique nature of this research subject, this exploratory qualitative case study adopts an inductive approach. It involves the analysis of data from the ManaBalss.lv (MyVoice) platform, a written response by a parliamentary commission and five interviews with the authors of civic initiatives, chairpersons of parliamentary commissions and a former President of Latvia (2019-2023).

The data on the analysed digital civic initiatives are in the Annex.

The words "petition", "initiative" and "collective submission" in the research are used interchangeably, given that the Latvian and Ukrainian legislation and societies use different terms to describe the same phenomenon.

The term "civic" in the research is preferred to the often used "civil" to distinguish between citizens' affairs and activities related to their community, society and state, and general human or civil attitudes, behaviour and norms within a society, like, civil rights stating what every person of the community has the right to.

## Results and Discussion

### *Multisided value of entrepreneurial law-making*

In the analysis of legal changes, incorporating the broadest network of involved actors alongside legal professionals, the economic approach using terms such as "entrepreneur", "capital", as well as "value", "investment", and "cost" is a useful simplification. It highlights common characteristics among the involved actors, allowing both in research and for the actors themselves to speak a common language. This is by no means self-evident.

The sentiment "the government doesn't listen to me" is a not less widespread attitude in democratic societies than an inclination towards "the people are not particularly smart; let the professionals work" on the side of bureaucracy, officials, and politicians. Similarly, in democracies, there has always been not only inter-party but also inter-institutional jealousy and competition, stemming from legitimate institutional interests on the side of the executives and public administration. The economic approach, when applied to the analysis of diverse institutional changes, encompassing the scope of legal norms and legislative modifications, enables the observation of these emotionally charged processes in a systemic and neutral manner. Ultimately, this approach can provide emotional relief and more constructive, practical approach also for the involved actors.

All kinds of policy actors operate in the market of ideas, and in this market, there are its own upheavals, such as Covid-19 or the war in Ukraine, fluctuations in demand for specific ideas, and risks to the investments made. Like, the risk for the invested time and energy of the initiative's authors and the attention capital received from the public. There is also fall or, conversely, a sudden surge in value of frozen civic or political investments due to a swing in demand.

Data from ManaBalss.lv indicate a momentary shift in the market of ideas with the onset of Russia's war in Ukraine. Since February 24, 2022, not a single citizen initiative on the topic of Covid-19 has been submitted, although it used to happen regularly. On the contrary, on the day of the invasion, two initiatives on the wartime issues already were published, and within four days until the end of the week, two more followed, but 17 initiative submissions were not published as they were deemed inconsistent with the platform's criteria[1]. Most of them duplicated the same demand – the dismantling of the Victory monument in Riga, which was already on the political agenda.

[1] Publicly available quality criteria for an initiative to be published. In Latvian: https://ej.uz/oi1y. These criteria as a cornerstone of e-participation efficiency are analysed in Luchenka, Melkis 2022 [10].

In the morning of February 24, protesters began to gather near the Russian embassy in Riga, practically ignoring the then-existing legal norms regarding Covid-19 restrictions. Both the number of protesters and the blatant disregard for Covid-19 norms reached their culmination in Riga on the afternoon of the invasion, including several hitherto law-abiding politicians. It was an extremely rapid, unmistakable and forceful change in the popular perception of the current *ratio legis*, which was soon followed by official legislation. It is mentioned here because it marks a dramatic shift in societal focus and the turnover of the market of ideas, irreversibly overshadowing the previous problem, the value of its themes and solutions, as well as the value of the invested civic activism, political, and in a way, financial capital. In this case, the market of ideas completely, instantly and irreversibly shifted from Covid-19 to the Russia's war in Ukraine.

Both entrepreneurial approach of the civic society and the legitimacy and different kind of a "currency" of the political capital should be understood for a comprehensive analysis of a legislative and legal change ecosystem.

Civic entrepreneurs drove the institutional change in e-participation in Latvia, as well as in Ukraine, during a window of opportunity. In Latvia, it coincided with an economic, social, and political crisis and growing public mistrust in the parliament, Saeima. In 2011, amidst the dissolution of the parliament by the President and a popular movement against the oligarchy, tech entrepreneurs, civic activists, professionals, and aspiring politicians together with the team of the newly established NGO MyVoice advocated for direct societal involvement in the legislative process through digital participation. As a result, the mechanism of collective submissions was introduced in the parliamentary Rules of Procedure [22].

Ukrainians have been able to use the mechanism of collective submissions (e-petitions) since July 2015, when Section II of the Law of Ukraine "On Citizens' Appeals" (in force since 02.10.1996) was supplemented by Article 23-1 "Electronic Petition, Procedure for its Submission and Consideration" [12]. This amendment to the law was initiated by the President of Ukraine with the aim of creating an effective mechanism for communication between citizens and the authorities, including through the use of information and communication tools. Ukrainian society welcomed the new opportunity, perceiving it as a real way to influence government decisions. The readiness of citizens to engage in such a dialogue with the state is evidenced by the number of such appeals, which amounted to several thousand petitions in each of the first months of the law's operation. This was a true manifestation of e-democracy in the broadest sense, which involves community involvement in solving various socio-political problems with the help of modern information technologies [13].

Collective submissions in Latvia require a minimum of 10’000 signatures from citizens aged 16 or older on the day of filing, i.e., in 2024 it is slightly above 0.75% from the eligible to this right [20]. It is a significantly high threshold vis-à-vis population of the state. In Ukraine, the required number of signatures is 25,000 [14], which is a much smaller percentage of the country’s population – 0.059%. At the same time, the law does not set a minimum age requirement for a citizen to initiate or sign a petition. Conversely, Article 7 of the Law of Ukraine "On Citizens’ Petitions" [12] contains a provision that prohibits refusal to accept and consider a petition based on the age of the citizen.

Most early e-participation platforms in Latvia were built on the assumption "we will build and people will come". Without strong organizational backing or a sustainable financing model, they largely failed to create a wider impact in society. The MyVoice platform is a notable exception in terms of public visibility and policy impact [15]. The governance innovation accomplished in Latvia through collective submissions, with a crucial role played by ManaBalss.lv, enables policy entrepreneurs to capitalize on windows of opportunity. This facilitates a sustained and consistent pursuit of their advocacy, leading to legislative changes independent of electoral cycles (Table 1).

**Table 1. Citizens’ initiatives data, ManaBalss.lv**

| Year | Submitted to the platform | Published on the platform | Percentage, published from the submitted | Implemented into law | Elections |
|---|---|---|---|---|---|
| 2011 | 215 | 25 | 12 | 1 | Yes |
| 2012 | 223 | 24 | 11 | 2 | No |
| 2013 | 168 | 15 | 9 | 2 | No |
| 2014 | 134 | 21 | 16 | 4 | Yes |
| 2015 | 166 | 38 | 23 | 1 | No |
| 2016 | 154 | 64 | 42 | 4 | No |
| 2017 | 152 | 70 | 46 | 6 | No |
| 2018 | 161 | 71 | 44 | 8 | Yes |
| 2019 | 195 | 61 | 31 | 3 | No |
| 2020 | 279 | 123 | 44 | 7 | No |
| 2021 | 360 | 115 | 32 | 13 | No |
| 2022 | 314 | 124 | 39 | 11 | Yes |
| 2023 | 344 | 173 | 50 | 11 | No |

| Year | Submitted to the platform | Published on the platform | Percentage, published from the submitted | Implemented into law | Elections |
|---|---|---|---|---|---|
| 2024[1] | 78 | 33 | 42 | 2 | No |
| Total | 2943 | 957 | 34 | 75[2] | |

Since 2011, ManaBalss.lv has spearheaded 75 civic initiatives resulting in legislative changes spanning a wide spectrum of civic and societal interests, even encompassing a constitutional amendment. In 2018, a constitutional amendment was enacted, introducing an open parliamentary vote for the President of Latvia. This provision took effect in 2019 and, based on our information, stands out globally as a unique instance where citizens, leveraging digital participation, have effectively influenced a constitutional amendment.

Continuous and direct civic participation in shaping the parliamentary agenda presents a fundamental dilemma. This dilemma arises from politicians' necessity to align with the preferences of the electorate to sustain a minimum level of stable political capital, while the parts of this capital – reputational capital and representative capital – tend to be divergent. The representative capital consists of parliamentary rights and legislator attributes that determines political entrepreneur's productivity in influencing a policy. In other words, the real, actual power. Whilst reputational capital determines legislator's standing with the voters and helps the voters to form their expectations, politicians as legislators tend to go against constituent interests and expend the reputational capital to accumulate representative capital [15] or the actual power.

Simultaneously, citizens insist on ongoing checks and balances concerning their preferences, leading to the volatility of political capital. Using economic terminology, politicians adhere to the gold standard of their political capital, while citizens advocate for a perpetual adjustment of both the mandate and values, sometimes including *ratio legis* – akin to a somewhat fiat currency of political capital.

[1] January 1 to March 7, 2024.

[2] Out of 130 collective submissions that have received the final decision since 2011. On March 7, 2024, there are 50 collective submissions under the review in different stages in Saeima and ministries. In addition, there are nine more initiatives directly submitted to the ministries and government, but their legal status is not defined, so they are omitted in MyVoice statistics. Also, 44 initiatives are in the review process in municipalities, which MyVoice also does not count, as their legal status is legislated only since 2023, and out of those 44 only 24 fall under the new Law on Local Governments. I.e., they are submitted since 2023. Historically, 24 collective submissions to municipalities in Latvia have achieved the demanded change; eight of these – since the Law on Local Governments came into force.

Ukraine's experience is different. The significant activity of Ukrainians in using the mechanism of electronic petitions and the possibility of sending them and placing them on the official resources of the parliament, the President and the government without prior quality checks does not inherently equal high efficiency of such interaction with the authorities. Tens of thousands of published initiatives often duplicate each other, are mostly characterised by a low level of quality, lack of a clearly defined goal and a real idea, which leads to a low level of support from the society. The same initiatives that have received the required 25,000 signatures often do not lead to real consequences in the form of new laws or government decisions [16].

The examination of political entrepreneurs utilizing ManaBalss.lv [1] corroborates that an e-participation system managed directly by civic society significantly streamlines the trial-and-error process inherent in political entrepreneurship. This system empowers political entrepreneurs to choose interest groups and constituents to engage with not only during the peaks of electoral cycles, where e-participation is typically observed [17], but consistently and irrespective of electoral cycles. Hence, it arguably smoothes the dilemma of the gold standard versus fiat currency of the political capital.

To disrupt the cycles of e-participation and amplify the tangible impact of policy entrepreneurs on parliamentary agenda-setting, including the expansion of *ratio legis*, an entrepreneurial approach to e-participation is indispensable. In countries such as Ukraine, Latvia, and Estonia, civic entrepreneurs played pivotal roles as change agents in the establishment of their respective e-participation systems. Notably, only in Latvia did civic entrepreneurs, represented by the NGO MyVoice, sustain their central role post the implementation of the e-participation system [18]. Among these three countries and others with comparable e-participation systems, Latvia stands out as significantly more efficient in civic participation in legislative processes.

A constitutional lawyer and former President of Latvia acknowledges that "in Latvia, the legal opportunities for civic society and individuals to influence the political process, as defined by the law, are among the broadest in the world" [19]. It is crucial to note that these "legal opportunities... defined by the law" are articulated in a soft and horizontally structured manner. In contrast to other comparable countries with vertically integrated e-participation systems, where the offices of presidents, parliaments, governments, and municipalities provide civic participation services, the Rules of Procedure in Latvia do not mandate the parliament to take specific actions [11]. Instead, they stipulate that collective submissions receive preferential legislative treatment when they reach the parliament. In simpler terms, the parliament

acknowledges the importance of deliberating civic initiatives only when substantial groundwork is undertaken by society itself.

The infrastructure for e-participation, campaign support services, legal assistance, and all related financing in Latvia are entirely entrusted to civil society. Structurally, encompassing the underlying legal norms, it is inherently entrepreneurial. Consequently, it empowers a range of policy entrepreneurs, including political entrepreneurs, whose political capital would, in traditional reasoning, be jeopardized by excessively frequent civic disruptions.

Instances of civic initiatives authored by political, profession, and public entrepreneurs on ManaBalss.lv are relatively rare. Limited activity of political and profession entrepreneurs on the platform is largely explained by the publication fee threshold, which can reach up to 4,900 euros plus VAT for political parties, companies and business lobby. In addition, public entrepreneurs may be constrained by the inherent hierarchy and characteristics of the public sector. Public entrepreneurs tend to initiate proposals on ManaBalss.lv when their professional, organisational existence is endangered. E.g., initiatives "Preserve the universities in Latvia's regions" and "Preserve specialized music education in Latvian schools[1]".

There is also a unique case of public entrepreneurship where a municipality initiates legislative change through e-participation[2]. Similar to the interviewed political entrepreneurs [1], this municipality expresses a preference for a civic-run, entrepreneurial e-participation platform that prioritizes efficiency, ease of use, and consecutive preferential legislative deliberation in the parliament, guaranteed by law. The preferential aspect implies that a legitimate collective submission in the parliament must be discussed based on its merits, not merely taken into consideration. Instances of outright dismissal of a collective submission in Saeima are rare – only 18 out of 130 submitted to the parliament in almost 13 years of ManaBalss.lv. Also in these cases, the submitted ideas are deliberated among political fractions' representatives, experts, officials and the author of the initiative during its initial evaluation in the Mandate, Ethics and Submissions Committee. These deliberations before dismissal routinely take the whole working day agenda of the Committee or even a couple of days[3].

[1] In Latvian, accordingly – https://manabalss.lv/i/2006, https://manabalss.lv/i/1562. Both initiatives successfully attained the demanded policy.

[2] "Legal basis for preventing violence in schools", in Latvian – https://manabalss.lv/i/2891. In the parliamentary legislative process, as of March 7, 2024.

[3] Deliberation of the dismissed collective submissions can be quickly traced in the red-marked entries on the Mandate, Ethics and Submissions Committee's webpage. In Latvian: https://ej.uz/13ds. Further analysis would take going through the audio recordings of the Committee meetings, also available publicly online.

Furthermore, preferential treatment is expressed in the fact, that the succeeding parliamentary term inherits collective submissions as obligatory legislative acts for consideration. No other legislative act that has not passed the final reading carries such rights. The new term, reflecting the political will of the electorate at that time, is not obligated to take over the unfinished work of the previous term. Collective submissions by citizens are an exception.

These and other characteristics provide that political entrepreneurs – the parties – consistently are willing not only to use but also to pay for the service of a civic initiative. Interviews attest that initiatives ease the inter-party jealousy, build otherwise difficult to form of even impossible policy-making coalitions and smooth the final legislative decision.

Regarding the demand to demolish the Soviet Victory monument, the former President of Latvia reasons – "one or two parties initially stood behind the demand as political entrepreneurs, but it became a widespread or majority concern, aligning with the identification of the general populace with these parties. It evolved into a question for the broader society, and, of course, these parties could assert, "We have always said this". However, there was no majority support until now. Now there is a majority, and the remaining parties, I would say, somewhat shyly adhered to it and accepted it" [19].

Likewise, the chairperson of a parliamentary committee observes – "the allure of such initiatives is that they trigger a flow. I would not say an avalanche, but a flow. And being in the flow is always easier" [20].

The chairperson of another parliamentary committee underscores the role of civic initiatives in smoothing political dynamics. "Another thing that played a role was political jealousy – pouring cold water on it. Because to me, it seemed – great; we're making progress! But then the "blanket dragging" began. And all of that happened right before the election year. (...) The initiative played a significant role. If one or another political party were to push it, it would be ascribed to the election year, there would be political resentment. (...) As individual deputies, we can each come up with ideas and visions, but what if you do not have allies?" According to the chairperson, the initiative "is a way to raise a question in public discourse where even like-minded parties and coalitions may have differences, but they don't want to show them publicly. They want to portray that everything is in order" [21].

The author of an implemented initiative observes the same. "Parties reached an agreement, and it can even be said that they somewhat solidified. Although there are already many differences between the parties on various issues, this particular question at that moment – yes, perhaps smoothed out other disagreements... Not disagreements, but other issues that had

been points of contention among the parties were momentarily set aside. In essence, it can be said that, in a way, it brought them together" [22].

In addition to the user-friendly and cost-effective advantages of e-participation, particularly when managed by civic society, the accounts of involved stakeholders highlight the multifaceted value of entrepreneurial law-making. The distinct and focused mandate of civic initiatives sidesteps the otherwise unavoidable inter-party "horse trading" concerning legislative changes. It facilitates the formation of political coalitions that might be otherwise unattainable, mitigates opportunistic grandstanding, and accelerates the process of policy-making and legislation. The latter factor is of particular significance, as a right delayed is a right denied, to borrow the words of Martin Luther King Jr.

***No way back: 'status quo' regains its literal meaning***

This research identifies two types of civic entrepreneurship in Latvia vis-à-vis wartime digital civic initiatives. One type brokers the problematisation of the actual *ratio legis*, expands its scope, and advocates for concrete legislative changes. The other type lobbies to maintain the problematised issues within the current state of conditions, seeking to uphold the *status quo* in the apparently changing legal environment.

Even when pursuing mutually exclusive aims in some cases, both types of civic entrepreneurs are legitimate. Both have managerial, entrepreneurial behaviour, both exploit opportunity, including utilising legislation on collective submissions and ManaBalss.lv services, to pursue specific values. Both engage in complex social issues or wicked problems, aligning with the principles of civic entrepreneurship [23].

Change advocates strive to broaden the *ratio legis*, pinpointing and addressing solvable aspects within what were previously deemed wicked problems and clearly suboptimal complex conditions. The advocated change does not eliminate suboptimality; instead, it redefines conditions by singling out and brokering solvable problems within the broader context. However, suboptimality and complexity persists. Examples include the demolition of signs of commemoration, representing loss of freedom, humiliation and genocide for one, and sacrificial heroism and greatness over evil for others. Another instance is demand of proficiency in the state language for Russian and Belorussian passport-holding residents, representing the minimum loyalty to the society and the state the person lives in for one, and "let *babushkas* alone!" attitude for others. Similarly, provision of equal civil rights to the same-sex couples, entangled in the tragedy of war and sharing the same existential burden with other subjects of civil rights, contrasts with conservative societal ideals of others, as we see in Ukraine.

For practical reasons, this research focuses on digital civic initiatives in Latvia and extends the observed correlations, mechanisms and conclusions to logically comparable petitions in Ukraine. The process of legalisation of the same-sex civil unions in Ukraine serves as an illustrative example of expanded *ratio legis*, where actors employ similar legislative change mechanisms as observed in Latvia.

A significant difference is that Latvia does not allow several petitions on the same issue to be published simultaneously. Accordingly, this does not create a situation where votes in support of a particular issue are scattered among similar initiatives. For example, the issue of legalising same-sex civil unions in Ukraine was raised in five petitions on the website of the Cabinet of Ministers of Ukraine in 2022 and 2023 alone. Another 18 initiatives raised this issue on the website of the President of Ukraine. Thus, 23 initiatives in 2022 and 2023 addressed the issue of legalising same-sex marriage in Ukraine. Three of these initiatives received over 25,000 votes each. Two out of the three initiatives collected votes in support of the legalisation of same-sex marriage, and one was against it. Responding to the initiatives supported by the required number of votes, the President of Ukraine noted that the issue of legalising same-sex marriage requires appropriate amendments to the Constitution of Ukraine, as Art. 51 [24] of the Basic Law stipulates that marriage is based on the free consent of a woman and a man. At the same time, the Constitution of Ukraine cannot be amended in a state of martial law or a state of emergency (Art. 157 of the Constitution of Ukraine) [25]. Thus, for Ukraine, the resolution of this issue needs to be postponed until the end of the war.

The above example clearly demonstrates one of the differences between the institutions of initiatives of the two states, which is the absence of restrictions in Ukraine on the publication of initiatives on such issues.

Digital participation systems in both countries work for the same end of direct civic participation in legislative and policy agenda-setting. However, both differ on the input criteria of such participation [18]. It results in a vastly greater number of digital petitions in Ukraine, their sometimes-inconsistent argumentation, messier campaigning and administration, as well as difficulties of following through.

For instance, there are several petitions addressing the voluntary dismissal of female servicepersons from the ranks of the Armed Forces of Ukraine, as well as petitions advocating for the development of Ukraine's own nuclear military capabilities [26]. While each petition has garnered a few thousand signatures, determining the true extent of civic support for these ideas remains challenging due to the division among these individual

initiatives. Consequently, it is also difficult to ascertain the eventual impact of these civic entrepreneurship activities. Nevertheless, the principles of civic entrepreneurship behind these initiatives in Ukraine arguably align with comparable ones studied in Latvia within the scope of this research.

The Latvian experience of building an effective petition system points to the expediency of rethinking the institution of electronic petitions in Ukraine. It also indicates possible steps that should be taken in this direction. In general, they could be summarised as follows:
1) limiting the use of electronic initiatives at the national level to the Parliament only (the legislative body has universal competence and is authorised to resolve any issue that may be of concern to the public at the level of law);
2) introduce preliminary control over the quality of initiatives (the principles of working with initiatives implemented by ManaBalss.lv serve as a good guide, in addition, some of this work can be done using artificial intelligence technologies [27]);
3) increase the number of votes required to support a petition to 100,000, while cancelling the time limit within which a petition must collect these votes.

The introduction of the proposed changes could lead to positive changes in the efficiency of the institution of electronic petitions and increase the trust in it on the part of civil society. Moreover, Ukrainian society needs an effective mechanism of influence on the authorities as never before. The recent trend has been a gradual but ever-increasing and tangible restriction of citizens' rights and freedoms. This is mainly due to the challenges of wartime and is a truly necessary measure aimed at ensuring the country's vital activity. However, disproportionate measures, such as the restriction of the right to education by introducing obstacles (additional exams, requirements for additional documents, shorter study periods, etc.), are becoming more common.

A symbolic and representative case of civic entrepreneurship is initiative "Demolition of the Victory Monument". Since its submission to Saeima in 2019, the prevailing argument against its implementation was the Art. 13 "Maintenance of Memorial Structures and Mass Burial Sites" of the "Agreement Between the Government of the Republic of Latvia and the Government of the Russian Federation on Social Protection of Russian Federation Military Pensioners Residing in the Territory of the Republic of Latvia and Their Family Members"[1]. In late March 2022, it was still in place when the civic initiative author asked the Foreign Affairs Committee of the Saeima to reactivate the collective submission, and a meeting was held together with the representative from the Ministry of Foreign Affairs of Latvia.

[1] In Latvian: https://likumi.lv/legislation/lv/lv/treaties/id/625.

Additionally, a complicating factor was the Russian diplomatic note, which has been attached to the international treaty since the attempted bombing of the Victory Monument in 1997, and remains secret. "Legal argumentation has stemmed directly from bilateral agreements and the infamous notes protected by a restricted access status. The confidentiality period is 25 years. Regardless, we will eventually find out who signed that note and what it contains. Of course, there are Members of Parliament with the relevant clearance who have seen the note, but they cannot comment on it as long as confidentiality is in place. It was the state position that cannot be criticized, as Latvia presents itself as a country responsible for international laws and obligations", says the chairperson of the Foreign Affairs Committee [21].

Based on these grounds, the first initiative in 2016 with a similar demand was rejected in Saeima[1]. The occupation of Crimea had already occurred, and the Russian invasion in Georgia predated it. This was sufficient for civic entrepreneurs to comprehend the actual circumstances underlying the established *ratio legis* and to bring attention to them. There were also aware political entrepreneurs, crucial for any substantial institutional change[2], but they constituted a parliamentary minority, and the compelling window of opportunity that typically accompanies a crisis was absent.

"But then came the atrocities of the Russian army in Bucha and Irpin. After that incident, politicians finally made the decision that we can indeed terminate this agreement with Russia. Against this backdrop, I believe this aspect played the most significant role in the politicians' decision to terminate this interstate agreement", the author of the initiative stated, when commenting on "what happened" [22].

Chairperson of the Foreign Affairs Committee affirms, "The change occurred in the clarity that Russia had grossly violated a series of international laws, commitments, conventions, and treaties. The international principle is that if there are gross violations of international law, the international community must do everything possible to rectify them. For example, preventing genocide. It cannot be ignored; there is a need to react and take action against it" [21]. Indeed, "the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity" [28, p. 246].

With the civic mandate of the initiative in the background, Saeima suspended the Article 13 of the said Agreement – "we halted its operation,

[1] Point 15 on the Mandate, Submissions and Ethics Committee webpage: https://ej.uz/13ds.

[2] In what Peter A. Hall calls the 3rd order of institutional change with a radical policy shift, politicians play a dominant role, though policy changes not as a result of autonomous action by the state, but in response to an evolving societal debate that soon becomes bound up with electoral competition [8, p. 288].

not the entire agreement. The cessation of the provision's enforcement is based precisely on the goal that it remains in effect until Russia completely withdraws its forces from Ukrainian territory, and territorial integrity is restored within its internationally recognized borders". To avoid eventual rebukes about "cherry picking", "we evaluated all bilateral agreements both with Russia and Belarus. This was not the only agreement of which we partially suspended one provision. There were numerous agreements that we began to denounce through the Parliament and the government. (...) We seriously assessed everything, and there were quite a few – close to 40 agreements, some of which were never implemented. We conducted a thorough audit", the chairperson of the Foreign Affairs Committee describes the "behind the curtains" process in the parliament and the government [21].

Continuously these events triggered expansion of *ratio legis* even further to its argumentable limits, as "the question of evaluating the bilateral agreements was not closed, and today – now, a year later – on the agenda is the legal assistance agreement and its denunciation", the chairperson continues. "Since 2022, when we began the assessment, the legal assistance agreement was something we agreed on – okay, let's continue monitoring how the situation develops. Following two or three Foreign Affairs Committee sessions, each of them concluded with the opinion that nothing was improving. In the final meeting on this issue in the Foreign Affairs Committee, all responsible institutions – the Prosecutor General's Office, the Ministry of Justice, and the Ministry of Foreign Affairs – stated that denouncing the agreement was up to a political decision. (...) Thanks to the Parliament – with 71 votes in favour, conceptually, the parliament has supported the denunciation of the agreement"[1].

Before the Victory monument in Riga was torn down as the central element of a wider legislative and policy change, also the very popular civic initiative for "Creating a Photo Exhibition in Victory Park on the Russian-Inflicted War Devastation in Ukraine"[2] was implemented by the municipality in early May 2022. The chairperson of the Foreign Affairs Committee of the Saeima admits that it raised "the awareness that we can" before the law was accepted on June 16 [29]. Hence, it arguably contributed to the expansion of the *ratio legis*.

The overall factual background of the expanding *ratio legis* is summarised by the chairperson of the Foreign Affairs Committee before the vote on the law *inter alia* prohibiting exhibition of objects glorifying the Soviet Regime. "Russia is purposefully deepening the association between the Russian

[1] Since the interview, the denunciation is enacted on Ferbuary 3, 2024. See in Latvian: "By denouncing the Latvia-Russia agreement, legal cooperation continues based on international conventions", on https://ej.uz/vdqq.

[2] In Latvian: https://manabalss.lv/i/2365.

Federation of today and the Soviet Union – both the rhetoric by state officials and the informative space are full of attempts to justify the actions of the Russian military in Ukraine by the need to eradicate fascism and prevent genocide, equating the so-called 'special military operation' with the Soviet Army. The image and symbols of the Soviet Army are now closely and clearly associated with the Russian aggression and the crimes committed by the Russian Armed Forces in Ukraine. Changes in the geopolitical circumstances and international practice determine that Latvia cannot and will not be obligated to maintain such buildings as Soviet occupation monuments" [30].

This reasoning extended well beyond monuments and symbols. The civic and political understanding of the current circumstances, following the Russian invasion in Ukraine, quickly embraced the concept of weaponization as a lens for thorough comprehension of the actual reality. Weaponization entails the adaptation of something previously associated with other spheres for use as a weapon of war.

The concept in Latvia was around for a long time, being used, *inter alia*, to interpret the Russian energy policy and "compatriots' policy" vis-à-vis Russian-speaking diaspora. For decades, this complex phenomenon remained in a state of "circumstances", and only civic and political entrepreneurs perceived it as a range of discernible and solvable issues. The shock from the war in Ukraine, particularly the evident war crimes and brutality by Russia, shattered the previous societal and elite tolerance and patience. The idea that "we must endure 40 years in the desert" and wait for the next generation to bring Latvia's society to full consolidation as a sovereign, democratic Western state with a strong and widely accepted rule of law and common norms, underwent a rapid transformation.

Among other things, this shock transformed individuals into civic entrepreneurs who might not have been in different circumstances. The author of the initiative "Prohibiting Individuals with Pro-Kremlin Sentiments from Holding Positions in State and Municipal Institutions" and two other initiatives represents the movement "For Liberation from Soviet Heritage" spontaneously formed in 2022. When asked, "If there hadn't been the war, would you have pursued these initiatives?" she admits, "Most likely not. I'll be honest" [31].

A longer excerpt from the interview with the former President of Latvia suits here to describe the changing public perception, legislative environment and how it relates to the next analysed civic initiative. "In legal terms, a new law was enacted. However, this law was already a response to public sentiment. The public's evaluation changed. It was bad, but not so bad that it was

time to abandon it now. However, in the changed context, society could no longer tolerate it because the Victory monument is a symbol of Russian imperialism, which, by the way, our fifth column has greatly developed with its May 9 events. In a democratic state, public opinion changed – it could not be tolerated, and a separate law was therefore adopted".

"This only proves that society has a significant impact on state decisions, and a shift in public opinion also leads to decisions that reflect it accordingly – this public sentiment. Also, a threat to the state. A law has just been passed that officials must be loyal. I have always felt that it is necessary, and I wrote an article about it 20 years ago".

"But the counterargument was the freedom of thought and conscience – it was valued higher. In a situation where there is no threat to the state, I would say – yes, it could be possible. But if there is a threat to the state, in such a situation, to assess this complete and far-reaching freedom of conscience, which includes a stance against the state, especially for a government official, it is a significant threat that could no longer be tolerated in this situation. Therefore, the law was accordingly changed" [19].

Evidently, the rationale for *ratio legis* does not aim at restricting freedom of thought, conscience, or expression, but rather at countering the weaponization of these democratic principles against democracy itself. It encompasses the concept of self-defensive democracy (in German: *Wehrhafte Demokratie*) – a democracy capable of defending itself against anti-democratic actors who exploit the democratic process to undermine it [9].

In this line of reasoning, the initiative called for prohibition to individuals with pro-Kremlin leaning to hold any positions and jobs in the public sector[1]. As a result, the legislator rephrased the demand in more comprehensive terms, leading to a significant amendment introduced in the State Administration Structure Law – specifically, Art. 102, which now addresses "Duty of Loyalty". It states that "if an employee of a public persona institution has expressed a public opinion or carried out other actions that unmistakably indicate disloyalty to the Republic of Latvia and its Constitution (Satversme), and if their continued employment in the respective public persona institution could significantly jeopardize the functioning of that institution or the interests of the state, then the failure to adhere to the duty of loyalty is considered an independent basis for terminating employment relations with any such employee and with persons employed within the framework of state service relations" [31][2].

[1] In Latvian: https://manabalss.lv/i/2436.

[2] Unofficial translation. The law is introduced on January 18, 2024, and is still in the translation process during this research.

The National Security Committee acknowledges that it was the collective submission that underscored the absence of a general regulation in Latvia, within the state administration, imposing an obligation on every employed individual to be loyal to the Republic of Latvia and its Constitution [32]. Consequently, the mentioned amendment was introduced.

Democratic self-determination entails a positive self-referential obligation for its reproduction. Civic society becomes not only an actor but also a paradigm in it, because it understands democracy as a horizontal practice of interaction, including legislation, even up to banning a certain political party. Such a case "is conceived not as a democratic contradiction but as an exception, based on a "case-specific historical justification" and vindicated by its constitutive role in understanding the point or purpose of democratic life" [8]. On these grounds, in May 2022 ManaBalss.lv allowed publication of an initiative impossible by its own standards just three months ago – "For a Unified Society Without the Latvian Russian Union".

Initiative gained fast popular approval and was submitted to Saeima in parallel with the National Security Committee already working on amendments in the Law on Political Parties. Consequently, the competencies of law enforcement institutions regarding prohibitions on political party activities were strengthened, and even before receiving the collective submission in the Saeima, a solution had been found to establish a system to halt the activities of anti-state political parties [32].

Still, submission was deliberated in two parliamentary committees, and the chairperson of the Mandate, Ethics and Submissions Committee suggests that the initiative strengthened powers of the National Security Committee, emphasising the monitoring activities of the Latvian Russian Union [20]. On the Mandate Committee webpage, the collective submission is marked as implemented[1], but the author strongly disagrees, as the achieved amendment is general, and Latvian Russian Union still functions. In cases where the official evaluation of an initiative's impact diverges from the author's opinion, MyVoice, in its statistics, respects the author's perspective. Accordingly, in Table 2, No. 13, it is marked as implemented with a disputed status.

[1] Point 105. here: https://ej.uz/13ds (in Latvian).

**Table 2. Civic initiatives related to Russia's war in Ukraine, published on ManaBalss.lv, and their statuses**

0 – no action; 1 – action taken; Dark grey – officially approved as contributing to the implemented legal change (all row); implemented regardless the initiative (a cell); implemented with a disputed status (a cell); Light grey – *status quo* demanding civic initiatives, going against the changing *ratio legis*

| No. | Publishing date | Name | Submitted | Final decision | Implemented |
|---|---|---|---|---|---|
| 1 | 29.09.2017 | Demolition of the Victory Monument | 1 | 1 | 1 |
| 2 | 24.02.2022 | Suspension of Diplomatic Relations with the Russian Federation | 0 | 0 | 0 |
| 3 | 24.02.2022 | Russian Embargo | 0 | 0 | 0 |
| 4 | 25.02.2022 | To Ensure Sports Does Not Serve Aggressor Propaganda | 0 | 0 | 0 |
| 5 | 27.02.2022 | Granting Official or Potential EU Candidate Status to Ukraine | 0 | 0 | 1 |
| 6 | 02.03.2022 | About Anna Politkovskaya Street in Riga | 0 | 0 | 0 |
| 7 | 04.03.2022 | Creating a Photo Exhibition in Victory Park on the Russian-Inflicted War Devastation in Ukraine | 1 | 1 | 1 |
| 8 | 23.03.2022 | Property Rights in Latvia Linked to Our Values and Security | 0 | 0 | 0 |
| 9 | 19.04.2022 | Closure of the Border with Russia and Belarus | 0 | 0 | 0 |
| 10 | 25.04.2022 | Dismantling of a Monument Glorifying the Soviet Army | 0 | 0 | 1 |
| 11 | 05.05.2022 | The Right to Refuse Russian Language in the Primary and High School Curriculum | 0 | 0 | 0 |
| 12 | 09.05.2022 | Renewing the Historical Victory Square as Freedom Park | 0 | 0 | 0 |
| 13 | 11.05.2022 | For a Unified Society Without the Latvian Russian Union | 1 | 1 | 0 |
| 14 | 13.05.2022 | Russians: If You Oppose War in Ukraine and Putin's Government – Speak Up! | 0 | 0 | 0 |
| 15 | 13.05.2022 | Open-Air Swimming Pool In Place of the Victory Monument | 0 | 0 | 0 |
| 16 | 18.05.2022 | Liberation from the Ideological Heritage of the Soviet Era – Monuments and Memorials | 0 | 0 | 1 |

| No. | Publishing date | Name | Submitted | Final decision | Implemented |
|---|---|---|---|---|---|
| 17 | 18.05.2022 | Expulsion of Disloyal Individuals from Latvia and Revocation of Latvian Citizenship | 0 | 0 | 0 |
| 18 | 18.05.2022 | Prohibiting Individuals with Pro-Kremlin Sentiments from Holding Positions in State and Municipal Institutions | 1 | 1 | 1 |
| 19 | 31.05.2022 | Latvian Lend-Lease to Ukraine | 0 | 0 | 0 |
| 20 | 08.06.2022 | Equal Rights for Speakers of the EU Languages | | | |
| 21 | 03.08.2022 | Voluntary and State-Funded Repatriation to Russia | 0 | 0 | 0 |
| 22 | 03.08.2022 | The National Concert Hall Should Be Located at the Victory Monument Site | 0 | 0 | 0 |
| 23 | 01.09.2022 | Confiscation of Assets for Individuals Sentenced for Supporting War and Genocide | 0 | 0 | 0 |
| 24 | 13.09.2022 | Restoring the Order of Lāčplēsis and Awarding It to the Ukrainian Nation | 0 | 0 | 0 |
| 25 | 13.10.2022 | Preventing the Consequences of the Communist Regime and Russification in Street Names | 0 | 0 | 0 |
| 26 | 18.10.2022 | Establishing a United Nations Organization Appropriate for the 21st Century | 0 | 0 | 0 |
| 27 | 25.11.2022 | Dismantling of the Pushkin Monument | 0 | 0 | 1 |
| 28 | 06.12.2022 | From Darkness to Light! On Disconnecting Electricity to the Russian Embassy in Latvia | 0 | 0 | 0 |
| 29 | 07.12.2022 | The Concept of 'Russkiy Mir' is Criminal Extremism | 0 | 0 | 0 |
| 30 | 19.12.2022 | Cease Teasing and Abusing Latvian Residents with Russian and Belarusian Citizenship | 1 | 1 | 0 |
| 31 | 13.01.2023 | At the Song Festival, Let's Sing the Most Powerful Resistance Anthem for Ukraine and Latvia! | 1 | 1 | 0 |
| 32 | 17.01.2023 | Ensuring the Status of the State Language | 1 | 0 | 0 |
| 33 | 22.02.2023 | Suspending State Funding for Political Parties Whose Members Act Contrary to the Constitution | 0 | 0 | 0 |

| No. | Publishing date | Name | Submitted | Final decision | Implemented |
|---|---|---|---|---|---|
| 34 | 07.03.2023 | Recognition of 'Old' State Language Proficiency Certificates | 0 | 0 | 0 |
| 35 | 23.03.2023 | Granting Opportunities for Ukrainians to Retain Citizenship | 0 | 0 | 0 |
| 36 | 04.04.2023 | Preserving Monuments to Latvian and World Literature Authors | 1 | 0 | 0 |
| 37 | 14.04.2023 | Recognizing the Private Military Company 'Wagner' as an International Terrorist Organization | 0 | 0 | 1 |
| 38 | 16.05.2023 | Latvianisation of the Work Environment in Latvia for Successful Implementation of the Integration Process | 0 | 0 | 0 |
| 39 | 24.07.2023 | Reducing the Age Threshold for State Language Proficiency Examinations to 65 Years | 1 | 1 | 0 |
| 40 | 31.07.2023 | Opening the List of Companies Exporting to Russia! | 0 | 0 | 1 |
| 41 | 23.08.2023 | Revitalizing Ventamonjaks' Operations without Compromising Sanctions | 0 | 0 | 0 |
| 42 | 24.08.2023 | Revoking the August 22 Agreement on Amendments to the Immigration Law Regarding State Language Proficiency | 1 | 0 | 0 |
| 43 | 14.09.2023 | For Latvian Language for Everyone! | 0 | 0 | 0 |
| 44 | 05.10.2023 | For Koenigsberg | 0 | 0 | 0 |
| 45 | 10.10.2023 | On Public Media Content in Russian Also After 2026 | 0 | 0 | 0 |
| 46 | 12.12.2023 | Suspending Payments to the Russian Military Budget | 1 | 0 | 0 |
| 47 | 04.01.2024 | Latvia's Withdrawal from the Ottawa Convention | 0 | 0 | 0 |
| 48 | 23.01.2024 | Termination of Tax Convention with Belarus | 0 | 0 | 0 |
| 49 | 22.01.2024 | Latvia to Remain in the Ottawa Convention | 0 | 0 | 0 |
| 50 | 16.02.2024 | At Least 50% of Books in All Latvian Bookstores Must Be Available in Latvian or Other EU Languages | 0 | 0 | 0 |

A whole section of civic wartime initiatives on Manabalss.lv argues for policy *status quo* and not expanding the current *ratio legis*. The most

prominent among them with the widest popular support[1] and persistent civic entrepreneurial activity of the author is the initiative "Cease Teasing and Abusing Latvian Residents with Russian and Belarusian Citizenship".

It demands to "repeal the hastily adopted and inadequately considered amendments to the Immigration Law in 2022, according to which more than 20 thousand permanent residents of Latvia with Russian and Belarusian citizenship must undergo a state language test and prove monthly income of at least 620 euros by September 1, 2023"[2]. Politicians widely acknowledge that the contested amendment was indeed rushed through shortly before the 2022 general elections and was inadequately considered, particularly regarding its implementation and the administrative burden it imposes.

The window of opportunity for the initiative was open – both the legislator and state officials acknowledged the inadequacy of the new legislation and were seeking amendments. A persistent civic entrepreneur was eager to seize the chance. Close scrutiny of the audio record of the Mandate Committee meeting[3] reveals a the presence of somewhat reluctant political entrepreneurship. However, the collective submission, in its current form, was rejected with the argumentation that further deliberation in Saeima would send the wrong signal to the subjects of this, even if arguably suboptimal, legislation. In other words, it was acknowledged that the earlier decision was flawed, but it was made in the right context – within the expanded *ratio legis* of the wartime, and there is no way back.

Legislative and civic activism followed back and forth from both relative sides, partly visible in Table 2. However, the newly expanded *ratio legis* was firmly established. It persists as the only feasible legislative direction. This research noted the same earlier in the context of continuous revisions of bilateral agreements between Latvia, Russia and Belarus.

In the wartime situation, with a noticeable contribution from the civic entrepreneurs, there was a successful problematisation of the ongoing weaponization of hitherto civil aspects of the national and international life. Through the expressed self-defensive quality of democracy, this problematisation expanded the scope of the *ratio legis*, where no *status quo ante bellum*, to quote the full literal source of the term, is possible. If anything in the legal reasoning in Latvia is perceived as "before the war", then perhaps only the borders of sovereign Ukraine that have to be restored.

The shift is tectonic and foreseeably irreversible, as exemplified by the respectfully declined civic initiatives. Regardless their argumentative

[1] The necessary 10'000 signatures and more were collected in three days.
[2] In Latvian: https://manabalss.lv/i/2605.
[3] Available at: https://ej.uz/4isg.

power and popular support, they operate in a different realm of the legal reasoning – the space of the previous or the *status quo*, which is decisively expanded with the *"bellum"* and therefore too narrow for comprehensive legal reasoning.

## Conclusion

Russia's war in Ukraine, marked by its atrocities and evident crimes, provides factual grounds to redefine various policies and legislative circumstances in Latvia. Previously motivated by societal and elite tolerance and patience, these circumstances are now reconsidered. Similarly, in Ukraine, there is ongoing work to expand civil rights to factual civil unions, including same-sex couples, which were until recently constrained by socially conservative legal reasoning.

In this research, determined civic actors function as civic entrepreneurs, capitalizing on the situation of Russia's war in Ukraine as a window of opportunity to expand the legal scope of existing norms (i.e., *ratio legis*) and bring about desired legislative amendments. This observation confirms the initial hypothesis.

There is a long tradition of studying entrepreneurial actors working towards their values and advocating for corresponding policy and legislative changes. However, the examination of synergies, particularly between the civic and political entrepreneurs, is a worthwhile theme to enhance the understanding of a mutually constructive policy-making agencies and to strengthen democracy. Seemingly, properly conceptualised and practiced digital civic participation contributes to this aim, and further study in this regard is suggested.

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# Some Issues of Determining Subject Matter Jurisdiction: the Experience of Ukraine and Germany

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**Abstract**
*The article examines the issues of delimitation of judicial jurisdictions in the categories of cases arising out of the challenges posed by martial law in Ukraine. The relevance of the study is stipulated by the growing controversy over the issues of delimitation of judicial jurisdictions in the categories of disputes which concern socially vulnerable groups of the population and are becoming more and more widespread. The purpose of the article is to study the issues of delimitation of judicial jurisdictions based on a comparative legal analysis of legislation and case law of Ukraine and Germany. In order to achieve this goal and solve the tasks stipulated by it, the following scientific methods were used: systematic, formal legal, comparative legal, analysis and synthesis, generalisation and critical analysis. The author examines domestic and German procedural legislation which defines the rules for delimitation of subject matter jurisdiction. The author highlights the issues of resolving cases related to establishing the fact of cohabitation of a woman and a man in the same family without marriage, which is necessary for further exercise of the person's right to receive a one-time financial assistance. The author examines the conditions and possibilities for a court to go beyond the established subject matter jurisdiction with a view to ensuring proper protection of a person's right in Germany. The author proves that it is impossible to apply such an approach in Ukraine without appropriate amendments to the existing procedural acts. On this basis, the author critically analyses the case law of the Supreme Court and draws relevant conclusions.*

***Keywords:*** *delimitation of judicial jurisdiction; administrative jurisdiction; legal fact, access to justice.*

# Окремі питання визначення предметної юрисдикції: досвід України та Німеччини

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**Анотація**
*У статті розглядається проблематика розмежування судових юрисдикцій у категоріях справ, виникнення яких спричинено викликами воєнного стану в Україні. Актуальність дослідження зумовлена загостренням суперечок щодо вирішення питань розмежування судових юрисдикцій за категоріями спорів, які стосуються соціально вразливих верств населення і стають чим далі більш розповсюдженими. Мета статті полягає в дослідженні проблематики розмежування судових юрисдикцій на основі порівняльно-правового аналізу законодавства, а також судової практики України та Німеччини. Задля досягнення поставленої мети та вирішення обумовлених нею завдань було використано такі наукові методи: системний, формально-юридичний, порівняльно-правовий, аналізу та синтезу, узагальнення та критичного аналізу. Досліджено вітчизняне та німецьке процесуальне законодавство, що визначає правила розмежування предметної юрисдикції. Висвітлено проблематику вирішення справ, пов'язаних із встановленням факту спільного проживання жінки і чоловіка однією сім'ю без укладання шлюбу, що необхідно для подальшої реалізації права особи на отримання одноразової грошової допомоги. Досліджено умови і можливості виходу суду за межі встановленої предметної юрисдикції з метою належного захисту права особи в Німеччині. Доведено неможливість застосування такого підходу в Україні без відповідного внесення змін до чинних процесуальних актів. На цій підставі здійснено критичний аналіз практики Верховного Суду та сформульовано відповідні висновки.*

***Ключові слова:*** *розмежування судової юрисдикції; адміністративна юрисдикція; юридичний факт; доступність правосуддя.*

## Introduction

The current state of events in public life, caused by the fundamental changes influenced by the war in Ukraine, has affected the adjustment of all spheres: politics, economics, and legislation. The fundamental changes in the functioning of the state, the lives of citizens, both those who remained in Ukraine and those who are outside Ukraine, could not but lead to the emergence of new categories of disputes, peculiarities of clarifying their nature and ways of resolving them. The emergence of new aspects of disputed legal relations also caused the consideration and adjustment of subject matter jurisdiction and the limits of dispute resolution by administrative courts.

It should be noted that the uniformity and unity of relations in peacetime acquires a completely different colour in martial law. Ordinary events in the private law regime are transformed into a more complex phenomenon, which may give rise to conflict over the nature and means of dispute resolution. Legal relations embody a double influence. On the one hand, it is a real social relation, and on the other hand, it is a rule of law. That is why clarification of the content of a legal relationship requires and implies analysis of the content and role of a legal rule; the content of the actual relations to be regulated by law; and the legal relationship itself [1, p. 223].

In practice, the issue of delimitation of judicial jurisdictions often arises. This issue periodically becomes the subject of scientific research aimed at developing universal approaches to the delimitation of judicial jurisdictions. Such research was carried out by T. Kolomoyets [2; 3], V. Kolpakov [4], O. Paseniuk [5], M. Smokovych [6], S. Stetsenko [7, pp. 389-390] and others. At the same time, the extraordinary circumstances that arose in our country on 24 February 2022 and are still in force today have caused new problems in the delimitation of administrative jurisdiction in cases involving the need to establish certain facts. These issues have not previously been the subject of scientific research. Thus, there is an urgent need to fill this gap, which is defined by the authors of the study as the main goal. This task is particularly relevant given that the uncertainty of the boundaries of judicial jurisdiction is considered by scholars and ECHR practice as a restriction of the right to a fair trial [8; 9].

When it comes to the proper protection of human rights and freedoms, it is sometimes necessary to resolve complex issues, some of which fall within the jurisdiction of different courts. In such cases, a person should not only be aware of the rules of delimitation of court jurisdictions, but also clearly understand the sequence of certain actions aimed at achieving the expected result. The question arises whether it is not possible to simplify the path

for a person seeking judicial protection. After all, its complexity is not conducive to the proper enforcement of a person's right to a fair trial. Let us try to deal with this issue by examining the experience of administrative courts in Germany [10] and Ukraine.

**Literature review**

The issue of delimitation of judicial jurisdictions has been relevant for a long time. The study of the principles of delimitation of jurisdiction of administrative courts and courts of general jurisdiction is devoted to the works of such scholars as O. Paseniuk [5], M. Smokovych [11], T.O. Kolomoyets [2], V.K. Kolpakov [4], V.V. Gordeev, L.G. Bzova [12], O. Nehoda [13].

The studies of these authors analyse in detail the legal category of "judicial jurisdiction", define general approaches to the delimitation of judicial jurisdictions, and outline the problematic issues of such delimitation based on the analysis of judicial practice.

O. Nehoda, formulating her own approaches to solving the problem of delimitation of judicial jurisdictions, notes that the resolution of the issue of court competence in each particular case depends on the nature of the disputed legal relationship. Administrative jurisdiction includes cases arising out of a dispute between Part icipants in public law relations. In contrast, civil jurisdiction covers disputes of a private law nature [13].

V.V. Gordeev and L.G. Bzova emphasise the problematic nature of correct determination of the jurisdiction of a dispute in many cases. In their opinion, this is due not only to imperfect legislation, but also to the dogmas existing in science and practice. In the authors' opinion, special problems in determining the jurisdiction arise if, when determining the criteria for such determination, the law proceeds from various inconsistent features, which may result in the same dispute being formally considered by courts of different jurisdictions [12]. As a result of the study, V. Gordeev and L. Bzova outline the conditions for the correct determination of the subject matter jurisdiction of administrative courts, namely: the need to take into account the subject matter of legal relations; the subject matter of the dispute and the nature of the disputed substantive legal relations; and the essence of the dispute.

The issue of delimitation of judicial jurisdictions under martial law has not been adequately reflected in scientific research. Certain issues are covered in the article "Jurisdiction to consider the issues of establishing the fact of the death of a citizen of Ukraine during military service, in particular, in defence of the Motherland (Supreme Court in case No. 201/10689/23)", prepared by Lawyers' association "Lugovy, Dichko and Part ners" [14].

This publication describes the course of consideration of a particular case in courts of various instances, as well as the content of the relevant court acts. The authors do not express their own position on the issue, nor do they conduct a scientific analysis of the dispute over the delimitation of judicial jurisdictions.

**Materials and Methods**

Based on the subject matter of the study – the procedural legislation of Germany and Ukraine establishing the rules for the delimitation of judicial jurisdictions – the main method of analysis is the formal legal method. The formal legal method was used to determine the content of legal provisions and analyse the intentions of the legislator when drafting them. It allowed us to systematise the information obtained from legal acts and identify the key aspects of the regulation of the issues of jurisdictional delimitation in both countries.

The formal logical method was used to identify the grounds for identifying shortcomings in national court practice and to find ways to correct them.

The comparative legal method is used to study specific elements of the legal systems of Germany and Ukraine by comparing the same legal provisions, institutions, principles, etc. and the practice of their application. The comparative legal method will allow us to find the best ways to solve the identified problems and eliminate the shortcomings based on the best positive practices of each of the countries under study.

The choice of the comparative method makes it possible to identify common and distinctive features of the legislation of the Federal Republic of Germany and Ukraine, as well as approaches to resolving situations where issues constituting a single legal case are subject to resolution in different judicial jurisdictions. This allows the researchers to identify positive practices and innovations in both systems, as well as to identify opportunities for improvement in each country.

The method of critical analysis will be used to assess the compliance of German and Ukrainian judicial practice with international standards, the requirements of the current national legislation of each country, as well as the case law of the European Court of Human Rights. This method will help to identify erroneous approaches to resolving the issues of delimitation of judicial jurisdictions.

In order to update the information and highlight the latest legislative changes in both countries, we will conduct a systematic analysis of official documents, including draft laws, regulations and other sources.

The functional method is used to determine the areas of legal influence of the Supreme Court's practice and the importance of its proper formation.

The methods of analysis, synthesis, induction, deduction and analogy were also used to formulate proposals and recommendations for solving the scientific and practical problem.

As for the main stages of this article, they are aimed at conducting a comparative legal analysis of the legislation of the Federal Republic of Germany and Ukraine regulating the rules for delimitation of court jurisdictions in complex cases.

The first stage involves defining the object and subject matter of the study, as well as formulating the actual problem to be studied. In the context of this study, it is determined that the object is the subject matter jurisdiction of administrative courts, and the subject matter is the legislation and case law of the Federal Republic of Germany and Ukraine.

The second stage involves a systematic analysis of existing scientific papers, monographs and legislation on the chosen topic. Primary and secondary data are collected, which form the basis for further analysis.

At the third stage, the choice of methods and approaches to be used for comparative legal analysis is justified. In particular, it is determined whether the legal or comparative method will be used, as well as the choice of criteria for assessing legislation.

This stage involves conducting the analysis itself, taking into account the selected methods and approaches. The article examines the common and distinctive features of determining the subject matter jurisdiction of administrative courts in the Federal Republic of Germany and Ukraine. Based on the results obtained, the author formulates conclusions.

At the final stage, the authors justify the choice of methods and approaches used, formulate conclusions and identify possible prospects for further research in this area.

**Results and Discussion**

The war in Ukraine has had severe consequences for society. This includes the destruction of residential buildings, infrastructure, business facilities, loss of territory, etc. But the most acute and painful is the loss of lives of our fellow citizens. The latter makes the issue of resolving the category of disputes related to the receipt of a lump sum payment in connection with the death of a serviceman very important. Every day, more and more citizens need this social assistance, which is not always easy to obtain, since, for example, when a man and a woman lived as a family

without registering a marriage, the receipt of financial assistance must be preceded by the establishment of the relevant fact. This, in turn, requires an application to a court of general jurisdiction. Whereas disputes regarding the payment of one-off financial assistance are within the jurisdiction of the administrative court due to the public law nature of these legal relations.

There are five independent jurisdictions in Germany (administrative, social, financial, labour and general jurisdiction), the origin of which has a historical basis. The distinction between these jurisdictions is sometimes disputed, but there are certain fixed rules that play an important role in this regard and have been confirmed by the case law of the highest courts over the decades. Pursuant to Art. 40(1) of the German Arbitration Code, administrative courts in Germany have jurisdiction over all public law disputes that are not assigned by law to another court (for example, § 51 SGG refers all public law disputes of a social nature to the competence of social courts). The question of when a dispute is a public law dispute has long been a subject of controversy and to some extent remains controversial in the literature today [15, pp. 21-24].

***General approaches to determining jurisdiction in Germany***

Let us analyse the experience of Germany in resolving jurisdictional disputes. According to the established case law of the highest courts in Germany and the prevailing opinion in the academic literature, the legal nature of the rule that resolves the dispute is crucial. For example, it may be a rule governing the right to receive a lump sum social benefit.

The question of how to determine the legal nature of norms is also not uncontroversial, but according to the so-called modified subject theory, it can generally be assumed that a norm is public law if it authorises or obliges the subject of authority as such. This is certainly the case with rules that satisfy claims for social benefits to a public authority. These norms give a citizen the right to direct a claim to the state for a certain benefit, provided that the conditions of such a norm are met. Thus, in the case at hand, we are undoubtedly dealing with a public law rule. In this respect, it is also irrelevant whether certain features of the legal relationship (for example, living together in a common household or being married) are of a civil law nature. The decisive factor is the legal effect of the rule: does it authorise or oblige the holder of public authority as such? If so, the rule is of a public law nature, which is confirmed in this case [16]. As a result, the challenged provision will be public law, which means that the legal relationship will be public law, and therefore, the administrative proceedings will be initiated in accordance with Art. 40(1) of the German Code of Administrative Procedure. This also does not exclude the fact that civil law issues may play a role

in the course of the proceedings, in which case they would also have to be decided by the administrative court. Thus, in this particular case, the administrative court will determine whether there is a common household, interpret and apply the relevant civil law provisions and, if necessary, collect evidence to clarify the facts relevant to the decision [10].

German legal doctrine stipulates that no one has the right to expect that civil law matters should be dealt with by civil courts alone and public law matters by administrative courts alone. There may be some arguments in favour of this, such as a particularly high level of expertise due to the specialisation of judges. On the other hand, the effectiveness of legal protection, which is, after all, even guaranteed by Art. 19(4) of the Basic Law, is a very valuable asset. After all, if citizens are forced to clarify each legal issue separately according to its legal nature in different courts, this will make legal protection less effective and more time-consuming and expensive for them. Furthermore, it would be doubtful that abstract legal issues, such as the validity of a marriage or the running of a joint household, could actually be clarified by means of a legal action in individual cases before the courts.

According to German procedural law, the need for legal protection generally arises only if the plaintiff can actually improve his or her legal position if the claim is granted. This means that, as a rule, the claimant must file a claim directly to improve his or her legal position, and all other issues related to the case are considered in the same proceedings. The fact that the administrative court sometimes has to clarify a previous civil law issue or vice versa is acceptable, especially since all judges in Germany are so-called full jurists, i.e. they have comprehensive legal knowledge in all areas of law. This is confirmed by Art. 17(2) of the Law on the Judiciary of Germany [17]. As a result, an administrative court (possibly even a social court specialising in social law) will have to examine the entitlement to social assistance, and in doing so it will have to examine all factual conditions, even if some of them are of a civil law nature.

As noted by M.P. Kucheriavenko, the peculiarities of the nature of legal relations, clarification of the nature of legal regulation on the border of several branches of law involves determining the place of such relations in the system of legal regulation. This process should combine the search for and determination of the most optimal legal form and the conditionality of such form by the real behaviour of the parties to the relationship [1, p. 224]. The actual behaviour of the parties to legal relations is based on the nature of social relations, which is reflected in the relevant legal form, legal means of regulating relations between the Part ies, stimulating and guaranteeing such dynamics of legal relations, which is in the interest of

all those who have to reach an agreement in forming a balance of public and private interests.

***Resolving jurisdictional issues in practice***

Thus, in Germany, the issue of delimiting the jurisdiction of courts does not hinder the proper and full protection of human rights. The German legal tradition allows for the jurisdiction of a particular court to be extended beyond the jurisdiction of a particular court if such extension is necessary to ensure the proper protection of the protected right.

In particular, in the case of contact with the state and the derivation of possible claims from this contact, it is important to make a clear distinction, according to which it is not the legal relationship itself, but the claims arising from it that determine the jurisdiction of the court. For example, the Federal Administrative Court in the case of an Afghan who, as an informant for the German Foreign Intelligence Service (BND), sought protection from threats in a lawsuit brought by Germany, ruled that the administrative proceedings were not subject to the request.

Although the plaintiff had worked on behalf of the BND in Afghanistan and, in particular, had been infiltrated into Islamist and terrorist networks, he was subsequently "switched off" due to a lack of information. The Federal Administrative Court describes the legal relationship between the BND and the informant as private law, although it also served public purposes (averting danger, public safety). Ultimately, this situation can be compared to a private company towing an improperly parked car on behalf of a public transport authority. The fact that the actions ultimately also serve the fulfilment of public tasks does not mean that the legal relationship should be assessed as public law, especially if the person concerned does not have his own public law decision-making powers. In this case, it acts exclusively within the framework of private law.

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The plaintiff in this case argued that there was a contractual relationship between the parties that obliged him, the plaintiff, to receive and transmit information of importance to the intelligence services in exchange for a monetary reward. For this purpose, he was to infiltrate and spy on terrorist organisations. The contract was aimed at providing security, or rather, intelligence support to the Bundeswehr in military-like operations. The fact that the Federal Intelligence Service appears to be using forms of private law and does not convert each of its agents to the status of a civil servant does not change the public law nature of the "spy contract". A public law "espionage contract" gives rise to a continuing duty to protect. The defendant was obliged to effectively prevent in good faith the specific dangers arising from the performance of the espionage contract. The only decisive factor here is that the danger to his life in which he is currently undisputedly placed is based on a risk which the Federal Intelligence Service objectively took and from which it derived or intended to derive benefit. The Federal Intelligence Service, as a public law client, was therefore obliged to effectively avert this danger. As a result, the applicant wanted to obtain a new identity card and financial support to move to another location. The Federal Administrative Court had already dismissed the claim as inadmissible for lack of administrative proceedings and gave the following reasons: The question of whether a dispute is a matter of public or civil law depends on the nature of the legal relationship from which the claim arises. As a rule, it depends on whether the parties involved are in a sovereign relationship of supremacy and subordination to each other and whether the sovereign power holder applies special legal principles of public law. However, a public law dispute may also be based on a relationship of equality. Relations of equality are public law relations if the legal rules governing the legal relationship do not apply to everyone, but are a special right of the state or other public authorities, which, at least on the one hand, applies only to public authorities. Thus, the difference between a public law and a private law contract depends on its subject matter and purpose. The legal nature of the contract is determined by whether the subject matter of the contract is governed by public or civil law.

In accordance with these principles, disputes regarding any continuing obligations arising from the agreement between the plaintiff as a confidential adviser and the Federal Intelligence Service to provide information in exchange for monetary remuneration may be considered in the courts of general jurisdiction.

By cooperating with the Federal Intelligence Service, a confidential adviser does not become a member of the public service – as this is neither a permanent nor even a professional activity – and does not become a trustee of the public authority, as sovereign powers are not related to his or her function. This is because the provision of information to the Federal Intelligence Service serves the fulfilment of its tasks, but is not a sovereign activity of the informant. Similarly, the generally accepted principle of mandatory and legitimate administrative activity does not imply that administrative activity is always carried out in a public law form. On the contrary, according to the established case law, when the state uses private forms of organisation to perform its tasks, the private law system is only supplemented, modified and imposed in certain respects on public law obligations, without the need to refer the administrative action itself to public law; as a result, general courts have a say in deciding on such public law obligations of administrative action under private law within their jurisdiction.

The legal basis of the relationship between the confidential adviser and the Federal Intelligence Service is a civil law contract aimed at obtaining intelligence information of importance to the intelligence service, for which the confidential adviser is remunerated as a freelance employee on a fee basis.

### *Case law of Ukrainian courts and modern approaches to resolving jurisdictional disputes*

When considering Ukrainian case law on jurisdictional disputes, it is interesting to give examples that illustrate the peculiarities of the current state of legal relations. In Ukraine, the situation with regard to the court's decision on the application for establishing the fact of cohabitation of a man and a woman without registration of marriage in peacetime is clear, but in the current situation it is fundamentally different. Russia's military attack on Ukraine has also led to the fact that the establishment of such a fact takes into account fundamentally new circumstances, which may affect the subject matter jurisdiction. The death of a man who was called up for military service gives rise to the right of a woman to receive a one-off financial assistance in connection with his death [18]. The fact that the marriage between such persons was not registered adds to the complexity

of resolving such disputes. In this case, the applicant, when applying to the court to establish the fact that a man and a woman lived as a family without registering a marriage, stated that establishing such a fact was necessary to receive a one-off financial assistance.

Logically, the exercise of her right to a one-off financial assistance should have been carried out in the following order. First, such a person must apply to a court of general jurisdiction to establish the fact of cohabitation with the deceased husband. Simultaneously with the establishment of this fact, the person acquires the status that allows him or her to apply to an authorised entity for a one-time financial assistance in connection with the death of a serviceman with whom such a person lived as a family without registering a marriage.

In other words, it is the establishment of the fact of living as a family without registering a marriage with the deceased serviceman that should determine the legal fact that gives rise to certain legal consequences, namely, the right to receive a one-time financial assistance [19]. Otherwise, a person has no legal grounds for filing a relevant application, as he or she cannot prove that he or she is the proper subject of such an application.

In case No. 290/289/22, the Courts of first instance and appeal established the fact that a man and a woman lived as one family, based on the proof and validity of the applicant's claims. In this case, the applicant stated that she was entitled to a one-off financial assistance in connection with the death of her husband (who, following the military attack on Ukraine by the Russian Federation and the declaration of martial law, was called up for military service and died), and requested that the fact of her living with him as one family without registration of marriage be established [18]. As correctly noted by the courts of first instance and appeal, the fact sought to be established by the applicant was of legal significance to her, as it was related to her right to receive a one-off financial assistance provided for by the Law of Ukraine "On Social and Legal Protection of Servicemen and Members of Their Families" [19].

The Ministry of Defence of Ukraine, acting as the interested Party in this case, disagreed with the applicant's arguments and filed a cassation appeal with the Supreme Court, arguing that the rules of jurisdiction of general courts had been violated.

In upholding the cassation appeal, the Supreme Court referred to the resolution of the Grand Chamber of the Supreme Court dated 10 April 2019 in case No. 320/948/18 (proceedings No. 14-567цс18) [20], which concluded that cases on fact-finding are considered in a separate proceeding, subject to certain conditions. Namely, if: according to the

law, such facts give rise to legal consequences, i.e., they determine the emergence, change or termination of personal or property rights of citizens; the current legislation does not provide for another procedure for their establishment; the applicant has no other opportunity to obtain or restore a lost or destroyed document certifying a fact of legal significance; the establishment of a fact is not connected with the subsequent resolution of a dispute about law. The current civil procedural legislation refers to the jurisdiction of the court to establish facts on which the emergence, change or termination of subjective rights of citizens depends.

In analysing the situation, the court found that the applicant had applied to the court to establish a fact in order to exercise her right to receive a one-off social allowance paid by the Ministry of Defence of Ukraine (a public authority). The court also noted that the decision of this body (in case of unsatisfaction of the application for one-time social assistance) should be appealed against in administrative proceedings.

In doing so, the court concluded that the applicant's claims were related to proving the existence of grounds for recognising (confirming) her certain social and legal status, which is not related to any civil rights and obligations, their emergence, existence and termination. Accordingly, by their subject matter and possible legal consequences, such claims are related to the applicant's public law relations with the state, and therefore cannot be resolved in civil proceedings.

Drawing a line under this case, the SC noted that the applicant's claim to establish the fact of living as one family without registering a marriage with her husband, who died while Part icipating in hostilities and ensuring the implementation of measures for national security and deterring the armed aggression of the Russian Federation, is not subject to resolution in civil proceedings. This dispute is subject to administrative, not civil, proceedings [18].

Following the logic of the Supreme Court, jurisdiction in this category of cases should be determined by the purpose for which a person wants to establish a particular fact. In doing so, the Supreme Court is leading us down an obviously wrong path, since there are no legal grounds for an administrative court to accept such an application for consideration. Thus, without establishing the fact of cohabitation with the deceased husband, a person cannot apply to the Ministry of Defence of Ukraine for a one-time social assistance (since he cannot prove that he is a proper applicant). Thus, a situation arises where there are no grounds for applying to an administrative court, as there is no dispute with the public authority. In the same case, if an applicant applies to the Ministry of Defence of Ukraine

for a one-time financial assistance without providing documents proving her status, she will receive a reasoned refusal to satisfy her application. This application can then be appealed to an administrative court. However, the prospects of such an appeal are obviously negligible. Thus, the person finds himself in a vicious circle, which deprives him of any opportunity to exercise his right to judicial protection.

Pursuant to Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter – the Convention) [21], everyone is entitled to a fair and public hearing within a reasonable time by an independent and imPart ial tribunal established by law.

The concept of "court established by law" includes, in particular, such a component as compliance with all rules of jurisdiction and jurisdiction. In addition, Art. 6 of the Convention, which is Part of the national legislation by virtue of Art. 9 of the Constitution of Ukraine [22], enshrines the principle of access to justice. According to the standards of the European Court of Human Rights (hereinafter – the ECHR), access to justice is understood as the ability of a person to obtain judicial protection without hindrance as access to independent and imPart ial dispute resolution under the established procedure based on the rule of law.

For the right of access to court to be effective, a person must have a clear factual opportunity to challenge an act that interferes with his or her rights (ECtHR judgment of 04 December 1995 in the case of Belle v. France) [23].

The right to a fair trial and the issues of its enforcement at the levels of the ECHR case law and domestic legal proceedings are discussed in detail in the monographic study by D.V. Luchenko and N.A. Polyakh "Application of the European Court of Human Rights Case Law in Administrative Proceedings of Ukraine" [8] and will not be discussed in detail in this article. We will only note that the position of the Supreme Court expressed in the above-mentioned resolution makes it impossible for the applicant to exercise her right to a fair trial, since the current procedural legislation of Ukraine does not provide opportunities for its exercise in the manner specified by the court.

In this regard, it is worth recalling the four main problem areas mentioned by Y. Matat concerning the issue of access to justice in the context of Art. 6 of the Convention. Among them, a prominent place is occupied by the conflict of judicial jurisdictions [24].

Returning to the above case, it seems logical and, most importantly, legitimate to take the approach that the exercise of a person's right to a one-time financial assistance in such circumstances consists of two successive stages. The first is to decide on cohabitation, and the second is to receive a

one-off financial assistance. These stages require a more detailed analysis, which should begin with the question of which courts have jurisdiction over each of the components of this case.

1. Establishment of the fact that a man and a woman live together as a family without marriage.
The fact of cohabitation of a man and a woman without marriage registration can be established by a court only from 1 January 2004 (after the entry into force of the Family Code of Ukraine), since the CFC of Ukraine did not provide for legal consequences for a man and a woman who lived together without marriage registration [25].

Pursuant to Art. 19(1) of the Civil Procedure Code of Ukraine [26], this category of cases is within the subject matter jurisdiction of general courts.

Pursuant to Art. 293(1) of the Civil Procedure Code of Ukraine, such a case must be considered in a special proceeding, which is used to consider civil cases on confirmation of the presence or absence of legal facts relevant to the protection of the rights, freedoms and interests of a person. This type of non-action civil proceedings also deals with cases on establishing the fact of a man and a woman living as a family without registering a marriage. Thus, the procedure for special proceedings provides for consideration of cases on establishing facts in the presence of certain conditions, which stipulates: a) such facts give rise to certain legal consequences (emergence, change or termination of personal or property rights) – which implies clarification of the purpose of establishing such a fact; b) the current legislation does not establish another procedure for their resolution, does not provide for another out-of-court procedure for establishing a legal fact; c) the applicant has no other opportunity to obtain a document certifying a fact that gives rise to legal consequences, for which he or she has to pay a fee [Ibid].

2. Exercise of the right to receive a one-time financial assistance in connection with the death of a spouse.
In the process of exercising this right, a dispute may arise between the applicant and the public authority. Thus, according to Part one of Art. 16 of the Law of Ukraine "On Social and Legal Protection of Servicemen and Members of Their Families" [19], a one-time financial assistance in case of death, disability or Part ial disability without establishing disability of servicemen, persons liable for military service and reservists called up for training (or check-up) and special training or for service in the military reserve is a state-guaranteed payment made to persons who are entitled to receive it in accordance with this Law.

Art. 16-1 of the Law of Ukraine "On Social and Legal Protection of Servicemen and Members of their Families" [Ibid] provides that in the cases

specified in subparagraphs 1-3 of Art. 16 (2) of this Law, family members, parents and dependents of a deceased serviceman, person liable for military service or reservist are entitled to receive a one-time financial assistance. It was in order to prove her right to receive the one-off financial assistance that the applicant had to apply to the court to establish the fact of living together as a family with the deceased serviceman.

The mechanism for awarding and paying a one-time financial assistance in case of death, disability or Part ial disability without disability (hereinafter referred to as the assistance) to servicemen, persons liable for military service and reservists called up for training (or check-up) and special training or for service in the military reserve is set out in the Procedure approved by the Cabinet of Ministers of Ukraine on 25 December 2013 No. 975 [27]. This Procedure establishes the procedure for applying to the authorised bodies for the payment of a one-off financial assistance.

In case of refusal to satisfy such application, a person has the right to apply to an administrative court. Art. 5(1) of the Code of Administrative Procedure of Ukraine (hereinafter – the CAP of Ukraine) [26] provides for the right of every person to apply to an administrative court if he or she believes that his or her rights, freedoms or legitimate interests have been violated by a decision, action or inaction of a public authority. Pursuant to Art. 19(1) of the CAP of Ukraine, the jurisdiction of administrative courts extends to cases involving public law disputes, including disputes between individuals or legal entities and public authorities regarding appeals against their decisions (individual legal acts), actions or inaction (paragraph 1(1) of this Art.) [Ibid].

Thus, in accordance with the requirements of the current legislation of Ukraine, a person who cohabited with a deceased serviceman as a family without marriage may exercise his/her right to a one-time financial assistance in connection with the death of such a serviceman by applying in succession
– to a court of general jurisdiction to establish the fact of cohabitation of a man and a woman as a family without marriage;
– to the authorised bodies with an application for payment of a one-time financial assistance;
– to an administrative court in case the authorised body refuses to satisfy the application for a one-time financial assistance payment.

At the same time, an appeal to an administrative court is not a mandatory step in exercising this right. If the authorised body satisfies the application for the payment of a one-off financial assistance, the person will have no grounds for further appeal.

As correctly stated in the resolution of the Supreme Court of 31.01.2024 in case No. 595/76/23, given that the purpose of administrative proceedings is to effectively protect the rights, freedoms and interests of individuals, the rights and interests of legal entities from violations by public authorities, an appeal to an administrative court is preceded by an appeal of a person to a public authority, following the consideration of which the person acquires the right to appeal to the court of administrative jurisdiction against decisions, actions or omissions of such a public authority. This corresponds to the purpose and tasks of administrative proceedings as defined in Art. 2 of the CAP of Ukraine [28].

In view of the above, the Supreme Court's determination in this case of the procedure for exercising the right to judicial protection by exclusively applying to an administrative court is not only illogical, but also contrary to the current procedural legislation of Ukraine.

The Grand Chamber of the Supreme Court noted that when deciding whether to accept an application for the establishment of a fact of legal significance, the judge, in particular, is obliged to clarify the issue of jurisdiction and jurisdiction, that is, the judge must check whether the application can be considered in court at all and whether its consideration is not within the powers of another body [29(33-35)]. According to Part 1 of Art. 19 of the Code of Administrative Procedure of Ukraine, the jurisdiction of administrative courts extends to cases in public law disputes, disputes of individuals and legal entities with public authorities regarding appeals against their decisions, actions or inaction. At the same time, based on Part 1 of Art. 1 of the Civil Code of Ukraine, civil law regulates personal non-property and property relations based on legal equality, free expression of will and property independence of their Part icipants.

In determining the nature of such relations, it is necessary to distinguish between: 1) the establishment of the fact of cohabitation, which expresses the relationship between a man and a woman characterised by civil law; 2) the fact of the right to receive a one-off financial assistance in connection with the death of a man. It is clear that in such a situation, such relations are fundamentally different both in nature and in terms of their subjects. The plaintiff's claim to establish a certain social and legal status based on the civil law nature of the relationship - the fact of cohabitation of a man and a woman – does not in any way imply the Part icipation of the Ministry of Defence of Ukraine in establishing such a fact. It is the establishment of the fact of cohabitation of the deceased man and woman that will give rise to the legal fact of the right to receive a one-off financial assistance in connection with the death of the husband.

The conclusion of the Supreme Court that the subject matter and possible legal consequences of this dispute exist in the field of public law relations and are not subject to resolution in civil proceedings appears [30] superficial and unfounded. Emphasising that the court must take into account the legal purpose of the applicant's application to the court, the Supreme Court concludes that the applicant's status is of legal importance only in public law relations "The Supreme Court, taking into account the statutory task of civil proceedings, recognises that it is inadmissible to initiate court proceedings in civil proceedings in order to assess the circumstances that are the subject of proof in administrative proceedings" [Ibid]. In fact, this situation involves two related but not identical stages, which differ in the purpose of the applicant's application. The first stage is to establish the fact of cohabitation between a man and a woman, which is the purpose of the application. The second stage is to establish the grounds for receiving the one-off financial assistance. The second stage cannot arise without the completion of the first stage; the result of the first stage (establishing the fact of cohabitation) is precisely the legal fact that triggers the second stage and creates a relationship between the applicant and the Ministry of Defence of Ukraine.

The Supreme Court's conclusion that "in such circumstances it is necessary to close the proceedings, since this dispute is subject to administrative, not civil, proceedings ... The Supreme Court considers it appropriate to explain to the applicant the right to file a corresponding claim with the administrative court" is also surprising [Ibid]. This is an interesting conclusion, but we would like to understand on what basis an applicant may file a claim with an administrative court. Pursuant to Art. 19 of the Code of Administrative Procedure of Ukraine, the jurisdiction of administrative courts extends to cases in public law disputes. The exhaustive list of types of such disputes does not include such a category of disputes as those relating to the establishment of the fact of cohabitation between a man and a woman. That is why it is unclear how a court can explain to a plaintiff how to file a claim with an administrative court if the Code of Administrative Procedure of Ukraine excludes such a ground.

Courts of administrative jurisdiction function as certain safeguards against arbitrariness of the state, an effective tool for protecting the rights and interests of legal entities and individuals. The above-mentioned position of the Supreme Court actually destroys the ability of a person to protect his or her rights and interests. It was in the context of "... a specialised court, where in the process a person was provided with certain procedural guarantees of protection in a dispute by a subject of power, that it was a truly revolutionary step towards the development of democracy" [31, p. 42].

It is clear that this situation is also due to the existing conflicts of legislative norms, which relate to contradictions between the norms of the same regulatory act and the norms between separate acts of a sectoral nature and between the norms of acts belonging to different sectors [32]. That is why the courts should take a very balanced and reasonable approach to resolving disputes of a complex nature and content. It is sad to come across examples when the proposals contained in court decisions cannot be implemented, and this makes it impossible and destroys the exercise of a person's right to judicial protection.

The court's awareness of the erroneousness of its position is evidenced by the Decision of 31 January 2024 in case No. 595/76/23, which states the following. Art. 245 (2) of the Code of Administrative Procedure of Ukraine sets out the list of court decisions that an administrative court is authorised to make in the event of a claim being upheld. This list does not include the establishment of a fact of legal significance. In other words, in case of resolution of a case in administrative proceedings, the establishment of a fact of legal significance must be determined by the court in the operative Part of the court decision, which is not provided for by the CAP of Ukraine.

At the same time, the analysis of the above civil procedural rules shows that the current civil procedural legislation refers to the jurisdiction of civil courts to establish facts on which the emergence, change or termination of subjective rights of citizens depends. The current legislation does not provide for any other judicial procedure for confirming a fact of legal significance, except for consideration of cases on establishing a fact of legal significance in civil proceedings [33].

Analysing the above case law, it can be noted that in resolving such a dispute, attention should be paid to the distinction between a legal fact and a complex legal fact. This is how the fact of cohabitation and the grounds for receiving a one-off financial assistance are related. It is reasonable to assume that the factual composition involves a set of independent life circumstances, legal facts, each of which gives rise to independent legal consequences [1, p. 477]. The factual composition, combining independent integral legal facts only in their totality, gives rise to certain consequences. At the same time, a separate legal fact already has legal significance, which implies its independent role in the dynamics of legal regulation. The integrity of legal facts, which are elements of the factual composition, only in their unity cause legal consequences.

On this basis, the fact of cohabitation is, by its very nature, a legal fact that can give rise to many relations. In peacetime, this most often led to the resolution of certain property disputes, the future of children, etc. The war in Ukraine has added another specific aspect to the significance and

consequences of establishing such a legal fact. That is why it is logical to distinguish between the legal fact of cohabitation and the complex legal fact that gives rise to the grounds for receiving one-off social assistance. Such a complex legal fact includes: 1) a certain regime of relations between a man and a woman, the fact of cohabitation; 2) the special status of a man – a military servant; 3) the death or injury of a man.

## Conclusions

The war in Ukraine has led to a significant increase in the number of issues (social benefits, mobilisation, etc.) related to the deaths of servicemen. Often, the resolution of such issues is impossible without first going to court to establish a certain fact. The search for legitimate ways to optimise such a procedure in order to make it easier for the applicant is a humanitarian goal that is being pursued in Germany and Ukraine in different ways.

Unlike German law, Ukrainian procedural law does not allow administrative courts to go beyond their jurisdiction, even in cases where such a move would help a private person to exercise his or her right.

The Supreme Court's attempts to change the procedure and grounds for determining judicial jurisdiction by formulating its own case law is a wrong way to go, which will not only fail to optimise the procedure for resolving certain categories of disputes, but may also lead to a violation of a person's right to a fair trial, as the European Court of Human Rights has repeatedly pointed out in its judgments.

Proper judicial protection of individual rights must be based on strict compliance with the requirements for the subject matter jurisdiction of the courts. At the same time, any attempts to optimise (accelerate) the procedure for resolving a case or to bypass the mandatory stages set out in the law should be guaranteed to lead to the only result – the cancellation of decisions made in this way.

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# Formation of Early National Constitutionalism in the Second Half of the 17th – Early 18th Centuries

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**Abstract**
*The relevance of the topic lies in the need to disprove the pseudo-scientific statements of the political leadership of the Russian Federation concerning absence of a historical tradition of Ukrainian state-building and national constitutionalism. The article is aimed at analyzing the main sources of constitutional law of the Ukrainian state and peculiarities of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries. In the course of the study, the historical comparative and historical typological scientific methods have been used which have made it possible to establish the characteristics of formation of national constitutionalism. Based on the principle of historicism, the objective regularities of the emergence and development of constitutionalism in Ukraine have been revealed. In the article, the process of rise of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries has been researched on the basis of the analysis of the sources of constitutional law of Ukraine such as Cossack customary law, Magdeburg law, constitutional legal acts, and treaties. Being in progress, this process was based on its own state and legal experience, in particular, of Zaporizhzhia Sich, as well as the experience of European countries. The key features of constitutionalism were the recognition and statutory expression of rights and freedoms, introduction of a republican form of government, and mechanisms for limiting the state power. It has been proved that the sources of Ukrainian constitutionalism of the Hetmanate period reflect treaty socio-political traditions that existed in the countries of Central and Eastern Europe. The main treaty tradition, which became the basis for the development of Ukrainian constitutionalism, was an effort to protect the interests of the Ukrainian state and representatives of its national elite in various treaty*

*forms, which laid the foundations for legal regulation of social relations. It should be taken in consideration that the features of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries were as follows: it was in progress simultaneously with the revival of the Ukrainian state and national liberation war with the Polish-Lithuanian Commonwealth and Tsardom of Muscovy, as well as struggle of officers' groups for power, confrontation between officers and lower strata of Cossacks. The formation of early national constitutionalism took place under the conditions of significant human and material losses, which was called the Ruin in the national historical science. The prospect of further research into the formation of Ukrainian constitutionalism is caused by the fact that the national historical and legal science and the science of constitutional law have not developed a unified position on the time and features of its emergence and development yet.*

***Keywords:*** *constitutionalism; Ukrainian state; hetman; Cossack law; treaty.*

# Формування раннього вітчизняного конституціоналізму у другій половині XVII – на початку XVIII ст.

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**Анотація**
*Актуальність теми полягає в необхідності спростування псевдонаукових заяв політичного керівництва російської федерації про відсутність історичної традиції українського державотворення та вітчизняного конституціоналізму. Метою статті є аналіз основних джерел конституційного права Української держави та особливостей процесу формування раннього вітчизняного конституціоналізму у другій половині XVII – на початку XVIII ст. У процесі дослідження використано історико-порівняльний та історико-типологічний наукові методи, які дозволили встановити ознаки формування вітчизняного конституціоналізму. Спираючись на принцип історизму, виявлено об'єктивні закономірності виникнення і роз-*

*витку конституціоналізму в Україні. На основі аналізу джерел конституційного права України другої половини XVII – початку XVIII ст., таких як козацьке звичаєве право, магдебурзьке право, конституційні нормативно-правові акти та міжнародні угоди, досліджено процес виникнення раннього вітчизняного конституціоналізму. Цей процес відбувався, спираючись на власний державно-правовий досвід, зокрема Запорозької Січі, та досвід європейських країн. Основними ознаками конституціоналізму стало визнання й юридичне закріплення прав і свобод, запровадження республіканської форми правління, а також механізми обмеження державної влади. Доведено, що джерела українського конституціоналізму доби Гетьманщини відображають договірні суспільно-політичні традиції, які існували у країнах Центральної та Східної Європи. Головна договірна традиція, яка стала основою для розвитку українського конституціоналізму, полягала в намаганні захистити інтереси Української держави та представників її національної еліти в різних договірних формах, що закладало основи правового регламентування суспільних відносин. Особливості процесу формування раннього вітчизняного конституціоналізму у другій половині XVII – на початку XVIII ст. полягають у тому, що він відбувався одночасно з відродженням Української держави та національно-визвольною війною з Річчю Посполитою та Московським царством, боротьбою старшинських угрупувань за владу, протистоянням між старшиною та козацькими низами, а також в умовах значних людських і матеріальних втрат, що у вітчизняній історичній науці отримало назву Руїна. Перспективи подальшого дослідження формування українського конституціоналізму зумовлюються тим, що вітчизняна історико-правова наука та наука конституційного права не сформували уніфікованого підходу щодо часу й особливостей його виникнення і розвитку.*

***Ключові слова:*** *конституціоналізм; Українська держава; гетьман; козацьке право; міжнародна угода.*

## Introduction

The study of the history of emergence and formation of early national constitutionalism is an important direction of the historical and legal science which was initiated in the post-Soviet period. Given the multifaceted nature of the subject of research and relatively short time of its study, the national historical and legal science and the science of constitutional law have not developed a unified position on the time and features of rise of early Ukrainian constitutionalism yet.

The relevance of the topic lies in the need to disprove the pseudo-scientific statements of the political leadership of the Russian Federation concerning absence of a historical tradition of Ukrainian state-building and national constitutionalism. The article is aimed at analyzing the main sources of constitutional law of the Ukrainian state and peculiarities of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries.

## Literature review

In the post-Soviet period, issues of the history of emergence of national constitutionalism have been the subject of discussion by such experts in the field of state history and law and constitutional law as Yu. Barabash, I. Boyko, S. Holovaty, V. Honcharenko, V. Zhuravskyi, V. Yermolaiev, V. Kolisnyk, V. Kravchenko, A. Krusyan, O. Myronenko, O. Petryshyn, V. Rechytskyi, I. Slovska, V. Tatsiy, Yu. Todyka, M. Tsvik, S. Shevchuk. The authors of the joint monograph published under the editorship of S. Holovaty [1] have touched upon the problems of the national constitutional tradition and history of development of national constitutionalism. In the joint monograph under the editorship of V. Skrypnyk, there have been revealed the results of the study of the history of Ukrainian constitutionalism, ideology of the current Constitution of Ukraine, issues of the development of constitutionalism in Ukraine as an integral component of the modern legal culture [2]. The issues of theory, history and practice of modern constitutionalism in the developed countries worldwide have been in the field of view of foreign scientists N. Barber [3], D. Grimm [4], M. Loughlin [5] and others. T. Suami researches the threat to global constitutionalism caused by the war of the Russian Federation against Ukraine [6]. From the second half of the seventeenth to the beginning of the eighteenth centuries, the aggressive foreign policy of the Tsardom of Muscovy was the analogous threat to the national constitutionalism.

## Materials and Methods

The empirical basis of the research has included the legal acts of the Ukrainian state – Hetman B. Khmelnytsky's universals of 1648-1657, the Treaty of Ukraine with the Ottoman Porte of 1648, Ukrainian-Polish treaties: the Treaty of Zboriv of 1649, the Treaty of Bila Tserkva of 1651, the Treaty of Hadiach of 1658, the Treaty of Chudniv of 1660, and the Ukrainian-Moscow treaties: the Pereiaslav Articles of 1654 and 1659, the Hlukhiv Articles of 1669, the Konotop Articles of 1672, the Kolomak Articles of 1687.

In the course of the study, the historical comparative and historical typological scientific methods have been used enabling to establish the characteristics of national constitutionalism formation. The synergistic method has enabled the study of the state and legal system of Ukraine from the second half of the seventeenth to the beginning of the eighteenth centuries as it was self-developed and had a weakly deterministic character. Using the sociological method, the influence of certain population groups on the formation of main components of national constitutionalism have been analyzed. Based on the principle of historicism, the objective regularities

of the emergence and development of constitutionalism in Ukraine have been revealed. The authors have relied on the principle of objectivity, which ensures impartiality, non-commitment of judgments and conclusions, independence from the researchers' worldview orientations or ideological preferences.

## Results and Discussion

### *Cossack customary law and regulatory legal acts of the Ukrainian state from the second half of the seventeenth to the beginning of the eighteenth centuries as sources of constitutional law*

In the middle of the seventeenth century, the political, social, and national conditions for the restoration of its statehood finally matured in Ukraine. It is evidenced by the national liberation war of the Ukrainian people which was anti-feudal by nature and had several common features with European bourgeois revolutions [7, pp. 40-41]. By that time, the Ukrainian national elite had already gained some constitutional experience which created opportunities for the formation of early national constitutionalism.

The restoration of the Ukrainian state in 1648 initiated the process of legal formation of early national constitutionalism. The Cossack legal customs – "Cossacks' ancient rights and liberties" formed in *Zaporozhian Sich* (Host) – remained valid in Ukraine-Hetmanate and became one of the sources of constitutional law. In the process of state formation, the Hetman and general government were guided by the system of Cossack customary law – it was the method which had been tested during the sixteenth and the first half of the seventeenth centuries. The norms of customary law determined Cossacks' rights and duties, regulated the procedure for the activities of the general, regimental, and *sotnia* (Cossack squadron) governments. The use of legal customs of Zaporozhian and registered Cossacks contributed to the formation of such democratic, republican institutions in Ukraine-Hetmanate as electability, collegiality, term of office, controllableness and accountability of the Cossack self-government bodies. When developing legal acts of the Ukrainian state and concluding treaties, the Hetman and the general government were guided by Cossack customary law. Several legal customs acquired legal consolidation in treaties and legal acts of the Ukrainian state. In view of this, according to the scientists, Cossack customary law should be called "customary constitutions" [8, p. 254].

The Statute on Organization of Zaporozhian Host, adopted by the *Rada starshyn* (Council of Officers) in June 1648, became the first constitutional and legal act of the Cossack state. It assigned the status of both the commander of the Cossack Host and the head of state to the Hetman. The Statute on Organization significantly expanded the Hetman's executive

and judicial powers. This constitutional and legal act determined the authorities of colonels, *sotnyks* (lieutenants of Cossacks), *horodovi otamans* (regimental town Cossack chieftains) and other Cossack officials. The Statute on Organization of Zaporozhian Host of 1648 has not been preserved, although references to it can be found in B. Khmelnytsky's universals [9, p. 110].

Several Hetman's universals and charters that protected the rights and freedoms of representatives of certain social groups established the elective, representative, collegial character of public authorities and became the sources of constitutional law of Ukraine. Thus, for example, B. Khmelnytsky's Universal of 1654 prescribed the rules of taxation of foreign merchants and introduced the position of a state watchman to collect duties [9, pp. 143, 228]. In the Universals adopted in June 1657, the Hetman confirmed the "rights and freedoms" of the Pinsk County nobility and the existing system of administrative and judicial bodies [9, pp. 231-235].

The Ukrainian state recognized the validity of the Magdeburg law which regulated the activities of municipal government bodies. The democracy and universality of the Magdeburg law and the spiritual kinship of Ukrainians with European culture objectively determined its rapid spread on the Ukrainian lands. The Hetman's charters confirmed the right of towns to self-governance or granted them such a right [9, pp. 93-94, 133, 177-178]. The Magdeburg law regulated rights and duties of townspeople, provided for the formation of municipal government bodies through election, established the division of bodies into administrative (magistrate, city council), executive (city administration, boards), and judicial (the bench), made provisions for collegiality, term of office and accountability of municipal government officials. The Ukrainian state abolished national and religious restrictions on representation in municipal government. In Ukraine-Hetmanate, ethnic Ukrainians, Orthodox believers received free access to municipal government bodies.

### *International treaties of Ukraine-Hetmanate from the second half of the seventeenth to the beginning of the eighteenth centuries as a component of formation of early national constitutionalism*

The treaties, which are called constitutions by the scientists [8, pp. 257, 269, 271], became an important component of the development of early national constitutionalism. They include the Treaty of Ukraine with the Ottoman Porte of 1648, the Treaty of Zboriv of 1649, the Treaty of Bila Tserkva of 1651, the Treaty of Hadiach of 1658, the Treaty of Chudniv of 1660 concluded with the Polish-Lithuanian Commonwealth as well as the Pereiaslav Articles of 1654 and 1659, the Hlukhiv Articles of 1669,

the Konotop Articles of 1672, the Kolomak Articles of 1687 entered into with the Tsardom of Muscovy [10, p. 20]. The procedure for concluding treaties was fixed in Cossack legal customs and stipulated a few mandatory stages: 1) adoption of a preliminary decision on the essentiality to conclude a treaty by the General *Rada* (Council); 2) drafting the treaty by the general government; 3) coordination of its draft by the contracting parties; 4) ratification of the treaty by the General Council.

However, in practice, when concluding treaties, the Hetman and the general government often violated Cossack customary law. Thus, without the participation of the General Council, the Hetman and the Council of Officers approved the Treaty of Zboriv of 1649, the Pereiaslav Articles of 1654, the Baturyn Articles of 1663, and the Moscow Articles of 1665. The Hlukhiv Articles of 1669, the Konotop Articles of 1672, the Pereiaslav Articles of 1674, and the Kolomak Articles of 1687 were coordinated by the General Council, although the composition of such councils was formed by officers, all the issues submitted to their consideration had been previously decided by the Council of Officers who imposed their decisions on Cossacks. Thus, to participate in the Konotop Council in 1672, colonels and *sotnyks* selected privileged, so-called "*znachni*" (important) Cossacks. About 2,000 Cossacks were admitted to the Kolomak Council in 1687, while the Cossack Host numbered 30,000 members according to the register. The officers formed initiative groups from among the members of the Council, thereby ensuring the adoption of the acceptable decision [11, p. 15].

According to the scientists, the conclusion of the Treaty between the Zaporozhian Host and the Ottoman Porte in July 1648 demonstrated the international recognition of the Ukrainian state [12, pp. 48-49; 13, pp. 11-13].

### *Characteristics of the formation of early national constitutionalism in the treaties of 1649-1660 between Ukraine and Poland along with Ukraine and Muscovy*

The restoration of the Ukrainian state was legally formalized and consolidated in the Treaty of Zboriv of 1649. Ukraine acquired an autonomous status as part of the Polish-Lithuanian Commonwealth within the boundaries of Kyiv, Chernihiv and Bratslav voivodships (provinces), and the Hetman received the powers of the head of the Cossack Autonomy. However, the Hetman's jurisdiction extended only to the Cossack population of the specified voivodships. The Hetman was directly subordinated to the King of Poland. According to the Treaty of Zboriv, Poland recognized the right of the Cossacks to elect the Hetman by the General Council [14, p. 5]. Under Art. 2 of the Treaty of Zboriv of 1649, the Hetman formed

a 40,000 Cossack register, which had to be approved by the Council of Officers. Registered Cossacks did official military service, had the right to participate in elections, bear part in activities of the general, regimental and *sotnia* councils. General, regimental, and *sotnia* governments as well as other administrative and judicial bodies were formed from among the Cossacks. Later on, the quantitative composition of the Cossack register was considered one of the most important factors that testified to the extent of Ukraine's sovereign rights. In pursuance of the Treaty of Zboriv of 1649, the Ukrainian nobility was equalized in rights with the Polish nobility, the Metropolitan of Kyiv received the right to participate in the work of the Senate of the Polish-Lithuanian Commonwealth [14, pp. 5-6].

Despite a number of unfavourable conditions for Ukraine, such as limitation of the territory of autonomy, reversion of the Polish administration, limited Cossack register, in the aggregate, the Treaty of Zboriv of 1649 contributed to the establishment of Ukrainian national statehood and formation of early national constitutionalism. Subsequently, it was used as a legal source for further constitutional projects.

After the defeats of the Cossack Host at Berestechko and Bila Tserkva in 1651, the Hetman and the general government were forced to conclude a new treaty with Poland, known as the Treaty of Bila Tserkva, which confined Ukrainian autonomy to the territory of Kyiv voivodeship and the Cossack register to 20,000 members [15, p. 70]. The Treaty of Bila Tserkva confirmed the autonomous status of Ukraine-Hetmanate as part of the Polish-Lithuanian Commonwealth, but at the same time it circumscribed its sovereign rights. However, after the victory at Batih in June 1652, the Treaty of Bila Tserkva of 1651 lost its validity and Ukraine acquired the status of a sovereign state. Titling B. Khmelnytsky can be considered acknowledgement of this state and legal status as "the Hetman with the Zaporozhian Host" in the Universals of 1652-1653, whereas after the conclusion of the Treaty of Zboriv, he was titled "the Hetman of His Royal Grace" [9, pp. 126-137].

The search for allies in order to form an anti-Polish coalition forced the Hetman government to maintain foreign policy ties with the Tsardom of Muscovy. As a result of lengthy negotiations, on January 18, 1654, the Pereiaslav General Council adopted a decision in favour of a military and political union with Muscovy. The draft of an agreement, named B. Khmelnytsky's March Articles, was approved by the Council of Officers in Pereiaslav, and in March 1654, it was ratified by the tsarist government.

Until now, there is no unanimity among researchers regarding the qualification of the state and legal status of Ukraine according to the

Treaty of Pereiaslav of 1654. According to several authors, it should be considered that the Treaty of Pereiaslav of 1654 had the character of a bilateral international legal act. The content of the Treaty was reduced to the support and provision of military assistance by Muscovy to the sovereign Ukrainian state, which meant establishment of protectorate relations. In pursuance of the Treaty, Ukraine retained its own government bodies, legislation, administrative-territorial system, army, finances, tax system and customs, the state border with the Tsardom of Muscovy and other countries, the right to foreign policy activities. B. Khmelnytsky's title in the Universals of 1654-1657, "the Hetman of His Tsarist Majesty", was of a formal nature and does not disprove the sovereign state and legal status of Ukraine [9, pp. 140-237].

However, after B. Khmelnytsky's death, Muscovy embarked on a path of incorporating Ukraine. This pushed Hetman I. Vyhovsky and his supporters to terminate the Treaty of Pereiaslav of 1654. The Cossack officers were increasingly oriented towards the idea of Ukraine entering the Polish-Lithuanian Commonwealth with the rights of autonomy, which led to the conclusion of the Treaty of Hadiach of 1658.

One of the authors of the Treaty of Hadiach of 1658 was Yu. Nemyrych, a member of the general government. He made a significant contribution to the development of national constitutional thought. Yu. Nemyrych defended the concept of creating a federation of the Polish Kingdom, Lithuanian, and Russian principalities as part of the Polish-Lithuanian Commonwealth. He developed the concept of a state leader on whom the state's position depends [15, p. 97].

The Treaty of Hadiach of 1658 provided for the abolition of the Church Union of Berestia of 1596 and recognized the right of the Ukrainian people to practice Orthodoxy freely. Orthodox metropolitans received the right to participate in the work of the Senate. The powers of the head of Ukrainian autonomy – the Grand Principality of Rus within the Polish-Lithuanian Commonwealth – were attached to the Hetman. However, the Treaty of Hadiach subordinated the Hetman to the King of Poland, deprived him of the rights to collect taxes and engage in foreign policy activities, as well as circumscribed the Hetman's judicial authorities (Art. 4-6) [13, pp. 22-23]. The conclusion of the Treaty was supported by Cossack officers as the main holder of constitutional ideas. The lower strata of Cossacks, who saw it as the threat of the renewal of serfdom and oppression of Orthodoxy, were opponents of the Treaty. Given this, a group of Cossacks, led by the Poltava colonel M. Pushkar and the *Kish* otaman Ya. Barabash, made a stand against the signing of the Treaty of Hadiach, and Hetman I. Vyhovsky was forced to suppress the opposition with the help of the Host. Therefore,

under V.A. Smolii, V.S. Stepankov, and other scientists, one should not exaggerate the importance of the Treaty of Hadiach of 1658 in the matter of building the Ukrainian state [8, p. 261; 16, p. 115].

At the same time, the vast majority of modern researchers evaluate the possibility of concluding the Treaty of Hadiach positively [17]. Thus, in particular, V. Shevchuk believes that the Treaty "was the culmination of Ukrainian state formation in the seventeenth century" [15, p. 189]. According to the authors, the conclusion of the Treaty of Hadiach of 1658 would have meant the rejection of the union with Muscovy, where the social and state system was based on the principles of eastern despotism, and the choice of the European democratic model of organizing state power was rested on the principles of constitutionalism.

Yu. Khmelnytsky tried to expand the sovereign rights of Ukraine and the Hetman's authorities, offering Muscovy a draft of a new treaty – the Zherdiv Articles. However, the Muscovy Embassy, taking advantage of the struggle of officers' groups to gain power, was able to impose the Articles of Pereiaslav of 1659 on Ukraine since they were more favourable to it. According to the Articles, the tsarist government recognized the Hetman's authorities provided for by Cossack customary law but prohibited him from appointing and dismissing officers and circumscribed his judicial powers. Art. 5 prescribed deployment of tsarist troops in six cities, which should be qualified as the direct intervention of Muscovy in the Ukrainian internal affairs. The Hetman was subordinate to the Tsar in the matters of military strategy. Art. 9 deprived the Hetman of the right to diplomatic relations [11, p. 87]. This norm was contained in all the subsequent Ukrainian-Muscovy treaties. Thus, according to the Pereiaslav Articles of 1659, Ukraine lost the status of a sovereign state and acquired an autonomous status as part of the Tsardom of Muscovy.

Having been defeated in the war with Poland, in 1660, Yu. Khmelnytsky was forced to conclude the Treaty of Chudniv with it. The new Ukrainian-Polish agreement was based on the Treaty of Hadiach of 1658, although the Treaty of Chudniv did not foresee the creation of the Grand Principality of Rus. The Hetman was completely subordinate to the King of Poland. His military, administrative and judicial powers were noticeably narrowed compared to those declared by the Treaty of Hadiach and the Pereiaslav Articles. The validity of the Ukrainian-Polish Treaty was not recognized by the Left Bank regiments of Ukraine. The Treaty of Chudniv of 1660 initiated the process of splitting the Ukrainian state into the Left Bank as part of the Tsardom of Muscovy and the Right Bank in the composition of the Polish-Lithuanian Commonwealth.

***Formation of early national constitutionalism in the international treaties of Left Bank Ukraine from the 1760s to the beginning of the eighteenth centuries***

The Moscow Articles of 1665, adopted during the hetmanship of I. Briukhovetsky, who was supported by the lower strata of Cossacks and Muscovy, abolished the Ukrainian autonomy, and therefore they should not be considered among the sources of Ukrainian constitutional law. As a result of the anti-Muscovy uprising of 1666, which was supported by the Right-Bank Hetman P. Doroshenko, I. Briukhovetsky lost his power and was executed, and the Moscow Articles of 1665 lost their validity. For a short time, P. Doroshenko managed to unite the Left-Bank and the Right-Bank Ukraine under his rule. However, the Truce of Andrusovo of 1667, concluded between the Tsardom of Muscovy and Poland without the participation of representatives from the Ukrainian government, legally established the split of Ukraine into the Left Bank and the Right Bank, as parts of the Tsardom of Muscovy and the Polish-Lithuanian Commonwealth, respectively.

Under the conditions of deepening political contradictions between the officers' groups and taking advantage of the support of Muscovy, at the beginning of 1669, the acting Hetman D. Mnohohrishny seized power on the territory of the Left Bank of Ukraine. With the support of Muscovy, the Hlukhiv Council elected D. Mnohohrishny as a full-time Hetman and concluded a new Ukrainian-Muscovy treaty. In pursuance of the Hlukhiv Articles, the observance of traditional Cossacks' rights was guaranteed. The tsarist government recognized the validity of Cossack customary law and the Hetman's powers provided for by it. Due to the split of Ukraine, the Treaty of 1669 reduced the Cossack register to 30,000 members. The tsarist voivodes (governors) were supposed to be located in five cities, whereas they were deprived of administrative and judicial powers. Tax collection was entrusted to the Hetman. Art. 17 gave the Hetman the right to send representatives to international negotiations if they concerned the interests of the Zaporozhian Host [11, pp. 118, 126].

On the initiative of officers, the Treaty of Hlukhiv of 1669 legitimized the custom which provided for the curtailment of the Hetman's powers by the Council of Officers. Art. 6 forbade the Hetman to carry out judicial proceedings single-handedly, dispose of estates, and petition the Tsar to grant nobility. Furthermore, Art. 19 provided for the introduction of control of the Council of Officers over the Hetman's activities [11, p. 120].

The Konotop Articles of 1672, which were concluded at the same time as the election of Hetman I. Samoilovych, copied the main provisions of

the Treaty of Hlukhiv of 1669. However, the Konotop Articles stipulated additional restrictions on the Hetman's powers. Art. 4 enshrined the right of the Council of Officers to control the Hetman's activities and resolve foreign policy issues. At the same time, representatives of the Muscovy garrisons were forbidden to interfere in the affairs of municipal government and the judiciary, and their functions were reduced to purely military ones [11, p. 137].

In 1687, during the election of I. Mazepa as the Hetman, the Zaporozhian Host and the Tsardom of Muscovy concluded the Treaty of Kolomak. Taking advantage of the terms of the Eternal Peace with Poland of 1686 and the Hetman's election, the tsarist government abridged the sovereign rights of Ukraine once again. Art. 11 proscribed the Hetman from dismissing general officers without the Tsar's sanction. The tsarist government established control over the Hetman and sent a rifle regiment to Baturyn. Art. 19 of the Treaty of Kolomak deserves our special attention as it formally prohibited the recognition of the Hetman as the head of the Ukrainian state [11, p. 170]. However, due to I. Mazepa's state policy, by the beginning of the eighteenth century the articles limiting Ukraine's sovereignty remained unimplemented. Although it was provided for by the Treaty of Kolomak of 1687, I. Mazepa did not restrict the rights of the Cossack officers' elite, the main holder of constitutional ideas, and it was important for the further development of Ukrainian constitutionalism [18, pp. 214-215].

At the beginning of 1708, the Zaporozhian Host concluded a treaty with Sweden which aimed to protect the sovereignty of Ukraine from the encroachments of Muscovy. At the same time, an international agreement with the Polish-Lithuanian Commonwealth which was based on the Treaty of Hadiach of 1658 was concluded. In March 1709, Ukraine concluded a new treaty with Sweden [16, pp. 208-209, 216]. The text of these treaties has not been preserved but researchers managed to reconstruct their main provisions. The treaties of 1708-1709 are mentioned in I. Mazepa's address to the people of Ukraine and in P. Orlyk's "Summary of the Rights of Ukraine", which gives us grounds for comparing them with the Treaty of Hadiach of 1658. Thus, in the Treaty of 1708, it was stated that the Swedish King had no right to interfere with the rights and freedoms of the Zaporozhian Host. Ukraine "on both sides of the Dnipro must be forever free from all foreign possessions" [19, pp. 42-44, 45-49]. The conclusion of the Ukrainian-Polish and Ukrainian-Swedish treaties of 1708-1709 was another attempt to establish the Ukrainian statehood and principles of European constitutionalism.

During the second half of the seventeenth and at the beginning of the eighteenth centuries the Ukrainian state was forced to resist the Polish-

Lithuanian Commonwealth and Tsardom of Muscovy which claimed its territory. And therefore, L.T. Biabovol's statement that the history of the formation of national constitutionalism is the history of the national liberation struggle of the Ukrainian people for independence is quite correct [20, pp. 19-20].

**Conclusions**

Thus, being in progress, the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries was based on its own state and legal experience and experience of European countries. The main features of constitutionalism were the recognition and statutory expression of rights and freedoms, introduction of a republican form of government – the elective, representative, collegial nature of public bodies, and mechanisms for limiting state power.

The sources of Ukrainian constitutionalism of the Hetmanate period reflect the treaty socio-political traditions that existed in the countries of Central and Eastern Europe. The main treaty tradition which became the basis for development of Ukrainian constitutionalism was an effort to protect the interests of the Ukrainian state and representatives of its national elite in various treaty forms, which laid the foundations for the legal regulation of social relations.

Despite the violation of Cossack customary law at the moment of their conclusion, the Ukrainian-Polish and Ukrainian-Muscovy treaties became an important source of Ukrainian constitutional law. The agreements had full force and effect, regulated the territory of Ukraine, its state and legal status, activities of higher and local state authorities, administrative-territorial division, judiciary, and tax system. Based on Cossack customary law, the treaties enacted the rights and freedoms of registered Cossacks, townspeople and Orthodox clergy, as well as electability, collegiality, controllableness and accountability of authorities in the Ukrainian state. The treaties legitimized the Cossack custom which required collegial resolution of the most important administrative, military, financial, and judicial matters and established the Hetman's controllableness to the Council of Officers. Provisions on the sovereignty of Ukraine, rights and freedoms of the Cossacks and other social classes, circumscription of the Hetman's powers implemented in the treaties became an important component of the process of formation of early national constitutionalism.

It should be taken into consideration that the features of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries were as follows:

it was in progress simultaneously with the revival of the Ukrainian state and national liberation war with the Polish-Lithuanian Commonwealth and Tsardom of Muscovy, as well as the struggle of officers' groups for power, confrontation between officers and lower strata of Cossacks. The formation of early national constitutionalism took place under the conditions of significant human and material losses, which was called the Ruin in the national historical science.

## Recommendations

In the authors' opinion, the prospect of further research into the formation of Ukrainian constitutionalism is caused by the fact that the national historical and legal science and the science of constitutional law have not developed a unified position on the time and features of its emergence and development yet. Researchers should pay attention to the sociological, cultural, ideological, religious, and other components of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries.

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# Legal Problems of Ensuring the Quality of Underground Drinking Water in Ukraine

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**Abstract**
*The paper is devoted to the analysis of the state of legal protection of the quality of drinking groundwater in Ukraine and the current trends in the development of national legislation in this area, taking into account the Directives of the European Union, which regulate water relations in this field. Drinking water is one of the most important human needs, as evidenced by numerous scientific studies, including legal ones, which formulate scientific approaches to understanding the right to drinking water as one of the basic human rights and ensuring its safety. On the basis of many factors, the problems of the lack of drinking water of the appropriate quality are revealed, in connection with which the demand for fresh underground water is rapidly increasing, and as a result, the anthropogenic load on the underground hydrosphere and the risk of pollution and depletion of these waters are increasing. Therefore, the underground waters of Ukraine are gaining more and more importance, and the legal problems of their protection and ensuring their quality are urgent. The work consists of three parts, which analyze the legal principles of ensuring the quality of drinking groundwater of Ukraine, the concept of drinking groundwater as an object of legal relations for protection and use, as well as the peculiarities of legal protection of the safety and quality of drinking groundwater of Ukraine. Current issues of groundwater protection, problems of legislative regulation of state accounting, state monitoring and state control of the quality of drinking groundwater on the territory of Ukraine are considered. The main problems of legal assurance of the quality of drinking groundwater and the ways to solve them have been determined. Particular attention is paid to the improvement of drinking groundwater quality*

*standards and their legislative enshrining. Proposals for improving the legal provision of drinking groundwater quality of Ukraine have been developed and substantiated, including taking into account the experience of the European Union. The article identifies the prospects for further scientific research in this area, in particular: determining the specifics of the legal regime for underground drinking water in Ukraine, studying the legal issues regarding implementation and protection of the right to drinking water (including underground water) of adequate quality, quantity and safety for human life and health and ensuring equal access to it at the national and international levels. The methodological basis of the study is a set of general philosophical, general scientific, special scientific and legal methods which allowed for a comprehensive analysis of the legal framework for the quality and protection of underground drinking water in Ukraine. The authors use descriptive and analytical methods of cognition as well as methods of legal norms interpretation. The problems of legal regulation are analyzed based on the study of international and national legal acts.*

***Keywords:*** *drinking water; underground water; quality of underground drinking water; state accounting; state monitoring; state control of quality of underground drinking water; regulation of quality of underground drinking water in Ukraine.*

# Правові проблеми забезпечення якості питних підземних вод України

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**Анотація**
*Стаття присвячена аналізу стану правового забезпечення якості питних підземних вод України та сучасним тенденціям розвитку національного законодавства у зазначеній сфері з урахуванням Директив Європейського Союзу, що регулюють питання водних відносин у цій галузі. Питна вода є однією з найважливіших потреб людини, про що свідчать численні нау-*

*кові напрацювання, в тому числі й правові, в яких формулюються наукові підходи до розуміння права на питну воду як одного з основних прав людини та забезпечення її безпеки. На підставі багатьох факторів розкриваються проблеми нестачі питної води відповідної якості, у зв'язку з чим стрімко збільшується попит на прісні підземні води, і як наслідок – зростає антропогенне навантаження на підземну гідросферу та ризик забруднення й виснаження цих вод. Тому підземні води України набувають дедалі більшого значення, а правові проблеми їх охорони та забезпечення їх якості – актуальності. Робота складається з трьох частин, в яких аналізуються правові засади забезпечення якості питних підземних вод України, поняття питних підземних вод як об'єкта правовідносин з охорони та використання, а також особливості правового забезпечення безпеки та якості питних підземних вод України. Розглянуто актуальні питання охорони підземних вод, проблеми законодавчого регулювання державного обліку, державного моніторингу та державного контролю якості питної підземної води на території України. Визначено основні проблеми правового забезпечення якості питних підземних вод та шляхи їх вирішення. Окрему увагу приділено вдосконаленню нормативів якості питних підземних вод та їх законодавчому закріпленню. Розроблено та обґрунтовано пропозиції щодо вдосконалення правового забезпечення якості питних підземних вод України, в тому числі з урахуванням досвіду Європейського Союзу. Виокремлено перспективи подальших наукових досліджень у зазначеній сфері, зокрема: визначення особливостей правового режиму питних підземних вод України, дослідження правових проблем реалізації та захисту права на питну воду (у тому числі й питну підземну) належної якості, кількості та безпечної для життя і здоров'я людини, а також забезпечення рівноправного доступу до неї на національному та міжнародному рівнях. Методологічну основу дослідження становить комплекс загальнофілософських, загальнонаукових, спеціально-наукових і правових методів, які дозволили здійснити всебічний аналіз стану правового забезпечення якості питних підземних вод України та їх охорони. Використано описові та аналітичні методи пізнання, а також методи інтерпретації правових норм. Проаналізовано проблеми правового регулювання на основі вивчення міжнародних і національних правових актів.*

***Ключові слова:*** *питна вода; підземні води; якість питних підземних вод; державний облік; державний моніторинг; державний контроль якості питних підземних вод; нормування якості питних підземних вод України.*

## Introduction

The problem with the lack of drinking water of appropriate quality appears due to pollution and depletion of most surface water bodies and the demand for fresh underground water has increased rapidly. As a result, the anthropogenic load on the underground hydrosphere and the risk of pollution and depletion of these waters have increased.

It is well known that underground water is one of the main sources of drinking water. According to Art. 61 of the Water Code of Ukraine and the Rules for the Protection of Underground Waters (clause 2 III Use of Underground water and State Accounting of Underground Waters), underground water of drinking quality must be used primarily to meet the needs of drinking, household water supply of the population, food industry and animal husbandry [1]. State sanitary norms and rules (DSanPiN 2.2.4-171-10) also provide for giving preference to water from underground sources of drinking water supply for the population as it is more protected from biological, chemical and radiation pollution (3.1) [2]. Although underground water resources in the country are limited, but in one or another quantity they are spread over the entire territory of Ukraine and in most regions, it is expedient to develop underground drinking water supply (National reports on some waters and the state of drinking water supply in Ukraine [3-5], Regional report on the state of the natural environment in the Kharkiv region as of 2021 [6]).

The underground water quality does not meet the regulatory requirements for water supply sources in many regions of Ukraine. A significant part of underground water bodies are located in the areas near large industrial and agricultural complexes experiencing significant anthropogenic influence, which is manifested in a major reduction of fresh water reserves and deterioration of its quality leading to the spread of many diseases. The EU Nitrate Directive 91/676/EEC on the protection of waters against pollution caused by nitrates from agricultural sources covers the issue of protection against nitrate pollution of hydrosphere objects, including sources of drinking water supply in rural areas, monitoring of nitrate water pollution, etc [7]. The national legislation on the use of pesticides and agrochemicals is regulated by the Law of Ukraine "On Pesticides and Agrochemicals" [8].

The high content of nitrates in natural waters leads to water deterioration and decrease in biodiversity inside reservoirs, which negatively affects human health. Drainage of swamps leads to negative consequences, in particular, to a decrease in the level of underground water, which is the reason for the disappearance of water in wells and natural springs. Climate change also has a negative impact on underground water. It should be noted that this kind of changes happen quite quickly, therefore, the legislative framework for regulating the relevant relations does not have time to be formed. This applies not only to Ukraine, but also to other countries. Currently, there is a need to implement a unified approach to the drinking water quality. After all, this may involve one underground horizon locating in different countries, where different requirements for

the quality of drinking water are applied. In particular, the list of drinking water quality indicators in different countries is different and periodically changes.

The operational reserves assessment of underground water has fairly established methods throughout the world that aims to forecast quantitative and qualitative characteristics for a certain amortization work period of water intake facilities. There are issues of providing sanitary zones due to the fact that water intakes of small capacity prevail and they have been growing in number. There is a need to protect and reduce the cost of assessment works for small consumers. These issues are especially exacerbated because of war in Ukraine as providing water to the country's population is complicated by the high risk of contamination of surface water bodies and, accordingly, there is an urgent need for more protected underground water.

It should be noted that the common idea that underground water is always ecologically clean does not correspond to reality. On the contrary, the current ecological state of underground water can be characterized as stressed to varying degrees. The technogenic impact and penetration of pollution in the underground hydrosphere extends to the entire zone of active water exchange corresponding to the first approximation to the zone of fresh water distribution [9]. In addition to the progressive penetration of surface pollution, the drinking water quality can also decrease as a result of drawing unconditioned natural water into catchment structures, for example – hard, iron, fluoride, etc. [10]. Thus, examples can be given of the decline in the quality of even a well-protected aquifer complex of Cenomanian-Lower Cretaceous sediments, which, for most of the Kharkiv region, is a strategic reserve of fresh drinking water [11; 12].

Unfortunately, non-compliance with the requirements regarding the proper water quality in water bodies, in particular underground water, does not allow citizens to exercise the right to public water use without harm to their lives and health [13].

Legal questions arise at the legislative level regarding the rational placement of wells, the economic use of new aquifers, etc. In particular, the draft Law of Ukraine No. 9020 dated February 16, 2023 provides for amendments to some legislative acts regarding the licensing of drilling wells for the extraction of underground water and their liquidation and/or tamping [14].

Thus, in connection with the growing needs for drinking water, the underground waters of Ukraine are gaining more and more importance and the legal problems of their protection and quality assurance are urgent.

## Literature review

Researches on the problems of ensuring the human right to drinking water was conducted, in particular, by such legal scholars as: N. Obijuh [15-18], K. Janishevskaya & A. Skoryk [19], S. Jacenko [20], A. Yevstigneyev [21; 22]; the issue of ensuring the quality and safety of drinking water was investigated by: O. Prjadko [23], V. Vitiv [24], A. Mkrtychjan [25], K. Riabets [26], M.J Stadnyk [27], V. Schestopalov [28]; legal provision of water protection was studied, in particular, by A. Sokolova [29-31]; special attention at the national and international level has been paid to underground drinking water and its protection by such research scientists as: O. Serdjuk [32; 33], V. Kharkevich & S. Kryzhevych [34], A. Kosygina [35], V. Shestopalov, V. Lyalko, V. Gudzenko & M. Drobnohod [36], M. Cherkashyna [37; 38], I. Iefremova, I. Lomakina & N. Obiiukh [39]; the issue of accessing underground drinking water was investigated through the prism of human rights by J. Grönwall & K. Danert [40]; peculiarities of ecological legal concepts ("pollution", "polluting substances", etc.) of Ukrainian and European water legislation, approximation of the Ukrainian environmental legal institute of water quality to the legislation of the European Union were considered in the works of V. Uberman, L. Vaskovets [41; 42]; water quality problems, in particular, underground water were studied by scientists M. Zeleňáková, K. Kubiak-Wójcicka & A.M. Negm [43]; management of groundwater considering its depletion and quality deterioration, in particular, due to climate change, is studied by E. L. Garner [44].

In many regions of the world, underground water resources and the social, economic and ecological systems that depend on them are threatened by over-abstraction and pollution. In this regard, the issues of limited reserves and quality of underground water affecting the sustainability of water supply systems are studied at the international level [45]; fundamental legal principles regarding the quantity and quality of underground water in the USA, Australia and the European Union are considered [46]; much attention is paid to the legal regulation of transboundary underground water [47]. Taking into account that dependence on underground water and its central role for realizing the human right to "safe" drinking water has increased manifold, the authors discuss the state's obligations to respect, protect and fulfill the right to water and suggest that self-sufficiency is the initial norm to exercise this right. Ignoring self-sufficiency, which occurs primarily from underground water, the state not only loses a great opportunity, but also endangers the water security of future generations [40; 48]. Achieving a clear understanding of local underground water indicators and human impact on underground water resources at various

scales is of primary importance for the comprehensive implementation of sustainable development goals [49].

The following example of a rational approach regarding the use of water resources can be given. There are three water supply networks in Stockholm – potable, technical and rainwater. Groundwater flows into the first one. Rainwater is purified and used, for example, for irrigation. In Ukraine, it simply flows into the nearest polluted rivers. The construction of new networks requires costs, but it is time to understand that water is a very expensive resource and high-quality drinking water is especially expensive since it is a leading factor in the formation of human health. According to WHO, up to 80% of human diseases are associated with drinking water contamination [48]. To improve the quality of drinking water in European countries, coastal water intakes are made (using a natural filter), and multi-stage drinking and waste water purification technologies are used.

It should be noted that the studies of underground water quality and the impact of its pollution on the environment are carried out by specialists of other sciences, in particular, hydrogeologists [9; 50-52]. Calculations of quantitative characteristics and forecasts of qualitative indicators made by V. Shestopalov, Je. Jakovlev, V. Jakovlev is the basis for underground water exploitation standards and is indirectly the basis for legal acts.

Thus, in the current conditions, the legal problems of ensuring the quality of underground drinking water on the territory of Ukraine do not lose its relevance and require additional consideration in order to provide proposals for the solution.

The aim of the Article is to analyze the state of legal regulation for underground water protection and the problems of legal assurance of the quality of underground drinking water on the territory of Ukraine. It also provides for the development and justification of proposals for improving legal support in the researched area, including the experience of the European Union.

**Materials and Methods**

The methodological framework of the research is a set of general philosophical, general scientific, special scientific and legal methods, which made it possible to carry out a comprehensive analysis of the legal provision regarding the quality of underground drinking water and its protection in Ukraine. The authors use descriptive and analytical methods of knowledge, as well as methods of interpreting legal norms. Problems of legal regulation are analyzed based on the study of international and national legal acts.

Thus, the following methods were used in the research process: dialectical, formal logical, analysis and synthesis, systemic structural, formal legal, comparative legal, interpretation of legal norms, prognostic, legal modeling, logical legal.

The dialectical method of cognition made it possible to analyze the development and current state of legal relations on the protection of underground drinking water in Ukraine and to ensure its quality as well as to argue the ineffectiveness of legal norms in this area. The formal logical method made it possible to analyze the legal norms of international and national legislation in the field of protection and quality assurance of underground drinking water, which determine the concept of underground drinking water and its special legal regime. The method of analysis and synthesis was used during the study of legal relations implementation regarding the protection and quality assurance of underground drinking water of Ukraine. Based on the system structural method, legal relations related to the protection and quality assurance of underground drinking water are considered as an integral part of relations in the sphere of protection of drinking water and legal assurance of its quality. The general principles of environmental law and terminology should be applied in this method. The comparative legal method was used for the comparative analysis on the legal regulation of the provisions of the Water Code of Ukraine, the Water Strategy of Ukraine for the period until 2050, the Rules for the Protection of Underground water, including the provisions of the environmental legislation of the European Union. An assessment of the legal regulation regarding the protection of underground drinking water and legal assurance of its quality was also carried out, and the general trends of harmonization of national laws with EU law were outlined. Using this method of legal norms interpretation, the meaning of certain regulatory terms as well as the scope of their application were revealed; the vagueness of certain wordings and the gaps in the the studied legal relations were also outlined. The formal legal method was used during the study of the national legislation specifics in the researched field of legal relations and the disclosure of these specifics in the relevant legal norms. The method of legal modeling was used by authors regarding reforming the current legislation of Ukraine and it helped to form the authors' own vision on the validity of legal norms and express their own position on relevant problematic issues. The use of the prognostic method of cognition made it possible to analyze the consequences of adopting proposals for improving the current environmental (in particular, water and weather) legislation of Ukraine, as well as making appropriate changes and additions to it in order to eliminate duplication, unclear wording and gaps. Based on our own scientific analysis of the researched relationships, trends in

their development and the current state of legal regulation, conclusions are formulated regarding the legal regulation of protection and quality assurance of underground drinking water using the logical legal method according to the purpose of the study.

## Results and Discussion

### *Legal principles of ensuring the quality of underground drinking water in Ukraine*

Ukrainian environmental policy is aimed at achieving strategic goals, including a state of the natural environment that is safe for human health. Among the tasks for its achievement is the Law of Ukraine "On the Key Principles (Strategy) of the State Environmental Policy of Ukraine for the Period till 2030" as it establishes, in particular, the preferential provision of compliance with sanitary and hygienic requirements for the quality of water used for drinking water supply until 2030 [53].

According to the Decision of the National Security and Defense Council of Ukraine "On challenges and threats to the national security of Ukraine in the environmental sphere and priority measures for their neutralization" dated March 23, 2021 No. n0018525-21 [54] the National Action Plan for Environmental Protection was developed on the period until 2025 that provides for: improvement of water quality, complete gradual cessation of the discharge of untreated and insufficiently treated wastewater into water bodies and ensuring compliance of the degree of wastewater treatment with established regulations and standards, as well as prevention of underground water pollution (clauses 109-112); permanent maintenance of the State Register of artesian wells (clause 31) [55].

The legislation of Ukraine in the field of water relations is characterized by the presence of a codified normative legal act, namely the Water Code of Ukraine, according to which the task of national water legislation, in particular, is to regulate legal relations ensuring the preservation, scientifically based, rational use of water for the needs of the population, water protection from pollution, clogging and depletion, improvement of the condition of water bodies, as well as protection of the rights of enterprises, institutions, organizations and citizens to use water (Art. 2) [1]. Also in 2023, the Law of Ukraine "On Water Drainage and Wastewater Treatment" was adopted, which defines the legal, economic and organizational principles of the functioning of the water drainage system, aimed at creating favorable conditions for human life and protecting the natural environment from the negative impact of wastewater [56]. The goal of the Concept of Water Management Development of Ukraine, in particular, is to improve the quality of water [57].

The research emphasizes that the above mentioned reflects the directions of the national environmental policy also in the field of legal relations on the use, protection and quality assurance of underground drinking water. The formation and development of these relations are fixed in both national and international environmental law, but they have different meanings. Thus, in the norms of international law, underground water is considered as a component of the ecosystem and is protected together with other components of the natural environment [58]. Regarding the protection of underground water in Ukraine, the relevant Rules [59] are in force, the requirements of which ensure their protection against "pollution, clogging, exhaustion, depletion and other actions that can worsen the conditions of water intake, the implementation of measures for the protection of the natural environment, in particular the subsoil, when implementing any types of anthropogenic activity that can negatively affect the quality and quantity of groundwater, reduce their ability to recover naturally, disrupt the hydrogeological regime of underground water, harm people's health".

Based on the Association Agreement between Ukraine and the European Union [60], the provisions of the Directives regulating water relations are introduced into national legislation. In particular, Directive 2000/60/EC of the European Parliament and the Council "On establishing the framework for Community activities in the field of water policy" dated October 23, 2000 (Water Framework Directive) [58]; Directive 2006/118/EC of the European Parliament and of the Council of the European Union on the protection of underground water against pollution and depletion, Strasbourg, December 12, 2006 [61].

Taking into account Directive 2020/2184 of the European Parliament and the Council of the European Union dated December 16, 2020 on the water quality intended for human consumption (new version) [62][1], it is possible to state that the national legislation is approaching the current standards of the water policy of the European Union. Thus, on February 15, 2022, the Verkhovna Rada adopted the Law of Ukraine "On the National Targeted Social Program "Drinking Water of Ukraine" for 2022-2026" [63]. The law provides for the sustainable development and reconstruction of the centralized water supply and drainage systems in a town, as well as the provision of sufficient drinking water quality to the residents of communities.

The Cabinet of Ministers of Ukraine approved the Water Strategy of Ukraine for the period until 2050 and the operational plan for its implementation

[1] The Directive does not apply to natural mineral waters (Directive 2009/54/EC) and waters that are medicinal products (within the meaning of Directive 2001/83/EC) In addition, sea vessels that desalinize water, carry passengers and act as water suppliers, subject only to Articles 1-6 and Articles 9, 10, 13 and 14 of this Directive and the relevant annexes to it.

[64]. This is an extremely important document for Ukraine on the way to fulfilling its international obligations in the field of "water" security of the country, the Association Agreement between Ukraine and the EU, and the UN General Assembly Resolution: Global Sustainable Development Goals by 2030. However, the opinion of M. Khvesyk, L. Levkovska, and V. Mandzyk should be supported: "... the algorithms for using many of the proposed mechanisms and approaches are not yet sufficiently institutionalized today, so they cannot be quickly implemented in water management and water protection practice. Mechanisms for periodic review of the main principles and objectives of the strategy should also be given regarding the possible new global and local challenges and conditions" [65].

Legal regulation of relations on the use and protection of underground water is carried out by the norms of various branches of legislation, first of all, by strategic planning documents. Thus, the Water Strategy of Ukraine for the period up to 2050 defines the problems of accounting, state control, protection and use, including groundwater. The goal is to ensure equal access to high-quality drinking water that is safe for human health. But taking into account the decrease in the volumes of fresh water resources of sufficient quality available for use, this document should have included measures to separate technical, household and purely drinking water supply.

Legal assurance of drinking water quality is carried out in Ukraine on the basis of State sanitary norms and rules (DSanPiN 2.2.4-171-10 Hygienic requirements for drinking water intended for human consumption) [2], DSTU 4808:2007 Sources of centralized drinking water supply. Hygienic and ecological requirements for water quality and selection rules dated May 7, 2007 No. 144 [66; 67], DSTU 7525:2014 Drinking water. Requirements and methods of quality control [68]. On April 22, 2022 the Order of the Ministry of Health of Ukraine No. 683 "On the approval of State sanitary norms and rules “Safety indicators and separate indicators of the quality of drinking water in conditions of martial law and emergency situations of a different nature”" was adopted [69].

The authors agrees with V.N. Pribylova, who states that the regulation systems of drinking water quality in different countries with different conditions of water supply and national characteristics of natural and socio-economic factors require analysis in order to adapt general approaches to local and regional conditions, in particular, Ukraine [70].

### *The concept of underground drinking water as an object of legal relations for protection and use*

Article 1 of the Water Code of Ukraine contains the definition of the *water object* as a natural or artificially created element of the environment in

which water is concentrated (sea, estuary, river, stream, lake, reservoir, pond, channel (except for a channel on irrigation and drainage systems), as well as an aquifer horizon); *underground water* refers to water existing below the Earth surface in layers of rocks on the upper part of the Earth crust in all physical states; water quality refers to the characteristics of the composition and properties of water, which determines its suitability for specific purposes of use [1].

The feature of underground water as an object of legal regulation is that it is considered by the current legislation as an element of subsoil, water, etc. Therefore, the difficulty in legal regulation of their use and protection lies in the need to apply norms of several subbranches of environmental law. Underground water as minerals has a dual legal regime: according to the Water Code of Ukraine, it is included in the State Water Fund, and according to the Water Code of Ukraine on Subsoil, it is included in minerals of national importance [40]. This position is also taken by the Supreme Court of Ukraine [71].

Legal regulation of the use and protection of underground water occurs in water, land and subsoil legislation having inter-subsector nature of the legal regulation of these legal relations. It should also be noted that the imperfection of legal regulation can exacerbate the problem of implementing legal norms in the specified sphere of relations and lead to collisions and contradictions. Therefore, research concerning the interaction of legal norms of the specified subbranches of environmental law in the process of legal regulation of the use and protection of underground drinking water is relevant.

The legislation on subsoil contains norms regulating relations in the field of geological study, use and protection of underground water. It should be noted that the boundaries and status of underground water deposits are quite conditional. There are three zones of sanitary protection and the intermediate one, namely the second zone, is defined for these boundaries. Deposits of other minerals have clear spatial boundaries. According to the list of minerals of national importance, approved by the Resolution of the Cabinet of Ministers of Ukraine [72], fresh underground waters belong to the group of minerals of national importance and belong to the subsurface. The classification of reserves and mineral resources of the State Subsoil Fund was approved by the Resolution of the Cabinet of Ministers of Ukraine [73].

The instruction on the application of the classification of mineral reserves and resources of the state subsoil fund to mineral underground water deposits establishes groups of mineral underground water and categories of

deposits (in particular, Category I – deposits of unique mineral groundwater, Category II – deposits of rare mineral underground water) [74].

National classifier DK 008:2007 "Classifier of useful of minerals" is a component of the national classifiers complex. It provides organized and unified information on solid, liquid and gaseous minerals that are used or may be used in the future, with their codes. The Classifier refers underground waters (drinking, mineral, industrial, thermal, technical) as minerals. It defines the concepts of: "underground water" is water existing below the level of the Earth's surface in layers of rocks on the upper part of the Earth's crust in all physical states (3.1); "underground drinking water" meaning underground water intended to meet the drinking and household needs of the population, as well as the food industry and animal husbandry. Qualitative characteristics of underground drinking water in its natural state or after special water treatment must meet the requirements established by relevant national standards, environmental safety standards for water use and sanitary standards (clause 3.1.1) [75].

The Law of Ukraine "On Environmental Protection" (Art. 38) stipulates that the use of natural resources in Ukraine is carried out in the order of general and special use of natural resources [76]. The use of water resources can be of two types – general and special (Art. 46 of the Water Code of Ukraine) [1].

While implementating special water use to meet the drinking and domestic needs of the population according to centralized water supply of enterprises, institutions and organizations in charge of drinking and household water supply pipes water dranaige is made directly from water bodies regarding the approved water intake projects structures, water quality standards and permits for special water use. These enterprises, institutions and organizations are obliged to constantly monitor water quality in water bodies, maintain the sanitary protection zone of the water intake in proper condition and notify the relevant state bodies of executive power and local self-government bodies about deviations from the established standards and regulations of water quality. Water users must install a local network of observation wells at centralized underground water intakes within their deposits and in adjacent territories (Art. 59 of the Water Code of Ukraine) [1].

When using water for drinking and household needs bydecentralized water supply, legal entities and individuals take it directly from surface or underground water bodies in the order of general and special water use (Art. 60 of the Water Code of Ukraine) [1].

The current legislation stipulates the obligation of the business entity to obtain a permit for special water use and a special permit to use a subsoil area. The use of underground water not only for meeting economic and

domestic needs, but also for production requires obtaining the appropriate permit [77]. At the same time, a special permit for the use of subsoil gives the right to extract underground water, and a permit for special water use – the right to use it (clause 6.5) [78].

The procedure for granting a special permit for subsoil use is regulated by Art. 16, $16^1$-$16^6$ of the Civil Code on the Subsoil. The State register of special permits for the use of subsoil is maintained [79]. The right to use the subsoil is approved by the act on the granting mining concessions, the receipt of which is regulated by the Procedure for the granting of mining concessions, approved by the Resolution of the Cabinet of Ministers of Ukraine dated January 27, 1995 No. 59 [80].

The analysis of the norms of the subsoil legislation allows to conclude that the extraction of underground water can be attributed to the extraction of minerals, for the implementation of which it is necessary to obtain a special permit for the use of subsoil, and in the case of extraction of mineral water, also a mining diversion (Articles 17, 23 of the Water Code of Ukraine on Subsoil) [81].

The legislation also provides for the need to issue a permit for special water use in accordance with the Procedure for Issuing Permits for Special Water Use, approved by Resolution No. 321 of the Cabinet of Ministers of Ukraine dated March 13, 2002 [82].

The draft Law of Ukraine dated May 20, 2016 No. 4347 On Amendments to the Water Code of Ukraine on Subsoils (regarding the optionality of studying subsoil in certain cases of groundwater extraction) deserves attention [83]. This document substantiates the expediency of introducing a legal norm on the possibility of extracting underground water without carrying out a geological study in the amount of up to 300 $m^3$/day. Clause 6 of this note indicates that the adoption of such a draft law "will contribute to a significant increase in the interest of business representatives... especially in areas that need irrigation...". Extracting this amount of water with an underground supply module of up to 0.5 l/s*$km^2$ attracts underground water resources on an area of more than 3.4 $km^2$, which exceeds the area of a large village. Extraction of underground water in the specified amount can lead to a decrease in underground water levels and dehydration of wells. Instead, the performed geological study includes a forecast of such a likely impact on the environment. Therefore, the authors of the paper express the opinion that the quantity of 300 $m^3$/day is insufficiently justified and suggest to revise this quantity with the involvement of specialists.

The Law of Ukraine "On potable water and potable water supply" defines the legal, economic and organizational provisions for the functioning of the

drinking water supply system aimed at ensuring the guaranteed supply of the population with high-quality and safe water for human health, and provides a definition of drinking water [84] (this definition is also contained in State sanitary standards and rules "Hygienic requirements for drinking water intended for human consumption" (DSanPiN 2.2.4-171-10 [2]). Namely, drinking water is water intended for human consumption (tap water, packaged water, water from pump rooms, bottling water, water from mine wells and catchments), for use by consumers to meet physiological, sanitary and hygienic, household and economic needs, as well as for the production of goods that require its use and if its composition meets the hygienic requirements according to organoleptic, microbiological, parasitological, chemical, physical and radiation indicators. Drinking water is not considered a food product in the drinking water supply system and in drinking water quality compliance points (Art. 1) [84].

A source of drinking water supply is a water object, which water is used for drinking water supply after appropriate treatment or without it according to the mentioned Law of Ukraine (Art. 1). Sources of drinking water supply must have passports issued in accordance with the procedure established by law. The list of water quality indicators in the passport of the drinking water source supply must correspond to the list determined by state sanitary norms and rules (Art. 16) [84]. According to DerzhSaNPiN 2.2.4-171-10, the production of drinking water is carried out regarding the regulatory and technical document and in accordance with the technological regulation or another document describing the technological process of drinking water production that has passed the state sanitary-epidemiological examination and received a positive conclusion [2]. Control of compliance with the regulations is carried out by the company itself. Since the source of water supply can be under the influence of various sources of pollution, it is advisable to accompany the control of water production regulations with the control of water quality in pure water reservoirs (PRW) according to the integral indicator – the toxicity index.

*Underground drinking water* is defined as underground water intended for meeting the drinking and household needs of the population, as well as the food industry and animal husbandry; quality characteristics of potable underground water in its natural state or after special water treatment must meet the requirements established by the relevant state standards, environmental safety standards for water use and sanitary standards (1.5.2). The quality of underground water in the course of its operation may remain unchanged or change over time both under steady and unsteady filtration regimes. Potential changes in water quality are caused by the hydrodynamic and hydrochemical conditions of formation of operational

reserves of the deposit, the presence of sources of pollution, conditions and volumes of underground water extraction (1.13). The selection and assessment of the source suitability for drinking water supply should be carried out in accordance with the current state standards, norms of ecological safety of water use and sanitary standards (2.1) [85].

### *Legal provision of safety and quality of underground drinking water of Ukraine: problematic issues and solutions*

The right to a natural environment that is safe for life and health is of key importance among the environmental rights of Ukrainian citizens enshrined in the Law of Ukraine "On Environmental Protection" (Art. 9) [76]. It is one of the main fundamental human rights, which is fixed in the Constitution of Ukraine (Art. 50) as noted by N.R. Malysheva and M.I. Jerofejev. An environment that is safe for human life and health is such a state of the natural environment that ensures the prevention of the ecological deterioration and the danger to the daily lives of the ppulation. The criteria for a safe state of the environment are determined by ecological standards and regulations, also technical, sanitary and hygienic, construction and other norms and rules containing requirements for environmental protection [86, p. 55]. Regarding water bodies in Ukraine, the Water Code establishes standards for the ecological safety of water use (Art. 36 of the Water Code of Ukraine).

Water is used to meet the drinking and household needs of the population and its quality characteristics correspond to the established standards of environmental safety of water use and sanitary standards. Water users have the right to demand from the water owner (water supplier) information about compliance of the drinking water quality with the norms (Art. 58 of the Water Code of Ukraine). In the case of non-compliance of the quality characteristics of these waters with the established standards of ecological safety of water use and sanitary standards, their use shall be terminated by decision of the central body of executive power ensuring the formation of state policy in the field of health protection (according to the Law of Ukraine "On the Public Health System") [87].

Art. 26 of the Law of Ukraine contains medical and sanitary requirements regarding the safety of water bodies and drinking water for human health and life. In particular, water bodies used for drinking and household water supply, as well as for medical, health and recreational purposes, including water bodies located within settlements, should not be sources of biological, chemical and physical factors of harmful influence on a person (Art. 26(1)). The safety criteria of water bodies for humans, including maximum permissible concentrations in water of chemical, biological substances,

pathogenic and conditionally pathogenic microorganisms, and the level of radiation background are established by sanitary legislation and determined by state medical and sanitary rules and regulations (Art. 26(2)) [87].

Art. 9 of the Law of Ukraine "On potable water and potable water supply" stipulates that every user of drinking water is guaranteed by the state right of free access to information about the quality of drinking water [84]. For this purpose, the central body of executive power implementing state policy in the field of housing and communal services prepares and publishes annually the National Report on the quality of drinking water and the state of drinking water supply in Ukraine [88], provides the interested bodies of the state authorities, public associations, enterprises, institutions, organizations and citizens with information about cases and causes of drinking water pollution, the procedure for calculating tariffs for centralized water supply services according to the procedure established by the Cabinet of Ministers of Ukraine. In case the quality of drinking water does not meet the requirements of state sanitary standards and regulations by individual indicators, local self-government bodies inform consumers through the media about non-compliance with the quality indicators of drinking water and take measures related to averting threats to human health.

Ecological norms for the quality of drinking water should prevent the adverse impact of the water factor on the quality of human life and health. The *ecological standard regarding the water quality of surface and underground water bodies* (clause 2 of Art. 35 of the Water Code of Ukraine) is established among the standards in the field of water use, protection and reproduction of water resources. It contains scientifically based values on concentrations of pollutants and indicators of water quality (general physical, biological, chemical, radiation), assess the ecological and chemical conditions of the surface waters and underground waters to determine water protection measures. The Ministry of Environmental Protection and Natural Resources of Ukraine (Ministry of the Environment) develops and approves the specified standard (Art. 37 of the Water Code of Ukraine, clause 117 of the Resolution of the Cabinet of Ministers of Ukraine No. 614 dated June 25, 2020 "Some issues of the Ministry of Environmental Protection and Natural Resources" [1; 89]). The rules for the protection of underground waters also determines *ecological water quality standards for groundwater bodies* (clause 4 of the general provisions) [59]. The List of pollutants for determining the chemical state of surface and underground water bodies and the ecological potential of artificial or significantly altered surface water bodies was approved by the Order of the Ministry of Natural Resources of Ukraine dated February 6, 2017 No. 45 [90].

The Water Code of Ukraine determines the state of groundwater by the categories "good" and "bad" based on the degree of their purity or pollution (Art. 212). According to the authors, it is possible to apply it to underground water in general. But fresh drinking water is the primary source of drinking water supply, therefore Art. $21^2$ is proposed to be supplemented with a paragraph on underground drinking water quality with an indication of its classification not by the quality categories "good" or "bad", but by four classes according to the state standard DSTU 4808: 2007 "Sources of centralized drinking water supply. Hygienic and ecological requirements for water quality and selection rules" [67].

The Law of Ukraine "On potable water and potable water supply" provides, in particular, for the environmental water quality standards of drinking water supply sources (Art. 29) [84].

The procedure, approved by the Resolution of the Cabinet of Ministers of Ukraine, determines the requirements for the development and approval of drinking water supply standards in the case of normal functioning of drinking water supply systems, in case of their violation, and in emergency situations of technogenic or natural character [91].

Prof. V.V. Jakovlev draws attention to the inconsistency of national quality standards with the peculiarities of the chemical composition of underground waters of Ukraine, in particular, the content of silicon. Also, in his doctoral dissertation, he raises the question of the need to establish lower values of the contents of all biophilic elements in drinking water [92]. At present, drinking water quality standards have established lower content values only for 9 such biophilic elements, but there are 29 of them in total [93]. The fact is that "artificial" water is obtained during water treatment, especially if using the reverse osmosis method, when removing all dissolved components from the water, including those necessary for living organisms.

Scientists S.M. Urasova and S.O. Kuryanova have comments on the DSTU standard 4808:2007. In accordance with European standards, the quality of water is considered to meet the requirements for water bodies for drinking purposes, if during the considered time period 90 % of the samples do not exceed the established standards. This requirement is stricter than the requirement of domestic norms: if the average value of the indicator coincides with the norm (permissible according to domestic norms), the number of MPC exceedances will be approximately 50 %, according to European norms no more than 10 % is permissible. In order to bring the requirements of domestic standards into compliance with European standards, it is sufficient to use not the average values of the indicators, but values with a margin of 10 %. Then, if the value of the indicator coincides with the norm, there will

be no more than 10% of the maximum limit exceeded for the considered period [94]. Therefore, the assessment of the water quality class according to DSTU 4808:2007 will reflect the actual state of the water body, if: instead of the average (and worst) values of the indicators, the value of the component concentration with a margin of 10 % is used.

Clause 3.9 DerzhSaNPiN 2.2.4-171-10 establishes that in case of contamination of drinking water with unknown toxic compounds and chemical substances, for the determination of which there are no research methods, it is recommended to use an auxiliary integral (express) indicator of the quality of drinking water – the index of toxicity of drinking water, calculated according to the results of biological tests (biotesting) [2].

Attention should be paid to the insufficient level of recommendations for drinking water quality control in emergency conditions. Therefore, in connection with the technical and organizational complexity of controlling all possible pollutants in crisis periods of natural disasters, large-scale ecological disasters, military operations, it is proposed to include water biotesting in the mandatory list of controlled indicators.

According to DSTU 4808:2008 "Sources of centralized drinking water supply. Hygienic and ecological requirements for water quality and selection rules" dated July 05, 2007 No. 144 the quality of underground water is divided into classes according to a semi-quantitative criterion, which has specific ecological and hygienic significance, and is a clear basis for the application of different levels (by complexity and the degree of intervention in the water composition) [67]. The latter is also related to economic parameters, that is, to the cost of water treatment and the cost of the prepared water. Given the limited resources of natural high-quality underground drinking water, a differential approach to setting fees for this resource depending on the quality class is appropriate. At the same time, the quality class must be determined during the geological and economic assessment of reserves (if a special permit for the use of subsoil is required) or during the preparation of documents for special water use (if a permit for the use of subsoil is not required). For this, the necessary changes and additions should be made to the regulatory documents of the State Commission of Ukraine on Mineral Reserves in the part of preparing materials for the geological and economic assessment of drinking and technical water deposits.

It is appropriate to point out the quantitative predominance of the water volume for economic and domestic purposes over the water volume for purely drinking purposes from the point of view of saving resources of high-quality drinking water. Therefore, it is considered necessary to provide

a centralized water supply with standards of quality of economic and domestic water, which must be bacteriologically safe. In fact, none of centralized systems of domestic and drinking water supply in Ukraine has water quality that meet the standard, regardless of the use of one or another water treatment. If even such water treatment will ensure the standard quality of drinking water at the stations, then this quality will be reduced in the water supply systems for homes. The experience of Western countries is based on legal economic factors and proves that this problem should be solved precisely by separating household and drinking water supply. In some large cities (for example, Paris) a separate water pipeline is installed, in a number of cities (in Ukraine, this is Kyiv, Odesa, Dnipro, Kharkiv, etc.) drinking water is sold in pump rooms, special kiosks, and transported by special tanker trucks to places of dense population.

Taking into account such development of real water supply to the population, legal regulation in this area should be improved accordingly. Therefore, when separating domestic and purely drinking water supply, there is an urgent need to develop water quality standards for domestic centralized water supply.

According to Art. 95 of the Water Code of Ukraine, all waters (water bodies) are subject to protection from pollution, clogging, depletion and other actions that may worsen the conditions of water supply, harm human health and the surrounding natural environment as a result of changes in the physical and chemical properties of water, reduction its ability to natural purification, violation of the hydrological and hydrogeological regime of waters. The activities of individuals and legal entities that cause damage to water (water bodies) may be terminated by a court decision.

Enterprises, institutions and organizations whose activities can negatively affect the state of underground water, especially those that operate storage tanks for industrial, domestic and agricultural effluents or waste, must take measures to prevent underground water pollution, as well as equip local networks of observation wells to monitor the quality of these waters (Art. 105 of the Water Code of Ukraine) [1].

The rules on the protection of underground water establish requirements and a list of measures for the protection of underground water, which are aimed at preventing and eliminating the consequences of their pollution, clogging, exhaustion and depletion, at preserving the qualitative and quantitative state of underground water, preventing a decrease in their ability to recover naturally, violation of the hydrogeological regime of waters (clause 4 of General Provisions) [59]. They must also comply with other current normative acts in the field under consideration [95-97].

According to Art. 87 of the Water Code of Ukraine in order to create a favorable regime for water bodies, prevent their pollution, clogging and depletion, destruction of aquatic plants and animals, as well as reduction of flow fluctuations along rivers, seas and around lakes, reservoirs and other bodies of water, water protection zones are established.

The rules of underground water protection (clause 1 IV Sanitary protection zones) establish sanitary protection zones (which are part of water protection zones) for centralized water supply, sanitary protection districts for medical and recreational needs.

According to V.V. Jakovlev it is expedient to create zones of sanitary protection, in particular, for catchments of natural springs, which are the sources of centralized and non-centralized water supply in a number of villages and towns of Ukraine [92]. Since water extracted from wells and shallow wells is almost everywhere contaminated [9], it is expedient and extremely necessary for local self-government bodies to periodically monitor the quality of water in wells and shallow wells on private plots of land (estates), in sources of collective use without pipelines and in street wells. According to Art. 60 of the Water Code of Ukraine "Periodic control for the quality of water used for non-centralized water supply of the population is carried out by enterprises, institutions, organizations accredited by the National Accreditation Agency of Ukraine (conformity assessment bodies), at the expense of water users". In order to accustom the population to the corresponding target costs, it is proposed to establish a temporary procedure for payment of the specified water quality control from the above-mentioned non-centralized sources of water supply at the expense of the state. This will increase the awareness of the population about the quality of water in wells and shallow wells leading to the continuation of personal payment for water quality control, or to the refusal to use low-quality water for drinking purposes. Both the first and second options are positive.

Control over the use and protection of water and the reproduction of water resources consists in ensuring compliance by all legal entities and individuals with the requirements of water legislation (Art. 18 of the Water Code of Ukraine). The national environmental legislation provides for the implementation of state and public control over the use and protection of water and the reproduction of water resources, which scientists paid attention to while studying the specifics of its implementation [13]. The procedure for state control over the use and protection of water and the reproduction of water resources is determined by this Code and other acts of legislation (Art. 19, Art. 20 of the Water Code of Ukraine).

Natural aquifers (layers of clay rocks, marls, thick chalk strata, etc.) are not completely impermeable. Therefore, these barriers provide protection from contamination from the surface (and from all technogenic objects of contamination) for a certain time, which in many cases has already passed. That is, depending on the amount of technogenic load, the distance from the polluting objects of natural water bodies, the intensity of extraction, the increase in the depth of pollution in the process of water exchange is a function of time. Therefore, it is not possible to completely exclude or significantly reduce the level of the latter, especially in areas located within industrial or cottage buildings. Therefore, in order to preserve and forecast the quality of drinking water for the future, it is necessary to ensure systematic and effective control of the ecological state of underground water throughout the country to the entire depth of the zone of active water exchange (zone of fresh underground water circulation), fixed at the legislative level. At the existing water intakes, a system of observation (monitoring) of the quality of underground water on the way to the catchment facilities should be established, for which observation wells should be installed. For these purposes, significant funds are not required, and the existing research and production potential can be used to implement the measures.

In connection with the possible threat of intentional water pollution of transboundary watercourses, it is necessary to make additions to the resolution of the Cabinet of Ministers of Ukraine "On the approval of the rules for the protection of surface waters from pollution by return waters" dated March 25, 1999 No. 465 [98]. Underground water reserves are hydraulically and filterally connected to surface waters. It should be noted that most of the rivers in Ukraine are transboundary, their flow is formed within the borders of Russia and Belarus. According to Clause 25, water quality control in transboundary water bodies is carried out in accordance with international agreements. It is not clear how this control will be carried out in the context of military operations. It is proposed to supplement paragraph 25 of the Resolution with a provision to provide for the change of water quality control under an international agreement to unilateral control for the period when the bilateral agreement ceases to be in effect.

The opinion of N.M. Obijuh should be supported regarding that the legislation of Ukraine does not provide specifics for the implementation of state environmental control over the use and protection of underground water. Therefore, state control in this area does not actually take place. In this regard, the author reasonedly proposes the creation and legislative consolidation of the activities of a special competent body, authorized to

exercise state control over the use and protection of groundwater, as part of the State Geology and Subsoil Service of Ukraine [17].

The task of state water accounting is to establish information (by forming a database) about the quantity and quality of water, as well as data about water use, on the basis of which water is distributed among water users and measures are developed for the rational use and protection of water and the reproduction of water resources (Art. 24 of the Water Code of Ukraine). State accounting of water use is conducted in accordance with the approved Procedure [99] in order to systematize data on the intake and water use, the discharge of return water and pollutants, the availability of circulating water supply systems and their capacity, as well as on the current wastewater treatment systems and their efficiency (Art. 25 of the Water Code of Ukraine).

State accounting of underground water is carried out by the central body of executive power, which implements state policy in the field of geological study and rational use of subsoil (the State Service of Geology and Subsoil of Ukraine), by observing the quantitative and qualitative characteristics of underground water according to the program approved by the central body of executive power ensuring the formation of state policy in the field of environmental protection (Art. 27 of the Water Code of Ukraine). Currently, water accounting is conducted according to quantitative indicators, as for qualitative indicators, the 7-GR reporting forms, although they contain data on qualitative indicators of underground water, but this information is not processed at the proper level.

Considering a shortage of high-quality drinking water resources, the task is to account not only the total resources of fresh underground water, but also to allocate that share of resources of the highest quality drinking water, as it was done by V.V. Jakovlev in his doctoral dissertation [92], where the resources of well-protected high-quality drinking water were identified in the chalky aquifers of the Dnipro-Donetsk artesian basin and soft underground waters with low mineralization within the sandy river terraces were defined based on objective data.

State water monitoring is carried out in order to ensure the collection, processing, preservation and analysis of information on the state of water, forecasting its changes and the development of scientifically based recommendations for making management decisions in the field of water use, protection and reproduction of water resources. The components of state water monitoring are the monitoring of biological, hydromorphological, chemical and physico-chemical indicators (Art. 21 of the Water Code of Ukraine). State water monitoring is carried out in accordance with

the procedure determined by the Cabinet of Ministers of Ukraine [100]. Underground water monitoring is a type of subsoil use monitoring that is carried out within the competence of the State Geology and Subsoil Service of Ukraine. However, the research of N.M. Obijuh is supported by authors as she proposes the absence of a regulatory act that would regulate the procedure for monitoring underground water and that fact indicates the ineffectiveness of state monitoring of underground water, including drinking water [17]. Unfortunately, nothing has changed in this situation since the proposal was made by the scientist.

The issue of monitoring the underground hydrosphere in our country is very acute, since underground water as a component of the hydrosphere suffers from progressive pollution. One of the aspects of the problem is the widespread rapid contamination of underground water with nitrogen compounds and the reasons are the almost complete absence of drainage systems in rural areas and the increasing use of nitrogen fertilizers in agriculture. It is significant that nitrate pollution of underground water is more dangerous than for surface water, since the processes of natural self-cleaning in the underground hydrosphere are very slow compared to surface water bodies. According to the data of the public organization "Ekodiya", the State Geological Survey has completely stopped monitoring the quality of underground water [101]. The state has missed all deadlines for the implementation of the EU Nitrate Directive, which is necessary to prevent the pollution of water resources. According to Art. 5 clause 6 of the Directive, "Member States shall develop and implement appropriate monitoring programs in order to assess the effectiveness of the action programs developed in accordance with this article. Member States applying Art. 5 on their national territory, must monitor the nitrate content in water (surface and underground water) at selected measurement points, which makes it possible to determine the degree of water pollution by nitrates from agricultural sources" [7]. On the other hand, according to Ekodiya, "the number of surveys of mine wells (this is the highest level of underground water, which suffers the most from the impact of economic activity) decreased by almost half after 2019 and continues to gradually decrease every year", added M. Dyachuk, referring to the National Report on drinking water quality for 2021 [101].

The problem of underground water quality is currently relevant, because wells and shallow wells are the main source of drinking water in the Ukrainian countryside. Therefore, on the example of just this one aspect of the problem of underground water quality, it can be seen that underground water monitoring should be restored first of all at the state level, which is a necessary basis for the restoration of regional and facility monitoring.

The largest compilation of methodological documents related to underground water monitoring was created at the Ukrainian State Geological and Survey Institute, which has many years of practice in processing materials for such monitoring and issuing annual Bulletins on the state of underground water in Ukraine. Bulletins were issued by the SRDE "Geoinform Ukraine" [102]. At the moment, the geological service has stopped monitoring the special network of regime wells, and therefore there is no data for bulletins (where there were forecasts of underground water levels). The Special Geoinform Unit will resume issuing bulletins and observations should resume as well.

A huge problem is also represented by thousands of emergency water intake wells, which are ways of underground water pollution. In order to intensify the process of liquidation of numerous emergency wells that are on the balance sheet or written off, but not plugged, it is necessary to attract funds from various enterprises and departments, with the coordinating role of the Ministry of Environment of Ukraine. Therefore, it is appropriate to propose a separate order of the Ministry of Environment of Ukraine to organize an immediate accounting of such wells, and to ensure control of their planned sanitary and technical tamponade.

**Conclusions**

Taking into account the analysis of the legal regulation regarding the protection and quality assurance of underground drinking water, it is necessary to emphasize the need to improve, first of all, environmental (including water, natural) legislation. Thus, the authors propose to make changes and additions to the legislation dedicated to the regulation of the specified water relations in order to eliminate duplication, unclear wording and gaps:

The Art. $21^2$ of the Water Code of Ukraine should be supplemented with a paragraph on underground drinking water quality with an instruction to classify it not by the categories "good" or "bad" quality, but in 4 classes according to the state standard DSTU 4808.2007. Sources of centralized drinking water supply. Hygienic and ecological requirements for water quality and selection rules.

Water biotesting should be included in the mandatory list of controlled indicators due to the technical and organizational complexity of controlling all possible pollutants during crisis periods of natural disasters, large-scale environmental disasters and military operations.

Taking into account the developed underground water quality criteria (DSTU 4808.2007) and the limited resources of natural, high-quality drinking underground water within Ukraine, the authors introduce: 1) a differential approach to setting fees for this resource depending on the

quality class; 2) separation of standards for household and purely drinking water supply to the population at the legislative level. At the same time, the quality class must be determined during the geological and economic assessment of reserves (if a special permit for the use of subsoil is required) or while preparating documents for special water use (if a permit for the use of subsoil is not required). The necessary changes and additions should be made to the regulatory documents of the State Commission of Ukraine on Mineral Reserves in the part of preparing materials for the geological and economic assessment of drinking and technical water deposits.

Drinking water quality standards should be improved in terms of expanding the list of dissolved biophilic microcomponents.

New sanitary protection zones should be created for the catchments of natural springs, which are the sources of centralized and non-centralized water supply in a number of villages and towns of Ukraine. Local self-government bodies should organize periodic quality control of water extracted from individual wells and shallow wells on private plots of land (estates), from sources of collective use without pipelines, and from street wells.

Systematic and effective control of the ecological state and water quality should be implemented at the legislative level throughout the territory of Ukraine and throughout the depth of the zone of active water exchange (zone of fresh underground water circulation).

The Ministry of Environmental Protection and Natural Resources of Ukraine was ordered by a separate order to organize the accounting of emergency wells (which are channels of contamination of drinking groundwater), and to control their planned sanitary and technical tamponage.

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# International Experience of Implementing E-Justice: Best Practices and Challenges

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**Abstract**
*The implementation of e-justice is an important aspect of the modernization of judicial systems around the world. Research and analysis of international experience allows to identify best practices and challenges faced by other countries during the implementation of electronic justice, which will help develop own strategy for reforming the judicial system or adapt them for Ukraine. That is why, the purpose of this article is to analyze the international experience of implementing electronic justice, classify countries according to the degree of development of e-justice, as well as identify best practices that can be applied in Ukraine. Conducting this research is extremely important and relevant, as it will reveal the level of implementation of electronic technologies in the judicial system of different countries of the world and determine the best strategies and practices, as well as factors that slow down this process. The research methodology was formed by a set of general scientific and special methods of cognition, namely, methods of dialectics, system analysis, comparative legal, classification and typology, formal logical, historical and empirical methods. The article analyzes in detail the experience of implementing e-justice in foreign countries, in particular in Estonia, Lithuania, Austria, Germany, Poland, Moldova, Greece, and Serbia. Attention is focused on the lack of a comprehensive approach to assessing the level of implementation of electronic justice in foreign countries in the scientific space, and the author's classification of countries according to the degree of implementation of electronic justice, which are divided into countries with a high, medium and low level of such implementation, is proposed. Based on the results of the research, it was concluded that countries with a high level of implementation of e-justice have a well-developed infrastructure and legal framework. Countries with an average level of e-justice implementation are actively working on the implementation of e-justice, but still have certain aspects for improvement. Conversely, low-implementation countries face a number of obstacles and need significant efforts to improve their judicial systems.*

***Keywords:*** *electronic justice; e-justice; classification; international experience; judiciary.*

# Міжнародний досвід впровадження електронного правосуддя: кращі практики та виклики

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**Анотація**
*Впровадження електронного правосуддя є важливим аспектом модернізації судових систем у всьому світі. Дослідження та аналіз міжнародного досвіду дозволяє виявити кращі практики та виклики, з якими стикалися інші країни під час впровадження електронного правосуддя, що допоможе розробити власну стратегію реформування судової системи або адаптувати їх для України. Саме тому метою цієї статті є аналіз міжнародного досвіду впровадження електронного правосуддя, класифікація країн за ступенем розвитку е-правосуддя, а також виявлення кращих практик, які можуть бути застосовані в Україні. Проведення дослідження є надзвичайно важливим й актуальним, оскільки дозволить виявити рівень впровадження електронних технологій у судову систему різних країн світу, зокрема європейських, визначити найкращі стратегії та практики, а також чинники, які сповільнюють цей процес. Методику дослідження утворили сукупність загальнонаукових та спеціальних методів пізнання, а саме: методи діалектики, системного аналізу, порівняльно-правовий, класифікації та типології, формально-логічний, історичний та емпіричні методи. У статті детально проаналізовано досвід впровадження е-правосуддя у зарубіжних країнах, зокрема в Естонії, Литві, Австрії, Німеччині, Польщі, Молдові, Греції та Сербії. Акцентовано увагу на відсутності в науковому просторі комплексного підходу до оцінки рівня впровадження електронного правосуддя в зарубіжних країнах та запропоновано авторську класифікацію країн за ступенем впровадження електронного правосуддя, які поділяються на країни з високим, середнім і низьким рівнем такого впровадження. За результатами проведеного дослідження зроблено висновок, що країни з високим рівнем впровадження е-правосуддя мають добре розвинену інфраструктуру та законодавчу базу. Країни з середнім рівнем впровадження активно працюють над впровадженням е-правосуддя, але ще мають певні аспекти для вдосконалення. Натомість країни з низьким рівнем впровадження стикаються з низкою перешкод і потребують значних зусиль для вдосконалення своїх судових систем.*

***Ключові слова:*** *електронне правосуддя; е-правосуддя; класифікація; міжнародний досвід; судова система.*

## Introduction

In today's world, the global digitalization process covers all spheres of social life, and justice is no exception. The implementation of the latest

technologies into the judicial system led to the emergence of a new modern way of administering justice - electronic (e-justice), which has become an integral part of the modernization of the judicial systems of many countries. The use of modern technologies in the judicial sphere opens up significant opportunities for increasing the efficiency, transparency and accessibility of justice. They contribute to the automation of many aspects of judicial proceedings, including electronic document flow, access to court decisions online, and conducting court hearings using video conferencing. This makes it possible to significantly reduce the costs of time and resources, as well as to minimize the human factor, which can affect the objectivity of the judicial process.

At the same time, it is necessary to take into account that the implementation of electronic justice is a complex process that requires a comprehensive approach and consideration of international experience. In particular, at the current stage of development, many foreign countries have already implemented or are actively implementing various elements of electronic justice. For example, the countries of Northern Europe (Denmark, Finland, Norway) have achieved significant success in this area thanks to a comprehensive approach and integration of various information systems. At the same time, as in other, less developed European countries, the implementation of e-justice faces numerous challenges. That is why the study of international experience will reveal the best strategies and practices that ensure the successful implementation and functioning of e-justice. Moreover, successful examples from different countries of the world can serve as reliable guidelines for building an effective electronic justice system in Ukraine.

In this context, we can agree with the point of view of I. Kalancha, who notes that our state needs to make more active use of the positive experience of European countries, which requires more in-depth scientific and practical research on this issue [1].

The purpose of this work is to analyze the international experience of implementing e-justice, classify countries according to the degree of e-justice development, as well as identify best practices that can be applied in Ukraine. In this context, the task of this study is to assess the current state of implementation of electronic justice in various European countries, their structure, functionality and effectiveness; determination of the main criteria for the classification of European countries according to the level of development of e-justice; identifying the best practices and strategies for the implementation of e-justice, which includes the analysis of successful examples of the implementation of e-justice, the identification of key success factors and the possibilities of adapting these practices to Ukrainian realities.

The latest scientific studies indicate a significant interest in the topic of electronic justice among both foreign and domestic authors. In the domestic scientific literature, a large number of scientific works are observed, which consider certain aspects of the problem of the implementation and functioning of electronic justice in Ukraine. Some scientific works are also devoted to the analysis of international experience in the implementation of e-justice. For example, O. Muzychuk summarizes the foreign experience of organizing court activities and elaborates on the possibilities of its use in Ukraine[2]. O. Sereda, V. Mamnitskyi, P. Kornieva, I. Cherevatenko explore the key elements of e-justice and assess the possibility of implementing electronic lawsuits in Ukraine's courts [3]. V. Pyrohovska, N. Holota, T. Kolotilova, A. Hreku, V. Kroitor analyze the challenges, advantages and prospects of digitalization of the judicial system [4]. As for foreign authors, R.K. Ahmed, K.H. Muhammed, A.O. Qadir, S.I. Arif, S. Lips analyzed the electronic court systems of Estonia and Iraqi Kurdistan, and also developed a number of important steps to be taken at various stages of the transition to the electronic court system [5]. P. Saxena analyzed how the courts in India worked during the pandemic and how modern information technologies changed the approach to the judiciary [6]. M.A. Ahmed, T. Kaya, T. Karanfiller investigate the acceptance and usage of e-court systems by regional governments in developing countries [7].

However, from the analysis of domestic and foreign scientific literature, it can be seen that today in the scientific space there is no defined classification of countries according to the degree of implementation of electronic justice and a comprehensive approach to assessing the level of implementation of electronic justice in such countries. This highlights the need for an integrated approach that will allow a better understanding of how different countries are adapting to the challenges and opportunities offered by digital justice, and to identify best practices for their implementation for Ukraine.

**Materials and Methods**

The study of the implementation of electronic justice in different countries, as well as the classification of such countries according to the degree of integration of electronic tools into the judicial system, included several key stages, each of which is aimed at obtaining new scientific results and deepening the understanding of the processes of digitalization of judicial systems. In particular, the main stages of scientific work include the collection and analysis of scientific literature, reports, regulatory acts and other sources of information in order to study the current state of implementation of electronic justice in different countries. A database of scientific articles, such as Google Scholar, was used, as well as official sources of foreign states – official websites of justice bodies of countries

that actively implement electronic justice and contain texts of legislative acts, resolutions, reports and other materials. In addition, the European e-Justice Portal was analyzed in detail, which contains information on the level of implementation of electronic technologies in the judicial system of various European countries. The next stages of the scientific work were the formation of a classification model, namely, the development of a criterion for the classification of countries according to the degree of implementation of electronic justice, the processing of collected data, the identification of main trends, problems and successful practices.

As for the methodology of scientific research, it consists of a set of general scientific and special methods of cognition. The methodological basis of the study is the *dialectical method* of scientific knowledge, which made it possible to consider the development of electronic justice in foreign countries in dynamics, revealing not only the current state, but also trends and prospects for development. This method helped to analyze how different factors influence the implementation of e-justice in different countries and what changes may occur in the future. The *method of system analysis* was used to study a large amount of information, including scientific literature, reports, regulatory acts and other sources of information. This made it possible to systematize existing knowledge and identify key aspects of the implementation of electronic justice. The system analysis helped to identify the relationships between the various components of the judicial systems and the technologies used. The *comparative legal method* was used to analyze the experience of different countries. The comparison revealed common problems and successful solutions used in different jurisdictions. This helped determine which approaches were most effective and how they can be adapted to Ukrainian conditions. The *method of classification and typology* was used to develop a classification model of countries according to the degree of implementation of electronic justice. This method made it possible to structure countries according to the level of development of e-justice, which helped to highlight different levels of development and identify best practices. Thanks to this method, we were able to create a conditional classification covering various aspects of technology implementation in the judicial system. The *formal-logical method* was used to structure and systematize the data obtained in the research process, as well as to draw logical conclusions based on the analysis of the received information. This method helped in identifying internal regularities and relationships between various elements of the electronic justice system, providing a logical sequence in the construction of a classification model of countries according to the degree of implementation of electronic justice. The *historical method* of scientific knowledge was used to study the evolution of electronic justice in different countries, which made it possible

to identify the main stages and trends in the development of this field. Historical analysis helped to understand how and why certain practices and technologies were implemented and how they affected the current state of the judicial system. *Empirical methods* included observations and experiments, which allowed in practice to evaluate the functionality of various electronic justice systems, their advantages and disadvantages. Empirical research provided a deeper understanding of the real conditions of the introduction of technologies into judicial practice.

The application of these methods made it possible to provide a comprehensive approach to research, taking into account both theoretical aspects and practical results of the implementation of electronic justice in different countries. This contributed to obtaining reliable and comprehensive conclusions that can be used to improve the judicial system of Ukraine.

**Results and Discussion**

As already mentioned above, one of the most important aspects for our state in the process of developing and implementing its own electronic court systems is the study of international experience in the field of electronic justice. Analysis and study of best practices and challenges faced by other countries during the implementation of electronic justice will help to develop their own strategy for reforming the judicial system. This will not only improve access to justice for all citizens, but also increase the general level of trust in the judicial system, make it more efficient and transparent. Based on the successful practices of other countries, Ukraine can develop its own strategy that will meet the highest standards and contribute to the construction of a modern and efficient judicial system.

Analyzing the experience of other countries in the field of e-justice implementation, we believe that the classification of countries by the degree of development of e-justice can become an effective tool for evaluating their achievements and identifying best practices. Thanks to such a classification, it is possible not only to understand the current state of technology development in the judicial system of different states, but also to determine which approaches and strategies have proven to be the most successful, and how they can be adapted to Ukrainian realities. In our opinion, the classification of countries according to the degree of implementation of electronic justice can be presented as follows:
– *countries with a high level of implementation and a developed e-justice system:* these countries are characterized by full integration of e-justice, including electronic document management, automation of most court processes and a high level of cyber security. This category includes Estonia, Lithuania, Denmark, Austria, Finland and others;

– *countries with an average level of implementation of e-justice:* these countries are actively working on the implementation of e-justice, but still have aspects for improvement. Examples of such countries are Germany, Spain, Italy, Poland and others;
– *countries with a low level of implementation of e-justice:* these countries are at the initial stage of implementation or face significant challenges, such as limited funding, insufficient technical support, etc. This category includes Greece, Moldova, Serbia, Montenegro and Andorra.

We believe that the proposed classification of countries by the degree of implementation of electronic justice is an important step for understanding the global landscape of digital judicial systems. Therefore, in the future, we will take a closer look at each category of countries, analyzing their achievements, challenges and specific solutions that allowed them to achieve or not achieve success in the digitalization of justice.

### *Countries with a high level of implementation and a developed e-justice system*

Countries with a high level of implementation of electronic justice have a fully implemented and developed electronic judicial system. Such countries include Estonia, Lithuania, Denmark, Austria, Finland, France, Switzerland, the Czech Republic, Singapore, South Korea, China, Australia, etc. We consider it important to focus on the analysis of the experience of the implementation and functioning of electronic justice in European countries, as they are the closest to our legal system and are of significant interest to domestic legal researchers and legislators.

Estonia is the European leader in the field of e-governance and implementation of the concept of an e-state. Estonia is also one of the first countries in the world to successfully integrate electronic technologies into the justice system. Back in 2006, Estonia first developed a complex electronic information system, and already this state has one of the fastest electronic court proceedings in Europe.

The experience of Estonia is traditionally studied by domestic scientists and lawyers as one of the priority ones, because after the collapse of the Soviet Union, this country joined the European Union much earlier than Ukraine. That is why this country is one whose positive experience is valuable to study in the context of our research.

As A. Ivanov notes, Estonia's e-judicial system is one of the most effective in the European Union, and the national Unified Judicial Information and Telecommunication System after its full implementation should become a similar system to the one that has been operating in Estonia for many years [8].

According to O. Tereshchenko, the most suitable for implementation in Ukraine is the introduction of the foreign experience of Estonia, so it is most suitable for the implementation of such important aspects as: saving money (long-term), saving time, saving space, providing extended access to the court for judges, lawyers and participants in court cases processes [9].

The Estonian electronic court system operates through the web portal "E-toimik" (e-File system). This electronic file system is the main information system that enables the functioning of e-justice in Estonia and allows filing lawsuits online, monitoring the progress of cases, receiving electronic documents, filing appeals, etc. In order to enter the electronic file system (e-File system), the user must be authorized using an ID card or Mobile-ID. When logged into the electronic system, users only have access to the legal proceedings and data in which they are involved.

Procedural documents are submitted through the electronic system in electronic format using a digital signature. In order to file an electronic lawsuit, you need to enter the text and all the necessary data in a special form. The forms of the documents differ, but all have a similar format: general information about the case, detailed information about the parties, attached documents and payment of state duty must be provided. The court renders the decision in electronic form, protecting it with the judge's digital signature. It should be noted that along with the electronic form of court proceedings in Estonia, the traditional paper format of court proceedings is preserved.

We believe that another European country that has achieved significant success in the implementation of IT technologies in the judicial system is Lithuania. The possibility of submitting claims electronically was implemented in Lithuania as early as July 1, 2013. The electronic exchange of documents is carried out through the Lithuanian Judicial Information System (LITEKO), which can be accessed through the Public Electronic Services (PES) subsystem. LITEKO is an electronic platform that stores complete information about court cases pending in Lithuanian courts. Procedural documents can be submitted to the Lithuanian court by filling in the templates available in the LITEKO PES subsystem, or by downloading ready-made documents. You can enter the portal of electronic services using such tools as electronic banking, an identification card or an electronic signature. Also, since 2013, attorneys and attorney assistants can receive procedural court documents and familiarize themselves with administrative case materials using electronic means of communication.

The experience of the functioning of electronic justice in Austria is also interesting. In this European country, legal proceedings can be initiated

using the Electronic Judicial Movement (ERV) electronic information system. Through this system, users can submit procedural documents in electronic format. There are two ways to use the ERV system: 1) through document centers; 2) through the download service ("ERV für alle").

Regarding the first method, two-way exchange of electronic documents with the court in Austria can be carried out through special document centers. Anyone can use this service, but for this it is necessary to register in the document center and pay a fixed monthly fee for the provision of services, as well as a fee for each individual submission of documents. The basic monthly fee is about 20 euros per month, and the document transfer fee is about 30 cents. The use of this method of document exchange is usually not mandatory, but lawyers, notaries, banks, insurance companies, state institutions of social protection, financial prosecutor's offices and bar associations are obliged to use document centers exclusively when applying to court.

For Austrian citizens, there is an alternative free way to electronically transmit documents to the court via the download service ("ERV für alle"). You can use this service with a citizen card (ID Austria). However, unlike document centers, the document download service ("ERV für alle") works only in one direction – for submitting electronic documents. That is, return documents are not received through this service [10].

Summarizing the experience of countries with a high level of implementation of electronic justice, we can conclude that in these countries electronic justice is characterized by digitalization of all stages of the judicial process, stability and high efficiency. The electronic systems of such European countries as Estonia and Lithuania are quite similar to the domestic model of the Unified Judicial Information and Telecommunication System, and therefore this experience can serve as a useful example for our country.

***Countries with an average level of implementation of e-justice***

Countries with an average level of implementation of electronic justice are characterized by partial digitization. These countries have some electronic systems supporting judicial processes, but digitization does not yet cover all aspects of the judiciary. This approach demonstrates an important transition of European countries from traditional methods of justice to the use of technology to increase the efficiency and accessibility of justice. Such countries include Germany, Italy, Spain, Poland, Hungary, Sweden, Bulgaria, Romania, Slovenia, Croatia, Latvia and some others.

For example, the process of establishing e-justice in Germany started back in 2013 and is quite complex and long. To date, Germany has created a coherent legal framework that regulates the issue of electronic justice in

the country's judicial system, but the implementation of these norms in practice is still at the stage of implementation.

In June 2017, the Law on the introduction of electronic cases in the sphere of justice and on the further promotion of electronic legal turnover [11] was adopted. The law provides for mandatory conduct of court cases in electronic format, which must be implemented by German courts by January 1, 2026. Until this date, the federal government and individual federal states have the right to develop their own legislation that regulates the use of electronic files in individual courts or for certain categories of cases. With this in mind, the degree of implementation and functioning of e-justice in German courts varies depending on the country, jurisdiction and case category.

In 2017, Art. 31 of the Federal Regulations on Advocacy, a special electronic mailbox of a lawyer (beA) was also introduced [12]. Every lawyer licensed in Germany must have a dedicated electronic mailbox (beA) for secure electronic communication between lawyers and other participants in electronic legal affairs (ERV). According to the Act, the obligation of passive use has been valid for lawyers since 1 January 2018, that is, the lawyer is obliged to ensure the technical capabilities necessary for its use and to be aware of the delivery and access to messages via beA. And from January 1, 2022, such use of an electronic mailbox becomes mandatory for all lawyers. That is, from now on, lawyers in all fields are obliged to submit documents to courts exclusively in electronic form [13].

Therefore, from 2022, communication and exchange of documents between German courts and lawyers is carried out exclusively in electronic form through the lawyer's electronic inbox. Until now, namely in the period from 2018 to 2022, such interaction was not mandatory. In addition, from January 1, 2026, all German courts will be obliged to conduct court cases electronically.

From the above, we can conclude that the process of establishing electronic justice in Germany is longer than in other European countries, as it took more than 10 years and has not yet reached its logical conclusion. We believe that this is related to the cultural characteristics and conservatism of the Germans, who prefer a gradual and careful approach to any reforms. In addition, the need for coordination between the federal government and individual states can also slow down the process.

Despite these challenges, we would like to note that Germany nevertheless follows common European standards for the implementation of e-justice and continues to move forward in the direction of the digitalization of the judicial system.

Regarding the level of implementation of electronic justice in the Republic of Poland, it is worth noting that it is quite high, but the digitalization process is also not yet complete. In particular, Poland's e-judicial system includes functions such as remote hearings, digital recording of hearings, electronic delivery of court documents, a system of random distribution of cases among judges, electronic payment of court fees and electronic auctions within the framework of executive proceedings.

However, Poland does not yet have a fully digitized judicial process, and it is working on further measures to achieve this goal, such as mandatory drawing up and serving of all procedural documents in digital form and easy access to fully digitized cases [14].

***Countries with a low level of implementation of e-justice***

Countries with a low level of implementation of e-justice are characterized by limited or completely absent e-justice. Such countries usually face a number of common challenges and problems, such as limited financial resources for investing in the necessary technological infrastructure, insufficient digital literacy among government bodies and the population, as well as the imperfection of the legislative framework, which does not allow to fully realize the potential of electronic justice. Such countries include Moldova, Greece, Montenegro, Serbia, and Andorra.

For example, the system of electronic justice in Moldova is only at the nascent stage. At the beginning of 2024, the Institute for European Policy and Reforms (IPRE) and the Ministry of Justice of the Republic of Moldova announced that as of 2024, as part of a pilot project, the electronic system "e-File" is being tested in eight courts of Moldova, and the main goal is its large-scale implementation in 2025 year [15].

Due to limited financial resources, the implementation of any pilot projects in the field of e-justice has not yet begun in Greece, and e-services in other areas are just beginning to develop.

As part of preparations for joining the European Union, with the assistance and financial support of the Council of Europe and the European Union, Serbia is carrying out a complete reform of the judicial system, which is planned for 2022-2024, but electronic justice has not yet been implemented in this country.

**Conclusions**

Therefore, the proposed classification of countries by the degree of implementation of electronic justice, which includes categories with a high, medium and low level, demonstrates the diversity of approaches and degrees of adaptation to digital technologies in the field of justice. This

indicates that countries with high levels of implementation tend to have well-developed infrastructure and legal frameworks that allow effective use of electronic systems to improve transparency and access to justice. At the same time, countries with an average level show that despite certain achievements, they still face a number of challenges to achieve greater integration and optimization of judicial processes. Despite the long process of implementing e-justice tools, these countries nevertheless demonstrate their commitment to progress in this area, as can be seen in the experience of Germany and Poland. Conversely, low-implementation countries face a number of obstacles and need significant efforts to improve their judicial systems. These obstacles often include limited financial resources, technical and legislative constraints, which require them to make more efforts to realize the potential of e-justice.

The experience of countries with a high level of e-justice implementation provides a valuable example and encourages other states to consider and adopt similar practices. Reflections on this process make it possible to provide a reasoned answer to the widely discussed question in academic circles about the prospects and need for the application of electronic justice. Therefore, it is important for our state to study and adapt the experience of European countries in this area, as well as to develop its own initiatives in order to meet the modern challenges and needs of citizens in access to justice.

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# Application of Administrative Procedures in Tax Law as a Means of Unloading the Judicial System

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**Absract**
*The relevance of the chosen issue lies in the need for general unification of administrative procedures. The Law of Ukraine "On Administrative Procedure" provides for the unification of administrative procedures (with certain exceptions), which also applies to administrative procedures in tax law – tax procedures. Accordingly, this necessitated changes to the Tax Code of Ukraine. The purpose of our research is to provide a comprehensive analysis of the current state of legal regulation of administrative procedures in Ukraine, as well as the peculiarities of application of such procedures in tax law as a method of pre-trial dispute resolution. The methodological basis of this study is a set of techniques and methods of modern scientific knowledge, which include: the method of comparative analysis in law, synthesis, analysis, analogy, modeling, induction, deduction, hermeneutic method and systematic approach. As a result of the research, the impact of the Law of Ukraine "On Administrative Procedure" on administrative procedures in tax law was determined. Separate provisions of the Tax Code of Ukraine, which must be brought into compliance with the requirements of the administrative procedure, have been analyzed. The main attention is paid to the provisions of Art. 56 of this Law, which regulates the procedure for appealing decisions of supervisory bodies. It is this procedure that will require conceptual changes – the expansion of the object of appeal. Currently, the Tax Code of Ukraine provides for the possibility of administrative appeals only against the decisions of the controlling body. Instead, according to the requirements of the Law of Ukraine "On Administrative Procedure", not only decisions, but also actions and inactions are subject to appeal. In addition, the provisions on the procedure for filing a complaint, the terms of appeal and review, as well as the*

*renewal of missed terms must be brought into line. The situation when changes to the Tax Code of Ukraine to unify administrative procedures will not be made on time has been investigated. In the context of promising areas of scientific research, it is stated that the Law of Ukraine "On Administrative Procedure" should regulate the possibility of establishing the peculiarities of administrative proceedings for certain categories of administrative cases. At the same time, the specifics must correspond to the principles of the administrative procedure, which is also established in this Law. The expediency of the principles of the administrative procedure was considered from the point of view of the possibility of monitoring compliance with them and the consequences of violation.*

***Keywords:*** *administration of taxes and fees; alternative remedies; administrative procedure; administrative procedures in tax law; legislative regulation; legitimate interest; public administration; subjective rights; remedies, taxpayers; tax system; tax procedures.*

# Застосування адміністративних процедур у податковому праві як засіб розвантаження судової системи

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**Анотація**

*Актуальність обраної проблематики полягає в необхідності загальної уніфікації адміністративних процедур. Закон України «Про адміністративну процедуру» передбачає уніфікацію адміністративних процедур (за певним винятком), що стосується й адміністративних процедур у податковому праві – податкових процедур. Відповідно, це зумовило необхідність внесення змін до Податкового кодексу України. Мета дослідження полягає в проведенні комплексного аналізу сучасного стану правового регулювання адміністративних процедур в Україні, а також*

*особливостей застосування таких процедур у податковому праві як способу досудового вирішення спорів. Методологічною основою цього дослідження є сукупність прийомів і методів сучасного наукового пізнання, до яких віднесено: метод порівняльного аналізу в праві, синтез, аналіз, аналогія, моделювання, індукція, дедукція, герменевтичний метод та системний підхід. У результаті проведеного дослідження визначено вплив Закону України «Про адміністративну процедуру» на адміністративні процедури в податковому праві. Проаналізовано окремі положення Податкового кодексу України, які мають бути приведенні у відповідність до вимог адміністративної процедури. Основну увагу приділено положенням статті 56 цього Закону, що регламентує процедуру оскарження рішень контролюючих органів. Саме ця процедура потребуватиме концептуальних змін – розширення об'єкта оскарження. Наразі у Податковому кодексі України передбачено можливість адміністративного оскарження виключно рішень контролюючого органу. Натомість за вимогами Закону України «Про адміністративну процедуру» підлягають оскарженню не тільки рішення, а й дії та бездіяльність. Крім того, мають бути приведенні у відповідність положення про порядок подання скарги, строки оскарження та розгляду, а також поновлення пропущених строків. Досліджено ситуацію, коли зміни до Податкового кодексу України для уніфікації адміністративних процедур не будуть внесені вчасно. У контексті перспективних напрямів наукових досліджень зазначено, що Законом України «Про адміністративну процедуру» має бути врегульовано можливість встановлення особливостей адміністративного провадження для окремих категорій адміністративних справ. При цьому особливості мають відповідати принципам адміністративної процедури, що також закріплено в цьому Законі. Доцільність принципів адміністративної процедури розглянуто з позиції можливості здійснення контролю за їх дотриманням та наслідків порушення.*

***Ключові слова:*** *адміністрування податків і зборів; альтернативні засоби правового захисту; адміністративна процедура; адміністративні процедури в податковому праві; законодавче регулювання; законний інтерес; публічна адміністрація; суб'єктивні права; засоби правового захисту; платники податків; податкова система; податкові процедури.*

## Introduction

Administrative procedure contains the best principles, practices of public administration, which allow to implement the concept of good administration in practice; administrative procedure allows to protect a person from arbitrariness of public administration [1]. One of the ways to protect the rights and interests of taxpayers is to appeal against the decisions of tax authorities in an administrative procedure. This method of protection is a pre-trial procedure for resolving a dispute between the tax payer and the controlling authority. Its advantages include absence of

court fees and saving of taxpayer's resources, simplicity of the procedure, collection of evidence, short terms of appeal, confidentiality of the decision, etc. It should be noted that this method of protection of taxpayers' rights is implemented through the application of appropriate administrative procedures. As it seems, their application in tax regulation, in particular, is one of the means of unloading the judicial system and has a positive impact on the regulation of relevant legal relations.

Quite a long time in Ukraine there is a discussion about the need to introduce a single legislative act that would unify administrative procedures. Back in 2018, a draft law on administrative procedure was submitted to the Verkhovna Rada of Ukraine [2].

The adoption of an act that would regulate administrative procedures corresponds to several documents of the Council of Europe. These are Resolution (77) 31 on the protection of a person in relation to acts of administrative authorities [3], and Recommendation No. R (80) 2 on the exercise of discretionary powers by administrative bodies [4], etc.

The adoption of the Law on Administrative Procedure determines the need to determine the procedure for agreeing with it other regulatory legal acts, which include the Tax Code of Ukraine. In this situation, two options are possible. The first, when the tax regulations of Ukraine and the relevant tax by-laws will be amended, which would take into account the provisions of the Law on administrative procedure. The second option, when administrative procedures in tax law will not apply to the provisions of the Law on administrative procedure. Undoubtedly, issues of administrative procedures, given one denominator, which is of public interest, will affect tax procedures.

This is important in the context of increasing the investment attractiveness of Ukraine. Transformation processes in tax and legal regulation should ensure not only balancing budgets due to tax revenues, but also establishing fair conditions for doing business, taking into account the needs of economic development. The formation of investment attractiveness of Ukraine should solve the problem of reducing the budget deficit and, as a result, the qualitative development of the economy, establishing fair conditions for management business [5, p. 107; 6]. Moreover, in the context of the taxpayer's optimization of his tax burden within the framework of international tax planning measures, the issue of regulating the principles of implementation of administrative procedures is significantly expanded. In this case, it is necessary to consider not only the provisions of the national tax legislation, but also the principles of implementing tax procedures on the verge of national and foreign regulation. This is due to the need for

the effective action of two mechanisms: a) elimination of double taxation; b) combating tax evasion [7-10].

Problems of administrative procedures were dealt with by a number of scientists, in particular, V. Averyanov [11], D. Luchenko [12], D. Sushchenko [13], I. Boyko [14], V. Tymoshchuk [15] and others. At the same time, the category "administrative procedure" for domestic legal science is a novel. Scientists have not reached a single understanding of its essence and content. Administrative procedure is defined as a normative procedure for consideration and resolution of administrative case and adoption of individual administrative act, and in some cases execution of such act [16, p. 18-19].

In tax law, there are also administrative procedures that have been considered traditionally by scientists separately as tax procedures or tax processes. Among the scientists who dealt with the problems of the tax process and tax procedures, it should be noted, first of all, M. Kucheryavenko [17]. It is necessary to mention the specialized work of I. Pudelka devoted to comparative analysis of administrative procedures in resolving tax disputes (on the example of Germany and Ukraine) [18].

In 2020, the Draft Law of Ukraine on Administrative Procedure [19] was submitted to the Verkhovna Rada of Ukraine, which was adopted on February 17, 2022, but this regulatory act enter into force on December 15, 2023 [20].

Traditionally, tax procedures were reasonably considered as independent procedures, which are fully regulated by tax legislation. However, among the relations that are not covered by the Law on Administrative Procedure, there is no tax relationship. This means that the provisions of the Law on Administrative Procedure will be extended to the procedures regulated by the Tax Code of Ukraine, and therefore it is advisable to speak about administrative procedures in tax law.

**Materials and Methods**

This scientific article is devoted to determining the place of administrative procedure in tax law. The normative basis of the study was the Tax Code of Ukraine [21], the Law of Ukraine on Administrative Procedure [22], the Fiscal Cod of Germany [23] and the Administrative Procedure Act of the Federal Republic of Germany [24]. The research issue, taking into account national legislative changes and innovations, foreign experience is problematic, since the attention of scientists requires both the basis (background) of such changes, and the nature of the consequences of their adoption and application, and requires comprehensive understanding.

The methodological basis of this study was a set of techniques and methods of modern scientific knowledge. One of the main was the method of comparative law. By applying it, similar and different in national and foreign (in particular, Germany) regulations governing administrative procedures in tax law were found. This method made it possible to obtain results on the identification and characterization of the peculiarities of the regulation of administrative procedures in tax law, as well as to compare approaches to the legal regulation of general and special administrative procedures (in particular in tax law) in Germany.

Along with this, such general legal methods as analysis, synthesis, analogy and modeling were applied. By means of analysis and synthesis, the relationship and mutual flow of the norms of the act have been established and characterized in depth, regulating relations of executive authorities, authorities of the Autonomous Republic of Crimea, local self-government bodies, their officials, other entities, which, in accordance with the law, are authorized to carry out the functions of public administration, with individuals and legal entities regarding the consideration and resolution of administrative cases in the spirit of the democratic and legal state defined by the Constitution of Ukraine and in order to ensure the rights and the laws, as well as the obligation of the state to ensure and protect the rights, freedoms or legitimate interests of a person and a citizen, on public relations in the field of taxation; clarified the conceptual apparatus used in the content of normative legal acts that streamline procedural aspects in the field of taxation. Methods of induction and deduction made it possible to draw conclusions from facts to the hypothesis, from general to special and vice versa, to express positions on the impact of the general act of administrative procedure, to describe the state of regulation of procedural relations in tax law, in particular, on the example of administrative appeal against decisions, actions and inaction of tax authorities.

Along with these methods, a systematic approach was also applied, which allowed administrative procedures to be considered as an element of the system of tax legislation and changes, to bring the provisions of the Tax Code of Ukraine into compliance with the requirements for the general administrative procedure, as well as highlight two directions in which the provisions of the draft law on administrative procedure will relate to the provisions of tax legislation regulating administrative procedures in tax law.

The hermeneutic method allowed for its own interpretation (interpretation) of the content of the principles that administrative procedures should comply with. By modeling, tendencies of functioning and development of current norms and legislative innovations are formed, to simulate the application, first of all, of the principles enshrined in the Law on

Administrative Procedure, to administrative procedures in tax law (tax procedures) on the example of such principles of administrative procedure as good faith and prudence, openness, the principle of timeliness and reasonable time to indicate the positive and negative consequences of their application, provided that the provisions of the Tax Code of Ukraine will not be in time, that is, before the introduction of the general administrative procedure, brought in accordance with the provisions of the Law on Administrative Procedure.

## Results and Discussion

### *Administrative Procedure in Germany: Experience for Ukrainian Regulation*

Compared to the approach proposed by the Administrative Procedure Act, a different approach to the ratio of "general" administrative procedure law and administrative procedures in tax law has been introduced in Germany. Administrative procedures are regulated by the Administrative Procedure Act of the Federal Republic of Germany [24]. The legislator consciously removed certain areas from the scope of the Law on Administrative Procedures (§ 2 LAP) and developed an independent special regulation for these areas. It includes social law and tax law. That is, the rules of administrative procedures applicable in tax law are not contained in the LAP, but in the independent Law on Tax Administrative Procedures, which, however, is very similar in content to the general Law of Administrative Procedures, and in some sections even identical to it [18, p. 23-24; 25, p. 997].

Administrative procedures in German tax law are regulated by the Fiscal Cod of Germany [23]. This act regulates the so-called general tax law and the right of tax procedures that govern the establishment of grounds for taxation, determination of tax amounts, tax collection rules and enforcement procedures, as well as procedural rules for the consideration of complaints [18, p. 24]. At the same time, legal mechanism of taxes is regulated by separate laws.

The German approach, when administrative tax procedures are regulated by an independent act, seems to us more balanced, for several reasons. Here we pay attention to several terminological and meaningful aspects.

### *Administrative Procedure and Tax Regulation in Ukraine*

Art. 1 of the Tax Code of Ukraine establishes the subject of regulation by the code: "The Tax Code of Ukraine regulates relations, arising in the sphere of taxes and fees, in particular, defines an exhaustive list of taxes and fees, coping in Ukraine, and the procedure for their administration,

taxpayers and fees, their rights and obligations, the competence of the supervisory authorities, the powers and duties of their officials during the administration of taxes and fees, as well as responsibility for violation of tax legislation" [21].

Note that Art. 1 of the Tax Code of Ukraine uses the term "administration" [21]. Art. 14 of the Tax Code of Ukraine defines the concept of "administration of taxes, duties, customs duties, a single contribution to compulsory state social insurance and other payments in accordance with the legislation, the control over compliance of which is entrusted to the regulatory authorities". In turn, Section II of the Tax Code of Ukraine is called "Administration of taxes, fees, payments", and Art. 40 of the Tax Code of Ukraine states that Section II defines the procedure for administering taxes and fees defined in Section I of the Tax Code of Ukraine, as well as the procedure for controlling compliance with the requirements of tax and other legislation in cases when the implementation of such control is entrusted to the tax authorities. This approach indicates a lack of terminological unity over the content of the term "administration".

Separately, the term "administration" in the Tax Code of Ukraine is not defined. In subsection 14.1.11 of clause 14.1 of Art. 14 of the Tax Code of Ukraine [21], the definition is given to the concept of "tax administration, duties, customs duties, single contribution for compulsory state social insurance and other payments in accordance with the legislation, control over compliance with which is entrusted to the regulatory authorities" as a set of decisions and procedures of the regulatory authorities and the actions of their officials, determining the institutional structure of tax and customs relations, organizing identification, accounting of taxpayers and payers of single contribution and objects of taxation, provide service to taxpayers, organization and control over payment of taxes, fees, payments in accordance with the procedure established by law. A rather confusing definition that lacks clarity. However, it can be distinguished that administration in tax law are: decisions, procedures and actions.

Referring to section II "Administration of taxes, fees, payments" of the Tax Code of Ukraine will not help to find out how the decisions, procedures and actions relate. This is possible only within the framework of a separate study. Based on the definition provided in subsections $14.1.1^1$ of clause 14.1 of Art. 14 of the Tax Code of Ukraine, the procedures of the regulatory authorities are subject to the provisions of the Law on Administrative Procedure.

Before answering this question, we propose to dwell on a meaningful aspect that has two components. The first component is the subject of regulation

of the Tax Code of Ukraine. As follows from Art. 1 of this Code, only the Tax Code of Ukraine by the administration of taxes and fees is regulated, that is, administrative procedures in tax law or tax procedures or administrative tax procedures.

That is, the question arises about the ratio of the provisions of the Law on Administrative Procedure and the Tax Code of Ukraine. On the one hand, tax procedures are regulated exclusively by the Tax Code of Ukraine, on the other hand, the provisions of the Law on Administrative Procedure apply to them. It is seen that this approach lays contradiction and can lead to conflicts. It should also be mentioned the provisions of Art. 5 of the Tax Code of Ukraine. If the concepts, terms, rules and regulations of other acts contradict the concepts, terms, rules and regulations of the Tax Code of Ukraine, the concepts, terms, rules and regulations of the Tax Code of Ukraine to regulate the relations of taxation are used [21]. The adoption of the law on law-making activities, the draft of which as a basis in November 2021 was adopted, can also bring additional complexity [26].

Nevertheless, Art. 3 of the Law of Administrative Procedure provides that the law may establish the peculiarities of administrative proceedings for certain categories of administrative cases. Such features must comply with the principles of administrative procedure defined by this Law [21]. It is certain that, according to the legislator's plan, at least the principles of administrative procedure should be unified. However, how such features are established, in which act (Law on administrative procedure or, for example, Tax Code of Ukraine) – the question is still unanswered.

However, it may not come to conflicts, because the Final and Transitional Provisions of the Law on Administrative Procedure stipulate that the Cabinet of Ministers of Ukraine within 18 months from the date of publication of this Law must:
1) within 12 months from the date of publication of this Law, submit to the Verkhovna Rada of Ukraine proposals for bringing legislative acts of Ukraine into compliance with this Law;
2) within 18 months from the date of publication of this Law, take measures to adopt and/or update regulations of executive authorities arising from this Law, ensuring that they enter into force simultaneously with the entry into force of this Law;
3) inform the Verkhovna Rada of Ukraine on the status of implementation of this Law in 24 months from the date of entry into force of this Law [22].

The Law on Administrative Procedure provides that for the proper application of its norms it is necessary to amend other laws. The TC of Ukraine here will not be an exception. This approach seems complex

and irrational. To do this, just pay attention to those articles of the TC of Ukraine, which should be changed.

First, Art. 1 of the Tax Code of Ukraine, which was already discussed. Although it is not clear without the Law on Administrative Procedure, especially when referring to Art. 3 of the Tax Code of Ukraine, which determines the composition of the tax legislation. The Tax Code of Ukraine regulates Art. 1 states that tax relations, and Art. 3 refers to a number of regulatory legal acts that constitute tax legislation. It would be more logical to make changes to Art. 1 of the Tax Code of Ukraine and talk not only about the Tax Code of Ukraine, but about tax legislation. In any case, the Administrative Procedure Act should be included in the tax legislation.

It is certain that individual positions of the article require changes. Articles 16, 17, 20, 191, 193 of the Tax Code of Ukraine defining the rights and obligations of taxpayers, functions of regulatory bodies, functions of state tax inspections and rights of regulatory bodies [21]. For example, in subsection 20.1.17 of paragraph 20.1 of Art. 20 of the Tax Code of Ukraine it is about the right to involve specialists, experts and translators in case of need. The Law on Administrative Procedure does not contain the term "specialist" at all [22]. The involvement of a specialist, expert and translator should be consistent with the Law on Administrative Procedure.

It will require clarifications and the procedure for correspondence between taxpayers and regulatory authorities. In paragraph 42.2 of Art. 42 of the Tax Code of Ukraine, it should be noted that bringing an administrative act to the attention of a person should take place in accordance with the requirements of the Law on Administrative Procedure (Art. 75) [22]. A number of other articles of section II "Administration of taxes, fees, payments" of the Tax Code of Ukraine should or should it be desirable to receive clarification. That is, not always the lack of clarification, a reference to the need to comply with the requirements of the Administrative Procedure Act is critical.

It is necessary to focus on certain clarifications (changes) on the example of Art. 56 of the Tax Code of Ukraine, which regulates the appeal of decisions of regulatory bodies [21]. We are interested in those provisions concerning the administrative appeal itself. According to paragraph 56.1 of Art. 56 of the Tax Code of Ukraine and by the very name of Art. 56, the taxpayer can appeal administratively only the decision of the supervisory authority and cannot appeal actions and inaction. Instead, part 1 of Art. 78 of the Law on Administrative Procedure has the right to administrative appeal by a person who believes that, among other things, the action, inaction of the administrative body negatively affects his rights, freedoms or legitimate

interests [22]. In fact, the whole concept of appeal in the administrative order of decisions (actions, omissions) of the supervisory authority needs to change. It is necessary to make appropriate changes in Art. 56 of the Tax Code of Ukraine and bring into compliance with the requirements of Part 1 of Art. 78 of the Law on Administrative Procedure and "allow" taxpayers to appeal administratively not only decisions, but also actions and inactions of the supervisory authority.

In paragraph 56.3 of Art. 56 of the Tax Code of Ukraine, the terms for filing a complaint against the decision of the supervisory authority to the supervisory authority of the highest level are regulated. The Tax Code of Ukraine provides 10 working days following the day the taxpayer receives a tax notification-decision or other decision of the supervisory authority, which is disputed [21].

At the same time, according to the general rule provided for in Part 1 of Art. 80 of the Law on Administrative Procedure, a complaint against an administrative act can be filed within thirty calendar days from the date of bringing it to the attention of a person who was a participant in the administrative proceedings for the adoption of this act. Logical step in terms of unification of administrative procedure. However, such changes are not consistent with the provisions of paragraph 57.3 of Art. 57 of the Tax Code of Ukraine, which fix the term of payment of the monetary obligation within 10 working days, which come after the day of receipt of the tax notification-decision [21]. That is, that the taxpayer within 10 working days either pays the amount of the monetary obligation defined in the tax notification decision, or submits a complaint in administrative order. This is important in terms of the possibility of imposing a fine and charging penalties for late payment. The taxpayer has 10 working days to decide whether to pay or appeal administratively. The change under clause 56.3 of Art. 56 of the Tax Code of Ukraine will lead to the fact that the payer still has a term for appeal, but negative consequences (fine and penalty) may be applied to it in connection with the late payment of a monetary obligation. Thus, it is necessary to amend clause 57.3 of Art. 57 of the Tax Code of Ukraine and to unify the period for payment and appeal.

Indeed, another way is possible, which is provided in Part 2 of Art. 3 of the Law on Administrative Procedure: "The Law may establish the peculiarities of administrative proceedings for certain categories of administrative cases" – and Part 1 of Art. 80 of the Law on Administrative Procedure: "For certain types of cases, the Law may establish other terms of filing a complaint" [22]. However, what then is the unification of administrative procedures.

Draws attention to another provision of paragraph 56.3 of Art. 56 of the Tax Code of Ukraine, which regulates the renewal of the missed period for filing a complaint in administrative order. In this situation immediately need changes and deadlines, and the procedure for renewal. Currently, the taxpayer within 6 months from the date of expiration of the administrative appeal period (10 working days following the day of receipt of the tax notification-decision or other decision) has the right to file a complaint together with a petition for renewal of the missed period for filing a complaint administratively and copies of supporting documents of the validity of the reasons for its admission (if any). The complaint may contain a request for renewal of the missed period for filing a complaint administratively [21].

The Law on Administrative Procedure in Part 2 of Art. 80 provides for a fundamentally different procedure for updating the missed deadline for filing a complaint against an administrative act. It is assumed that the complaint against the administrative act and the application for renewal of the deadline for filing the complaint are filed separately. A petition is submitted for renewal of the term, and it is submitted within ten working days from the date of termination of the circumstances that were a valid reason for missing the deadline for filing a complaint, but no later than one year from the date of adoption of the administrative act, and not within 6 months as provided for in the Tax Code of Ukraine. At the same time, a decision should be made on such a petition and the complainant should be notified. Within ten working days from the date of receipt of the notification of the renewal of such a period, the complaint itself is filed [26]. Such harmonization will lead to the need to exclude the provision of paragraph 56.7 of Art. 56 of the Tax Code of Ukraine, which provides for the prohibition of consideration of the complaint, in case of refusal to the taxpayer to resume the missed period [21]. The Law on Administrative Procedure provides for first consideration of the issue of renewal of the term, and only then filing a complaint [22].

In this article, we do not analyze the contradictions (conflicts) of the Administrative Procedure Act itself. Just pay attention to one thing. In para 2 part 2 of Art. 80 states: "In case of renewal of the deadline for filing a complaint, the subject of consideration of the complaint notes this in a separate decision or in the decision on the complaint with the indication of valid reasons for missing the deadline for filing a complaint and documents or other evidence confirming the existence of valid reasons". If the deadline for filing a complaint requires first filing a request for renewal and sending a notice of such renewal, how can there be an alternative for the subject of the complaint to indicate the renewal of the term with an indication of the

valid reasons for missing the deadline for filing a complaint and documents or other evidence, confirming the existence of good reasons when the decision to renew the deadlines should be motivated.

The following provision of paragraph 56.3 of Art. 56 of the Tax Code of Ukraine, which requires changes, defines the body to which the complaint should be sent [21]. Currently, a complaint against the decisions of the territorial bodies of the central executive body implementing the state tax (customs) policy by the taxpayer is submitted to the central executive body implementing the state tax (customs) policy.

However, Art. 82 of the Law on Administrative Procedure provides that a complaint is submitted to the administrative body that has adopted an administrative act, procedural decision and/or has committed a procedural action or has failed to act, which is appealed, which not later than the next day (sends) it along with the materials of the case to the subject of the complaint – the administrative body of the highest level [22]. Such changes in paragraph 56.3 of Art. 56 of the Tax Code of Ukraine should result in the cancellation of the provisions of paragraph 56.5 of Art. 56 of the Tax Code of Ukraine, which the taxpayer must simultaneously submit a complaint to the supervisory authority of the highest level in writing to notify the supervisory authority whose decision is appealed.

Examples of other provisions as Art. 56 of the Tax Code of Ukraine, and other articles of the Tax Code of Ukraine requiring unification with the provisions of the Law on Administrative Procedure. However, it is possible that the relevant unification will not take place under different circumstances and then the provisions of Art. 3 of the Law on Administrative Procedure should be applied to administrative procedures in tax law. This provision provides for the possibility of establishing special procedures of administrative proceedings for certain categories of administrative cases in compliance with the principles of administrative procedure.

The Law on Administrative Procedure in its Art. 4 provides 13 principles of administrative procedure, namely: the rule of law, including legality and legal certainty; equality before the law; reasonableness; impartiality (impartiality) of the administrative body; good faith and prudence; proportionality; openness; timeliness and reasonable time; efficiency; presumption of legality of actions and claims of a person; formality; guarantee of the right of a person to participate in administrative proceedings; guarantee of effective remedies; and other principles. According to A. Osadchyi, the approach to consolidation of the above principles of administrative procedures is somewhat destructive, since the system of principles includes guarantees and presumptions. At the same time, the researcher points out that the

principles on which administrative procedures are based are nothing more than a special set of objective and subjective principles, guiding ideas and cognized regularities that are enshrined or require regulatory consolidation aimed at achieving optimal results of the activities of public administration entities in the adoption of regulations or consideration of administrative cases. Each principle of administrative procedure has its own clearly defined role in the organization and implementation of role in the organization and implementation of administrative and procedural activities. On the other hand, the principles of administrative procedure cannot be considered without taking into account their overall unity and interdependence. They do not act separately, but taken together, closely intertwined and interact, pass into each other, and flow from each other [27].

Of course, some principles are provided by the Constitution of Ukraine [28] and do not require additional legislative consolidation. It should be noted about their logic and expediency of extension to administrative procedures in tax law, because the principles of tax procedures are not enshrined in the Tax Code of Ukraine at all. Let us put only some accents.

Principles should not only be declared, but also provide for specific ways to monitor compliance and the consequences of their violation. Any principle should not only be formally enshrined, but also have clear criteria, limits, compliance with which is mandatory. That is, the content of the principle should be disclosed taking into account the real possibility of monitoring compliance. There are enough examples. Art. 4 of the Tax Code of Ukraine enshrines the principles of tax legislation. In particular, the principles of fiscal sufficiency and efficiency of taxation. The first one provides for the establishment of taxes and fees, taking into account the need to balance budget expenditures with its revenues, the second, the establishment of taxes and fees, the amount of revenues from the payment of which to the budget significantly exceeds the cost of their administration [21].

The sources of budget revenues are tax revenues, non-tax revenues, income from capital transactions, transfers [29]. Thus, not only taxes affect the balance of expenditures with budget revenues. The fate of tax revenues is influenced by many factors, which actually makes it impossible to arbitrarily increase taxes to cover budget expenditures. That is, the principle of fiscal sufficiency does not define specific criteria, compliance with which can be controlled by the interested person – the taxpayer.

The principle of tax efficiency provides for the availability of information on the costs of administering a particular tax. Application of the assessment category "significantly" does not allow to understand the meaning of the

principle at all. The criterion of compliance with the principle is formally fixed, but there is no real opportunity to monitor compliance. It is also complicated by the fact that taxpayers use structures involving controlled foreign companies in their activities. In this case, there may be attempts to transfer part of the economic activity to low-tax jurisdictions, which significantly changes the criteria by which the level of tax efficiency is determined.

The proposed individual principles of administrative procedure have similar shortcomings [16]. Thus, the principle of good faith and prudence stipulates that an administrative body in the implementation of administrative proceedings should act, guided by common sense, logic and generally accepted norms of morality, in compliance with the requirements of the law. As for compliance with the requirements of the law – it is clear. However, what is common sense is a question. In practice, this principle will be reduced to compliance with the law. It is impossible to prove to the interested person that the administrative body was not guided by common sense in the administrative proceedings. Therefore, the principle is purely formal.

The principle of openness also requires clarification [22]. Thus, a participant in administrative proceedings has the right to know about the initiation of administrative proceedings and his right to participate in such proceedings, as well as the right to get acquainted with the materials of the relevant case.

It is possible to draw an analogy with the taxpayer's objections to the audit report, the submission of which is provided by Art. 86 of the Tax Code of Ukraine. In case of disagreement of the taxpayer with the conclusions of the audit or the facts and data set out in the audit report, they have the right to submit their objections and additional documents and explanations. Consideration of the audit materials is carried out by the commission on consideration of objections of the tax authority within 10 working days following the day of receipt of objections to the audit report and/or additional documents and explanations. The tax authority is obliged to notify the taxpayer of the place and time of consideration of the audit materials. The taxpayer has the right to participate in the process of consideration of the audit materials in person or through his representative. Directly during the consideration of the audit materials, the taxpayer has the right to provide written and/or oral explanations on the subject of consideration [21].

However, the tight deadlines – 10 working days – cause the problem of proper notification of the taxpayer about the place and time of consideration of the audit materials. The taxpayer due to unsatisfactory work of the mail

or improper awareness of the receipt of the notification, and in the vast majority of cases the tax authority fails to send in time the notification about the place and time of consideration of the audit materials objectively does not have the opportunity to participate in the consideration of the audit materials. In accordance with subpar. 86.7.3. of para. 86.7 of Art. 86 of the Tax Code of Ukraine absence of the taxpayer or his representative, notified in the manner prescribed by this article about the time and place of consideration of the audit materials, is not an obstacle for consideration of the audit materials. Thus, on the one hand, the principle of openness, although provided for in the consideration of objections to the act of audit, but on the other hand, in practice, the absence of the taxpayer for any reason (including failure to notify of the time and place of consideration of the audit materials) leads to the possibility of consideration by the tax authority of the audit materials without the taxpayer. The taxpayer is deprived of the opportunity to provide written and/or oral explanations during the consideration of the audit materials. It should be additionally noted that the taxpayer who was not notified in due manner and in due time about the time and place of consideration of objections has no possibility to appeal the results of consideration of objections to the tax audit report on these grounds. The procedure is not provided by the legislation.

It is also difficult to agree with the content of such principle as timeliness and reasonable time. The taxpayer may appeal against the decisions taken by the tax authority in administrative procedure [22]. Paragraph 56.8 of Art. 56 of the Tax Code of Ukraine stipulates that the tax authority is obliged to make a reasoned decision and send it within 20 calendar days following the day of receipt of the complaint to the taxpayer by post [21]. It is a complex legal fact - to make a reasoned decision and send it. And all this should happen within 20 days. In practice, the tax authority, at least formally, but makes a decision within the allotted period, but sends it to the taxpayer exactly outside the allotted period. This fact can be traced through the mail.

The Tax Code of Ukraine provides for the consequences of non-compliance by the tax authority with the requirements of the procedure for consideration of the taxpayer's complaint. If the motivated decision on the taxpayer's complaint is not sent to the taxpayer within 20 days or within the period extended by the decision of the head (his deputy or authorized person) of the tax authority, such complaint is considered fully satisfied in favor of the taxpayer from the day following the last day of the specified terms. When a reasoned decision is not made and sent to the taxpayer within the allotted term (a complex legal fact), the taxpayer's complaint is automatically satisfied. Such mechanism or guarantee of the taxpayer that his/her complaint will be considered, if not within a reasonable time, then

at least within the time limit prescribed by law, and even if not, the taxpayer will receive a positive result, can only be assessed positively. The presence of clear criteria and certain consequences for the administrative authority should certainly contribute to the observance of the timeliness principle.

However, there are some problems here as well. When the tax authority makes a decision on the results of consideration of the taxpayer's complaint in time, but does not send it in time, the taxpayer's complaint seems to be satisfied, but the taxpayer does not have any documents that would formalize this circumstance.

Here it is also appropriate to return to the principle of good faith and prudence. The administrative body is obliged to act in good faith to achieve the goal defined by law. Thus, the tax authority, sending a decision on the results of consideration of the taxpayer's complaint outside the allotted period, acts in bad faith. Although for us the question about the content of good faith of the administrative body remains open.

We can dwell on other principles of administrative procedure enshrined in the Law on Administrative Procedure [22]. Nevertheless, we consider it appropriate to refer to the conditions of legality of an administrative act. An administrative act is lawful if it is adopted by a competent administrative body in accordance with the law in force at the time of adoption of the act. Art. 87 of the Law on Administrative Procedure provides for the criteria of an unlawful administrative act. Unlawful is an administrative act that does not meet the requirements specified in part one of this article, in particular:
1) is adopted by an administrative body that: a) did not have the authority to do so; b) used discretionary powers illegally;
2) contradicts the provisions of the law on the form and content of an administrative act;
3) such act violates the rules of substantive law;
4) it does not comply with the principles of administrative procedure.

The main thing to pay attention to is that the violation by the administrative body of the administrative procedure stipulated by law, if it did not and could not affect the legality of the case on the merits, does not entail the illegality of the administrative act. The principle of substance over form is laid down, which cannot be assessed positively. We believe that it is necessary to proceed from the provisions of Art. 19 of the Constitution of Ukraine, which provides that public authorities and local self-government bodies, their officials are obliged to act only on the basis, within the powers and in the manner provided by the Constitution and laws of Ukraine [29]. Non-compliance with the procedure should at least result in the recognition of the decision as unlawful. It is desirable that non-compliance with the administrative procedure has also positive consequences for the person concerned.

## Conclusions

Administrative procedures in tax law currently have independent legal regulation by the provisions of tax legislation. The Law on Administrative Procedure [22] should unify approaches to administrative procedure and resolution of administrative cases. Administrative procedures in tax law are no exception.

Unification of administrative procedures will require numerous amendments to the tax legislation. The Draft Law on Administrative Procedure provides for a 12-month period (and taking into account the proposals of the President of Ukraine – 18 months) from the date of publication to the entry into force. This time should be enough for the relevant provisions of the Tax Code of Ukraine to be brought into compliance. As we managed to find out, such work is quite large-scale and painstaking.

Due to various reasons, it may not be possible to make the relevant changes within 12 (18) months. The Law on Administrative Procedure provides for the possibility of establishing special procedures of administrative proceedings for certain categories of administrative cases in compliance with the principles of administrative procedure. The Draft Law on Administrative Procedure does not specify how certain categories of administrative cases will be determined. The possibility of certain categories of cases, for example, tax cases, is important to avoid gaps in regulation. It is important that in any case the administrative procedures in the tax law should be covered by the principles envisaged by the Draft Law on Administrative Procedure.

There are no principles of tax procedures in the tax legislation, which is a significant drawback. However, when enshrining any principles, it should be taken into account that the principle should not only be formally enshrined, but also have clear criteria, limits, compliance with which is mandatory. That is, the content of the principle should be disclosed taking into account the real possibility of monitoring compliance. Non-compliance with the principle should have specific legal consequences, preferably favorable for a person who is not an administrative body (tax authority). In any case, in order to extend administrative procedures in tax law to the principles of administrative procedures, it is also necessary to amend the Tax Code of Ukraine.

The idea of unification of administrative procedures seems to be logical, it will allow all participants to adapt to the uniform rules. However, at the moment of entry into force of the Draft Law on Administrative Procedure, it is necessary to amend the Tax Code of Ukraine, at least those related to the principles of administrative procedures.

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# Countering Organized Crime in the European Context

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**Abstract**
*The importance of the topic is determined by the study of issues related to combating organized crime in the context of world security policy. The purpose of the article is to analyze foreign experience of combating crime in Italy and Great Britain at the current stage of their development. In the course of the study, attention was drawn to the fact that organized crime arises from a complex causal complex, the fight against which will be effective only when there are appropriate conditions for the formation of a system of measures (economic, social, legal, organizational, etc.), which will be aimed at blocking, neutralization of these socially dangerous modern phenomena on the basis of special law enforcement activities. The center of such activity should be represented by a law enforcement structure capable of promptly and effectively responding to existing challenges and threats that emerge from the organized crime, including at the transnational level. The paper states that the issue of socio-legal control of the activities of transnational criminal structures directly depends on the level of adaptation of national legislation to changes in crime and, first of all, its highly organized forms. When studying foreign experience of fighting crime, including in Italy, it has been found that all issues related to the fight against organized crime are under the responsibility of the Ministry of Internal Affairs. The main areas of activity of organized crime in Italy are: drug smuggling, extortion, corruption and fraud, robberies, etc. While analyzing fight against organized crime in the United Kingdom, attention has been drawn to the fact that the main areas of activity of organized crime are drug business, illegal migration, laundering of "dirty" money, corruption, fraud, illegal circulation of weapons and other explosive items, cybercrime, etc. In the course of the study, it has been emphasized that the peculiarity of such crime is its transnational and global nature. In this context, all efforts to combat organized crime in Great Britain are put into a comprehensive fight against this socially dangerous phenomenon today.*

***Keywords:*** *latency; fraud; abuse of power; thief in law; criminal influence; drug trafficking; illegal migration; interaction with law enforcement agencies.*

# Протидія організованій злочинності в європейському контексті

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**Анотація**
*Актуальність теми зумовлена дослідженням питань протидії організованій злочинності в контексті світової безпекової політики. Метою статті є аналіз зарубіжного досвіду протидії злочинності в Італії та Великій Британії в сучасних умовах. У роботі, зокрема, наголошено, що організована злочинність виступає складним причинним комплексом, боротьба з якою буде ефективною лише за умови існування відповідних умов формування системи заходів (економічних, соціальних, правових, організаційних та ін.), спрямованих на блокування та нейтралізацію цих суспільно небезпечних явищ на засадах здійснення спеціальної правоохоронної діяльності. Головним центром такої діяльності має стати правоохоронна структура, яка здатна оперативно й ефективно реагувати на наявні виклики й загрози з боку організованої злочинності, в тому числі на транснаціональному рівні. У статті наголошено, що питання соціально-правового контролю діяльності транснаціональних злочинних структур безпосередньо залежить від рівня адаптації національного законодавства до змін злочинності та насамперед її високоорганізованих форм. При вивченні зарубіжного досвіду боротьби із злочинністю в Італії з'ясовано, що всі питання, пов'язані з протидією організованій злочинності, перебувають у віданні Міністерства внутрішніх справ. Основними сферами діяльності організованої злочинності в Італії є: контрабанда наркотиків, вимагання, корупція та шахрайство, розбійні напади та ін. Досліджуючи протидію організованій злочинності у Великій Британії, звернено увагу, що основними сферами діяльності організованої злочинності є наркобізнес, нелегальна міграція, відмивання «брудних» грошей, корупція, шахрайство, незаконний обіг зброї та інших вибухонебезпечних предметів, кіберзлочинність тощо. У ході дослідження наголошено, що особливістю такої злочинності є її транснаціональний і глобальний характер. У цьому контексті всі зусилля протидії організованій злочинності у Великій Британії спрямовані на комплексну боротьбу з цим суспільно небезпечним явищем сьогодення.*

***Ключові слова:*** *латентність; шахрайство; зловживання владою; злодій у законі; злочинний вплив; незаконний обіг наркотиків; нелегальна міграція; взаємодія з правоохоронними органами.*

## Introduction

The large-scale war waged by the Russian Federation against Ukraine has continued the effect of the existing negative factors in the international security environment and launched additional destructive processes, thus destroying legal foundations of the world legal order.

In this regard, the rapid development of social and legal relations, the democratization of state institutions is impossible without an offensive fight against crime in its various manifestations. The state, represented by the competent authorities, determines the rules of conduct aimed at guaranteeing the safety of each person, as well as establishing the state of protection of society and the state from various types of illegal encroachments on protected interests. Violation of these provisions can lead to irreparable damage to the effective functioning of the state in its various spheres.

In the conditions of globalization, transnational organized crime is a natural result of the development of criminal activity in society, its organized spheres and it embodies the most highly latent and dangerous system of organized criminal activity.

Issues of socio-legal control of the activities of transnational criminal structures directly depend on the level of adaptation of national legislation to changes in crime and, first of all, in its highly organized forms. A number of scientists note that such changes mainly relate to the provisions on criminal liability for participation in the activities of criminal organizations and issues of confiscation of criminal assets [1, p. 11].

Before the full-scale invasion of the Russian Federation to the territory of Ukraine, Ukraine ranked 34th among 193 countries in the world and third in Europe based on the Global Initiative against Transnational Organized Crime (GI-TOC) crime rating.

The following types of activities connect Ukraine with global criminal markets: 1) smuggling routes connecting Russia and Ukraine and passing through the occupied territories; 2) world smuggling hubs in Odessa and other ports on the Black Sea; 3) factories in Ukraine that manufacture prohibited export goods; 4) crimes related to the violation of human rights, namely those involving "human trafficking", "white slavery", "migrant smuggling", etc. Various types of criminal elements, including "thieves in law", who try to retain a criminal influence on the security situation in the southern region of Ukraine, control such areas of illegal activity.

As time has demonstrated, today this issue continues to remain acute and relevant for the entire world community. This is a well-established transnational type of illegal activity, which brings enormous income to criminals and occupies a leading position in the criminal world in terms of profitability [2, p. 195].

This infrastructure supported various "business models" for the implementation of criminal designs and the transportation of various goods.

Before the full-scale invasion, Ukraine was a transit route for heroin from Afghanistan, thus supplementing routes through the Balkans and the Caucasus. Cocaine from Latin America traveled through the Black Sea. From Mykolaiv, mafiosi exported weapons to Asia and Africa.

In 2020, Ukraine became the largest source of illegal tobacco supply in Europe, effectively overtaking China. Ukrainian amphetamine production was on the rise: 67 criminal laboratories were closed – the highest mark in history for all countries combined [3].

The above requires law enforcement agencies to intensify their fight against transnational crime in modern conditions.

**Literature review**

Recently, issues related to fighting organized crime in its various manifestations have become the subject of scientific research in the works of A. Vozniuk [4, pp. 54-56; 5, pp. 52-56], B. Golovkin [6, pp. 75-87], D. Kamensky [7, pp. 64-75], R. Orlovskyi [8, pp. 197-230] V. Shevchuk [9, pp. 119-136] etc.

Thus, the issue of combating crime was and remains a pressing one for both scholars and practitioners.

**Materials and Methods**

Based on the defined research subject, I have chosen a comprehensive approach to the application of scientific knowledge methods. In the course of this research, I employed the comparative method, which allowed to compare existing issues of the existence and development of the law enforcement system of the studied countries, the process of establishing and fixing relations of identity, similarity, opposites, differences of existing social phenomena, as well as comparing different legal systems and theoretical concepts. The formal legal method was used to establish the content of legal norms and to analyze the practice of their application by the law enforcement agencies under review. The application of the formal-logical method became the basis for identifying shortcomings in the regulation of foreign legislation and finding ways to overcome them.

## Results and Discussion

### *Problems of combating organized crime: Ukrainian context*

The systemic reorganization of law enforcement agencies of Ukraine, the creation of new law enforcement units, the improvement of existing legal acts in the field of combating organized crime, including transnational crime, have once again confirmed that such fight is a global issue which cannot be solved at a separate state level, law enforcement agency or of the normative legal act [10, pp. 283-292; 11, pp. 61-66]. That is why the fight against crime in many countries of the world plays a decisive role in the formation of security policy in various spheres of public administration [12, pp. 825-838].

When considering the fact that organized crime arises from a complex causal chain, the fight against it will become effective only when there are appropriate conditions for the formation of a system of measures (economic, social, legal, organizational, etc.) aimed at blocking and neutralizing such dangerous modern phenomena on the basis of special law enforcement activities. The main center of such activity should be a law enforcement structure capable of promptly and effectively responding to the challenges and threats that arise from organized crime, including at the transnational level [13, p. 111; 14, p. 209; 15, pp. 893-910].

The war in Ukraine has changed everything by creating an "atmosphere of unacceptable risk for international criminal business". According to the U.S. government report, international criminality faced such obstacles in Ukraine as: closed ports, mined areas, part of the population has gone to defend the country, curfew largely prevents criminals from operating during the night period.

It should also be noted that a large number of criminal organizations have stopped cooperating with Russian "colleagues" [16].

After Ukraine fell out of the smuggling routes, criminals found other supply routes. For example, the flow of heroin and methamphetamine across the Turkey-Iran border has increased.

In the first quarter of 2022, Lithuanian border guards recorded a fourfold increase in the volume of illegal tobacco transportation compared to the previous year. In 2023, Estonian officials together with Europol seized 3.5 tons of Latin American cocaine worth half a billion euros in the port of Muuga.

The blockade of Ukrainian ports and the strengthening of control over the western borders have influenced the increase in cases of seizures in Russia: smuggling of luxury goods, especially designer goods, has increased.

Currently, criminals in Ukraine have additional earning opportunities, such as human trafficking [17, pp. 202-218] and cross-border transportation of army evaders.

Thus, SBU counter-intelligence agents blocked the channel of illegal migration of foreigners through Ukraine to the European Union. According to preliminary data, more than 100 people have used the illegal mechanism.

As the SBU established, Kyiv residents and their foreign accomplices have been organizers of the scheme. They created a mechanism for the illegal stay of persons from South Asian countries in Ukraine.

The perpetrators created a number of fictitious companies and, under the international student exchange program, issued fictitious invitations to foreigners allegedly to study at Ukrainian universities. However, instead of studying, on the basis of the invitations received, "students" had the opportunity to travel to EU countries, using Ukraine as a crossing point.

According to the investigation, members of the group were active throughout the territory of Ukraine. They met migrants, provided them with housing and "pre-legalized" them in Ukraine under fictitious documents. In the future, these "entrepreneurs" formed groups and transported "students" abroad.

According to preliminary estimates, the perpetrators transported over 100 foreigners using the channel of illegal migration. The cost of "services" depended on the country of destination and ranged from $4,000 to $8,000. The countries of Western Europe were in the greatest "demand" among migrants.

A number of searches were conducted in Kyiv and Kyiv region, as a result of which law enforcement officers have discovered a group of 15 people who were being prepared for transportation to Europe. In addition, fictitious documents used to legalize foreigners and vehicles used to transport criminals had been seized.

As part of the criminal proceedings, one of the organizers has been charged under Part 2 of Art. 332 (illegal transportation of persons across the state border of Ukraine) of the Criminal Code of Ukraine [18].

As one can see, despite the large-scale aggression of the Russian Federation against Ukraine, law enforcement agencies continue to oppose socially dangerous acts which encroach on the protected interests of the state.

When studying organized crime related to transnational crime, it is impossible to ignore foreign countries where the fight against crime (including transnational crime) remains quite effective.

### *Fighting organized crime in Italy*

In Italy, all issues of combating organized crime are under the responsibility of the Ministry of Internal Affairs. Police has been particularly active in the last decade. As an example, it is necessary to pay attention to a number of seizures carried out by law enforcement agencies based on a court verdict. So, in Sicily alone, mafia property worth of 300 million euros, has been confiscated. At the same time, a large number of shares in various companies, 60 hectares of land and 220 buildings were confiscated. All this belonged to the mafia boss from the Sicilian city of Trapani, Matteo Messina Denaro, and was registered in the name of a local businessman, Giuseppe Grigoli.

In recent years, Italian authorities have confiscated nearly 10,000 real estate properties from the mafia. Confiscated buildings, as a rule, are transferred to public and state organizations engaged in social support of low-income families. Italian justice hands down harsh sentences to members of criminal communities.

Thus, police of a number of European countries, as well as Brazil and Panama, led by representatives of German law enforcement agencies, exposed and arrested about a hundred suspects of cocaine smuggling, money laundering and tax crimes [19]. The main target of the large-scale operation, which was conducted in cooperation with Eurojust and Europol agents and involved law enforcement officers, were the leaders of the "Ndrangheta" group. The detained persons are suspected of money laundering, drug trafficking, tax evasion and fraud. This mafia syndicate is considered to be one of the most powerful in the world. Currently it receives a significant part of its income from the drug trade.

Activities of the "Ndrangheta" syndicate, in addition to Europe, have spread to the USA, Mexico and Latin American countries. According to law enforcement officers, representatives of the "Ndrangheta" have set up a large hub for "laundering" money in this country.

The "Ndrangheta" clan originates from Calabria, the poorest province in Italy. According to experts, it includes about 150 Calabrian families. Drug and arms trade, robberies, fraud and siphoning of public funds annually provides the clan with a profit of over 50 billion euros. Activities of the "Ndrangheta" are spread throughout Italy, as well as the USA, Australia, Belgium, Canada, Germany, Austria, the Netherlands, Argentina, Colombia and Mexico. The clan is considered to be the biggest distributor of cocaine in Europe [19].

### *Tackling organized crime in the United Kingdom*

In Great Britain, the National Crime Agency (NCA) is required by law to combat organized crime (including transnational). The main tasks of the

national agency include: countering illegal trafficking of weapons and drugs, cybercrime, fraud, bribery and corruption, human trafficking, illegal migration, laundering of "dirty" money, etc.

The NCA's primary mission is to protect the public from organized crime (including transnational crime) by targeting and prosecuting those criminals, who pose the greatest public danger to the UK.

Today, the NCA employs over 5,000 officers who have a wide range of expertise and carry out various tasks to protect the public from organized crime (including transnational). Officers collect and analyze information in order to make an objective assessment of the threats the UK may face in both short and long term. NCA officers use different types of forensic knowledge and innovative technologies to prevent, stop and solve criminal offenses that have already been committed, which in turn ensures the safety of citizens and the country from criminal offenses of various types [20].

As one illustrative case, in February of 2024, a person was convicted for participating in an organized criminal group, which was active in the business of the illegal transportation of migrants to Great Britain by trucks. During the investigation, it was determined that the person, who has been arrested as part of a long investigation, was a member of an organized crime group that used GPS trackers to track vehicles in which they secretly hid people with a goal to illegally cross the state border.

This individual was arrested during an NCA operation in South Mimms on March 30, 2021, where he was caught red-handed while attempting to break into a truck to transport four migrants, without the knowledge and consent of the driver.

At the time of his arrest, this person worked for an organized criminal group specializing in illegal border crossing. A search and seizure of the criminal's personal belongings uncovered evidence of the individual's involvement in a separate criminal network that has extorted 7,000 pounds per person from migrants for the services to smuggle them into the UK [21].

Also, the NCA effectively counters international drug trade. Thus, the head of a drug gang received a prison term in March 2023, after an investigation involving NCA officers.

The criminal, by using conspiracy methods, engaged in illegal activities related to drug trafficking using an encrypted communications platform. His closed network consisted of more than 50 criminal contacts, including those abroad. Within the course of the investigation, irrefutable evidence was obtained that he supplied drugs to criminal groups, in conjunction with drug gangs, in the North West, as well as in Plymouth and Southampton

in the UK. The offender disguised his criminal activities as a legitimate business, since he owned a car company in Wavertree and Liverpool. This company was engaged in transportation both in Great Britain and abroad.

According to the judgment of the British court, in addition to the imprisonment of the leader of the drug gang, his property worth almost 400 thousand pounds was also confiscated to the state treasury. The criminal proceeds from multi-year criminal activity total about 3 million pounds [22].

**Conclusions**

Organized crime, in particular in its transnational form, poses a threat to global security policy as it represents an alternative system of social construction, which is based on criminal relations.

In the near future, organized crime will primarily retain its transnational character, its socially dangerous activities will be concentrated primarily in the social, economic and criminal spheres. In this regard, the greatest threats to world security policy are seen as the following phenomena: illegal migration and human trafficking, the spread of drugs and the rise of the drug business against this background, organized crime of a transnational nature and crime in the information space, illegal circulation of weapons and other explosive objects.

Thus, having studied the work of authorized bodies to combat organized crime in Italy and Great Britain, it should be noted that the law enforcement agencies of these countries effectively apply the fight against crime not only at the national, but also at the international level, thereby creating new units and looking for new approaches, methods and crime prevention technologies and also widely using the experience of the developed world jurisdictions.

While summarizing the expertise of the studied countries in the field of combating organized crime, it is necessary to pay attention to the fact that both Italy and Great Britain have developed sufficiently effective mechanisms for combating organized crime. Among the progressive points, the following should be noted: legislators in Italy and Great Britain are quite active in law-making in the area of combating crime; law enforcement agencies of Italy and Great Britain are provided with great authority in terms of combating crime, which makes it possible to effectively counter socially dangerous acts caused by manifestations of international organized crime; presence of separate law enforcement agencies, which are aimed at fighting organized crime on a national and global scale, deserves special attention.

We hope that positive experience of Italy and Great Britain will be useful in the fight against organized crime not only in Ukraine, but also beyond its borders.

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# International Economic Sanctions. Part 1. History and Theory

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**Abstract**
*The relevance of this research lies in examining the evolution of approaches to the application of international economic sanctions at the level of nation-states and international organizations; the reasons for their increasing popularity after the end of the Cold War; and determining the conditions for their effectiveness. The study aims to analyze and synthesize information on the application of economic sanctions, compare approaches to understanding their content and purpose across different historical periods, assess their humanitarian consequences, and formulate conclusions and recommendations for both theoretical and practical purposes. The research employed a wide range of approaches and methods, including the formal-legal method, which allowed for the formulation of basic terms, concepts, features, constructs, and classifications; the historical method, which aided in analyzing the evolution of approaches to the application of economic sanctions; the systemic method, which clarified the mechanisms for imposing, modifying, and lifting economic sanctions; and the comparative legal method of scientific inquiry, which was used to evaluate approaches to the legal regulation of economic sanctions at various stages of historical development. The results of the study include determining the role of international universal organizations, particularly the League of Nations and the UN, in recognizing and enshrining economic sanctions in international law as legitimate means of inducing sanctioned states to engage in desired activities. It has been established that the consequences of applying economic sanctions are ambiguous; in addition to positive effects, they can in some cases hinder peace processes and post-conflict recovery, impede the activities of peacekeeping organizations, undermine negotiations, and exacerbate disagreements between conflicting parties. Despite the possibility of negative consequences, economic sanctions remain popular as a means of demonstrating power or the ability to influence the behavior of a sanctioned government without resorting to military conflict. To mitigate the negative impact of sanctions on peacekeeping efforts, it is recommended that*

*initiators set clear objectives when introducing economic sanctions; conduct regular substantive reviews of their impact; and expand exceptions to sanctions for peacekeeping activities, among other measures. The consequences of economic sanctions for the sanctioned country are primarily manifested in their impact on trade conditions. It is noted that economic sanctions are not necessarily more effective in the case of multilateral sanctions than in unilateral actions. The research observes that economic sanctions affect supporters and opponents of the ruling regime in the sanctioned country differently and may, in some cases, contribute to the consolidation of society around the ruling regime. The study concludes that despite existing shortcomings, economic sanctions have become an important tool for national governments and international organizations in responding to foreign policy challenges.*

***Keywords:*** *international law, restrictions, sanctions, sanctions policy, security, sovereignty.*

# Міжнародні економічні санкції. Частина 1. Історія та теорія

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**Анотація**
*Актуальність дослідження полягає в розгляді еволюції підходів до застосування міжнародних економічних санкцій на рівні національних держав і міжнародних організацій; причин зростання їхньої популярності після завершення «холодної війни»; визначенні умов їхньої ефективності. Мета та завдання дослідження передбачають аналіз і синтез інформації, пов'язаної з практикою застосування економічних санкцій, порівняння підходів до розуміння їх змісту та призначення на різних етапах, оцінки їх гуманітарних наслідків, а також формулювання авторських висновків із визначеної проблематики, рекомендацій для теоретичного та практичного використання. Під час роботи використовувався широкий перелік підходів і методів дослідження, зокрема: формально-юридичний метод дав змогу сформулювати основні терміни, поняття, ознаки, конструкції та провести класифікації; історичний метод став у пригоді при аналізі еволюції підходів до застосування економічних санкцій; системний метод – при з'ясуванні механізмів накладання, зміни та скасування економічних санкцій;*

*порівняльно-правовий метод наукового пізнання використаний при оцінці підходів до правового регулювання застосування економічних санкцій на різних етапах історичного розвитку. Отримані результати дослідження полягають у визначенні ролі міжнародних універсальних організацій, зокрема Ліги Націй і ООН, у визнанні та закріпленні на рівні міжнародного права економічних санкцій як легітимних засобів спонукання підсанкційних держав до певної бажаної діяльності. Встановлено, що наслідки застосування економічних санкцій є неоднозначними, тобто, крім позитивного ефекту, вони здатні в окремих випадках перешкоджати мирним процесам та постконфліктному відновленню, стримувати діяльність миротворчих організацій, підривати переговори та посилювати розбіжності між конфліктуючими сторонами. Попри можливість негативних наслідків, економічні санкції користуються популярністю як засіб демонстрації своєї сили або здатності впливати на поведінку підсанкційного уряду, не вдаючись при цьому до воєнного конфлікту. Для усунення негативного впливу санкцій на миротворчі зусилля їх ініціаторам рекомендується ставити чіткі цілі при введенні економічних санкцій; проводити регулярні змістовні огляди їхнього впливу; розширити винятки із санкцій для миротворчості тощо. Наслідки економічних санкцій для підсанкційної країни проявляються насамперед в їх впливі на умови торгівлі. Зазначено, що економічні санкції не обов'язково є більш ефективними у разі багатосторонніх санкцій, ніж у разі односторонніх дій. Зазначається, що економічні санкції по-різному впливають на прибічників і противників правлячого режиму підсанкційної країни і в окремих випадках можуть сприяти консолідації суспільства навколо правлячого режиму. Зроблено висновок, що попри існуючі недоліки, економічні санкції стали важливим інструментом реагування на зовнішньополітичні виклики національних урядів і міжнародних організацій.*

***Ключові слова:*** *санкції; обмеження; санкційна політика; суверенітет; безпека; міжнародне право.*

## Introduction

International economic sanctions, while constituting a form of intervention and coercion, are generally regarded as a less costly and less risky course of action between diplomacy and war.

States, universal and regional international organizations impose economic sanctions in an attempt to influence the strategic decisions of national governments and non-state actors that threaten their interests or violate international legal norms. Sanctions have become a defining feature of the response of states and international organizations to a range of geopolitical challenges, including Iraq's occupation of Kuwait, the nuclear programs of North Korea and Iran, as well as Russia's aggression against Ukraine. In recent decades, states have expanded the use of coercive economic measures, applying and intensifying them against sanctioned states.

Throughout history, various types of economic sanctions have been developed: they can be comprehensive, prohibiting commercial activities in relation to an entire country, or they can be targeted, blocking transactions between specific enterprises, groups, or individuals. Economic sanctions take various forms, including travel bans, asset freezes, arms embargoes, restrictions on capital movement, reductions in foreign aid, and trade restrictions.

Throughout the 20th and 21st centuries, the list of situations warranting the application of economic sanctions has significantly expanded. National governments and international organizations, particularly the United Nations and the European Union, impose economic sanctions for the purposes of coercion, deterrence, punishment, or stigmatization of state political regimes that jeopardize their interests or violate international legal norms. Today, economic sanctions are utilized to achieve a range of foreign policy objectives, including the promotion of democracy and human rights; combating nuclear proliferation; countering terrorism; resolving various types of conflicts; enhancing cybersecurity; and addressing other international concerns.

**Literature review**

Foreign literature presents a significant volume of research works, as international economic sanctions have been studied since the 1960s. Of particular value are the scientific works of researchers (J. Galtung [1]; J. Dashti-Gibson et al. [2]; M. Doxey [3]; R. Pape [4]; A. Drury [5]), who laid the foundation for the doctrine of international economic sanctions, specifically identifying factors that determine their success. In turn, G. Hufbauer, J. Schott & K. Elliott created an informational database encompassing all instances of coercive economic measures implementation, beginning from 1914 (approximately 200 economic sanctions were applied in the period from 1914 to the present) [6; 7]. However, despite numerous works devoted to economic sanctions, particularly collective ones, it is necessary to concur with J. Masters' conclusion that consensus on the definition of collective sanctions remains elusive [8].

Although the EU's sanctions policy has been implemented for 30 years, to date there are no comprehensive reviews of it either within united Europe or beyond its borders, including Ukraine. Existing analysis of the European Union's targeted sanctions policy focuses predominantly on examining individual cases of its application (sanctions policies concerning Egypt, Zimbabwe, Iran, Tunisia, and several other states, which included trade and financial sanctions, as well as withdrawal or threat of withdrawal from traditional trade or financial relations) and assessing their effectiveness (van P.A.G. Bergeijk [9]; T.J. Biersteker and C. Portela [10]; A. Boogaerts [11]; J. Grebe [12]; L. Vovchuk [13]). Exceptions to this rule can be

found in the scientific inquiries of M. Bali and N. Rapelanoro (M. Bali and N. Rapelanoro [14]), dedicated to modeling international economic sanctions; C. Beaucillon, who examined the evolution of EU sanctions policy [15]; F. Giumelli, who seeks to answer questions about when, against whom, where, and why EU sanctions were imposed [16; 17], as well as attempts to define general EU approaches to sanctions policy that have formed over the last decade [18-20]. Separately, it is worth highlighting studies by authors who present harsh criticism of the use of international economic sanctions [21-24].

Russian aggression against Ukraine, which began in 2014, has prompted a new direction in both foreign (E. Jones and A. Whitworth [25]; E. Hellquist [26]) and domestic (A. Klymosiuk [27]; O. Kukartsev [28]; V. Shamrayeva [30]; O. Sharov [31]; I. Yakoviyk and A. Turenko [32]) research on EU sanctions policy towards the Russian Federation. Nevertheless, this problematic remains insufficiently developed in domestic scholarship.

**Materials and Methods**

Substantive research on international economic sanctions began in the 20th century and immediately acquired an interdisciplinary character – representatives of international law, international relations, political science, and economic theory have been engaged in the development of this problem. Throughout the 20th century, the practice of applying international economic sanctions was limited, which complicated their study. Therefore, in the period from the 1950s to the 1970s, the development of economic sanctions was dominated by qualitative case studies and descriptive statistics. Some analysts in that embryonic stage already tried to glean general lessons from selected collections of cases [33].

A genuine breakthrough in research was provided by G.C. Hufbauer, J.J. Schott and K.A. Elliott, who in their work "Economic Sanctions Reconsidered: History and Current Policy" (1990) analyzed 100 cases of economic sanctions application in the 20th century. Based on the results of their analysis, they concluded that economic sanctions are becoming an increasingly central instrument of foreign policy for major powers. This raises questions about the effectiveness of economic sanctions in achieving the foreign policy, and in some cases domestic policy, goals proclaimed by their initiators. Doubts about their effectiveness were primarily caused by the assessment of the consequences of the Soviet grain embargo and pipeline sanctions [6]. As a result, the question of the expediency of using economic sanctions was raised once again, and proposals were formulated to limit recourse to such measures in the future.

In the 21st century, the breadth and depth of research on international economic sanctions are expanding faster than ever before, which has

serious implications for the theory and practice of their application. Sanctions research has gained further development and depth due to the introduction of a dataset on the threat and imposition of economic sanctions. In 2009, T.C. Morgan, N. Bapat and V. Krustev analyzed 888 cases where economic sanctions were threatened and/or applied between 1971 and 2000 [34]. A broader sample of sanctions cases allowed for a correction of the conclusions obtained by G.C. Hufbauer, J.J. Schott, and K. A. Elliott.

In our study, we do not idealize the practice of applying collective economic sanctions, as we take into account the fact that empirical results of previous studies demonstrate either the absence of a connection or a certain negative correlation between international cooperation and the success of economic sanctions (S. Bonetti [35]; D. Drezner [36; 37]; G. Hufbauer et al. [6]; P.A.G. van Bergeijk et al. [38]).

It should be noted, however, that at the level of the aggregated case studies and general methodology the van Bergeijk uncover a tendency to inflate success scores, reclassifying failures into successes even when the evidence for doing so was not convincing [39]. Given this, scholars have yet to answer the question: Are sanctions, particularly targeted sanctions, really the potent instruments optimists suggest? Under what circumstances do punitive economic measures induce policy change in sanctioned countries?

We strongly support the opinion of D. Peksen, who calls for a comprehensive study of international economic sanctions to avoid the conventional pitfalls of modern research. First, the sender-biased interpretation of sanctions effectiveness renders the treatment of the 'ineffective' cases with negative outcomes the same as those cases that induce no discernable change in target behavior. Second, the prevalent use of static data from existing sanctions databases reduces the ability of researchers to study various time-specific factors affecting the probability of sanctions success. Third, the dominant state-centric bargaining model in the literature offers limited insight into contemporary coercive measures directed at non-state actors. Fourth, the study of sanctions in isolation of other instruments that frequently accompany them, such as incentives and diplomatic pressure, leads to a partial understanding of the specific role sanctions play in shaping the outcome of key foreign policy initiatives [40].

## Results and Discussion

### *Economic Sanctions: Historical Background*

For an extended period, unilateral sanctions predominated – a form of restrictive measure imposed by one country on another with the aim of limiting the trade and business relations of the target country. Unilateral

economic sanctions inflict the most significant harm on vulnerable categories of the population in the sanctioned state.

Unilateral economic sanctions are traditionally regarded as one of the important means of foreign policy influence[1], utilized by Ancient Athens (the Megarian Decree (433-432 BCE)); Napoleon (the Continental Blockade of England (1806-1814)); the United States (the enactment of the law restricting U.S. trade with the rest of the world (Jefferson's Embargo), primarily with Great Britain and France (1808-1810)); the British Empire (for example, the Opium Wars with China (1839-1842, 1857-1860)); Great Britain and France, which during World War I attempted to isolate Germany and its allies from the global economy; and the League of Nations (prohibition of imports of Italian goods, exports to Italy of raw materials necessary for the military industry, as well as an appeal to League member states to refrain from providing Italy with credits and loans (1935)).

However, the modern history of the "economic weapon"[2] sanctions and their wartime analogue, blockades – begins during World War I. The prevailing doctrine of liberalism traditionally protected the principle of free trade from wartime measures. The general rule was that states were compelled to continue paying credits to other countries with which they were at war, as well as sign treaties that protected private property from seizure[3]. On the eve of World War I, English officials became preoccupied with how best to turn globalization against Great Britain's enemies. One should agree with N. Mulder's opinion that the practice of applying economic sanctions in the 20th century shifted the border between war and peace, created new ways of mapping and manipulating the fabric of the world economy, changed liberalism's understanding of coercion, and altered the course of international law development [41].

As a result, the view prevailed that economic weapons, particularly blockades, could bring an aggressor to its knees "without a drop of blood". Consequently, if blockades, as a "peaceful means of pressure", were once

[1] It is well known that in ancient times, an army that could not conquer a city surrounded by defensive walls would besiege it to block the supply of necessary provisions to the people living in it. Since then, this strategy has not changed substantially.

[2] Economic sanctions are often interpreted in English as an "economic weapon". In 1919, U.S. President W. Wilson characterized economic sanctions as follows: they are "something more than war": the threat was "absolute isolation..."... it brings a nation to its senses just as suffocation removes all inclination to fight from an individual. Apply this economic, peaceful, silent, and deadly remedy, and there will be no need for force. It is a terrible remedy. ... it exerts pressure on that nation which, in my opinion, no modern nation can resist" [41].

[3] During the Crimean War of 1853, the British and Russian Empires continued to service each other's debts. In the summer of 1934, when the German Reichsbank had barely a week's supply of currency to finance foreign exchange operations, and sanctions could have toppled the new Nazi regime, British banks opposed sanctions due to the risk of default and losses on their German debts [44].

considered prohibited, even in wartime, after World War I they became a weapon for maintaining peace that could be used, if necessary, without a declaration of war and even as an alternative to it. This conclusion was formed despite researchers' assessments that the consequences of the blockade during World War I were horrific: 300,000-400,000 people in Central Europe died of starvation or disease due to the blockade, and 500,000 people perished in the Ottoman Empire. N. Mulder believes that the blockade did not play a decisive role in Germany's defeat. However, the general belief that the economic weapon worked led its proponents to see it as a panacea, while its victims saw it as a real threat to their existence [42].

The League of Nations played a defining role in legitimizing economic sanctions. Article 16 of the Covenant, on which the League of Nations was founded, stipulated that if any member of the League resorted to war in disregard of its covenants under Articles 12, 13, or 15, it would ipso facto be deemed to have committed an act of war against all other members of the League, who undertook immediately to subject it to the severance of all trade or financial relations and to prohibit all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a member of the League or not [43].

Nicholas Mulder, in his book "The Economic Weapon: The Rise of Sanctions as a Tool of Modern War", proposed a reassessment of the League of Nations' activities, arguing that its authority was based not on futile moral appeals but on the application or threat of economic and financial sanctions [42]. The League of Nations relied on the power of economic sanctions to ensure global peace, and in some cases, these measures produced the expected effect: the threat of economic sanctions facilitated the resolution of the Saar region issue between France and Germany (1920s and 1930s); compelled Yugoslavia to refrain from war against Albania (1921), and Greece from military action against Bulgaria (1925); and helped settle the conflict between Colombia and Peru (1932). Thus, economic sanctions were more effective than most contemporary commentators believed, but they also provoked fierce counter-reactions in some cases[1].

[1] For instance, the application of economic sanctions against Italy in 1935 did not provoke protest against Mussolini's fascist regime among Italians, but rather a reverse reaction – strengthening of patriotic solidarity (for example, the successful conduct of the "Day of Faith" on December 18, 1935, when the regime proposed that Italians donate gold and valuables to support the war effort). Italian bankers calculated that 10 million rings weighing 55 tons and valued at between 80 and 120 million dollars were donated. In late November 1935, Italians began appealing to relatives in the US to send their wedding rings to Mussolini. In less than six months, more than 100,000 American women sent their wedding rings to various Italian groups. Mussolini's regime managed to identify itself and its policies as one with the national organism. Participation in demonstrations against the embargo became not just a political activity but a patriotic one, and opposition to the dictatorship's initiatives became anti-Italian rather than anti-fascist acts.

Regarding the assessment of the League of Nations' sanctions policy, it should be noted that this organization was authorized to apply sanctions to warring states and, accordingly, could not apply them, for example, to change the behavior of a national government towards its citizens. Another important conclusion drawn from the analysis of the League of Nations' sanctions policy is that a universal international organization applying economic sanctions to maintain peace and security can hope for their effectiveness only if all influential states supporting the sanctions are members of such an organization. This is because international cooperation enhances the effectiveness of economic sanctions, as it effectively isolates the sanctioned state.

When assessing the effectiveness of sanctions, the following should be taken into account [8]:
– the dynamics of each historical case differ significantly, and their effectiveness depends on numerous factors. Consequently, sanctions that are effective in one historical and geographical context may prove ineffective in others. Sanctions regimes with relatively limited objectives generally have a higher chance of success than those with grand political ambitions. It should be noted that sanctions may achieve the desired economic effect but fail to change state policy;
– the content of sanctions, their scope, and the underlying logic may change over time;
– in a specific situation, correlations can be identified rather than causal relationships;
– A comparative assessment of the utility of sanctions is important, not merely whether they achieved their goal[1].

The United Nations played a key role in developing collective sanctions[2], with its Security Council empowered to apply restrictive measures to

The threat of economic sanctions prompted the governments of Germany, Italy, and Japan to develop counter-sanctions policies. For instance, Berlin turned to finding ways to ensure economic self-sufficiency. Germany based its four-year economic plan on the principles of "raw material freedom" and "blockade resistance" [42; 45; 46].

[1] U.S. and EU sanctions against Russia have not yet ended Russian aggression against Ukraine, but other options, including inaction, could have proven worse and more costly.

[2] During the Cold War, due to the confrontation between the socialist bloc and the collective West, the UN rarely decided to impose economic sanctions. Before 1990, the UN Security Council applied economic sanctions only twice: against the white minority regime in Rhodesia and against South Africa. Freed from the straitjacket of the Cold War era, the United Nations began to intervene more aggressively in international affairs, including the imposition of mandatory economic sanctions. As a result, during the 1990s, the UN Security Council authorized far more sanctions than during the previous 45 years. However, due to concerns about collateral damage to civilians from economic sanctions, in the late 1990s, the UN moved away from the practice of imposing comprehensive embargoes of the previous era to more limited measures [7; 47].

countries it pressures to fulfill specific foreign policy objectives (Art. 41 of the UN Charter).[1]

Etymologically, the term "sanction" derives from Latin, meaning "coercive measure". In contemporary international law, sanctions are understood as "isolation", "blockade", "boycott", "economic coercion", or "economic weapon".

Defining multilateral sanctions is challenging, as both the term "multilateral" and the concept of "sanctions" are subject to debate. Indeed, Article 41 of the United Nations Charter does not explicitly use the term "sanctions", instead referring to "... measures not involving the use of armed force" that the UN Security Council may employ to give effect to its decisions. "These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations" [48]. European Union institutions also use the term "restrictive measures", adding "sanctions" in parentheses [18-20].

Today, economic sanctions can be imposed by international organizations, both universal (UN) and regional (for example, the EU and NATO)[2], as well as in the form of a unilateral (autonomous) act of a state. In the latter case, states individually resort to sanctions of various forms, which may align with the values promoted and protected by the UN Charter, or deviate from them. It should be noted that this latter type of sanctions is subject to criticism, as unilateral sanctions face a lack of international support [49; 50]. In recent history, the number of both unilateral and collective restrictive measures has been rapidly increasing, for example, against Venezuela, Iraq, Iran, North Korea, Libya, Cuba, Russia, Syria, Sudan, and others.

While during the Cold War, sanctions policy was associated with the confrontation between two military-political blocs, after it, it became linked to the promotion of democracy and human rights, the proliferation of

[1] According to Article 41 of the UN Charter, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations" [48].

[2] It should be noted that sanctions from different international organizations, such as the UN and EU, can in some cases be applied in parallel. For example, in the field of combating terrorist financing, the following freezing regimes operate: the UN "Al-Qaeda – Islamic State" regime based on UN Security Council Resolutions 1267 (1999), 1989 (2011), and 2253 (2015); the UN "Afghanistan/ Taliban" regime based on UN Security Council Resolution 1988 (2011); the EU "persons involved in terrorist acts" regime derived from EU Regulation 2580/2001; the EU "Islamic State – Al-Qaeda" regime based on EU Regulation 2016/1686; and national asset freezing measures to combat terrorism in accordance with the Monetary and Financial Code (International economic sanctions).

weapons of mass destruction, illicit drug trafficking, the resolution of internal conflicts, the disruption of peace processes, international terrorism, cybersecurity, and more. In some cases, sanctions programs pursue multiple objectives that subsequently change, and in many instances, individuals, organizations, and countries may be subject to sanctions for several reasons. Modern sanctions policy can be directed against both political regimes and non-state actors. The classification of sanctions has also become much broader. Today, it is common to distinguish:
– instrumental sanctions, designed to prevent the sanctioned country from obtaining specific goods or financial capital;
– punitive sanctions, which involve economically punishing the target state for unacceptable foreign/domestic policy behavior; such sanctions do not prevent the sanctioned country from obtaining goods or capital but can cause significant economic damage;
– symbolic sanctions, the consequences of which are so insignificant that the sanctioning state does not expect significant economic damage in the target state.

Widespread concern about the negative impact of sanctions at the level of individual countries led to the development, after the September 11, 2001 terrorist attacks in the US, of so-called targeted or "smart" sanctions [40; 51; 52]. The introduction of this category of sanctions is due to the increasing focus in international law on individual responsibility of specific persons or organizations believed to be responsible for unlawful behavior/activities. The distinctive characteristics of targeted sanctions are: firstly, they are directed against individuals and non-state actors, allowing sanctions to be used in a wider range of crisis types; secondly, the objectives of targeted sanctions differ significantly from comprehensive sanctions; thirdly, the form of sanctions today differs substantially from trade embargoes imposed in the past [53].

However, this category of economic sanctions is also subject to criticism by some researchers, especially during the Russian aggression against Ukraine. For instance, F. Ladurner argues that the conflicting moral codes of Russia and Western states complicate the assessment of sanctions application procedures as good or bad from a moral standpoint [54].

Although this approach is believed to enhance the effectiveness of sanctions as a foreign policy tool, human rights advocates express significant concerns about their impact on human rights. They argue that the application of economic sanctions contradicts Art. 25 of the Universal Declaration of Human Rights, which states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food... and medical care..." [55].

The issue of human rights violations during the application of economic sanctions, particularly blockades, was first seriously considered by researchers during and after World War I. However, the prevailing view was that blockades could lead to civilian casualties, but this was a sad necessity. Therefore, it was deemed illogical to change the policy of economic sanctions at a time when it was necessary to maintain all possible peaceful means of pressure on the enemy [42].

In modern conditions, the European Court of Human Rights has questioned the legality of UN targeted sanctions and found that they violate some procedural rights enshrined in the European Convention on Human Rights [56]. The UN High Commissioner for Human Rights, Michelle Bachelet, also criticized unilateral coercive measures (sanctions) at the 48th regular session of the UN Human Rights Council[1]. A response to such concerns can be seen in the practice of refusal, for example by the European Union, to block exports and operations related to food and agricultural products, as well as the pharmaceutical sector. Additionally, the position of individual companies, such as Bayer, and scholars, who confirmed their obligation to supply medicines and consumables and called on the international community to avoid "economic sanctions that violate the right to health" [57], reflects this concern.

### *Economic Weapon: The Use of Sanctions as an Instrument of Modern Warfare*

The development of economic warfare was initiated by mercantilists and later expanded by economists such as List, Marx, and Hirschman. The term "economic weapon" (less frequently, "trade weapon") entered academic discourse during World War I, primarily through the work of German researchers (A. Dix [58]; P. Eltzbacher [59]; J. Gruntzel [60]; Kahl [61]) and was used to justify the empire's aggressive policies.

After the war, representatives of the Entente countries contributed to the development of economic weapon concepts, paying particular attention to economic blockades and their differences from older forms of blockades [62]. Zimmern A. used it in 1918 to describe the economic sanctions policies of the British Empire and France against the German Empire [63] De Launay L. investigated the use of economic weapons in the post-war period [64]. From March 1918 to January 1920, the Entente countries

[1] Michelle Bachelet notes that when sanctions are directed against an entire country or whole sectors of the economy, it is the most vulnerable people in that country – those who are least protected – who are likely to suffer the most. And those who are intended to be targeted may actually derive a perverse benefit from the gaming of sanctions regimes and profit from the economic distortions and incentives they create. Sanctions regimes that constrain the actions of third parties are also problematic if they are overly broad and affect individuals and economic actors other than those directly responsible for human rights violations [49].

blockaded Bolshevik Russia to combat the revolution and cut off Germany's access to Russian resources. The mechanisms of the 1919 Soviet Russia blockade entered international law as a means of punishing aggressors in peacetime and are considered the beginning of modern economic sanctions [65]. The concept of economic weapons continued to be developed in subsequent years [66; 67].

A renewed interest in economic weapons was observed during World War II, when representatives of the anti-Hitler coalition states engaged in its development [68; 69], as well as during the Cold War, when such types of economic weapons as blockades (regarding Cuba, for example, [70; 71] and grain embargoes [72; 73] were applied. It should be noted that both the Cuban blockade and the grain embargo, according to researchers' estimates, proved to be ineffective means of economic warfare.

Today, a hundred years after the end of World War I, the idea of perceiving economic sanctions as a weapon is gaining an increasing number of supporters. The emergence of global supply chains encourages modern states to use economic weapons, such as trade, financial, production, and investment policies, to compete for power, waging "wars without gunsmoke" [74-76]. It should be noted that the growing attention to economic sanctions in the modern world is also associated with the consideration of trade as a strategic weapon of the world's leading powers, and consequently, the desire to limit its successful use in case of conflict [77].

### *The Problem of Economic Sanctions Effectiveness*

International economic sanctions are an increasingly common instrument used by both national governments and international organizations to implement their foreign policy, despite the fact that sanctions can sometimes hinder peace processes and post-conflict recovery, constrain the activities of peacekeeping organizations[1], undermine negotiations, and exacerbate differences between conflicting parties. To mitigate the negative impact of sanctions on peacemaking efforts, their initiators should set clear objectives when imposing sanctions; conduct regular, meaningful reviews

[1] In the context of discussing how and why sanctions impede peacemaking, experts highlight three main issues. First, sanctions are usually rigid: they are difficult to modify, soften, or cancel due to the complex procedure for their coordination and bureaucratic inertia. Second, there is no system for comprehensive assessment of the harm or effectiveness of sanctions – and therefore, the entities imposing sanctions cannot evaluate whether they help or hinder efforts to achieve the peace and security goals for which they were introduced. Third, as sanctions proliferate, they become increasingly complex, making them more difficult to resolve or reform. Sanctions have become less likely to influence conflict parties who do not believe that sanctions will be lifted or their consequences mitigated if they make concessions. Based on these considerations, the UN Security Council in 2022 adopted a resolution to exclude humanitarian activities from some Security Council sanctions [79].

of their impact; expand exemptions from sanctions for peacemaking; and strengthen private sector confidence in investing in previously or partially sanctioned jurisdictions (Sanctions, Peacemaking).

At first glance, the connection between international cooperation and the success of economic sanctions seems obvious [3]. However, empirically obtained results are quite surprising: a number of studies indicate that successful episodes of economic coercion demonstrate the lowest level of cooperation between sanctioning states [35; 37].

It might appear that collective (multilateral) economic sanctions would have a greater impact on the trade conditions and finances of the sanctioned country than unilateral sanctions. However, despite the potential to inflict greater damage, collective sanctions are sometimes less effective in achieving desired political outcomes. Collective sanctions can enhance the political effectiveness of opposition groups in the sanctioned country or, conversely, strengthen groups that support the regime's undesirable policies[1]. This situation is partly explained by the inability of multilateral coalitions to ensure cooperation among their members, as well as the appropriation of sanctions rent in the target country. Unilateral sanctions imposed by a country closely associated with their purpose sometimes prove more effective in achieving the intended political goals [78].

Contrary to popular belief, economic sanctions achieve foreign policy goals in only about a third of cases (the effectiveness of sanctions is defined as the ability of the sanctions initiator to exert economic pressure on the sanctioned entity [3]). In rare instances, due to their ineffectiveness, they may be replaced by other more stringent measures, as was the case with Iraq's aggression against Kuwait[2]. The effectiveness of sanctions policy largely depends on the pursued goal, the economic and political environment in the target country, and the method of implementing the sanctions policy (Hufbauer et al., P. IX). Governments and international organizations impose economic sanctions in an attempt to change the strategic decisions of state and non-state actors that threaten their interests or violate international norms of behavior. In the target country, sanctions that demonstrate different impacts on supporters and opponents of the

[1] As previously mentioned, the League of Nations, in imposing economic sanctions on Italy, erred in the matter of the Italian society's reaction. Italians perceived the economic sanctions as unjust (iniquesanzioni) and they evoked unprecedented support for Mussolini's fascist regime within the country. Patriotic and nationalistic sentiments reached a peak: memorial plaques were hung on houses, perpetuating the injustice towards Italy. A typical text read: "In memory of the blockade. Let there remain for centuries evidence of the great injustice committed against Italy, to which so many civilizations of all continents owe so much" [80].

[2] For example, the UN Security Council imposed comprehensive sanctions against Iraq four days after the invasion of Saddam Hussein's army into Kuwait (1990). A few months later, the Security Council had already authorized the use of military force against Iraq.

ruling political regime (generating internal conflict) usually force it to change its policy [81]. It should be noted that many strategies involve the use of sanctions for signaling and deterrent purposes, and thus the effect of such strategies may end at the stage of expressing a threat, without their direct implementation.

When studying sanctions economic policy, one should take into account its impact on both the economy of the sanctioned state and the countries that imposed it, as well as various aspects of sanctions wars, including energy, financial, and food export sanctions [82].

The analysis of the insufficient effectiveness of the current sanctions policy towards Russia is explained by the fact that the adverse impact on the GDP of a country under sanctions will be maximum when imports, exports, production, distribution, and finances are inflexible (universal non-substitution); in Russia's case, its economic system during 2022-2024 demonstrates moderate universal interchangeability, and thus is less vulnerable to sanctions [83]. Economic sanctions imposed on Moscow by the European Union, the USA, and a number of other states have an indirect impact on Russia's GDP through direct effects on inflation, interest rates, and the national currency (sanctions transmission mechanism) [84].

Despite their relatively low effectiveness, economic sanctions remain an important foreign policy tool for the world's leading countries, as well as for integration associations such as the European Union.

**Conclusions**

International economic sanctions constitute a significant instrument of foreign policy for contemporary states and international organizations, regardless of whether they are employed to restrict resources of conflict participants, address their abuses, alter their cost-benefit calculations, or promote negotiations. While economic sanctions do not play a decisive role in terminating or resolving conflicts, they can influence the cost-benefit calculations of conflict participants, limit their resources for waging war, or signal condemnation of the sanctioned country's policies by the sanctions' initiators and their partners.

The League of Nations played a pivotal role in legitimizing economic sanctions, emphasizing their use to ensure global peace, which in certain instances yielded the anticipated effect. The League of Nations' experience convincingly demonstrates that a universal international organization applying economic sanctions to maintain peace and security can expect their effectiveness, provided that all influential states supporting the sanctions are members of such an organization. This is attributable to the fact that international cooperation enhances the efficacy of economic

sanctions by effectively isolating the sanctioned state. Presently, economic sanctions may be imposed by international organizations, both universal (UN) and regional (e.g., EU and NATO), as well as in the form of a unilateral (autonomous) act of a state.

While during the Cold War, sanctions policy was associated with the confrontation between military-political blocs, in the post-Cold War era, it has been linked to the promotion of democracy and human rights, proliferation of weapons of mass destruction, illicit drug trafficking, resolution of internal conflicts, disruption of peace processes, international terrorism, cybersecurity, and other issues. In some cases, sanctions programs pursue multiple objectives that may subsequently change, and in many instances, individuals, organizations, and countries may be subject to sanctions for several reasons.

When implementing economic sanctions, the following points should be considered:

1. Given the ambiguous reputation of sanctions, countries initiating their adoption should moderate their expectations regarding achievable outcomes.
2. Sanctions should be incorporated into a clearly articulated strategy, developed on a multilateral basis where feasible, to enhance their effectiveness and legitimacy. Such sanctions should include clear and attainable requirements.
3. Initiators of restrictive measures must acknowledge that economic sanctions may, in certain instances, result in adverse humanitarian consequences and hinder peacekeeping efforts. Consequently, the implementation strategy should encompass mechanisms for monitoring and mitigating these effects, particularly through the modification or lifting of sanctions when deemed necessary.

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# Combating Child Pornography: International Legal Regulation and Experience of Ukraine and Foreign Countries

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**Abstract**
*The relevance of the topic is determined by the fact that child pornography is a serious threat to the safety and well-being of children, and combating it requires a comprehensive approach at the national level and international cooperation. Thus, the purpose of this study is to analyse international legal regulation in the field of combating child pornography, the experience of Ukraine and such foreign countries as France, Japan, India, the United Kingdom and Canada. The objectives are to identify the main regulatory provisions, mechanisms and approaches aimed at preventing and combating child pornography. The study was conducted using a number of scientific methods, including dialectical, formal and logical, analysis, comparison and generalisation methods. The authors draw attention to the concept of child pornography. It is determined what actions are considered to be the crime of child pornography and are criminalized. The recommendations and obligations of countries that have ratified these acts are analyzed. The article analyses the issues of criminalization of child pornography offenses in the legislation of the respective countries, criminal liability measures, establishment of national organizations and structures to combat it, etc. It was concluded that the maximum term of imprisonment an offender can receive in Canada and Great Britain, and one of the smallest – in Japan and India. The article also disproves the hypothesis that approaches to combating child pornography are identical in individual countries with different legal systems. The authors draw attention to the problem of determining the status of graphic materials and works of artificial intelligence that contain signs of child pornography. The authors also raise the issue of criminal legal assessment of viewing child pornography, including live broadcasts. It is stated that no country is immune to this form of child sexual exploitation. Attention is drawn to international cooperation, which is key to sharing best practices, resources and information between countries. It is argued that national governments, law enforcement agencies and civil society*

*need to work together in a concerted effort to ensure the protection of children in the world. This is important, among other things, to combat the avoidance of responsibility by criminals.*

***Keywords:*** *child pornography; Internet pornography; sexual exploitation; minors; pornographic materials; child prostitution; anime; artificial intelligence; cybercrime.*

# Протидія дитячій порнографії: міжнародно-правове регулювання та досвід України і зарубіжних країн

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**Анотація**

*Актуальність теми статті визначається тим, що дитяча порнографія є серйозною загрозою безпеці та благополуччю дітей, і боротьба з нею вимагає комплексного підходу на рівні країни та міжнародного співробітництва. Таким чином, метою даного дослідження є аналіз міжнародно-правового регулювання у сфері протидії дитячій порнографії, досвіду України та таких зарубіжних країн, як Франція, Японія, Індія, Велика Британія та Канада. Завданнями є визначення основних нормативних положень, механізмів та підходів, спрямованих на запобігання та протидію дитячій порнографії. Дослідження було здійснено за допомогою низки наукових методів, зокрема, діалектичного, формально-логічного, аналізу, методів порівняння та узагальнення. Авторами звертається увага на поняття дитячої порнографії. Визначено, які дії вважаються злочином щодо дитячої порнографії та є кримінально караними. Проаналізовано рекомендації та зобов'язання країн, які ратифікували ці акти. Розглянуто питання криміналізації злочинів, пов'язаних з дитячою порнографією, у законодавстві відповідних країн, заходи кримінальної відповідальності, створення національних організацій і структур для боротьби з нею тощо. Зроблено висновок, що максимальний термін ув'язнення правопорушник може отримати в Канаді та Великій Британії, а один з найменших – в Японії та Індії. У статті також спростовується гіпотеза про те, що підходи до боротьби з дитячою порнографією є ідентичними в окремих країнах*

*з різними правовими системами. Звернено увагу на проблему визначення статусу графічних матеріалів і творів штучного інтелекту, які містять ознаки дитячої порнографії. Крім того, порушено питання щодо кримінально-правової оцінки перегляду дитячої порнографії, в тому числі в прямому ефірі. Констатується, що жодна країна не застрахована від цієї форми сексуальної експлуатації дітей. Звернено увагу на міжнародне співробітництво, яке є ключовим для обміну найкращими практиками, ресурсами та інформацією між країнами. Наголошено, що національні уряди, правоохоронні органи та громадянське суспільство повинні працювати разом, об'єднуючи зусилля для забезпечення захисту дітей у світі. Це важливо, в тому числі, для боротьби з уникненням злочинцями відповідальності.*

***Ключові слова:*** *дитяча порнографія; інтернет-порнографія; сексуальна експлуатація; неповнолітні; порнографічні матеріали; дитяча проституція; аніме; штучний інтелект; кіберзлочинність.*

## Introduction

The problem of child pornography remains one of the most pressing and threatening problems in the modern world, which indicates the *relevance of the study*. In recent decades, it has grown in size due to the proliferation of the Internet, which pedophiles use to acquire and distribute pornographic materials with children. The proliferation of information technology has led to an unprecedented proliferation and accessibility of child pornography. Since then, the criminalization of child pornography has increased significantly in many countries around the world, which is not surprising, as it has become a serious problem.

In this context, it is important to study the international legal regulation and legislation of individual countries in combating child pornography, as they play a key role in protecting children's rights. The relevance of this study is dictated by the threat of child pornography as a global problem, the need to promote international cooperation and effective counteraction to child pornography, especially in the context of technological development and the increasing ability of criminals to avoid responsibility for crimes against children, one of the most vulnerable segments of society.

The study will allow us to understand what specific actions to combat child pornography are provided for in the national legislation of Ukraine, as well as in the legislation of France, Japan, India, the United Kingdom and Canada. Given the global nature of the problem, understanding international legal regulation and the experience of individual countries is important for the development of more effective strategies and legislative frameworks to combat child pornography at the international level. Thus, *the purpose of this study* is to analyze the international legal regulation in the field of combating child pornography, the experience of Ukraine and

such foreign countries as France, Japan, India, the United Kingdom and Canada. The objectives are to identify the main regulatory provisions, mechanisms and approaches aimed at preventing and combating child pornography.

## Materials and Methods

The following Ukrainian scholars have devoted their works to the study of ways and means of combating child pornography: S. Shatrava [1], O. Dzhafarova [1], T. Shevchenko [2], I. Lubenets [3], S. Knizhenko [4], V. Yemelianov [5], S. Denysov [6], I. Zhdanova [7] and others. Among the scholars of the countries whose legislation is being studied, P. Agal [8], S. Bhadury [9], L. Langde [10], A. Mignault [11], J. Patil [12], M.P. Hutagi [12], E. Huber [13], Y. Matsuura [14], S. Toshiaki [15], G. Oliván-Gonzalvo [16], E. Newman [17; 18], S. Prat [19], V. Savoie [20], etc. However, certain aspects of the comparative legal study of responsibility for the creation and distribution of child pornography were not the subject of a separate thorough study. Theoretical foundations of the study include scientific articles, legislation reviews, doctrinal ideas, and views on the subject. The empirical basis of the research includes criminal legislation acts of Ukraine, France, Japan, India, Great Britian and Canada. International legal acts have been also used in this paper. The methodological basis of the research consists of general and special scientific methods. The dialectical method was used to define the terms of "child pornography", "pornographic materials", "sexual exploitation". To analyze the experience of foreign countries and international legislation, a formal method, methods of comparison and generalization were used.

## Results and Discussion

In the modern era of civilization, information technology plays a key role in all aspects of our lives. Thanks to access to information technology, users are united on a global scale. However, the rapid development of these technologies also leads to negative consequences, one of which is the growth of new forms of transnational crimes on the Internet, where cyberspace is a convenient place for the easy distribution of pornographic materials with children. Today, child pornography is not the least of the online crimes and is the cause of serious conflicts related to sexual abuse and sexual crimes against children. It also leads to other crimes against children, such as child trafficking, sex tourism, child abuse, etc.

Child pornography is a problem that violates, first and foremost, the fundamental rights of children. Establishing legislation and effective mechanisms is essential to successfully combat child pornography and child exploitation on a global scale. The most effective means of combating

child pornography and child exploitation are a holistic and unified approach to ensure consistency in criminalization and punishment, raising public awareness of the problem, improving the professionalism of law enforcement, increasing the number of services available to assist victims, and other efforts by states at both the international and national levels. In addition to establishing a national legislative framework to combat child pornography, it is important to ensure that national legislation complies with international legal standards, which can be considered the first step in combating child pornography.

***International legal regulation of combating child pornography***

In general, there are three main international legal documents related to combating child pornography, namely: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; Convention on Cybercrime; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. These international legal acts are effective tools in combating not only child pornography, but also sexual exploitation of children in general, as they contain clear and specific definitions of the relevant crimes and require criminalization of the relevant acts at the national level. In addition, some provisions require states to implement mechanisms and provide services to assist child victims and their families.

On November 20, 1989, the United Nations General Assembly adopted the *Convention on the Rights of the Child*. This convention is a continuation of the Declaration on the Rights of the Child, adopted on November 20, 1959, which states that the child, owing to lack of physical and intellectual maturity, needs special protection and special care, including appropriate legal protection, both before and after birth [21].

Although this Convention addresses a fairly broad range of rights, such as civil, cultural, economic, political and social, it also contains provisions to combat sexual exploitation of children. Specifically, Art. 34 states that States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials [22].

*The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* entered into force on January 18, 2002. As of October 2022, 178 states are parties to the

Protocol. As for the definition, Art. 2 defines "child pornography" as "any representation, by any means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes" [23]. Art. 3(1) requires States Parties "that, at a minimum, the following acts and activities are fully covered by its criminal or penal law, whether such offenses are committed domestically or transnationally or on an individual or organized basis" [Ibid]. That is, not only crimes committed domestically, but also transnationally, both individually and in an organized manner, are taken into account. Art. 3(1) (c) criminalizes "producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes" child pornography. Thus, mere possession, regardless of the intention of distribution, is covered by this article. Paragraph 4 of the same Art. 3 regulates the liability of legal entities. This Optional Protocol also emphasizes the importance and necessity of international cooperation in the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism [Ibid]. States should facilitate international cooperation in this area, because, as already emphasized, child pornography spreads easily and quickly across borders, offenders can avoid detention and continue their criminal activities against children in the absence of international cooperation between countries.

The development of civilization and information technology has made it possible for cybercriminals to be located in different countries (i.e., different jurisdictions) from their victims. This has become a huge challenge in the fight against child sexual exploitation and pornography. For a unified and common approach to addressing the issue in the fight against *cybercrime, the* Council of Europe adopted the *Convention on Cybercrime on* November 23, 2001. The issue of child pornography offenses is addressed in Chapter 2, Title 3, entitled "Content-related offenses". Art. 9(1) criminalizes the following offenses: Producing child pornography for the purpose of its distribution through a computer system; offering or making available child pornography through a computer system; distributing or transmitting child pornography through a computer system; procuring child pornography through a computer system for oneself or for another person; and possessing child pornography in a computer system or on computer-data storage [24].

Paragraph 2 of this Art. lists what child pornography includes, namely pornographic material that visually depicts: "a minor engaged in sexually explicit conduct; a person appearing to be a minor engaged in sexually explicit conduct; realistic images representing a minor engaged in sexually explicit conduct" [Ibid]. However, Art. 9(4) of the Convention also stipulates

that a State may not apply, or apply in Part or in full, the subparagraphs concerning procuring child pornography and possession, as well as subparagraphs of paragraph 2, namely (b) a person appearing to be a minor engaged in sexually explicit conduct; and realistic images representing a minor engaged in sexually explicit conduct.

According to paragraph 3 of this Article, the term "minor" includes all persons under 18 years of age, but the state may set a lower age threshold, but it must not be less than 16 years of age.

*The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* is an international legal document that aims to combat sexual exploitation of children, including child pornography. It was concluded and signed on October 25, 2007 and focuses on combating violence against children by preventing abuse and exploitation. It addresses important issues related to the protection and assistance of child victims, the punishment of perpetrators and the promotion of national and international law enforcement cooperation in this area.

Paragraph 1 of Art. 20 criminalizes intentional behavior in the following areas: "producing child pornography; offering or making available child pornography; distributing or transmitting child pornography; procuring child pornography for oneself or for another person; possessing child pornography; knowingly gaining access, through information and communication technologies, to child pornography" [25].

The term "child pornography" is also defined as "any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes" [Ibid]. The state retains the right not to apply, in whole or in part, the subparagraphs relating to the production and possession of pornographic products consisting of simulated representations or real images of a non-existent child; and involving children who have reached the age set in the application of Art. 18(2), where these images are produced and possessed by them with their consent and solely for their own private use. The state is also given the choice to criminalize the subparagraph on knowingly gaining access, through information and communication technologies, to child pornography in whole or in Part [Ibid]. Separate questions are raised regarding attempts and incitement, liability of legal entities, international cooperation, and others.

In order to analyze and confirm or refute the hypothesis that approaches to combating child pornography are similar or different in individual countries with different legal systems, it would be advisable to consider the legislation of *France, Japan, India, the United Kingdom, Canada and Ukraine*.

### *Experience of combating child pornography in France*

In the *French* Criminal Code, Articles 227-23 and 227-24 are aimed at protecting children and combating child pornography. Specifically, Art. 227-23 of the Criminal Code provides that the fact of capturing, recording or transmitting an image or representation of a minor with the intent to disseminate it, if it is of a pornographic nature, is punishable in France by up to 5 years in prison and a fine of EUR 75,000 [26]. French law also stipulates that if pornographic material concerns a person under the age of fifteen, these actions are punishable, even if they were not committed with the intent to distribute. The mere fact of offering, providing access to or distributing such materials by any means, whether importing or exporting them, is punishable equally. The penalty has been increased to seven years' imprisonment and a fine of EUR 100,000 for an electronic communications network. The fact of ordinary counseling or for payment of a publicly available online communication service that makes available such an image or representation, acquisition or possession of such an image or representation by any means is punishable by five years' imprisonment and a fine of EUR 75,000.

As for the attempted crime under the same article, it is punishable by the same penalties. However, if the crime is committed by an organized group, the penalty is increased and is ten years' imprisonment and a fine of EUR 500,000. It is important to note that the provisions of this Art. in France also apply to pornographic images of a person whose physical appearance is that of a minor, unless it is established that the person was eighteen years old on the day of recording or recording his or her image.

Art. 227-23-1 also criminalizes the actions of an adult who requires a minor to distribute or transmit pornographic material to a minor, which is punishable by seven years in prison and a fine of EUR 100,000 [Ibid], a penalty that is higher than in Art. 227-23. The penalty is also increased to ten years' imprisonment and a fine of EUR 150,000 if the acts are committed against a person under 15 years of age. In the case of an organized group, the penalty is increased to ten years' imprisonment and a fine of one million EUR.

Art. 227-24 makes the fact of producing, transporting, disseminating by any means and media a message of a violent nature, inciting terrorism, of a pornographic nature, including pornographic images containing one or more animals, or causing serious harm to human dignity or inciting minors to participate in games that put them in physical danger or to trade in such a message punishable by three years' imprisonment and a fine of EUR 75,000 if the message is likely to be seen or noticed by a child [Ibid].

With this provision, the legislator also places the responsibility of the result on the publishers of content on the Internet or on mobile phones. They are therefore responsible for ensuring that minors do not have access to harmful content.

Various laws have also been adopted to strengthen the system established by Art. 227-23 of the Criminal Code. Law No. 98-468 of June 17, 1998, on the prevention and suppression of sexual offenses and the protection of minors. This law penalizes pornographic images of minors, even virtual ones. Law No. 2002-305 of March 4, 2002 on parental authority was also passed, adding a Part to Art. 227-23, which penalizes the simple fact of possessing pornographic materials with minors.

***Experience of combating child pornography in Japan***

In *Japan, the* "Act on Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children" is the national legislation regulating child pornography. The criminalized conduct covered by the Act consists of: importing, producing, exporting, and possessing materials that fall within the scope of child pornography.

The reason and prerequisite for the adoption of this law was the World Conference Against the Commercial Sexual Exploitation of Children, which took place in Stockholm in 1996. At that time, Japan was accused of lagging behind other developed countries in terms of combating child pornography, which led to the mass production and sale of such materials, and called for an immediate response and change. And in May 1998, a bill was submitted by the ruling parties to the parliament and discussions began. In June of the same year, the UN Committee on the Rights of the Child recommended that Japan take all necessary measures, including legal ones. As a result, Japan adopted the Law on the Punishment of Acts Related to Child Prostitution and Child Pornography and the Protection of Children, which came into force on May 26, 1999.

Later, it was amended in 2004 and 2014 to include more restrictive provisions. The 2004 amendment added a provision on the protection of children's rights to the purpose of the Law in line with international trends. It also increased the number of penalties and expanded the scope of their application. In 2014, the title of the Law was changed to the Law on the Control and Punishment of Activities Related to Child Prostitution and Child Pornography and the Protection of Children. The definition of child pornography was also clarified, simple possession was criminalized, and other changes were made.

The term "child pornography" in this Law is defined as photographs, recording media containing electronic or magnetic recordings (which

means a recording used in computerized information processing, created in electronic form, magnetic form or any other form that cannot be perceived by human senses; the same shall apply hereinafter) or any of the following means that depict the image of a child in a form that can be recognized by the organs of vision: any depiction of a sexual act or any behavior similar to a sexual act.

It also contains a definition of a child, namely, a "child" is a person under the age of 18, as set forth in Art. 2(3) of the Law.

Section 2 sets out penalties for actions related to child prostitution and child pornography. Specifically, Art. 7 provides for punishment for child pornography. Any person who possesses child pornography for the purpose of satisfying sexual desire shall be punished by imprisonment for a term not exceeding 1 year or a fine not exceeding 1,000,000 yen. Any person who provides child pornography shall be punished by imprisonment for a term not exceeding 3 years or a fine not exceeding 3,000,000 yen. Any person who produces, possesses, transports, imports or exports child pornography from Japan for the purpose of committing the acts referred to above shall be punished with the same penalty as provided in this paragraph. Any person who provides child pornography to many or indefinite persons or displays it in public shall be punished by imprisonment for a term not exceeding 5 years, a fine not exceeding 5,000,000 yen, or both [27].

***Experience of combating child pornography in India***

Sexual abuse of children is a widespread problem, and *India* also has various legal acts regulating this area and aimed at protecting the rights and welfare of children. The Constitution of India enshrines the right to life and personal liberty, with the impossibility of deprivation of this right, except as provided by law, in Art. 21. Art. 24 prohibits the employment of children in factories, mines or any other hazardous work under the age of fourteen. In addition, the state is obliged in Art. 45 to endeavor to provide early childhood care and education for all children until they reach the age of six. Several other articles of the Indian Constitution are also devoted to the protection of children's rights and ensuring their well-being.

There are also specific laws that are aimed at protecting children's rights and preventing offenses against children, such as: *The Immoral Traffic (Prevention) Act, 1986*; *The Prohibition of Child Marriage Act*; *The Child Labour (Prohibition and Regulation) Act, 1986; Juvenile Justice (Care and Protection of Children) Act, 2000; Indian Penal Code, 1860; The Indecent Representation of Women (Prohibition) Act, 1986, sections 3 and 4 Deal with Pornography.*

*The Indian Penal Code contains* provisions to combat sexual abuse of children and distribution of obscene items to minors. Specifically, Section

293 criminalizes the sale, hiring out, distribution, display or transfer to any person below the age of twenty years of any obscene article, or offering or attempting to do so, punishable with imprisonment for a term not exceeding three years and a fine of Rs. 2,000 in the case of a first conviction. In the case of a second or subsequent conviction, the penalty shall be increased to imprisonment for a term which may extend to seven years and a fine which may extend to Rs. 5,000.

It is important to understand and define what the Criminal Code means by "obscene". Art. 292(2) contains a definition that includes the content of a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene if it is lascivious or appeals to the prudish interest or if its effect or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein [28] Whoever sells, lets to hire, distributes, publicly exhibits or in any way puts into circulation, or for the purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene object; or imports, exports or transfers any obscene object, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any way put into circulation; or takes Part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, made, produced, purchased, stored, imported, exported, conveyed, publicly exhibited or in any way put into circulation; or advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offense, or that any such obscene object can be procured from or through any person; or offers or attempts to do any act which is an offense under this section shall be punishable, on first conviction, with imprisonment for a term not exceeding 2 years and a fine of Rs. 2,000 [Ibid]. In the case of a second or other subsequent conviction, the penalty is increased to 5 years' imprisonment and a fine of up to 5,000 rupees. The same article, inter alia, identifies some exceptions to which the law does not apply, such as if the publication is justified for the public good and on the grounds that such book, paper, picture, image, etc. is in the interest of science, literature, art, education, etc. of general interest; or an image of such nature is presented in an ancient monument, archaeological site, etc., or in any temple or any vehicle used for the transportation of idols, or is kept or used with any religious

*Information Technology Act, 2000*. With the development of civilization and information technology, there was a need to regulate electronic and

digital activities in the country. To this end, a law was adopted to regulate cyber legislation in the country. The law was amended and supplemented in 2008. Among other things, Section 67 "Punishment for publishing or transmitting obscene material in electronic form" was amended to reduce the term of imprisonment from 5 years to 3 years and increase the fine from INR 100,000 to INR 500,000, and Sections 67A to 67C were added.

Section 67A deals with the electronic transmission and publication of sexually explicit material, which is punishable, on a first conviction, by imprisonment for up to 5 years and a fine of up to ten lakh rupees (1 million rupees); on a second or subsequent conviction, the imprisonment is increased to seven years and the fine remains the same.

Section 67B of the law deals with child pornography and provides for penalties for those who "publishes or transmits or causes to be published or transmitted material in any electronic form that depicts children engaged in sexually explicit acts or conduct; or creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in an obscene or indecent or sexually explicit manner; or cultivates, entices or induces children to an online relationship with one or more children for and on a sexually explicit act or in a manner that may offend a reasonable adult on a computer resource; or facilitates abusing children online, or records in any electronic form his own abuse or that of others pertaining to sexually explicit acts with children", shall be punishable, on first conviction, by imprisonment for a term not exceeding 5 years and a fine not exceeding ten lakh rupees (1 million rupees), on second or subsequent convictions, the imprisonment shall be increased to seven years and the fine shall remain the same [29]. We can conclude that the penalties under both Section 67A and 67B, which specifically address child pornography, are identical. It is also important to note that in Section 67B the term "children" is defined as a person under the age of 18.

*Protection of Children from Sexual Offenses Act, 2012.* This law was adopted to protect children from crimes related to sexual abuse, sexual harassment, and pornography, and provides for the establishment of special courts to try such crimes and cases related to them or related to them. The article defines, among other things, the term "child", which means any person under the age of 18. Also, the term "child pornography" is defined as any visual depiction of sexually explicit conduct involving a child that includes a photograph, video, digital or computer-generated image indistinguishable from an actual child and an image created, adapted, or modified but appearing to depict a child [30]. In other words, based on Art. 2, we can conclude that "a computer-generated image indistinguishable from an

actual child and an image created, adapted, or modified but appearing to depict a child" refers to child pornography.

Section 3 deals with child pornography under the title "Using child for pornographic purposes and punishment therefor". According to the provisions of Art. 13, anyone who uses a child in any form of media (including a program or advertisement broadcast by television channels or the Internet or any other electronic form or printed form, whether or not such program or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, shall be guilty of the crime of using a child for pornographic purposes [Ibid].

Art. 14 deals with the punishment for the use of a child for pornographic purposes and provides for imprisonment for a term of not less than 5 years and a fine, and in case of a second or subsequent conviction, it is increased to not less than 7 years and a fine.

Art. 15 also criminalizes the possession of pornographic material involving a child, namely, any person who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with intent to share or transmit child pornography [Ibid], shall be punishable with a fine not less than 5,000 rupees, and on a second or subsequent conviction, with a fine not less than 10,000 rupees. Section 2 provides that any person who stores or possesses pornographic material in any form involving a child for transmission or propagation or display or distribution in any manner at any time except for the purpose of reporting as may be prescribed or for use as evidence in a court of law shall be punishable with imprisonment of either description which may extend to three years, or with fine, or with both [Ibid]. Section 3 provides for the punishment of possession or handling of pornographic material of this nature with children for commercial purposes, punishable, on a first conviction, with imprisonment for a term not less than 3 years as specified, which may extend to 5 years, or with fine, or with both. In the case of a second or subsequent conviction, the penalty is increased to imprisonment for a term of not less than 5 years, which may be increased to 7 years, and a fine. It is also important to note that the law provides for the punishment not only of the offender who commits such acts, but also of persons who incite or attempt to commit such acts. A person who contributes to the commission of a crime by incitement, conspiracy, intentional assistance by any act or omission is liable for the commission of a crime and is subject to punishment. The same applies to attempted murder, which is the subject of Section 4 of this Law [30].

However, it is important to pay attention to the problem of the term, as the concept of "child pornography" is defined in different ways in the

laws, which can lead to conflicting explanations of the meaning of child pornography.

***Experience of combating child pornography in the UK***

In the *UK, the* main legislative act regulating the issue of combating child pornography is The Protection of Children Act 1978. In addition to it, there are a number of legal acts, such as The Obscene Publication Act, 1959; The Protection of Children Act, 1978; The Data Protection Act, 1984; The Computer Misuse Act, 1990, etc. It is important to note that simple possession of pornographic materials with children was not criminalized immediately, but only after the adoption of the Criminal Justice Act of 1988.

Section 1 of The Protection of Children Act 1978, entitled "Indecent photographs of children", states that it is an offense for a person:
(a) to take, or permit to be taken, any indecent photograph of a child (meaning in this Act a person under the age of 16); or
(b) to distribute or show such indecent photographs; or
(c) to have in his possession such indecent photographs, with a view to their being distributed or shown by himself or others; or
(d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs. or intends to do so.

A person convicted on indictment of any offense under this Act shall be liable to imprisonment for a term not exceeding ten years, or to fine, or to both [31].

In digital media, when an obscene image is saved to a computer's hard drive, it is considered "creating" the image because it produces a copy that did not exist before.

To cover "pseudo-photographs", the 1978 Act was expanded by the Criminal Justice and Public Order Act 1994. Among other things, the Criminal Justice Act, Section 160A clearly states that it is an offense for a person to have any indecent photograph of a child in his or her possession.

Also, the well-known Sexual Offenses Act of 2003, which also applies to child pornography, changed the age of a "child" from 16 to 18 years, with 16 years being the age of consent. However, there are certain exceptions, such as images of a person who has already reached the age of 16 may remain legal if the material is private and between two parties. Also, the same law was expanded in 2008 to cover caricatures and other works based on photographs or pseudo-photographs and in 2009, caricatured sexual images of minors were criminalized, not just those derived from photographs or pseudo-photographs.

In the same year, 2009, any possession of pornographic images of children became a criminal offense, whereas previously it was legal to possess printed copies of such images if there was no intention to distribute or show them to others. This prohibition is reflected in the Coroners and Justice Act 2009.

An independent organization, the Internet Watch Foundation, was also created to combat child pornography. It was founded on December 10, 1996, and provides a hotline mechanism for anyone wishing to report illegal content on the Internet to the police. It cooperates with the police, authorities, society, Internet providers and other organizations to identify, prevent and remove harmful and illegal child sexual abuse content on the Internet and protect one of the most vulnerable parts of society, i.e. children.

***Experience of combating child pornography in Canada***

According to research, in *Canada,* from 2014 to 2022, police registered 15,000 cases of sexual offenses against children on the Internet, and more than 45,000 cases of online child pornography. The overall rate of police-reported cases of online child sexual exploitation has increased since 2014. As noted, the percentage of child online pornography increased by 290% from 2014 to 2022. The majority of victims were girls, especially those aged 12 to 17, accounting for 71% of all victims.

The provisions prohibiting the production, distribution, possession and access in Canada have been reflected in the Criminal Code since 1993. However, section 163.1 of the Criminal Code has been amended several times to take into account the new realities of information technology. Indeed, this offense has undergone various transformations over time. The popularization of the Internet since the 1990s has increased the availability of child pornography online. This has made it more difficult to identify offenders. In addition, the definitions and activities associated with online child sexual exploitation have been revised to reflect the technological changes brought about by the Internet. In 2007, the federal government raised the legal age of consent from 14 to 16, taking further steps to protect children.

Art. 163(1) of the Criminal Code of Canada states that every person commits an offense who makes, prints, publishes, distributes, circulates or has in their possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or any other obscene thing [32]. Child pornography is separately singled out and criminalized. Namely, Art. 163.1, Part 1 defines child pornography as
– a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
(ii) the dominant characteristic of which is the depiction, for sexual purposes, of a sexual organ or anal region of a person under the age of eighteen;
– any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen that would be an offense under this Act;
– any written material whose predominant characteristic is the description, for sexual purposes, of sexual activity with a person under the age of eighteen that would be an offense under this Act; or
– any audio recording that has as its dominant characteristic the description, presentation or representation, for sexual purposes, of sexual activity with a person under the age of eighteen that would be an offense under this Act.

With regard to punishment, paragraphs 2 and 3 of the same Article provide that a person is guilty of a criminal offense and shall be punished by imprisonment for a term not exceeding 14 years and a minimum sentence of one year for the creation and distribution of child pornography, etc. With regard to possession, this is Part 4, anyone who possesses any child pornography shall be punished by imprisonment for a term not exceeding 10 years and a minimum sentence of imprisonment for a term of one year. The same applies to access: anyone who has access to any child pornography shall be punished by imprisonment for a term not exceeding 10 years and a minimum sentence of one year's imprisonment. The law specifies that a person gains access to child pornography if he or she knowingly causes the viewing or transmission of child pornography to himself or herself or to other persons. In the case of a simplified procedure, the offense is punishable by imprisonment for a term not exceeding two years without one day and a minimum sentence of six months' imprisonment.

If the person committed the crime for profit, the court considers this as an aggravating factor, which is enshrined in Part 4.3 of Art. 163(1). According to Art. 164(1) of the Code*, the* judge may order the provider to provide information necessary for identification and search of the person if there are reasonable grounds to believe that child pornography is available through the computer of the Internet service provider that posted it. The judge may order the provider to remove pornographic materials with children.

In 2004, the Government of Canada also launched The National Strategy for the Protection of Children from Sexual Exploitation on the Internet. This strategy included prevention and raising public awareness of the risks

of child sexual exploitation on the Internet, identifying and prosecuting offenders, protecting children's rights and providing support services to victims, and supporting and cooperating with national and international organizations.

A key partner in The National Strategy for the Protection of Children from Sexual Exploitation on the Internet is the Canadian Centre for Child Protection, a charitable organization dedicated to combating child sexual abuse. They are also responsible for the Cybertip.ca website, where people can report cases of online child sexual exploitation. They also run Project Arachnid, which detects and processes tens of thousands of images per second and sends takedown notices for child sexual abuse material to online service providers around the world.

***Experience of combating child pornography in Ukraine***

In *Ukraine, the* Law No. 1256-IX "On amendments to certain legislative acts of Ukraine concerning the implementation of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)" of February 12, 2021 [33] introduced some amendments and additions to the Criminal Code of Ukraine, including those related to sexual abuse of children. The Code was supplemented with new articles, namely Art. 156 "Solicitation of a child for sexual purposes" and Art. 301(1) "Gaining access to child pornography, its acquisition, storage, importation, transportation or other movement, sale and distribution".

Part 1 provides for punishment for intentional access to child pornography using information and telecommunication systems or technologies or intentional acquisition of child pornography, or intentional storage, importation, transportation or other movement of child pornography without the purpose of sale or distribution, which is punishable by probation for up to five years or restriction of liberty for the same period, or imprisonment for a term of two to six years with deprivation of the right to hold certain positions or engage in certain activities for up to three years. If child pornography is imported into Ukraine for the purpose of sale or distribution, or if it is stored, transported or otherwise moved for the same purpose, it is punishable by imprisonment for a term of seven to ten years with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years, as set out in Part 2 of this article. Part 3 criminalizes the production, distribution, sale of child pornography or coercion of a minor to participate in the creation of child pornography, which is punishable by imprisonment for a term of eight to twelve years with deprivation of the right to hold certain positions or engage in certain activities for up to three years [33].

The actions criminalized by paragraphs 2 and 3, committed repeatedly or by conspiracy of a group of persons, or with the receipt of large-scale income or forcing a minor to participate in the creation of child pornography, shall be punishable by a possible imprisonment for a term of nine to fifteen years with disqualification to hold certain positions or engage in certain activities for up to three years.

However, there are also exceptions in parts 5 and 6, which provide that minors shall not be subject to criminal liability if the production, storage, transportation or other movement of child pornography was committed without the purpose of sale or distribution and the person who intentionally gained access to, or intentionally acquired or stored, imported, transported or otherwise moved child pornography in order to perform the powers vested in him/her on the grounds and in the manner prescribed by law.

It also specifies that gaining access to child pornography through the use of information and telecommunication systems or technologies should be considered intentional if it is proved that the person was aware that in this way he or she would gain access to child pornography (for example, it is proved that the person gained such access repeatedly or by paying a fee, etc.

### *The problem of determining the status of graphic materials and works of artificial intelligence, watching child pornography live*

It is also important to note in this study that the issue of graphic and simulated images and artificial intelligence has been increasingly criticized and discussed in the world recently, due to the proliferation of graphic and simulated pornographic materials with children, the easy access to which has been noted by international organizations. For example, anime and manga are becoming increasingly popular all over the world, with Japan being the country of birth. Some sub-genres of these materials have proliferated, usually consisting of scenes of a pornographic nature, including those with children and violence, which is worrying and criticized. They have significant markets and remain as prevalent as other categories of pornography. The international legal instruments considered in this study extend the concept of child pornography to this type of material, such as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Each of the countries considered in the Article has ratified this act, but we can pay more attention to Japan, which is the country of birth of manga and anime. Article 3 of the Act on Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children, which deals with artistic and cultural activities, explains the reason for excluding

manga from the definition of "cultural and artistic activities" by referring to the Basic Law of Japan on the Development of Culture and Art, which recognizes manga as an important element of the national tradition.

Another issue that has been gaining attention around the world and has recently been discussed is artificial intelligence and the fact that pedophiles are using it to create pornographic material, which makes it possible to create extremely accurate images of child sexual abuse. A recent investigation by the Internet Watch Foundation found instructions on the darknet that encourage criminals to use software tools that remove the clothes of real children and then blackmail them into providing real photos and videos of these children.

At the same time, there are proposals to legalize pedophiles' mere possession of pornographic materials with children modeled by artificial intelligence or graphic images, without distributing, selling, etc., arguing that this initiative does not harm real children and is aimed at preventing crimes and violence against real children, instead of allowing the use of materials created in this way. However, opponents of such an initiative argue that legal permission even for this type of material will not stop criminals, and may even encourage them to satisfy their sexual desires with real children in the future.

The issue of viewing pornographic materials with children, live, etc. remains controversial. The problem in court practice is that a person who has viewed an image or video does not save any copies of it on his or her device. In other words, in cases related to live broadcasting, after viewing an image or video, there are no forensic traces on the device used to view the image or video. The person who viewed the image or video will not save any copy of it on their device.

## Conclusions and Prospects for Further Research

This research article has achieved the purpose of the study, namely to analyze the international legal regulation in the field of combating child pornography and the experience of foreign countries, such as France, Japan, India, the United Kingdom, Canada and Ukraine, in order to identify the main regulations, mechanisms and approaches aimed at preventing and combating child pornography. The goal was also to refute the hypothesis that approaches to combating child pornography are the same in different countries with different legal systems.

The authors analyzed three major international legal instruments in the field of combating child pornography, namely the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; the Convention on Cybercrime; and

the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. They highlighted the concept of child pornography, the actions that are criminalized, and recommendations and obligations for countries that have ratified these acts in combating child pornography.

The legislation of individual countries, such as France, Japan, India, the United Kingdom, Canada and Ukraine, was also considered in more detail. Each of these countries criminalizes child pornography, but there are peculiarities and differences, such as the degree of criminal liability. In France, the fact of capturing, recording or transmitting an image or representation of a minor for the purpose of dissemination, if it is of a pornographic nature, is punishable in France by up to 5 years in prison and a fine of EUR75,000. The mere fact of offering, providing access to or distributing such materials by any means, whether importing or exporting them, is punishable equally. In Japan, possession of child pornography for the purpose of satisfying sexual desire is punishable by imprisonment for a term not exceeding 1 year or a fine not exceeding 1,000,000 yen. Any person who provides child pornography is punishable by imprisonment for a term not exceeding 3 years or a fine not exceeding 3,000,000 yen. Any person who produces, possesses, transports, imports or exports child pornography from Japan with the intent to commit the acts described above shall be punished with the same penalty. In India, the Penal Code punishes the possession, sale, distribution, manufacture, etc. of child pornography, on first conviction, with imprisonment for up to 2 years and a fine of Rs. 2,000. In the United Kingdom, the production, distribution, possession, publication, etc. of child pornography is punishable by imprisonment for a term not exceeding ten years or a fine, or both. In Canadian law, a person is subject to imprisonment for a term not exceeding 14 years and a minimum sentence of one year for the production and distribution of child pornography, etc. Possession is punishable by imprisonment for a term not exceeding 10 years and a minimum penalty of one year's imprisonment, and the same applies to access. In Ukraine, intentional access to child pornography through the use of information and telecommunication systems or technologies, or intentional acquisition of child pornography, or intentional storage, importation, transportation or other movement of child pornography without the purpose of sale or distribution, is punishable by probation for up to five years or restriction of liberty for the same period, or imprisonment for a term of two to six years, with disqualification to hold certain positions or engage in certain activities for up to three years. If child pornography is imported into Ukraine with the intent to sell or distribute it, or if it is stored, transported or otherwise moved for the same purpose, it is punishable by imprisonment for a term of seven to ten years

with deprivation of the right to hold certain positions or engage in certain activities for up to three years. The production, distribution, sale of child pornography or coercion of a minor to participate in the creation of child pornography is punishable by imprisonment for a term of eight to twelve years with disqualification to hold certain positions or engage in certain activities for up to three years. It can be stated and concluded that the maximum possible sentence can be received by a criminal in Canada or the United Kingdom, and one of the shortest in Japan and India.

The study also drew attention to the problem in connection with the proliferation of graphic and modeled images and artificial intelligence. Anime and manga are becoming increasingly popular around the world, and some subgenres of these materials have proliferated, usually consisting of scenes of a pornographic nature, including children and violence. Also, artificial intelligence is being discussed in the world and the fact that pedophiles use it to create pornographic materials, which makes it possible to create extremely accurate images of sexual abuse of children. The issue of viewing pornographic materials with children, live or otherwise, remains controversial, and the problem is that the person who has viewed the image or video does not save any copies of it on his or her device, meaning that there are no forensic traces.

In summary, no country is immune to this form of child sexual exploitation, and governments, law enforcement agencies and civil society need to work together to ensure that children are protected around the world.

The importance of further research in this area is to find new strategies and tools to effectively combat child pornography. This may include developing more progressive legislation, raising public awareness of the problem, and improving mechanisms for international cooperation and information exchange between countries. It is also important to study the impact of technology, in particular the Internet, on the spread of child pornography and develop strategies to limit it, and to pay attention to issues related to graphic materials, such as manga and anime, artificial intelligence, and others, as cyberspace is a convenient environment for criminals.

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# Place of Commercial Cases in the Agreement Between Ukraine and the Republic of Poland on Legal Assistance and Legal Relations in Civil and Criminal Cases of 24 May, 1993

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**Abstract**
*The relevance of the article is determined by dedicating the study to the place of commercial cases among the categories of cases defined in Art. 1 of the Agreement between Ukraine and the Republic of Poland on legal assistance and legal relations in civil and criminal cases of May 24, 1993. The purpose of the work is to consider the possibility of applying contractual provisions to commercial cases, given the fact that the latter are not defined as a type of "civil cases" as well as, for example, family or work cases. Certain aspects of Polish and Ukrainian legislation in the context of understanding and correlation of civil and economic cases are highlighted. The obtained results became possible thanks to the use of methods of scientific knowledge taking into account the peculiarities of their use in legal science. The preparation of the article became possible, and the conclusions were substantiated by using general scientific and legal methods: analysis and synthesis, deduction and induction; empirical and other methods. At the same time, it is difficult to find out exactly what goals the representatives of the authorities of Poland and Ukraine pursued in the context of not including economic cases in the 1993 Agreement. However, according to the preamble, the main purpose of concluding this agreement was to maintain friendly relations between the two states and deepen cooperation in the legal field, including in civil cases. Among Polish and Ukrainian representatives of the scientific community, there is no unanimous opinion regarding the place of economic affairs in the Agreement of 1993. In the Polish doctrine, one can find the opinion that the evaluation of statements in international treaties additionally requires taking into account their effectiveness, that is, interpreting the text so that it has a certain meaning and was useful In our opinion, taking into account the preamble and Art. 1.4 of the Agreement of 1993, which extends the provisions of the treaty to legal entities formed in accordance with the legislation of each participating state, the exclusion of economic affairs from the field of international regulation would be ineffective and too unfavorable for business entities from both countries. The obtained results, in addition to the above, also consist not only in the analysis of international treaties of Poland and Ukraine*

*with other states, which have a similar subject of regulation to the Agreement of 1993 and the place of economic affairs in them, but also in the analysis of judicial practice of the application of this type of treaties.*

***Keywords:*** *international agreement; civil case; commercial case; civil proceedings; commercial proceedings; Polish law; Ukrainian law; agreement of 1993.*

# Місце господарських справ у Договорі між Україною та Республікою Польща про правову допомогу та правові відносини у цивільних і кримінальних справах від 24 травня 1993 року

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**Анотація**
*Актуальність статті визначається присвяченням дослідження місцю господарських справ серед категорій справ, визначених ст. 1 Договору між Україною і Республікою Польща про правову допомогу та правові відносини у цивільних і кримінальних справах від 24 травня 1993 р. Метою роботи є розгляд можливості застосування договірних положень до господарських справ з огляду на той факт, що останні не визначені як різновид «цивільних справ» так само, як, наприклад, сімейні чи трудові справи. Висвітлено окремі аспекти польського та українського законодавства в контексті розуміння і співвідношення цивільних та господарських справ. Отримані результати стали можливими завдяки використанню методів наукового пізнання з урахуванням особливостей їх використання в юридичній науці. Підготовка статті стала можливою, а висновки – обґрунтованими при використанні загальнонаукових та правових методів: аналізу та синтезу, дедукції та індукції; емпіричного та інших методів. Водночас складно з'ясувати, які саме цілі ставили собі представники влади Польщі та України в контексті невключення господарських справ у Договір від 1993 р. Однак згідно з преамбулою, основною метою укладення цього договору було підтримання дружніх відносин між двома державами та поглиблення співпраці в правовій сфері, в тому числі в цивільних справах. Серед польських та українських представників наукового середовища немає одностайної думки щодо місця господарських справ у Договорі від 1993 р. У польській доктрині можна зустріти думку, що оцінка висловлювань у міжнародних договорах додатково вимагає врахування їхньої ефективності, тобто тлумачення тексту так, щоб він мав певне значення і був корисним. На*

*нашу думку, зважаючи на преамбулу та статтю 1 пункт 4 Договору від 1993 р., який поширює положення договору на юридичних осіб, що утворені відповідно до законодавства кожної держави-учасниці, виключення господарських справ зі сфери міжнародного регулювання було б неефективним та надто несприятливим для суб'єктів господарювання з обох країн. Отримані результати, крім вищевказаного, також полягають не лише в аналізі міжнародних договорів Польщі та України з іншими державами, які мають схожий предмет регулювання з Договором від 1993 р. і місцем у них господарських справ, також в аналізі судової практики застосування такого виду договорів.*

***Ключові слова:*** *міжнародний договір; цивільна справа; господарська справа; цивільне судочинство; господарське судочинство; польське право; українське право; Договір від 1993 р.*

## Introduction

European integration processes in Ukraine are currently complicated by the realities of today connected with military aggression against it. Various aspects of its consequences have been discussed in the legal literature [1]. The forced migration of the population and the expansion of Ukrainian business to European countries, including the Republic of Poland, determine the intensity of cooperation in various fields and have a significant impact on legal relations. Any cooperation, conclusion of contracts, fulfillment or non-fulfillment of the provisions of the latter must be subject to the regulation of the relevant legislation, both national and international. In this regard, we can talk about updating the provisions of the Agreement between Ukraine and the Republic of Poland on Legal Assistance and Legal Relations in Civil and Criminal Cases of May 24, 1993 (hereinafter referred to as the *Agreement of 1993*) [2] and the relations regulated by it.

The Agreenent of 1993, as its full title indicates, is dedicated to legal assistance and legal relations in civil and criminal cases. Poland and Ukraine, guided by the desire to develop friendly relations between the two states, as well as to deepen and improve mutual cooperation in the field of legal relations, agreed on certain specifics of legal regulation in civil and criminal cases. It is worth noting that Art. 1 does not contain a legal definition of such concepts as "civil cases" or "criminal cases". However, Art. 1, paragraph 3 states that the term "civil cases" in this agreement should also include family and labor affairs. Additionally, the reference to the Agreenent of 1993 states that its main purpose is to deepen and improve mutual cooperation in the field of legal relations and legal assistance in civil and criminal cases. The agreement regulates the legal relations between the two states in the fields of private law, family law (marriage,

alimony relations, adoption, etc.), regulates property relations, inheritance, the procedure for resolving labor disputes, recognition and enforcement of court decisions, as well as a wide range of issues in the field criminal law (extradition of criminals, transfer of physical evidence, enforcement of decisions in criminal cases). The emergence of legal relations on the basis of the mentioned Agreement occurs, in particular, in the presence of a final court decision on a particular case, the problems of the normative definition of which in Ukrainian national law have received attention in the legal literature [3].

The above provisions do not define the place of economic cases and whether they are covered by the concept of "civil cases" under Art. 1(3) of the Agreement. It is worth noting that in the Ukrainian scientific community there is an opinion that international agreements in the field of legal assistance, concluded before 1996, do not apply to economic cases, but only to civil, family and sometimes labor relations [4, p. 44]. However, such an interpretation does not take into account the aspects related to the interpretation of the provisions of international treaties from the perspective of their usefulness and effectiveness, which, for example, are emphasized by Polish scientists [5] and judicial practice. Separately, special attention should also be paid to scientific studies of domestic legislation regarding the classification of economic cases as a type of civil cases in Poland [6] and Ukraine [7].

The main *purpose of our article* is to provide a comprehensive analysis of the issues related to the application of the 1993 Agreement to economic cases, taking into account the existing research of scholars, provisions of domestic Polish and Ukrainian legislation, and court practice.

In view of this, it is advisable to ask ourselves a few questions: *"Are economic cases a type of civil cases within the meaning of domestic Ukrainian and Polish law?", "Do they fall under the regulation of the 1993 Agreement as civil cases in the broad sense of the term?", "Do Polish and Ukrainian courts apply the provisions of the 1993 Agreement to economic cases?".* The author will try to answer these key questions in the next part of this study.

**Literature review**

The issue of certain questions of international legal cooperation in civil proceedings has received due attention in the legal literature.

The issue of applying the provisions of the 1993 Agreement to economic affairs has gained new importance in Polish-Ukrainian relations in recent years, and before that it was not the subject of comprehensive research in the Polish and Ukrainian scientific community. However, it should be emphasized that the analysis of various aspects of bilateral international

treaties has been given sufficient attention by Polish and Ukrainian scientists, jurists and experts in the field of law.

In Ukraine, various issues of application of international agreements, including those on legal aid, have been studied by H.A. Tsirat [4], K.V. Husarov [8], S.Y. Fursa [9], E.Y. Fursa [10], V.A. Bigun [11]. Among Polish representatives of the scientific community, the issue of international agreements was the subject of research by M. Płachta and A. Wyrozumska [5], M. Czepelak [12], J. Ciszewski [13]. Recently, I.M. Mikhailova [14], M. Pilich and J. Turlukowski [15] have focused on some aspects of the application of the provisions of the 1993 Agreement in civil cases.

Each of the scholars dealt with different issues related to international treaties and domestic legislation, depending on what was the main subject of their analysis, the author of this article will continue to focus on the research that will be relevant from the perspective of disclosing the issues of application of the 1993 Agreement to economic affairs.

It is worth emphasizing that at the moment the application of the Polish-Ukrainian agreement does not provide for such a mechanism, and representatives of the scientific community, including those mentioned above, have not comprehensively analyzed this possibility.

**Materials and Methods**

The preparation of this scientific article became possible thanks to the use of the scientific works of Polish and Ukrainian representatives of the doctrine, among which we should first of all note the works of G.A. Tsirat [4] and M. Pilich [15]. In addition, we have analyzed not only the scientific works of specialists in the field of this research subject [16-21], but also the provisions of the 1993 Agreement and other international treaties that have a similar subject of regulation to the 1993 Agreement. In particular, we pay special attention to the provisions of the domestic legislation of Poland and Ukraine regarding the understanding of such concepts as "civil cases" and "economic cases", as well as to judicial practice, which is crucial in practice.

The methodology of scientific research included both general scientific and special research methods, which allowed the author to prepare a comprehensive analysis of the issues of application of the 1993 Agreement to economic cases, taking into account the existing research of scholars, the norms of domestic Polish and Ukrainian legislation, and judicial practice.

Thanks to the dialectical method, the current state of research in the field, which is the subject of scientific research, as well as the prospects of applying the Treaty of 1993 to economic affairs between economic entities of Poland and Ukraine, was analyzed. Using the *dialectical method,* the

author analyzes the current state of research in the area of scientific study, as well as the prospects for applying the 1993 Agreement to economic affairs between business entities of Poland and Ukraine. The *comparative legal method* was used to analyze the provisions of Polish and Ukrainian legislation and to classify "economic cases" as a type of "civil cases". The *methods of analysis and synthesis* made it possible to analyze and systematize the possibilities of applying the provisions of the 1993 Agreement to economic cases without changing the provisions of the aforementioned Agreement.

The *formal-logical method* was used to formulate conclusions regarding the place of economic affairs in the 1993 Agreement. The *descriptive* research *method* allowed to present the place of economic cases in the Agreement of 1993 in a comprehensive manner, not only from a theoretical perspective, but also from a practical one. The article also uses *sociological methods, methods of categorical and terminological generalization, deduction, induction, analogy, and the deductive method,* which allowed not only to systematize problematic issues, but also to present relevant conclusions.

## Results and Discussion

The discussion regarding the place of economic cases in the 1993 Agreement actually boils down to two opposing views – whether the provisions of the Polish-Ukrainian Agreement can be applied to economic cases or not.

As already noted, in the Ukrainian doctrine there is an opinion that international agreements in the field of legal assistance, concluded before 1996, do not apply to economic cases, but only apply to civil, family and sometimes labor relations [4]. This argument can be supported by the fact that in the provisions of agreements with a similar subject of regulation, both Poland and Ukraine clearly defined economic (commercial) cases in the catalog of "civil cases" within the meaning of these agreements.

### *The place of economic cases in the international agreements of Ukraine and Poland*

For example, the Agreement between Poland and the Hellenic Republic on Legal Assistance in Civil and Criminal cases of October 24, 1979, according to which the expression "in civil cases" also includes issues arising from commercial (Polish – *handlowego*) and family law (Art. 5 contract) [22]. The Agreement between Poland and the Republic of Iraq on Legal and Judicial Assistance in Civil and Criminal cases of October 29, 1988 specifies that the parties undertake to provide each other with legal assistance in civil, commercial (Polish – *handlowych*), personal, family and criminal cases (Art. 6 of the Agreement) [23]. Poland and Romania, in their bilateral Agreement on Legal Assistance and Legal Relations in

Civil Cases of May 15, 1999, defined that "civil cases" are understood as cases of civil, family, commercial (pol. *handlowego*) and labor law (Art. 1 of the Agreement) [24].

A similar trend is observed in international bilateral agreements of Ukraine, for example, with the People's Republic of China dated October 31, 1992, where the term "civil cases" also includes commercial, economic, marital, family and labor cases (Art. 1 of the Agreement) [25]. The Agreement on Legal Assistance with Mongolia states that the term "civil matter" as used in this Agreement also includes commercial, economic, family and labor cases (Art. 1 of the Agreement) [26]. This leads to the conclusion that if the parties had wished to regulate economic cases in the 1993 Agreement, they would have been included in the catalog of cases specified in Art. 1, paragraph 3 of the Agreement, but Poland and Ukraine stipulated that only civil cases, including labor and family cases, but not economic cases, would be subject to bilateral regulation. Such a conclusion can be drawn if only the grammatical interpretation of Art. 1, Clause 3 of the 1993 Agreement is applied. In practice, this would mean that in the case of, for example, the recognition and enforcement of a decision of a court of Ukraine or Poland issued in an economic case, regardless of the provisions of Chapter VII "Recognition and enforcement of decisions", which regulates this issue, the norms of internal Polish or Ukrainian legislation should be applied respectively, depending on where the legalization of the foreign judgment should take place.

H.A. Tsirat notes that it would be expedient to consider the possibility of starting the procedure for making changes to the relevant agreements in order to extend their effect to economic relations and cases arising from these relations [4]. It is difficult not to agree with this opinion, because if economic affairs were directly indicated in the catalog of "civil cases", this scientific article would not be relevant. In the current circumstances, I consider it expedient to consider the possibility of applying the provisions of the 1993 Agreement to economic affairs, taking into account the following.

### *Vienna Convention on the Law of Treaties*

In the Polish academic environment, there is an opinion that every treaty on private international law is a kind of small international codification and, unless the provisions of the international treaty indicate otherwise, it cannot be interpreted relying on the concepts and institutions provided for by national law [12]. However, among scientists there is also an opinion that if an international agreement contains legal formulations that are familiar to all parties to the agreement, then the meaning given to this term separately in each country is taken into account [27].

In cases of interpretation of international treaties, it is advisable to pay attention to Art. 31 of the Vienna Convention on the Law of Treaties of May 23, 1969 [28][1] (hereinafter referred to as the Vienna Convention), which regulates the issues of interpretation of international treaties. Pursuant to Art. 31(1) of the Vienna Convention, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the treaty. Art. 31, paragraph 3 states that, along with the context, the following are taken into account:
1) any subsequent agreement between the parties regarding the interpretation of the agreement or application of its provisions;
2) the subsequent practice of applying the agreement, which establishes the agreement of the parties on its interpretation;
3) any relevant rules of international law applicable to the relations between the parties.

A special meaning is given to a term when it is established that the parties had such an intention, as stated in Art. 31(4). In addition, pursuant to Art. 32 of the Vienna Convention, additional means of interpretation, including preparatory materials and the circumstances of the conclusion of the treaty, may be used to confirm the meaning to be given by application of Art. 31 or to determine the meaning when interpreted in accordance with Art. 31:
1) leaves the meaning ambiguous or unclear; or
2) leads to results that are clearly absurd or unreasonable.

It should be noted that the possibility of applying Articles 31-32 of the Vienna Convention to international treaties in the field of private international law is confirmed in the doctrine. It is noted that the provisions of the Vienna Convention provide interpretation guidelines of such a general nature that they can also be applied to international treaties in the field of private international law [28-31]. The provisions of the Vienna Convention clearly indicate that in cases of interpretation of international treaties, in addition to grammatical interpretation, attention should also be paid to logical and historical interpretation, as well as the later practice of applying international treaties.

In today's realities, it is difficult to establish the intentions of the Polish and Ukrainian authorities regarding the place of economic affairs in the 1993 Agreement, however, according to the preamble, the main motive for concluding the treaty was the desire to develop friendly relations between the two states, as well as deepening and improving mutual cooperation in

[1] Ukraine joined this Convention in accordance with the Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR dated April 14, 1986. Poland joined the Convention on April 27, 1990, the Convention entered into force for Poland on August 1, 1990.

the field of legal relations. The Polish doctrine states that the evaluation of expressions used in an international treaty requires taking into account their effectiveness, that is, interpreting the text in such a way that the text means something and its meaning is useful [5]. Taking into account the preamble and Art. 1 (4) of the 1993 Agreement, according to which the provisions of this Agreement concerning nationals of the contracting parties also apply to legal entities organized in accordance with the laws of the contracting party in whose territory they are located, the exclusion of business cases from the subject of international regulation would be inefficient and extremely unhelpful for business entities in Poland and Ukraine.

In addition, it is necessary to pay attention to the currently only Polish commentary to the provisions of the 1993 Agreement, which states that the term "civil case" should be given an autonomous meaning, taking into account the results of comparative legal interpretation – primarily, taking into account the legislation of both contracting states, i.e. Poland and Ukraine [15]. Therefore, it is expedient to analyze whether economic affairs, in the sense of the norms of domestic Ukrainian and Polish legislation, could potentially fall under the definition of "civil cases" referred to in the 1993 Agreement.

### *The concept of "economic cases" in the understanding of the norms of domestic Polish and Ukrainian legislation*

According to Art. 1 of the Civil Procedure Code of Poland [32], the Civil Procedure Code regulates judicial proceedings in civil, family, guardianship and labor cases, as well as in cases related to social security and other cases to which the provisions of this Code apply on the basis of special laws (civil cases). In accordance with Art. 19 (1) of the Code of Criminal Procedure of Ukraine [33], courts consider cases arising from civil, land, labor, family, residential and other legal relations in civil proceedings, except for cases which are considered in the order of other proceedings. It is possible to draw a conclusion It can be concluded that the general provisions of the Polish and Ukrainian Civil Procedure Code on civil proceedings are similar.

In Art. $458^2$ Clause 1 of the Civil Procedure Code of Poland [32] there is a definition of the concept of "economic cases", according to which economic affairs are:
1) cases arising from civil legal relations between entrepreneurs within the scope of their economic activity;
2) cases specified in point 1 even if one of the parties has ceased business activity;

3) cases arising from corporate relations and relating to claims specified in Articles 291-300 and 479-490 of the Code of Business Companies of Poland [34];
4) cases against entrepreneurs on the termination of environmental violations and the restoration of the previous state before the violations or on compensation for the related damage, as well as on the prohibition or restriction of activities that threaten the environment;
5) cases related to construction contracts and contracts related to the construction process, for construction works;
6) cases related to leasing contracts;
7) cases against persons responsible for the entrepreneur's debts, also alternatively or jointly, by law or by contract;
8) cases between bodies of a state enterprise;
9) cases between the state enterprise or its bodies and the body that founded it or the control body;
10) cases provided for by the legislation on bankruptcy and restructuring;
11) cases of enforcement of an executive document, which is a decision of an economic court that has entered into legal force or is subject to immediate execution, or a settlement agreement concluded before a commercial court;
12) cases on the impossibility of enforcement of an executive document based on a decision of an economic court that has entered into legal force or is subject to immediate enforcement, or a settlement agreement concluded before a commercial court.

At the same time, Art. 458²(2) of the Polish Code of Civil Procedure [32] implies that cases concerning the division of joint property of the partners of a civil partnership (Polish: *wspólników spółki cywilnej*) after its termination or a claim acquired from a person who is not an entrepreneur are not economic cases, unless the claim arose out of legal relations related to the scope of business activities carried out by all the partners. It should be emphasized that civil and economic cases in the Polish legal system are regulated by the Civil Procedure Code of Poland, which differs from Ukrainian legislation.

In Ukraine, in this regard, it is worth paying attention to Art. 1 of the Commercial Procedure Code of Ukraine [35], according to which the Commercial Procedure Code of Ukraine defines the jurisdiction and powers of commercial courts, establishes the procedure for conducting legal proceedings in commercial courts. Art. 20(1) of the Commercial Procedure Code of Ukraine states that commercial courts shall hear cases in disputes arising in connection with the conduct of business activities (except for cases provided for in part two of this article) and other cases in cases specified by law, in particular:

1) cases in disputes arising from the conclusion, amendment, termination and execution of transactions in business activities, except for transactions to which an individual who is not an entrepreneur is a party, as well as disputes regarding transactions concluded to secure the fulfillment of an obligation to which legal entities and/or individual entrepreneurs are parties;
2) cases in disputes regarding the privatization of property, except for disputes about the privatization of the state housing fund;
3) cases in disputes arising from corporate relations, including disputes between participants (founders, shareholders, members) of a legal entity or between a legal entity and its participant (founder, shareholder, member), including a participant who dropped out, related to the creation, activity, management or termination of the activity of such a legal entity, except for labor disputes;
4) cases in disputes arising from transactions with shares, stakes, units, other corporate rights in a legal entity, except for transactions in family and inheritance relations;
5) cases in disputes regarding financial instruments, in particular regarding securities, including related to rights to securities and rights arising from them, emission, placement, circulation and repayment of securities, accounting of rights to securities, liabilities by securities, except for debt securities, held by an individual who is not an entrepreneur, and promissory notes used in tax and customs legal relations;
6) cases in disputes concerning the right of ownership or other real rights to property (movable and immovable, including land), registration or accounting of rights to property that (rights to which) is the subject of the dispute, invalidation of acts violating such rights, except for disputes involving an individual, and disputes concerning the seizure of property for public needs or for reasons of public necessity, as well as cases in disputes concerning property that is the subject of enforcement of an obligation to which legal entities and/or individual entrepreneurs are parties;
7) cases in disputes arising out of relations related to the protection of economic competition, restriction of monopoly in economic activity, protection against unfair competition, including disputes related to appealing against decisions of the Antimonopoly Committee of Ukraine, as well as cases on applications, petitions of the Antimonopoly Committee of Ukraine on issues within their competence, except for disputes within the jurisdiction of the High Court of Intellectual Property;
8) bankruptcy cases and cases involving disputes over property claims against a debtor in respect of which bankruptcy proceedings have been initiated, including cases involving disputes over the invalidation of any transactions (agreements) concluded by the debtor; recovery of wages;

reinstatement of the debtor's officers and employees, except for disputes over the determination and payment (collection) of monetary obligations (tax debt) determined in accordance with the Tax Code of Ukraine, as well as disputes over the invalidation of transactions at the request of a controlling authority in the exercise of its powers under the Tax Code of Ukraine;
9) cases on applications for approval of the debtor's rehabilitation plans prior to the opening of bankruptcy proceedings;
10) disputes concerning appeals against acts (decisions) of business entities and their bodies, officials and employees in the field of organization and conduct of business activities, except for acts (decisions) of public authorities adopted in the exercise of their administrative functions and disputes involving an individual who is not an entrepreneur;
11) cases on appealing against decisions of arbitration courts and on issuing an order for enforcement of decisions of arbitration courts established in accordance with the Law of Ukraine "On Arbitration Courts", if such decisions are made in disputes referred to in this Article;
12) cases in disputes between a legal entity and its official (including an official whose powers have been terminated) on compensation for damages caused to a legal entity by the actions (inaction) of such an official, at the request of the owner (owners), participant (participants), shareholder (shareholders) of such a legal entity filed in its interests;
13) claims for registration of property and property rights, other registration actions, invalidation of acts violating rights to property (property rights), if such claims are derived from a dispute over such property or property rights or a dispute arising out of corporate relations, if such dispute is subject to consideration by a commercial court and is submitted for consideration together with such claims;
14) cases in disputes on protection of business reputation, except for disputes involving an individual who is not an entrepreneur or self-employed person;
15) other cases in disputes between business entities;
16) cases on applications for a court order if the applicant and the debtor are a legal entity or an individual entrepreneur;
17) cases arising out of the conclusion, amendment, termination and execution of agreements concluded within the framework of public-private partnership, including concession agreements, except for disputes that are considered in other legal proceedings;
18) disputes concerning the protection of violated, unrecognized or disputed rights and legitimate interests of bondholders arising between the bondholder administrator and the bond issuer and/or persons providing security for such bonds;
19) cases involving disputes over decisions of bondholders' meetings;

20) cases involving disputes between a water user organization and its member or the owner (user) of an agricultural land plot included in the service territory of the respective water user organization regarding the acquisition or termination of membership in such a water user organization, conclusion, amendment, termination, execution by the water user organization of contracts, additional agreements and other documentation that is an integral part of the contract, terms of service provision by the water user organization, recognition of invalidity of transactions made by a water user organization, as well as determination of the service territory of a water user organization; cases involving disputes between owners of reclamation systems or networks and water users regarding the terms of water intake, delivery and discharge;
21) cases of liquidation of an insurer or credit union at the request of the National Bank of Ukraine in accordance with Art. 110 of the Civil Code of Ukraine.

It should be concluded that the catalog of commercial cases in the Polish Civil Procedure Code and the Commercial Procedure Code of Ukraine is quite wide. It is worth noting that in both Polish and Ukrainian doctrine and judicial practice, economic cases can be considered as cases of civil legal relations.

### *The concept of "civil cases" in the understanding of the norms of domestic Polish and Ukrainian legislation*

In the Ukrainian scientific community, it is noted that the concept of "civil case" is insufficiently developed and requires more detailed research [7]. It is worth paying attention to the resolution of the Plenum of the Supreme Economic Court of Ukraine dated October 24, 2011 [36], which states that an economic dispute is subordinate to the economic court, in particular, under the following conditions: 1) participation of a business entity in dispute; 2) the existence between the parties, firstly, of economic relations regulated by the Civil Code of Ukraine (435-15), the Economic Code of Ukraine (436-15), other acts of economic and civil legislation, and, secondly, a dispute about the right, arising from the relevant relationship; 3) the presence in the law of a norm that would directly provide for the resolution of the dispute by the economic court; 4) the absence in the law of a rule that would directly provide for the resolution of such a dispute by a court of another jurisdiction. In Poland, on the other hand, it is stated that the assignment of a case to the economic category is determined by three jointly fulfilled criteria, first of all, it must be a case from civil legal relations (in the sense of substantive civil law), a case between entrepreneurs and related to their economic activity [6]. Therefore, it can be concluded that economic cases in the understanding of the provisions of the domestic legislation of Poland and Ukraine fall under the category of "civil cases".

### *Judicial practice of Poland and Ukraine regarding the application of the Agreement of 1993 to economic cases*

We should also pay special attention to the judicial practice of applying the Polish-Ukrainian Agreement of 1993. According to the decision of the Supreme Court dated January 9, 2018 in case No. 910/10109/16 [37] regarding the dispute between Ukrainian and Polish business entities, the court applied the provisions of the Agreement of 1993, namely the rules for determining international jurisdiction – determining the competent court in disputes between business entities of Ukraine and Poland. In the decision of February 7, 2024, the Commercial Court of the Kyiv region in case No. 911/2090/23 [38] between Polish and Ukrainian business entities also referred to the provisions of the 1993 Agreement, namely Art. 33, which states that the obligations arising from contractual relations are determined by the legislation of the contracting party on whose territory the agreement was concluded, unless the participants of contractual relations subordinate these relations to the legislation chosen by them. The application of the provisions of the 1993 Agreement also took place, for example, in the decision of the Western Commercial Court of Appeal dated July 4, 2023 in case No. 914/2548/22 [39] and the decision of the Commercial Court of Lviv Region dated June 20, 2023 in case No. 914/ 2549/22 [40].

Unfortunately, due to limited access to Polish court decisions issued on the basis of the 1993 Agreement in economic cases, the author of this article can only note that in case XXVI GCo 188/17 of October 22, 2019, in the decision of the District Court in Warsaw XXVI Economic division between the Polish and Ukrainian companies, the court does not state the legal grounds for the decision, so it is impossible to determine whether the 1993 Agreement was applied [41]. Instead, in case XX GCo 310/16 of October 27, 2016, the District Court in Warsaw XX Commercial Division in its justification for the issued decision did not apply, erroneously, in the opinion of the author of this article, the provisions of the 1993 Agreement, referring exclusively to the provisions of domestic Polish law [42]. At the same time, it should be emphasized that there are cases in Polish judicial practice when a Polish court referred to an agreement on legal assistance with another state in an economic case, despite the fact that economic cases were also not specified in the international agreement, as in the case of the Afreement from 1993.

### Conclusions

Thus, taking into account the subject and purpose of the 1993 Agreement, as well as the practice of its application and other international agreements with a similar scope of regulation by Polish and Ukrainian courts, it can

be concluded that the Polish-Ukrainian Agreement of 1993 can be applied to economic cases regardless of the fact that the latter are not explicitly defined in it as a type of "civil cases". In the author's opinion, the possibility of such application is the most effective and useful way out of the situation when there is no direct amendment of the provisions of the 1993 Agreement.

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# Private Standards of Non-Governmental Organizations in the Field of Sanitary and Phytosanitary Measures Application

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**Abstract**
*The relevance of the article is as follows: on the one hand, the importance of sanitary and phytosanitary measures as an integrating category, a category that stands at the crossroads of agrarian, environmental, social and international policies is not yet fully realised and therefore significantly underestimated; on the other hand, at the present stage, it is impossible to ignore the objective growth of the role and importance of non-governmental organisations in regulating the relations in the field of sanitary and phytosanitary measures. The purpose of the article is to identify and highlight the range of issues related to the relations between the State and non-governmental organisations which approve their own standards in the field of sanitary and phytosanitary measures, between the World Trade Organization (WTO) and the same non-governmental organisations, and also between the WTO and the State under whose jurisdiction a non-governmental organisation approves its own standards in the field of sanitary and phytosanitary measures. The leading methods of scientific cognition were: the dialectical method, which served as the methodological basis for scientific cognition, reflecting the relationship between theory and practice, as well as the conceptual provisions of legal science; formal logical method was used to analyse the content of current national and European legislation on the legal regulation of the application of private standards in the field of sanitary and phytosanitary measures; the comparative legal method was used to analyse and study the EU requirements, in particular the provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures and practical mechanisms that can be implemented in national legislation and put into practice; the conclusions and proposals contained in the article are formulated using the method of dogmatic (logical) analysis. The article covers a range of issues related to the relations between the State and non-governmental organisations that approve their own standards in the field of sanitary and phytosanitary measures and notes that internal corporate standards and policies play a significant role in the activities of most international companies, which ensure that company employees comply with the requirements of both international and national legislation. The study revealed the following results: 1) the issue of risks of private standards has been updated, namely, they are not always based on scientific data, as required*

*by the Agreement on the Application of Sanitary and Phytosanitary Measures; differ from international standards; such standards are stricter than official sanitary and phytosanitary requirements; require additional costs for small suppliers; private standards are set without transparency, consultation and appeal systems; private standards are diverse and not harmonised; the rule of Further research on the purpose of increasing the influence of private standards in international trade; development and justification of the procedure for introducing standards; determination of the role of the state and its responsibility; analysis of the prospects for the introduction of stricter requirements by non-governmental organisations; development of methodological foundations for the extension of certain international legal obligations to private individuals are considered promising.*

***Keywords:*** *sanitary and phytosanitary measures; WTO; EU; international standards; non-governmental organizations; international trade.*

# Приватні стандарти неурядових організацій у сфері застосування санітарних та фітосанітарних заходів

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**Анотація**

*Актуальність теми цього дослідження полягає в тому, що, з одного боку, важливість санітарних та фітосанітарних заходів як інтегруючої категорії, яка стоїть на перехресті аграрної, екологічної, соціальної та міжнародної політики, ще повною мірою не усвідомлена й тому суттєво недооцінена, а з іншого – на сучасному етапі неможливо ігнорувати об'єктивне зростання ролі та значення неурядових організацій у регулюванні відносин санітарних та фітосанітарних заходів. З огляду на це метою статті є виявлення й висвітлення кола питань, присвячених відносинам між державою та неурядовими організаціями, які затверджують власні стандарти у сфері санітарних і фітосанітарних заходів, між Світовою організацією торгівлі (СОТ) і цими ж неурядовими організаціями, а також між СОТ та державою, до юрисдикції якої належить неурядова організація, яка затверджує власні стандарти у сфері санітарних та фітосанітарних заходів. Провідними методами наукового пізнання стали: діалектичний метод, який виступив методологічним підґрунтям наукового пізнання, що відображає взаємозв'язок теорії та практики, а також концептуальні положення юридичної науки; формально-логічний метод застосовано під час аналізу змісту чинного націо-*

*нального та європейського законодавства щодо правового регулювання застосування приватних стандартів у сфері санітарних та фітосанітарних заходів; порівняльно-правовий метод застосовано при аналізі та дослідженні вимог ЄС, зокрема положень Угоди про застосування санітарних і фітосанітарних заходів та практичних механізмів, які можна імплементувати в національне законодавство та запровадити у практичній площині; формулювання висновків і пропозицій, які містяться у статті, здійснено за допомогою методу догматичного (логічного) аналізу. Висвітлено коло питань, присвячених відносинам між державою та неурядовими організаціями, які затверджують власні стандарти у сфері санітарних і фітосанітарних заходів. Наголошується, що в діяльності більшості міжнародних компаній значну роль відіграють внутрішні корпоративні стандарти й політики, завдяки яким забезпечується дотримання співробітниками компаній вимог як міжнародного, так і національного законодавства. У ході дослідження отримано такі результати: 1) актуалізовано питання ризиків приватних стандартів, а саме: вони не завжди базуються на наукових даних, як того вимагає Угода про застосування санітарних і фітосанітарних заходів; відрізняються від міжнародних; такі стандарти жорсткіші за офіційні санітарні та фітосанітарні вимоги; потребують додаткових витрат з боку дрібного постачальника; приватні стандарти встановлюються без прозорості, консультацій та систем апеляції; приватні стандарти різноманітні та не гармонізовані; ігнорується правило еквівалентності, яке лежить в основі Угоди про застосування санітарних і фітосанітарних заходів; 2) висвітлено блок проблемних питань, сформульованих як відносини «СОТ – держава, до юрисдикції якої належить неурядова організація, що затверджує власні стандарти у сфері санітарних та фітосанітарних заходів». Убачаються перспективними подальше дослідження мети зростання впливу приватних стандартів у міжнародній торгівлі; вироблення та обґрунтування процедури введення стандартів; визначення ролі держави та її відповідальності; аналіз перспектив введення неурядовими організаціями більш сурових вимог; опрацювання методологічних основ поширення на приватних осіб певних міжнародно-правових зобов'язань.*

***Ключові слова:*** *санітарні та фітосанітарні заходи; СОТ; ЄС; міжнародні стандарти; неурядові організації; міжнародна торгівля.*

## Introduction

In modern legal doctrine, the importance of sanitary and phytosanitary measures as an integrating category, the one that stands at the crossroads of agrarian, environmental, social and international policies, is not yet fully realized and therefore significantly underestimated. The lack of scientific and methodological understanding leads to the lack of a conceptual vision of the legislation's strategic development in the field

of sanitary and phytosanitary measures application. Even accession to the WTO and European integration obligations did not lead to qualitative changes in the direction of developing the doctrinal foundations of the legislation reform that regulates sanitary and phytosanitary requirements in agriculture. The rapid, geometric growth of legislation in this area, which has taken place over the past few years, remains practically imperceptible in science. All legislative changes are carried out under the slogans of European integration and the fastest possible implementation of European legislation, and therefore mostly do not raise questions about their conceptual basis. This leads to the unsystematic accumulation of normative material, which occurs in isolation from the real development of agrarian relations [1].

At the same time, the objective growth of the role and importance of non-governmental organizations at the current stage in the regulation of sanitary and phytosanitary measures relations (hereinafter – SPS) cannot be ignored. At the same time, it is interesting that the states differ greatly in their attitude towards non-governmental organizations and recognition of their role. For example, in Chinese scientific doctrine, which is based on ancient legal traditions and the legal culture of this country, the role of the state in global economic management is highly valued, while paying less attention to non-governmental organizations and civil society [2, pp. 578-594].

In the conditions of economic globalization, states lose their autonomy, in addition, they are forced to share their political and social powers, and their sovereignty with businesses, international organizations and many groups of citizens known as non-governmental organizations [3].

This process is ambiguously evaluated and can be viewed from different angles. Foreign researchers reveal tendencies towards experimental forms of management, with an emphasis on private management. In the sphere of SPS, this has a direct manifestation, as through the development of a multitude of private standards, codes of conduct and quality assurance schemes, non-governmental organizations (in particular transnational corporations – TNCs) are replacing traditional intergovernmental regimes in solving significant global environmental and socio-economic problems, ranging from logging forests, depletion of fisheries, climate change, ensuring proper working conditions and ending with the observance of human rights [4, pp. 320-407].

That is, non-governmental organizations are increasingly taking over the functions of regulating relations, which were previously the exclusive competence of states. This directly applies to the relations regulation of the SPS application.

The purpose of the article is to identify and highlight a range of issues related to relations between the state and non-governmental organizations that approve their standards in the field of sanitary and phytosanitary measures, between the WTO and the same non-governmental organization, as well as between the WTO and the state to whose jurisdiction the non-governmental organization belongs, which approves its standards in the field of SPS.

The tasks of the study are to highlight a range of issues related to relations between the state and non-governmental organizations that approve their own standards in the field of sanitary and phytosanitary measures, and it is noted that in the activities of most international companies, internal corporate standards and policies play a significant role, thanks to which the company's employees comply with the requirements both international and national legislation; updating the issue of the risks of private standards, namely: they are not always based on scientific data, as required by the Agreement on the Application of Sanitary and Phytosanitary Measures; differ from international ones; such standards are stricter than official sanitary and phytosanitary requirements; require additional costs from the small supplier; private standards are set without transparency, consultation and appeals systems; private standards are diverse and not harmonized; the rule of equivalence, which is the basis of the Agreement on the Application of Sanitary and Phytosanitary Measures, is ignored; the legal nature investigation of the legal relationship formulated as the relationship "WTO is a state under whose jurisdiction belongs a non-governmental organization that approves its own standards in the field of sanitary and phytosanitary measures".

**Literature review**

The fundamental basis for the research was the works of domestic scientists who expressed ideas related to the subject of the study, in particular, G. Anisimova, A. Getman, H. Grigor'eva, A. Dukhnevych, V. Yermolenko, I. Karakash, N. Kobetska, T. Kurman, V. Nosik, A. Stativka, T. Kharytonova, M. Shulga and others. At the same time, the issue of legal relations between the state and non-governmental organizations that approve their standards in the field of sanitary and phytosanitary measures, as well as the identification and analysis of the private standards risks, require comprehensive research.

**Material and Methods**

Based on the defined research subject, a comprehensive approach to the application of scientific research methods was chosen. The methodological basis of the study, taking into account the comparative legal aspect

embedded in the subject of the study, is the comparative legal method, which was used to study various scientific approaches to the content and form of legal regulation of sanitary and phytosanitary measures application under the law of Ukraine, the WTO and the EU; to study the legislation of some foreign countries in the field of application of sanitary and phytosanitary measures in agriculture. The formal-logical method was used when building the structure of the work, presenting the main provisions, formulating definitions and categories, substantiating conclusions and recommendations. Formulation of conclusions and proposals contained in the article is made using the method of dogmatic (logical) analysis.

**Results and Discussion**

Three blocks of problematic interrelated issues were formulated to reveal comprehensively the peculiarities of the non-governmental organizations influence on relations of the SPS application, based on three groups of problems (the problem of influence – providing access to the decision-making process within the framework of the WTO, the problem of justice, which consists in giving non-governmental organizations the right to appeal to the dispute resolution body within WTO and the problem of standards, which includes the issue of establishing private standards that are different or stricter than international ones).

***Relations "the state – non-governmental organizations that approve their standards in the sphere of SPS"***

Internal corporate standards and policies play a significant role in the activities of most international companies. Thanks to these documents, compliance by company employees with the requirements of both international and national legislation is ensured that is the so-called "compliance" (observance, execution) is ensured. At the same time, the principle is implemented according to which, in case of discrepancies between the requirements of the national legislation of one or another country and the requirements of internal corporate rules, the affiliated company must comply with those requirements that are stricter [5, pp. 205-221; 6, p. 291]. At the same time, powerful companies, putting forward their own stricter standards, actually force them to adhere to them, since they have significant market weight. Suppliers have no legal obligation to comply with these requirements. However, as soon as such standards become the norm and begin to be widely used, entrepreneurs have no other choice, otherwise, they risk losing their place in the market. As an example, we can offer the requirements and sanitary standards of the European Spice Association (ESA), which sets minimum levels of pesticides, salmonella, Escherichia coli, etc. They are widely used by European entrepreneurs and

have an impact on trade that is different from the impact of state standards. For example, the Indian Spices Council takes these requirements into account when manufacturing its products [7, p. 303].

In some cases, there is a hybridization of standards – when private standards are recognized by state regulatory structures. National governments can find themselves "caught" between their international obligations and the demands of their citizens. In addition, they may be faced with a difficult choice: either respond independently to the concerns of their consumers and risk the same, entering into a conflict with international obligations; or respond to manufacturers who oppose "private burden" that nominally exceeds the requirements set forth by the WTO [8, pp. 488-504].

The general rule, according to which the state is not responsible for the economic activities of private individuals, and private companies being independent legal entities are not responsible for the actions of the state in which they are registered [5, pp. 205-221], problematic issues are not exhausted.

***Relations "WTO – non-governmental organizations that approve their standards in the sphere of SPS"***

The WTO – as an institutional embodiment of the global trade system – formed the main rule for all member states: the requirements for SPS should be based on international standards, primarily approved by the "three sisters" – the Codex Alimentarius Commission, WHO, IPPC. Other standards imposed by states are subject to in-depth analysis to establish the scientific validity of such requirements. Against the background of such clear determination and limitation of the official states' manoeuvrability, a significant curtailment of their opportunities in the sphere of the SPS application, the construction of a whole formal and substantive obstacles system that makes it difficult (or impossible) to depart from international standards, the freedom and unaccountability of private sector organizations stand out very clearly, which set their standards, ignoring all the barriers carefully constructed by WTO law for states. A clear example is GlobalG.A.P. – the leader in the standardization of agricultural products. In 2015, 153461 producers of vegetables and fruits were certified according to the standards of this organization.

What are the risks of private standards? Firstly, as mentioned above, they are not always based on scientific data, although this is one of the most important requirements of the Agreement on the Application of the SPS. Secondly, such standards differ from international ones. Thirdly, such standards are stricter than official sanitary and phytosanitary requirements (for example, this applies to the maximum permissible level of pesticides

in products). Fourth, they require additional costs on the part of the small supplier. Fifth, private standards are set without transparency, consultation and appeals systems, which in turn can facilitate abuse by NGOs as they leave providers without recourse. Sixth, private standards are diverse and not harmonized. Seventh, the rule of equivalence is ignored, which is the basis of the Agreement on the application of the SPS [9, p. 205].

***Relations "WTO is a state to which jurisdiction belongs a non-governmental organization that approves its standards in the sphere of SPS"***

This block of problematic relations becomes a natural consequence of all previous ones, because as a result of the emergence of private standards, additional obstacles for international trade appear, and the WTO calls on the relevant state to take certain measures to correct the situation. However, WTO member states react ambiguously to objections in this matter. For example, the issue of private sector standards was first raised at the meeting of the WTO Committee on SPS in 2005, when St. Vincent and the Grenadines expressed its concern about EUREPGAP (today GlobalGAP) requirements for the import of bananas and other goods into the territory of the United Kingdom because such requirements were stricter than those of the EU. In turn, the EU stated that EUREPGAP is an association of retail chains, and therefore the union has no right to interfere in the activities of this private organization, as it represents the interests of consumers. This issue became the subject of further study, and in 2008 a special task force was established to gather information. The 30 respondents included both developed and developing countries [8, p. 205]. The results of the conducted research demonstrated a deep contradiction between the attitude of developed countries and developing countries to private standards. If less developed countries regard private standards as an additional barrier to market access, more developed countries insist on the right of private individuals to set their level of product safety.

***State responsibility for the actions of non-governmental organisations***

The main question that arises in this context is whether the states are responsible for the violation of the rules of the Agreement on the Application of the SPS by non-governmental organizations. States, of course, try to defend the position of the autonomy of non-governmental organizations and the impossibility of the official authorities to bear responsibility for the actions of private individuals.

For a more thorough answer to this question, it is worth analyzing the provisions of the Agreement on the Application of the SPS. Art. 13 of the Agreement states that "Members shall take such reasonable measures

as may be available to them to ensure the implementation of the relevant provisions of this Agreement by non-governmental institutions in their territory, as well as by regional bodies of which the relevant institutions in their territory are members". That is, the following conclusions can be drawn from this norm: a) the state undertakes to take reasonable and affordable measures to ensure that non-governmental institutions fulfil the requirements of the WTO regarding the SPS (such wording excludes a direct obligation to ensure implementation); b) it is clear from the very wording of the norm that it is about the obligation to facilitate, to create appropriate conditions so that non-governmental organizations can fulfil the stipulated requirements; c) there is no detailing and disclosure of "justified measures that may be available to them" (this gives a formal right, for example, to the EU not to put pressure on GlobalGAP, referring to the fact that such a measure would be unjustified because it would cross the limits of public authority intervention in the activity private person).

The same Art. 13 provides an interesting rule according to which "Members shall not take measures that would directly or indirectly compel or encourage such regional or non-governmental institutions or local government bodies to act in a manner contrary to the provisions of this Agreement". The rule establishes a safeguard for states that might be tempted and try to abuse the rather liberal rule analyzed above regarding the absence of a direct obligation to influence non-governmental organizations. Yes, the state should not create conditions that would encourage non-governmental organizations to violate WTO norms regarding SPS. However, the question arises, is, for example, the state policy of promoting a healthy lifestyle, consumption of organic products and/or products produced in compliance with high environmental requirements, such an encouragement? This is most clearly shown in the example of the EU. Indeed, European society has reacted rather harshly to attempts to flood their domestic market with hormone-raised meat. The same opposition was recorded regarding the import of GMO products. Therefore, the state for a long time, conducting appropriate educational, informational, and cultural policies, contributed to the formation of a society whose values were high organic requirements for food. If we assume that such behaviour is a violation of the relevant norm of the WTO Agreement on the application of SPS, then we must agree that the progressive development of society, as well as its movement towards sustainable development, will stop.

The last norm of Art. 13 of the WTO Agreement on the Application of SPS requires members to "ensure that they rely on the services of non-governmental agencies for the application of sanitary or phytosanitary measures only if these agencies comply with the provisions of this

Agreement". There are two doctrinal positions regarding the interpretation of this part: some scientists believe that on this basis the state can be held responsible for the entire private sector, while others narrowly interpret this norm, arguing that the state is responsible only for those organizations that it has permitted to enter their standards [10].

In our opinion, the analyzed norm means that in cases when the state officially recognizes the services of non-governmental organizations in the sphere of SPS (for example, recognizes their certificates, conclusions, entrusts them with inspections, etc.), then it thereby recognizes that these institutions comply with the provisions of the WTO Agreement. Ideally, this means that such NGOs apply international standards.

According to some scientists, the WTO legal regime should be extended to private individuals as well [11, pp. 99-122], in particular, based on an expanded interpretation of the concept of "assignment of behaviour to the state" (State Attributability). In international law, there is a general principle according to which the behaviour of private individuals or entities cannot be attributed to the state under international law. However, in some cases, such behaviour may, nevertheless, be considered as the behaviour of the state due to the special factual connection between the person who performs such behaviour and the state [12, pp. 249-254].

It can be seen that this is precisely a return to the above-analyzed provision that in the case of deliberately entrusting a non-governmental organization with certain functions in the sphere of SPS, the state thereby ensures that such a non-governmental organization complies with the provisions of the WTO Agreement. This forms a connection between the public authority and a non-governmental organization, which can form the basis of the state's responsibility for the actions of such a non-governmental organization.

**Conclusions**

The study reveals the growing role and importance of non-governmental organisations at the present stage, which cannot be ignored, since non-governmental organisations are increasingly taking over the functions of regulating relations that were previously the exclusive competence of the States, and this directly relates to the sphere of sanitary and phytosanitary measures. The article establishes that the risks of using private standards are that they are not always based on scientific data, as required by the Agreement on the Application of Sanitary and Phytosanitary Measures, differ from international standards, are stricter than official sanitary and phytosanitary requirements, and require additional costs for a small supplier. At the same time, private standards are set without transparency, consultation and appeal systems. Private standards are diverse and not

harmonised, ignoring the rule of equivalence that underpins the SPS Agreement.

The problems analyzed above require the fastest solution given the rapid development of private standardization in the field of SPS. Why is it so important to find a way out of the current situation? First, the influence of private sector standards in international trade has grown over the years [13, p. 901]. Second, it is not known what their main purpose is: to secure consumers or to prevent specific suppliers from entering the market. Thirdly, it is necessary to develop a procedure for the introduction of standards and determine what role the states play in this and to what extent they are responsible for it. In addition, it should be determined whether non-governmental organizations can introduce stricter requirements [8, p. 205]. This line of scientific research is very promising because, as Agni Calfagianni writes, there is currently a lack of guidance on the principles that can attribute ethical duties to private institutions [13, p. 901; 14, pp. 174-186].

This requires a thorough study of the methodological foundations of the extension of certain international legal obligations to private individuals.

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# Freedom of Religion: the Doctrine of Forum Internum in the ECHR's Law Enforcement Practice

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**Abstract**
*The legal dimension of freedom of religion is important in the formation of civilizational approaches to state-building processes, strengthening civil society, and the humanistic outlook of citizens that would promote pluralism and tolerance and be shared by the entire community. The study of the relevant legal framework in Ukraine, the state, scope, and completeness of the reflection of the essence of freedom of conscience and religion in it and some legal documents, has necessitated the expression of our thoughts on their implementation. The purpose of this study is to analyze the right to freedom of religion and to study the application of the forum internum doctrine in the judicial and law enforcement practice of the ECHR. To achieve this, the following research tasks were solved: the author analyses the doctrine of forum internum (personal faith, internal freedom), and approaches to its content; examines models of church-state relations (in particular, the ECHR judgments on the forum internum doctrine and their impact on Ukrainian legislation). A range of methods of scientific cognition was used in the course of the study, in particular, the dialectical method (to assess the mutual influence of various legal provisions on the protection of the right to freedom of religion and religious belief), the method of structural analysis and synthesis (in the context of the study of the doctrine of forum internum (personal faith, internal freedom), approaches to its content), historical and logical methods, methods of deduction and induction (helped to identify models of church-state relations (separating, identifying and cooperative), comparative (analyzed the ECtHR judgments on the forum internum doctrine and their impact on Ukrainian legislation). The author concludes that the doctrine of forum internum (personal faith, internal freedom) has a dualistic nature: on the one*

*hand, it gives a person internal freedom, i.e. the ability to choose, adhere to, develop and even completely change their personal thoughts and beliefs; and on the other hand, it obliges the State to refrain from actions aimed at preventing any ideological processing of a person, interference with fundamental ideas and beliefs that are born in the depths of a person's soul. However, the state may impose restrictions on freedom of conscience and religion, but they have fairly clear limits. The author examines the genesis of the concept of "freedom of religion" in the history of legal traditions and constitutional documents and concludes that a significant period has passed during which significant changes have taken place in the stereotypes in the public consciousness, religious ideas, and state-legal relations regarding freedom of worldview. The author examines the ECtHR judgments on the forum internum doctrine and their impact on Ukrainian legislation. It is noted that, given the complex state-building processes of modern Ukraine, the institution of religious freedom requires a more detailed study in the philosophical and legal sense, which will allow for improving its conceptual framework. The author points out that the problems associated with worldview values and human rights in the area of freedom of conscience and freedom of religion make it relevant to study the doctrine of forum internum (personal faith, internal freedom) and its impact on judicial and law enforcement practice.*

***Keywords:*** *freedom of worldview; freedom of religion; the doctrine of forum internum; internal freedom; judicial practice, ECHR judgments.*

# Свобода віросповідання: доктрина forum internum у правозастосовній практиці ЄСПЛ

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**Анотація**
*У формуванні цивілізаційних підходів до державотворчих процесів, зміцненні громадянського суспільства, гуманістичного світогляду громадян,*

*які сприяли б розвитку плюралізму, толерантності та поділялися б усією спільнотою, велике значення має правовий вимір свободи віросповідання. Вивчення відповідної нормативно-правової бази в Україні, стан, обсяг і повнота відображення в ній та в низці правових документів суті свободи совісті та віросповідання зумовили необхідність висловити власні думки щодо їх реалізації. Метою нашого дослідження є аналіз права на свободу віросповідання, вивчення застосування доктрини forum internum (особистої віри, внутрішньої свободи) в судовій та правозастосовній практиці ЄСПЛ. Для її досягнення вирішено такі дослідницькі завдання: проаналізовано доктрину forum internum, підходи до її змісту; розглянуто моделі державно-церковних відносин (зокрема, рішення ЄСПЛ щодо доктрини forum internum та їх вплив на законодавство України). З цією метою використано комплекс методів наукового пізнання, зокрема: діалектичний – для визначення взаємовпливу різних норм праворегулювання на захист права на свободу віросповідання та релігійних переконань; структурного аналізу та синтезу – в контексті дослідження доктрини forum internum, підходів до її зміст; історичний і логічний, дедукції та індукції, які допомогли виокремити моделі державно-церковних відносин – відокремлюючу, ідентифікаційну та кооперацій ну; порівняльний – для аналізу рішень ЄСПЛ щодо доктрини forum internum та їх впливу на законодавство України. Зроблено висновок, що доктрина forum internum має дуалістичний характер: з одного боку, дає людині внутрішню свободу, тобто можливість обирати, дотримуватися, розвивати і навіть повністю змінювати свої особисті думки та переконання, а з іншого – зобов'язує державу утримуватися від дій, спрямованих на запобігання будь-якій ідеологічній обробці людини, втручання у фундаментальні ідеї та переконання, що народжуються в її душі. Однак держава може застосовувати обмеження свободи совісті та релігії, які мають досить чіткі межі. Досліджено генезу уявлень про «свободу віросповідання» в історії правових традицій та в конституційних документах і зроблено висновок, що за цей час у суспільній свідомості відбулися суттєві зміни стереотипів релігійних уявлень і державно-правових відносин щодо свободи світогляду. Розглянуто рішення ЄСПЛ відносно доктрини forum internum та їх вплив на законодавство України. Наголошено, що з огляду на складні державотворчі процеси в Україні інститут свободи віросповідання потребує більш детального вивчення у філософсько-правовому сенсі, що дозволить вдосконалити його понятійний апарат. Вказано, що проблеми, пов'язані зі світоглядними цінностями, правами людини у сфері свободи совісті та віросповідання, актуалізують дослідження доктрини forum internum (особистої віри, внутрішньої свободи) та її впливу на судову та правозастосовну практики.*

***Ключові слова:*** *свобода світогляду; свобода віросповідання; доктрина forum internum; внутрішня свобода; судова практика; рішення ЄСПЛ.*

**Freedom of conscience, religion, and belief legally and historically does have a certain special status and should enjoy this status in the minds of the international community.**
***David Little* [1]**

## Introduction

Freedom of religion, the establishment and observance of which is considered a criterion of human self-determination not only in the spiritual sphere but also in life in general, has come a long way before it was enshrined and recognized. The first international act to enshrine the right to freedom of religion and belief at the international level was the Universal Declaration of Human Rights in 1948.

After that, the UN did not reduce its efforts to instill respect for religious freedom around the world. To this end, two major historical documents were developed and adopted, namely: The International Convention on Civil and Political Rights (1966), where Art. 18 deserves special attention, and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981). Along with the UN initiatives, some international organizations have taken other important, more geographically limited steps in this direction. These include the adoption of the European Convention on Human Rights of 1950 (Articles 9 and 2 of the First Protocol are devoted to this right); the American Convention on Human Rights of 1969 (especially Art. 12); The African Charter on Human and Peoples' Rights (1981), as well as some documents of the Conference (now the Organization) on Security and Co-operation in Europe, in particular the Vienna Concluding Document of 1989 (primarily the principles of 16-17) [2; 3].

Thus, the right to freedom of religion is a necessary component of the freedom of personal self-determination, which, according to constitutional law, is one of the fundamental natural human rights. This has led to an increased interest and choice by scholars of the freedom of worldview and religion as a subject of research.

In addition, according to international and national law, absolute freedom of thought and ideological choice is a component of freedom of conscience and religion: no beliefs can be criminalized or prohibited as long as they are only within the human mind. In other words, ideas or beliefs that are not expressed externally and do not entail any actions cannot cause public harm. Thus, the freedom of thought, conscience, and religion, which does not find its manifestation, cannot be subject to interference by the state.

Moreover, internal freedom of religion is based on the maxim lex noncogit ad impossible (the law does not require the impossible) - the law simply cannot control a person's thoughts, so it should be possible for an individual to change his or her religious faith or community [4].

It should be added that modern foreign scholarship has devoted a lot of research to the analysis of international law provisions. For example, scholars Y. Baskin, Y. Bezborodov, K. Borisov, D. van der Weijver, T. Vasylieva, M. Janis, K. Ivans, M. Ivans, Y. Karlov, D. Carlson, N. Lerner, D. Little, B. Tahzib, P. Taylor, D. Whitt, and others pay attention to the study of the protection of the human right to freedom of conscience and religion. It should be noted that developments in this area generally began with consideration in the nineteenth and early twentieth centuries of the possibility of separating religious rights and their protection. Such world-renowned scholars as J. Bluntschli, F. List, J. Martens, F. Martens, A. Riviere, A. Stoyanov, M. Taube, and G. Wheaton contributed to the solution to this problem [5].

In Ukraine, various aspects of the right to freedom of conscience and religion have also been the subject of research. Among the constitutional law specialists, the human right to freedom of conscience (constitutional and legal regulation) was the focus of attention of V. Bediia, constitutional and legal regulation of relations in the field of the right to freedom of religion in Ukraine – O. Bykova, the right to freedom of conscience and religion, and discussion issues around the forum internum aspect – O. Vasylchenko [6], philosophical and legal dimension of freedom of religion was studied by M. Koliba, constitutional provision of the right to freedom of worldview and religion – by V. Malyshko, evolution of approaches to regulation of the right to freedom of worldview and religion in legal science – by Y. Paida [7], constitutional and legal regulation of relations between the state and religious organizations in guaranteeing freedom of religion – G. Sergienko, judicial protection and some problems of exercising the right to freedom of religion – E. Tkachenko [8], Legal support for freedom of religion – L. Yarmol.

At the same time, there is a lack of comprehensive constitutional and legal studies of certain aspects of this right, such as the issue of internal freedom (forum internum), which determined the *purpose* of this publication – to analyze the right to freedom of religion, to study the application of the forum internum doctrine in judicial and law enforcement practice. To achieve this goal, the following tasks need to be addressed:
– to analyze the doctrine of forum internum (personal faith, internal freedom) and approaches to its content;
– to identify the models of church-state relations and their impact on the ECHR judgments on the forum internum doctrine.

The study of freedom of religion through the prism of the legal dimension makes it possible to identify certain national models and international peculiarities of protection of the right to freedom of religion, which is enshrined in national legal systems, legal acts of international organizations, and decisions of the ECHR.

**Materials and Methods**

Based on the outlined subject of the study, a comprehensive approach to the application of scientific research methods was chosen. Among the classical methods of the philosophical level, the author uses the dialectical approach to assess the interplay of various legal provisions on the protection of the right to freedom of religion and religious belief. The dialectical approach, as the ability to find the truth through rational discussion between interlocutors with different points of view (in the general sense), firstly, allows us to take into account social changes in modern societies and their impact on rethinking the content of the right to freedom of religion in different models of church-state relations; secondly, it made it possible to define freedom of religion as a general social (natural) human right – a natural historically formed human right to free and open recognition, inheritance, observance, change of religious or other doctrines, views, beliefs and proper guarantee by the state of respect and tolerance for religious feelings and beliefs of citizens, religious and church organizations acting by the legally established procedure, as well as a value-based worldview paradigm.

In addition, the work applies general scientific methods, including the *historical* method of research based on the study of the emergence, formation, and development of objects in chronological sequence; the *logical* method, which allows forming positions based on certain conclusions, and the use of mental activity, which helps to develop rational methods for the development of legal processes. Logic as a scientific tool allows for a deeper understanding of the cause-and-effect relationships that exist in real social life. Historical and logical methods make it possible to understand the essence of the problem in depth and to explore the idea of "freedom of religion" in constitutional documents.

When studying the doctrine of forum internum (personal faith, inner freedom) and approaches to its content, *structural analysis and synthesis* were useful as universal, oppositely directed ways of comprehending an object used both in theoretical research and in practice, especially in the study of interdisciplinary scientific concepts. According to G. Hegel, analysis is "the removal of a certain subjective obstacle from the subject, a certain external shell" by "applying logical definitions", while synthesis

is the unity of what is "originally separated, connected only by an external way" [9, p. 4]. Based on this, through analysis, the author gained knowledge about the individual elements of the object of knowledge in various facets of their existence, and at the level of synthesis, an idea of its structure and systemic features, and the interrelation of its essential characteristics was formed.

Using *deduction and induction*, the author examines the main systemic characteristics of ensuring freedom of religion in the modern world. Induction proceeds from the particular to the general, i.e., based on knowledge about a part of the subject matter of the study, an idea of the social phenomenon in general is formed. In induction, thought moves from less general to more general provisions, so that, summarizing the available empirical material, it is possible to make assumptions about the cause of the phenomena under study, to draw conclusions that are theoretically proved and turned into reliable knowledge through the use of deduction. For example, the method of deduction makes it possible to draw a conclusion about a particular element of a set based on knowledge of its general properties. Finally, both of these methods allowed us to distinguish between models of church-state relations (separating, identifying, and cooperative).

The existence of a large number of practical cases on ensuring and protecting religious freedom necessitated the use of a *comparative method*, which allowed us to study and compare practical cases and consider the possibility of balancing religious freedom with other rights or public goods. However, given that a comprehensive and integrated study of the issue required comparing different countries or cultures, the main obstacle was that data sets around the world characterize certain categories differently (for example, there are differences in the definition of religious freedom) or do not use the same categories. However, using the comparative method, the author analyses the ECtHR judgments on the *forum internum* doctrine and their impact on state-religious relations in different models.

## Results and Discussion

### *1. The doctrine of forum internum, approaches to its content*

As noted above, the international community has found a consensus on approaches to addressing the issue of enshrining and guaranteeing the right to freedom of religion or belief, which is, of course, reflected in the relevant international human rights instruments. According to Little David, "about the relationship of religious freedom to other human rights, it seems clear that existing human rights instruments and recent international jurisprudence give the right to religious freedom a special status" [1]. This

laid the foundations for the formation of the doctrine of *forum internum* (personal faith, internal freedom).

Among the fundamental points considered by the legislation in this area is internal freedom, including absolute freedom of thought and ideological choice as a component of freedom of conscience and religion. Freedom of thought, conscience, and religion, which has no external manifestation, cannot be subject to interference by the state, and a person may, at will, renounce his or her religious faith [4].

The doctrine of *forum internum*, *on the one hand*, gives a person internal freedom, i.e. the ability to choose, adhere to, develop and even completely change their personal thoughts and beliefs [10, p. 5], and *on the other hand,* it obliges the state to refrain from attempts to prevent any ideological processing of a person, including through religious indoctrination (influence) and other forms of manipulation, interference with fundamental ideas and beliefs that are born in the depths of a person's soul.

Let's look at each of these elements of the *forum internum* doctrine. *The first is the internal freedom of religion*, based, as already noted, on the maxim lex non cogit ad impossibilia (the law does not require the impossible) – the law simply cannot control a person's thoughts. Ideas or beliefs that do not have any external manifestation and do not entail any actions cannot cause public harm. State interference in the sphere of personal religious or non-religious beliefs (to force one to have certain views, beliefs, or change beliefs, or to disclose one's religious views) would directly contradict the concept of freedom of religion and international norms. This approach establishes the absence of limits to individual freedom of conscience and the possibility of its restriction to prevent indoctrination of the individual by the state, which allows a person to develop, deepen, and change his or her individual worldview.

The absolute nature of the "internal" aspect of freedom of religion (*forum internum*) is emphasized in almost all international documents that enshrine human rights and freedoms and the criteria for the permissibility of their restriction. The limits of freedom of conscience are defined by the European Convention, which clearly states that restrictions on the exercise of freedom of conscience and religion relate exclusively to the external manifestation of individual beliefs. Thus, Art. 9(2) states the following: "Freedom to manifest one's religion or beliefs shall be subject only to such restrictions as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". The same approach is enshrined in other international legal instruments, namely Art. 18(3) of the International Covenant on Civil and Political

Rights and Art. 12(3) of the American Convention on Human Rights. In these acts, the provisions on restrictions on freedom of religion relate only to the freedom of manifestation of religion and demonstration of religious beliefs externally (*forum externum*) and do not affect the internal freedom of religion related to the mental activity of a person and other members of society, their internal beliefs (*forum internum*). In addition, there shall be no derogation from freedom of thought, conscience, religion, or belief, even in case of war or public emergency (Art. 4(2) of the International Covenant on Civil and Political Rights).

*The second element of the* doctrine *of forum internum is that the state refrains from interfering with the fundamental ideas and beliefs of the individual.* It should be possible for an individual not to renounce or change his or her religious faith or religious community [4].

Religious freedom is primarily a matter of personal conscience, but also includes, inter alia, the freedom to "manifest one's religion", either individually or in community with others, in public or private, and in the community of fellow believers. Art. 9 lists the various forms that may be manifestations of religion or belief, including worship, teaching, practice, and observance [11].

However, out of the two aspects of freedom of conscience and religion established by international law, it is the second component (exercise of freedom of conscience externally, in the collective dimension) that is subject to *restriction*, i.e., the limits of freedom of conscience and religion lie in the area of public religious activity. Thus, according to international documents, namely Art. 9(3) of the Convention and Art. 18(2) of the International Covenant on Civil and Political Rights, the state has the right to impose *restrictions on freedom of conscience and religion*, but these have rather clear limits. According to the criteria for restricting freedom of conscience and religion, the reasons for state intervention in this area are public order; security; health; protection of public morals; realization of rights and freedoms of others; the right of parents to ensure the religious and moral education of their children by their own beliefs (International Covenant on Civil and Political Rights, Art. 18(4)).

Thus, international norms have defined the possibility, reasons, and criteria for potential restrictions on religious freedoms. However, the scope of restrictions is not specified in international legal documents. There is still a debate about finding a balanced balance and compromise between the sphere of the free activity of individuals and religious communities and the sphere of prohibition, the violation of which authorizes state authorities to use various forms of coercion.

It is worth noting that in the absence of a clearly defined scope of restrictions in international law, and in the context of variability in the exercise of religious freedom, the decisions of the European Court of Human Rights, which constitute case law, play a significant role in establishing the limits of state powers concerning the cases and scope of restrictions on freedom of conscience and religion, and are particularly significant in this regard. Let us dwell on this in more detail.

As the analysis shows, the European Court of Human Rights (from now on – ECHR, the Court) imposes additional requirements on state authorities when applying restrictive measures:
– *firstly,* the restriction (interference with the exercise of freedom of conscience and religion) must meet an urgent social need and pursue legitimate aims. It should be noted that the recognized legitimate interests that allow for the restriction of religious freedom, according to the Court, are "in the interests of public order, health or morals or the protection of the rights and freedoms of others" (this wording is consistent with Articles 8, 9, 10 and 11 of the European Convention). For example, in the case of Serif v. Greece, a conviction for unlawful conferral of religious dignity to a "recognized religion" was considered a restriction pursuing the legitimate aim of protecting public order [12];
– *secondly,* in a democratic society, the restriction must, on the one hand, be consistent with the principle of necessity, which includes compliance with an urgent social need, proportionality to the legitimate aim pursued, and, on the other hand, be justified by foreseeable and sufficient reasons. The Strasbourg Court, in particular, defined the characteristics of a "European democratic society", establishing pluralism, tolerance, and broad-mindedness as its symbols.

In the case of Kokkinakis v. Greece, for example, the ECtHR stated: "As enshrined in Article 9, freedom of thought, conscience, and religion is one of the foundations of a 'democratic society' "... In its religious dimension, this is one of the most important aspects that define the identity of believers and their concept of life, but it also has value for atheists, agnostics, skeptics, and those who are not interested in these issues. Pluralism depends on it, and it is inseparable from the democratic society, which, after centuries of struggle, has been won at such a high price" [13].

In the case of Bessarabian Metropolis and Others v. Moldova, the Court noted that "In a democratic society in which several religions or several streams of the same religion coexist within the same population group, it may be necessary to impose appropriate restrictions on this freedom in order to reconcile the interests of different groups and to ensure respect for the beliefs of others. Nevertheless, in exercising its power in this regard

in relation to different religions, confessions, and beliefs, the state must remain neutral and impartial in order to preserve pluralism and the proper functioning of democracy" [11];

– *third,* the restriction must be imposed on legal grounds. This concept reflects the value of legal stability, which can be broadly defined as the ability to operate within the existing legal framework without fear of arbitrary or unpredictable state interference. Thus, the challenged measure must be enshrined in national law and be equally accessible and predictable, as well as contain sufficient protection against arbitrary application of the law.

It is important to add that freedom of conscience and religion do not protect any convenient behavior, provided that it is motivated by considerations of religion or philosophy. In other words, Art. 9 of the Convention protects the inner world of the individual, not any public behavior dictated by beliefs: this is why such behavior must be in line with the main (national) legislation [14].

It is worth mentioning once again that there is a lively debate about finding a balanced compromise between the sphere of the free activity of individuals and religious communities and the sphere of prohibition, the violation of which authorizes state bodies to use various forms of coercion.

Proceeding from the fact that everyone has the right to have beliefs and the right to profess them, enshrined in clause 1 Art. 9 of the Convention, the ECHR considers this provision, respectively, *in two aspects*: in the case of Ivanov v. Bulgaria, the Court noted that the right to have any belief (religious or not) in one's heart and not to change one's religion or beliefs – "this right is absolute and unconditional and the state cannot interfere with it, for example, by ordering a person to believe what he or she should believe or by taking measures aimed at forcing a change of beliefs; as for the right to manifest one's religion or belief in private and in community with others or in public, it is not absolute, but any restriction on the manifestation of one's religion or belief must be provided for by law and be necessary in a democratic society for the purpose of pursuing one or more of the legitimate aims listed in Art. 9, of Art. 9(2) of the Convention, as reflected, in particular, in the case of Eweida and Others v. the United Kingdom [15].

Thus, the doctrine of *forum internum* (personal faith, internal freedom) has a dualistic character: *on the one hand*, it grants a person internal freedom, i.e. the ability to choose, adhere to, develop and even completely change their personal thoughts and beliefs; and *on the other hand*, it obliges the state to refrain from actions aimed at preventing any ideological processing

of a person, interference with fundamental ideas and beliefs that are born in the depths of a person's soul. However, the state has the right to impose *restrictions on the freedom of conscience and religion*, but these restrictions have fairly clear limits.

Due to the complexity of the application of the *forum internum* doctrine, the European Court of Human Rights provides for additional requirements for state authorities when taking actions of a restrictive nature, in particular, with regard to freedom of religion, namely, interference with the exercise of freedom of conscience and religion must: meet an urgent social need and pursue legitimate aims; be carried out on legal grounds; and comply with the principle of necessity in a democratic society.

## *2. Models of church-state relations in the decisions of the ECtHR on the doctrine of forum internum*

The difficulty of preserving the national identity of European states against the backdrop of expanding immigration, and diversity of cultures, traditions, and religions creates conditions for the spread of the phenomenon of communitarianism in modern Europe, which is the prevalence of religious identity over civic identity. The practice of social exclusion and numerous instances of discrimination against minorities necessitate closer unification based on a common unifying idea. Most often, this is their religious affiliation.

History proves that establishing a balance between religious institutions and the state, as well as between different religions, has always been considered a difficult task. Over the centuries, bloody events have occurred one after another due to the struggle for privileges and prerogatives, or with heretics [16].

As a result of this struggle, each state developed its own model that determined the relationship between the state and religious communities. The formation of these models is conditioned by the historical development of the country and the original factors in each European state.

### *2.1. Models of church-state relations*

In the area of church-state relations in Europe today, there are three main models that have developed in the course of historical development: separating (in France, the Netherlands, Switzerland, Ireland), identifying (in the UK, Denmark, Greece, etc.) and cooperative (in Austria, Belgium, Germany, Portugal, Spain, Italy, Sweden, etc.) [17].

Let us get acquainted with them on the example of specific countries, which will make it easier to understand the role of the religious factor in the life of modern Europe.

*The secessionist model.* In 1905 (9 December), for the first time in history, France, by adopting a special law on the separation of church and state, set an example of a modern sovereign state based on the official breakdown of the union with the church and the withdrawal of the religious factor from the public sphere. Since then, the French state has traditionally been guided by the principle of secularism in its policy towards religious organizations, according to which manifestations of religion in the public sphere are not approved, as it is believed that public manifestations of religious affiliation harm the unity of French society, in which no religious association has any legal privileges. Issues related to the religious sphere are regulated by private law.

An illustrative example is the law adopted by the French National Assembly on 13 July 2010, which prohibits locking a person in public places. In 2014, the European Court of Human Rights in Strasbourg ruled that the law adopted in France, based on the idea of "peaceful coexistence", did not violate the European Convention on Human Rights. The ECHR's decision paved the way for the adoption of such a law in other European countries subject to the Court's jurisdiction. Later, a ban on the wearing of the niqab and veil (albeit only on the street) was introduced in the Netherlands.

The application of this Law in educational activities is interesting. Thus, in the case of Dahlab v. Switzerland, the ECtHR justified the interference with the forum internum of a Muslim teacher by protecting the rights of her students (Art. 9(1) of the Convention), when it confirmed the ban on teachers wearing Muslim headwear, noting that wearing it could establish the fact of certain indoctrination of children in the Muslim religion and was difficult to reconcile with the principles of tolerance, respect for others, equality and non-discrimination that teachers must adhere to in a democratic society [18].

Similar approaches have been taken in other cases relating to the education sector. In particular, in the case of Köze and Others v. Turkey, the Court found that the current rules in that state obliged all students of secondary education institutions to wear school uniforms and come to school with their heads uncovered, and in the cases of Dogru v. France, Kervantsi v. France Jamaleddin v. France, Aktas v. France, Ranjit v. France and Yazvir Singh v. France, the Court examined the French domestic jurisprudence according to which the wearing of religious symbols is per se incompatible with the principle of secularism in school institutions [15].

Thus, the sanctioning of a balanced mutual *separation* of the state and religious organizations consists of upholding the principle of secularism, recognizing the equality of all denominations before the law, distancing the

state from supporting any religion, refraining from budgetary funding (at least direct) of religious associations, ambiguity in the perception of social adaptation of churches and denominations, and their involvement in social and public activities.

The *identification model* is inherent in states where there is a mutual influence of faith and law, church, and secular in various forms of institutional and legislative relations. It should be noted that the existence of this model is explained by the strength of traditions and the importance of their special influence on maintaining the stability of the state. A striking example is the United Kingdom, where the monarch is the head of the Anglican (state) church, and the government readily supports the public expression of religious faith, sponsors denominational schools and furnishes its events and ceremonies with religious rituals. However, only a small proportion of the population (approximately 7-8 %) regularly attends religious services.

The above allows us to support the opinion of the prominent English scientist G. Spencer, who states that in modern British society, religion is perceived as one of the most widespread and sophisticated cultural habits that are not of great importance and are formal in nature [19].

However, at the same time, the current problems faced by representatives of various religious denominations give grounds to state that there is "banal discrimination" in the UK [20].

The applications to the ECHR by residents of *the United Kingdom* who *lost their jobs* due to discrimination on religious grounds are illustrative.

The case of Azmi v. Kirklees Borough Council clearly illustrates that an appearance standard can be justified as a proportionate means of achieving a legitimate aim. Azmi worked as a teacher's assistant and was dismissed for failing to comply with her employer's order requiring her to remove her niqab when working with children in the classroom. Azmi lost her claim for direct indirect discrimination. The court found that the employer's refusal to allow her to wear a headscarf covering her face put her at a particular disadvantage compared to others. The ECtHR stated that, under the rebuttable presumption, indirect discrimination was justified, i.e., the restriction on the wearing of the niqab was proportionate in view of the need to protect the right of children to receive the best possible education.

A similar approach, based on the balance of conflicting interests, was used in the case of Eweida and Others v. the United Kingdom, which included two cases related to appearance standards. In the first case, the Court ruled in favor of the employee, and in the second case, the employer managed to justify the restriction it had imposed. British Airways check-in counter

employee, Ms. Aveyda, was denied permission to wear a crucifix over her uniform. In this case, the ECHR Chamber ruled that the restriction was disproportionate. The Court made this decision because other forms of religious clothing, such as hijabs and turbans, were permitted, and the argument that the employer needed to maintain its corporate image was not sufficiently weighty compared to Ms. Eweida's freedom of religion.

However, in another case, in which the employer insisted that Nurse Chaplin remove a crucifix she wore on a chain around her neck because, in the opinion of management, the decoration could cause health hazards, the Court concluded that the health and safety reasons were sufficiently serious to outweigh the employee's religious interests.

Along with the Eweida case, the ECtHR considered the case of Ladel v. Islington City Council. Ms. Ladel asked to be exempted from the obligation to register same-sex marriages, citing her religious beliefs, but her request was denied. The Court of Appeal ruled that the refusal to grant Ms. Ladel's request was justified as the employer was entitled to rely on its policy requiring all employees to provide services to all customers regardless of the customer's sexual orientation.

In another case, a family and marriage counselor, Gary McFarlane, was dismissed after he stated that giving advice to gay people was against his beliefs.

It should be noted that all of them, including Eweida, had previously lost their cases in British courts. At the same time, the Court concluded that in the cases of Chaplin, Macfarlane, and Ladell, the plaintiffs' rights had not been violated. These cases were heard in Strasbourg simultaneously. The case was initiated in the UK under the name of Eweida v British Airways (2010), then it was joined with the claims of other employees in an appeal to the European Court of Human Rights and was considered as Eweida and Others v UK [21].

*The experience of Greece* is no less interesting. This is evidenced by the cases pending before the European Court of Human Rights in the area of freedom of conscience. The vast majority of them concern citizens and religious organizations in Greece, a country that has declared the Greek Orthodox Church the official religion. The Court's decisions once again confirm that the socio-political conditions that have changed since the Middle Ages, including due to migration processes, lead to the need to make significant adjustments to the system of established relations between the state and religious organizations.

In the case of Kokkinakis v. Greece and Larissis and others v. Greece, a distinction was drawn between "Christian witness" and "improper

proselytism": while the former is "an essential mission and duty of every Christian and every church", the latter is "a distortion or defamation of the former". Thus, internal religious freedom is subject to protection only in the case of improper actions, i.e., actions of a manipulative, fraudulent, or coercive nature.

In the case of Alexandris v. Greece, the ECtHR recognized the requirement to disclose the fact that the applicant is not a member of the Orthodox Church when taking the oath to become a lawyer as a violation of freedom of religion. The European Court noted: "The freedom to manifest one's religion also contains a negative aspect, namely the right not to manifest one's religion or religious beliefs and not to be forced to take actions that would allow one to conclude whether or not such a person has beliefs. State authorities have no right to interfere in this area of individual consciousness and certify religious beliefs or force one to disclose their beliefs on spiritual matters. This is all the more true in cases where a person is required to take action to fulfill certain duties, in particular, to take an oath to be admitted to office" [22].

In the case of Dimitras v. Greece, the ECtHR emphasized that witnesses and parties to a trial who do not wish to take an oath based on religious oaths should not be forced to disclose that they are "atheists" or adhere to the "Jewish" faith" [23].

Thus, religious tolerance existing in the system of the identification model is not yet religious freedom.

*The cooperative model*. It is believed that in modern Europe the most widespread model is based on increasing the role of cooperation in church-state relations, when, based on the principle of separation and in the absence of a state religion, legitimate cooperation between the state and religious organizations is implemented. In essence, this model is a "golden mean" between identification and strict separation.

The establishment of partnership neutrality between the state and religious institutions is possible where church-state relations are characterized by the maximum degree of mutual non-interference in each other's sphere of authority, a guarantee of broad freedom of religion, the creation of favorable conditions for social service of denominations, the provision of financial support to socially active churches that promote an atmosphere of tolerance and faithfulness, and the absence of a special state body that would control the activities of denominational entities. This is the case in the Netherlands, Germany, Finland, and Sweden.

For example, Art. 4(1) of the Constitution of Germany (1949), which is still officially considered temporary, guarantees the inviolability of freedom of

religion, conscience, and freedom to express religious and ideological views; § 8 of Chapter 2 of the Finnish Form of Government (1919) grants citizens the right to perform religious rites and to leave the religious community to which they belong and freely join another; para. 6 § 1 Chapter 2 Section 1 of the Swedish Form of Government (1974) provides for freedom of religion [24].

However, this model is best developed in Germany. In church-state relations (Staat-Kirche-Verhaeltnisse), the principles of ideological neutrality, parity, and tolerance are the main ones, and these relations are regulated by constitutional norms of public law, namely church-state law, which is their main regulator and is the oldest part of German constitutional law [25].

Certain religious organizations may be granted the status of a public law entity (Koerperschaft des oeffentlichen Rechts), which allows them to take an active part in public life and enjoy significant privileges: the right to collect church tax (levied at the rate of 8-9 % from members of religious organizations that are public law entities). The tax covers two-thirds of the church's financial needs), the right to teach religion in public schools (according to Art. 7 of the German Basic Law, religion is a compulsory subject in public schools), the right to act as employers and enter into labor relations of a public law nature, to receive exemptions from several taxes, to have representatives in the State Committee for Youth Work, etc. These privileges apply to all existing confessions (except Islam).

"Mutually beneficial" civilized relations between the state and the church organically fit into the modern liberal democratic system.

The national courts ensure that conflicts between the state and the church are comprehensively addressed through a thorough examination of the circumstances of the case and a careful balancing of the competing interests of the state and the religious community [26].

Thus, despite significant differences in the models of church-state relations, the only values of the European Union are religious freedom, religious autonomy, dialogue, and cooperation. It is from this perspective that the role of the European Court of Human Rights should be viewed, as it deals with different constitutional models that define the relationship between states and religious denominations; it must accept these models as a given, but at the same time provide effective protection for the individual and collective right to freedom of religion.

**Conclusions**

Thus, the concept of "freedom of religion" is one of the most difficult concepts within the category of human rights from both philosophical and legal points of view. Analyzing various models of church-state relations,

legal documents, and ECHR judgments, it can be concluded that *freedom of religion* as a general social (natural) human right is a natural and historically formed human right to free and open recognition, following, observance, and change of religious or other doctrines, views, and beliefs, and proper guarantee by the state of freedom of religious feelings and beliefs of citizens and religious and church organizations acting under the legally established procedure.

The genesis of the formation and consolidation of freedom of religion in legal documents shows that a significant period of time has passed, during which significant changes in stereotypes in public consciousness, religious beliefs, and state-legal relations have taken place. An analysis of the value characteristics of freedom of religion in different worldview traditions and at different times gives grounds to assert that there is a desire to comprehend the understanding of the natural human right to freedom of religion, which is inherent in one's inner worldview and corresponds to one's hopes and way of life. This has led to the possibility of the existence in Europe of three main models of relations between the state and the church that have developed in the course of historical development: separating (in France, the Netherlands, Switzerland, Ireland), identifying (in the UK, Denmark, Greece, etc.) and cooperative (in Austria, Belgium, Germany, Portugal, Spain, Italy, Sweden, etc.).

Outside the scope of the study were the issues of unlawful deprivation of liberty of individuals to try to "unprogrammed" the beliefs they acquired while in a "sect" (Riera Blume and others v. Spain), religious upbringing and education of children, protection from unlawful proselytism and the right to apostasy, manifestation and disclosure of religious beliefs, religious secrecy and confession (the problem of disclosure of "religious information" by third parties), the doctrine of *forum internum* in the ECHR judgments and their impact on Ukrainian legislation, etc. These issues may be the subject of further research.

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