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ЗМІСТ

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Exploring the Limits of Ukrainian Tort Law from Business and Human Rights Perspective

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Abstract

The increasing volume of business-related human rights violations significantly highlights the need for effective legal frameworks to ensure corporate accountability. Ukrainian tort law would face significant challenges in addressing these issues, particularly in cases involving corporate misconduct and indirect liability. This topic is crucial for aligning Ukraine's legal system with international standards on human rights and corporate responsibility. This paper aims to assess the capacity of Ukrainian tort law to provide redress for business-related human rights violations. It examines how effectively the legal system handles direct and indirect corporate actors involved in such violations. The methodology involves analyzing a model case that illustrates key challenges, such as the intersection of tort and human rights law, indirect liability, jurisdictional complexities, and collective redress mechanisms. The analysis identifies significant doctrinal and procedural shortcomings. These include the restrictive definition of wrongfulness, rigid causation standards, the underdeveloped concepts of vicarious liability and joint infliction, and the absence of a formal class action mechanism. The analysis reveals several systemic shortcomings in Ukrainian tort law. The concept of wrongfulness is narrowly tied to explicit statutory breaches, limiting its applicability in cases of subtle or systemic violations. Rigid causation requirements and the conflation of fault and wrongfulness further impede the effective use of tort law in addressing complex cases involving multiple actors. The framework for vicarious liability and joint infliction remains underdeveloped, posing additional barriers to holding entities accountable for indirect involvement in human rights violations. Despite these limitations, Ukrainian procedural law offers some avenues for addressing collective harms, such as the joinder of multiple claims and representation by NGOs, although the absence of a formal class action mechanism undermines litigation efficiency. Jurisdictional provisions demonstrate flexibility, accommodating cases with international elements and cross-border implications. The paper concludes that while Ukrainian tort law faces significant doctrinal and procedural challenges, these are not insurmountable. Through creative legal strategies and ongoing reforms, the framework has the potential to evolve into a more robust mechanism for addressing corporate accountability in human rights contexts. Future research should focus on refining tort law doctrines, particularly wrongfulness and causation, and developing clearer standards for indirect liability. Additionally, exploring the establishment of formal collective redress mechanisms would enhance Ukraine's ability to address business-related human rights violations effectively.

Key words: *tort law; business and human rights; wrongfulness; fault; causation; vicarious liability; joint infliction; class actions; environmental harm; jurisdiction.*

Випробування меж українського деліктного права з точки зору бізнесу і прав людини

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Зростання кількості бізнес-зумовлених порушень прав людини значно актуалізує необхідність створення ефективної правової основи для забезпечення корпоративної відповідальності. Українське деліктне право може зіткнутися зі значними проблемами у вирішенні цих питань, особливо у справах, пов'язаних з корпоративною неправомірною поведінкою та непрямою причетністю. Ця тема має вирішальне значення для приведення правової системи України у відповідність до міжнародних стандартів у сфері прав людини та корпоративної відповідальності. Стаття має на меті оцінити спроможність українського деліктного права забезпечувати відшкодування за порушення прав

людини, пов' язаних з бізнесом. Вона досліджує, наскільки ефективно правова система ладнає з безпосередніми та опосередкованими корпоративними суб'єктами, причетними до таких порушень. Методологія передбачає аналіз типової справи, яка ілюструє ключові виклики, такі як взаємодія деліктного права та права прав людини, непряма відповідальність, юрисдикційні складнощі та механізми колективного відшкодування. Аналіз виявив значні доктринальні та процесуальні недоліки. Серед них - обмежувальне визначення протиправності, жорсткі стандарти причинно-наслідкового зв'язку, нерозвиненість концепцій вікаріальної відповідальності та спільного заподіяння шкоди, а також відсутність формального механізму колективних позовів. Аналіз виявляє кілька системних недоліків в українському деліктному праві. Поняття протиправності вузько прив'язане до прямих порушень законодавства, що обмежує його застосування у випадках неявних або системних порушень. Жорсткі вимоги щодо причинно-наслідкового зв'язку та плутанина між виною та протиправністю ще більше перешкоджають ефективному застосуванню деліктного права у вирішенні складних справ за участю багатьох суб'єктів. Концепція субститутивної відповідальності та спільного заподіяння шкоди залишається недостатньо розвиненою, що створює додаткові бар'єри для притягнення суб'єктів до відповідальності за опосередковану причетність до порушень прав людини. Незважаючи на ці обмеження, українське процесуальне законодавство пропонує деякі шляхи для вирішення колективних вимог про відшкодування шкоди, такі як об'єднання декількох позовів та представництво громадськими організаціями, однак відсутність формального механізму колективних позовів підриває ефективність судових процесів. Юрисдикційні положення є гнучкими і дозволяють розглядати справи з міжнародними елементами та транскордонними наслідками. У роботі зроблено висновок, що хоча українське деліктне право стикається зі значними доктринальними та процесуальними проблемами, вони не є нездоланними. Завдяки креативним правовим стратегіям і постійним реформам ця система має потенціал перетворитися на більш надійний механізм для вирішення питань корпоративної відповідальності в контексті прав людини. Майбутні дослідження мають бути зосереджені на вдосконаленні доктрин деліктного права, зокрема протиправності та причинно-наслідкового зв'язку, а також на розробці чіткіших стандартів непрямої відповідальності. Крім того, вивчення можливості створення офіційних механізмів колективного відшкодування підвищить здатність України ефективно протидіяти порушенням прав людини, пов'язаним з бізнесом.

Ключові слова: *деліктне право; бізнес і права людини; протиправність; вина; причинний зв'язок; субститутивна відповідальність; спільне заподіяння; колективні позови; екологічна шкода; юрисдикція.*

Introduction

In a broad sense, there is a plethora of cases where violation of person's rights is committed in the course of running business. Yet business and human rights framework has given rise to a new, distinct and outstanding category of cases, so that in a narrow sense when we speak of a case involving business-related human rights violations we mean a specific (more or less) crystallized fact pattern. The purpose of this article is to test the protective capacity of Ukrainian tort law by applying its provisions to the model case representing a somewhat averaged image of a case involving business-related human rights violation.

Literature Review

Business and human rights is a new paradigm gaining more and more attention in academic literature [1]. Numerous works has been published recently. These include monographs by W. Cragg [2], L.C. Curzi [3], R. McCorquodale [4], P. Muchlinski [5], C.A. Rodríguez Garavito [6], V. Rouas [7], R. Sullivan & M. Robinson [8] and others. In Ukraine this paradigm is furthered by O. Uvarova [9-12].

The intersection of tort law and business-related human rights violations has garnered increasing scholarly attention in recent years, driven by the growing recognition of corporate accountability in global supply chains and the limitations of traditional legal frameworks to address human rights abuses. Current literature explores this intersection across diverse jurisdictions, addressing doctrinal challenges, procedural issues, and the potential for reform.

A central theme in the literature is the challenge of aligning tort law with human rights obligations. Scholars such as Anita Ramasastry and John Ruggie have discussed the insufficiency of national legal systems to regulate multinational corporations effectively, emphasizing the need for tort law to evolve to bridge this accountability gap [13; 14]. This includes expanding notions of wrongfulness and causation to cover indirect involvement, such as supply chain complicity or parental company oversight. Some argue for the incorporation of human rights standards directly into tort law doctrines, while others suggest leveraging existing principles, such as negligence or vicarious liability, to hold corporations accountable.

Jurisdiction and access to justice are recurring obstacles in the literature. Authors like Joanna Kyriakakis [15] and Surya Deva [16] have noted how jurisdictional hurdles – especially in cases involving transnational corporations – often prevent victims from seeking redress in the companies' home countries. Discussions also emphasize the high evidentiary burdens in tort claims, particularly in proving causation and fault for human rights abuses occurring in distant or poorly regulated regions.

Scholars widely critique the absence of effective mechanisms for collective action in many jurisdictions. Class actions are seen as vital for addressing widespread human rights abuses, as they lower litigation costs and increase the feasibility of claims. However, legal systems like those in Ukraine lack formalized class action frameworks, necessitating reforms to facilitate collective redress for victims of corporate misconduct.

Some literature highlights emerging practices that could transform tort law's application to business and human rights. For instance, strict liability regimes are proposed as a solution to bypass the need for fault in high-risk corporate activities, such as mining or hazardous waste management. Others advocate for new statutory duties, such as the duty of care in supply chains, as seen in the UK's Modern Slavery Act and France's Duty of Vigilance Law.

Globally, courts in jurisdictions like the UK, Canada, and the Netherlands are increasingly willing to hear cases against parent companies for human rights violations committed by their subsidiaries. Scholars cite landmark cases as evidence of a judicial shift towards acknowledging corporate accountability through tort law mechanisms. These cases demonstrate courts' willingness to impose liability on parent companies for failing to exercise due diligence over their operations.

The literature underscores a growing consensus on the need for tort law to adapt to the realities of global business practices. While there is No. universal solution, doctrinal and procedural innovations, coupled with enhanced international cooperation, could provide more robust remedies for victims of corporate human rights abuses. This evolving discourse reflects the dynamic interplay between tort law, human rights, and the global push for corporate accountability.

Materials and Methods

In this paper we offer a model hypothetical case that would serve to test how Ukrainian tort law may respond to main challenges posed by the business and human rights perspective. However it worth noting that with regard to many issues case law and doctrine has not yet developed a conventional approach. Therefore there is much potential for creative lawyering and shaping new approaches.

Model case[1]**.** Company A in the course of its business activities infringes universally recognized fundamental human rights. The victims may be the employees of the Company A or third parties [18], including the general public. With regard to employees, the violation may consist in the use of forced labor, child labor, or in sustaining working conditions that are inhumane or unsafe and result in health deterioration, injuries, and death [19; 20]. With regard to third parties, the violation may consist in environmental harm [21; 22] or Company A may be involved in acts of violence, such as the brutal suppression of peaceful demonstrations against the construction of a new plant in the region [23; 24].

[1] For a more variations of typical case scenarios that may arise within business and human rights perspective see: [17].

Despite the gross human rights violations, bringing Company A to justice proves to be unrealistic. Usually it is because of the place of action (where Company A is registered and operates): it is a jurisdiction that does not provide effective protection and remediation of human rights (due to weak institutions, corruption or other reasons). However, it is conceivable that the reason may be the simple insolvency of Company A.

Therefore, victims have to sue Company B, whose business is closely related to the business of the direct perpetrator. The two companies may be linked either through the supply chain (Company B purchases raw materials for its products from Company A) or through the corporate structure (Company B is a parent company for A). Usually, Company B is domiciled in another jurisdiction. And it is this fact that nourishes the victims' hope for the better prospects for their lawsuit. Yet, we will also address the variation where both companies are residents of the same country and the sole reason for suing B is that A is insolvent.

Research Questions. The model case is a challenge for tort law, as it poses a number of questions that have not previously arisen, or at least have not been seen from this angle.

First, it is the interrelation between tort law and human rights law. Can private companies be the considered as bearers of human rights obligations, and if so, does a breach of these obligations constitutes a private tort?

Second, and perhaps the most convoluted, issue is the viability of tort action for *indirect involvement* in human rights violations, since Company B is not the principal offender whose actions immediately caused victims' harm.

Third, procedural, issue is jurisdiction. Since companies A and B are usually domiciled in different countries the case is related to at least two jurisdictions which calls for the determination of the proper court to consider the case. We will assume that Ukraine may be either the country of residence of the direct perpetrator (Company A) or the country of residence of the indirectly involved Company B.

Fourth, the effective protection of some human rights, (in particular the right to a safe environment) often requires the ability to consolidate the claims of many victims into a single lawsuit [25]. Therefore, another procedural issue is the availability of class action mechanism or similar ways to protect collective interests.

The analysis of the model case and the aforementioned issues needs, however, to be preceded by a brief outline of tort elements.

Results and Discussion

Elements of tort claim in general (See also [26]). According to the current case law and doctrine for a tort claim to succeed four elements of tort have to be established: wrongfulness, damage, causation and fault [27, Para 55; 28, Para 7.4]. The rules on "special delicts" may modify the basic formula (e.g. by excluding fault element).

A. Wrongfulness. Currently there is No. settled understanding of wrongfulness. The three main approaches are considered: violation of the norm, infringement of the right and non-performance of the duty [29, pp. 113-125]. Judges mostly see the concept self-evident, which is why courts' judgments do not contain extensive reflections on the subject. Since Ukrainian law is not familiar with the "duty of care" [30-32] as an overarching doctrine, wrongfulness appears to be strongly tied to the provisions of the written law (legislation). The Grand Chamber of the Supreme Court in a recent case defined wrongfulness as "non-compliance [of a person's conduct] with the requirements set out in the acts of civil legislation" [28, Para 7.4].

Thus, the courts are more inclined to find wrongfulness where defendant violates prohibitions expressly provided by statutes, or fails to fulfill obligations expressly provided by statutes. At the same time, interference with the plaintiff's right, which is not fortified by the express prohibitions or obligations saddled on the defendant, may also qualify as wrongful conduct, provided that the very

right is expressly set forth in the law. If the tortfeasor contends he or she acted in the exercise of his/her own right, then to resolve a conflict courts employ the abuse of rights doctrine [33].

B. Damage. Actionable damage is defined in Articles 22 and 23 of the Civil Code of Ukraine (CC): the former is devoted to pecuniary damage and the latter to non-pecuniary (moral) damage. Both pecuniary and non-pecuniary damage are subject to compensation in all cases as long as the plaintiff can prove it (universal remedy).

Pecuniary damage includes real losses and lost profits. Real losses are defined as "losses suffered as a result of person's property being destroyed or impaired as well as costs that has been incurred or have to be incurred by a person to restore his/her violated right" (Art. 22 CC).

Lost profits are generally compensable regardless of the type of tort, interest infringed or other circumstances. However, the courts are overly exacting with regard to the proof of lost profit [34, pp. 38-40]. The Supreme Court emphasizes that "[t]he plaintiff must prove that he could and should have received certain income, and only the wrongful acts of the defendant became the sole sufficient reason that deprived him of the opportunity to make the profit" [35-37].

Sometimes the rigid approach leads to untenable denial of remedy [34, pp. 38-40].

Nevertheless, as long as the case concerns physical person losing earnings because of injury or other health deterioration special provisions of § 2 Ch. 82 CC apply. They provide clear-cut rules for computing the amount of earnings lost and thus significantly ease the burden of proof for plaintiffs. The same paragraph also contains the rules for identifying other pecuniary losses that are subject to compensation in case of injury, other health deterioration or death.

***C. Causation*.** Probably the least attention among all the elements of the tort is paid to causation. CC does not contain any guidelines on how to assess it. In Ukrainian jurisprudence (unlike in English or American), there were No. high-profile cases that would induce judges to reflect extensively on the issue of causation. Therefore, with regard to causal nexus judges usually confine themselves to yes-or-No. statements. Explanations are limited to tautological sayings like "causation is present whenever the defendant's conduct and the plaintiff's damage relate to each other as cause and consequence respectively" [38-41].

Neither the legislation nor the case law provides for exceptions to the proof of causation (when causation is presumed or the burden is reversed). Needless to say, courts do not award compensation in proportion to the probability of causation (proportional liability) (See: [42]).

D. Fault. There is No. definition of fault for the purposes of tort law. It is defined only with regard to breach of existing obligations (such as contractual obligations): under Art. 614 CC "a person is not at fault if he/she proves that he/she has taken all measures he/she could to properly perform the obligation". This definition *mutatis mutandis* is used for the purposes of tort liability as well. Thus, it is obtained that fault means that the tortfeasor has not taken all the measures he/she could to avoid harming the plaintiff [43, p. 38].

As a general rule, tort liability depends on fault. However, there are many exceptions to the rule, when a regime of strict, i.e. no-fault liability applies [44]. The most significant of these exceptions concerns the so-called "source of increased danger" (Art. 1187 CC.). The concept encompasses numerous activities that cannot be fully controlled and, hence, generate increased risk both for the actor and for the others. The scope of the concept is surprisingly broad, including a wide variety of activities related to vehicles, machinery, equipment, chemicals, radioactive or flammable substances, wild animals and fighting dogs (Art. 1187(1) CC). Even driving a regular automobile is considered to be a "source of increased danger".

Whenever damage is caused by a source of increased danger the tortfeasor cannot avoid liability by proving absence of fault (i.e. that he/she has done everything in his/her power to avoid the incident).

The only two defenses available are force majeure and intent of the victim (Art. 1187(5) CC) (as, for example, when man willing to commit suicide throws himself under the wheels of the car).

It is important to emphasize that even where liability depends on fault the latter is presumed (Art. 1166(2) CC). Hence, the plaintiff's burden of proof includes: wrongfulness, damage and causation [45-48]. And only if the plaintiff has discharged his burden, the presumption of fault activates. It means that it is now up to the defendant to prove that he took all possible measures to prevent damage.

Pursuant to common view the essence of strict liability regime is simply to strike off the element of fault while the other three elements remain intact [44, pp. 70-103]. But this view appears to produce a systemic error, in particular, because of the blurred borderline between wrongfulness and fault. Fault denotes failure to take necessary precautions, i.e. failure to comply with the standard of prudence expected of a person in the circumstances. But doesn't wrongfulness mean the same? This ambiguity may lead to the benefits of strict liability regime being negated by the need to prove wrongfulness.

Therefore, the doctrine should be reconsidered by acknowledging that fault-based liability and strict liability are two distinct regimes each having its own formula of tort elements[2]. Fault, damage and causation should be the elements of tort within the fault-based regime; source of increased danger, damage and causation should be the elements of tort within strict liability regime. Distinguishing the two regimes of liability is particularly important within the context of business-related human rights violations, since the defendants' activities in many industries can often qualify as a source of increased danger.

Analysis

A. Interrelation Between Tort Law and Human Rights

1. Referring to human rights law and the wrongfulness element in tort claim in general

In Ukraine human rights are enshrined at three levels: in international treaties, in the Constitution and in the CC.

Ukraine is a party to major international human rights treaties[3]. The impact of the European Convention on Human Rights (ECHR) is particularly significant. According to Art. 9 of the Constitution international treaties ratified by the Parliament are considered as part of the national legislation. When domestic law contradicts international treaty, the latter applies[4]. So, the provisions of international treaties do not require special implementation through the adoption of domestic legislation. Once an international treaty is ratified, it is integrated into national law, and its legal force is higher than any domestic statute other than the Constitution.

It means that in principle victims of human rights violations will not have problems appealing to international treaties to substantiate their claims. But can they appeal to international treaties when the defendant is a private company?

With regard to tort claims, so far there are No. such cases. Yet, the Supreme Court on a number of occasions has applied the ECHR to disputes between private parties, in particular: in the case where minority shareholders challenged the squeeze-out procedure [50]; in the case where plaintiff sought eviction of the relatives of the former apartment owner [51]; in the case where woman sought eviction of her ex-husband who drank and committed domestic violence [52]; in the case where depositor claimed back his money from the insolvent bank [53].

Thus, jurisprudence recognizes a horizontal effect of human rights enshrined in the ECHR. It is achieved primarily through the concept of positive obligations of the state. The state must not only

[2] This approach appears to be embodied in the Principles of European Tort Law (PETL). See Art. 1:101, Ch. 4 and 5 PETL.

[3] List of international human rights treaties ratified by Ukraine, see [49, p. 4].

[4] Art. 19, the Law of Ukraine "On International Agreements of Ukraine".

refrain from interfering human rights, but also must take actions to prevent interference by others, namely private persons. Hence, if a private company can get away with violation of human rights, it may signal that the state has failed to fulfil its obligations under an international treaty.

Section II of the Constitution addresses human rights. It is titled "Rights, Freedoms and Duties of Human and Citizen". Although some of the articles in the Section are clearly addressed to the state (e.g. Art. 29), a number of other articles are formulated in a way that implies imposing obligations on everyone (e.g. Art. 43).

Under Art. 8(3) of the Constitution, "the provisions of the Constitution of Ukraine have direct effect. Applying to court for the protection of the constitutional rights and freedoms of human and citizen directly on the basis of the Constitution of Ukraine is guaranteed". As the Constitutional Court of Ukraine explained, this means that the norms of the Constitution are applicable "regardless of whether relevant laws or other normative legal acts have been adopted to elaborate on those norms" [54]. If a court concludes that a law or other legal act contradicts the Constitution, the court shall not apply the law or other legal act, but instead shall apply the norms of the Constitution of Ukraine directly[5].

In addition, provisions of the Constitution, similar to international treaties, also have a horizontal effect: the rules of private law must be interpreted and applied in a manner compatible with constitutional values, the most important of which are human rights [55, pp. 17-19]. Constitutional justice knows examples of Section II of the Constitution being employed to interpret the acts governing relationships between private parties [56].

Finally, many of the human rights are reiterated in the CC, where there is Book II ("Personal non-pecuniary rights of natural person") devoted to them. According to Art. 275(1) CC, "a natural person has the right to protect his/her personal non-pecuniary right from unlawful encroachments *by other persons*". Thus, the range of potential perpetrators is not limited to public authorities, but instead encompasses all civil law actors (Art. 2 CC). The available remedies are determined in accordance with the general provisions of the CC (Ch. 3 CC). Naturally, one of the remedies is compensation for pecuniary and moral damage (Subparas (8) and (9) Para 2 Art. 14 CC).

Based on the above, in the Model case plaintiffs would not have troubles finding the provisions of Ukrainian law that enshrine the respective human rights. Neither would they have troubles proving that the relevant provisions apply to relations between private parties. In particular, in case of violation of the employees' rights, victims may invoke Art. 4 of the ECHR, Art. 43 of the Constitution, Art. 312 CC, as well as special labor legislation; in case of environmental harm – Articles 2 and 8 of the ECHR, art 50 of the Constitution, Articles 282 and 293 CC, as well as special land and environmental legislation; in case of violent rally dispersal – Articles 2, 3, 5, 10, 11 of the ECHR, Articles 27-29, 34, 39 of the Constitution, Articles 288, 289, 314 and 315 CC, as well as special legislation providing for compensation for damage caused by law enforcement agencies.

However, the mere fact that a person's fundamental right has been interfered with is not sufficient to conclude that such a person has the right to seek redress. All the elements of tort need to be established for the claim to succeed.

The fact that the victim is able (a) to identify the rule of domestic law that recognizes the alleged right and (b) to prove that a private company has interfered with that right may be relevant for establishing one element only, viz wrongfulness. However, even in this context, the court may find No. wrongfulness if the special provisions defining the obligations of the defendant company have not been violated by the latter.

2. Wrongfulness in environmental cases

Environmental cases illustrate the point. Suppose a company pollutes the air with harmful substances, which adversely affects the inhabitants of the adjacent areas. The court while examining the

[5] Art. 10(6) Civil Procedural Code of Ukraine (CPC).

wrongfulness element, will not confine itself to the fact that plaintiffs have a right to a safe environment, and polluting the air is certainly an interference with such a right. Instead, the court will assess whether the emission of pollutants was legal (i.e., whether the defendant company had a permit or a license to emit), and whether the emissions did or did not exceed the permissible limits. And if it turns out that the emission was legal, and the amount was within the permissible limit, the court finds No. wrongfulness and, on this basis, denies the claim.

In the case No. 2012/4613/2012 a woman sued Kharkiv coke plant [57]. She claimed that due to dioxin emissions she developed a number of diseases, namely: bronchial asthma, pneumosclerosis, emphysema, immune disorders and skin pigmentation. However, the Supreme Court noted that the Plant had all the necessary permits for emissions of pollutants into the atmosphere, and "the volume of emissions met the requirements of sanitary legislation of Ukraine". In addition, the plaintiff failed to convince the Court that her health problems were actually caused by the defendant. The claim was denied for the lack wrongfulness and causation.

A number of lawsuits concerned the operation of the Trypilska Thermal Power Plant (TPP) [58-63]. The plaintiffs referred to the fact that the TPP emits 37 pollutants into the atmosphere, including lead (3.47 t / year) and chromium (3.44 t / year). Permanent inhaling of these substances has adverse effect on the respiratory system, central nervous system (lead) and some of them are carcinogenic (nickel, lead, chromium).

Two aspects of TPP cases are noteworthy. First, they prove the general trend in the courts' assessment of wrongfulness in environmental cases: the claims were dismissed because the TPP had the necessary permits and complied with the standards of maximum allowable concentrations. The Court placed special emphasis on official documents by regulatory authorities, viz the State Environmental Inspectorate, which did not report violations of environmental legislation by the defendant TPP.

In contrast, in cases where regulatory authorities had reported violations of environmental law by the polluters, the Supreme Court ruled in favor of the plaintiffs. This was the case, in particular, in the lawsuit against the Korostenskyi MDF plant [64], where the numerous inspections of the plant by the State Environmental Inspectorate during 2012-2015 revealed a number of serious violations, including: excessive emissions of pollutants into the air; unauthorized discharge of pollutants into the soil; excess of pollutants in wastewater discharged to water treatment plants. The Supreme Court upheld a first instance court's judgment to award each of the plaintiffs living in the adjacent area 50,000 UAH in compensation for non-pecuniary damage.

The second interesting aspect about TPP cases is that the Supreme Court refers directly to the ECHR and the case law of the ECtHR. The judgment states that "the lawsuit in this case was filed against the business entity and not against the state, yet the assessment of the circumstances that constitute the subject matter of the lawsuit, is effectively the same".

While considering the claim for non-pecuniary damage caused by the violation of the right to a safe environment, the Supreme Court refers to the ECtHR's case-law [65, Para 77] setting the conditions under which environmental pollution may be considered sufficient to constitute a violation of the right to respect for private and family life (Art. 8 ECHR). The logic of the Supreme Court is as follows: whenever environmental pollution is severe enough to qualify as violation of the right to respect for private and family life (according to the tests used by the ECtHR), the plaintiff is entitled to compensation for moral damage and vice versa.

This approach departs from the conventional understanding of compensable damage. Under the conventional account interference with the right in itself does not amount to compensable damage. Instead damage is a certain economic loss that plaintiff suffers as a result of the interference. It may well be that there is an interference with the right, but the right holder nevertheless does not suffer

any losses (as, for example, when someone unauthorized walks through my land without harming crops[6]).

In contrast, in the TPP cases the Supreme Court effectively implies that the very interference with the right to respect for private and family life may be seen as a compensable damage. It has to be admitted, though, that the "distance" between "interference with right", on the one hand, and "compensable damage" on the other, is leaped largely due to the concept of moral harm. It is reasonable to assume that when an individual has good reasons to fear for his/her life or health on a daily basis, it causes stress and anxiety which may constitute moral damage. Accordingly, the Supreme Court's position can be read as establishing the presumption of non-pecuniary damage in any case where environmental pollution (according to ECtHR case-law) amounts to interference with the right to respect for private and family life (Art. 8 of the ECHR).

In fact, in the case of Korostenskyi MDF plant [64] the Supreme Court *obiter dictum* recognized that there are two distinct grounds for compensation: one is the negative impact on the environment *per se* while the other is the damage to the life, health or property due to the negative impact on the environment.

It is eloquent that among all the environmental cases considered by the Supreme Court there are no cases where the plaintiff is compensated for the actual health deterioration. All successful lawsuits [66-70] concerned non-pecuniary damage consisting in anxiety and stress caused by the mere threat of a health deterioration. The reason is the difficulty of proving causation in the absence of any guidelines in the CC or jurisprudence, as well as the critical lack of a comprehensive doctrine of causation in the academic literature.

The analysis of the wrongfulness element in the context of environmental cases is closely related to the problem of distinguishing between fault-based and strict liability regimes. In all the above cases defendants' businesses shall be considered the "sources of increased danger" and thus defendants shall be subjected to strict liability.

But since under the prevailing view strict liability eliminates only the fault element (while others remain in place) the jurisprudence places considerable emphasis on the proof of wrongfulness. And since the wrongfulness inquiry is considerably based on the documented assessment of the polluters by the official governmental bodies (in particular State Environmental Inspectorate) victims are often denied compensation.

Had the strict liability been considered a distinct regime with its own set of tort elements, there would have been no need to prove wrongfulness; it would suffice to establish that the defendant's business is a "source of increased danger" and it causes actionable harm to the plaintiff. Such an understanding would really meet the definition of "strict liability" and would make it much easier for the victims to obtain compensation.

In a scenario with a violent dispersal of a rally by law enforcement bodies Ukrainian law does allow to sue the relevant law enforcement body[7]. Two different sub-scenarios have to be distinguished though. First, when the law enforcement body officially prosecutes protesters: e.g. brings charges against them, officially arrests or detains them within criminal proceedings or proceedings in administrative offense case. Second, when law enforcement officers use brutal force (beatings, torture, kidnapping people) without even trying to cover it with made-up charges against protesters.

In the first sub-scenario special law applies, namely the Law No. 266/94-VR. With regard to wrongfulness element the Law provides in Art. 2 that procedural measures shall be considered illegal (wrongful) only in the specified cases, that include acquittal of the person by a court, termination of

[6] In this case, under Ukrainian law the tort claim has no standing.

[7] Art. 1176 CC; Law "On the Procedure for the Compensation of Damage Caused to Citizens by Illegal Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts" (Law No. 266/94-VR).

the criminal proceedings for exonerative grounds or establishing the wrongfulness of the measures in a verdict or other judicial decision (delivered in respective criminal proceedings).

3. Wrongfulness in case of oppressing the demonstration

In this case liability of the state does depend on the fault of the particular law enforcement officer[8]. Hence, whenever a person is acquitted all procedural measures applied during the investigation are thereby considered illegal (wrongful) and the state cannot avoid liability asserting good faith mistake. In the second sub-scenario, when the actions of the law enforcement officers are completely arbitrary, proving the elements of the tort is much more difficult for the plaintiffs. This sub-scenario is not covered by the Law, and therefore the wrongfulness element has to be proved on general grounds.

Moreover, beatings, torture and kidnapping all constitute criminal offences. Therefore, if plaintiff bases his/her civil claim on the allegation of these criminal offences the court will find the claim ill-founded unless there is a verdict in a criminal case, finding defendant law enforcement officers guilty of these crimes.

Both sub-scenarios took place during the Revolution of Dignity (21 November 2013 – 21 February 2014). Those protesters who were officially charged (mostly with mass disorder under Art. 294 of the Criminal Code of Ukraine) were eventually acquitted and awarded compensation [71-76]. As for the protesters who have suffered from arbitrary violence, the situation is more complicated, as many criminal cases against law enforcement officers and their accomplices are still pending [77; 78].

4. Tort law and employee's rights

With regard to damage caused by harmful working conditions tort law does not apply. Instead, employees receive compensation through the social insurance mechanism.[9] Therefore, if a work-related accident occurs or an employee contracts professional disease then compensation is provided by the Social Insurance Fund of Ukraine (and not by the employer).

The Supreme Court clarified that social insurance law is a *lex specialis* in relation to tort law, and therefore the former excludes the latter [79]. However, in accordance with Art. 36 (8) of the Law "On Compulsory State Social Insurance" insurance payments do not include compensation for non-pecuniary damage, and victims have the right to claim compensation for it by filing tort claims in accordance with the CC and the Labor Code of Ukraine.

This should mean that to claim compensation for non-pecuniary damage from the employer, the employee has to prove all elements of the tort. However, in one such case [80] the Supreme Court ruled in favor of the employee, despite the fact that his own negligence was the cause of the injury. In other words, the claim was satisfied although neither the wrongfulness (on the part of the employer), nor the causation (linking the employer's wrongful actions with the harm) was established. Noteworthy, it is exactly the conclusion that would have been reached had there been a clear distinction between the regimes of fault-based and strict liability: employer's business (coal mining) is a source of increased danger, which is why there is no need to prove wrongfulness; and causation

[8] Art. 1176 CC, Para 2 art 1 Law No. 266/94-VR.

[9] See the Law "On Labour Protection"; the Law "On Mandatory State Social Insurance"; Resolution of the Cabinet of Ministers of Ukraine, "Procedure for the Investigation and Accounting of Safety Incidents, Occupational Diseases and Occupational Accidents" (No. 337, April 17, 2019); Resolution of the Directorate of the Fund of Social Security, "Procedure for Awarding, Recalculation and Making Insurance Payments" (No. 11, July 19, 2018); Resolution of the Cabinet of Ministers of Ukraine, "The List of Occupational Diseases" (No. 1662, November8, 2000); Resolution of the Cabinet of Ministers of Ukraine, "The Procedure for Determining the Average Wage (Income, Gains) for the Purpose of Calculation of Payments within Mandatory State Social Insurance" (No. 1266, 26 September 2001).

has to bridge the employer's very activity (and not the wrongful aspect of it) with the employee's harm.

Liability for Indirect Involvement. In the model case, Company A is the direct perpetrator of human rights. Company B's involvement is indirect: it is involved because its policy affects Company A's policy which appears to include violation of human rights.

There are two potential ways to substantiate the liability of Company B. The first is to prove that under the circumstances granted Company B shall be responsible for the actions of others (liability for others). The second is to argue that the actions of Company B itself, even though not immediately cause harm, shall nevertheless be considered unlawful and result in the obligation to compensate (liability for own actions).

1. Liability for others. As a general rule, everyone shall be responsible only for his/her own actions or omissions, and should not be responsible for the actions or omissions of others (personal responsibility). Exceptions to this rule are possible, but any such an exception has to be explicitly provided for in the law.

Art. 1172 CC is a Ukrainian analogue of what is known in English-language literature as "vicarious liability". The article contains three exceptions to the rule of personal responsibility: (1) an employer is responsible for the damage caused by an employee; (2) a commissioner of the work is responsible for the damage caused by a contractor; (3) commercial company is responsible for the damage caused by its shareholder while conducting business activity on behalf of the company.

Exception (2) can potentially be used in the model case: it makes commissioner of the works accountable for the actions of an independent contractor. The exception encompasses a fairly broad range of agreements commonly referred as contracts for work (Ch 61 CC). They have to be distinguished from the contracts for providing services (Ch 63 CC). The key distinction is that under the contracts for work contractor has to hand over some tangible result to the commissioner (Art. 837 CC) (e.g. house built, equipment repaired, architectural project drafted etc.), while in service contracts there is no tangible result: the service is being consumed while it is being provided (Art. 901(1) CC). Hence, the exception (2) is applicable only if the two companies are linked through some type of contract for work. Service contracts will not do, let alone contract for the supply of goods.

In case law exception (2) is used, for example, when traffic accidents occur due to potholes or other deficiencies in highways maintenance [81-83]. Car owners sue local authorities responsible for the maintenance of the roads, although it is the independent contractors who actually maintain the road surface.

Art. 1172(2) CC literally requires only that contractor acts "on the assignment" of the commissioner. However, the Supreme Court of Ukraine in the case No. 6-13344sv10 [84] concluded that contractor must act not only "on the assignment" but also "under the control" of the commissioner. According to the Court it shall be assessed whether the commissioner exercised (or at least under the terms of the contract should have exercised) control over the contractor's operations, in particular, the control over observing safety rules during the work. So, if it turns out that the commissioner did not and should not have exercised such a control, he/she is not responsible for the damage caused by the contractor. Generally, the approach remains good law in the jurisprudence of the new[10] Supreme Court as well [85; 86].

[10] I use "new" to denote the composition of the Court after the judicial reform of 2016.

At the same time, in one of the new cases [87] the Supreme Court concluded that defendant Road Service is obliged to monitor the performance of the contractor's obligations not because it is so provided in the contract, but because Art. 849 CC allows commissioner to do it. This article, in particular, stipulates that "the commissioner has the right to check the progress and quality of the work at any time without interfering with the contractor's operations". Instead of examining the terms of the particular contract, in this case the Court noted that commissioner is entitled to control by virtue of the direct provision of the CC which is applicable to all the contracts for works. Under this approach it makes no sense to set the additional requirement of control in the first place, since this requirement is always met as long as the contract for works is at hand. However, it would be premature to conclude that this latter approach now dominates as there is only one such case in the Supreme Court's practice and so far the Court has not contemplated the divergence openly.

Thus, in the model case, Company B may be held responsible for the damage caused by Company A only if there was a contract for works between the two companies where Company A was the contractor and caused damage while performing the contract. In addition, it should be shown that Company B was obliged to control Company A performing the obligations under the contract. It would be helpful for the plaintiffs if the contract explicitly provided for the possibility of such control. However, it may suffice to invoke the provisions of applicable law setting forth commissioner's right to control the progress of work.

2. Liability for own actions. In some jurisdictions the doctrine of aiding and abetting is employed to substantiate liability for indirect involvement in human rights violations [88, pp. 351, 357]. There is no such concept in Ukrainian law. The closest analogue is Art. 1190 CC: "persons whose joint actions or omissions have caused damage are jointly and severally liable to the victim. At the request of the victim, the court may determine the liability of the persons who jointly caused damage, in proportion to the degree of their fault".

The key question is, can Company B be considered to have caused damage jointly with Company A? The article itself does not contain definition of what shall qualify as joint infliction of damage. The jurisprudence has not fashioned elaborate approach either.

Courts apply the article mainly to two categories of cases. The first one is cases concerning traffic accidents. The Plenary High Specialized Court of Ukraine explained that when two cars collide, a distinction should be made between the damage caused by the drivers to each other and the damage caused by the drivers to third parties (such as passengers or pedestrians). The first type of damage is compensated depending on the fault of each driver (Art. 1188 CC), while the second type of damage is compensated regardless of their fault and considered to be a damage jointly inflicted by the drivers (Art. 1190 CC).

The other category of cases where Art. 1190 CC applies is compensation for damage resulting from a crime committed by several accomplices [89-91]. Understandably, if the crime is committed in complicity, the resulting damage is "jointly inflicted". But does it mean that "joint infliction" in tort law can only take place if there has been "criminal complicity"? The jurisprudence in this regard is somewhat confusing.

The milestone case No. 6-168tss13 concerned obtaining a bank loan by submitting the forged documents with no intention to repay the debt [92]. There were three defendants in the case. Two of them were found guilty of forgery (Art. 366 of the Criminal Code of Ukraine (CrimC)) and financial fraud (Art. 222 CrimC). The third defendant, the bank employee, was found guilty of neglect of duty (Art. 367 CrimC). The bank filed a civil lawsuit against all three, seeking to invoke joint and several liability under Art. 1190 CC.

The court of first instance, upheld the claim. However, the Supreme Court of Ukraine overturned this decision and remanded a case for a new trial. The following passage from the Supreme Court's decision became often cited:
"Based on the content of the substantive law rule [Art. 1190 CC], persons who jointly caused indivisible damage by interdependent, collective actions or actions with common intent, are jointly and severally liable to the victim.

When damage is caused by the crime committed by two or more persons in order for joint and several liability to apply it shall be established that the actions of the tortfeasors were united by a common criminal intent, and the damage caused by them was the result of their joint actions" [92].

The position in this case is ambiguous. The first sentence of the passage uses conjunction "or" and, thus, implies that "joint infliction" requires *either* the actions being "interdependent and collective" *or* the actions having common intent. In contrast, the second sentence contains a clear indication that all tortfeasors must have a common intention. And it is this second sentence that became decisive for the final judgment in the case: after the remittal of the case the third defendant (bank employee) was absolved from liability in tort [93-95].

The jurisprudence concerning Art. 1190 CC, thus, reveals a major inconsistency. On the one hand, whenever the damage is caused by the criminal offence committed by several persons, for joint and several liability to apply all the tortfeasors must act with common intent. Instead, whenever the damage is caused by actions that do not amount to criminal offense, then common intent is not required. The latter applies primarily to the infliction of harm to third parties due to several cars colliding. Obviously, no one would consider two drivers that crashed into each other as having a "common intention" to harm their passengers or pedestrians.

Thus, it turns out that the concept of "joint infliction" of damage within Art. 1190 CC is attached two different meanings depending on whether the harmful actions amount to a criminal offence. If they do, "joint infliction" is treated as the absolute equivalent of complicity in criminal law (Art. 26 CrimC) (which means, in particular, that all tortfeasors must act intentionally). If not, then "joint infliction" is treated much more broadly and in this case the finding of the joint infliction is not precluded by one of the tortfeasors acting negligently. In this latter case, the exact meaning of the concept remains unclear.

The above considerations regarding Art. 1190 CC are relevant for the two aspects of the model case. First, they may cast light on the sub-scenario where Company A provides assistance to the state law enforcement bodies in violent dispersing of the rally. Second, they are relevant for the question of whether Company B may be held liable for the Company A's actions as an accomplice in all sub-scenarios.

As for the first question, the case is not very promising for the plaintiffs. Illegal use of force by law enforcement bodies to disperse a peaceful rally is a criminal offense. It may qualify as abuse of power by a law enforcement officer (Art. 365 CrimC). Therefore, according to the approach currently followed in jurisprudence, only those who have been found guilty of complicity in respective crimes can be held liable in tort.

Meanwhile under Art. 18 CrimC only a natural person (and not a company) can be subjected to criminal liability. At the same time, the CrimC provides for the possibility of imposing so-called "measures of criminal law" (Sec XIV-1 CrimC) (fine, confiscation, liquidation) on a legal entity in case its official is found guilty of a crime and the crime is committed on behalf and in the interests of the legal entity. Although the "measures of criminal law" do not in themselves restore the rights of the victim, Art. 96-6(2) CrimC provides that "whenever measures of criminal law are applied, the

legal entity is obliged to compensate for damage and harm in full". Therefore, in general the law provides for the possibility to claim damages from the legal entity in the event of a crime committed by its official. However, the range of the crimes which allow to invoke the mechanism is limited to an exhaustive list provided for in Art. 96-3 CrimC.

The list in Art. 96-3 does not include abuse of power by a law enforcement officer (art 365 CrimC). However, the list includes other crimes that could potentially be relevant in the context of a violent dispersal of a rally, e.g. unlawful deprivation of liberty or kidnapping (Art. 146 CrimC), creation of illegal paramilitary or armed organizations (Art. 260 CrimC), creating, managing a criminal community or criminal organization, and participation in it (Art. 255 CrimC).

Considering the above, in the sub-scenario with the violent dispersal of the rally, the prospect of recovering compensation from Company A appears hardly feasible (let alone recovering compensation from Company B). It is noticeable that despite the amendments introducing "measures of criminal law" into the Criminal Code were passed in 2015[11] there are still no instances of those measures having been applied by the courts.

The second aspect of the model case where Art. 1190 CC could be of use is the substantiating Company B's liability in all sub-scenarios. The above considerations concerning criminal complicity can also be applied here. But the whole other thing when defendants' harmful actions do not amount to a criminal offence. In this case, plaintiffs will have to rely solely on Art. 1190 CC.

As have been shown, neither jurisprudence nor doctrine has developed clear criteria for qualifying harm as "jointly inflicted" in case of pure torts (i.e. torts which are not criminal offenses at the same time). *De lege ferenda*, "joint infliction" in tort law should be no narrower than criminal complicity. However, not in the sense that only accomplices recognized as such in criminal proceedings can only be sued in tort, but in the sense that the civil law concept of "joint infliction" should include all the forms of complicity recognized in criminal law (Art. 27 CrimC) (organizer, abettor, instigator and accessory).

So that even when the harmful act does not constitute a crime, it should be possible to sue in tort not only the principal tortfeasor, but also the one who incited the principal tortfeasor (instigator) helped him/her in causing damage with advice, guidance, tools etc. (abettor) or managed the harmful operations (organizer).
The broad approach would pave the way for holding Company B liable as an organizer (whenever it is a parent company) or instigator (whenever it is a purchaser in the supply chain). It would also allow to hold Company A liable as an abettor in the sub-scenario with violent dispersal of protesters.

Jurisdiction. With regard to the jurisdiction four variations of the model case should be considered: a) Company A and Company B both have their places of business in Ukraine; b) Company A has its place of business in Ukraine while Company B has its place of business abroad; c) Company A has its place of business abroad and Company B has its place of business in Ukraine; d) Company A and Company B both have their places of business abroad.

In variation (a), the case is subject to consideration by the Ukrainian courts, and the specific court is determined in accordance with the rules of civil procedural law of Ukraine (§3 Ch 2 CPC).
In variations (b) and (c) legal relationship contains a "foreign element" (SubPara (2) Art. 1 of the Law "On Private International Law"). Therefore, when suing Company B, plaintiffs should resort to Art. 76 of the Law "On Private International Law" according to which Ukrainian "courts may allow claims and consider cases containing a foreign element if: 1) … 3) the case concerns compensation for

[11] The Law of Ukraine No. 314-VII, May 23, 2013, https://zakon.rada.gov.ua/laws/card/314-18.

damage caused on the territory of Ukraine; … 5) the case concerns compensation of damage as long as the plaintiff is a natural person domiciled in Ukraine or the defendant is a legal entity having its place of business in Ukraine".

In the context of subPara 3) Art. 76 of the Law "On Private International Law", the question is how to determine the place where damage was caused: is it the place where the plaintiff suffered damage or is it the place where the defendant committed the action which entailed damage?
Currently, there are no high-profile cases where the higher courts would have touched upon the question in detail. Most of the cases concern traffic accidents that took place on the territory of Ukraine with foreigners involved [96-97]. In several cases [98-99] rolling stock derailed because of the negligent maintenance of one car owned by a foreign company. In one such case [99], the defective car belonged to a Russian company and its last maintenance was carried out in Russia. Although the negligence (failure to check and repair the car properly) was committed in Russia, the case was considered by Ukrainian courts because the accident occurred in Ukraine.

Therefore, when Company A is located in Ukraine and company B is located abroad (variation (b)), a claim against Company B may be filed in a Ukrainian court on the basis of subPara 3) Art. 76 of the Law "On Private International Law" (damage caused in Ukraine). It should be noted that the article states that courts "*may* allow claims". It means that in this case the jurisdiction is not exclusive, i.e. the Ukrainian law does not exclude the possibility of the case being considered by foreign court. In other words, no monopoly of Ukrainian courts is asserted over this type of cases.

When Company A is located abroad and Company B is located in Ukraine (variation (c)), a claim against Company B may be filed in a Ukrainian court on the basis of the second part of subPara 5) Art. 76 of the Law "On Private International Law" (defendant is a legal entity having its place of business in Ukraine). In this case, the jurisdiction is not exclusive either.
In variation (d), when both companies are located abroad, filing a lawsuit against Company B in the Ukrainian court is theoretically possible on the basis of the first part of subPara 5) Art. 76 of the Law "On Private International Law" (the plaintiff is a natural person domiciled in Ukraine). However, there are no such cases so far.

Vindicating Collective Interests. Ukrainian procedural law does not provide for the mechanism of class actions. However, it allows for a number of actions (brought by a number of plaintiffs) being joined and considered by the court within one case. Participation of several plaintiffs in one case is allowed if: 1) the subject of the dispute are common rights of several plaintiffs; 2) the rights of several plaintiffs were brought about by the same fact; 3) the subject of the dispute are similar rights and responsibilities (Art. 50 CPC). These provisions are often applied by courts in environmental cases.
Two of them are notable: the first, already mentioned above, concerned the Trypilska TPP; the second concerned a large-scale fire at an oil depot in the town of Glevakha (Kyiv region). In total, the Supreme Court considered six TPP cases. The total number of plaintiffs is 280 (the largest number of plaintiffs in one case – 108).

In the second case, plaintiffs claimed compensation for non-pecuniary damage arguing that extensive pollution of air, soil and groundwater was caused by the fire. The Supreme Court considered five such cases [100-104] with a total of 330 plaintiffs (the largest number of plaintiffs in one case was 215). Each plaintiff in these cases was awarded UAH 50,000 in compensation for non-pecuniary damage.

The other way of vindicating collective interests in environmental cases may be through filing a lawsuit by members of the public concerned (either NGOs or even individuals). This option is provided for in the Aarhus Convention[12] and in national legislation as well.[13]

Yet, this type of lawsuits is usually aimed at some other goals rather than compensation, for instance: halting the pollutant's operations [105]; declaring illegal and revoking permits issued for the construction of a new industrial facility [106-108]; ordering defendant to take measures to lessen the environmental impact [109-111] etc. The probable reason why there are no claims for damages brought by the members of the public concerned is that national legislation does not provide a mechanism for allocating the awarded money among all victims.

Case No. 904/6125/20 is the rare exception. In this case, the NGO "Lawyers for Environment" filed a lawsuit against seven mining companies in Shirokiv district [112]. The lawsuit stated that the defendants' businesses exert adverse impact on the environment of the surrounding areas. On this basis, the NGO claimed UAH 0.5 million for 48 of its members (residents of the area) in compensation for pecuniary damage and the same amount in compensation for moral damage. In the lawsuit it was stated that the awarded funds will be allocated proportionally among the members of the NGO in whose interests the lawsuit was filed.

While considering the issue of proper jurisdiction for the case (civil or commercial), the Grand Chamber of the Supreme Court in general confirmed that NGOs are entitled to file lawsuits for the sake of vindicating environmental rights of their members [112].

However, during the retrial [113], the claim was returned to the plaintiff without consideration.[14] Among the deficiencies there were: lack of any reasoning as to the amount of compensation claimed for each individual separately; lack of evidence proving the alleged victims own property in the affected area; lack of evidence that property has been destroyed or damaged.

From the deficiencies indicated it follows, that for this claim to succeed, NGO should have provided individualized evidence (i.e. evidence pertaining to each particular victim) substantiating two elements of tort: damage and causation, meanwhile wrongfulness (as a violation of environmental regulations by the defendants) could be proved once and for all. Thus, with regard to the burden of proof and the range of evidence required the situation is no different from that when there are numerous plaintiffs in one case.

Thus, in the sub-scenario, where Company A violates the environmental rights of residents of adjacent territories, the collective interests of the victims can be considered and vindicated in a single case either through the mechanism of joining multiple claims (Art. 50 CPC) or through filing a claim by a body authorized by law to represent the interests of others (Articles 56, 57 CPC). However, in both cases, the optimization (as would have been provided by the class action mechanism) is not achieved, since Ukrainian law requires the submission of individualized evidence for each victim showing the damage, its exact calculation and causal nexus between damage and defendant's activities.

Conclusions

[12] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (done at Aarhus, Denmark, on June 25. 1998) Art. 9.

[13] Para 2 Art. 293 CC; subPara (zh) art 21 of the Law "On environmental protection"; Judgment No. 12-rp/2013 of the Constitutional Court of Ukraine, November 28, 2013, Para 2.6.

[14] It means there were deficiencies in statement of the claim and the plaintiff was given time to amend them, but failed. See Art. 174 of Commercial Procedural Code of Ukraine.

Of the four challenges tort law encounters in the model case as for Ukraine the biggest issue is the liability for the indirect involvement in human rights violations. Several factors contribute to it being so, in particular: absence of the duty to ensure ethical supply chain in national legislation; a limited number of cases of vicarious liability; inchoate doctrine of joint infliction. In addition, there are some systemic shortcomings concerning the formula of tort elements: the concepts of fault and wrongfulness significantly overlap entailing the misconception of strict liability regime; requirements for the proof of causation are rigid and inflexible allowing for no exceptions or alleviation.

Against this background, a relatively minor problem is the lack of a mechanism for class actions: although the desired optimization of litigation costs may not be achieved, some avenues to protect collective interests do exist.

The "translation" of the circumstances of the case from the language of human rights into the language of tort law is not in itself an obstacle: some difficulties are explained rather by the already mentioned imperfection of the doctrine of tort elements. Finally, the rules of jurisdiction seem flexible enough to allow either Ukrainian or foreign courts to consider the case.

At the end of the day, all the obstacles mentioned are not insurmountable, so given the creative lawyering and further development of the doctrine and jurisprudence, the model case may well have a judicial prospect in Ukraine.

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Virtual Asset Market Participants

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Abstract

The relevance of the topic is due to the need to specify the circle of participants in the virtual asset market, since participants are an important element of legal relations in the virtual asset market. However, a clear circle of them has not yet been formed. With the development of the virtual asset market, new participants emerged, which explains the need to specify their circle at the current stage of market formation. The need for such specification is also due to the fact that the role and importance of the virtual asset market for the economy of Ukraine, including for its post-war recovery, require urgent certainty regarding the legal framework for the market functioning, which, in particular, should concern participants, which will allow to solve a problem of regulation of other legal aspects of the market functioning. The purpose of the Art. is to specify the circle of the virtual assets marker participants and to substantiate their place and role in this market by means of classification. Based on the provided study, author specifies the circle of virtual assets marker participants, which are proposed to be divided into the following functional groups: 1) the main participants – virtual assets service providers, which, depending on the activities carried out, may be business entities, the range of which is presented in Art. 55 of the Commercial Code of Ukraine, business entities established under the laws of foreign states, as well as decentralized autonomous organizations functioning as virtual assets service providers; issuers (including miners); offerors; consumers; and individuals conducting transactions with virtual assets in their own interests; 2) participants with auxiliary functions that provide the necessary conditions for the functioning of the virtual asset market by providing services (banking, insurance, legal, consulting, etc.); 3) participants with special functions related to state regulation of the virtual asset market and self-regulatory organizations. The author suggests that the concept of "virtual asset market participant" should be properly enshrined in national legislation.

Key words: *virtual assets; virtual assets market; market participant; provider of services related to the turnover of virtual assets; market infrastructure; state regulation of the market.*

Учасники ринку віртуальних активів

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Анотація

Актуальність теми зумовлена необхідністю конкретизації кола учасників ринку віртуальних активів, адже учасники є важливим елементом правовідносин на ринку віртуальних активів, а чітке їх коло і досі не сформовано. Із розвитком ринку віртуальних активів почали з'являтися нові учасники, що пояснює необхідність конкретизації їх кола на поточному етапі формування ринку. Необхідність такої конкретизації також зумовлено тим, що роль і значення ринку віртуальних активів для економіки держави, зокрема і для її повоєнного відновлення, вимагають невідкладної визначеності щодо правових засад функціонування ринку, які мають стосуватись учасників, що дозволить урегулювати інші правові аспекти функціонування цього ринку. Метою статті є конкретизація кола учасників ринку віртуальних активів та обґрунтування їх місця й ролі на цьому ринку, здійснивши їх класифікування. За результатами проведеного дослідження конкретизовано коло учасників ринку віртуальних активів,

яких запропоновано поділити на такі функціональні групи: 1) основні учасники – постачальники послуг, пов'язані з оборотом віртуальних активів, якими залежно від діяльності можуть бути суб'єкти господарювання, коло яких представлено у ст. 55 ГК України, суб'єкти господарювання, створені згідно із законодавством інших держав, а також децентралізовані автономні організації, що функціонують як постачальники послуг, пов'язаних з оборотом віртуальних активів; емітенти (в тому числі майнери), оференти; споживачі та особи, що здійснюють операції з віртуальними активами у власних інтересах; 2) учасники із допоміжними функціями, що забезпечують необхідні умови для функціонування ринку віртуальних активів, надаючи послуги (банківські, страхові, юридичні, консалтингові тощо); 3) учасники із спеціальними функціями, пов'язаними з державним регулюванням ринку віртуальних активів, а також саморегулівні організації. Висловлено пропозицію стосовно належного закріплення поняття «учасник ринку віртуальних активів» у національному законодавстві.

Ключові слова: *віртуальні активи; ринок віртуальних активів; учасник ринку; постачальник послуг; пов'язаних з обігом віртуальних активів; інфраструктура ринку; державне регулювання ринку.*

Introduction

Virtual assets market is an important part of the economy. J.-G. Dumas, S. Jimenez-Garces and F. Șoiman pointed out that stakeholders (interested parties in the virtual assets market) play an important role and can greatly influence the risks of this market, based on their role and degree of involvement [1, p. 2]. As it was stated by J. Almeida and T. Cruz Gonçalves, it is no surprise that the virtual assets market has attracted considerable attention from different parties: media, regulators, individual and institutional investors [2, pp. 1-2]. The study by A. Copestake, D. Furceri, P. Gonzalez-Dominguez emphasizes the interconnection between virtual asset market participants: the most sophisticated investors pay significant attention to government policy on virtual assets [3, p. 7].

Participants are an important element of legal relations in the virtual assets market, but their clear circle has not yet been formed. With the development of the virtual assets market, new participants emerged, which explains the need to specify their circle at the current stage of market formation. The need for such clarification is also due to the fact that the role and importance of the virtual asset market for the state's economy, including for its post-war recovery [4, p. 15], require urgent certainty regarding the legal basis for the market's functioning, which, in particular, should apply to participants, which will allow regulating other legal aspects of the market's functioning.

Provisions on virtual asset market participants are contained in the Law of Ukraine "On Virtual Assets", which has not yet entered into force due to the fact that the relevant amendments to the legislation related to the taxation of virtual assets have not been adopted. Some issues are covered by the Law of Ukraine "On Prevention and Counteraction to Legalisation (Laundering) of Criminal Proceeds, Terrorist Financing and Financing of Proliferation of Weapons of Mass Destruction". Meanwhile, an analysis of the legislation shows that its provisions regarding the range of market participants are not sufficiently developed.

The issues of legal regulation of the virtual asset market, and, in particular, certain aspects of virtual asset market participants functioning, have been the focus of attention of many Ukrainian and foreign legal scholars. Among the domestic scholars, the contributions of S.O. Hrytsai are worthy of note. He identified specific attributes of some virtual asset market participants [5]. It is also noteworthy to mention the contributions of R.A. Dzhabrailov, T.S. Hudima and V.A. Ustymenko, who co-authored a comprehensive analysis of the key priorities for the development of a legal framework for post-war economic recovery in Ukraine, and mentioned importance of the virtual asset market for the state's economy [4]. It should be noted that among the foreign scholars whose contributions to this field are worthy of particular mention are T. Ankenbrand, D. Bieri, T. Kronenberger and L. Reichmuth. Their research has identified the following market participants: companies which offer investment products and services related to cryptocurrencies; retail and private clients; corporations; family offices; banks and other financial institutions [6, p. 6]. K. Stylianou and N. Carter also mentioned crypto exchanges and miners [7]. However, all the participants were mentioned indirectly, and their circle was not specified, which indicates the relevance of the issue and the expediency of its study.

The purpose of this study is to specify the circle of virtual assets marker participants and to substantiate their place and role in this market by classifying them.

Materials and Methods

The methodological basis of the study is the general scientific and special methods of scientific cognition used in legal science.

The dialectical method of scientific research made it possible to reveal the virtual asset market as a complex economic and legal phenomenon, its dynamics and connection with other legal phenomena.

The application of the comparative tools of the comparative legal method, which uses synchronic and diachronic methods, made it possible not only to outline the problem of determining the main vectors of modernization of Ukrainian legislation in the relevant area, but also to form a rational system of coordinates for further development of legal regulation of these relations.

The use of the techniques of the special legal (formal-dogmatic) method – classification and systematization – made it possible to study the set of legal rules governing relations in the field of virtual assets turnover. When applying the special legal method, legal norms were considered in three aspects: what kind of norm is in the law (draft law); whether it is applicable in this form in certain practical situations; what it should be ideally. The use of this method helped to clarify the textual meaning of regulatory provisions, provisions of draft laws and identify their essence.

The special legal method allowed us to interpret the meaning of certain terms and legal categories, such as "participants" and "subjects".

The method of technical and legal analysis and the general theoretical method with the use of certain means of normative design technique, to use and develop the general conceptual apparatus on the research topic.

With the help of the logical and legal method, the author made proposals for improving the legislation governing the virtual asset market.

Results and Discussion

Correlation between the categories of "subject" and "participant"

Starting the analysis with the characteristics of virtual asset market participants and based on the legislative definition of the term "virtual asset market participant", we can state that the legislator specifies the following participants: 1) virtual assets service providers; 2) any individual who, in his or her own interest, engages in transactions involving virtual assets (Para 12, Part 1, Art. 1 of the Law of Ukraine "On Virtual Assets").

Concurrently, an examination of scientific sources and legislative acts of Ukraine reveals two key developments. Firstly, there is a discernible shift towards a more expansive understanding of market participants. Secondly, there is a notable ambiguity surrounding the correlation between the concepts of "participant" and "subject".

The textbook on economic law edited by V.S. Shcherbyna states that commercial relations are characterized by a limited range of subjects in comparison with civil law, and such subjects are participants in relations in the field of economic activity, which actually equates these concepts [8, p. 17]. Similarly, V.I. Polyukhovych posits that the concepts of "subject" and "participant" in the context of the securities market are essentially synonymous [9, p. 198]. It should be noted that N.B. Patsuriya concluded that the concept of a "participant" in insurance legal relations is broader than the concept of a "subject" [10, p. 331]. O.V. Kolohoida observed that the terms “participant” and “subject” of stock exchange relations should be distinguished based on the degree of participation in legal relations. She proposed that only those participants engaged in stock exchange relations directly, exercising their specialized economic competencies in the issuance (issue) of securities and their

derivatives, investment, professional activities on the stock exchange, or its management, should be recognized as subjects [11, pp. 80-81].

The Commercial Code of Ukraine distinguishes between the concepts of "participant in relations in the field of economic activity" (Art. 2) and "subject of economic activity" (Art. 55), recognizing the former as broader and covering the latter.

In the Scientific and Practical Commentary to the Commercial Code of Ukraine, edited by V.K. Mamutov, it is observed that the concept of "participant in relations in the field of economic activity" is a generalized one, indicating the diversity of such participants and determining the specifics of the legal status of each of them. The primary criterion by which these distinctive characteristics are defined is economic in nature, specifically the proximity of a particular participant to direct economic activity. Upon entering into economic legal relations, these participants assume a purely legal quality, becoming subjects of these legal relations [12, p. 16].

From the aforementioned evidence, it can be concluded that participants in the virtual assets market are granted the status of subjects within this market upon entering into direct legal relations within the market. Therefore, it is essential to differentiate between the concepts of "participant" and "subject" based on the extent of their involvement in legal relations within the virtual assets market. Concurrently, the degree of participation does not directly determine the circle of participants. Consequently, when analyzing the scientific literature, it is possible to refer to the works of both those scholars who have identified participants in certain relations and those who have identified subjects.

Classification of virtual assets market participants into functional groups

In order to proceed directly to the specification of the circle of virtual assets market participants, it seems appropriate to rely on the understanding of the circle of participants in economic relations set out in Art. 2 of the Commercial Code of Ukraine. It is important to note that the virtual assets market is not solely characterized by economic relations. In fact, a multitude of other relations, including civil and administrative relations, emerge within this market. Consequently, the circle of participants encompasses not only economic relations participants but also, for instance, civil relations participants, such as consumers as defined by the Ukrainian Law "On Protection of Consumer Rights".

In the Great Ukrainian Legal Encyclopedia, edited by V.A. Ustymenko, the following subjects of the stock market (securities market) are identified: issuers, investment investors, professional stock market participants, associations of professional stock market participants (including self-regulatory organizations), subjects of organizational and economic powers vested with economic competence in the state regulation of relations in the stock market, and individuals, public and other organizations acting as individual investors. [13, p. 733].

Yu.M. Pavliuchenko specifies the subjects of the agricultural market and divides them into functional groups: 1) main subjects – agricultural producers (as the first sellers), professional traders of agricultural products, buyers (economic entities that purchase products for the needs of production activities or other economic needs); 2) subjects with auxiliary functions to ensure and facilitate the sale of agricultural products (grain storehouses, carriers, etc.); 3) subjects with special functions related to the state regulation of the agricultural market - subjects of organizational and economic powers [14, p. 385].

Given the above scientific literature and analysis of the legislation on virtual assets market regulation, it seems possible to specify the range of participants in the virtual asset market by dividing them into the following functional groups: 1) main participants; 2) participants with auxiliary functions; 3) participants with special functions related to the regulation of the virtual assets market.

Main virtual assets market participants

The leading role among the main participants in the virtual asset market is played by virtual assets service providers. They are exclusively business entities – legal entities that carry out one or more of the following activities in the interests of third parties: storage or administration of virtual assets or virtual asset keys; exchange of virtual assets; transfer of virtual assets; provision of intermediary services related to virtual assets (Para 8, Part 1, Art. 1 of the Law of Ukraine "On Virtual Assets").

That is, providers of such services carry out business activities in the virtual asset market and are business entities, the range of which is presented in Art. 55 of the Commercial Code of Ukraine, and acquire the status of a market participant if they carry out certain types of business activities that are directly prescribed by the law.

It should also be noted that in accordance with Part 6 of Art. 9 of the Law of Ukraine "On Virtual Assets", a foreign legal entity that is a participant in the market of virtual assets and is subject to the law of a foreign state may act as a virtual assets service providers in accordance with the procedure and under the conditions established by the National Securities and Exchange Commission, taking into account the requirements and restrictions established by the legislation.

At the same time, only a financial institution can provide services related to the circulation of virtual assets secured by monetary values (Part 6 of Art. 9 of the Law of Ukraine "On Virtual Assets"). This includes both banks and non-bank financial institutions.

In the context of a service provider related to the circulation of virtual assets, it is also worth mentioning a Decentralized Autonomous Organization (DAO), which can actually perform certain functions of a service provider, but without any legitimation. S. Van Kerckhoven, U.W. Chohan noted that the key terms in the DAO acronym help to partially explain its essence: "Decentralization" (D) refers to the possibility of dispersing the participant base through blockchain-based technologies. "Autonomy" (A) means that a DAO should be able to act autonomously on the basis of available information, i.e. without external interference, automatically executing pre-programmed commands [15, pp. 2-3]. U.W. Chohan also summarized that in 2021 Wyoming became the first US state to recognize a DAO as a legal entity, and CryptoFed DAO became the first business entity to be recognized in this way. Although the legal status of a DAO is often unclear, functionally a DAO can be a corporation without legal status [16, pp. 7-8]. In this context, it is interesting to note the opinion of K. Nekit that "in the information society, new participants in civil relations, whose legal status has not yet been determined, but whose existence cannot be denied, are new participants in civil relations" [17, p. 87].

From the above it can be seen that DAO can perform as a virtual assets service providers and, in certain jurisdictions, may even have the same status as a legal entity.

In other words, legal entities established under the laws of Ukraine or of a foreign state that have been granted an appropriate permit to conduct such activities, as well as Decentralized Autonomous Organizations, may act as such a participant in the virtual assets market as a virtual assets service provider.

In analyzing the first group of participants, it is notable that the scientific literature indicates that the legislation does not explicitly mention miners engaged in the mining of cryptocurrencies among the virtual asset service providers [5, p. 156]. While this assertion is largely accurate, it is important to recognize that the activities of mining and the issuance of virtual assets are not explicitly included in the scope of services provided by virtual asset service providers.

The Law of Ukraine "On Virtual Assets" indirectly mentions such a participant as an issuer of virtual assets (Articles 4, 16), although it does not disclose it in any way. Such gaps are eliminated by the draft laws amending the Law of Ukraine "On Virtual Assets": Draft Law on Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine on Regulation of the Turnover of Virtual Assets in Ukraine No. 10225 dated 07.11.2023 (hereinafter also referred to as the Main Draft Law

No. 10225) and its alternative No. 10225-1 (hereinafter also referred to as the Alternative Draft Law No. 10225-1).

An issuer is a legal entity, including one established under the laws of another state, or another participant in civil relations in accordance with the Civil Code of Ukraine, which issues virtual assets (Para 7, Part 1, Art. 2 of the Main Draft Law No. 10225). At the same time, Para 6 of the same Art. defines "issuance" as the creation of virtual assets, including the preliminary creation of virtual assets (by creating all tokens of an issue prior to a public offering or admission to trading), the ongoing creation of virtual assets (including as a result of mining) and the creation of virtual assets in any other way that is not prohibited by the National Securities and Stock Market Commission and/or the National Bank of Ukraine as such, which may lead to abuse of the virtual asset market. The alternative draft law No. 10225-1 in Para 6, 7 of Part 1 of Art. 1 contains the same definition of an issuer and slightly changes the definition of an issue, excluding the reference to the need to use this particular method of issue that is not prohibited by the National Securities and Stock Market Commission and/or the National Bank of Ukraine.

In light of the aforementioned evidence, it can be posited that the issuer is a participant in the virtual asset market, a category that encompasses the miner of the virtual asset.

It is noteworthy that both draft laws introduce another market participant. Para 17 of Part 1 of Art. 1 of the Alternative Draft Law No. 10225-1 provides the term "offeror" which is defined as "an individual or a legal entity that makes a public offering of virtual assets not issued by them or an issuer that makes a public offering of virtual assets issued by them". A public offering of virtual assets is defined as a notification to third parties in any form and by any means containing sufficient information about the terms of the offer and the virtual assets being offered, enabling potential owners to make an informed decision to purchase such virtual assets. (Para 19, Part 1, Art. 1 of the Alternative Draft Law No. 10225-1). Experts in the virtual asset market refer to a public offering of virtual assets as an Initial Coin Offering, or ICO. Summarizing the scientific approach, A.C. Moxotó and her colleagues have provided a summary of the scientific approach, noting that ICOs are becoming an increasingly popular method for raising capital for blockchain startups [18, p. 4178].

The issuer also acquires the status of an offeror if it conducts a public offering of virtual assets it has issued. However, the offeror may also make a public offer of virtual assets not issued by it, which allows the offeror to be distinguished as a separate participant in the virtual asset market.

The next major participant in the virtual asset market is the consumer. Obviously, since there are providers of services related to the turnover of virtual assets, there are also customers (clients) of such services. In the view of I.A. Avanesova, Ukrainian legislation is undergoing a period of active development in the field of the regulation of the protection of the rights and interests of consumers of financial services. The main list of legislative acts containing rules of protection of the rights of consumers of financial services includes the Law of Ukraine "On Virtual Assets" [19, p. 16]. However, the Law of Ukraine “On Virtual Assets” still refers to the fact that the specifics of consumer protection of financial services, as well as services related to the turnover of virtual assets, are determined by the relevant laws.

It is also noteworthy to mention another significant participant in the virtual assets market, as explicitly outlined in the current iteration of Ukraine's "On Virtual Assets" legislation. This individual conducts transactions with virtual assets in his or her own interest. While they may not utilize the services of virtual assets service providers, they are entitled to possess and transfer virtual assets, provided that their actions are aligned with their personal interests. This thesis can be supported by Part 5 of Art. 16 of the Alternative Draft Law No. 10225-1, which states that the exchange of virtual assets for cash between two individuals acting on their own behalf and in their own interest is not considered to be the provision of a service for the exchange of virtual assets for cash. Therefore, if an individual conducts transactions in virtual assets in his or her own interest without using the services of the provider, such individual is an independent participant in the virtual assets market.

Virtual assets market participants with auxiliary functions

As for the next group of participants with auxiliary functions in the virtual assets market, it should be noted that they constitute the virtual assets market infrastructure. A.H. Bobkova and Yu.M. Pavliuchenko recognized business entities, institutions, organizations that ensure interaction between participants in relations in the field of environmental entrepreneurship, provide financial, consulting, marketing, information and communication, legal, educational and other services to ensure the organization and implementation of environmental entrepreneurship as subjects of environmental entrepreneurship infrastructure [20, p. 59].

V.V. Reznikova noted that depending on their position in the real estate market, all its participants can be divided into three groups: 1) sellers; 2) buyers; 3) service infrastructure, which should also include business entities – intermediaries (professional participants in the real estate market). Professional intermediaries in the real estate market include: brokers, who provide services to sellers and buyers in real estate transactions; developers, who are engaged in the creation and development of real estate, including the organization and financing of investment projects, design and construction, full or partial sale of objects or their lease (both independently and with the involvement of other real estate market participants, developers and investors); redevelopers, who are engaged in the development and transformation (secondary development) of territories; property managers, who are engaged in the financial management and technical operation of real estate objects; analysts, who forecast, prepare, organize and/or support business operations in the real estate market [21, p. 360].

It seems that in the virtual asset market the purpose of this group of participants is to create appropriate conditions for the effective functioning of the market and to ensure its stable operation. At the same time, it should be noted that in the proposed classification of participants in the virtual asset market, the concept of infrastructure covers only those who do not participate in transactions with virtual assets, but create the necessary conditions for the functioning of the virtual asset market by providing services (banking, insurance, legal, consulting, etc.) to other participants.

Virtual assets market participants with special functions related to the regulation of the virtual assets market

Regarding participants with specific functions in relation to the regulation of the virtual asset market, the following should be noted.

The law refers to the state as a participant in relations in the sphere of circulation of virtual assets (Para 7, Part 1, Art. 1 of the Law of Ukraine "On Virtual Assets"). Implementation by the state of comprehensive measures for regulation, control and supervision of the market of virtual assets, regulation of the rules of operation of service providers in connection with the circulation of virtual assets, as well as measures to prevent and counteract abuses and violations in the market of virtual assets is a state regulation of the market of virtual assets (Part 1, Art. 16 of the Law of Ukraine "On Virtual Assets").

A.M. Zakharchenko concurred with the proposition that the state, in its capacity as a public legal entity, is a party to relations within the sphere of economic activity. However, he additionally posited that public authorities act on behalf of the state [22, p. 79].

Therefore, in the virtual assets market, public authorities are responsible for rationalization, control, supervision, and regulation of the rules of operation of service providers in connection with the circulation of virtual assets, as well as measures to prevent and counteract abuses and violations in the market.

At the same time, it should be noted that given the contradiction between Art. 16 of the Law of Ukraine "On Virtual Assets" and Paragraph 5 of Part 1 of Art. 18 of the Law of Ukraine "On Prevention and Counteraction to Legalisation (Laundering) of Criminal Proceeds, Terrorist Financing and Financing of Proliferation of Weapons of Mass Destruction" in terms of defining the system of state authorities carrying out state regulation of the virtual assets market, the specification of the

above system should be the subject of a separate study. However, the above does not contradict the conclusion that the state authorities responsible for state regulation of the market are participants in the virtual asset market.

Meanwhile, the virtual asset market is not regulated by public authorities alone. Combining different instruments and regulatory strategies in the best possible way is called "smart regulation" [23, p. 21].

In addition to public authorities, such influence is exercised by self-regulatory organizations – non-profit associations of various organizational and legal forms, which are not aimed at making profit from the economic activities of their members, based on the membership of business entities united by a common professional orientation of their economic activities in the field of production or in the market of services (goods), whose main functions are to regulate the activities of their members by establishing additional rules and standards for carrying out professional activities in a particular sector of the state economy, to represent the interests of their members and to bring to justice those responsible for violating the norms of the current legislation of Ukraine and the additional rules and standards developed and adopted by a particular self-regulatory organization [13, p. 614]. Some self-regulatory organizations are established as quasi-public entities. However, most others are established as public organizations [24, p. 13]. In Ukraine, the Public Union "Virtual Assets of Ukraine" was established in November 2020 by the non-governmental organization "Blockchain4Ukraine", the blockchain ecosystem "Binance", and the law firms "Juscutum" and "Arzinger". Its stated objective is the launch of a virtual asset market in Ukraine, as well as the implementation of blockchain technology in key business and public sectors [25].

Thus, self-regulatory organizations are virtual assets market participants whose activity is to regulate social relations in the virtual asset market by establishing appropriate standards or rules, as well as to monitor compliance with the requirements provided by them on the basis of association in specially created organizations.

Proposals for Improving Ukrainian legislation on the turnover of virtual assets

The aforementioned range of participants in the market of virtual assets appears to be an appropriate subject for inclusion in Para 12, Part 1, Art. 1 of the Law of Ukraine "On Virtual Assets". This would entail the statement that participants in the market of virtual assets are virtual assets service providers; issuers; offerors; consumers; individuals who conduct transactions with virtual assets in their own interest; public authorities with the power to regulate the market of virtual assets; self-regulatory organizations; and creators of the necessary conditions for the functioning of the market of virtual assets.

Conclusions

Based on the provided study, the author specifies the range of participants in the virtual assets market, which are proposed to be divided into the following functional groups:

1) the main participants – virtual assets service providers, which, depending on the activities carried out, may be business entities, the range of which is presented in Art. 55 of the Commercial Code of Ukraine, business entities established under the laws of foreign states, as well as decentralized autonomous organizations functioning as virtual assets service providers; issuers (including miners); offerors; consumers; and individuals conducting transactions with virtual assets in their own interests.
2) participants with auxiliary functions that provide the necessary conditions for the functioning of the virtual asset market by providing services (banking, insurance, legal, consulting, etc.).
3) participants with special functions related to state regulation of the virtual asset market and self-regulatory organizations.

The aforementioned range of participants in the market of virtual assets appears to be an appropriate subject for inclusion in Para 12, Part 1, Art. 1 of the Law of Ukraine "On Virtual Assets". This would entail the statement that participants in the market of virtual assets are virtual assets service providers; issuers; offerors; consumers; individuals who conduct transactions with virtual assets in their own

interest; public authorities with the power to regulate the market of virtual assets; self-regulatory organizations; and creators of the necessary conditions for the functioning of the market of virtual assets.

Further research is required on the legal regulation of the virtual asset market, with a particular focus on the system of state regulatory authorities governing the virtual asset market.

Recommendations

The article's contents are of value to those engaged in the process of rulemaking, including attorneys, legal advisers, and employees of public authorities responsible for regulating the virtual asset market.

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Employee Bonuses as a Stimulating Factor for Productive Labor

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Abstract

The relevance of the topic of the article stems from the ongoing significance of remuneration in both scientific and practical discourse. While the general aspects of remuneration – its structure and essence – have been widely studied, the application of specific remuneration elements as methods to stimulate employees has received less attention. This applies in particular to the system of stimulation by establishing qualitative and quantitative indicators of the efficiency and productivity of employees in performing their duties. This article aims to address this gap by examining the application of Key Performance Indicators (KPIs) and the allocation of company shares as distinctive tools for incentivizing employees towards higher productivity. For this purpose, formal-logical, comparative, analytical and synthetic research methods are used. The authors conclude that bonuses based on KPI performance are a promising way to motivate employees and are designed to improve labor efficiency at the enterprise through material incentives for employees. Integrating KPIs into the remuneration system enables a clear differentiation of employee performance levels. For the KPI system to be effective, it must be absolutely transparent. A performance evaluation scheme must also be created, with the help of which employees will be motivated to achieve results. In order to fairly calculate payments based on KPI, all payments to the employee should be taken into account. The article also explores the distribution of company shares among employees as an increasingly popular mechanism for employee rewards. One notable advantage of this approach is that the original owner retains ownership of the shares while linking employee remuneration to dividends. Another model involves the sale of shares with options, either incorporated into the share purchase and sale agreement or established through a separate agreement. These mechanisms offer innovative pathways to align employee incentives with the company's success, fostering enhanced productivity and engagement.

Keywords: incentives; bonuses; employee evaluation; key performance indicators; labor productivity; labor process management.

Преміювання працівників як стимуляційний фактор продуктивної праці

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Анотація

Актуальність статті обумовлена тим, що питання оплати праці завжди перебувають у центрі уваги науковців і практиків. Утім, в основному, аспектами наукових досліджень є загальні питання оплати праці, її структура та сутність, тоді як проблеми використання різних елементів оплати праці працівників як методу стимулювання працівників вивчено недостатньо. Це стосується,

зокрема, системи стимулювання шляхом установлення якісних і кількісних показників ефективності та продуктивності виконання працівниками своїх обов'язків. Саме тому метою цієї статті є аспекти застосування Key Performance Indicators та наділення акціями працівників як особливі стимуляційні фактори працівників на шляху до продуктивної праці. З цією метою використовуються формально-логічні, порівняльні, аналітичні та синтетичні методи дослідження. Автори дійшли висновку, що преміювання за результатами виконання KPI є перспективним способом мотивації працівників і покликане підвищити ефективність праці на підприємстві через матеріальне стимулювання працівників. KPI у системі оплати праці дає змогу чітко розмежовувати рівень результативності співробітника. Для того щоб ця система працювала, вона має бути абсолютно прозорою. Також має бути створена схема показників оцінки, за допомогою якої співробітники будуть стимулюватися на результат. Для справедливого розрахунку виплати на основі KPI слід брати до уваги всі виплати співробітнику. Крім цього, у статті розглядається розподіл акцій (часток) серед співробітників компанії на безоплатній основі, що поступово стає все більш привабливим механізмом преміювання працівників. Головною перевагою цієї опції є той факт, що власник частки не передає її працівникам. Відповідно до цієї опції власник акції (частки) встановлює виплату винагороди працівнику, розмір якої прив'язаний до дивідендів. Ще однією опцією є продаж акції (частки) з опціоном (включеним у договір купівлі-продажу акції (частки) або укладанням окремої угоди.

Ключові слова: заохочення; преміювання; оцінка працівників; ключові показники ефективності; продуктивність праці; управління процесом праці.

Introduction

Employees are an important resource for the company because they have the talent, energy, and creativity that the company needs to achieve its goals, the performance sought by the company is someone who depends on the ability, motivation, and individual support received [1]. Good human resource performance is important for the survival of the organization. If the organization wants to proliferate, it must have human resources that can display good performance [2]. To achieve this goal, to stimulate employees to do their job well, it is appropriate for the employer to apply various methods of employee incentives while establishing objective criteria for assessing the quality of employees' performance of their duties. As stated by Mathis and Jackson [3], employee performance appraisal is the process of evaluating how well employees do their jobs when compared to a set of standards and then communicating that information to employees. Then the performance appraisal can be said to be effective if it includes two things, namely (1) the existence of a set of standards and (2) information communication(feedback). This statement is also supported by Dessler [4], who argues that effective appraisal also requires supervisors to set performance standards and requires that employees receive the necessary training, feedback, and incentives to eliminate performance deficiencies.

Performance measurement is still an interesting topic to study because there is not much empirical evidence that raises key performance indicators to measure employee performance. Ruky [5] states that key performance indicators are financial and non-financial metrics used by companies to measure their performance. Key Performance Indicators are usually used to assess the condition of a business and what actions are needed to address these conditions. Key Performance Indicators (hereinafter "KPIs") can be used as a reference for employees to achieve their work goals and measure how much employees have accomplished work targets. KPI is a management tool or instrument so that an activity or process can be followed, controlled (if it deviates, it can be recognized for correction), and ensured to achieve the desired performance [6, p. 36].

The issue of remuneration is always at the center of the attention of scientists and practitioners. However, the main aspects of scientific research are general issues of remuneration, its structure and essence, for example, in the scientific works of O.M. Yaroshenko, O.Ye. Lutsenko, N.M. Vapnyarchuk [7], N.O. Melnychuk, I.P. Zhygalkin and others [8].

The problems of using various elements of remuneration of employees as a method of stimulating employees have not been sufficiently studied by specialists. This applies in particular to the system

of stimulation by establishing qualitative and quantitative indicators of the efficiency and productivity of employees' performance of their duties. That is why this article will highlight the aspects of the application of KPIs and granting employees shares as special stimulating factors for employees on the path to productive labor.

Materials and Methods

This study uses formal-logical, comparative, analytical, and synthesis methods. The object of the study is ways to motivate employees through KPIs and equity grants. Both primary and secondary data are employed as data sources. Primary data is information gathered from the initial source, an individual, or information collected from the first source at the site or research object. Secondary data is information acquired from other sources, often in the form of theories that are supported by the findings of earlier studies in the literature.

Library research methods are used to collect data and information. For this type of research, books and prior studies that are relevant to the topic being studied are read and reviewed in a library or through literary studies. In order to justify the findings in this study, this literature review seeks as much theory as possible.

Results and Discussion

Employee Bonus Using Key Performance Indicators

Employees are rewarded with compensation for their accomplishments while performing their responsibilities. Financial compensation and non-financial compensation are the two types of remuneration. Salaries, bonuses, and incentives serve as indicators of financial compensation, but the supply of specific amenities, such as pensions, serves as an indicator of non-financial compensation [9, p. 32]. Direct and indirect financial compensation are two categories of compensation, according to Mohamad Syamsul [10, p. 275].

According to Yocki Pramudya [11], the purpose of providing compensation (remuneration) includes:
a) Cooperation bonds with the provision of compensation, a formal cooperation bond is established between the employer and the employee;
b) Job contentment employees will be able to satisfy their egoistic, social status, and bodily requirements with compensation, resulting in job happines;
c) Successful procurement the organization will find it simpler to hire qualified staff if the compensation scheme is designed to be sufficiently generous;
d) Job contentment employees will be able to satisfy their egoistic, social status, and bodily requirements with compensation, resulting in job happiness;
e) Successful procurement the organization will find it simpler to hire qualified staff if the compensation scheme is designed to be sufficiently generous.

KPI is a quantitative performance metric that is preapproved by management and reflects the key elements that contribute to a company's success [12, p. 67].

Modern companies are using and implementing key performance indicators – KPIs. KPI is a tool that can be used to effectively measure the goals set. In other words, it is an indicator of the effectiveness of an individual employee or the organization as a whole, thanks to which the company has the opportunity to achieve its strategic goals. Speaking about key performance indicators, it is worth noting such a scientist as Peter Ferdinand Drucker, was the one who stood at the origins of the "Management by Objectives" system. This system involves the process of identifying the company's goals and finding ways to achieve the goals set. Not only should the managers share the company's goals, but also the employees who take part in achieving the result. The main advantage of this system will be the effective work and motivation of employees, due to set goals for them. Specific time frames are determined, which allows you to gradually and efficiently perform the work.

In addition, a huge advantage is the cohesion of the management and employees, due to the focus on the overall result. KPI, like any other system, has its pros and cons. The advantages include the timely development of plans and strategies to achieve results. Evaluation of the results of current activities, any bonuses of the employee will depend only on the results and efficiency of his work. Each employee will be assigned responsibility for a certain part of the work, which in total allows for a more detailed identification of the stage at which errors occur or new ideas are born. It is worth noting that thanks to the KPI system, employees feel their contribution to the overall performance of the company. Speaking about the disadvantages of the system, more attention is paid to the fact that with a large number of different KPIs, ultimately the share of each individual indicator will be extremely small. Conversely, if the weight of one indicator is disproportionately large compared to others, it can lead to imbalances and distortions in the workflow. Setting key performance indicators deserves special attention. If an organization sets unattainable KPIs for employees, this will only demotivate the employee and direct him/her to an ineffective result.

KPIs can be categorized based on different criteria, such as leading indicators and lagging indicators. Leading ones mainly provide an opportunity to project future progress; lagging ones help in analyzing the current situation. Furthermore, they can be divided into target, process, project, and external environment indicators. Target indicators show how close the company or an individual employee is to their goal. Process indicators reflect how effectively and rationally we are moving towards the set goals, and most importantly – whether it is possible to reduce the time and costs to achieve the goal, without the risk of a poor result. The essence of the project indicator is the effectiveness of the implementation of a project or its individual stages. External environment indicators should be taken into account when developing goals, without this indicator, the wrong path to achieving goals may be chosen. It is also worth noting individual, team, and project KPIs. The specifics of this category of indicators include an assessment of the volume and level of complexity of tasks for each member of the team, the flow of tasks for each employee, and the time of work.

KPIs in the remuneration system make it possible to clearly evaluate the performance levels of employees. In order for this system to work, it must be transparent, and there are certain approaches to the introduction of this system into the organization. One of the principles of introduction is the rule "10/80/10", which means that the organization should have ten key performance indicators, and the number of production indicators should not exceed eighty and have ten key performance indicators. Moreover, a scheme for evaluating indicators should be created, with the help of which employees will be motivated to achieve results.

Performance indicators must coexist in harmony with the strategy and goals of the organization. An employee’s income consists of a salary, allowances, and bonuses so that key performance indicators, in turn, can relate to the bonus part. In order to fairly calculate payments based on KPIs, an employer must take into account all payments to the employee. An employee’s remuneration consists of material and non-material remuneration. Material remuneration includes cash payments such as salary, bonus, and merit bonuses. It is also worth emphasizing that benefits should be considered a separate category within material remuneration. Non-material remuneration includes the opportunity for career growth and training at the company’s expense. If the organization has a clearly structured remuneration system, then employees in this case receive a fair salary.

Bonuses based on KPI performance are a mandatory step in motivating employees and are designed to improve labor efficiency at the enterprise through material incentives for employees. The bonus process should be based on several principles:
1. Objectivity – the bonus amount is determined based on the KPI assessment.
2. Predictability – the employee must understand what amount of remuneration (bonus) they will receive depending on the KPI performance.
3. Adequacy – a higher remuneration is established for work of greater intensity.
4. Timeliness – the bonus for KPI performance is paid in accordance with the regulatory documents.

When setting KPIs and target values to increase staff motivation, the levels of performance of indicators are established, i.e. not only planned values (target), but also permissible deviations from the planned figures, which can be called differently: lower/upper level of performance, threshold value, and ambitious value. The threshold value is a target value reflecting the minimum permissible level of goal performance for the organization (from 60% to 80% of the target value). The planned value is the value at which the set goal is fully achieved by 100%. The ambitious value is the maximum level of the target value, set in cases where exceeding the target value brings measurable benefits (more than 100%, for example, 150% of the target value). It is recommended not to set monthly ambitious values, at least at the initial stage of implementing the KPI system, since this greatly increases the requirements for the correctness of target values for indicators, as well as their tracking. However, at the end of the year, this is quite possible.

The bonus is calculated based on the employee's salary in effect in the reporting month. In the event of non-fulfillment of KPIs, the reasons for their non-fulfillment are analyzed and the degree of influence of employees on their non-fulfillment is determined. Based on the results of the analysis, the actual percentage of fulfillment for a separate KPI for calculating the bonus for the month can be increased by agreement with the head of the service of the relevant area. KPIs offer an effective way to measure and track a company's performance across many different indicators. By understanding what KPIs are and how to implement them correctly, managers can better optimize the business for long-term success.

Bonus for Employees by Granting Them Shares in the Authorized Capital of the Company

Distribution of shares among the company's employees on a gratuitous basis is an institution from Anglo-Saxon practice, which is gradually becoming an increasingly attractive bonus mechanism in various countries, in particular in France, where many companies successfully use this institution, in particular:
1. "Sanofi": in May 2018, gratuitous distribution of shares "determined by performance" among the employees of the Group’s companies; the number of shares distributed varied depending on the achievement of various criteria [13; 14].
2. "TotalEnergies": from May 2010 till now, there has been a gratuitous distribution of shares among more than 100,000 employees of the Company in 124 countries. Depending on the country, the formulas vary, in particular the 2+2 formula (two years to acquire until becoming a shareholder and two years to retain) or the 4+0 formula (four years to acquire, without obligation to retain). It should be noted that at the beginning of 2015, the Group's employees owned approximately 4.72% of the capital, representing 8.63% of the voting rights [15].
3. GDF Suez: in July 2009, a gratuitous distribution of shares, i.e., the distribution of almost 3.8 million shares among the Group’s 200,000 employees [16].

"Phantom plan" ("phantom" share or "phantom" stock)

The main advantage of this option is the fact that the owner of the share does not transfer the share to employees. Following this option, the owner of the share (share) sets the payment of remuneration to the employee, the amount of which is tied to dividends (i.e. if the "phantom share" is 1% of the authorized capital of the company, then the remuneration will be equal to dividends from 1% of the authorized capital). Such a "phantom share" gives the right to remuneration only while the employee is an employee of this organization, and at the same time, it does not give the right to vote and participate in decision-making. Thus, the "phantom share" provides only the illusion of owning a share (stock) in the authorized capital of the company, but at the same time it is an additional incentive for the employee (company manager) and for the owner of the share (share) a guarantee that his share in the company will not be diluted. It is worth noting that a "phantom share" represents a certain risk for an employee during the reorganization of a legal entity, since a new legal entity appears, where the safety of "phantom shares" may be questioned, since it is not provided with the necessary number of guarantees of the rights of employees.

Bonus by Sale of Shares

Another option is the sale of a share with an option (included in the share purchase agreement (share) or with the conclusion of a separate agreement). There are several options for implementing this option, namely, the inclusion of an option that allows the transfer of a share (stake) in the company to an employee if he meets certain conditions or the immediate sale of a share (stake), but due to the inclusion of mechanisms to protect the owner, namely:
– automatic resale of a share (stake) at a fixed price after termination of the employment contract;
– a detailed description of the circumstances under which the mechanism for the reverse transfer of a share
– (stake) in the company to its owner at a fixed price will be activated;
– prohibiting the employee from selling his shares in the company while he is the owner of this share;
– inclusion of a restrictive mechanism for the implementation of the preemptive right to purchase a share, namely if the mechanism for the reverse sale of a share in the company by an employee to the owner is launched, other employees who also have shares may have a preemptive right to purchase the share of the above-mentioned employee;
– concluding an agreement on the exercise of the rights of shareholders (participants) of the company, under which they undertake to exercise their rights in a certain way and/or refrain from (refuse) to exercise the above-mentioned rights, including voting in a certain way at the general meeting of participants of the company, by agreeing on voting options with other participants;
– resolving the issue with the right of inheritance;
– resolving the issue regarding a situation related to divorce.

Among the above options, the most crucial are the options that are related to the divorce or death of an employee of the company who was provided with shares (interests) on a gratuitous basis. Much attention is paid to the legal regulation of these options in France, in particular:
– in France, in the event of a divorce of an employee of the company who was provided with shares (interests) on a gratuitous basis, the question arises when one of the spouses, married within the framework of jointly acquired property, holds options on the date of divorce, some of which could be exercised, which allowed him or her to become a shareholder (participant). Are shares (interests) received as a result of a bonus included in the jointly acquired property? The decision of the French Court of Cassation gave a negative answer [17];
– in the event of the death of an employee of the company who was provided with shares (interests) on a gratuitous basis, in accordance with Art. L. 225-183 of the French Commercial Code [13] provides for the possibility for heirs to exercise options within six months, which is the period of recovery. However, it is not uncommon for these heirs to be unaware of the existence of such options and thus lose the benefit of their exercise. Can they then accuse the company of not having warned them? The answer is negative. According to the Court of Cassation, which considers that the issuing company is not bound by the obligation to inform the heirs [18]. Can they then act against the notary? The answer is negative since the Court of Cassation states that the duties of a notary involved in the liquidation of an estate do not include informing and advising the heirs on the advisability of using the subscription options held by the deceased [19]. It would be fairer to impose on the company the duty to inform, if not the heirs, then at least the notary, who will try to find out the state of the estate – such as bonuses or the remainder of the salary of the deceased employee to his employer. It is worth noting that many companies inform the heirs of the existence of options on their own initiative.

Conclusions

Employees should be interested in working for a specific employer, understanding that the employee is valued, that their level of knowledge is important for the team and for the success of the enterprise as a whole. That is why in modern conditions, different methods of stimulating employees to make even more efforts for production efficiency are often used.

Bonuses based on the results of KPIs implementation are a promising way of motivating employees and are designed to increase labor efficiency at the enterprise through material incentives for

employees. However, unattainable KPIs only demotivate the employee and direct him to an ineffective result.

KPIs in the remuneration system allow you to clearly distinguish the level of the employee's result. In order for this system to work, it must be absolutely transparent, and there are certain approaches to introducing this system into an organization. One of the principles of introduction is the "10/80/10" rule, which means that the organization must have ten key performance indicators, and the number of production indicators should not exceed eighty and have ten key performance indicators. A scheme for assessing indicators should also be created, with the help of which employees will be motivated to achieve results. In order to fairly calculate payments based on KPI, all payments to the employee should be taken into account.

Distributing shares (stakes) among the company's employees on a gratuitous basis is an institution from Anglo-Saxon practice, gradually becoming an increasingly attractive mechanism for rewarding employees. The main advantage of this option is the fact that the owner of the share does not transfer the share to employees. In accordance with this option, the owner of the share establishes the payment of remuneration to the employee, the amount of which is tied to dividends.

Another option is to sell a share with an option (included in the share purchase and sale agreement or with the conclusion of a separate agreement). There are several options for implementing this option, namely the inclusion of an option that allows the transfer of a share in the company to an employee if he meets certain conditions or the immediate sale of the share, but due to the inclusion of owner protection mechanisms.

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Implementation of the Right to Privacy in the Context of the Restrictive Impact of Modern Information Technologies

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Abstract

The relevance of the topic is due to the multidimensionality, relativity, conceptual multiplicity and social and practical significance of the problem of ensuring the human right to privacy in the context of modern social reality. The purpose of the article is to examine the phenomenon of privacy and the socio-cultural conditions for the realisation of the human right to it from a philosophical perspective. Methods used: the dialectical method (for comprehensive knowledge of the nature and genesis of the right to privacy), systemic and structural-functional approaches (for studying the contradictory information impact on a person of complex technical systems), analytical and synthetic method, as well as methods of comparison and analogy (for comparing practical models of the impact of the latest information technologies on the ways of ensuring the human right to privacy). The authors show that the modern socio-cultural reality demonstrates the dichotomy of what is proper and what is in solving the problem of security of the private status of an individual and the human right to privacy. The loss of privacy, which is a trend in modern social life, indicates the ever-increasing risks of alienation of privacy in social reality. The author emphasises that modern technologies can completely violate the human right to privacy, penetrate special places and certain aspects of private life and change the locus of privacy. It is substantiated that modern information and digital technologies, having an ambivalent impact on the freedom and security of personal existence, radically narrow the boundaries of the right to privacy, thereby problematising the structures of human self-identity and generating insecurity of personal life, and the prospects for research in this area are emphasised.

Key words: *right to privacy; identity; self-identity; personal space; information space; cyberspace.*

Реалізація права на приватність в умовах обмежувального впливу сучасних інформаційних технологій

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Анотація

Актуальність теми зумовлена багатовимірністю, релятивністю, концептуальною множинністю і соціально-практичною значущістю проблеми забезпечення права людини на приватність в умовах сучасної соціальної реальності. Мета статті – розглянути з філософських позицій феномен приватності та соціокультурні умови реалізації права людини на неї. Застосовані методи: діалектичний метод (для всебічності пізнання природи та генезису права на приватність), системний і структурно-функціональний підходи (для дослідження суперечливості інформаційних впливів на людину складних технічних систем), аналітико-синтетичний метод, а також методи порівняння й аналогії (для порівняння практичних моделей впливу новітніх інформаційних технологій на способи забезпечення права людини на приватність). Показано, що сучасна соціокультурна реальність демонструє дихотомію належного та сущого у розв'язанні проблеми безпеки приватного статусу особистості, права людини на приватність. Втрати приватного життя, що є тенденцією сучасного соціального життя, свідчать про дедалі стрімкіше зростаючі ризики відчуження приватності у соціальній реальності. Акцентується, що сучасні технології можуть тотально порушувати право людини на приватність, проникати в особливі місця й окремі аспекти приватного життя та змінювати локус приватності. Обґрунтовується, що сучасні інформаційні та цифрові технології, амбівалентно впливаючи на свободу та безпеку особистісного буття, радикально звужують межі реалізації права на приватність, проблематизуючи тим самим структури самоідентичності людини та породжуючи незахищеність особистого життя і наголошується на перспективності досліджень у цьому напрямку.

Ключові слова: *право на приватність; ідентичність; особистий простір; інформаційний простір; кіберпростір.*

Introduction

According to the socio-cultural experience of mankind, privacy is ontologically irresistible, it is "governed" by necessity. Privacy, rooted in the priority of the personal way of being and autonomous constitution, is a universal human value. Socio-culturally, this is confirmed by the democratisation of political life, the development of civil society, the establishment of the rule of law, etc. However, modern social life demonstrates the dichotomy of the "proper and the real" in solving the problem of security of the private status of an individual and the human right to privacy. The loss of privacy, the private continuum of personal existence, and the confidential principle, which is a trend in modern social life, indicate the growing risks of alienation of privacy in social reality.

The social era of "involvement" clearly demonstrates a pronounced asymmetry in the relationship between the personal and the social, the public and the private, personal and social identities, autonomy and heteronomy of the individual, personal and social control. Privacy as a phenomenon of social life is not given a "worthy" place in contemporary social practice. The reduction of personal status, autonomy, private life, and privacy finds its explanation in the modern society itself, where social rationality is organised according to the criteria of prediction, standardisation, consistency, and diligence of action, where the possibility of autonomy, uncontrolledness, and uncodifiedness of any act is excluded.

Today, the value of personal space and privacy is being devalued. A person is enslaved by virtual reality, lives with an "identity without personality", an anonymous identity, a "profane" body, "sold out intimacy", and Internet socialisation, becoming more and more impersonal and public. This process is accelerated by modern technologies, whose achievements and "products" upset the techno-humanitarian balance of our time. NBIC technologies, including information technologies themselves, are a large-scale and effective means of unauthorised interference in private life and its destruction.

Thus, the problem of ensuring the human right to privacy, given its multidimensionality, complexity, relativity, conceptual multiplicity, as well as personal and social and practical significance in the context of modern social reality, is certainly relevant.

Literature review

The problems of privacy and the human right to it have been addressed by many researchers. The beginning of the scientific discourse on the right to privacy can be considered the article by two Boston lawyers, S. Warren and L. Brandeis, "The Right to Privacy" (1890), where this right is considered as a general category that may include an unforeseenly wide range of powers that is constantly expanding. The authors argue that inevitable technical progress and development of technologies will make adjustments to legal regulation in the future. In anticipation of the long-term relevance of their ideas on privacy, the authors noted that the law should be flexible and able to adapt to the needs of the present [1].

In the context of this problem, Z. Bauman rightly believes that any social institution seeks to neutralise the destructive influence of private behaviour, thereby "privatising" morality [2].

E. Giddens reflects on the elimination of the phenomenon of privacy in modern times, believing that the boundaries of secret and overt in social forms of activity are changing and combining in some public spheres [3].

Domestic researcher Yulia Volkova believes that the human right to privacy can act as a humanistic guideline for the development of not only the state as a whole, but also the national security system that has developed in the state. National security is a means of ensuring the personal rights of citizens, including the right to privacy [4, c. 117].

O. Pankevych considers the right to privacy to be one of the most important personal rights and emphasises that in the context of the development of the latest technologies, the right to privacy, which is based on the issue of obtaining and disseminating information about a person, is subject to constant threats of violation [5].

R. Prystai focuses on "privacy by design", a concept of building a state of ensuring privacy throughout the entire life cycle of personal data processing, including technologies, systems, processes, practices and policies, from their early design stage to implementation, use of data and, ultimately, their disposal. It argues that ensuring the human right to privacy should be seamlessly integrated into all levels of data operations, rather than being seen as a compromise or something to be considered after the product, system, service or process is created [6, c. 553].

Y. Razmetayeva emphasises that information technology is gradually changing people's attitudes to privacy. At the same time, people are getting used to bringing personal issues into the public sphere and interpenetration of various spheres of life, giving up privacy for the sake of their own convenience, the capabilities of communication networks, and unimpeded access to cyberspace, which ultimately reduces the level of expectations for the preservation and protection of privacy [7].

S. Bulavina and T. Davidova, through clarifying the nature of privacy, highlighting certain problems of ensuring the right to privacy, conclude that this right, although formed, has not yet been formalised as a fundamental right. The authors argue that the right to privacy is a right of the third generation (the generation of global human and civil rights), which is associated with both the information component and such rights as the right to inviolability, freedom of thought and speech and dignity [8].

Paying tribute to the scientific achievements of domestic and foreign researchers, it should be noted that the philosophical reflection on the problem of the right to privacy in the context of informatisation and digitalisation of society requires clarification and detailing of both individual aspects and the phenomenon as a whole.

Materials and Methods

The purpose of the article is to examine the phenomenon of privacy and the socio-cultural conditions for the realisation of the human right to privacy from the philosophical perspective.

The methodology for studying the issue of the human right to privacy in the context of the dynamics of the information society development involves the consistent application of general scientific, philosophical and special methods and approaches, which allows achieving the above goal.

The initial stage of applying the methodology is a comparative analysis of the most illustrative scientific publications relating to various aspects of the dynamics of the information society, understanding the essence and characteristics of a modern person and his or her rights in the new socio-cultural (information) environment, etc. Particular attention was paid to the coverage of information processes and peculiarities of the use of the latest information technologies in social reality and in the practice of human rights realization.

The next stage is to study the impact of the main attributes of the information society on the realisation of the human right to privacy. The application of the systemic and structural-functional approaches made it possible to investigate the contradictions of such an impact as a consequence of the growing interaction between humans and complex technical systems. The analytical and synthetic method, as well as the methods of comparison and analogy, made it possible to compare practical models of the impact of the latest information technologies on the ways of ensuring human rights in general and the right to privacy in particular.

At the final stage, when substantiating the directions and prospects for the development of the practice of ensuring the human right to privacy in the information (digital) society, the methods of all three levels were comprehensively applied, and as a result, the arguments in favour of the author's hypothesis were generalised, according to which modern information and digital technologies, having an ambivalent impact on the freedom and security of personal existence, radically narrow the boundaries of the right to privacy, thereby problematising the structures of human self-identity and generating the experience of insecurity of personal life.

Based on the complementarity of various methods, there are grounds to conclude that in the context of total social control, the impact of modern technologies, the ontological and axiological "fate" of human existence depends on human reflection on the newest risks of social existence and ensuring the right to privacy.

Results and Discussion

First used in 1890, the concept of "right to privacy" is such a general category that it can include an unforeseenly wide range of powers, which is constantly expanding. Modern social reality demonstrates its ambivalent existence, the gap between public and private, personal and social. Private life, privacy rooted in the priority of the personal way of being and autonomous constitution, is a universal human value. However, today the value of personal space and privacy is being devalued.

It is quite obvious that transformations associated with the rapidity of the dynamics of social life, with the "dizzying" speed of change that outpaces natural abilities and possibilities of their reflection and internalisation, require not only philosophical and psychological reflection, but also the development of mechanisms for adaptation to them.

Among those who were among the first to comprehend this situation was the futurist E. Toffler. He pointed out in this regard that in order to survive, to prevent what we have called the shock of the future, the individual must become infinitely more adaptable and knowledgeable than ever before. He must look for entirely new ways to anchor himself, as all old roots - religion, nation, community, family or profession - are already faltering under the hurricane force of acceleration. Before they can do so, however, they need to understand how the effects of acceleration are penetrating their private lives, affecting their behaviour and changing their quality of existence [9].

Polish futurologist S. Lem defines technology as driven by the state of knowledge and social efficiency means of achieving goals left by society, including those that no one had in mind when they started out, due to the state of knowledge and social efficiency.

Any technology, in his opinion, essentially just continues the natural, innate desire of all living things to dominate the environment, or at least not to submit to it in the struggle for existence [10].

The dual meaning and ambivalent social role of modern technologies has been noted by many researchers. The choice to create or expand technology can be seen as a bifurcation point. Right,

freedom, or various forms of coercion stand behind the use of technology. Freedom, which is considered one of the highest values in many cultures, does not always lead to the realisation of rights and security. Thus, it appears that modernity is facing an alternative of freedom or security.

Modern computer technologies make the world more and more "transparent". Many authors use the Baudrillardian metaphor of "transparency" to characterise modernity [11]. The example of E. Snowden serves as a confirmation of the world's "transparency" (openness, accessibility, awareness). He revealed the "secret" that the United States is spying on more than a billion people in more than 50 countries, including presidents, ministers and heads of major corporations, recording their calls and location, emails, SMS messages [12].

Technological and socio-cultural transformations of the semantic field of the right to privacy

According to socio-cultural practice, the transition to a "transparent world" means a revision of many meanings, values, and cultural norms. Therefore, it is possible that in the near future, efforts will be made to "close" certain parts of virtual reality in one way or another and return to people their individual information space.

A striking example of living in a "transparent world" was the information that Apple cooperates with the intelligence services of the world's leading countries and the confirmation that iPhones and iPads take covert photos and send the data to Apple.

Obviously, one of the main goals of any intelligence agency is to obtain intelligence at any cost. Therefore, the ability to "log in" to any phone is an intelligence super-task. As is known, government agencies in many countries allocate a separate budget to their intelligence agencies to "work" with the cipher keys of leading corporations engaged in the development and production of personal computers, smartphones, software and digital content. Technologically, when decrypting a cipher key, you can run special programmes on the device that will search for security vulnerabilities. Then, it is possible to select keys, try hacking methods, analyse the incoming information, and eventually adapt the spyware. For an average user of electronic devices, this situation will mean the ability to "backdoor" an application at any time and gain access to all the data stored in it: passwords, messages, and personal information.

It is known from various information sources that the "resisting identity" is represented by those who fight against illegal intrusion, interference of special services in private life, personal space, private zone. The media has made it known that Apple CEO Tim Cook has spoken out in favour of people's right to privacy and the preservation of private information, and stressed that no one should accept that the government, a company or anyone else has the right to our private information. This is a basic human right. Each of us has the right to privacy. And we should not give up this right. [13].

Cyber threats to the practice of exercising the right to privacy

The cyber threat of owning and using iPhones, iPads and other popular gadgets is that these devices can take photos, shoot videos and transmit these files to the outside world without their owners knowing. Apple's mobile devices, as well as smartphones and tablets on competing platforms, have built-in software that collects and analyses information about the user, his or her movements, with the possibility of connecting a photo and video camera and reading images, and sends all the collected information to the manufacturer. In fact, this is a Trojan horse, as its presence is not declared anywhere, there is no icon or any other indication of its presence on a mobile device.

Another point of contention is the relationship between the legitimate human right to privacy and the legitimate right of the state to protect its security. As an example, in December 2015, the Dutch blog misdaadnieuws.com (Crime News) published a document stating that law enforcement agencies in the Netherlands had found a way to recover deleted messages and read encrypted emails on BlackBerry devices. It is known that BlackBerry was "famous" for the security of its smartphones with built-in PKI encryption [14].

Today, the scale of the cyber threat in the form of phone hacking and access to any information is many times greater than the threats from murder, torture, and kidnapping; modern terrorism is extremely active in using information opportunities for its barbaric purposes. For example, in February-March 2024, France suffered from powerful cyberattacks. More than 33 million people - slightly less than half of the French population – were affected by a data breach that included information such as "marital status, date of birth and social security number, name of health insurer and coverage provided by the policy" [15].

It should be noted that the scale of the cyber threat affects the ontological status of human life. The point is that virtual and real space are not identical. They are different realities, and the possibilities in these realities are also different. In virtual space, the boundary between the real and the unreal, the imaginary, is erased, eliminated. This entails the absence of "clarity of consciousness", the criteria of the sane, which is a sign of rationality and rational planning of actions. The priority of the virtual "I" over the real "I" leads to the destruction of the integrity of identity, especially personal identity, to the suppression of critical reflection, and to the violation of the boundaries of law and personal freedom [16-18]. The reason for choosing the value of virtual reality is the following. Due to the intensification of the dynamics of life, there is an instantaneous spatio-temporal reorientation, switching of codes of perception and behaviour, which becomes a condition for life competence.

According to Z. Bauman, privacy is a less concentrated form of freedom, the right to refuse the intrusion of other people (as individuals or as agents of some supra-individual authority) into specific places, at specific moments or during specific activities. With privacy, an individual can "escape from the public eye", confident that he or she is not being watched, and is therefore able to do whatever he or she wishes to do without fear of judgement. Privacy is usually partial - intermittent, limited to special places or certain aspects of life. When it crosses a known boundary, it can turn into loneliness and thus give a taste of some of the horrors of imaginary "complete" freedom. Privacy works best as an antidote to social pressures when it is possible to enter and leave it freely; when privacy truly remains an interlude between periods of social torture and is mainly an interlude for which the timing is up to the individual [19].

We cite this statement by Z. Bauman about privacy to show that it does not quite "adequately" reflect the reality: modern technologies can already violate the human right to privacy, penetrate special places and certain aspects of private life and change the locus of privacy. For example, the key technology of the 21st century – nanotechnology – transforms the boundaries of privacy at the level of the human body.

Thus, the use of nanotechnology in the context of transhumanist goals obviously raises the problem of rethinking the boundaries of law/freedom, internal/external, private/public, secret, and seclusion. Technological programmes for human enhancement, including military projects, are emerging, which is essentially a violent interference in a person's internal affairs. A person, even when agreeing to such interference, is unable to assess the extent of the unforeseen consequences that can lead to the destruction of not only his or her body, but also the personality (for example, through interference with the neurophysiological processes of the brain). This is a disguised form of violence and violation of the human right to privacy, and a problem arises related to the loss of self-identity and blurring of personal characteristics of a particular person, changes in adaptive behaviour, and the emergence of a sense of loneliness.

Another striking example of violation of individual rights, including the rights to freedom, autonomy, and privacy, is the characteristics of health that can be affected by nanotechnology. The functionality of nanotechnology includes the ability to permanently create databases on national health and the health of a particular person based on diagnostics, which can be used in the public sphere by employers or insurance companies. This includes all types of health, from genetic to mental health. Without protection of personal data on private life, it is quite easy to manipulate a person.

The social modus operandi of "involvement" clearly demonstrates a pronounced asymmetry in the relationship between the personal and the social, the public and the private, personal and social

identities, autonomy and heteronomy of the individual, personal and social control. Privacy as a phenomenon of social life and the right to it are not given a proper place in modern times. Z. Bauman sees the reason for the reduction of privacy, autonomy, and private life in modernity itself. The conditions of a technocratic society imply that social rationality is built in accordance with the criteria of diligent behaviour, its predictability, unification and proceduralism. In view of this, social rationality will exclude privacy, uncontrollability, uncodified nature of any action or deed, and every social organisation will seek to neutralise private behaviour. From Bauman's point of view, private actions are actions that do not meet the criteria of purpose or procedural definitions and are declared non-social, irrational. "And the way in which an organisation socialises actions includes, as a necessary consequence, the privatisation of morality" [20].

Giddens discusses the elimination of the phenomenon of privacy in the modern era. Describing modernity in a phenomenological way as dialectically interrelated structures of experience, he distinguishes privacy and involvement as the intersection of pragmatic acceptance and activism. Giddens points out that the boundaries of the secret and the overt are changing, as many forms of activity that did not previously intersect are now combined in the same public spheres [3].

Agreeing with contemporary world sociologists in the importance of social production of the reduction of the phenomenon of privacy, we will reveal those ways of self-defence of this phenomenon, which is crucial for the constitution of human and personal principles, which belong to the socio-cultural imperatives of personal existence, as well as those modes of self-defence of privacy and the right to it initiated by the context of social existence.

Recognition of the problematic existence and constitution of privacy in modern life, the need to protect privacy, private life and personal existence is the best way to overcome this problem. The method of self-defence is understood as a person's self-changing at his/her existential, subjective and personal levels of being.

"Care" as a way of self-defence of the individual and his/her right to privacy

One of the ways in which an individual self-defends his or her right to privacy is through caring. It is a clear expression of the divergence and "convergence" of what is and what is due. The principle of "self-care", expressed in numerous procedures, practices, and regulations, thereby determines social practice, offering a basis for interpersonal communications. According to M. Foucault, this principle has become an icon of activity, a maxim of behaviour, a style and a way of life. In his work "The Hermeneutics of the Subject", M. Foucault argues that self-care is a constitutive feature of the subject, its rationality, responsibility [21].

Caring (care, guardianship) is the founder and a way of self-defence of personal existence. According to M. Heidegger, care is the structure of human existence in its integrity, the beginning of human existence "in the world of being". Care is existential, all ways of being are integrated by care. Caring is the unity of three modes: being in the world, "running ahead" (projecting), and being with the intra-worldly being. Heidegger believes that care as an initial structural integrity lies existentially a priori "before" any Dasein, that is, already in any actual "situation" and "behaviour" as such. Therefore, its phenomenon in no way expresses the priority of "practical" behaviour over theoretical behaviour. Nor does the attempt to reduce the phenomenon of care in its essentially inseparable integrity to special acts or impulses like will and desire or aspiration and craving succeed. Caring is ontologically primary in relation to these phenomena [22].

M. Heidegger saw the true meaning of care in the "inequality of the self"', existential preoccupation with the future. Caring is a "concern" for order, care for the other, a function of guardianship, rather, a "preoccupation" or a certain ontological "imbalance", "unequal to oneself", "being-forward-of-itself", ontological groundlessness.

According to the French sociologist and philosopher J. Baudrillard, the mystical meaning of care dominates in the modern consumer society. The principle of "service" applies to the entire consumption system, so everything appears as a personal service, as pleasure [23]. In today's social

realities, pleasure and care are realised through the institutions of social redistribution in the form of social security, numerous benefits, subsidies, insurance, etc. Like everything else, the consumer society continuously consumes care and all the phenomenal ways of expressing it.

J. Baudrillard reveals a total contradiction in the modern social system of care. On the one hand, this system of production lives and depends on the laws of material production; on the other hand, the system of production does not reach the goal of the physical, material world to other (spiritual) relations. Hence the constant distance, disposition, lack of communication, and impenetrability.

According to Baudrillard, the entire system of care of our time is destructive in its purpose, distorted, and distorts its purpose. He notes that a fundamental contradiction is felt in all areas of "functional" human relations, since this new way of living in society, this "radiant" care, this warm "environment" have nothing to do with anything direct, because they are produced institutionally and industrially. It would be surprising if the tone of this care did not reveal its social and economic truth. And it is this distortion that is visible everywhere, the care service is distorted and as if "caught cold" as a result of aggressiveness, sarcasm, "black" humour, everywhere the services provided, kindness is deftly combined with deception, parody. And everywhere you can feel the fragility of the general system of pleasure, which is always on the verge of disorder and collapse, associated with this contradiction [23].

Describing the consumer society through the prism of sign consumption, Baudrillard rightly concludes that the sign replaces reality, and "simulacra" turn life into a simulation, into the manipulation of signs. On the one hand, the sign, the "simulacrum", seems to contribute to the mastery of reality, and, on the other hand, it destroys the authenticity of reality by replacing it with itself. This is fully transmitted into care.

Thus, self-care, expressing the socio-cultural level of a person (social subject, personality), the degree of his/her responsibility to himself/herself and society, the degree of his/her autonomy in decision-making, appears as a way of self-defence of the individual, his/her right to privacy.

Exercise of the right to privacy by a subject as a guarantee of its security

The right to privacy is connoted as a social purpose, a designation, and is translated into certain social functions in order to maintain social cooperation. The Universal Declaration of Human Rights reaffirms the social function of human rights and points to the need for human rights to be protected by the rule of law in order to ensure that individuals are not forced to resort, as a last resort, to rebellion against tyranny and oppression. However, the real situation differs in many ways from the legal, normative model of the right to privacy, as a discrepancy between what is and what is due. Among the reasons for this discrepancy are such radical shifts in the development of modern civilisation as post-industrialism, globalisation, and war, which cannot but affect the private sphere, the redefinition of the boundaries of public and private, and the change in the conceptual vision of the private and the public.

Among the reasons that lead to the reduction of the phenomenon of privacy is the information revolution, which has increased the power of the media's manipulative influence on the public consciousness of citizens, their socio-political behaviour, personal priorities and personal autonomy in politics. The autonomous choice of political position creates the need for each citizen to be able to really comprehend the political situation independently, compare and critically analyse events and develop their own assessment.

Increasingly, the media are reporting on wiretapping of private conversations and other violations of privacy of individuals. This calls for reflection on the limits of social control in the context of information security, personal data protection, and a clear definition and further realisation of the right to privacy.

It is obvious that social control is an instrument of power. The essence of social control is general surveillance, control over the sphere of "taboos", prohibitions, and the fulfilment of duties. On the

one hand, through the mechanism of social control, the ethos of social life is formed, norms of behaviour are sanctioned, and citizens are protected. Social control becomes expansive as social life becomes more complex. However, overly close, "total" surveillance, invasion of personal space and privacy (listening to conversations, visual surveillance, collection of huge amounts of personal data through information technology) have devastating social consequences.

Privacy and secrecy of private life are being devalued. Channels of the information space most clearly demonstrate the negative consequences of violation of the right to privacy. The study of cyber issues allows us to identify specific connotations of the phenomenon of privacy [24-26].

The phenomenon of information security can be called a counter to the violation of the right to privacy, total control over a person. We believe that it fully reflects the risky nature of social reality with its information component and the high degree of vulnerability of personal existence [27-29].

The concept of information security, which "exposes" the problem of the development of the information society with its inherent risks, is important to understand in the socio-cultural context. The security culture is ontologically rooted in the imperative and maxim of "caring for oneself and others". "Self-care" is a way of personal existence. The absence of the ability and imperative attitude to care is evidence of a person's "recklessness" and irresponsibility. At the onto-psychological level, the need for protection and security is determined by the desire for certainty, integrity, reliability, and organisation.

However, the socio-informational reality clearly demonstrates the tendency of "risk-taking". Risk is evidence of the existence of objective and subjective uncertainty of existence [30].

Risk is a characteristic of the objective and subjective side of human activity in conditions of uncertainty, which captures the "ambiguity" of personal and social existence, which does not provide a practical opportunity for social control and the use of security technologies. Ignoring the objective and subjective sources of uncertainty is futile. Satisfaction of the fundamental need for security is associated with a person's desire to avoid risk and regain lost certainty.

Philosophers and psychologists alike have discussed the ontological roots of security and its evolutionary role for humans. Security is the leading need in Maslow's famous pyramid. It implies that a person establishes a reasonable order, as well as a desire to live a better life.

The psychological discourse interprets security as a state of inviolability of individual interests from various threats based on fear of reality. The result of emotional assessments is security from threats.

Sociological and legal discourses understand security as the social context of the subject's existence, which it influences and controls. This situation is called risk conditions. Social activity is a system of interactions between subjects with goal-setting activity and the conditions in which they exist. The goal of the subject is self-realisation and self-reproduction; the goal, understood in the sense of foreseeing the result, means an opportunity. The embodiment of the possibility in reality is carried out under certain conditions, in a certain situation by transferring the subject's activity to the object (subject). The security of activity is ensured by the ability of the subject to control the conditions of its existence in the process of self-realisation and self-reliance.

The political science discourse today emphasises that the modern information sphere consists of two components: information and technical and information and psychological. Information security is defined as the state of security of the information environment, which is achieved through the implementation of an appropriate set of information security management measures, which can be represented by policies, methods, procedures, organisational structures and software functions.

Information protection is considered as an activity related to the prevention of information leakage, as well as the prevention of unauthorised and unintended impacts on it. Information security is the protection of confidentiality, integrity and availability of information. Preservation of information resources and protection of legal rights of individuals and society ensures information security of

social entities (individuals, the state, and society). Information security is a fragment of personal security [29, 31-32].

As a socio-philosophical concept, security is considered in the context of the paradigm of society as a system of laws of its functioning and development, in relation to its specific social, political, cultural and historical realities. In view of this, a comprehensive study of the "individual-society-state" complex, in particular, the protection of individual freedom and private existence in the information space, is a key issue in the study of security. Security is a set of the most favourable conditions for the subject to control his/her own life and values, which allows to ensure the integrity of personal and social existence. The exercise by a subject of freedom and the right to privacy, as the ability to control the conditions of his/her own existence, is a guarantee of his/her security.

However, the modern information reality and the latest information technologies can stimulate violations of individual rights and freedoms, the boundaries of privacy and personal data, which is an additional threat to the existence of the individual and his or her integrity. The phenomenon of information security should act as an "antidote" to these threats.

Thus, the concept of "security", including information security, indicates multidimensionality, ambiguity, contextual "filling" with social content, openness to interpretations of this concept in solving social problems, in particular, the problem of privacy as a sphere of private existence and the right to it.

In the domestic social and legal realities, the ethical and legal problem of personal data protection clearly demonstrates the fact of invasion of the private sphere and violation of the boundaries of social control. This problem goes back to the global problem of denial of traditional ethics, moral pluralism with its "conventions", norms, and prohibitions in the virtual network space. The ethical features of virtual space are based on the escape from morality, from the accepted forms of personal freedom and personal responsibility.

According to well-known sociologists, the problem of protecting civil rights and freedoms, including personal data, became more acute after 11 September 2001, which is associated with the onset of the era of total state surveillance. This problem is fundamentally rooted in the global problem of social mobility as a way of organising modern social life, and when almost every movement is accompanied by tracking and control, and no one can be outside the panopticon, as described in detail by domestic researchers I. Kovalenko and co-authors [33-34].

Indeed, information technologies provoke extensive and intensive "digitisation" of each individual, the growing "distribution" of the individual across various databases. "Digital media", "computer-mediated communications", the Internet with all the sites hosted on it; social networks; virtual reality; computer games and animation; digital photos and videos; artistic interactive installations; human-computer interface; digital books, etc. ensure such a division [35, p. 69]. In such a situation, one of the ways to protect personal privacy is to calculate the risks of maintaining its status and protect personal data. Information protection, as the adoption of legal, organisational and technical measures, is aimed at ensuring the protection of information from unauthorised access, destruction, modification, blocking, copying, provision, dissemination, as well as other unlawful actions in relation to such information; maintaining the confidentiality of restricted information; and exercising the right to access information. In accordance with the above restrictions, it can be stated that the protection of information constituting a state secret is carried out in accordance with, for example, the legislation of Ukraine on state secrets regardless of the owner of information resources, and for personal data, the law should only establish the procedure for access to personal data of citizens (individuals).

In addition, it makes sense to talk about the technological problematisation of information security, which applies to all levels of control, in particular when protecting confidential information.

Conclusions

Privacy is a social representation of individual autonomy. It is identified as the ability of a person to differentiate between internal/external individual and personal life, to distinguish between his/her own/other's, private and public existence, to respond to unauthorised actions of the public (social) environment, as well as the ability to behave reflectively to protect the boundaries of personal existence. The phenomenon of privacy, which exposes the boundaries of personal and social being, balances between the individual and social aspects of human life. The reflection and experience of privacy testify to the process of personalisation of the individual, its autonomous constitution, and the reconciliation of identities.

In the twenty-first century, civilisational fractures, technological and other challenges require a responsible attitude to the risks of social realities of privacy and the development of adequate ways to practically implement the human right to privacy. The right to privacy is constitutionally enshrined in the human being.

Modern information and digital technologies, having an ambivalent impact on the freedom and security of personal existence, radically narrow the boundaries of the right to privacy, thereby problematising the structures of human self-identity and generating the experience of insecurity of personal life.

The social problem of information security and personal data protection demonstrates the violation of the right to privacy, which in the era of ultra-fast development of the latest technologies is based on issues related to the acquisition, storage and dissemination of information about a person; to the extent that other people and public authorities have access to this information, and to the ability of an individual to maintain his or her anonymity.

In the context of total surveillance and unlimited social control, the impact of modern technologies, the ontological and axiological "fate" of human existence depends on the social choice of the individual, his or her reflection on the newest risks of social existence and ensuring the right to privacy.

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Significance of the State Registration for the Acquisition of the Real Estate Title

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Abstract

The relevance of the research topic related to the registration of rights to real estate is due to the development of Ukrainian legislation in the field of civil turnover and different approaches to understanding the moment of acquisition of ownership. In writing this article, the author used the instrumental research method and the comparative analysis method, which allowed comparing Ukrainian and German legislative approaches to the acquisition of property rights. The Ukrainian legislation on state registration of property rights and their encumbrances is based on the principle of entry, i.e. introduces a negative title system. State registration is essential for the acquisition of the real estate title and its protection, as it is the final legal fact with which the law links the acquisition of ownership. This is preceded by the conclusion of an agreement, which is the basis for the acquisition of ownership, and therefore the basis for making an entry in the state register of real rights to immovable property and their encumbrances. Since an agreement for the alienation of real estate is subject to notarisation, a notary performs both a notarial act to certify the agreement and a registration act to enter the relevant information into the register. If the agreement on the basis of which the entry was made in the register is challenged, the question arises as to what legal consequences will occur and whether this will affect the ownership of the person in whose name it is registered. This is all the more important if the property has already been alienated by a party to a transaction that has been declared invalid and acquired by a third party who relied on the correctness of the entry in the register. Ukrainian court practice holds that vindication by a person who disputes the real estate alienation agreement and is considered to be the owner of his property is permissible against an acquirer who is unlawfully listed in the register as the owner. The legal regulation of real estate acquisition in Germany is different from that in Ukraine, and therefore the legal consequences of challenging the title to property are different. Under German law, two fundamental principles must be observed when acquiring real estate property: The separation and abstraction principle as well as the public faith of the land register and the protection of bona fide acquisition. According to the principle of separation and abstraction, the sale and purchase agreement (under the law of obligations) and the legal transaction (in rem) for the transfer of ownership are strictly separated from each other. They are also not dependent on each other in terms of their existence. The entry in the land register is only one Part of the legal transaction in rem for the transfer of ownership. The public faith of the land register means that the bona fide purchaser of a right entered in the land register may rely on this entry - even if it is not correct under substantive law. Consequently, a person who proved the invalidity of a sale and purchase agreement is not entitled to vindication but to condictio, as the transfer of ownership is valid. In case of resale of the real estate to a bona fide third party, the original seller is only entitled to a compensation in money: The entry in the land register is of paramount importance to all those who relied in good faith on its correctness, believing that they were entering into an agreement with a person who has the right to alienate the property as its owner.

Keywords: *immovable property; title; state registration of rights; moment of acquisition of rights; property transfer agreement.*

Значення державної реєстрації для набуття права власності на нерухомість

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Анотація

Актуальність тематики досліджень, пов'язаних з реєстрацією прав на нерухомість, обумовлена становленням українського законодавства у сфері цивільного обороту і різними підходами до розуміння моменту набуття права власності. При написанні статті було використано інструментальний метод дослідження та метод порівняльного аналізу, який дозволив порівняти український та німецький законодавчі підходи до набуття права власності. Законодавство України про державну реєстрацію речових прав та їх обтяжень спирається на принцип внесення, тобто запроваджує титульну негативну систему. Державна реєстрація має істотне значення для набуття права власності на нерухоме майно та його захисту, оскільки вона є кінцевим юридичним фактом, з яким закон пов'язує набуття права власності. Цьому передує укладення договору, що є підставою набуття права власності, а відтак – підставою для внесення запису до державного реєстру речових прав на нерухоме майно та їх обтяжень. Оскільки договір про відчуження нерухомості підлягає нотаріальному посвідченню, то нотаріус вчиняє і нотаріальну дію з посвідчення договору, і реєстраційну дію – внесення відповідних відомостей до реєстру. При оспоренні договору, на підставі якого було внесено запис до реєстру, виникає питання про те, які правові наслідки матимуть місце, і чи вплине це на право власності особи, за якою воно зареєстроване. Це має тим більше значення, якщо нерухомість уже була відчужена стороною правочину, визнаного недійсним, і набута сторонньою особою, яка покладалась на правильність запису в реєстрі. Українська судова практика дотримується позиції про допустимість віндикації особою, яка оспорює договір відчуження нерухомості та вважається власником свого майна, від набувача, який неправомірно значиться в реєстрі як власник. Правове регулювання Німеччини відносин з набуття нерухомості принципово відрізняється від українського, а тому різняться й правові наслідки оспорення титулу права на майно. За німецьким законодавством, крім договору купівлі-продажу, який є зобов'язальним правочином, укладається й речовий договір з передання нерухомості, який також посвідчується нотаріально. Крім того, нотаріус посвідчує заяви відчужувача та набувача нерухомого майна про внесення запису до реєстру прав. Це дозволяє майже унеможливити випадки оспорювання як запису в реєстрі, так і договору, на підставі якого відбувся перехід права власності на нерухомість. Проте навіть у випадку, якщо це було б гіпотетично можливо, особа, яка довела недійсність договору купівлі-продажу, не має права на віндикацію, оскільки запис в реєстрі має першочергове значення для всіх, хто покладався на його правильність, вважаючи, що укладає договір з особою, яка має право на відчуження цього майна як його власник.

Ключові слова: *нерухоме майно; право власності; державна реєстрація прав; момент набуття права; договір передання майна.*

Introduction

To acquire the real estate title, the law requires its state registration. Accordingly, both at the stage of creation of property and during its turnover, as well as in case of destruction of property or waiver of rights to it, it is necessary to make a corresponding entry in the register of real rights to immovable property (hereinafter – the Register) about the person who has the right to own this property. This raises questions about the significance of state registration of real rights to immovable property and their encumbrances (hereinafter – Registration of rights) as a legal fact in the legal structure, the moment of acquisition of the real estate title, the possibility of challenging the right registered in the register for one person by another person and the legal consequences of this, establishing an appropriate way to protect persons involved in legal relations on acquisition and change of ownership, etc. The issues arising from the application of the rules on acquisition of the real estate title and

registration of rights to it are actually numerous and their range is constantly expanding. This is especially evident when it comes not to the acquisition of the real estate title per se, but to mortgages or the recognition of a real estate transaction as invalid, or if the real estate was sold at auction to enforce a court decision, or if the real estate is subject to state ownership, and etc.

It is impossible to cover and analyse the entire range of issues related to registration of rights in this article, so we will focus on the first two. The main issue is whether registration of rights is a fact establishing or confirming the right. The Art. will provide a comparative analysis of the acquisition of property rights under the German and Ukrainian legal orders, as well as the ways to protect the rights of a person who considers his or her right to real estate to be violated and the entry in the register to be untrue. The Art. consists of two parts, the first analysing the legal mechanism of acquisition of ownership under German law, and the second – under Ukrainian law.

The purpose of the Art. is to analyse the significance of the state registration for establishing the moment of acquisition and termination of the immovable property title.

The Art. will address the following issues: characteristics of state registration of real rights to immovable property as a legal fact; determination of the moment of acquisition of ownership in the laws of Ukraine and Germany; legal consequences of making an entry in the register and establishing the absence of grounds for such an entry.

Problem solving stage

Civil lawyers are cautious about studying the importance of state registration for the acquisition and termination of the real estate title, perhaps because in Ukraine there is still an approach to sectoral studies – civil law and public law. Since registration of rights falls outside the scope of civil law regulation, its study is almost ignored. Among those who have touched upon this topic are O. Korovaiko [1], Ya. Tamaria [2], O. Martyniuk [3], N. Maika [4], V. Djafarova [5], D. Spyesivtsev [6], O. Letnieva [7], V. Kysil [8] etc. It has repeatedly been the subject of our scientific research [9-12]. At the same time, the issues related to the registration of rights to real estate have become more acute due to the legal positions of the Grand Chamber of the Supreme Court (hereinafter – the GC SC). This applies not only to the moment of acquisition of the real estate title, but also to the ways of protecting a person's rights to property due to a disputed entry in the register.

The state of development of the issues under study in the German doctrine is provided in the text of this article.

Materials and Methods

The Article uses a number of scientific methods which made it possible to analyse the issues of acquisition of property rights and identify the key questions, the answers to which allow us to understand the causes of problems in the law enforcement practice of Ukraine. The author used the instrumental research method, which is based on the view of legal norms as a means of achieving certain goals driven by certain economic and social needs. Accordingly, an objective assessment of the legal regulation mechanism, including the legal positions of the Supreme Court, is possible from the standpoint of the extent to which this mechanism ensures or is capable of ensuring the achievement of the goals set when regulating relations on acquisition of property rights. In particular, this concerns the stability of civil turnover, the security of property rights and, in general, compliance with the approach to ensuring the right to peaceful ownership of property.

The Article uses the comparative method and the method of comparative analysis, and also applies a comparative approach to identify the key principles of adequate legal regulation of the transfer of ownership and the place of state registration in the legal mechanism for acquiring this right. By comparing the Ukrainian and German approaches, and taking into account the well-established experience of German law, which has proved to be effective in that litigation over challenging entries in the real estate registers is almost non-existent in German courts, it became possible to identify the mistakes made by Ukrainian court practice.

Results and Discussion

I. Transfer of the title under Ukrainian law

History of the issue; consequences of legal regulation of registration of rights to real estate and transactions with it

The current Ukrainian realities prove certain complications of the significance of registration, which was formed in the second decade of the 2000s. Therefore, first of all, we should give a brief historical overview of the regulation of registration of rights to real estate.

– Prior to the adoption of the Civil Code of Ukraine (hereinafter – the CCU) in 2003, the Civil Code of the Ukrainian SSR (1963) did not require registration of rights to real estate (and did not contain such a concept at all), but only provided that the buyer should register the residential building with the technical inventory bureau.
– Articles 182 and 210 of the CCU provide for state registration of rights to real estate and transactions with real estate. Moreover, Art. 182 of the CCU only states that ownership (and other actions and rights) to real estate *are subject* to state registration. And Art. 334 of the CCU states that state registration is required at the time of acquisition of ownership.
– With the adoption of the Law of Ukraine of 2004 "On State Registration of Real Property Rights and Encumbrances" [13] the title to the real estate shall be registered, which follows from its name. However, before this Law came into force (from 03.08.2004) the Temporary procedure for *state registration* of transactions was in force, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 671 dd. 26 May 2004 (expired on 1 January 2013) [14]. According to this bylaw, transactions, not rights, were subject to registration. In other words, despite the adoption of the said Law, registration has not changed.
– Changes in approaches to state registration occurred only with the adoption of the Resolution of the Cabinet of Ministers of Ukraine "On State Registration of Real Property Rights and Encumbrances" dd. 25 December 2015 No. 1127 [15], which already refers to the *registration of the* real estate title.
– Therefore, two points are noteworthy. First, at the level of law (the CCU and the 2004 Law of Ukraine "On State Registration of Real Rights to Real Estate and Their Encumbrances"), it was established that ***a right*** is *subject to registration*. Instead, at the level of a subordinate legal act, it was established that a ***transaction*** *is subject to registration*. As a result, real estate transactions were subject to registration for a certain period of time, and later real estate ownership became subject to registration. Secondly, all the time before the adoption of the CMU Resolution "On State Registration of Real Property Rights and Encumbrances", transactions were registered, but the right was not registered, and the register did not contain information on the ownership of previously acquired property. The adoption of the CMU Resolution did not clearly and unambiguously regulate how the register of transactions should be handled and whether the information should be entered into the register of rights accordingly. Ukrainian law did not contain a requirement to enter the relevant information into the register of rights, and there were no negative consequences for persons who registered transactions and did not subsequently register their ownership. However, controversial situations arose, and different positions were expressed not only by the GC SC [16], and even by judges of the GC SC in separate opinions [17] (2020). In other words, the echo of changes in the legal regulation of registration of rights and transactions is still being heard today.
As a result, the register of rights was formed anew, and the information in it did not correspond to the proper rights to real estate that arose before 2015.

Cases where Ukrainian legislation bypasses the issue of regulating the acquisition of the real estate title without linking it to state registration

There are other reasons why the information in the register of rights is not true, such as the *acquisition of rights to immovable property as a result of a prescription of the law in the cases specified in it.*

The first example is the acquisition by a member of a cooperative of ownership of an apartment in a housing cooperative building, a garage in a garage cooperative or a garden house in a garden cooperative, subject to payment of their value.

This was envisaged back in 1991 in the Law of Ukraine "On Property" [18] (Art. 15). The CCU of 2003 has a similar provision (Part 3 of Art. 384), which states that a member of a housing cooperative becomes the owner of an apartment in case of its redemption. Little is clear from this provision, since, firstly, it refers only to *the condition* and *not to the moment of acquisition of* ownership of the property. Secondly, it refers to redemption, the concept of which does not exist in the CCU, and one can only assume that it means payment of the apartment price or payment of share contributions. In addition, this provision narrows the range of similar opportunities for members of other cooperatives, such as garage and gardening cooperatives, as was the case in the Law of Ukraine "On Property".

Therefore, the fact that a member of a housing cooperative paid the cost of an apartment in a housing cooperative building can hardly be perceived as the legislator allowing a situation where the acquisition of ownership of an apartment is associated not with the state registration of the right to it, but with the final settlement between the housing cooperative and its member. Therefore, it is quite possible to believe that even in the absence of a clear and unambiguous indication in the CCU of the moment of acquisition of ownership of an apartment in a housing cooperative building, the general rule should apply that such moment is the state registration of the right to an apartment by a member of the housing cooperative who has purchased the apartment.

The situation is more complicated with the acquisition of the real estate title by way of inheritance. There are two levels of difficulty. The first one is when an heir inherits real estate from an heir who has permanently resided with the testator and has inherited passively (Part 3 of Art. 1268 of the CCU [19]); the second – in case of inheritance by minor and underage children (Part 4 of Art. 1268 of the CCU), who are considered to have accepted the inheritance unless their legal representatives refuse to accept it. In both cases, acceptance of the inheritance took place, and therefore, legal succession took place. Therefore, logically, the heir as successor has already acquired the property right. However, he is obliged to apply to a notary and obtain a certificate of inheritance (Art. 1297 of the CCU), although this obligation is not of a civil nature. Moreover, the legislator deliberately avoids regulating the moment of acquisition of the real estate title by inheritance, and in 2013 excluded Art. 1299, which regulated this issue, from the CCU. Therefore, it is not clear from the CCU when the heir becomes the owner – either upon the expiry of the six-month period for acceptance of the inheritance if he did not apply to a notary (the heir who lived with the testator) or could not apply in principle (a minor child), or when he received a certificate and the relevant information was entered into the register.

Thus, it can only be stated that Ukrainian legislation allows for cases of existence/acquisition of the real estate title without state registration of the right, at least this is not mentioned in the CCU.

It seems that in these cases, no exception should be made to the general rule that the acquisition of ownership is associated only and exclusively with the entry of the relevant entry in the register, as rightly noted in the literature [20; 21]. If the heir does not make an entry in the register (does not receive a certificate of inheritance), he does not become the owner, and his right to the inherited property should be characterized as possession, and in case of disputes, the protection of the right to peaceful enjoyment of property should be applied. This will allow both to protect the rights of such persons and not to destroy the general approach to the meaning of the register, and in case a person who peacefully possesses the inherited property applies for the acquisition of the title of owner by entering information in the register, he or she can always do so, since he or she has exercised the right provided for in the CCU to actually accept the inheritance.

Algorithm for acquiring the real estate title under Ukrainian law

It is well known that in order to acquire a right, a legal fact is required to give rise to that legal consequence. To acquire the real estate title, a legal fact is required, which differs depending on the

basis on which ownership is acquired - whether it is for an apartment in a built-up building, or in the case of acquisition under a contract, or by inheritance, or pursuant to a court decision and sale of real estate at a public auction. In all of these cases, the legal composition includes the action that serves as the basis for the acquisition of ownership (contract, inheritance, etc.), and the last legal fact will always be the registration of the real estate title [22].

However, such a universal scheme was not accepted in Ukrainian court practice for a long time. In numerous cases, the Supreme Court has stated that *the fact of title is not the state registration of a right itself, but a contract* or other transaction. And there is no objection to this, because registration must have a basis, and this basis must be provided in order to enter information into the register. As a result, it is pointless to challenge the entry in the register itself – it is necessary to challenge the grounds on which the entry appeared.

Instead, none of this concerns the importance of state registration as a fact that is associated with the moment of acquisition of ownership - only with it, and not with the conclusion of an agreement or its certification. This has already been clearly established by the legislator by amending in 2024 Part 2 of Art. 3 of the Law of Ukraine "On State Registration of Real Rights to Real Estate and Their Encumbrances", which states that real rights to real estate, an object under construction, a future real estate object and their encumbrances, which are subject to state registration in accordance with this Law, arise, change and terminate *from the moment of such registration* [23]. At the same time, no changes were made to clause 1 of Part 1 of Art. 2 of this Law, which defines state registration of real rights to immovable property and their encumbrances as official recognition and confirmation by the state of the facts of acquisition, change or termination of real rights to immovable property, encumbrances of such rights by entering the relevant information into the State Register of Real Property Rights. In other words, the legislator sees no discrepancy between the definition of state registration and the moment of acquisition of ownership of real estate. And this logically follows not only from the meaning of state registration, but also from the rules of law that preceded the Law. In particular, Part 4 of Art. 334 of the CCU previously established that rights to real estate subject to state registration arise from the date of such registration in accordance with the law.

Nevertheless, for a long time the Supreme Court has not only perceived, but generated this discrepancy, insisting that since state registration is defined as the official recognition and confirmation by the state of the facts of acquisition of property rights, this means that a person's right has already arisen before state registration and does not depend on its state registration. Somewhat similar is the case in French law, which requires proof of ownership of land, and therefore proof of possession or ownership, as registration of title is not used for this purpose [24]. The situation is similar under Polish law, according to which an entry in the land register is declarative. Therefore, registration has rather an explanatory effect, which consists mainly in recording information on the acquisition of ownership. This approach raises the question of whether it should be retained or replaced by the rule of constituent entry [25]. At the same time, Polish researchers are concerned with the public reliability of land registers, which is considered one of the fundamental principles of the Polish land registry system [26].

This interpretation of the Law has led to a number of court decisions over the past five years, in which the courts have relied on the fact of entering into a real estate contract rather than the fact of state registration and, accordingly, have considered the buyer under the contract to be the owner, rather than the person indicated in the register as the owner.

This interpretation was incorrect, and the decisions made on the basis of this legal position are illegal. The incorrectness of this interpretation is also evidenced by the fact that in other similar cases, where a legal provision requires state registration of a right, the acquisition of this right is linked exclusively to registration, and not to the existence of a basis for registration. For example, Part 1 of Art. 462 of the CCU states that the acquisition of intellectual property rights to an invention and utility model is certified by a patent, and to an industrial design by a certificate. However, hardly anyone would dare to argue that intellectual property rights to these objects arise before or regardless of the grant of a

patent. The court practice has not interpreted that the term "the right ... is certified" means that the right has already arisen and is only certified by the patent. Of course, this is nonsense. Meanwhile, the Ukrainian Supreme Court has not been upset by such nonsense in the area of acquisition of property rights.

Significance of the state registration

The significance of the state registration is to ensure that the information in the register is true and can be relied upon for the purposes of real estate turnover – the acquisition of rights to it [27].

State registration of rights is important not only for the acquisition of property rights, but also for other private law relations (protection of the rights of persons living in housing, for lending, etc.), as well as public law relations – for taxation, in the context of measures to prevent corruption, etc. Therefore, the area in which state registration of rights becomes crucial is very broad, and a brief classification of the areas in which it is used indicates the mega importance of addressing these issues in private and public interests. As such, we can point to the following: a) determination of the proper subjects of real estate rights (which is necessary for its disposal, taxation, control by authorized bodies, including environmental protection measures); b) establishment of the proper object for real estate transactions (not only its material characteristics, but also the rights of other persons to it, and therefore the encumbrances that the real estate owner has), and in certain cases - the emergence of such an object (in the case of unfinished real estate) c) the type of registered right, its scope, the moment of acquisition, change and termination, which is important for the acquirers both in general and for risk assessment; d) the possibility of forecasting real estate markets and budget revenues; e) the impact on unauthorized construction, etc. Each of these areas is worthy of an in-depth professional study. In this article, we will limit ourselves to the following fundamental aspects, such as the importance of state registration for the acquisition of ownership of real estate.

Accordingly, if ownership of real estate is acquired on the basis of information contained in the register, the acquirer should be considered bona fide and his right cannot be challenged.

German Professor Wieacker points out that while the protection of the state of peace is left to the physical possession of the real estate (§§ 854 et seq. of the GCC), the legitimation and transfer functions of the old Gewere have been transferred to the Land Register [28].

How to resolve disputes over registered rights to the real estate

Ukrainian court practice shows that it is difficult to resolve disputes arising when a buyer or a lender relied on the data in the register when entering into a mortgage agreement, and subsequently a person not listed in the register as the owner proved or tried to prove that he or she had ownership of the real estate that was the subject of the relevant sale and purchase or mortgage agreements. In this case, the courts hesitate between the protection of the owner's rights (if the person proves that the entry in the register on the right of another person to the property appeared without any basis, and in fact he is the owner of the property) and the right of a bona fide purchaser [29] or bona fide mortgagee.

The GC SC gave preference in the protection of rights to a person whose ownership of the property was not in the register, but who, in the court's opinion, was the owner of the real estate [30]. Another person, identified in the register as the owner, entered into a mortgage agreement to secure the performance of the loan agreement, and the mortgagee intended to foreclose on the property. As a result, the mortgagee found itself in a position where its claim was not satisfied by the court because the mortgaged property did not belong to the mortgagor, but to another person.

Reflecting on these and similar circumstances, which indicate that the registry data does not play the role for which the registry exists, two emphases should be made. The first is the significance of the register of rights to real estate as publicly reliable information, which is guaranteed by the state. The second is that those who rely on the information in the register are bona fide participants in civil legal relations (purchasers, mortgagees).

Therefore, good faith is alpha (A) and omega (ƻ) in civil legal relations [31]

Therefore, bona fide buyers or mortgagees should not be allowed to bear the negative consequences of the fraud of others. According to all the canons of civil law, negative consequences are incurred by the offender. Therefore, in any case, it is necessary to find out who committed the offence. It may be a party to a contract that has defects and therefore has grounds for invalidation, or a registrar who has not fulfilled his or her duties in good faith when making an entry in the register, or it may be a state or local government body on the basis of an act of which such an entry was made in the register. The court must check all these links for the good faith and legality of the actions of the relevant persons, officials or bodies.

Indeed, there is a dilemma when deciding who to protect: a person who has every reason to believe that he or she is the owner or a bona fide mortgagee, as both suffer negative consequences due to unlawful actions of third parties. Instead, these third parties themselves are left out of the dispute over the protection of the rights of the persons related to the disputed property – the owner and the mortgagee. This is a violation of the principle of justice – the second important principle of civil law.

The protection of the owner's right seems fair, but it is unfair that the rights of a bona fide mortgagee are unprotected. Therefore, in this situation, such a way of resolving the dispute indicates a lack of balance. Preferring to protect the rights of a person whom the court considers to be the owner in the absence of a relevant entry in the register, and vice versa, refusing to protect the rights of a mortgagee in the presence of an entry in the register of his right, leads to the conclusion that the entry in the register is unreliable and threatens to put those who relied on this entry at a disadvantage. The infringer, on the other hand, remains completely free from the consequences that result from the violation of the owner's rights caused by him. The violator may be a criminal who forged documents for making an entry in the register or for notarizing a property alienation agreement, or it may be a public authority or local government body that issued the decision on the basis of which the entry was made in the register. In all such cases, it is they who should bear the negative consequences. After all, it was their actions that provoked further violations – entering incorrect information into the register, and then entering into a mortgage agreement, which led the mortgagee to believe that the loan was secured, relying on the register data.

Therefore, it is hardly fair and reasonable to exclude from the zone of threat of prosecution the state or local government body that made the unlawful decision on the basis of which the entry was made in the register and/or the person who provided false information for making such an entry. After all, the registration of rights to real estate is regulated by public law and is under the control of state authorities, which is generally recognized [32]. They should be held liable to a bona fide mortgagee who may demand from them, in the event of the debtor's failure to pay the loan agreement, to repay his debt, since it became impossible to foreclose on the mortgaged property due to their unlawful actions.

The situation becomes more complicated if it is impossible to bring to justice the person whose unlawful actions resulted in the entry in the register as a result of his or her death, and if it is established that there are no grounds to consider the decision of the state or local government body on the basis of which the entry was made in the register to be unlawful. It seems that in these cases, it would also be unfair to impose negative consequences on a bona fide mortgagee and assume that there was a mishap. If the state has guaranteed the accuracy of an entry in the register, it must be consistent and take on the negative consequences of an incorrect entry.

Conclusions

The approach to the significance of state registration of rights should be universal for all civil legal relations – acquisition of property rights, mortgage relations, corporate relations, etc.

Neglecting the importance of state registration as a fact that is associated with the moment of acquisition of property rights is unacceptable, otherwise it will lead to a complete collapse in civil turnover and protection of the rights of bona fide persons.

The basis for the acquisition of ownership is a contract/transaction, not state registration, but only state registration should be the moment of acquisition of ownership.

If legally significant actions have been taken in reliance on the data in the register, the negative consequences should not be for the person who acquired the right to the property (buyer, mortgagee), but for the person or public authority whose actions led to the incorrect data on ownership in the register. At the same time, the mortgagee or buyer who relied on the register data acquires the right to real estate (ownership or mortgage), and the person whose right to real estate is violated is entitled to full compensation for its value.

II. Transfer of Ownership of Movable and Immovable Property under German Law

1. Different principles of the transfer of ownership

Principle of separation – principle of unity (Trennungsprinzip – Einheitsprinzip)

The question of separation – unity is about whether the obligation and the disposal legally form a unit or whether they are two separate contracts.[1]

a) Principle of separation

Under German law, both transactions – obligation and performance – are independent legal transactions that are clearly separated from one another. Both are contracts, but with different content.[2]

aa. Obligation[3]

Only rights and obligations are created by the obligation contract.[4] The best-known example is the obligation of the seller to transfer the item and the obligation of the buyer to pay the purchase price. Conversely, the buyer has a claim to the transfer of ownership of the item and the seller has a claim to the transfer of the money.[5]

bb. Performance

A right is transferred, encumbered, amended or revoked by means of the performance.[6] The legal situation in rem is changed by the performance to fulfill the claims from the obligation. It is a contract under property law.[7] The performance therefore has a double effect:[8]

– Fulfillment of the claims from the obligation contract: The claims and obligations from the obligation contract are fulfilled by the performance. Using the example of the performance of the purchase contract, this is the transfer of ownership of the item by the seller and the transfer of ownership of the money by the buyer. The performance is therefore also referred to as a "fulfillment transaction".

– Change in the legal attrribution of the item: Ownership of the object of purchase is transferred from the seller to the buyer. Similarly, ownership of the money is transferred from the buyer to the seller. This is why the disposal transaction is also called a "property law" or "in rem" legal transaction.[9]

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1 Soergel/Stöcker, p. 413.
2 Prütting, margin number 28, p. 18 f.
3 Other terms are "contractual" or "obligatory" legal transaction, Prütting, margin number 28, p. 18.
4 Prütting, margin number 28, p. 19.
5 Soergel/Stöcker, p. 412.
6 Medicus/Petersen, margin number 25, p. 13.
7 Prütting, margin number 28, p. 19.
8 Soergel/Stöcker, p. 413.
9 Prütting, margin number 28, p. 18.

This is, for example, the transfer of ownership of the object of purchase in order to fulfill the obligation arising from the purchase agreement: Two obligations arise from the purchase agreement:

– After conclusion of the purchase contract, the seller is obliged to transfer ownership of the purchased item to the buyer.

– At the same time, the buyer is obliged to pay for the purchased item, i.e. to transfer ownership of the money to the seller.

The transfer of ownership of the purchased item and the transfer of ownership of the money are each carried out by means of separate performance transactions. These performance transactions are carried out to fulfill the obligations arising from the obligation transaction.

The transaction for the transfer of ownership[10] (*Übereignung*) consists of two parts: The agreement in rem (*dingliche Einigung*) on the transfer of ownership and an element of publicity[11]: In the case of movable property, the handover (*Übergabe*),[12] in the case of real estate, the entry in the land register.[13]

b. Principle of unity (*Einheitsprinzip*)

Other legal systems follow the principle of unity.[14]

The purchase agreement not only creates the obligation to transfer ownership and to pay the purchase price: The purchase agreement also brings about the change in title at the same time: ownership of the object of purchase and the deposited purchase price are transferred upon conclusion of the purchase agreement.[15]

2. Principle of causality – principle of abstraction (*Kausalitätsprinzip – Abstraktionsprinzip*)

If one follows the principle of separation, then the relationship between the two *separate* contracts (obligation – performance) must be clarified. This is done using the concepts of causality and abstraction.[16]

a. Principle of causality

The term "causality" (*Kausalität*) originates from the *causa*[17] of Roman law. Roman law understood this to mean the legal reason for the (property law) change in the legal attribution of an object or a right.[18] Austrian law, for example, follows this principle.

The causal principle states that a performance of property cannot be made per se, but only on the basis of a reason recognized by the legal system. In other words, the transfer of property rights must be based on a valid title (legal ground, *Rechtsgrund*, *causa*).[19] Neither the reason for acquisition (the obligatory transaction) nor the method of acquisition (the transaction of performance) on their own, but only both together bring about the transfer of ownership.[20]

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10 The purchased item and the money.

11 The change in the absolute right of ownership should be externally recognizable in the interest of secure legal transactions; Prütting, margin number 371, p. 162.

12 The procurement of direct possession.

13 Prütting, margin number 371 - 374, p. 162 - 164; margin number 354 - 358, p. 155 - 157.

14 Also referred to as the consensus principle, Baur/Stürner, § 5 margin number 42, p. 56.

15 Baur/Stürner, § 5 RN 42, p. 56. Soergel/Stöcker, p. 413 with an example from Polish law. On the principle of separation or unity in French law Stadler, p. 29 - 31.

16 Soergel/Stöcker, p. 414.

17 On the causa: Zwalve/Sirks, pp. 273-276.

18 Soergel/Stöcker, p. 414.

19 Thus for Austrian law: Heindler, RN 54, p. 18. The title is the obligatory legal transaction (transaction of obligation). The title is not the agreement on the transfer of ownership (transaction of performance), ibid.

20 For Austrian law: Gschnitzer, p. 100, no. 1

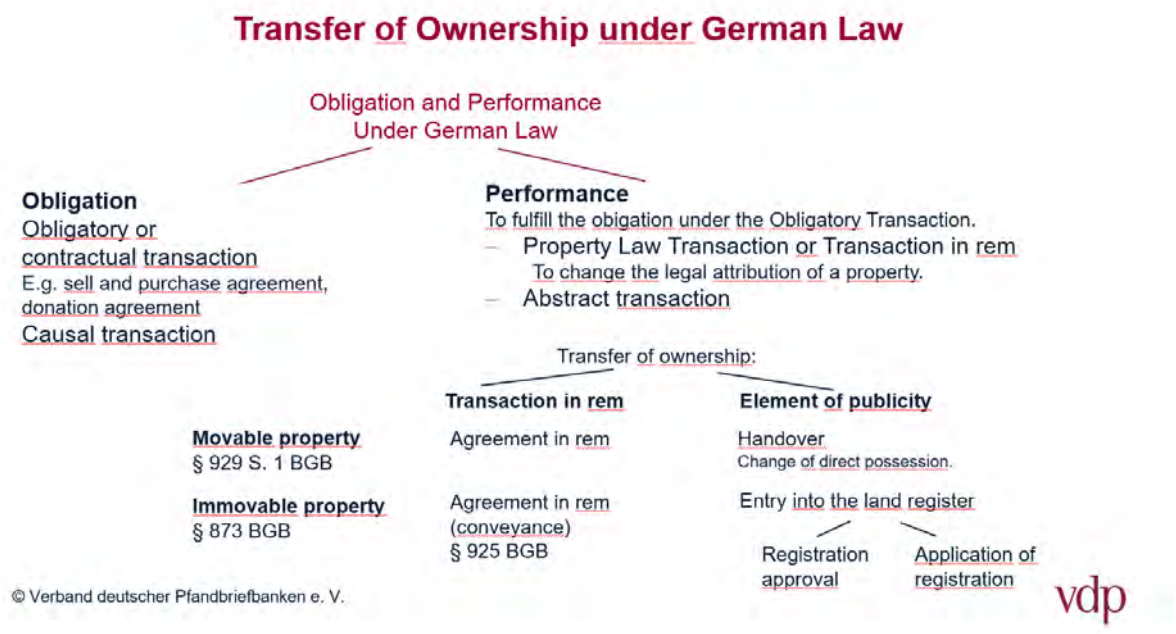
If the title (*causa*) is invalid or is revoked retroactively (*ex tunc*), the right in rem ceases to exist retrospectively. In other words, the lack of title prevents the transfer of rights and what has been transfered can be reclaimed on the basis of property law.[21] In simple terms: The transferor – e.g. the seller - has never lost his ownership and can therefore, as the owner, demand the return of the item from the purchaser (vindication).

b. Principle of abstraction

In contrast, the principle of abstraction applies in German law: the validity of the transaction under property law, e.g. the transfer of ownership, remains unaffected if there is no valid *causa*.[22]

If the principle of abstraction applies, the validity of the transaction under the law of obligations and the performance under the law of property (in rem) must be considered separately: Thus, the ineffectiveness of the obligation[23] does not result in the ineffectiveness of the performance; however, claims for restitution (condiction, *Kondiktion*) of the object[24] and the money[25] may arise.[26] If the transaction of performance is ineffective[27], the claims arising from the obligation remain in force.[28]

The implementation of the principle of separation and the principle of abstraction in German law is a constructively complicated choice. However, the effects protect legal and commercial transactions through the clear attribution of ownership through the constitutive publicity act - the handover or the land register entry.[29]



[21] Heindler, margin number 55, p. 18.
[22] Soergel/Stöcker, p. 414.
[23] E.g. the purchase contract.
[24] Of the object of purchase.
[25] Of the purchase price.
[26] This will be explained in detail in section C.
[27] Example: A sells B a car (obligation). The purchase contract is valid. A then transfers ownership of the car to B to fulfill the purchase contract (performance). It later transpires that the performance is void. This means that ownership has not been transferred. A is still the owner. However, A is still obliged under the purchase agreement to transfer ownership of the car.
[28] Soergel/Stöcker, p. 412 - 415.
[29] Baur/Stürner, § 5, margin number 42, p. 57.

III. The acquisition of ownership of movable property under German law

Under German law, the transfer of ownership of movable property under property law requires agreement (*Einigung*) and handover (*Übergabe*) (§ 929 BGB), the so-called transfer of ownership (*Übereignung*). [30]

1. Agreement (Einigung)

The agreement is a contract in rem in which the contracting parties agree that ownership of a specific object is to be transferred to the purchaser. The agreement must relate to a specific object.[31] The agreement is called "in rem" because it is intended to bring about a change in the legal situation in rem.[32]

In the case of movable property, the agreement is not bound to any form and in practical legal transactions is not usually expressed in words at all, but is tacit.[33]

The abstract nature of the transfer of ownership, i.e. the independence of the existence and effectiveness of the causal transaction (*Kausalgeschäft*),[34] exists for movable as well as immovable property.[35]

2. Handover (Übergabe)

According to § 929 sentence 1 of the German Civil Code (BGB, *Bürgerliches Gesetzbuch*), the transfer of ownership of the movable property requires not only an agreement but also a handover of the property, i.e. a change of direct possession.[36] The transfer requires a change of direct possession that is intended by both parties.[37] This handover is the act of publicity (*Publizitätsakt*) for movable property.

B. The acquisition of ownership of immovable property under German law

Under German law, the transfer of ownership of a (immovable) property also requires a performance transaction. As with movable property, this transaction consists of an agreement in rem and an act of publicity (*Publizitätsakt*).

However, there are special regulations for the agreement in rem (*Einigung*) of real estate. Publicity is also established for real estate through entry in the land register (*Grundbucheintragung*). In the case of movable property, this takes place through possession.

I. Significance of the land register (*Grundbuch*)[38]

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30 Prütting, margin number 371, p. 162.

31 Prütting, margin number 372, p. 163. This is an expression of the principle of certainty (*Bestimmtheitsgrundsatz*) and the principle of specialty (*Spezialitätsprinzip*) in German law, ibid.

32 E.g. the transfer of ownership of the purchased item from the seller to the buyer.

33 Prütting, margin number 372, p. 163.

34 E.g. the purchase contract.

35 Prütting, margin number 373, p. 163.

36 Prütting, margin number 375, p. 164.

37 Prütting, margin number 376, p. 165. In most cases, this is done by handing the object over to the acquirer, ibid.

38 On the land register systems in Europe and some non-European countries: This is dealt with in detail by the Round Table on Security Rights over Real Property (*Runder Tisch Grundpfandrechte, RTG*):
app.vdpgrundpfandrechte.de - Questionnaire - Chapter II - Public Disclosure Requirements and Protection of Trust – passim.
In this database, the Round Table on Security Rights over Real Property at the vdp (RTG) makes the results of its work known to the public. In the RTG, experts from over 35 countries in Europe, Japan and North America examine and compare the dogmatic foundations and practical use of security rights over real property in various countries.

1. Structure of the land register

Legal relations and business require a large number of transactions in rem for the purpose of transferring existing rights, establishing new rights or terminating existing rights. One of the necessary foundations of secure legal transactions is the certainty that the contractual partner with whom a performance is agreed is the true beneficiary. In the case of real estate law, the land register serves this purpose as a public register of the legal relationships in rem of the property.[39]

It is therefore not surprising that the state declares the registration of real estate and the legal transactions affecting it to be a matter for which it is responsible.[40]

The land register implements the principle of publicity (*Publizitätsprinzip*) in real estate law: In order to be effective, a legal transaction must be entered in the land register (§ 873 BGB).[41] Neither the BGB nor the Land Register Regulations (*Grundbuchordnung,* GBO) contain a statutory provision specifying which rights and legal relationships can be registered. When determining the group of rights that can be registered in accordance with § 892 BGB, one must therefore start from the purpose of the land register, which is to represent the legal relationships to land.[42]

The following, in particular, are eligible for registration:[43]

– Ownership (*Eigentum*) of the property (*Grundstück*) and rights equivalent to real property (*grundstücksgleiche Rechte*);[44]

– limited rights in rem (*beschränkte dingliche Rechte*) to real estate;[45]

– Restrictions on performance (*Verfügungsbeschränkungen*) and prohibitions on acquisition (*Erwerbsverbote*).

2. Protection of good faith (Schutz des guten Glaubens) in the land register

An inaccuracy in the land register can occur for the following reasons, for example:

– Incorrect action by the land registry;

– legal changes outside the land register (e.g. inheritance);

– nullity of a legal transaction in rem.

The activities of the Round Table were most recently described by Stöcker/Stürner, passim and Lassen/Seeber, passim (in comparison with other approaches to comparing mortgage law regulations).
About the Round Table: https://www.vdpgrundpfandrechte.de/en/.

39 Prütting, RN 204, p. 89 f. For the foundations and historical development of the concept of the "land register", see Brinkmann/Schmoeckel, passim and Nossek, passim.

40 Baur/Stürner, § 14 margin number 2, p. 167 f.

41 Baur/Stürner, § 14 margin number 11, p. 170.

42 Baur/Stürner, § 15 margin number 28, p. 178.

43 Baur/Stürner, § 15 margin number 29 - 34a, p. 178 - 180; see also Baur/Stürner, § 19 margin number 6, p. 236 f.

44 These are rights that are treated like real estate: They can be sold and encumbered like immovable property. Examples are
- the heritable building right (*Erbbaurecht*). The beneficiary of the heritable building right can physically erect a building on someone else's land plot; legally the building is erected on the heritable building right. This is a special regulation: In principle, under German law, the owner of the land plot is also the owner of the erected building (*superficies solo cedit*).
- residential property (*Wohnungseigentum*). However, this is disputed: the prevailing opinion does not see residential property as a right equivalent to real property, but as "real ownership" (*echtes Eigentum*).

S. Baur/Stürner, § 15 margin number 26, p. 177 f.; overview: Baur/Stürner, § 3, margin number 46, p. 31.

45 These are rights of use and exploitation that are "split off" from ownership. Examples are easements (*Dienstbarkeiten*) or mortgages (*Grundpfandrechte*). See Baur/Stürner, § 3 margin number 35 - 41, p. 27 f. Under German law, liens (pledges, charges) on movable and immovable property are always rights in rem; Baur/Stürner, § 3, margin number 46, p. 31 (Übersicht).

The entries in the land register are initially presumed to be correct (§ 891 BGB). This applies in two directions: A registered right is presumed to exist and to be attributed to the registered beneficiary. A deleted right is presumed not to exist. However, except in the case of acquisition in good faith (*gutgläubiger* Erwerb), there is no presumption that the land register is complete: there is therefore no presumption that no rights other than those registered exist. [46]

The BGB increases the presumption to an irrefutable fiction of the accuracy of the land register if legal transactions are carried out in good faith with a person entered in the land register as the legal owner: The BGB stipulates that the content of the land register is deemed to be correct in these cases.[47] An indispensable prerequisite is that the purchaser is in good faith, i.e. believed in the accuracy of the land register (*Richtigkeit des Grundbuchs*). Good faith[48] does not have to be proven by the purchaser. The party disputing the validity of the acquisition must prove that there was no good faith. Good faith is excluded, for example, if an objection (*Widerspruch*) to the right is entered in the land register. [49]

The "content of the land register" (*Inhalt des* Grundbuchs), which is covered by the protection of good faith, is the legal information. Factual information, such as the size, location or development of the property are not included. Of the legal details, only those that belong in the land register according to their content enjoy good faith (e.g. not about a person's legal capacity). [50]

Public belief (*öffentlicher Glaube*) has a positive and a negative effect:

The positive effect is that if someone acquires a property right in good faith from the person entered in the land register as the entitled party, this right is transferred to the acquirer as if the seller had actually been the entitled party (§ 892 (1) sentence 1 BGB). Registration (*Eintragung*) and good faith replace the transferor's missing right.[51] The acquisition in good faith is effective. This means that the acquirer of the property or property right can effectively transfer it onwards, even to someone who could not have acquired it directly due to bad faith.[52]

The negative effect is a fiction of the completeness of the land register. The purchaser acting in good faith acquires the property right, e.g. ownership, free of all encumbrances that are not evident from the land register. If, for example, a mortgage has been wrongly deleted, ownership is transferred to the purchaser unencumbered by this mortgage. The mortgage expires.[53]

To compensate for the loss of rights, the former true beneficiary has a claim against the unauthorized seller for unjust enrichment.[54] If the transferor himself was acting in bad faith, claims for damages in tort[55] are also available.[56]

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[46] Prütting, margin number 210, p. 91. The reverse is the case with the acquisition in good faith of a right to the land: In this case, the public faith of the land register creates a fiction of the completeness (*Fiktion der Vollständigkeit*) of the land register: the purchaser acquires the right to the land, e.g. ownership, free of all encumbrances that are not evident from the land register (Prütting, margin number 228, p. 97).

[47] Prütting, margin number 212, p. 92.

[48] Anyone who does not know and does not need to know that the land register is incorrect is deemed to be acting in good faith.

[49] Prütting, margin number 213 f., p. 92 f.

[50] Prütting, margin number 219, p. 94.

[51] Prütting, margin number 225, p. 96.

[52] Prütting, margin number 231, p. 98.

[53] Prütting, margin number 228, p. 97.

[54] As a rule, this will be a condictio of the former true beneficiary against the unauthorized seller. The claim is for the return of what is obtained (*Herausgabe des Erlangten*) through the performance transaction (§ 816 (1) sentence 1 BGB).

[55] In other words, if the seller knew that he was not the owner of the right but wanted to harm the true beneficiary (§§ 823; 826 BGB).

[56] Prütting, margin number 234, p. 99.

In the event of breaches of official duty by the land registrar, the state shall be liable instead of the civil servant under the same conditions and to the same extent as the civil servant would be liable.[57]

3. View on other countries

In Europe, there are two groups when it comes to the question of whether the land register entry is constitutive for the transfer of ownership.

Registration is not constitutive in the countries of the Romanic jurisdictions (France, Italy, Spain, Belgium), the Nordic countries and Poland.[58] On the other hand an acquisition in good faith is possible in Poland and Spain, but not in the Netherlands.[59]

Similar rules apply for creation, transfer and bona fide acquisition of mortgages.[60]

II. Transaction of obligation

The transaction of obligation under the law of obligations for the legal acquisition of ownership is usually a purchase agreement. A contract under the law of obligations for the transfer or acquisition of ownership of immovable property requires notarization.[61]

III. Transaction of performance

In the case of immovable property, the rule applies that the acquisition of ownership requires agreement (*Einigung*) and the entry of the new owner in the land register (*Eintragung ins Grundbuch*).[62]

1. Agreement – Einigung (conveyance; Auflassung)

The agreement[63] (*Einigung*) must be declared in the simultaneous[64] presence of both parties (*gleichzeitige Anwesenheit beider Teile*) before a competent authority.[65] This agreement is called "conveyance"[66] (*Auflassung*) in the case of the transfer of ownership of real estate.[67] Any German notary is competent to accept the conveyance (*Entgegennahme der Auflassung*).[68]

In the case of real estate, too, the transaction under the law of obligations must be clearly separated from the transaction in rem (the performance). It is stipulated that the conveyance should only take place if the deed (*Urkunde*) of the obligatory transaction - e.g. the notarized purchase agreement - is presented.[69]

In practice, conveyance is carried out at the notary immediately after the purchase agreement has been notarized. The purchase agreement and the conveyance are two separate legal transactions. [70]

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57 § 839 BGB; Art. 34 GG. The state is only entitled to recourse against the land registry official if the official has acted with intent or gross negligence; Art. 34 S. 2 GG. See Prütting, margin number 256, p. 108.

58 app.vdpgrundpfandrechte.de - Questionnaire - Chapter II - Public Disclosure Requirements and Protection of Trust – Q.18.

59 app.vdpgrundpfandrechte.de - Questionnaire - Chapter II - Public Disclosure Requirements and Protection of Trust – Q.19.

60 app.vdpgrundpfandrechte.de - Questionnaire - Chapter II - Public Disclosure Requirements and Protection of Trust – Q.21 to Q.29.

61 § 311b (1) sentence 1 BGB.

62 § 873 BGB. Prütting, margin number 354, p. 155.

63 In other words, the contract in rem as part of the performance transaction.

64 Attendance does not have to be in person, representation is possible.

65 § 925 BGB.

66 § 925 BGB.

67 § 29 GBO requires that the conveyance be evidenced by a "public or publicly notarized deed" for entry in the land register. Therefore, in practice, the conveyance is notarized; Prütting, margin number 355, p. 155 f.

68 Prütting, margin number 355, p. 155; Baur/Stürner, § 22 RN 2, p. 284; margin number 3, p. 285.

69 § 925a BGB. Prütting, margin number 356, p. 156.

70 Prütting, margin number 356, p. 156.

2. Entry (Eintragung)

In the case of movable property, in addition to the agreement in rem (*Einigung*), it is also necessary to hand over (*Übergabe*) the property to the purchaser in order to effect the transfer of ownership.[71]

In the case of real estate, only the agreement in rem (conveyance, *Auflassung*) and the entry in the land register (*Eintragung ins Grundbuch*) together can effect the change in title.[72] In this way, the legislator ensures that the actual legal situation and the book status generally correspond.[73]

The land registry officials are subject to special inspection obligations for the entry: For example, the deed of causal transaction[74] and the notarial deed of conveyance[75] must be submitted.[76] The effect of the entry is that ownership is transferred to the purchaser. The economic unity of the property is preserved by the fact that essential components and accessories are also transferred with the transfer of ownership.[77]

In addition to the substantive legal (*materiell-rechtlich*) requirements, entry in the land register is also subject to formal requirements. [78]

The first requirement for an entry is an *application* (*Antrag*):[79] As a rule, the land registry does not act ex officio, but should only effect an entry upon application.[80] This also applies if, aPart from the application, all substantive legal bases for the entry are present. The application is neither a legal declaration of intent (*weder eine rechtsgeschäftliche Willenserklärung*) nor any other substantive legal requirement (*noch sonst ein materiell-rechtliches Erfordernis*)[81]: The application for registration (*Eintragungsantrag*) is merely addressed to the land registry and is not bound by any form.[82]

Both the holder of the right concerned and the person in whose favor the right is to be registered are entitled to file an application. [83]

The second requirement for entry in the land register is *registration approval* (*Eintragungsbewilligung*). This is the consent of the party affected by the entry.[84] Only the passive party comes into consideration here.[85] The *registration approval* is a unilateral declaration addressed to the land registry.[86] The registration approval must be clearly distinguished from the declaration of intent of the substantive legal agreement (the conveyance). [87]

C. The abstraction principle in practice

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71 On registration systems for real estate: Lassen/Seeber, p.117 f.; for movable property: Lassen, Registration, passim.

72 The necessary publicity of the transfer of ownership is therefore not achieved by the change of possesion (as with movables), but by the entry in the land register (principle of publicity or disclosure; *Publizitätsprinzip* or *Offenkundigkeitsprinzip*); Prütting, margin number 38, p. 22 f.

73 Baur/Stürner, § 19 margin number 22, p. 241.

74 E.g. the notarized purchase contract.

75 § 29 GBO.

76 Baur/Stürner, § 22, margin number 13 - 15, p. 287 f.

77 Baur/Stürner, § 22, margin number 22, p. 290.

78 Prütting, margin number 273, p. 114.

79 Prütting, margin number 274, p. 114.

80 § 13 (1) sentence 1 GBO.

81 However, it is a formal requirement.

82 V. Civil Senate of the Reichsgericht, decision of 16 May 1903, RG Z, 54, p. 378 - 386 (384).

83 Passive and active parties, § 13 para. 1 sentence 2 GBO. Prütting, margin number 274, p. 114.

84 § 19 GBO.

85 This is, for example, the seller in the case of a real property sale; Prütting, margin number 276, p. 115.

86 Prütting, margin number 277, p. 115.

87 Baur/Stürner, § 16, margin number, p. 194. On the legal nature of the registration approval: ibid., § 16, margin number 25 - 31, p. 195 f.

The effect of the principle of abstraction (*Abstraktionsprinzip*) becomes apparent if the contractual obligation (*schuldrechtliches Verpflichtungsgeschäft*) is null and void (*nichtig*).

Example: V sells a plot of land to K (purchase agreement 1) and declares conveyance. K is entered in the land register as the new owner.

K later sells the property to D (purchase agreement 2) and declares conveyance. D is entered in the land register.

V contests (*anfechten*) purchase agreement 1 between V and K.

Situation 1: The avoidance (*Anfechtung*) takes place after the conclusion of purchase agreement 2 between K and D, conveyance and entry of the change of ownership to D in the land register.

Situation 2: The avoidance takes place after the conclusion of purchase agreement 2 between K and D, but before the conveyance and land register entry of the change of ownership to D.

Situation 3: Purchase agreement 1 is not contested. After the entry of D in the land register, it turns out that the performance under property law is invalid.

It should be noted that the abstract nature of the performance transaction does not mean that a legal change made without legal grounds – in this case without a valid purchase agreement – must be accepted. Rather, it is the task of the institute of unjust enrichment[88] to "reverse" such unjustified performances.[89]

1. Ownership situation after conclusion of purchase agreements 1 and 2

In the example case, purchase agreement 1 represents the contractual transaction of obligation (*Verpflichtungsgeschäft*) between V and K. The transfer of ownership of the property with entry in the land register is the performance transaction under property law (*Erfüllungsgeschäft*) to fulfill the seller's obligation under purchase agreement 1.

The same applies to purchase agreement 2 and the conveyance and land register entry in favor of D. As a result of the entry, D becomes the owner of the property.

2. Effect of the challenge (Anfechtung)

According to German law, challenge (*Anfechtung*) is a right of disposition (*Gestaltungsrecht*). It has the effect that the contested (challanged) legal transaction is invalid from the outset (*ex tunc*).[90]

The contractual obligation (*Verpflichtungsgeschäft*) - the purchase agreement - is invalid from the outset due to the challenge (*Anfechtung*).

3. Condition claim after avoidance

However, due to the principle of abstraction, the performance transaction in rem (*dingliches Erfüllungsgeschäft*) remains effective after the purchase agreement has been contested: K became the owner of the property through its entry in the land register. D therefore acquired the property from the true owner.

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88 The condictio, § 812 BGB.

89 Baur/Stürner, § 5, margin number 44, p. 57.

90 For detailed information on rights of formation under German law: Lassen, Перетворювальні права, passim; on challenging (*Anfechtung*): ibid., pp. 196 - 197.

In such cases, reverse (*Rückabwicklung*) is effected via the law of unjust enrichment, i.e. condictio.[91] The principle here is that the condictio is undoubtedly only made between the partners of the void causal relationship (*nichtiges Kausalverhältnis*), i.e. in the relationship between V - K. [92]

Otherwise, the person who has obtained something through the performance (*Leistung*) of another person without legal grounds is obliged to return what he has obtained.[93]

a. Through the performance of another person (*Durch Leistung eines anderen*)

Performance (*Leistung*) is the deliberate, purposeful increase of third-party assets.[94] *The condictio indebiti* refers to payments made to settle a liability.

In the present case, the performance was the transfer of ownership from V to K. V performed to fulfill its liability under purchase agreement 1.

b. Obtained something (*Etwas erlangt*)

What is obtained can be anything that can be the subject of legal transactions.[95]

In the example case, K acquired ownership of the property.

c. Without legal grounds (*Ohne Rechtsgrund*)

The legal reason for the benefit was missing from the outset.[96]

Purchase agreement 1 was invalidated by the challenge from the outset, i.e. retroactively to the date of conclusion of the purchase agreement. There was therefore always no legal basis for performance.[97]

d. Duty to surrender of what has been obtained (*Verpflichtung zur Herausgabe des Erlangten*)

The legal consequence is that V can demand the surrender of what K has obtained. The debtor of the condictio is solely K. He must return what he has obtained through the enrichment. This is precisely the legal position that he acquired without legal grounds through the performance.[98]

Anything that is tangible can be considered as "obtained": If, for example, the debtor in possession has obtained ownership, restitution means retransfer of ownership. Due to the principle of abstraction, this also frequently occurs in the case of ineffective obligations.[99]

In our example case (situation 1), K therefore basically owes the retransfer of the property to V.

e. Compensation for lost value (*Wertersatz*)

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91 Medicus/Petersen, margin number 669, p. 351.
Under German law, condictions are divided into performance condictions (*Leistungskondiktionen*) and non-performance conditions (*Nichtleistungskondiktionen*). In the present case, this is a performance condition, as V has effected a performance (*eine Leistung bewirkt*) for K. A performance is the deliberate, purposeful increase of third-party assets (Medicus/Petersen, margin number 666, p. 350).

92 Medicus/Petersen, margin number 669, p. 351. An exception may exist if K had given the property to D as a gift. In this case, the so-called direct recourse (*Durchgriffshaftung*) according to § 822 BGB comes into consideration; ibid.

93 Performance condictio pursuant to § 812 para. 1 sentence 1 var. 1 BGB; Medicus/Petersen, RN 664, p. 348. This is the so-called *condictio indebiti*, Medicus/Petersen, margin number 689, p. 363.

94 Medicus/Petersen, margin number 666, p. 350.

95 Medicus/Lorenz, § 61, margin number 11, p. 411.

96 Medicus/Petersen, margin number 689, p. 369.

97 It is also conceivable that the legal reason for the performance ceases to exist at a later date. In this case, too, there is a claim of unjust enrichment, the condictio ob causam finitam (§ 812 (1) sentence 2 var. 1 BGB).

98 Medicus/Lorenz, § 67, margin number 2, p. 434.

99 Medicus/Lorenz, § 67, margin number 3, p. 434.

Now, however, K is no longer the owner of the property. He has sold it on to V and transferred ownership.

Due to the principle of abstraction, K was also true owner (*rechtmäßiger Eigentümer*) at all times. D therefore acquired from the owner and thus became the true owner himself.

It should also be noted that in the case of reverse of a transaction, the condictio is only between the parties to the obligatory transaction. In this case, this is purchase agreement 1 between V and K.

However, if the debtor is unable to surrender what he has obtained, he must reimburse the value.[100] This is the case, for example, if the item obtained has been resold. [101]

The amount of the value to be compensated is the objectively determined market value.[102] If the debtor of the condictio has sold the item for more than the market value, any proceeds from the sale that exceed the *market value* are generally not to be compensated.[103]

This means that K must pay to V the market value of the property in cash.

f. Synallagma and balance (*Saldo*)

As a result of the challenge (*Anfechtung*), purchase agreement 1 has become invalid. As a result, V's obligation to provide K with ownership of the property has lapsed.

However, the obligation of K to pay the purchase price to V is also invalid.

I.e.: V has a claim against K for retransfer of the property.[104] K also has a condictio claim against V: for repayment of the purchase price paid.

If K were still the owner of the property, he would have to transfer the property back to V. For his part, V would have to repay the purchase price.[105]

In principle, the debtor od the condictio is obliged to return what he has obtained – i.e., the ownership of the property. However, since in situation 1 K only owes compensation in money, in practice the *balance* (*Saldo*) can be formed between the two monetary claims: Both monetary claims are offset against each other. Only the excess must be paid.[106]

4. Challenging prior to closing transfer of title to D

The legal situation is different in situation 2: The challenging takes place after the conclusion of purchase agreement 2 between C and D, but before the conveyance and land register entry of the change of ownership to D.

Such a case is very theoretical in nature. The notarization of the purchase agreement (here purchase agreement 2), the conveyance and the registration approval are usually carried out in one appointment with the notary. The time gap required for this constructed case does not regularly exist in practice.

In this theoretical case, K would still be the owner of the property. As a result of V's claim to condictio, K must transfer ownership of the property back to V. K also receives the purchase price back from V.

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[100] § 818 (2) alt. 2 BGB.
[101] Medicus/Lorenz, § 67, margin number 11, p. 436.
[102] Medicus/Lorenz, § 67 margin number 12, p. 436.
[103] Medicus/Lorenz, § 67 margin number 12, p. 436. This may be the case, for example, in the event of a breach of public morals (*gute Sitten*) or bad faith (*Bösgläubigkeit*).
[104] Or if K has already resold the property, V is entitled to compensation for the market value in money.
[105] So-called "enrichment law synallagma"; Medicus/Petersen, margin number 223, p. 107.
[106] Medicus/Petersen, margin number 224, 225, p. 107 f.

However, purchase agreement 2 between K and D continues to exist. D still has a claim to ownership of the property. And to precisely this property, not just any property.

The rules on the impossibility of providing a performance (*Unmöglichkeit zur Ebringung der geschuldeten Leistung*) owed apply here. In individual cases, it must be examined whether D could be entitled to compensation for non-performance. However, it would also have to be taken into account that D saves the purchase price.

5. Invalidity of the in rem performance transaction between C and C

Situation 3 is similar theoretic to the case in situation 2: Purchase agreement 1 is not challenged. However, after D's entry in the land register, it turns out that the performance transaction (*Erfüllungsgeschäft*) under property law is invalid.

The agreement in rem (the conveyance) usually takes place at the same time as the notarized purchase agreement is concluded. A situation in which the purchase agreement is effective but the conveyance is ineffective is somewhat contrived.

The legal situation in this case would be as follows:

K has not become the owner of the property.

D therefore did not acquire the property from the true owner. However, K was entered in the land register. D was entitled to rely on this entry and therefore acquired ownership in good faith.

In addition, various claims for compensation under the law of obligations may exist between the parties involved.

D. Excursus: The procedural situation

In the above example case, variant 1, V can assert his claim for retransfer of the property against K in court.

I. Retransfer of the property

German civil procedure law provides for the action for performance (*Leistungsklage*). The action for performance serves to enforce claims.[107] This can be a claim for the surrender – for conveyance and handover – of a property. Only a judgment for performance can be enforced. [108]

In principle, in civil proceedings, each party bears the burden of assertion and proof for all facts that are a prerequisite for their claim.[109] It is not necessary to prove legal principles. The court must be aware of these.[110]

There are exceptions to this principle of the burden of proof if the law expressly stipulates this. This is the so-called reversal of the burden of proof.[111] This applies, for example, if the claimant demands that the defendant surrenders a property on the grounds that he himself (the claimant) is the owner: if the defendant is entered in the land register, the plaintiff must prove the facts on which his assertion of ownership is based.

In our case, this means that V must prove that

– he has challenged the purchase agreement 1;

– facts existed on the basis of which he asserted the challenge.

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[107] According to § 194 (1) BGB, a claim is the right to demand an action or omission from another party.
Jacoby, ch. 7, margin number 4, p. 87.

[109] Jacoby, ch. 14, margin number 11, p. 181.
Iura novit curia. Jacoby, ch. 14, margin number 12, p. 181.

[111] Jacoby, ch. 14, margin number 42, p. 189.

V can sue directly for performance, namely retransfer of the real property. It is not necessary for him to first bring an action for a declaratory judgment on the legal situation following his challenge in order to then - based on the declaratory judgment - bring the action for condictio.

V's claim is for the retransfer of the property.

II. Claim for compensation in money

In the example case, K has already sold the property on to D. V then only has a claim for compensation for value in money against D.

Alternative 1: If V knows that K has resold the property, V can only bring his action directly for compensation. This is his claim under substantive law.

Alternative 2: If V is unsure whether K has resold the property, there is the following possibility:

He can submit a main request (*Hauptantrag*) for retransfer of the property. Alternatively (*Hilfsantrag*), he can also apply for the value of the property to be compensated to him in money if K is no longer the owner of the property.

Such an auxiliary request (*Hilfsantrag*) can be filed by the claimant in the event that he does not prevail with the main request (*Hauptantrag*). This is permitted if the main and auxiliary requests are legally or economically related.[112]

Alternative 3: V only learns during the process that K had sold the property in the meantime.

In this case, V can change the claim from retransfer of the property to payment of compensation in money.

Such a conversion is possible if, instead of the original subject matters of action (*Klagegegenstand*), a different subject matters of action or interest is now claimed due to a subsequent change.[113] The claimant can no longer demand the original object of the action; instead, to avoid a new lawsuit, he now demands a different object, i.e. a different object of the procedural claim.[114] In the case of a condictio claim, this includes when the surrender of the enrichment is now demanded instead of performance.[115] The change must have occurred or become known to the claimant after the action was filed.[116]

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Collecting Evidence and Investigating Ecocide in Ukraine: Problems, Innovations, Prospects

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Abstract

The relevance of this article lies in the study of the problems of collecting evidence and investigating ecocide in Ukraine during the armed Russian aggression and the formation of criminalistic recommendations for countering such crimes. The purpose of this study is to clarify the essence of ecocide in the context of an armed conflict, study the historical genesis of the problem, analyze national and international legal regulation of ecocide. An important aspect of covering the goals and problems of this article is the possibility of determining forensic means of countering ecocide during an armed conflict to form individual criminalistic recommendations for investigating the crime under study. Among the methods by which the study of this topic is carried out, one can highlight: the method of synthesis and theoretical analysis, the historical and legal method, the functional method, the analytical method, the dialectical method, the empirical method, the formal legal method, the systems method, the axiomatic method, the deductive method, the inductive method, the structural-genetic analysis and synthesis and event analysis and others, substantiating the topic of the study. Based on the study and analysis of judicial and investigative practice, a wide range of scientific sources and norms of national and international law, the essence of ecocide during an armed conflict is investigated. The position on the advisability of securing at the legislative level a separate article "Ecocide during an armed conflict" in the context of the requirements of international law is substantiated. The article reflects the forms of international interaction with state and non-state actors in the investigation of ecocide. The results of this article: conducting an analysis and providing a description of ecocide in the context of its relationship with armed conflict; substantiating the position on the need to include ecocide in the jurisdiction of the International Criminal Court; clarifying and disclosing the features of the formation of individual sources of obtaining evidentiary information; characterizing the features of ecocide regulation from the point of view of national and international law; defining forensic means of counteracting ecocide and obtaining evidentiary information in the context of building an effective methodology for investigating such a crime. The provisions and recommendations proposed in this article are of scientific and practical value primarily for practitioners conducting pre-trial investigations, whose activities are directly aimed at identifying and investigating ecocide, as well as for all participants in this process and persons whose rights may be violated during the investigation and consideration of the ICC. The problems considered and the proposed conclusions will be useful for scientists, practicing lawyers, attorneys and judges.

Keywords: *environmental crimes; criminal proceedings; evidence collection; special knowledge; criminalistic strategy; forensic examination; criminalistic innovations; environmental safety.*

Збирання доказів та розслідування екоциду в Україні: проблеми, інновації, перспективи

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Анотація

Актуальність статті полягає в дослідженні проблем збору доказів та розслідування екоциду в Україні під час збройної російської агресії та формування криміналістичних рекомендацій протидії таким злочинам. Метою дослідження виступає з'ясування сутності екоциду в умовах озброєного конфлікту, аналіз історичного генезису проблеми та національного й міжнародного правового регулювання екоциду. Серед методів, за допомогою яких здійснюється дослідження даної теми, можна виділити: метод синтезу та теоретичного аналізу, історико-правовий метод, функціональний метод, аналітичний метод, діалектичний метод, емпіричний метод, формально-юридичний метод, системний метод, аксіоматичний метод, дедуктивний метод, індуктивний метод, структурно-генетичний аналіз і синтез й івент-аналіз та інші, що обґрунтовують тему дослідження. На підставі дослідження та аналізу судово-слідчої практики, широкого кола наукових джерел і норм національного та міжнародного права розкрито сутність екоциду під час озброєного конфлікту. Обґрунтовано позицію щодо доцільності закріплення на законодавчому рівні окремої статті «екоцид під час озброєного конфлікту» в контексті вимог міжнародного законодавства. Висвітлено форми міжнародної взаємодії з державними й недержавними суб'єктами під час розслідування екоциду. Результатами цієї статті є: проведення аналізу та надання характеристики екоциду в контексті його взаємозв'язку з озброєним конфліктом; обґрунтування позиції щодо необхідності включення екоциду до юрисдикції Міжнародного кримінального суду; з'ясування та розкриття особливостей формування окремих джерел отримання доказової інформації; характеристика особливостей регулювання екоциду з точки зору національного та міжнародного права; визначення криміналістичних засобів протидії екоциду та отримання доказової інформації в контексті побудови ефективної методики розслідування такого злочину. Положення та рекомендації, запропоновані у цій статті, становлять науково-практичну цінність насамперед для практиків, які здійснюють досудове розслідування, діяльність яких безпосередньо спрямовано на виявлення та розслідування екоциду, а також для всіх учасників цього процесу та осіб, чиї права можуть бути порушені під час розслідування та розгляду МКС. Розглянуті проблеми та запропоновані висновки будуть також корисні для науковців, практикуючих юристів, адвокатів і суддів.

Ключові слова: *злочини проти довкілля; кримінальне провадження; збирання доказів; спеціальні знання; криміналістична стратегія; судова експертиза; криміналістичні інновації; екологічна безпека.*

Introduction

It is important for world civilization to create a mechanism to ensure environmental safety for humanity. For the international community, the issue of ensuring the functioning of institutional mechanisms of responsibility for crimes against the environment and natural resources remains a pressing issue. A new challenge was the military aggression of the Russian Federation on February 24, 2022, which significantly affected all spheres of life and reflected on the dynamics of crimes against the environment in our country. Thus, as of August 29, 2023, 571 war crimes against the environment (ecocrimes) were committed on the territory of Ukraine [1].

According to preliminary estimates alone, the total damage to the environment from Russian aggression is more than $ 54.7 billion. Of this, damage from air pollution is more than $ 27.2 billion, damage to soil and land – more than $ 24.6 billion. A third of Ukrainian forests were damaged; 20 % of Ukraine's protected areas are affected by the war; 35 % of Europe's biodiversity, which Ukraine owns, is under threat; Russia occupied 740 Ukrainian mineral deposits; approximately 40 % of our territory is contaminated with various types of ammunition; the Russian Federation contributes to and

aggravates the climate crisis with its actions; the damage caused to the climate by the war is estimated at 33 million tons of additional greenhouse gas emissions into the atmosphere. The negative environmental impact will be felt for years. Since the environment has no borders, the consequences of military actions in Ukraine will be felt by the entire world [2].

According to the estimates of the Ministry of Environmental Protection and Natural Resources (Ministry of Environment and Natural Resources), the amount of damage from environmental pollution caused by the war is estimated at about 25 billion euros, with another 11.5 billion euros needed to eliminate the consequences of soil pollution. In particular, almost a third of the indicated amount of estimated damage, namely more than 407.3 billion hryvnias, is damage to the land resources of Ukraine. Of the total amount of damage, more than 176.5 billion hryvnias of damage was caused to the atmospheric air as a result of unorganized emissions of pollutants rising into the air during fires caused by shelling, including in forest areas and natural reserve areas. So far, a third of Ukrainian lands have already suffered from the war. The soils are heavily damaged: on average, there are 50 tons of metal and chemical compounds per 100 hectares of land. According to rough estimates, at least a hundred years will be needed for restoration. This applies not only to lands [4]. An estimated 900 of the country's protected areas have been affected by Russia's military activities. About 30% of all protected areas in Ukraine – 1.2 million hectares – suffer from the effects of the war [5]. Russia's invasion has set back the progress it had already made in addressing environmental challenges before the war began [6].

It is obvious that in conditions of armed conflict, ecocide is a particularly dangerous crime against the environment for the international community. The issue has become extremely important after the events surrounding the Kakhovka hydroelectric power station dam, the destruction of which UN Secretary-General Antonio Guterres called "a huge humanitarian, economic and environmental catastrophe in the Kherson region of Ukraine" [7]. As shown by the analysis of statistical data of the Prosecutor General's Office, law enforcement agencies identified and initiated pre-trial investigations into 37 criminal offenses under Art. 441 of the Criminal Code of Ukraine (hereinafter referred to as the CC). In particular, in 2014–2015, no criminal proceedings were initiated for the commission of ecocide, in 2016, 1 crime of the type under study was recorded, in 2017 – 3, in 2018 – 2, in 2019 – 8, in 2020 – 6, in 2021 – 2, in 2022 – 15, in January–February 2023 – 0 [8].

Certainly, such threats require the development of the latest approaches to combating crime, modernization and updating of the criminal justice system to modern conditions and global threats of the 21st century [9]. It is no longer possible to solve environmental problems relying only on domestic experience and legislation, since these problems are simultaneously of a natural scientific, social and political nature and are undoubtedly connected with the issue of forming a European (possibly even global) system of environmental safety. The identified challenges determine modern trends in the development of legal science and determine the need to form and implement innovative approaches in forensic support for combating ecocide in modern conditions. Under such circumstances, there is a need to propose modern means of combating ecocide in armed conflict within the framework of forensic support in order to use all available national and international legal mechanisms to bring the perpetrators to criminal responsibility, as well as to invent mechanisms for compensation for the damage caused.

It must be acknowledged that the absence of a separate methodology for investigating ecocide in armed conflict conditions leads to a number of difficulties in criminal justice agencies, primarily related to the correct criminal-legal qualification of these acts; determining the scope and content of circumstances to be clarified; selecting areas and programs of investigation; collecting and examining evidentiary information, etc.

Effective means of solving this problem are the introduction of modern criminalistic scientific and methodological recommendations on issues of identifying, collecting, recording evidentiary information and conducting a proper investigation of ecocide specifically in armed conflict conditions. Taking into account the needs of investigative practice, the above circumstances

determine the urgent need to intensify scientific research on the proposed issues of investigating ecocide and allow us to assert that the research topic is relevant.

The main objective of this study is to clarify the nature of ecocide in armed conflict, as well as to determine criminalistic means of counteracting ecocide and to formulate individual forensic recommendations for investigating ecocide in armed conflict.

Literature Review

Recently, issues related to fighting organized crime in its various manifestations have become the subject of scientific research in the works of V.M. Shevchuk (2023) [10, pp. 795-822], A.A. Zadnipryanets (2020) [11, pp. 160-163], V.O. Ukolova, E.O. Ukolova (2021) [12, pp. 353-356], S.K. Phillips (2021) [13], C. Voigt (2021) [14] etc.
Thus, the issue of combating crime was and remains a pressing one for both scholars and practitioners.

Materials and Methods

Among the research methods of this article, it is necessary to highlight general theoretical and special legal methods of scientific knowledge, the combination of which substantiates the chosen topic of research. According to the defined goals and objectives, the work uses a set of research methods of modern epistemology. Using the methods of synthesis and theoretical analysis, studies of scientific works on the commission of ecocide in the context of an armed conflict and the formation of individual forensic recommendations for the investigation were conducted. Historical and legal – to establish trends and development of individual provisions of legal regulation on ecocide in the context of an armed conflict. Functional – to study the mechanism of committing ecocide in the context of an armed conflict. The analytical method was used in the study and development of the necessary national and international regulatory framework.

The dialectical method is the basis of the scientific study of the problems chosen by the authors, since this method helps to understand all the processes associated with responsibility for ecocide and their impact on the development of criminalistic recommendations for the investigation. The empirical method, which was used at the initial stage of the study within the limits of collecting the necessary materials and statistical data on the commission of ecocide, should also be considered as effective research methods; the institutional method, which made it possible to reveal the features of sustainable development of Ukraine and the world community and the principle of its functioning.

By means of the formal-legal method of research, an analysis of the criminalistic essence and legal nature of ecocide was carried out, with the help of which its effective investigation is carried out; with the help of the systemic method, the range of problems under study was determined and proposals for their solution were developed. Effective methods of ecocide research should also be considered the axiomatic method, the task of which is to build a scientific theory in which some statements (axioms) are accepted without evidence and then used to obtain other knowledge according to certain logical rules; the deductive method, which made it possible to determine the potential for mediation in armed conflicts with an environmental dimension; the inductive method, thanks to which it became possible to clarify the role of Ukraine in security cooperation with the international community on environmental and natural resource issues.

To study the problems of this topic, the authors used scientific works in the field of ecocide investigation, legal regulation of ecocide, forensic examinations, interaction and international cooperation. The main works that were used to write this article are the scientific works of such forensic scientists as: K. Ambos [15], O.M. Borshchevskaya [4, pp. 113-129], C. Voigt [14], V.A. Ukolova, E.O. Ukolova [12, pp. 353-356], A.V. Pchelina, V.B. Pchelin [16, pp. 187-189], V.K. Rybachek [17, pp. 82-87], E.Z. Stakhiv [18] and others.

Results and Discussion

Modern understanding of ecocide during armed conflict: international and domestic context

In today's realities, one of the most important trends in modern forensic science is the integration of knowledge and the proposal of innovative forensic tools aimed at solving the problems of combating crime in wartime conditions regarding the effective formation of evidence that can subsequently be used in both national and international courts [9, pp. 33-46]. Such activities are possible in the context of forensic support, which should be understood as the process of creating and providing scientific and proven forensic tools (technical and forensic, tactical and forensic, methodological and forensic, informational, preventive) used by employees of criminal justice bodies based on the knowledge and skills they have acquired, in accordance with the general principles and objectives of criminal proceedings in order to combat crimes [10, pp. 795-822].

To determine the subject and boundaries of proving the commission of ecocide, it is important to take into account the correct understanding of the essence of the concepts used. Today, the lack of a clear understanding of the nature and essence of ecocide negatively affects the devaluation of the evidence base for its investigation. It seems that history knows many cases of ecocide. For example, during World War I, German troops were the first to use chemical weapons of mass destruction (mustard gas and chlorine) against their enemies, the French and the British, near the town of Ypres (Belgium) in 1915; during World War II, German occupiers transported fertile black soil from Northern and Eastern Ukraine by train; during the Vietnam War, US fighters sprayed over 100 thousand tons of defoliants over Cambodia and Vietnam, due to the use of which almost half of Vietnam's arable land was taken out of cultivation, 2 million hectares of forests were destroyed, and 2/3 of biological species became extinct; during the Gulf War, Iraqi government troops deliberately blew up 1,200 oil fields, a number of oil depots and tankers; US troops used phosphorus munitions in the 2004 bombing of the Iraqi city of Fallujah, which resulted in the death of people and catastrophic contamination of the surrounding soils with phosphorus compounds; the bombing of Hiroshima and Nagasaki by US troops in 1945 and other cases [11, pp. 160-163]. The term "ecocide" comes from Greek and Latin, for example, "oikos" means house, and "caedo" means to demolish or kill. Now its meaning is the destruction of large areas of the natural environment as a result of human activity in peacetime or wartime [19].

The legal definition of ecocide is relatively new. The term "ecocide" has been enshrined, calling for urgent international attention to the problems [12], as the widespread destruction, damage or loss of ecosystem(s) of a particular However, despite the refusal, the International Criminal Court subsequently agreed to consider cases of environmental destruction as "crimes against humanity" provided that they had a sufficiently detrimental impact on people living in the territory [20]. In 2019, the reason for the renewal of the movement towards criminalization of ecocide, which began in the 1970s, was a written statement to the ICC by A. Salim, a member of the Maldivian parliament, which contained the recognition of victims of climate change as an integral part of the international criminal justice system [13]. In order to formally define the term "ecocide", a group of international lawyers was established in November 2020, on the occasion of the 75th anniversary of the opening of the Nuremberg war crimes trials of Nazi leaders in 1945, to develop plans for a legally binding crime of ecocide - the criminalization of the destruction of the world's natural resources. The group is chaired by Philippe Sands, Dior Fall Slow and Florence Mumba. The proposed definition will eventually be adopted as an amendment to the Rome Statute governing the ICC [21].

In 2021, a concept paper by the NGO Stop Ecocide Foundation [22] was presented to define "ecocide" in order to begin the process of including this crime in the Rome Statute of the International Criminal Court [23]. "Ecocide is an unlawful and reckless act committed in the knowledge that there is a significant likelihood of serious and/or widespread or long-term harm to the environment caused by these acts". To define the terms given, the panel of experts provides an interpretation of each, in particular: 1) "Unreasonable" means reckless disregard for losses that would be clearly excessive in relation to the expected social and economic benefits; 2) "serious" means harm involving serious adverse changes, disruptions or damage to any element of the environment, including serious impacts on human life or natural, cultural or economic resources; 3) "large-scale" means damage that extends beyond a limited geographic area, crosses national boundaries, affects entire ecosystems or specific

species, many people; 4) "long-term" means harm that is irreversible or cannot be repaired through natural restoration within a reasonable time; 5) "Environment" means the Earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space [17, pp. 82-87]. In our opinion, ecocide during an armed conflict as an international criminal offense is characterized by: 1) the open, aggressive nature of its commission; 2) great public danger; 3) the presence of long-term harm to the environment, great material damage and economic losses; 4) the presence of both immediate/direct consequences (pollution of land, air, reservoirs, sea shelf, destruction of fauna, flora), as well as remote (secondary) consequences (infertility of land, human diseases); 5) a high level of environmental pollution, destruction of ecosystems, which is explained by the use of military/lethal weapons; 6) limited possibilities of recording evidentiary information, certain facts and episodes of ecocide, which is explained by the use of military/lethal weapons and the difficulty of getting to the places of pollution and military operations; 7) causing harm to life and health of people, etc.

Criminalistics means and methods of combating ecocide in Ukraine

Criminalistics in Ukraine has chosen the European vector of development. European approaches are also manifested in the application of standards of proof in criminal proceedings [24, pp. 83]. It is believed that Art. 91 of the Criminal Procedure Code of Ukraine defines the list of circumstances that constitute the subject of proof and must be clarified.

However, when resolving this issue, it is necessary to proceed from the specifics of the crime under study, the conditions and means of its commission, the damage and consequences for the environment and ecosystems, as well as material (economic) damage. Therefore, in order to form a general idea of the content of methodological recommendations for investigating ecocide during an armed conflict, it is necessary to highlight the following groups of circumstances that must be established: 1) circumstances that are important for considering the act as an international crime (provisions of the Criminal Code and international treaties of Ukraine that determine the international illegality of the act); 2) circumstances related to the object/location of pollution (land, body of water, enterprise, warehouses, seaports and shelf, etc.): place, time and situation of pollution. The issue concerns the Chernobyl Nuclear Power Plant, spent nuclear fuel storage facilities and the Shelter facility; the Kyiv Reservoir dam; the oil depot in Akhtyrka; the Zaporizhzhya Nuclear Power Plant[4]; the Azovstal plant; damaged nuclear facilities, nuclear waste storage facilities and other places where hazardous and toxic chemicals are stored [18]; damaged critical infrastructure facilities [25]; remnants of ammunition, missiles, and toxic substances [26]; 3) circumstances related to the consequences of ecocide: material damage; level of pollution, level of destruction of environmental objects and ecosystems, concentration of substances and damage; 4) circumstances determining measures to eliminate negative consequences; 5) circumstances related to the mechanism of ecocide: tools and means of committing ecocide; methods of committing ecocide; 6) circumstances determining the need to apply security measures in criminal proceedings; 7) circumstances related to identifying the perpetrators (states as subjects of international politics and political leadership of the state).

Moreover, organizing an investigation of ecocide in the context of an armed conflict requires the analysis of a large number of different materials, which can be divided into the following groups: 1) materials that reflect the state of objects before the moment of damage/pollution; 2) materials reflecting the consequences of ecocide, namely air, water, land pollution or the threat of their occurrence.

When speaking about recording cases of ecocide committed under martial law, it is necessary first of all to clarify that criminal-legal features are inherent in the category of criminal offenses under study. This will make it possible to distinguish ecocides from other illegal acts against the environment, in particular, to differentiate them from war crimes that infringe on public relations in the sphere of ensuring environmental safety [16, pp. 187-189]. Thus, according to the requirements of Art. 441 of the Criminal Code of Ukraine ecocide is considered to be the mass destruction of flora or fauna, poisoning of the atmosphere or water resources, as well as the commission of other actions that may

entail an environmental disaster [27]. This crime has an unusual structure, which differs: 1) from ordinary formal crime compositions by the need for practical establishment, not counting the act, and also the creation by this act in a specific case of a real threat of the occurrence of consequences through an environmental disaster; 2) from typical material crime compositions by the non-obligation of the occurrence of such consequences for recognizing the crime as completed. However, without resorting to a thorough analysis of the crime composition, we will only note that in the national legislation of Ukraine the crime composition "Ecocide" includes too many evaluative concepts that are not reflected either in the current Criminal Code of Ukraine or in the legal positions of the Supreme Court of Ukraine [28].

However, in the context of an armed conflict, it is necessary to understand the difference between ecocide and a war crime against the environment. In particular, the requirements of Art. 8(2) (b)(iv) of the Rome Statute defines that a war crime is the intentional commission of an attack in the knowledge that such attack will cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe harm to the environment, which will be clearly disproportionate to the concrete and immediate overall military advantage anticipated [29]. However, in domestic criminal legislation, liability for such acts is provided for in Art. 438 of the Criminal Code of Ukraine. According to the specified article of the Special Part of the Law on Criminal Liability, the following violations of the laws and customs of war against the environment should be classified as: an attack on the environment as a civilian object; causing excessive damage to the environment or the possibility of causing such damage; causing large-scale, long-term and serious damage to the environment or the possibility of causing such damage; destruction or seizure of the environment or property used for the study and protection of the environment, unless this is required by urgent military necessity; striking objects under protection and used for the purpose of studying and protecting the environment; plundering objects associated with the environment and its elements; attacks, destruction, destruction or disabling of objects necessary for the survival of the civilian population; attacks on installations and structures containing dangerous forces; hostile use of means of influencing the environment; use of poison or poisonous weapons; an attack on the environment with the use of incendiary weapons [30, pp. 7-14].

To date, there is no legal basis for combating ecocide at the international level, and there is no mechanism for holding accountable corporate, government officials and states that make environmentally harmful decisions that cause oil spills, deforestation, and pollution of the world's oceans in peacetime, and during armed conflicts in general, ecocide can have unpredictable consequences, but should be assessed as a deliberate crime, since war itself is a crime and actions, therefore, are also, accordingly, a crime [4]. Protocol I to the Geneva Conventions in Part 3 of Art. 35 provides for a ban on the use of methods or means of warfare that are intended to cause, or may be expected to cause, widespread, long-term and severe damage to the natural environment [31] any other hostile use of environmental modification techniques, through the deliberate manipulation of natural processes, to alter the dynamics, composition and structure of the Earth, including its biosphere, lithosphere, hydrosphere, atmosphere or outer space. The Convention on Environmental Impact Assessment in a Transboundary Context establishes the duty not to resort to military or any other hostile use of environmental modification techniques "that have widespread, long-term or severe effects, as a means of destruction, damage or injury to any other State Party". The term "environmental modification techniques" refers to any means of altering, through deliberate manipulation, natural processes, the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or outer space [33].

Therefore, the definition of a specific international legal construct that would fit into the logical structure of the legal concept regarding responsibility for committing ecocide during armed conflict is a pressing issue. In this context, it should be noted that it was only in March 2023 that the European Parliament voted to include ecocide in EU law. The Kakhovka disaster prompted the EU to accelerate the implementation of this ecocide law [34].

K. Ambos also focuses on the usefulness of a separate definition of "ecocide", examining whether the addition of a new international crime would better protect the environment than "the existing core international crimes that have an environmental component and on which the draft decision on ecocide is partly based". Professor K. Ambos specifically refers to Art. 8(2) (b)(iv) of the Rome Statute of the ICC, which provides a definition of an international war crime against the environment [15]. H. Voigt notes that the current reference to the Rome Statute of the ICC regarding harm to the natural environment, including harm related to military actions, is quite limited, since it does not take into account harm to the environment that may be caused in peacetime [14]. O.M. Borshchevskaya writes that ecocide harms not only humanity, but also the environment. Therefore, its recognition as a fifth grave crime offers a new, non-human-centric approach and places the environment at the center of international law. To accomplish the tasks of preventing ecocide, it is necessary to: introduce the crime of "ecocide" into the Rome Statute of the ICC and the Criminal Code of Ukraine, adding a new crime to international criminal law. Its recognition as the 5th grave crime offers a new, non-human-centric approach and places the environment at the center of international law. Including ecocide in international law will allow for the prosecution of environmental criminals even at the level of aggressor states. It is also necessary to introduce into the circulation of international humanitarian law an option, if a state is recognized as an aggressor, a terrorist, by the signs, then in a compulsory manner, without ratification of any conventions on its part, it is necessary to introduce into it a peacekeeping contingent of those countries that have decided on its illegal status. Even if the aggressor country has not ratified such a convention [4].

In the context of what has been said, we note that in the literature there are different positions and arguments regarding the implementation of the Rome Statute in the national legislation of Ukraine [35-37]. However, we agree that Ukraine should still ratify the Rome Statute of the International Criminal Court and support the amendment to the Rome Statute, which provides for the inclusion of the crime of ecocide, which will end the immunity of top officials for committing the most serious crimes against the environment during military operations and peacetime, serving as a warning factor for the occurrence of environmental disasters in the future [38]. Moreover, it should be noted that granting Ukraine the status of a candidate for EU membership and in accordance with Articles 8 and 24 of the Association Agreement with the EU created an additional impetus for the harmonization of approaches and the intensification of actions to ratify the Rome Statute [39].

Consequently, an analysis of literary sources and legal acts governing liability for ecocide allows us to state that the existing international system of environmental law does not meet modern challenges. In our opinion, international legal norms governing ecocide issues during armed conflict are polysystemic norms of international law, since they are inherent in several institutions and branches of international law. All this emphasizes the scale of the public danger of ecocide, which occurs precisely during war.

Features of documenting, recording and investigating ecocide, problems of their improvement

It remains important in conditions of armed conflict to clarify the features of recording and investigating criminal offenses related to the commission of ecocide. Therefore, for this purpose, the National Council for the Recovery of Ukraine from the Consequences of the War and the corresponding subgroup on environmental security issues were created. As a first step, the environmental security group records all cases of environmental crimes by the occupying Russian troops in order to demand compensation for damages in international courts in the future [18].

Another problem on the way to recording and investigating ecocide in conditions of martial law is the timely detection of traces of this crime and their correct recording and removal. Unfortunately, the participants of the investigative and operational groups who go to the scene of the incident pay much more attention to damage to individual objects and human corpses. In this case, no actions are taken to search for traces of environmental pollution (soil, water resources, atmosphere, etc.), the scale of the death of representatives of the animal world, damage to the plant world, etc. are not detected and recorded. Moreover, quite often, ecologists are not included as specialists in the SOG,

who would use certified equipment to search for traces of ecocide, take samples and/or samples, determine the coordinates, area and volume of damage to ecosystem components [30, pp. 7-14].

The difficulties of investigating ecocide are due to the specific conditions of studying ecocide objects, which is explained by the use of firearms/lethal weapons, means and sources of obtaining evidentiary information.However, in the conditions of military aggression of the Russian Federation against Ukraine, traditional forensic tools and forms of evidence collection may work to a limited extent due to the danger for all participants in investigative (search) actions, as well as the impossibility of direct access to the scene of the incident [40]. Therefore, the introduction of innovative technical and forensic tools aimed at documenting and investigating ecocide is of certain scientific and practical interest. We are talking about using the possibilities of using unmanned aerial vehicles (UAVs) capable of initiating and maintaining controlled flight and navigation without the presence of a person on board [41] – quadcopters and conducting forensic aerial photography.

The potential of this technology made it possible to consolidate the necessary forces and means to develop multifunctional unmanned aviation complexes and expand the use of the latter in conducting inspections of hard-to-reach places of various events and collecting evidence [42, pp. 368-380]. The peculiarity of the survey using UAVs is the safe and remote assessment of the consequences that were caused as a result of the ecocide, with the subsequent recording of the location of the discovery and removal of physical evidence and individual traces. Moreover, the use of UAVs in the process of forensic mapping will not only increase the accuracy of the collected data. The presentation of a three-dimensional image in the courtroom during the trial will allow a more accurate picture of the scene of the incident, and to clearly present all the physical evidence recorded at the scene [43, pp. 104-113].

Crimes committed by the Russian military on the territory of our state involve the investigation of a significant volume of events, the careful collection of a large amount of evidentiary information, the involvement of experts, specialists, and the conduct of a huge number of forensic examinations and forensic studies [44, pp. 49-53]. In this sense, the conduct of forensic examinations remains one of the main forensic means of obtaining evidentiary information during the investigation of ecocide in armed conflict [45]. During the investigation of ecocide in armed conflict, the objects of forensic examination research may be: environmental objects - soil (its properties), air, objects of the animal and plant world, watering places, feed, products and products of animal origin; corpses of various animals and birds, contaminated pastures; people (living and corpses); substances, compounds and microorganisms that caused pollution of land, water bodies or air; sources of harmful effects on individual objects of the environment (including lethal weapons); technical condition and efficiency of the operation process of critical infrastructure facilities; damage caused to various environmental objects, natural resources; causal relationship between the cause - the conduct of hostilities (armed conflict) and the consequences.

During the investigation of ecocide, the following forensic examinations are assigned to clarify numerous circumstances: forensic-ecological, hydrological, forensic-technical, construction-technical, forensic-technological, agrotechnical, veterinary, forensic-ichthyological, chemical, sanitary-hygienic, forensic-medical, forensic-medical, forensic-scientific and other types of forensic examinations. Depending on the type of research, this allows obtaining the following forensically significant information (evidence) about: a) the source of poisoning and/or contamination of environmental objects during ecocide; b) the nature and extent of air, water, soil pollution (physicochemical properties and level of toxic substances); c) the causes of disease and death of animal objects; d) the extent of damage and negative anthropogenic impact on ecosystems (consequences of ecocide or threat of harmful consequences); e) the state of the technological process, mechanisms and equipment of critical infrastructure objects; e) the level of environmental protection of a certain region and territory (administrative unit of the state); f) substances, materials, compounds and objects (lethal or weapons of mass destruction) used in the commission of ecocide, storage, processing, the use of which is specially regulated by criminal and environmental legislation (radioactive, explosive, poisonous, potent substances, etc.); g) traces related to the commission of

ecocide: traces of weapons used, explosive devices and ammunition, traces in the form of radioactive radiation absorbed by the air environment; g) traces of the death of objects of the animal and plant world and others.The activity of investigating crimes against the environment and natural resources, a type of which is ecocide, makes it possible to carry out this activity only within the framework of international cooperation and international cooperation of states [46], which should be understood as any coordinated activity of states, their bodies and state and interstate (and often non-state) organizations in terms of fulfilling common tasks [47, p. 161].

Usually, cooperation represents the cooperation of different states in countering criminal acts, the public danger of which requires the joint efforts of several states. We believe that the commission of ecocide during the armed conflict against Ukraine goes beyond its territory, violates both national and international legislation, which significantly increases their public danger. In view of this, the counteraction to ecocide acquires an international character and must be clearly organized and methodically justified. An extremely important element of the mechanism of cooperation between states and international organizations to prevent ecocide is undoubtedly the presence of ratified international agreements on environmental protection.

To a large extent, the success of implementing the tasks of documenting ecocide in armed conflict depends on the standardization of the investigation process and the algorithmization of individual procedural actions. Therefore, innovative developments in this field of forensics should be aimed at creating methods for investigating new types of criminal offenses, tactical operations, algorithms for investigative (detective) actions, checking typical investigative versions, developing a forensic characteristic of criminal offenses, etc. [44, pp. 49-53].

According to V.A. Zhuravel, forensic investigation methodology is a mental image of a set of methods for the process (technology) of revealing and investigating crimes, determined by the relevant situations, while the methodology is an information and cognitive model, which reflects a set of methodological recommendations (advice) for solving practical problems of revealing, investigating and preventing criminal manifestations in accordance with certain situations that arise [48, p. 98]. The substantive part of forensic methodology, as noted by B.V. Shchur, constitute methodological recommendations, which are complexes of interconnected typical tips, tested by investigative practice, and proposed for use in the investigation of certain types of crimes, aimed at optimizing investigative activities [49].

An analysis of scientific sources [48; 50, pp. 176-222; 51, pp. 125-135; 52, pp. 52-67] allows us to propose the following elements as structural elements of a comprehensive methodology for investigating ecocide in armed conflict: 1) forensic characteristics of ecocide; 2) circumstances to be clarified during an ecocide investigation; 3) features of the initial stage of an ecocide investigation; 4) typical investigative situations; 5) tactics of individual procedural, investigative (search), and covert investigative (search) actions.

Conclusions

In the course of this study, a set of theoretical and practical issues of investigating ecocide in armed conflict was considered, and individual forensic tools were identified within the framework of forensic support for counteracting ecocide. Ecocide is the mass infliction of any harm (economic, ecological, anthropogenic) to human life and health, the environment, ecosystems and natural resources as a result of armed conflict (military action).Ecocide during military operations as an international criminal offense is characterized by: open, aggressive nature of its commission; high public danger; presence of long-term harm to the environment, significant material damage and economic losses; presence of both immediate consequences, as well as remote (secondary) consequences; high level of environmental pollution, destruction of ecosystems, which is explained by the use of military/lethal weapons; limited possibilities of recording evidentiary information, certain facts and episodes of ecocide, which is explained by the use of military weapons and the difficulty of getting to the places of pollution and military operations; causing harm to life and health of people, etc.

An innovative technical and forensic tool aimed at conducting an inspection and study of the environment, recording the location of the discovery of material evidence and individual traces in conditions of limited access to the place of ecocide is the use of unmanned aerial vehicles (UAVs).The circumstances that need to be established are: a) circumstances that are significant for considering the act as an international crime; b) circumstances related to the object/location of pollution; c) circumstances related to the consequences of ecocide: material damage; level of pollution, level of destruction of environmental objects and ecosystems, concentration of substances and damage; d) circumstances determining measures to eliminate negative consequences; e) circumstances related to the mechanism of ecocide: tools and means of committing ecocide; methods of committing ecocide; f) circumstances determining the need to apply security measures in criminal proceedings; g) circumstances related to the identification of the guilty persons (states as subjects of international politics and the political leadership of the state).

It is assumed that the forensic methodology support provides for the development of a comprehensive forensic methodology for investigating ecocide in military situations, the structure of which consists of the following elements: forensic characteristics of ecocide; circumstances to be clarified during the investigation of ecocide; Features of the initial stage of ecocide investigation; typical investigative situations; tactics of individual procedural, investigative (search), covert investigative (search) actions.

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Proportionality of Intervention and the Balance of Public and Private Interests in Covert Evidence Collection in Criminal Proceedings

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Abstract

The Article addresses problematic issues of proportionality of interference and the balance of public and private interests during covert evidence collection in criminal proceedings. The relevance of this topic is driven by the fact that, in the context of contemporary challenges related to security, digitalization, and globalization, covert investigative (search) actions should be considered indicators of adherence to the balance of public and private interests during criminal procedural activities. The aim of the Article is to provide a scholarly understanding of ensuring proportionality of interference and balance of public and private interests in criminal proceedings during covert evidence collection. The following scientific methods were used to achieve this purpose and accomplish the related objectives: dialectical, formal-legal, formal-logical, analysis and synthesis, and inductive. The empirical basis of the research comprises the most relevant and significant positions of the cassation court concerning covert evidence collection, which are perceived as guidelines and, consequently, as indicators of trends in the national law enforcement system. The authors examine the Supreme Court's positions on specific procedural issues related to interference with private communication, identifying a trend toward emphasizing public interest. Analyzing critical decisions of the cassation court on the appropriate limits of procedural confidentiality allows the authors to conclude that protecting the confidentiality (secrecy) of the technical component in covert investigative (search) actions, though justified for specialized technical means, cannot be considered proportionate concerning the carriers of obtained results. The procedural analysis of issues related to crime provocation highlights the cassation court's practice of using a comprehensive approach to consider the circumstances of covert operations and the diligence and fairness of the prosecution's procedural conduct within the adversarial court process, which is actively used to assess the presence or absence of elements indicating crime provocation. Based on the analyzed material, the study identifies procedurally significant trends and prospective directions for further research.

Keywords: *proportionality of interference; pre-trial investigation; covert investigative actions; crime provocation.*

Пропорційність втручання та баланс публічних і приватних інтересів під час негласного збирання доказової інформації у кримінальному провадженні

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Анотація

У статті розглянуто проблемні питання пропорційності втручання та балансу публічних і приватних інтересів під час негласного збирання доказової інформації у кримінальному провадженні. Актуальність теми зумовлена тим, що в контексті сучасних викликів з питань безпеки, цифровізації та глобалізації індикатором дотримання балансу публічного й приватного інтересу під час кримінальної процесуальної діяльності варто визнати негласні слідчі (розшукові) дії. Мета статті – наукове осмислення дотримання пропорційності втручання та балансу публічних і приватних інтересів у кримінальному провадженні під час негласного збирання доказової інформації. Для досягнення зазначеної мети та виконання завдань, що з неї випливають, використовувались такі наукові методи: діалектичний, формально-юридичний, формально-логічний, метод аналізу і синтезу, а також індуктивний метод. Емпіричну основу проведеного дослідження склали найбільш актуальні і вагомі в контексті негласного збирання доказової інформації позиції суду касаційної інстанції, які в національній правозастосовній системі сприймаються як орієнтири, а відтак – й індикатори тенденцій. Досліджено позиції Верховного Суду щодо окремих процесуальних питань втручання у приватне спілкування, в результаті чого констатовано тенденцію до зміщення акценту на користь публічного інтересу. Авторське осмислення ключових рішень суду касаційної інстанції щодо визначення належних меж процесуальної прихованості дій дозволяє стверджувати, що охорона негласності (таємності) технічного компоненту негласних слідчих (розшукових) дій, будучи виправданою щодо спеціальних технічних засобів, не може вважатися пропорційною щодо носіїв отриманих результатів. Дослідницьке звернення до процесуального осмислення питань провокації злочину дозволило виокремити у практиці суду касаційної інстанції застосування комплексного підходу до врахування обставин проведення негласної операції, а також активність й добросовісність процесуальної поведінки сторони обвинувачення в контексті судової змагальності, які активно використовуються з метою оцінки наявності або відсутності ознак провокації вчинення злочину. На основі опрацьованого матеріалу визначено процесуально значущі тенденції та перспективні напрямки подальших наукових пошуків.

Ключові слова: *пропорційність втручання; публічні та приватні інтереси; негласне збирання доказів; приватність; провокація.*

Introduction

Modern realities bring forth several pressing issues for Ukrainian society, particularly security, digitalization, and globalization. According to the State Security Strategy, approved by the Presidential Decree of Ukraine on February 16, 2022, No. 56/2022, it identifies actual and potential threats to Ukraine's national security. It defines the directions and objectives of state policy in national security. Among the priorities outlined is intensifying efforts against terrorism and organized crime, counteracting the degradation of the state apparatus and local governance due to widespread systemic corruption within state agencies (Para 24, Part III of the Strategy). It is evident that effective state counteraction to these criminal activities is impossible without law enforcement agencies' operational and covert efforts, which must employ the most advanced digital technologies and leverage them in a globalized world (including efforts to combat organized cross-border cybercrime). This highlights a clear and pressing public interest.

In turn, the digital space, having become an integral part of human life, is characterized by vulnerabilities in law enforcement’s adherence to fundamental rights and freedoms. Furthermore, given the absence of "virtual boundaries" between states, the vulnerability of rights and freedoms can expand beyond sovereign borders, lending the issue an interstate (universal) significance.

This brings to the forefront the need to maintain a reasonable balance between public and private interests in criminal procedural activities, a pressing issue when determining the proportionality of interference with fundamental human rights and freedoms during covert evidence collection in criminal proceedings. Covert investigative (search) actions serve as a "litmus test" for these aspects of the issue, as they: a) represent some of the most technically advanced procedural tools for gathering evidence; b) can simultaneously impact several fundamental human rights and freedoms (in

particular, the right to respect for private and family life, and the right to confidentiality of communication); and c) due to their latent and secret nature, carry a significant risk of arbitrariness by law enforcement agencies.

Therefore, covert investigative (search) actions should be recognized as an indicator of adherence to the balance between public and private interests in criminal procedural activities.

Scholars who have dedicated their work to the study of covert investigative (search) actions in the context of maintaining proportionality of interference and safeguarding fundamental human rights and freedoms include O. Kaplina, A. Tumanyants, I. Krytska [1–3], O. Panasiuk, L. Grynko, A. Prokhazka [4], O. Babikov, V. Bozhyk, O. Bugera, S. Kyrenko, M. Viunyk [5], A. Koval [6]. The legal foundations for restricting human rights and freedoms during pre-trial investigations have been explored in the research Art. by I. Hloviuk, V. Zavtur, I. Zinkovskyy, L. Pavlyk [7]. At the same time, current issues regarding their adherence in criminal proceedings in the context of digitalization have been addressed in the works of Y. Razmetaeva, Y. Barabash, D. Lukianov [8], O. Kaplina, A. Tumanyants, I. Krytska, O. Verkhoglyad-Gerasymenko [9], Y. Razmetaeva, S. Razmetaev [10]. The legal aspects of incitement to commit a crime have been developed by M. Zubrytska [11], O. Hura [12], I. Berdnik, S. Tagiev [13]. However, despite the exploration of critical aspects of the raised issues in scientific works (adherence to rights and freedoms during covert activities in pre-trial investigations, ensuring a balance of the rights and liberties in the context of digitalization, crime provocation), there is currently a lack of comprehensive work dedicated to understanding the proportionality of intervention and the balance of rights and freedoms from a synthesizing perspective, taking into account current law enforcement trends.

Thus, the aim of this work is to provide a scholarly understanding of the proportionality of interference and the balance of public and private interests in criminal proceedings during covert evidence collection. To achieve this goal, the following research objectives need to be addressed:

– find and organize judicial and practical guidelines regarding the proportionality of intervention and the balance of public and private interests during the covert collection of evidence;
– during the covert evidence collection, identify key trends regarding the proportionality of intervention and the balance of public and private interests.

Materials and Methods

Without a method, there is neither researcher nor research – this statement can be perceived as axiomatic for scientific investigation. The author’s proficiency in utilizing the method reveals the level of their competencies and skills. In contrast, for the results of scientific work, a properly chosen method guarantees reliable and well-founded conclusions. Therefore, in order to ensure a maximally objective assessment of the balance between public and private interests during covert investigative (search) activities, there is a need for scientific reflection on such a phenomenon in domestic state-legal reality, which, *on the one hand*, accumulates widespread trends in understanding at the level of law enforcement, and *on the other hand*, reflects the implemented legal standards in the field of human rights.

Justitia est fundamentum regni – based on this ancient Roman statement, it is quite appropriate to recognize the judicial practice of the Supreme Court as such a phenomenon, which, being the highest court in the judicial system of Ukraine, ensures the stability and unity of judicial practice in the manner and way defined by procedural law (Part 1 of Art. 36 of the Law of Ukraine *"On the Judicial System and Status of Judges"*). Therefore, the scientific reflection on the judicial practice of the court of cassation, formed as a result of assessing the legality of covert evidence collection, should be the focus of research efforts within this work. At the same time, to ensure the relevance of the identified trends, it is worth analyzing the court decisions made after the onset of Russia's full-scale military aggression against Ukraine and the introduction of martial law in Ukraine on February 24, 2022, the implementation of which has influenced, among other things, trends in criminal justice.

The following methods of scientific research will serve as "assistants" in studying judicial practice:

– the dialectical method, which will allow for a comprehensive understanding of the positions developed by the cassation court's judicial practice regarding covert evidence activities in their entirety and concerning public and private interests;
– the formal-legal method, which will serve as a means of understanding the content of categories enshrined in legislation and forming conclusions regarding appropriate procedural algorithms;
– the formal-logical method, which will enable a critical reflection on the arguments expressed in domestic judicial practice to find the most well-founded answers to the questions being studied;
– the analysis method, which will serve as a practical tool for highlighting the critical arguments of the positions of the cassation court;
– the synthesis method, which will help formulate mainstream vectors implemented regarding human rights standards in covert activities of law enforcement agencies;
– based on critical arguments of the cassation court's positions, the inductive method will facilitate the formulation of trends in maintaining the proportionality of intervention and a reasonable balance between public and private interests during covert evidence collection in criminal proceedings.

The first stage of the work involves identifying the object and subject of the research, formulating problem questions, and selecting theoretical and empirical material.

In the second stage of the research, it is planned to process the collected material using the methods mentioned above to form a comprehensive understanding of the vectors of proportionality of intervention and ensure a balance between public and private interests presented in the domestic law enforcement space.

In the third stage of the scientific work, there is a need to systematize the processed material to formulate conclusions and outline prospective directions for further research.

The authors of the work believe that the structure for presenting the material should be based on two criteria: a) thematic, which will allow for grouping the positions of the cassation court depending on the essence of the issues being resolved; b) chronological, which will enable the organization of positions within each thematic subgroup and track the dynamics of trend formation.

Results and Discussion

Interference in private communication

An analytical review of the legal positions of the Cassation Criminal Court within the Supreme Court should begin with a court decision that is valuable primarily from the perspective of a negative finding: the Cassation Court recognized the absence of interference in private communication under conditions where "access to the files was not restricted by their owner or possessor, and such actions were not related to overcoming any logical protection systems" [14]. Such an assessment was made by the court of cassation regarding the admissibility as evidence of information obtained as a result of the actions of the employees of the "Cybercrime Countermeasures Department, who monitored the worldwide network "Internet", during which a file containing signs of pornography was freely downloaded" [14]. Despite the additional expression by the court of cassation of an indisputable argument regarding the assessment of the admissibility of such actions before the start of the pre-trial investigation, the primary analytical attention will be focused on the understanding of the criterion used to establish the presence or absence of interference with private communication. Such, as follows from the text of the resolution mentioned above, is the mode of access to information content. If access to files is not limited to their owner and is not related to overcoming any logical protection systems, then, according to the logic of the court of cassation, there is no interference with private communication.

It is worth noting that a similar course of reasoning was already embodied in the practice of the Criminal Court of Cassation as part of the Supreme Court. Still, then it was accompanied by a somewhat different technical emphasis. Thus, in the decision of the Supreme Court dated April 9, 2020 (case No. 727/6578/17), the argument of the defense "that during the pre-trial investigation, illegal (without a decision of the investigating judge) access to information from electronic

information systems was found to be groundless of networks, which is designed as a protocol for the examination of the object – the phone", the motivation of which was indicated as follows: "As for the information that was available in the person's mobile phone, it was examined by turning on the phone and examining the text messages that were in it and accessing which was not related to the provision by the owner of the corresponding server (mobile operator) of access to electronic information systems. In this case, the body of the pre-trial investigation conducted an inspection of the object – the phone..." [15]. One of the critical theses that preceded the quoted conclusion was the regulatory consolidation of the mode of access to electronic information systems depending on the mode of access to the systems: obtaining information from electronic information systems or its part, access to which is not limited to its owner, does not require the permission of the investigating judge or by the holder or is not related to overcoming the logical protection system (Part 2 of Art. 264 of the CPC).

It is worth agreeing that by virtue of Part 2 of Art. 264 of the CPC, obtaining information from electronic information systems cannot be considered as removal of information from electronic information systems (as one of the types of interference in private communication – paragraph 4 of Part 4 of Art. 258 of the CPC) or its parts, the access to which is not limited by its owner, possessor or holder or is not related to overcoming the logical protection system. It can be assumed that the logic of the legislator was as follows: a person who does not limit access to digital devices, presuming the possibility of access to them by other persons (for example, family members or close relatives, roommates in a dormitory, colleagues at work), knowingly and voluntarily waives the privacy of information stored in this manner. The definition of private communication also confirms the given vector of reasoning: communication is private if the information is transmitted and stored under such physical or legal conditions under which the participants of the communication can count on the protection of information from the interference of other persons (Part 3 of Art. 258 of the CPC). In addition, the given logic fits into the concept of "reasonable expectation of privacy" formed in the precedent practice of the courts of the United States of America (see the decision of the Supreme Court of the United States in the cases Katz v. United States [16], Carpenter v. United States [17] and the European Court of Human Rights (Halford v. United Kingdom, Application No. 20605/92) [18], Case of Peev v. Bulgaria, Application No. 64209/01 [19], Case of Benedik v. Slovenia, Application No. 62357/14 [20] [for more details, see 21].

However, it should be noted that in the absence of clear criteria for qualifying the access regime to an electronic information system or its part, the understanding mentioned above of the provisions of Part 2 of Art. 264 of the CPC may lead to unlawful and disproportionate interference in the sphere of human rights and freedoms. Moreover, defining the access regime solely based on the presence or absence of a logical protection system (such as a graphical key, digital code, password, biometric identification tools, etc.) can result in a purely formal assessment of the openness of access to information stored on a digital device, which would not align with several constitutional and criminal procedural guarantees that will be discussed further. Therefore, to establish a lawful procedural method for accessing information stored on a digital device, judicial practice uses the access regime to its carrier: open access (public placement of the device or information) excludes the possibility of recognizing it as private and requiring prior judicial permission for review within the framework of covert extraction of information from electronic information systems. However, without the development and implementation of clear criteria to distinguish between open and restricted access to an electronic information system and its part, there is a risk of unlawful and disproportionate covert interference in privacy.

Similar to the position mentioned above, a court decision where the cassation court established the absence of covert interference in private communication during the examination of a detainee's phone holds research value [see 22]. The discussion concerned the protocol for examining the seized mobile phone, Samsung J5, from the detainee, on which photos and videos of the torture of victims were stored. According to the court's conclusion of the first instance, there was no significant violation of human rights and freedoms (Art. 87 of the CPC) during its examination [23]. The defense's argument

was that "during the examination, there was interference with their (*the convicted person's* – author's note – *I.T., A.S.*) right to privacy in the absence of prior consent from the phone's owner or a judge" [22].

Critically evaluating the arguments of the defense side, from which it was not clear what kind of authorization was in question, the court of cassation concluded that there was no need to obtain the prior consent of the owner of the phone or judicial authorization, referring to two fundamental theses: 1) "such a review of information that contained in the phone, obviously does not constitute tacit interference in private communication, provided for in § 2 of Chapter 21 of the CPC"; 2) the obligation of the prosecuting party to obtain court permission in accordance with the procedure defined by Chapter 15 of the CPC (temporary access to things and documents) is groundless, because "in this case, the phone had the prosecuting party after it was seized; therefore the requirement to give oneself access to it would contradict common sense" [22]. The above-described issue, while not directly related to conducting covert investigative (search) actions, remains of research interest within this work due to the problematic questions it raises: a) whether covert interference in private communication occurs during the examination of information from a phone; b) whether permission (from the owner or judicial authorization) is required when it is necessary to examine the content of information stored on the phone.

Analytical reflection on the conclusions formulated by the cassation court allows us to assert that their application, without regard to the circumstances of the case, carries the risk of legitimizing arbitrary interference by law enforcement authorities in a person's private life. It is reasonable to agree that examining photos and videos stored on a smartphone, conducted without concealment from its owner, in form does not constitute a covert investigative (search) action. One of the essential features of such actions is indeed missing: their covert nature, secrecy, and concealment from the individuals to whom they pertain. Thus, these procedural actions genuinely lack secrecy. However, does this automatically mean that the absence of covertness legitimizes such interference with rights and freedoms without permission from the owner or a judge?

In the authors' opinion, the answer to this question is negative for the following reasons. *Firstly*, modern mobile phones (smartphones) store various types of information, from private correspondence to personal information. Thus, it can be argued that digital devices should be recognized as a 'concentration point' for several fundamental human rights and freedoms: for example, the right to secrecy of correspondence, telephone conversations, telegraph, and other communications (the right to privacy of communication) (Art. 31 of the Constitution of Ukraine), and the right to respect for personal and family life (the right to privacy) (Art. 32 of the Constitution of Ukraine). Therefore, a generalized conclusion about the lawfulness or unlawfulness of examining the content of a mobile phone (smartphone) detached from the nature of the information being reviewed, in the authors' view, does not align with the essence of specific human rights guarantees, which are interfered with in this manner. It is not the storage medium (mobile phone, smartphone, tablet, portable computer, etc.). Still, the nature of the information being examined that is decisive in determining whether permission is required for examination and, if so, what kind. Otherwise, uncontrolled restrictions on several human rights and freedoms are legitimized, for which, in the absence of a digital "concentration point", prior permission (from the owner or an investigating judge, or court) would unquestionably be required[1].

The following should be noted regarding the guarantees accompanying the collection of private information. In criminal proceedings, everyone is guaranteed protection against interference with private (personal and family) life (Part 1, Art. 15 of the CPC). Additionally, no one may collect, store, use, or disseminate information about a person’s private life without their consent, except in cases

[1] It is worth noting that covert extraction of information from electronic information systems or their parts, access to which is not restricted by the owner, possessor, or holder or is not associated with overcoming logical security systems, as previously mentioned, does not require prior judicial authorization due to the direct provision of procedural law (Part 2 of Art. 264 of the CPC).

provided by this Code (Part 2, Art. 15 of the CPC. Access to private information, in the absence of covert means of obtaining it, is accompanied by the following procedural safeguards: (a) personal correspondence and other personal records (Para 6, Part 1, Art. 162 of the CPC), as well as a person's data (Para 8, Part 1, Art. 162 of the CPC), are classified as legally protected secrets contained in items and documents; (b) obtaining a court or investigating judge's authorization for temporary access to such items and documents is accompanied by a particular burden of proof (Part 6, Art. 163 of the CPC): additionally, the possibility of using the information contained in these items and documents as evidence must be demonstrated, as well as the impossibility of proving the circumstances in question by other means. Given the open (public) nature of obtaining information from a phone, the guarantees above serve as effective safeguards against disproportionate or unwarranted interference with a person's privacy and, therefore, should accompany any procedural action aimed at obtaining personal information.

The argument of the cassation court that "the requirement to grant oneself (*the prosecution* – the author's note – *I.T., A.S.*) access to it would contradict common sense", while logical in the context of the provisional nature of temporary access to items and documents, fails to consider its judicial oversight component: the granting of an order for temporary access to items and documents by an investigating judge is the result of their assessment of the proportionality of the interference with rights and freedoms, which inevitably accompanies access to items and documents containing personal information. Therefore, the primary purpose of the authorization for temporary access to items and documents in this situation is not to facilitate access but to ensure control over its legality and proportionality, which is impossible without such authorization. However, it is reasonable to agree with an exception to this rule, which implicitly follows from the cassation court's argument: voluntary consent from the holder of the item or document, if the requested information pertains to their private life, enables access without prior judicial oversight. This is because the individual, as the bearer of the right to privacy, is free to exercise it in favor of the public interest, represented in this case by the prosecution.

In the framework of protecting information of a private nature, it is essential to distinguish procedural access to the results of private communication, which, in addition to the right to respect for personal and family life (Art. 32 of the Constitution of Ukraine), is also protected by the right to confidentiality of correspondence, telephone conversations, telegraph, and other communications (Art. 31 of the Constitution of Ukraine). According to constitutional guarantees, exceptions can only be established by a court in cases provided by law to prevent a crime or ascertain the truth in a criminal investigation if the information cannot be obtained by other means (Part 1 of Art. 31 of the Basic Law). This exception enshrined in the Constitution of Ukraine is also implemented procedurally in criminal procedural law. In criminal proceedings, everyone is guaranteed the confidentiality of correspondence, telephone conversations, telegraph, and other forms of communication (Part 1 of Art. 14 of the CPC). In turn, interference with the confidentiality of communication is possible only based on a court decision in cases provided by this Code to detect and prevent a serious or especially serious crime, establish its circumstances, and identify the perpetrator if this goal cannot be achieved by other means (Part 2 of Art. 14 of the CPC). Thus, the legal basis for interfering with private communication (both as an exchange of information through messengers and its results in the form of correspondence, message threads, etc.) is a court decision. Its proportionality is determined by considering the gravity of the offense committed, the purposes pursued (detection and prevention of a serious or especially serious crime, establishing its circumstances, and identifying the offender), and the condition (if the goal cannot be achieved by other means).

At the institution of covert evidence collection level, the aforementioned constitutional guarantee has found its implementation in the requirement to obtain prior (Articles 260–264 of the CPC) or, in exceptional cases, subsequent judicial authorization for such interference (Art. 250 of the CPC). However, the law provides an appropriate algorithm if interference with private communication accompanies another investigative (search) action that is not covert and, thus, is not listed in Articles 260–264 of the CPC. In such cases, the prosecutor or investigator, with the prosecutor's approval, is

required to file a motion with the investigating judge for authorization to interfere with private communication under the procedures outlined in Articles 246, 248, and 249 of this Code, if any investigative (search) action will include such interference. From the above, it follows that the legislator does not provide exceptions to the general rule that interference with private communication requires judicial authorization, regardless of whether access to the relevant information is obtained openly or covertly.

Thus, the material presented above allows us to assert that: (a) maintaining the proportionality of interference and the balance between public and private interests is of particular importance in the context of both overt and covert information retrieval from digital devices (mobile phones, smartphones, tablets, laptops, etc.); (b) procedural methods for obtaining information from these devices should be accompanied by guarantees of respect for rights and freedoms (the right to respect for private and family life, the right to communication secrecy), with the specific set of guarantees determined based on the nature of the information obtained, as well as the access regime defined by the owner, holder, or custodian (including, but not limited to, the presence or absence of logical protection systems); (c) in the absence of the voluntary consent of the bearer of the relevant rights and freedoms, interference with these rights should be preceded by a judicial assessment of the proportionality and legality of such interference, which equates these procedural actions with covert interference in private communication in terms of the level of protection of rights and freedoms; (d) the above-analyzed positions of the court of cassation reflect a tendency to shift procedural emphasis in favor of public interests at the expense of private ones, which should be compensated by the development of procedural algorithms at the enforcement level aimed at implementing the established guarantees of human rights and freedoms, as well as an impartial assessment of the appropriate access regime to the electronic information system and its components.

Procedural concealment of actions

According to the traditional understanding of the admissibility of evidence, the critical criteria that influence its definition are proper procedural source, proper subject, and proper procedural order. Within the latter, particular attention is paid to the completeness and correctness of reflecting the data in one of the legally prescribed forms for recording criminal proceedings.

Thus, according to Part 2 of Art. 104 of the CPC, if a procedural action is recorded during a pre-trial investigation using technical means, this must be indicated in the protocol. Additionally, the introductory part of the protocol must include, among other things, the characteristics of the technical recording devices and information carriers used during the procedural action, as well as the conditions and procedures for their use (§ 1 of Part 3 of Art. 104 of the CPC). According to Part 1 of Art. 252 of the CPC, recording the course and results of covert investigative (search) actions must comply with the general rules for recording criminal proceedings as provided by this Code.

Considering that the overwhelming majority of covert investigative (search) actions are conducted exclusively using technical recording means, the question arises regarding how the requirement to reflect the technical component of covert activities in the protocol should be fulfilled. The problem with this issue is based on the fact that information about the fact or methods of conducting a covert investigative (search) action (Art. 4.12.3 of Part II of the Compendium of Information Constituting State Secrets, approved by order of the Central Directorate of the Security Service of Ukraine on December 23, 2020, No. 383 (hereinafter referred to as the Compendium), as well as information on specific indicators about the external appearance, tactical and technical characteristics of special technical means that reveal the organization, methodology, and tactics of their covert application in solving operational and investigative tasks (Art. 4.4.15 of Part II of the Compendium), constitute state secrets. Therefore, their complete recording in procedural documents may lead to disclosure. Consequently, the question arises as to how a reasonable balance should be ensured between maintaining state secrets (public interest) and allowing private participants in criminal proceedings to verify the proper order and accuracy of the recording made (private interest).

Its own vision of a reasonable balance of interests on this issue was expressed by the court of cassation in the resolution dated November 16, 2023 (case No. 629/4665/15-k), where, concerning the systematic interpretation of Articles 4.5.1, 4.5.6 of the covert investigative (search) actions formulated the following conclusion: "It does not contradict the provisions of the CPC not to specify information about the name of special equipment and the procedure for its use during the covert investigative (search) actions, taking into account that such information is intended for obtaining information secretly, is a state secret and concerns not only of this criminal proceeding, their disclosure without proper and substantiated grounds threatens national interests and security, the concepts and signs of which are defined in the Law of Ukraine *On National Security of Ukraine*" [24]. It is worth noting the consistency of the Court of Cassation in implementing the above conclusion into judicial practice: the Court of Cassation reached a similar conclusion in the resolution of January 26, 2022 (case No. 677/450/18), adopted even before the introduction of martial law on the territory of Ukraine. Thus, the court of cassation stated: "The name and serial number of the special equipment, its characteristics, and information carriers intended for obtaining information secretly are not specified in the protocol drawn up as a result of the secret investigative (search) action (audio, video monitoring of a person) on the admissibility as evidence of the technical record recording the conduct of this covert investigative (search) action, as well as the specified protocol" [25].

Therefore, as follows from the above, the balance of public and private interests in the issue of the completeness of the display of the "technical component" of covert investigative (search) actions is shifted in favor of keeping secret the data that characterize the relevant special technical means. However, it should be noted that the above does not cover information carriers on which the results of secret investigative (search) actions are stored and which are attached to the relevant protocols. In the opposite case, there are no guarantees that the data carrier attached to the protocol of an undercover investigative (search) action is exactly the one that was created after it was carried out and was not subjected to any operations other than writing the corresponding files to it. It is in this way that it is possible to ensure the confirmation of the proper procedural source of the data contained in it (the document is an appendix to the protocol), as well as the observance of the procedure for recording an undisclosed investigative (search) action. Therefore, hiding the technical features of the used equipment, which constitute a state secret (public interest), must be accompanied by a proper recording of the characteristics of the medium on which the files are copied and which is added to the protocol in order to prevent any unauthorized operations with it in the future (private interest).

Provocation of a crime

One of the vivid examples of how, on the one hand, it is difficult and, on the other hand, how important it is to observe the proportionality of the intervention and a reasonable balance of public and private interests is the prohibition during the monitoring of the commission of a crime to provoke a person to commit it. Thus, according to Part 3 of Art. 271 of the CPC, during the preparation and implementation of measures to control the commission of a crime, it is prohibited to provoke (incite) a person to commit this crime to further expose it, helping a person to commit a crime that he would not have committed if the investigator did not contribute to this, or for the same purpose to influence her behavior with violence, threats, blackmail. In addition, the legislator defined quite radical consequences that should follow the provocative behavior of law enforcement agencies: things and documents obtained in this way cannot be used in criminal proceedings. It is obvious that there are permanent procedural battles between the parties to the process around the presence or absence of signs of provocation, the judicial decision of which outlines the "red lines" for the law enforcement system. It is worth going further to consider the trends in the practice of the court of cassation in terms of assessing signs of provocation while using the chronological criterion outlined at the beginning of the work to organize the conclusions.

A kind of "checklist" of circumstances that must be checked by the court in the framework of establishing the presence or absence of provocation was once again given in the decision of the

Criminal Court of Cassation as part of the Supreme Court dated October 19, 2022 (case No. 728/1614/17): "In order to establish the fact of provocation of a crime, it is decisive to find out the following questions: were the actions of law enforcement agencies active, did they encourage a person to commit a crime, for example, initiative in contacts with a person, repeated offers, despite the person's initial refusal, persistent reminders; whether the crime would have been committed without the intervention of law enforcement agencies; whether the law enforcement agencies had objective data that the person was involved in criminal activity and the probability of his committing a crime was significant" [26]. The research value within the mentioned decision is, firstly, the adaptation of the "checklist" to the specifics of committing the crime provided for in Art. 368 of the Criminal Code: "... it is necessary to check who initiated the meetings, whether there were facts of refusal by the accused to receive an illegal benefit, whether there were persistent actions on the part of the witness, or whether the crime would have been committed without the intervention of law enforcement officers" [26], *secondly,* ascertaining the distribution of the burden of proof in relation to the given circumstances: "...in the context of the prescriptions of Art. 92 of the CPC, if the defense claims clearly not groundless arguments about the presence of provocation, the prosecution must prove that there was no incitement" [26]. Placing on the prosecution the burden of proving the absence of signs of provocation, if the defense reasonably claims their presence, reflects the vector of “equalization of forces” of the parties introduced by the Court of Cassation in proving one of the key issues within the framework of covert crime detection activities.

In the context of the law enforcement interpretation of certain signs of provocation, the following positions of the Court of Cassation are worthy of attention:

a) a negative statement that "the gap in time between the entry of information into the Unified Register of Pretrial Investigations and the direct receipt of an unlawful benefit cannot by itself indicate that it is a provocation of a crime since the pretrial investigation body cannot clearly predict the specific date of the commission of the crime", because its task is “only the recording of such illegal activity, which sometimes takes place for a long period of time due to the specifics of the crime committed” [27];
b) emphasizing the need to carefully check the activity of a law enforcement agent during operational procurement: "In order to establish the presence or absence of provocation of a crime, it is important to examine the information by the court based on the results of such an undercover investigative (search) action, such as the removal of information from transport telecommunication networks, the materials of which were not disclosed to the defense, were not attached to the court case materials and, accordingly, were not examined by the court. During a new trial in the court of appeals, it is necessary to investigate, in particular, the testimony of a person who was involved by law enforcement agencies in cooperation, according to which it was he who called the accused regarding the purchase of a narcotic drug and a powerful medicinal product, statements of the accused about repeated calls to a stranger's mobile phone with an offer to sell her a narcotic drug, the content of the conversations, which were recorded as a result of the removal of information from transport telecommunications networks, which was carried out before the operational purchase" [28].

Thus, from the positions outlined above, it is unequivocally evident that the careful and comprehensive verification of the activities of law enforcement agencies or their agents during the control of criminal offenses is crucial, as is establishing sufficient grounds to consider the individual subject to such covert investigative (search) actions involved in illegal activities. *On the one hand,* such verification contributes to the realization of the defense's right to a fair trial (the right to be heard and to receive judicial responses to the arguments presented), which undoubtedly supports private interests. *On the other hand,* it disciplines the prosecution, which must provide clear answers to key questions regarding the prohibition of provocation even before conducting a covert operation, thereby serving the public interest in the proper functioning of the law enforcement system.

A particularly illustrative example in the context of seeking a reasonable balance between public and private interests when assessing the presence or absence of signs of crime provocation is the

compensatory mechanism mentioned in the ruling of the Cassation Criminal Court within the Supreme Court on November 21, 2023 (case No. 991/722/21) [see 29]. Thus, while evaluating the arguments presented by the defense regarding the claim that the prosecution's "correspondence was not limited to this fragment and contained information that, when combined with other circumstances of the case, proved incitement to conversations concerning the receipt of a bribe from the convicted individual", the court reached the following conclusions:

a) "The prosecution, by failing to document complete information about this correspondence, also did not ensure the preservation of this information in any other way, for example, by seizing the phone and securing it from access by third parties. ... Thus, through its actions, the prosecution created and/or contributed to the creation of circumstances under which the exchange of messages between the convicted individual and another person became completely inaccessible to the defense" [29];
b) "The court previously noted that in cases where it is impossible to question a witness, courts must provide the party with adequate opportunities that could compensate for the disadvantageous position in which it finds itself due to such complications. The court believes that this principle should also be applied, mutatis mutandis, to other situations where a party is restricted in utilizing opportunities to clarify important circumstances of the case due to various reasons. The consequences of the actions of a party that has made it impossible or significantly complicated the examination of important evidence by the court should be interpreted in favor of the opposing party so as not to encourage the party to use such tactics (see, for example, Part 5 of Art. 97 of the CPC)" [29].

Thus, the creation of artificial barriers by the prosecution that restrict the defense's access to the full extent of materials that may indicate provocation of a crime is qualified by the court as improper conduct, which can be presumed to constitute reasonable doubt regarding the person's guilt, interpreted in favor of the defense (Part 3 of Art. 62 of the Constitution of Ukraine). This compensatory approach aims to "balance" the power dynamics between the prosecution and the defense in adversarial judicial proceedings, countering the "monopoly" on covert activities by law enforcement agencies that exists at the pre-trial stage of the process. Therefore, such a direction in applying and interpreting procedural law provisions in establishing the presence or absence of signs of crime provocation should be welcomed.

Conclusions

The conducted research on the proportionality of intervention and the balance of public and private interests during the covert collection of evidential information in criminal proceedings allows for the identification of the following law enforcement trends:

1) adhering to the proportionality of intervention and balancing public and private interests is particularly challenging during procedural operations involving digital data carriers, which serve as 'concentration points' for several fundamental human rights and freedoms. Effective safeguards against abuse must accompany any interference in these rights. Law enforcement practice demonstrates a tendency to shift the emphasis in favor of the public interest, which, considering the risk of uncontrolled and arbitrary intrusion into privacy, is difficult to justify;
2) the protection of the confidentiality (secrecy) of the technical component of covert investigative (search) actions, which is not fully reflected in the relevant protocols contrary to several procedural law requirements, is justified concerning special technical means but cannot be considered proportional regarding the carriers of the obtained results. Judicial practice, while recognizing the possibility of not reflecting such data in the protocol, does not demonstrate an adequate level of requirements for the documentation of its appendices;
3) the assessment of the presence or absence of signs of crime provocation, as practiced by the court of cassation, reflects a comprehensive approach to considering the circumstances of conducting a covert operation, as well as the activity and good faith of the prosecution's procedural conduct in the context of judicial adversariality.

Promising directions for further scientific research may include: a) the development and scientific justification of appropriate procedural algorithms for both overt and covert collection of evidential information from digital devices, which would ensure the proportionality of intervention and a reasonable balance between public and private interests; b) the formulation of amendments to legislation concerning the establishment of limits on reflecting the technical component of covert investigative (search) actions; c) the formation and scientific-practical provision of compensatory mechanisms that follow covert activities (proper documentation and recording of covert investigative (search) actions, ensuring the accessibility of all materials for verifying the presence or absence of crime provocation).

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International Economic Sanctions. Part 2. Sanctions Policy of the European Union Towards Russia: Problems of Implementation

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Abstract

The relevance of this study lies in examining the process of formation and development of the European Union's sanctions policy, focusing particularly on the theory and practice of applying restrictive measures against Russia in response to its aggression against Ukraine. The purpose and objectives of the research involve analyzing and synthesizing information related to the development of the theory and practice underlying the European Communities'/European Union's application of economic sanctions, comparing approaches to shaping a general sanctions policy and the specific sanctions policy toward Russia (referred to as a "sanctions revolution"), as well as formulating the author's conclusions and recommendations for both theoretical and practical application. A broad range of research methodologies and approaches was employed in the study. The formal-legal method facilitated the formulation of key terms, concepts, characteristics, and constructs, as well as the development of various classifications. The historical method proved useful in examining the establishment and evolution of the EU's sanctions policy. The systemic method aided in elucidating the mechanisms by which the EU imposes, modifies, and lifts economic sanctions against Russia. Additionally, the comparative-legal method was employed to evaluate the legal regulation of economic sanctions during different phases of European integration. The results of the study are reflected in the characterization of the European Union's autonomous economic sanctions as a system of restrictive measures introduced by EU institutions within the framework of the Common Foreign and Security Policy, without a mandate from the UN Security Council. The Art. concludes that the scope and depth of the EU's numerous sanctions regimes indicate that the Common Foreign and Security Policy is not merely an aspirational construct; rather, it actively promotes the development of legal norms and processes within the EU's internal legal order. In contemporary EU foreign policy, sanctions have effectively evolved into one of the Union's most favored instruments of external action. The Art. further argues that achieving member-state consensus on formulating a common sanctions policy demonstrates not only the Europeanization of national foreign policies but, more importantly, the formation of a genuinely pan-European foreign policy. It concludes that the EU's autonomous sanctions aim to penalize Russia, whose policies violate international law and threaten both regional and global security, by inflicting maximum damage. International law does not prohibit states or their unions, such as the European Union, from imposing unilateral economic restrictive measures if justified by security considerations. Finally, the Art. acknowledges imperfections in the EU's sanctions policy, evidenced by the widespread circumvention of its anti-Russian sanctions. Recognizing this reality compels EU institutions and the governments of its member states to develop additional instruments to combat the evasion of existing restrictive measures.

Keywords: sanctions; restrictions; sanctions policy; Russian aggression; sovereignty; security; EU law; Ukraine.

Міжнародні економічні санкції. Частина 2. Санкційна політика Європейського Союзу щодо Росії: проблеми реалізації

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Анотація

Актуальність дослідження полягає в розгляді процесу становлення та розвитку санкційної політики Європейського Союзу, зокрема теорії та практики застосування обмежувальних заходів стосовно Росії як відповіді на агресію проти України. Мета та завдання дослідження передбачають здійснення аналізу і синтезу інформації, пов'язаної з формуванням теорії та практики застосування економічних санкцій Європейським Співтовариством/Європейським Союзом, порівняння підходів до формування загальної санаційної політики і санаційної політики стосовно Росії, яку ідентифікують як санкційну революцію, а також формулювання авторських висновків із визначеної проблематики, рекомендацій для теоретичного та практичного використання. У процесі дослідження 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 процесу становлення й розвитку санаційної політики ЄС; системний метод – при з'ясуванні механізмів накладання, зміни та скасування економічних санкцій стосовно Росії; порівняльно-правовий метод використано під час оцінювання підходів до правового регулювання застосування економічних санкцій на різних етапах європейської інтеграції. Отримані результати дослідження полягають у визначенні автономних економічних санкцій Європейського Союзу як системи обмежувальних заходів, запроваджених інститутами ЄС в рамках Common Foreign and Security Policy, за відсутності мандату Ради Безпеки ООН. У статті сформульовано висновок, відповідно до якого широта і глибина численних санкційних режимів, що використовуються ЄС, свідчить про те, що Common Foreign and Security Policy є не просто прагненням, а сприяє розвитку права і правових процесів в середині правопорядку ЄС. У сучасній Common Foreign and Security Policy ЄС санкції фактично перетворилися на один з найулюбленіших інструментів зовнішньої політики ЄС. У статті аргументовано тезу про те, що досягнення згоди держав-членів в питанні вироблення загальної санкційної політики є свідченням не лише європеїзації національних зовнішніх політик, але й, що особливо важливо, формування загальноєвропейської зовнішньої політики. Сформульовано висновок про те, що автономні санкції ЄС спрямовані на покарання Росії, політика якої порушує міжнародне право та загрожує регіональній та глобальній безпеці шляхом заподіяння максимальної шкоди. Міжнародне право не забороняє державам та їхнім об'єднанням, наприклад, Європейському Союзу, вводити односторонні обмежувальні заходи в економічній сфері, якщо вони виправдані міркуваннями безпеки. У статті констатовано недосконалість санкційної політики ЄС, що проявляється в масовому обході антиросійських санкцій. Усвідомлення цього факту спонукає інститути ЄС і уряди держав-членів розробляти додаткові інструменти боротьби з обходом наявних обмежувальних заходів.

Ключові слова: санкції; обмеження; санкційна політика; російська агресія; суверенітет; безпека; право ЄС; Україна.

Introduction

From the inception of the European integration process in 1951, a united Europe has been regarded as one of the world's most stable and attractive regions, as evidenced by the rapid expansion of its membership. However, the unprovoked aggression of the Russian Federation (RF) against Ukraine

in 2014, which escalated into a full-scale invasion in 2022, resulted in the first high-intensity war in Europe since World War II. Thus, Russian aggression and its associated consequences have become key factors in the redistribution of economic, legal, and political relations, as well as in the reconfiguration of goods and services supply chains across the EU.

It was entirely expected that the European Union, which began developing its own sanctions policy in 1994, would respond to Russian aggression: the EU introduced unprecedentedly large-scale sanctions against the RF. These measures complement the individual and economic sanctions imposed against Russia from 17 March 2014, following the annexation of Crimea and the occupation of parts of Donbas [1], as well as due to Moscow's non-compliance with the Minsk Agreements[1].

In connection with the introduction of the European Union's sanctions policy against Russia, it has become evident that EU member states hold differing attitudes toward Moscow. One group (the Baltic States and Poland, the Nordic countries, Romania, and the United Kingdom) adheres to a "hawkish" approach, which entails a more stringent application of this policy. By contrast, other states (Austria, Bulgaria, Greece, Spain, Italy, Cyprus, Slovakia, Portugal, and Hungary) are inclined to maintain a certain level of engagement with Russia due to longstanding economic, cultural, and religious ties. In this situation, France and Germany have assumed a more moderate stance [2-4].

Restrictive measures were introduced by the European Union in February 2022 in response to Russia's decision to extend recognition to territories in the Donetsk and Luhansk regions of Ukraine not under government control, treating them as independent entities, and to deploy Russian troops there. In October of that same year, these measures were extended to include the non-government-controlled territories of Zaporizhzhia and Kherson. These measures will remain in effect until 24 February 2025.

As of December 2024, the European Union has introduced 15 packages of sanctions [5; 6] against Russia. According to clarifications provided by the Council of the EU, the imposed sanctions include targeted restrictive measures (individual sanctions)[2], economic sanctions[3], and restrictions on the issuance of visas by EU member states[4] [8]. However, in December 2022, the sanctions packages were supplemented by provisions allowing Western companies to continue operating in Russia, despite existing sanctions. This step was intended to assist Western companies seeking to withdraw capital from Russia but unable to do so for various reasons. Experts believe that certain firms exploit this loophole, using it as political cover to remain in Russia. To prevent the

[1] In March 2014, the Council of the EU decided to freeze the assets of individuals responsible for the misappropriation of Ukrainian state funds. Restrictions on economic cooperation were introduced by the EU for the first time in July 2014 and included the following measures: the European Investment Bank was asked to suspend the signing of new financial operations; EU member states agreed to align their positions in the Board of Directors of the European Bank for Reconstruction and Development with the aim of suspending the financing of new operations in Russia; and the implementation of EU bilateral and regional cooperation programs with Russia was reviewed, resulting in the termination of certain programs.

[2]Individual sanctions target persons responsible for supporting, financing, or implementing actions that undermine the territorial integrity, sovereignty, and independence of Ukraine, or those who benefit from such actions. These EU restrictive measures apply to a total of 1706 individuals and 419 legal entities. The list of legal entities includes: banks and financial institutions; companies in the military and defense sector; companies in the aviation, shipbuilding, and mechanical engineering sectors; armed forces and paramilitary formations, including the Wagner Group; political parties; the "All-Russia People's Front" movement; telecommunications companies; and media outlets responsible for propaganda and disinformation. Sanctions against individuals include travel bans and asset freezes, while sanctions against legal entities consist of asset freezes. This means that all accounts belonging to the listed persons and organizations in EU banks are frozen. It is also prohibited to directly or indirectly make any funds or assets available to them [7].

[3]These sanctions target the financial, trade, energy, transport, technology, and defense sectors.

[4] Since February 2022, the EU has decided that Russian diplomats, other Russian officials, and businessmen can no longer benefit from visa facilitation provisions. In September 2022, the Council of the EU decided to suspend the EU-Russia visa facilitation agreement.

circumvention of sanctions, certain Russia-controlled entities based in the illegally annexed territory of Crimea were included in the list. In addition to the EU's collective sanctions, more stringent sanctions have been imposed, for example, by Estonia[1], Latvia, Lithuania, Poland, the Czech Republic, and Finland[2]. Since 2014, diplomatic sanctions have also been in effect against Russia[3].

Confronted with unprecedentedly large-scale sanctions, the RF employs various mechanisms to circumvent these restrictive measures, for instance, by using complex financial schemes, falsifying the nature or origin of traded goods, or relying on the jurisdictions of third countries. Individuals and legal entities included in sanctions lists also make efforts to conceal their assets [9]. Moscow's development and use of such mechanisms require the rapid refinement of the EU's sanctions policy and that of individual member states. For Ukraine, this task is critically important, as the Russian Federation's economic capacity to continue its aggression depends on it.

Ukraine, for its part, is also implementing a sanctions policy. The President of Ukraine periodically issues decrees containing annexes listing sanctions against Russian legal and natural persons involved in supporting Russia's military apparatus. Efforts are underway to synchronize Ukrainian sanctions with corresponding decisions made by partner states. Beginning on 31 January 2024, the National Security and Defense Council of Ukraine has been forming the State Sanctions Register – an information and communication system that ensures free public access to up-to-date and reliable information on all subjects against whom Ukrainian restrictive measures have been applied. The purpose of maintaining this register is to provide public access to current and reliable information on the entities against which restrictions have been imposed [10].

Literature Review

There is a significant body of scholarly research on international sanctions. However, the EU's sanctions activities have not been systematically compiled into a single database, even considering many years of experience in this domain. Over the last decade, this situation has begun to change: an increasing number of authors are examining the European Union's restrictive measures (G. Felbermayr [11]; F. Giumelli [12; 13]; J. Kreutz [14]; C. Portela [15]).

Only relatively recently have scholars started paying particular attention to variations in the types and structures of sanctions (M. Hedberg [16]; E.V. McLean, T. Whang [17]; C. Portela [18]). In his research, F. Casolari focuses on the hybridization of the legal instruments of the European Union's sanctions policy, i.e., their modification in the face of changing threats confronting a united Europe, with the aim of preserving its strategic autonomy [19].

Sanctions the EU against Russia brought about an unprecedented emphasis on sanctions implementation and enforcement, which have traditionally relied on a decentralised system. This has resulted in a mosaic of practices across the EU, involving more than 160 designated competent authorities within Member States. While reflecting the principle of subsidiarity, this by triggering practical confusion and contradictory legal interpretations of key sanctions provisions between Member States. Under these conditions, The EU should design a new horizontal sanctions regime to

[1]Thus, in 2023, against the backdrop of a migration crisis at the Estonian-Russian border, Estonia decided to restrict operations at its border crossing points, halted issuing visas to Russians, and is developing a legal mechanism for transferring frozen Russian assets and those of its sanctioned citizens to Ukraine.

[2]Finland did not limit itself to economic sanctions against Moscow. In July 2022, the Finnish Parliament passed a law allowing for the installation of barriers along the border with Russia and the closure of the 1,300-kilometer-long border. In November 2023, against the backdrop of a sharp increase in the flow of migrants at the border with the Russian Federation, Finland closed all checkpoints on the Finnish-Russian border. In April 2024, the Finnish authorities halted traffic for pleasure craft on the Saimaa Canal through Nuijamaa, and the Haapasaari and Santio maritime checkpoints were also closed indefinitely.

[3] In 2014, the EU-Russia summit was canceled, and EU member states decided not to hold regular bilateral summits with Russia and to suspend bilateral talks with the Russian Federation on visa matters. Instead of the G8 summit in Sochi on 4–5 June 2014, a G7 meeting took place in Brussels. Since then, meetings have continued in the G7 format. EU countries also supported suspending negotiations on Russia's accession to the Organisation for Economic Co-operation and Development (OECD) and the International Energy Agency.

counter circumvention [20]. The legal regulation of relations aimed at preventing the circumvention of sanctions is an important area of research within the EU's sanctions policy. However, it has received attention only in recent years. Studies by E. Kaca [21]; K. Meissner, C. Graziani [22; 23] cover the full history of Council decisions, regulations, and annexes concerning the EU's restrictive measures.

Russia's aggression against Ukraine, launched in 2022, has prompted researchers to examine the European Union's sanctions policy specifically toward Russia (M. Onderco, R. van der Veer [24]; P.M. Silva, Z. Selden [25]; V. Szép [26]; P.A. van Bergeijk [27]; I.V. Yakoviyk, Ye.A. Novikov, A. Turenko [28-30]). Yet, a systematic and comprehensive account of the full record of EU sanctions imposed on Russia is missing, especially in Ukrainian scholarship.

Materials and Methods

In the twenty-first century, the breadth and depth of studies on international sanctions are expanding faster than ever before, with serious implications for the theory and practice of their application. Since the end of the Cold War, regional organizations, including the European Union, have increasingly used sanctions against states experiencing democratic crises.

The aspect of autonomy focuses on the capacity to act EU independently from the respective member states. The presentation of the legal framework and the practice of sanctions will provide indications on the degree to which EU institutions and member states can act independently from each other in the utilisation of such measures. This is also linked to the internal discussion within the EU, namely "the ability to formulate effective policies" in order to respond to "opportunity and/or to capitalize on presence". Looking at sanctions imposed can provide only a partial picture of EU action/inaction, but the increase in sanctions adoptions is certainly a strong indicator of the greater impact and reach of its international actorness [13, p. 5; 31, p. 97-101].

For a long time, research on economic sanctions examined the policy of sanctioning countries as a choice between imposing sanctions to gain concessions from the targeted country and taking no action. This is undoubtedly a simplified approach that should be replaced by an analysis of sanctions as a multifaceted foreign policy instrument of the European Union and its individual member states. In this article, we argue that regional economic sanctions cannot be viewed solely as tools for promoting democracy. Instead, the policy of regional sanctions reveals contradictions concerning the essence and limitations of democracy, as well as the processes of regional intervention into an area at the core of interstate conflicts. Building on studies of restrictive measures, one should conceptualize three potential drivers of these sanctions designs: humanitarian considerations; domestic considerations; and geopolitical considerations [23, p. 379].

Results and Discussion

The Formation of the European Union's Sanctions Policy

Until the 1980s, the European Communities did not impose their own sanctions; instead, member states took measures at the national level arising from the UN Security Council's sanctions policy concerning Rhodesia (1965) and South Africa (1977).

The member states of the European Community turned to the establishment of a sanctions policy in the early 1980s [32]. During this period, sanctions policy was only rarely mentioned in the context of discussions about structuring the external policy of the European Communities [33; 34]. Researchers believe that the development of an autonomous sanctions policy became possible after on 13 October 1981, in London, the Foreign Ministers of the Ten adopt a report on European Political Cooperation (EPC) that sets out a more coherent approach to international issues and to matters of security [35; 36, p. 7]. The Communities' sanctions against the Soviet Union in response to its invasion of Afghanistan marked the start of a coordinated European sanctions policy independent of the UN.

The next and final instances of an autonomous sanctions policy prior to the entry into force of the

Maastricht Treaty (1993) involved the introduction of arms embargo on Myanmar for the military coup (1988) and on China after the events of Tiananmen Squar (1989), as well as restrictive measures on the Democratic Republic of Congo (1993) and on Nigeria (1993). The significance of the Maastricht Treaty lay in its establishment of the Common Foreign and Security Policy (CFSP), which provided the EU with the authority to impose sanctions.

In the early 1990s, sanctions practice became more frequent and complex, giving rise to the notion of a European Union sanctions policy. In this context, EU sanctions are defined as restrictive measures introduced by EU institutions within the framework of the CFSP and in the absence of a United Nations Security Council mandate.

Paradoxical as it may seem, for the European Union—which at that time lacked the capacity to demonstrate its military might, did not implement a consistent and binding external policy for its member states, and was generally considered a "soft power" – sanctions became one of the most favored instruments of the united Europe's foreign policy. To some extent, this can be explained by the EU's growing self-perception as an active participant on the international stage.

Despite the relatively widespread practice of the European Union's use of sanctions, this realm of European foreign policy remains largely unknown to the general public, which explains the interest it attracts from both foreign and domestic researchers.

Sanctions are not clearly defined at the level of EU legislation, but they serve a purpose similar to that of the sanctions adopted by the UN Security Council. In the early 2000s, EU institutions developed a number of documents defining the Union's strategic security objectives. For example, the European Security Strategy (2003) identified the security threats to a united Europe and the measures for responding to them [37]. In addition to the Strategy, which was general in nature, documents addressing specific aspects of European security policy were also approved.

It is well known that UN obligations to prevent threats to international peace include preventing the proliferation of weapons of mass destruction. This provided the basis for UN and EU sanctions against the nuclear programs of Iran and North Korea. In 2003, the European Union adopted strategy against the proliferation of Weapons off mass destruction, in which sanctions were mentioned for the first time [38]. In 2004, the Council approved the "Basic Principles on the Use of Restrictive Measures (Sanctions)" [39], devoted to the introduction of autonomous sanctions by the Union.

In the "Basic Principles", emphasis was placed on the following points:
– the EU is devoted to the effective use of sanctions as an important way to maintain and restore international peace and security in accordance with the principles of the UN Charter and of our common foreign and security policy;
– the EU will apply measures within the UN, in line with Art. 19 TEU, to coordinate its actions related to sanctions. The Council will ensure full, effective and timely implementation of measures agreed by the UN Security Council;
– if necessary, the Council will impose autonomous EU sanctions in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance. EU will do this in accordance with common foreign and security policy, as set out in Art. 11 TEU, and in full conformity with our obligations under international law;
– the Council will work to enlist the support of the widest possible range of partners in support of EU autonomous sanctions which will be more effective when they are reinforced by broad international support;
– the Council is committed to using sanctions as part of an integrated, comprehensive policy approach which should include political dialogue, incentives, conditionality and could even involve, as a last resort, the use of coercive measures in accordance with the UN Charter;
– sanctions should be targeted in a way that has maximum impact on those whose behaviour we want to influence. Targeting should reduce to the maximum extent possible any adverse

humanitarian effects or unintended consequences for persons not targeted or neighbouringcountries;
– the Council will work to further refine sanctions and to adapt the instrument to the new security environment. In this context, the Council stands ready to impose sanctions, where necessary, against non-state actors;
– the Council aims to deploy all its instruments flexibly and in accordance with needs on a case-by-case basis;
– in all cases, our objectives should be clearly defined in the enabling legal instruments. Sanctions should be regularly reviewed, in order to ensure they are contributing towards their stated objectives. Sanctions should be lifted according to their objectives being met;
– the European Union will work to further develop the instrument of sanctions in the light of lessons learned and to improve their implementation, both internally and within the UN [39].

Despite the obligations to respect human rights enshrined in its Charter, the UN Security Council rarely imposes sanctions for human rights violations, primarily due to the resistance of Russia and China, which regard such issues as "internal affairs". In contrast to the UN, human rights and democracy constitute the dominant theme in most of the EU's autonomous sanctions against certain states, such as Belarus, Burundi, China, Guatemala, Guinea, and Venezuela, as well as former regime leaders accused of the misappropriation of state funds (e.g., Tunisia's Ben Ali). The EU has established a separate Global Human Rights Sanctions Regime, one of the four horizontal EU sanctions regimes [40].

In the European Union, a regulatory framework has evolved to govern the application of EU sanctions: first, sanctions are imposed in accordance with the principles set out in the "Basic Principles" (2004); second, sanctions are devised and imposed in accordance with the targeted approach defined in the "Guidelines" (2018); third, pursuant to the "Best Practices" (approved in 2018 and progressively updated), which ensure the uniform implementation of EU decisions across member states [13, p. 6].

In the 21st century, sanctions have become one of the central elements of the Common Foreign and Security Policy. As of 2018, the European Union had 42 sanctions programs, placing it second only to the United States in terms of active use of restrictive measures. While comprehensive trade embargoes were once preferred, over the past two decades the EU has moved towards asset freezes and visa bans targeted at individual persons and companies, aiming to influence foreign governments while avoiding humanitarian costs for the general population. Among other measures in the sanctions toolkit, one should note arms embargoes, sectoral trade and investment restrictions, as well as the suspension of development aid and trade preferences [41].

EU Anti-Russian Sanctions (Restrictive Measures)

In the context of the European Union's common foreign and security policy (CFSP), Art. 29 of the Treaty on European Union allows the Council of the EU to adopt a decision to impose restrictive measures (sanctions) against non-EU countries, non-state entities or individuals. These measures, which must be consistent with the objectives of the CFSP, as laid down in Art. 21 TEU, are imposed to bring about a change in policy or activity by the target party responsible for the behavior that is at issue (not respecting international law or human rights, or pursuing policies that do not conform with the rule of law or democratic principles). The Council takes decisions to adopt, renew, or lift sanctions regimes by unanimity, on the basis of proposals from the High Representative of the Union for Foreign Affairs and Security Policy (Art. 29 TEU). The economic and financial aspects of such decisions are implemented by regulations adopted by the Council on the basis of Art. 215 TFEU, upon a joint proposal by the High Representative and the European Commission [42; 43].

The EU's sanctions policy toward Russia began on 17 March 2014, when, following the contentious Crimean referendum, the United States, the European Union, and Canada imposed targeted sanctions. On 31 July 2014, the Council of the EU adopted Regulation No. 833/2014 [44]

(subsequently amended multiple times) concerning the introduction of economic sanctions (aka restrictive measures[1]) in connection with the actions of the Russian Federation that destabilize the situation in Ukraine. These EU measures aimed to weaken the aggressor state's economic base by depriving it of critical technologies and markets, thereby significantly limiting its capacity to wage war. Both European and American policymakers tend to view sanctions as a low-risk instrument, especially when compared to military solutions.

On 28 June 2016, the European Union updated its doctrine to enhance the effectiveness of the defense and security of the European Union and its member states by adopting the EU Global Strategy (which replaced the European Security Strategy (2003)). The global strategy emphasized: a stronger Union requires investing in all dimensions of foreign policy, from research and climate to infrastructure and mobility, from trade and sanctions to diplomacy and development. Long-term work on pre-emptive peace, resilience and human rights must be tied to crisis response through humanitarian aid, CSDP, sanctions and diplomacy. Therefore, "Restrictive measures, coupled with diplomacy, can play a pivotal role in deterrence, conflict prevention and resolution. Smart sanctions, in compliance with international and EU law, will be carefully calibrated and monitored to support the legitimate economy and avoid harming local societies. To fight the criminal war economy, the EU must also modernise its policy on export control for dual-use goods, and fight the illegal trafficking of cultural goods and natural resources" [45].

The concept of strategic autonomy, as part of the Global Strategy, concerns the European Union's ability to protect Europe and act without relying too heavily on the United States. This concept devotes significant attention to the hybridization of the legal instruments of the EU's sanctions policy, i.e., their modification in light of the changing threats faced by the EU, in order to preserve its strategic autonomy [19].

In its early stages, the EU's sanctions policy often entailed overly broad restrictive measures (for example, the embargo imposed on Argentine imports following that country's occupation of the Falkland Islands (1982) [46]). However, concerns about the negative humanitarian consequences of the UN trade embargo against Iraq (1990-2003) led both the UN and the EU to adjust their stance toward a more targeted approach: exerting maximum pressure on individuals (the political and military leaders of regimes) and organizations responsible for unlawful activities [46]. As a result, the European Union now more frequently resorts to measures such as visa bans, asset freezes and arms embargoes. These restrictions can cause significant inconvenience to targeted persons and entities while not affecting the broader population. The EU also uses economic sanctions, albeit less frequently. EU economic sanctions typically focus on one or more strategic activities of a given country rather than its entire national economy, thereby minimizing negative humanitarian repercussions wherever possible.

An exception to this rule has been the unprecedented scope and scale of European Union sanctions (some researchers describe them as a sanctions revolution [40; 47; 48]) aimed at Russia's economy and political elite. These measures are intended to significantly limit Russia's ability to carry out hostilities against Ukraine.

On the eve of Russia's aggression against Ukraine, the European Union undertook efforts to improve the legislative framework of its sanctions policy; the following documents were adopted:
– in 2018, the Council adopted an updated paper on EU best practices for the effective implementation of restrictive measures (basic principles on the use of restrictive measures (2004)) [49];
– Sanctions Guidelines (2018) [50];
– Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against

[1] The sanctions and restrictive measures are used interchangeably in this article and shall have the same meaning. Treaties use the termrestrictive measures (see Title IV of the Treaty on the functioning of the EU entitled "Restrictive measures"). However, in thes cientific discourse, in the politicall exicon and soft law actsterm "sanctions" iswidelyemployedas a synonym for «restrictive measures".

the proliferation and use of chemical weapons [51];
– Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons [52];
– Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [53];
– Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [54];
– Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items [55];
– Common Military list of the European Union adopted by the Council on 21 February 2022 (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment) [56].

Between 2014 and 2021, the EU periodically expanded its sanctions against individuals and legal entities and imposed embargoes on arms and related materials, goods and dual-use technologies intended for military purposes or for military end-use. It also imposed bans on the import of arms and related materials, controls on the export of equipment for the oil industry, and restrictions on the issuance and trade of certain bonds, shares, or similar financial instruments. Economic sanctions directly targeting Crimea were also introduced. However, until 2022, anti-Russian sanctions remained relatively limited.

Russia's invasion of Ukraine on 24 February 2022 presented an unprecedented threat to both the European and international legal order. Enshrining in its Constitution the incorporation of Luhansk, Donetsk, Zaporizhzhia, and Kherson oblasts signaled an escalation of the conflict. In response to Russia's aggression against Ukraine, the European Union resorted to the most comprehensive sanctions it had ever adopted autonomously: it introduced the 15th package of sanctions against Russia, as well as separate sanctions packages against Belarus [57].

EU Efforts to Combat Sanctions Circumvention

The unprecedented scale and scope of anti-Russian sanctions have created new implementation challenges for the European Union. EU institutions and member states have concentrated their efforts on making the alignment of positions truly global and closing loopholes to prevent Russia from circumventing sanctions.

Under EU law, it is prohibited to "knowingly and intentionally participate in activities the object or effect of which is to circumvent the sanctions" [58]. Nonetheless, almost immediately after the introduction of anti-Russian sanctions, it became clear that Moscow was seeking and finding ways around them. An analysis conducted by Forbes experts suggests that Russia imports high-tech and other goods through third countries. In 2022, Turkey, Kazakhstan, Armenia, Uzbekistan, and Kyrgyzstan increased their trade flows with Russia the most. At the same time, there was a significant increase in exports to these countries from Western states. According to experts, the scale of the problem is such that Russians obtained all the goods they needed, and re-exports from neighboring countries almost completely neutralized all sanctions prohibitions[1]. The process of closing loopholes is complex, and Ukraine is understandably dissatisfied with its speed.

[1]In 2022, compared to 2021, the following countries increased their exports to Russia: Turkey by 62%, or USD 3,568 million; Kazakhstan by 25%, or USD 1,762 million; Armenia by a factor of 2.98, or USD 1,571 million; Uzbekistan by 53%, or USD 896 million; Kyrgyzstan by a factor of 2.46, or USD 571 million. They also increased their exports to: Kazakhstan: China by 17%, or USD 2,395 million Germany by 25%, or USD 1,325 million South Korea by a factor of 2.15, or USD 888 million Lithuania by a factor of 2.13, or USD 476 million Czech Republic by a factor of 3.01, or USD 462 million Uzbekistan: China by 28%, or USD 1,622 million Kazakhstan by 33%, or USD 916 million Germany by a factor of 2.05, or USD 723 million Hong Kong by a factor of 17.99, or USD 717 million South Korea by 16%, or USD 304 million Kyrgyzstan: China by a factor of 2.06, or USD 7,948 million Lithuania by a factor of 9.16, or USD 296 million Germany by a factor of 5.94, or USD 293 million South Korea by a factor of 3.31, or USD 260 million Turkey by 20%, or USD 153 million [59].

Nevertheless, it is taking place, and partner states are demonstrating the political will to close paths for sanctions evasion.

It is natural that EU member states have differing views on what constitutes a breach of restrictive measures (sanctions) and what penalties should be applied in the event of a violation. Clearly, this can lead to varying degrees of sanction enforcement and a risk of circumventing these measures. Potentially, this allows sanctioned persons to continue accessing their assets and supporting regimes targeted by EU measures. To put an end to attempts to circumvent sanctions, the EU Council noted that "signs of cases where EU sanctions prove ineffective" include "The fact that the main activity of a third country operator consists of purchasing restricted goods in the Union that reach Russia, the involvement of Russian persons or entities at any stage, the recent creation of a company for purposes related to restricted goods reaching Russia, or a drastic increase in the turnover of a third country operator involved in such activities". Thus, the EU Council provided non-exhaustive lists of red flags for identifying 'cases of frustrating' EU sanctions, which may lead to the inclusion of organizations or individuals on sanctions lists [60].

On 28 November 2022, the EU Council unanimously decided to add the violation of restrictive measures (sanctions) to the list of "EU crimes" included in the Treaty on the Functioning of the EU [61]. Council and European Parliament reach political agreement to criminalise violation of EU sanctions and Council gives final approval to introduce criminal offences and penalties for EU sanctions' violation [62].

Including the violation of restrictive measures in the list of "EU crimes" was the first of two steps towards ensuring a uniform degree of sanctions enforcement throughout the EU and putting an end to attempts to circumvent or breach EU measures. The next step involved the European Commission preparing a proposal for a directive setting out minimum rules concerning the definition of criminal offences and penalties for violating the EU's restrictive measures [63].

Stopping those who facilitate the circumvention of EU sanctions is a complex task, and member states and EU institutions have been rather hesitant and slow in their pursuit of a solution. It should be noted that every conclusion of the European Council since March 2022 [64] has called for action to prevent and counter the circumvention of EU sanctions against Russia. The European Parliament also expressed concern about the scale of trade sanctions evasion [65]. In response, the European Union adopted the 11th package of sanctions[1] (June 2023) [66], aimed at ensuring better enforcement and implementation of EU sanctions against Russia based on lessons learned over the past year. To this end, a special anti-circumvention instrument was included, which provides for:
– the EU plans to enhance cooperation with third countries and provide technical help. In cases where circumvention persists, the EU may resort to exceptional measures, such as restricting the sale of goods and technology to third countries at high risk of being used for circumvention;
– the EU has imposed a transit ban on goods and technology that could contribute to Russia's military and technological advancements. The ban includes items related to the aviation and space industries and jet fuel and fuel additives exported from the EU to third countries;
– the EU has imposed restrictions on road transport by prohibiting the entry of goods transported by trailers and semi-trailers registered in Russia. In light of deceptive practices in the shipping industry, vessels suspected of breaching bans on importing Russian crude oil and petroleum products or tampering with their navigation systems will be denied access to EU ports and locks;
– the European Council has amended the existing listing criterion regarding the circumvention of EU sanctions, or significant frustration of EU sanctions by third-country operators, including instances where the main activity of a third-country operator consists of purchasing restricted goods in the EU that reach Russia, the involvement of Russian individuals or entities, the recent creation

[1]This package comprised: Council Regulation (EU) 2023/1214 amending Council Regulation 833/2014, covering the EU's sectoral sanctions on Russia; Council Regulation (EU) 2023/1215 amending Council Regulation 269/2014 (Regulation 269), covering the EU's asset freeze regime on Russia; and Council Implementing Regulation 2023/1216 added more individuals and entities to the asset freeze lists under Regulation 269.

of a company for purposes related to prohibited goods reaching Russia, or a drastic increase in the turnover of a third country operator involved in such activities [67].

It should be noted that, in order to list an entity for facilitating the circumvention or obstruction of EU sanctions, the EU Council applies the standard of "reasonable suspicion" or "reasonable cause to suspect" (the United Kingdom follows a similar position [68]). The EU Council, as the institution applying sanctions, does not need direct evidence of circumvention to impose sanctions on entities for these reasons.

The fight against sanctions circumvention continued in the 14th package[1], adopted on 24 June 2024. The 14th package contains several measures aimed at the strengthening of anti-circumvention. In particular, the newly introduced Art. 8a of Regulation 833/2014 now requires EU parent companies to undertake "their best efforts" to ensure that their non-EU subsidiaries do not take part in any activities undermining EU sanctions. In accordance with the newly introduced Art. 12ga of Regulation 833/2014, EU operators which sell, licence or transfer IPR or industrial know-how related to certain items on the Common High Priority (CHP) list are now required to contractually prohibit their commercial counterparts in third countries from using those rights and know-how to manufacture CHP goods for RF or for use in Russia. Art. 12gb of Regulation 833/2014 obliges EU exporters of CHP goods to implement specific due diligence requirements to ensure that CHP goods do not reach RF, including through risk assessment, policies, controls and procedures. EU exporters of CHP goods must also ensure that their foreign subsidiaries trading in CHP goods implement the same measures. Both provisions require compliance from 26 December 2024 and Art. 12ga provides an additional six-month transitional period for pre-existing contracts.

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Finally, the existing anti-circumvention provision in Art. 12 of Regulation 833/2014 and Art. 9 of Regulation 269/2014 now clarifies that circumvention for these purposes includes participating in "activities the object or effect of which is to circumvent the [EU sanctions]," even "without deliberately seeking that object or effect but being aware that the participation may have that object or effect and accepting that possibility". This amendment codifies existing case law from the European Court of Justice in Case C-72/11 [69] and, in principle, should not make the anti-circumvention rules stricter than they already were [70].

On 24 April 2024, the European Parliament and Council adopted Directive (EU) 2024/1226 on the definition of criminal offences and penalties for the violation of European Union restrictive measures, and amending Directive (EU) 2018/1673. The Directive criminalizes the following sanctions violations: providing funds to sanctioned individuals, or failing to freeze their assets; breaching travel bans; entering into prohibited agreements with third states; transactions involving restricted-use goods; providing certain restricted services; circumventing EU sanctions; and violating the conditions of licenses issued by Member States [71].

This was the final step of a complex process during which, for the first time, the European Union added the violation of EU sanctions to the list of EU crimes. This is the first time since the Lisbon Treaty that the EU has expanded its list of EU crimes. The Directive introduced significant changes to EU sanctions enforcement by harmonizing the rules on sanctions violations and setting common definitions of criminal offences and penalties. It also introduces incentives for compliance, such as

[1] The 14th package consists of Council Regulation (EU) 2024/1745 amending Regulation (EU) 833/2014, and Council Regulation (EU) 2024/1746 and Council Implementing Regulation (EU) 2024/1746 which amend Regulation (EU) 269/2014.

reduced penalties for voluntary self-disclosure. The Directive entered into force on 20 May 2024, and Member States have until 20 May 2025 to implement it into national law [72].

Conclusion

There are three major types of EU sanctions. First, the EU grants these measures standing in European law through a Council decision under the CFSP, followed by the adoption of a regulation. The EU measures are thus “embedded” in universally applicable UN sanctions. Second, there are EU autonomous sanctions that go beyond UN sanctions – these are additional restrictive measures taken to strengthen UN sanctions regimes. Third, there are EU autonomous sanctions applied in the absence of UN sanctions. They also serve as an instrument of EU foreign policy, expressing concern about what is considered unacceptable behavior and reaffirming EU values on the international stage [73].

The EU has progressively imposed restrictive measures on Russia in response to: the illegal annexation of Crimea (2014); the full-scale invasion of Ukraine (2022); and the illegal annexation of the Donetsk, Luhansk, Zaporizhzhia, and Kherson regions of Ukraine (2022). So far, 15 packages of sanctions have been adopted. The EU's restrictive measures are designed to weaken Russia's economic base, depriving it of critical technologies and markets, and significantly reducing its ability to wage war.

EU sanctions tend to be imposed in conjunction with measures taken by other actors. In applying sanctions, the European Union focuses on perpetrators and seeks to avoid penalizing other participants, especially innocent people living under autocratic regimes.

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Jurisprudential Perspective on Civic-Political Synergy in Digital Participation in Latvia

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Abstract

This cross-disciplinary study in political science employs analytical and sociological jurisprudence to elucidate the civic-political synergy among actors within Latvia's highly efficient digital civic participation ecosystem. With 78 civic-initiated legislative changes over 13 years – most occurring between electoral cycles – Latvia stands out globally for its efficiency in this area of governance. Despite its international significance in democratic processes and governance innovation, the efficiency of digital civic participation and the roles of its actors remain underexplored. Comparable systems of digital civic participation are widespread, including in Ukraine; however, their measurable and sustained efficiency often presents challenges. The case of legislated collective submissions in Latvia, alongside the digital civic participation ecosystem centred on the ManaBalss.lv (MyVoice) platform since 2011, provides a clear example of mutually beneficial, goal-oriented synergies between diverse democratic actors. Moreover, it underscores the importance of balanced regulation in establishing the legal framework within which these dedicated participants operate. While the ManaBalss.lv platform was initially created to empower civil society vis-à-vis politicians, political parties have gradually reframed their campaigns to leverage this highly successful and respected platform for their own objectives. To prevent misuse of ManaBalss.lv, a publication fee for politicians' initiatives was introduced in 2018, alongside a disclaimer accompanying such initiatives. This case study examines recent examples of party-sponsored civic campaigns on ManaBalss.lv from 2018 to 2023, analysing the motivations of politicians and parties in utilising this tool. The analysis draws on the theory of the network society, integrating concepts such as the normalised digital revolution and policy entrepreneurship. To elucidate the legal foundation underpinning the civic-political synergy under study, the research relies on the concept of institutional facts developed by analytical jurisprudence. Sociological jurisprudence complements this approach by providing a contextual analysis of the actors' engagement within the normative framework of digital civic participation in Latvia. Furthermore, it aids in theorising the potential alignment of legal systems to promote efficient digital civic participation in legislative agenda-setting, contributing to the novelty of this research. The empirical data for this study consists of semi-structured interviews mostly with politicians who have recently used ManaBalss.lv in their campaigns, as well as with those familiar with the platform since its inception in 2011. The research also incorporates data obtained directly from ManaBalss.lv. The analysis reveals a constructive and purposeful synergy between various actors within Latvia's digital participation ecosystem. The study highlights two primary types of actors: the NGO behind ManaBalss.lv and individual politicians or political parties. These actors are conceptualised as policy entrepreneurs, with civic entrepreneurs and political entrepreneurs representing their respective roles. The study concludes that a hallmark of political campaigns within Latvia's established digital participation ecosystem is their sustainability and independence from electoral cycles. These campaigns maintain enduring connections to pressing civic society issues within specific policy areas, thereby bolstering the political capital of the actors involved. The findings underscore the pivotal role of the civic component in fostering an efficient civic-political synergy in digital participation. Additionally, through the combined lens of analytical and sociological jurisprudence, this research elucidates an essential aspect of a coherent legal framework for an effective digital participation ecosystem: synergy among the stakeholders.

Keywords: *analytical jurisprudence; sociological jurisprudence; ManaBalss.lv, civic entrepreneurs; political entrepreneurs; collective production.*

Юридична перспектива щодо громадсько-політичної синергії в цифровій участі в Латвії

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Анотація

Це міждисциплінарне дослідження в галузі політології використовує аналітичну та соціологічну юриспруденцію для розкриття громадсько-політичного синергізму між акторами в рамках високоефективної цифрової екосистеми громадянської участі Латвії. З 78 громадських ініціатив, що привели до законодавчих змін за 13 років,– більшість з яких відбулася між виборчими циклами, – Латвія виділяється на глобальному рівні своєю ефективністю в цій сфері управління. Незважаючи на міжнародне значення для демократичних процесів та інновацій у сфері управління, ефективність цифрової громадянської участі та ролі її акторів залишаються недостатньо вивченими. Подібні системи цифрової громадянської участі є поширеними, зокрема і в Україні, однак їхня вимірювана та стійка ефективність часто викликає труднощі. Приклад колективних законодавчих ініціатив у Латвії, разом із цифровою екосистемою громадянської участі, побудованою навколо платформи ManaBalss.lv («Мій голос») з 2011 р., є яскравим прикладом взаємовигідного, цілеспрямованого синергізму між різними демократичними акторами. Крім того, цей випадок підкреслює важливість збалансованого регулювання для створення правової бази, в межах якої діють ці віддані учасники. Хоча платформа ManaBalss.lv спочатку була створена для зміцнення позицій громадянського суспільства у відносинах із політиками, політичні партії поступово адаптували свої кампанії, щоб використовувати цю високоефективну та авторитетну платформу у своїх інтересах. Щоб запобігти зловживанню платформою ManaBalss.lv, у 2018 р. було запроваджено плату за публікацію ініціатив політиків, а також застереження, яке супроводжує такі ініціативи. Це дослідження аналізує приклади партійно підтриманих громадянських кампаній на платформі ManaBalss.lv у період з 2018 до 2023 р., досліджуючи мотивації політиків і партій щодо використання цього інструменту. Базуючись на теорії мережевого суспільства, дослідження інтегрує концепти нормалізованої цифрової революції та політичного підприємництва. Для висвітлення правової основи, яка є підґрунтям досліджуваного громадсько-політичного синергізму, дослідження використовує концепцію інституційних фактів, розроблену аналітичною юриспруденцією. Соціологічна юриспруденція доповнює цей підхід, забезпечуючи контекстуальний аналіз залучення акторів у межах нормативної рамки цифрової громадянської участі в Латвії. Крім того, вона допомагає теоретично осмислити можливе узгодження правових систем для сприяння ефективній цифровій громадянській участі у формуванні законодавчого порядку денного, що є інноваційним аспектом цього дослідження. Емпіричні дані для цього дослідження складаються з напівструктурованих інтерв'ю, переважно з політиками, які нещодавно використовували ManaBalss.lv у своїх кампаніях, а також з тими, хто знайомий із платформою з моменту її створення у 2011 р. Дослідження також включає дані, отримані безпосередньо від ManaBalss.lv. Аналіз виявляє конструктивний і цілеспрямований синергізм між різними акторами в цифровій екосистемі участі Латвії. У дослідженні виділено два основних типи акторів: громадську організацію, що стоїть за ManaBalss.lv, та окремих політиків або політичні партії. Ці актори концептуалізуються як політичні підприємці, де громадянські підприємці та політичні підприємці представляють їхні відповідні ролі. У дослідженні сформульовано висновок, що характерною ознакою політичних кампаній у встановленій цифровій екосистемі участі Латвії є їхня стійкість і незалежність від виборчих циклів. Ці кампанії підтримують тривалі зв'язки з актуальними питаннями громадянського суспільства в певних політичних сферах, тим самим зміцнюючи політичний капітал залучених акторів. Результати підкреслюють ключову роль громадського компоненту у сприянні ефективному громадсько-політичному синергізму в цифровій участі. Крім того, через поєднання аналітичної та соціологічної юриспруденції це дослідження висвітлює важливий аспект узгодженої правової бази для ефективної цифрової екосистеми участі: синергію між заінтересованими сторонами.

Ключові слова: *аналітична юриспруденція; соціологічна юриспруденція; ManaBalss.lv, громадянські підприємці; політичні підприємці; колективне виробництво.*

Introduction

Latvia's digital participation efficiency: a governance innovation, not a freak accident

Online political campaigning that incorporates elements of digital civic participation, or e-participation, involves citizens in shaping legislative agendas but tends to be unstable, occurring in waves. Such campaigns and e-participation efforts experience surges during elections and crises but decline afterward [12]. In this context, e-participation often becomes a political by-product – a temporary tool employed by political entrepreneurs to achieve short-term goals, such as winning elections or consolidating power. As a result, ad hoc e-participation is driven by the cyclical needs of political entrepreneurs and lacks consistency or persistence.

Among the numerous countries with e-participation platforms and corresponding laws and policies designed to involve citizens in proposing new legislation, Latvia stands out globally for the quantitatively measurable efficiency of its e-participation system. Since 2011, with the implementation of the collective submission system, Latvia has achieved 78 national-level legislative changes through e-participation, including the remarkable accomplishment of citizens securing a constitutional amendment via the internet. The civic initiatives platform ManaBalss.lv, driven by civic entrepreneurs, has been instrumental in sustaining the effectiveness of e-participation beyond electoral cycles. Furthermore, it provides long-term value to political entrepreneurs as a tool for building political capital.

To comprehend this phenomenon, three research questions are posed: 1) Why does Latvia's e-participation system in legislation maintain persistent efficacy, in contrast to wave-like patterns observed elsewhere? 2) How does this system contribute to sustainable online political campaigning? 3) Can a jurisprudential analysis of civic-political synergy in digital civic participation in Latvia clarify the broader political science theme of an efficient digital participation ecosystem?

This research hypothesises that the persistent efficacy of Latvia's e-participation system in the legislation is rooted in the presence of civic entrepreneurship at its core. This fosters synergy with political entrepreneurs and addresses their challenges in achieving sustainable online political campaigning. Furthermore, the study posits that analysing this phenomenon through analytical jurisprudence, combined with examining the observed civic-political synergy through sociological jurisprudence, enhances academic understanding of the dynamics underlying digital participation. It also highlights the structural and institutional factors contributing to its efficiency – or lack thereof.

As of November 2024, the aggregate data on the efficiency of ManaBalss.lv over a 13-year period are as follows: out of 137 civic initiatives resulting in final parliamentary decisions, 78 legislative acts and amendments have been implemented at the national level. Notably, only 24 of these were enacted during election years and could, therefore, be subject to conventional campaigning scrutiny. In Latvia, most civic-initiated parliamentary agenda-setting takes place independently of electoral cycles, contradicting the wave-like patterns typically associated with online political campaigning involving some level of civic participation [12].

Additionally, 51 citizens' initiatives are currently at various stages of review and legislation. Since 2011, the platform has been used by over 500,000 individuals who have voted at least once, representing a significant portion of Latvia's population of 1,876 million. The total number of votes cast exceeds three million. Each year, tens of thousands of new users join the platform.

The rarity of measurably effective civic e-participation in legislation has sometimes led international experts to view the success of ManaBalss.lv in Latvia as a "freak accident". However, the NGO Foundation of Public Participation, also known as Organisation MyVoice, which developed and

manages the ManaBalss.lv platform, asserts that its 13 years of consistent effectiveness tell a different story. They argue that the platform represents a stable and sustainable governance innovation [28].

The interviewed politicians and officials, whether or not they explicitly use the term "innovation", describe ManaBalss.lv as an innovative platform that required substantial initial lobbying and extensive behind-the-scenes technical and managerial work. In 2011 and 2012, the focus was on convincing both the public and politicians of the reliability of signatures and the security of data. This was achieved by engaging Latvia's main banks to provide eSignature services [36]. Additionally, the popular local social network Draugiem.lv played a key role as an initial provider of eSignatures, as it required strong user authentication. Simultaneously, a multi-stakeholder legislative lobbying effort was undertaken to amend the Saeima's Rules of Procedure, which led to the introduction of the collective submissions system in February 2012 [29].

The 2012 amendment of Saeima's Rules of Procedure resulted in a governance innovation and fostered an ecosystem of synergy and trust among the actors involved in digital civic participation in Latvia. Notably, the balanced regulation of collective submissions assigns a crucial role to civil society within this system. This institutional framework, which empowers entrepreneurial actors such as civic and political entrepreneurs, is analysed in the closing section under results and discussion, with jurisprudence providing key support for the analysis.

Literature Review

In studying actors of institutional change, including parliamentary agenda-setting, the seminal work of John W. Kingdon [13] remains indispensable. Kingdon introduced the overarching concept of policy entrepreneurs into academic discourse, a term further refined by subsequent researchers to encompass roles specific to different types of actors, such as civic, political, and institutional entrepreneurs. The concept of policy entrepreneurs, developed in the 1980s to explain policy change, retains its relevance in the digital era, which permeates all spheres of life, including democratic institutions, albeit with new challenges.

Manuel Castells highlights these caveats in his conceptual framework of the network society [3], particularly when describing the systemic factors of informational politics that contribute to the troubling reality of citizen participation being relegated to the "back seat" by political parties. This identified threat to democracy underscores the urgency of analysing democratic actors and their synergies.

The earlier concept of policy entrepreneurs in governance innovation and policy change is highly relevant to the analysis of digital participation in Latvia. The case of digital civic participation in Latvia also provides a demonstrably sustainable example of the opposite dynamic – where political parties in a network society and within the context of informational politics collaborate closely with civic actors. To some extent, this collaboration operates even on terms set by the civic actors, while each type of actors gains its specific value from the synergy. For politicians, this translates into sustainable political capital, facilitated precisely by the risky, novel reality of the network society described by Castells.

In the case of Latvia, it takes on a distinctive form. Civic society, within the legislated system of collective submissions, collaborates closely with other stakeholders, including parliamentarians and politicians more broadly. Digital civic participation in Latvia is legislated in an equitable and horizontal manner – contrasting sharply with the globally prevalent top-down model, which is also characteristic of e-petitions in Ukraine.

Analytical and sociological jurisprudence aids in elucidating this rather unique model, which political science might otherwise regard as a mere fact or even dismiss as an anomaly, as noted in the

introduction. Neil MacCormick's [16] concept of law – specifically the regulation of collective submissions in this research – as an institutional fact provides the necessary depth to understand the subject under discussion.

Sociological jurisprudence, as employed in this research, in turn systematises the collected qualitative data – comprising descriptions, evaluations, and observations from interviewed politicians and officials. A jurisprudential perspective enables a concrete analysis of the underlying law – the regulation on collective submissions – as a "mode for social engineering" [24, p. 8] and facilitates an evaluation of whether, and in what way, it is shaped by societal needs and values, as advocated by sociological jurisprudence and described by Brian Z. Tamanaha.

The perspective of sociological jurisprudence in this study is grounded in the seminal conceptualisations of Roscoe Pound [21] who viewed law as a means, not an end, with a focus on the standards or expectations of the public. Furthermore, this study draws on the recent elaborations of Roger Cotterrell. He advocates for a renewed application of sociological jurisprudence to provide a precise and contemporary juristic understanding of the legal value orientations of justice, security, and solidarity, "to help make law fit for purpose" [5, p. 226] – with the aspirations, expectations, and lived experiences of the subjects being the purpose in question.

Materials and Methods

To analyse the context of the ManaBalss.lv platform and its usage by politicians, this study draws on the theoretical framework of network society [2] and monitory democracy [9]. Within this framework, ManaBalss.lv is examined through the lens of the concept of a normalized digital revolution [27], which reconciles the normalization theory of conventional politics [19] with the utopian predictions of an electronic agora during the early days of computer-mediated communication [22]. Additionally, the concepts of civic and political entrepreneurs, derived from the definition of policy entrepreneurs [13], are employed to analyse the key actors involved.

The following terms are used in this research without further elaboration:
– 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 organization that seizes opportunities to influence policy outcomes in the interests of society.
– Political entrepreneur: An individual politician or 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.

In light of the limited research on the impact of e-participation in legislation, this exploratory qualitative study employs an inductive approach, examining data drawn from interviews, the ManaBalss.lv platform, and pertinent theories and concepts.

In analysing the regulation underlying digital civic participation in Latvia, this research follows the methodologies of analytical [4] and sociological [24] jurisprudence. This approach involves, *inter alia*, the principle of capture – employing a suitably broad conceptual framework with well-defined concepts relevant to the phenomenon under study. The cross-disciplinary nature of this study facilitates this breadth.

Moreover, the triangle of juristic values – fairness, effectiveness, and predictability – defined by Gustav Radbruch and promulgated by sociological jurisprudence [5], provides a valuable framework for analysing the cultural purposefulness of the regulation underlying digital civic participation in Latvia, as well as its broader applicability, such as in addressing the participation dilemma posited by Castells. Sociological jurisprudence also offers a helpful analytical vantage point in examining the specific cultural conditions that shape deliberate legislation.

Results and Discussion

Regulate with moderation and unleash the policy entrepreneurship

In Latvia, collective submissions, including their digital form – that is the only mechanism that functions effectively – are regulated with moderation. The relevant legislation, Saeima's Rules of Procedure on the particular aspect, is notable for its impartiality, despite being specifically lobbied in 2011 by e-participation activists.

Digital collective submissions are an available option, with the responsibility for civic participation resting entirely on civic society until the required support threshold is reached (over 0,6 % of the population, counting only Latvian citizens aged 16 and older). Civic society independently manages the technical, managerial, legal, and quality aspects of citizens' initiatives, as well as the funding for the underlying infrastructure and services.

This contrasts sharply with the approach taken in many other countries, where civic e-participation is established and managed top-down by parliaments, governments, or both. A partial exception is Estonia, where e-petitioning also originated with a strong element of civic entrepreneurship through the citizen-driven initiative "Charter 12". This initiative emerged during the political crisis of 2012 and eventually led to the establishment of the e-petitioning platform Rahvaalgatus.ee in 2016 [23].

However, during its formation, civic society transitioned to a "citizen as a user" role, as the platform became publicly managed. In this context, e-governance-savvy Estonians appear to engage minimally with the platform, perceiving it as a default service [12]. Consequently, the initial moment of civic entrepreneurship was lost. As with most publicly run legislative e-participation platforms, assessing the effectiveness of Rahvaalgatus.ee in quantitative terms remains challenging.

Similarly, the emergence of e-petitioning in Ukraine was catalysed by a combination of a political crisis, which created a window of opportunity, and the efforts of civic entrepreneurs advocating for policy change. Following the 2014 Maidan Revolution, a coalition of civil society organisations – led by the Center for Innovations Development at the National University of Kyiv-Mohyla Academy and the Reanimation Package of Reforms – pushed for amendments to the Law of Ukraine On Citizens' Appeals. These efforts culminated in the Verkhovna Rada of Ukraine adopting the amendments in 2015, thereby legitimising e-appeals and e-petitions [11]. As in Estonia, Ukraine's civic society transitioned to a "citizen as a user" role after achieving the legislative change.

The case of Latvian citizens' digital participation, centred on ManaBalss.lv, is notable not only for its robust and quantitatively measurable efficiency but also for its unique model of sustained civic entrepreneurship. Unlike other contexts where civic entrepreneurs play a pivotal role in initiating institutional change, in Latvia, civic society itself maintains a continuous entrepreneurial role within the established system.

ManaBalss.lv has never received public funding. Its initial publicity, driven by respected influencers, its demonstrable impact on legislation and policymaking, and a continuous feedback loop with the community – through news, publications, and newsletters[1] – help to build public trust and reinforce

[1] ManaBalss.lv newsletter twice a month is e-mailed to more than 25'000 subscribers.

the perception that engaging in this demanding form of participation is worthwhile. Notably, ManaBalss.lv is demanding for both initiative submitters and voters.

The voting process for an initiative requires strong authentication via Latvian internet banking or the official eSignature, ensuring adherence to the principle of "one person – one vote" and preventing the involvement of bots or fraudulent votes. Despite the effort and trust required to provide personal data, Latvians willingly complete the authorisation process due to the evident and well-communicated efficiency of the initiatives' system. Additionally, they voluntarily contribute donations to support the maintenance of ManaBalss.lv.

At least 30,000 individuals contribute to ManaBalss.lv annually. The typical optional micro-donation during the voting process ranges from €0.50 to €5. The widespread acceptance of strong authentication and the consistent willingness to respond to micro-donation requests reflect the trust and commitment of voters to the ManaBalss.lv platform and the collective submission system. The sustained effectiveness of Latvian e-participation underscores that its success is neither coincidental nor accidental.

Civic entrepreneurs spearheaded and managed the institutional shift towards e-participation in Latvia, as well as in Estonia and Ukraine, during a critical window of opportunity. This period coincided with economic, social, and political crises, accompanied by growing public mistrust in the Latvian parliament, the Saeima. In 2011, amidst the dissolution of the parliament by the President and a popular anti-oligarchy movement, a coalition of tech entrepreneurs, civic activists, professionals, and aspiring politicians advocated for direct societal involvement in the legislative process through digital participation. These efforts culminated in the introduction of the mechanism of collective submissions into the parliamentary Rules of Procedure.

In Latvia, collective submissions require a minimum of 10,000 signatures from citizens aged 16 or older at the time of filing. The ManaBalss.lv platform, which employs strong authentication via internet banking and the official eSignature, is instrumental in the effectiveness of this mechanism. Its digital format simplifies the process of campaigning for initiatives, while strong authentication significantly reduces the likelihood of signing errors.

The introduction of collective submissions in Latvia exemplifies civic entrepreneurship seizing a window of opportunity to address a recognised issue with a proposed policy solution. Factors such as the political crisis, public demand for greater participation beyond elections, and early endorsement from the President were instrumental in the platform's establishment and subsequent success.

The efficiency of ManaBalss.lv can be attributed to the ecosystem of trust surrounding it, which involves multiple stakeholders, including the NGO Foundation for Public Participation, parliament, government institutions and officials, experts from various fields, media, other NGOs, and the wider civil society. This trust is cultivated through the establishment of quality standards for initiatives promoted on the platform, as well as the deliberative process during their formation and promotion.

Political parties are legitimate societal actors in using ManaBalss.lv, provided they adhere to the platform's quality criteria. These include full disclosure of any political or commercial interests behind initiatives, transparent civic lobbying, and clear disclaimers for initiatives with political or commercial motives, along with the payment of a publication fee.

The fee for political or commercial publications on ManaBalss.lv ensures that micro-donors supporting the platform do not inadvertently fund political parties or business advocacy. It also helps maintain a balance between the involvement of political parties, their members, and the wider community in proposing initiatives. The fee varies depending on the size of the party or business, ranging from €2,000 to €4,900 plus VAT. For initiatives without political or commercial interests, ManaBalss.lv offers the service free of charge to both signatories and initiative authors.

Over the years, political parties and companies have utilised the paid service of ManaBalss.lv on several occasions. Examples include initiatives concerning issues such as the inheritance rights of

second-pillar pensions, a progressive tax system, timely notifications on tax changes, transparency in state and municipal expenditures, reduced VAT on groceries, and a nationwide ban on gambling halls[2]. These and other paid initiatives are subject to the same quality criteria, which includes a requirement for strong social relevance.

This approach helps maintain a balance between the potential political influence of ordinary citizens and more resourceful actors. On one hand, it prevents the platform from being exploited as a mouthpiece for powerful groups, such as aspiring political opposition or commercial advocacy. On the other hand, it ensures democratic access for the promotion of legitimate and relevant legislative ideas by anyone, while transparency policies, including disclaimers, foster mutual trust.

It is worth noting that even government coalition parties occasionally use ManaBalss.lv as an alternative means of promoting their policy agenda, as discussed in this study. This practice highlights the recognised effectiveness of collective submissions and underscores the importance of constructive civic lobbying within the system.

Political parties, particularly those in the government coalition, could easily opt for the conventional "shortcut" of initiating new legislation by submitting a draft with the support of five parliamentarians[3]. However, the value of demonstrable civic support in political debates, the procedural framework of collective submissions, and the predictable media attention are among the reasons why a political party might choose to pay for the services of ManaBalss.lv, publish an initiative, and risk not garnering substantial public support for the legislative proposal.

The voluntary and consistent commitment of the ManaBalss.lv team to upholding high standards of public engagement and purposeful, efficient participation has played a key role in fostering an ecosystem of trust around the collective submissions mechanism. One key element of this ecosystem is the consultation system, where authors of submitted initiatives that have not yet been published receive input and advice from leading experts in the relevant fields.

This consultation system partially aligns with the theory of collective production of innovative ideas by crowds [18], as the network of ManaBalss.lv *pro bono* experts simultaneously critiques and reframes both the problems and proposed solutions presented in the initiatives. The revised problem and solution formulations are then suggested to the initiative authors, who, following consultation, make a decision, with the final choice regarding publication for public voting or decline resting with the ManaBalss.lv team.

Declined initiatives often present legitimate problem statements but propose solutions that are not legally or practically feasible. Some of these issues involve "wicked problems" that cannot be resolved solely through legislative changes. As a result, ManaBalss.lv and its expert consultation system only partially align with the theory of collective production of innovative ideas by crowds. The system does not specifically address wicked problems, and it is not truly a "crowd" but rather a network of willing experts who engage in critiquing, reframing, and expanding both the problems and solutions proposed by the initiatives.

Although ManaBalss.lv generally encourages authors to propose concrete and implementable legislative solutions to identified problems, the platform occasionally publishes initiatives addressing systemically complex issues and dilemmas, after consultation with the relevant experts. For example, initiatives related to the development and implementation of effective methods of resocialisation for minors and the establishment of a support system and services for young children[4].

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[2] Information in Latvian; see https://manabalss.lv/i/1248, https://manabalss.lv/i/169, https://manabalss.lv/i/1333, https://manabalss.lv/i/1613, https://manabalss.lv/i/1747 and https://manabalss.lv/i/1364 accordingly.
[3] Saeima's Rules of Procedure (Saeimas kārtības rullis), clause 79. (1) (4). Retrieved from https://ej.uz/fsm5.
[4] The initiatives in Latvian; accordingly – https://manabalss.lv/i/2739, https://manabalss.lv/i/2574.

ManaBalss.lv embodies the deliberative principle, which fosters the collective production of innovative ideas. It also addresses the dilemma of thick versus thin participation often encountered in civic digital engagement. Thick participation involves purposeful and inclusive exchanges of ideas, information, perspectives, and values, where individuals work towards decisions or judgments based on factual evidence, data, personal values, emotions, and other relevant factors. This approach ensures accessibility while encouraging thoughtful engagement [20]. In contrast, thin participation primarily activates individuals rather than groups and is characterised by more simplistic forms of engagement, such as "liking" or "disliking".

Although crowd engagement on ManaBalss.lv primarily occurs during the voting phase and may appear similar to "lik"-type engagement, it is not considered thin participation. Voters are required to carefully consider the deliberated problem statement and the proposed legislative solution, as well as undergo a strong authorization process to cast their vote. The numerous voluntary micro-donations made during the voting process further support the view that ManaBalss.lv voters' behaviour aligns with thick participation. Some individuals even choose to make regular monthly or quarterly automatic payments to the platform, demonstrating their ongoing engagement.

Moreover, the legislative deliberation of proposed changes in initiatives continues within the Saeima. This process often uncovers deeper systemic amendments required to achieve the desired solutions. For example, during the parliamentary deliberation of the collective submission titled "To reimburse psychotherapy prescribed by the doctor", a shortfall in the projected number of new psychotherapy specialists was identified, highlighting the need for further action. Similarly, the collective submission "State-funded reconstruction surgeries for breast cancer patients" revealed deficiencies in existing support systems and suboptimal communication between doctors, state officials, and patients. As the proposed changes are implemented, these issues are gradually being addressed.

Politicians find it difficult to reject collective submissions, as the legislated mechanism triggers specific deliberative and legislative processes, often facilitating the establishment of otherwise unattainable legislative agendas [37]. This observation, corroborated by other interviewed politicians, highlights the potential of policy entrepreneurs facilitated through ManaBalss.lv. The ability to set the agenda is a key characteristic of policy entrepreneurs [13].

A recent example, also relevant to Russia's full-scale invasion of Ukraine, is the collective submission titled "For a United Society Without the Latvian Russian Union", which calls for the prohibition of a political party with clear pro-Kremlin leanings. Prior to Russia's invasion of Ukraine, it would have been unimaginable to publish such an initiative on ManaBalss.lv. However, with the significant escalation of the Kremlin's genocidal aggression, the situation has dramatically changed. The proposal qualified, was published, garnered public support, was discussed in the Saeima, and received considerable further deliberation[5].

The interviewed politicians regard certain challenging policy-making agendas, such as abolishing real estate tax for single properties, imposing stringent regulations on gambling establishments, and implementing fundamental changes to the state-funded pension scheme, as practically impossible to introduce except through ManaBalss.lv. These cases are covered further in this study.

New means versus old ways: digital participation and monitory democracy

The initial expectations in the early 1990s revolved around the empowering potential of communication technologies, envisioning a citizen-designed and citizen-controlled worldwide

[5] For deeper elaboration on the topic, see the article "Civic Entrepreneurs and "Ratio Legis" During Russia's War in Ukraine: a Case Study of Digital Petitions in Latvia and Ukraine" in 2024 Issue *1*(25) of this journal.

communications network evolving into an electronic agora (Rheingold 1993). However, there was a simultaneous warning not to mistake the tool for the task and to maintain control over technologies.

A decade later, research by Margolis and Resnick [19] revealed that digital politics had not brought substantial political change, leading to the proposal of normalization theory. It concluded that the internet, on its own, was unlikely to trigger significant political transformation and emphasized the need to temper utopian expectations, recognizing the normalization of technology within socio-political realities.

Another decade later, Wright [27] introduced the concept of the normalized digital revolution, amending the normalization theory. This concept criticized Margolis and Resnick's narrow definition of revolution and highlighted the potential for revolutionary changes that deviate from a libertarian ideal. The punctuated evolution concept, derived from economic regulation theory [7], was also proposed to analyse the cumulative and incremental changes in deliberative processes during times of crisis [8]. Wright further built upon this concept, suggesting that a normalized (digital) revolution involves significant changes to the functioning of established political institutions without overthrowing them.

The concept of a normalized digital revolution balances the analysis of governance innovation and avoids both the dichotomy between agency and structure and extremes of utopian expectations and "politics as usual". It recognizes that elected representatives maintain their power while new technologies enhance the establishment of a more robust representative democracy. The ManaBalss.lv innovation in digital participation is precisely perceived as a normalized revolution by civic entrepreneurs in MyVoice, Latvian politicians, and state officials, as it revolutionizes and innovates the functioning of current institutions and practices without replacing them.

Politicians view the system of collective submissions and ManaBalss.lv as innovative and disruptive, while still integrated and enhancing their political roles. It is fundamentally different from comparative European examples, making it a democratic practice worth exporting through development cooperation instruments [35]. In international government forums, the story of ManaBalss.lv and effective digital participation in Latvia stands out amidst discussions on the challenges of digitalization [34]. A former UN official in Georgia even taught her staff to pronounce "Mana Balss" in Latvian [38] to emphasize its significance.

Analysing ManaBalss.lv as a local case within the framework of punctuated evolution and normalized revolution helps embed Latvia's digital participation system and perceive it as part of a novel global social, economic, and political reality. This novel reality is the network society that emerged around 2000 [2], characterized by networks in all key dimensions of social organization and practice. The digitally networked legislative agenda setting through ManaBalss.lv, with its multi-stakeholder ecosystem of trust, exemplifies this phenomenon.

The operations of ManaBalss.lv strongly demonstrate the characteristics of network society. For instance, the principle that technology does not determine society but embodies it is evident in the institutional changes achieved through the efforts of Latvian civic entrepreneurs. The underlying technology of ManaBalss.lv and the legislation on collective submissions alone did not determine public and political behaviour, but together they embody the will of a functional society. Likewise, the dialectical principle that society does not determine technological innovation but uses it applies. The open-source solution behind ManaBalss.lv is available to the world, yet Latvian civic society has turned it into a disruptive and enhancing governance innovation.

Network society is not merely an entertaining playground. Throughout his comprehensive study, Castells emphasizes the power shifts in a society where information generation, processing, and transmission are fundamental sources of power for the involved stakeholders [2, p. 21].

While being clearly on the side of revolution rather than politics as usual, Castells envisions concrete paths of democratic reconstruction in the disruptions-rich network society. One such path involves enhanced citizen participation and consultation to re-create and strengthen the local state in the face of the unavoidable network state reality. As a network state, a national state must balance and advance its power within the shared network, which inevitably involves some loss of individual sovereignty. At the same time, the state is equally responsible for representing the weighted interests of its constituency in the network state, mediating and managing the dual relationship between domination and legitimation [3].

Network society serves as the analytical framework and context in which the balance of power between the state and civic society takes place. It is both a democratic and existential task for a state to recognize and respect the disruptive power of citizens ('demos') in order to unleash its innovative potential and avoid potential destructiveness while maintaining a balance of power ('kratos') in a democratic society.

Even though network society and the need for power balancing are global phenomena, Castells notes that the most influential trends legitimizing democracy occur at the local level. At this level, the principal mistake and risk of triggering the doomsday machine of undemocratic destructiveness lies in politics as usual and closed one-way political communication systems that exclude citizen participation.

The observed closedness serves a purpose, albeit with potential consequences. Politicians, particularly candidates, are compelled to manage the messages within their networks, enabling them to avoid being held accountable for positions or statements that could be detrimental or disconnected from the preferences of the electorate. Consequently, "as long as political parties and organized campaigns control the political procedure, electronic citizen participation will take a back seat in informational politics, as it refers to formal elections and decision-making" [3, p. 416].

In the context of the necessary power balancing in network society, it is crucial to clarify that political procedure with citizen digital participation in the back seat is not a joy ride but a democracy doomsday machine with a dilemma at its wheel. This dilemma stems from the politicians' need to address the preferences of the electorate in order to maintain at least stable political capital, while citizens demand constant checks and balances on these preferences, resulting in fluctuating political capital [15]. Politicians adhere to the gold standard of their political capital, whereas citizens demand a constant fine-tuning of both the mandate and values – a somewhat fiat currency of political capital.

This dilemma involves reputational and representative capital, corresponding to the agential-structural dichotomy addressed by the concept of normalized revolution. It is crucial to emphasize the promise within the concept of normalized revolution that wholesale changes to the function of established political institutions do not necessarily imply their overthrow. The key question is how to achieve disruptive political innovation rather than undemocratic destructiveness.

As mentioned earlier, MyVoice and the ManaBalss.lv platform, along with stakeholders, have successfully achieved such innovation. The theoretical framework of network society is helpful in understanding the broader context and general social, economic, technological, and political principles that enable this innovation. To focus on the agency and entrepreneurial aspect of policymaking, which is essential for leveraging the beneficial network society context and the windows of opportunity within it, this study adopts the theoretical framework of monitory democracy.

In monitory democracy, the fundamental framework of democracy undergoes transformative changes while retaining key features such as elections, multi-party competition, and citizen expression of approval or disapproval of legislation. This gradual evolution aligns with the concept of punctuated evolution, where incremental changes accumulate and periodically lead to revolutionary

transformations [8]. Consequently, due to the evolutionary nature of transformation, the concept of democracy itself evolves. The revolutionary character of ManaBalss.lv is explicitly expressed by a politician comparing it to the National Front, a movement instrumental in the fall of the Soviet Union and the regaining of Latvia's sovereignty [37].

In monitory democracy, power is subject to continuous checks and balances, ensuring that no one can rule without the consent of the governed or their representatives [9]. This aligns with the observed demand from the electorate for engagement in the constant fine-tuning of the policymaking agenda.

Gradually emerging and developing, monitory democracy represents a way of life and a governance approach, encompassing both civic culture and institutions that embody it. Keane notes that since 1945, monitory democracy has introduced approximately a hundred different types of power-monitoring devices that were previously non-existent in the world of democracy. These devices include extraparliamentary institutions such as citizens' juries, citizens' assemblies, think tanks, expert reports, and participatory budgeting. The citizens' initiatives platform, with its demonstrable and sustainable capacity for parliamentary agenda setting, fits well within the framework of monitory democracy.

These mechanisms, categorized by Keane as watchdogs, guide dogs, and barking dogs, are revolutionising the political dynamics of democracies. They deviate from traditional representative democracy, where elected parliamentary representatives affiliated with political parties are seen as the primary advocates for citizens' needs. Entrepreneurial agency is crucial, as both Keane and Castells highlight the non-inevitability of monitory democracy and the transformations in network society. Policy entrepreneurs play a vital role in advocating for economic and political choices, and they may also form innovative synergies, as shown in this research.

Help us to help you: citizen-led e-participation and political entrepreneurs

Entrepreneurship is the pursuit of value, which can encompass various types of values beyond monetary ones. In the context of civic entrepreneurship, there is a blurred boundary between entrepreneurship in the civic and public sectors, as both share the goal of pursuing social good [14]. However, for analytical clarity, it is important to distinguish between different types of actors within the broader framework of policy entrepreneurship. While their motivations and roles may sometimes overlap, distinct actors involved in policy entrepreneurship include civic entrepreneurs, political entrepreneurs, public entrepreneurs, and profession entrepreneurs. ManaBalss.lv has worked with each of these actors. Although further research is recommended, this study does not delve into the specific dynamics of profession and public entrepreneurs.

Political parties venture into the realm of civic initiatives when persuaded by individual politicians. Since the introduction of the fee threshold on ManaBalss.lv for political parties and commercial organizations in 2018, there have been 37 individual contracts with members of political parties regarding the publication of initiatives. These contracts stipulate that the initiated proposals are authors' individual initiatives and will not be used in the parties' campaigns. Additionally, there were three initiatives by politicians published prior to the fee threshold implementation.

After 2018, six initiatives by politicians are published for a fee, accompanied by corresponding disclaimers. This research focuses on three of those initiatives, along with a previous one by a civic entrepreneur that was eventually promoted by the "New Conservative Party" during its tenure in the governing coalition from 2018 to 2022.

Policy entrepreneurs are characterized by their activities of framing a problem, developing solutions, building support coalitions, and seeking opportunities and attention [1]. Analysis of Interviews 1–4

and ManaBalss.lv data confirms that parties in the analysed cases utilised civic initiatives as political entrepreneurs.

In framing a problem, political entrepreneurs identify an existing condition that violates important values, reframe it as a problem, and propose a solution [1; 10]. The analysed cases involve condition-problem pairs with corresponding proposed solutions, as shown in Table 1.

Table 1. Condition-problem pairs with solutions

No.	Initiative[6]	Condition	Problem	Solution
1	The prohibition of gambling halls throughout the territory of Latvia	Freedom of commerce; high tax income	Broken individual lives and financial calamities of households due to addiction	Allow gambling only in four- and five-star hotels under additional regulation[7]
2	Transparency of the use of state and municipal funds	Commercial secrecy of the procurement tenders	Opaque public expenditure; overpriced estimates of public expenditure	Disclosure of the winning bids for the public tenders
3	Voluntary participation in the 2nd level of the pension system and a 6% reduction in taxes	Well-established state funded pension scheme	Diminished pension savings capital due to market fluctuations and high banking commissions; missed opportunity of lowering labour taxes	Voluntary contribution to the 2nd level of the pension scheme and lowering mandatory social insurance of labour by 6%
4	Removal of real estate tax for the only property	Established and easy to administrate tax income source for municipalities	Intolerable tax burden on population due to the real estate speculations; violation of constitutional right to the property	Removal of real estate tax for the only property up to a certain property size

[6] Texts in Latvian; accordingly – https://manabalss.lv/i/1364, https://manabalss.lv/i/1613, https://manabalss.lv/i/2742, https://manabalss.lv/i/976.

[7] Like, no alcohol to the gamblers, no smoking, checking of the Register of resigned individuals before admission to the premises.

In the analysed activities of problem framing and other change-making endeavours, a clear synergy is evident between political entrepreneurs and ManaBalss.lv as civic entrepreneurs. Faced with the entrenched power of the gambling industry, ManaBalss.lv is viewed as the logical choice and the power brokering tool without alternative in an otherwise seemingly hopeless situation [30][8]. In this context, problem framing serves not only as an explanatory influence but also as a means of accumulating power through provable popular support for specific changes and garnering media attention. The legislative procedure associated with collective submissions becomes the avenue through which this power is exercised.

In the process of problem framing and advocating for specific solutions, civic initiatives within the collective submissions framework are preferred over regular legislative proposals, as the latter inherently involve compromises from the outset. This approach allows for a more purposeful cross-party coalition building, focused on achieving a clear change rather than settling for a suboptimal "business as usual" outcome.

The recognition and respect for societal mobilisation through ManaBalss.lv played a crucial role in garnering support for the ideas. As one interviewee stated, without this platform, their idea would have remained marginalized and no change would have occurred. The ability to demonstrate provable civic mobilisation was convincing for initially reluctant parliamentarians from other parties to join in, either seeking a share in expected reputational capital or, at the very least, avoiding the loss of representative capital. The interviewee attributed the biased stance of political competitors on the issue of gambling regulation as a reason for their failure to be re-elected in 2022, resulting in a loss of representative capital.

Political entrepreneurs found similar motivation in utilising ManaBalss.lv for effective problem framing, power brokering, and coalition building, as seen in the case of the initiative regarding the disclosure of winning bids for public tenders. By mobilising a community and applying pressure through ManaBalss.lv, the initiative became a powerful tool to demonstrate the widespread need for a concrete change. Closed-door negotiations and party factions engaging in bargaining based on their own interests were avoided. The initiative successfully accumulated a coalition of up to 14 additional votes from other parties in the parliament, alongside the 16 votes the party already had, without traditional bargaining.

These cases illustrate the synergy between political and civic entrepreneurship within an established governing coalition party, despite being a minority partner. Alternative power accumulation beyond existing representative capital was necessary to effectively address key problems, as exemplified by the real estate tax and gambling issues. The limitations of the coalition format were recognised, leading to the adoption of the civic lobbying approach.

A similar motivation was observed in the case of an aspiring political party advocating for voluntary contributions to the state-funded pension scheme. ManaBalss.lv serves as the platform for their cause, given the absence of viable alternatives due to unrealistic referendum threshold and the prohibition on raising budget-related issues in referendums. Addressing the pension scheme with its deep vested interests, requires an approach that goes beyond traditional political channels.

Launching a civic initiative allows the aspiring party to attract attention from incumbent politicians and society at large. Their campaign is designed for the long term, and its aspirations correspond to

[8] "No alternative" in "a quite hopeless situation" description is especially strong by this interviewee as a former high-ranking anti-corruption officer.

the sustained efficiency of civic initiatives on ManaBalss.lv, even without concurrent political campaigning during elections.

These examples demonstrate how political and civic entrepreneurship work together to tackle complex issues and mobilise support. ManaBalss.lv serves as a platform for long-term initiatives, enabling actors to overcome political dilemmas and bring about meaningful change.

The aspiring political party utilises the civic initiative not only for external impact but also for internal capacity building, including networking, mobilisation around a specific cause, and crystallising its ideology. Consequently, this actor is more willing to invest in civic lobbying compared to another, more established party, even though their public financing is comparable.[9]

For this actor, the initiative serves as a potential tool for coalition-building rather than an immediate one. Other power brokers "have clarified our positions, but only for their own understanding. If we come into a position of power, then – come again, and we will already be familiar. And together we can fight and change something. But for now, there is no point in meeting for us" [33].

The more established party, which was not re-elected in 2022 and has reduced public financing, is now more cautious about investing in initiatives. The party leader calculates that, in the current situation, they are less comfortable paying 4,900 euros plus VAT for an initiative. Still, with the right idea and timing for going public with it, the party is willing to use ManaBalss.lv again.

Other interviewees who strongly affirm that the ManaBalss.lv platform facilitates sustainable political campaigning corroborate this. "It is your success story – you are not tied to elections. People see that if you want to change something in the country, then this is one of the understandable and effective mechanisms available" [32].

The analysed campaigns are somewhat tempered, more collegial vis-à-vis society, which the party only partially targets with the campaign as an audience. The leading characteristic here is synergy with the civic society, beginning with publication and other support services by ManaBalss.lv. Avoidance of clichés, high quality content of the message, focus on practically implementable policy goal and a long-term attitude characterizes these campaigns.

High-quality standards applied to the initiatives by political parties are appreciated. Not turning ManaBalss.lv "into a garbage bin full of absurd proposals" [30] maintains its relevance and demanding, focused attitude towards its users. Campaigning on ManaBalss.lv and even just voting on it takes effort, but it is appreciated. With previous experience in both municipal and parliamentary politics, a politician sees the platform and campaigning on it as crucial for advancing his and his party's ideas and gaining partial support.

Political campaigning on ManaBalss.lv aligns with the e-government analysis by Darrell M. West, who identifies four stages of e-government, ranging from a billboard stage to interactive democracy with comprehensive public outreach and accountability-enhancing features. Genuine innovation and transformative change occur in the latter stage.

While the functions and tasks of governments differ substantially from political parties, the stages and models of technological change in digitization also vary accordingly. However, the analytical framework developed by West provides a helpful tool for evaluating the stage of digitalization for individual parties and political systems in a country (see Table 2).

[9] Both parties get around 185'000 euro public financing a year. Information in Latvian – https://ej.uz/vmez.

Table 2. Stages and models of technological change in political campaigning

Source: Author compilation; West 2005; Castells 2010b

Billboards	Portals with some integrated communication	Interactive democracy
Generalised political rhetoric and tight communication control for looking good; citizen participation – in a back seat; short term campaigns	Generalised political rhetoric and tight communication control for looking good; some feedback, like, protocols of the meetings; one-way citizen participation, like, application for a membership, making donation, purchasing branded advertisement goods; short term and 'ad hoc' campaigns	Party and politicians deliberate on and campaign for policy change together with civic society; full accountability: multi-sided communication, measurable policy-making success or failure shared with society; long term and focused campaigning for specific policies
Incremental Change		
	Secular Change	
		Transformational Change

In Latvia, the political parties analysed using ManaBalss.lv for campaigning are operating within the stage of interactive democracy. In comparison to the earlier stages of billboard and portal, where civic participation is limited or tokenistic, the model of interactive democracy goes beyond mere appearances. The values pursued by politicians in their campaigns on ManaBalss.lv are concrete and measurable, rather than generalized.

The focus on measurability exposes politicians to the risk of failure, but it also strengthens their connection with the electorate. They share the responsibility for both incremental policy changes and profound transformations. It fosters a pragmatic synergy of "help us to help you".

This shift in discourse changes the dynamics of demand and supply, as discussed in the previous chapter. In an economic parallel, the inclusion of civic fine-tuning in interactive democracy does not undermine political capital, but rather expands the base of stakeholders or even shareholders. This approach mitigates the risks of blame-game tactics, enhances accountability, and tempers populist rhetoric. As one interviewee described, participating in an initiative through ManaBalss.lv and influencing the process creates a sense of being a shareholder in the decision-making [32].

Another interviewee, from a party just recently characterised as clearly populist, acknowledges that campaigning through a civic initiative has transformed their short-term approach and rhetoric. Rather than focusing solely on criticizing and highlighting problems, they now emphasize offering solutions. This shift allows them not only criticise with attention-grabbing rhetoric, but also genuinely focus on proposing solutions [33].

This study does not impose concepts on the interviewed actors or attempt to fit their stories into theoretical frameworks. During the conversations, the interviewees were introduced to the concepts of policy, civic, and political entrepreneurship at appropriate moments. Two of them identified themselves as civic entrepreneurs in the cases of the initiatives they were involved in. One of them acted as a civic entrepreneur in parallel with a party-promoted initiative. All the interviewees agreed

that their parties, in relation to the addressed initiatives, acted as political entrepreneurs. Furthermore, all the political interviewees with active or past civic digital initiatives described them as sustainable both as political campaigns and as a system of civic participation in general.

All the interviewed politicians with active or past civic digital initiatives prefer civic-led digital participation over government- or parliament-led alternatives. The entrepreneurial nature of the civic sector, where everything not explicitly prohibited is allowed according to Latvian civil law, provides an advantage. Platforms like MyVoice, as one interviewee noted, prioritize addressing situations based on their essence rather than relying on clichés [31].

Another reason for the preference of civic-led digital participation is the comparative trustworthiness of NGOs compared to governmental and municipal institutions. Society's trust in governmental and municipal institutions tends to be lower, while NGOs that have proven themselves as operating professionally and objectively enjoy greater public confidence. Therefore, a platform originating from the NGO sector, such as ManaBalss.lv, has a greater chance of success than a similar platform created by a government structure [30].

Based on his experience in power, a political party leader expressed doubts about the full independence of a state-run platform. He raised concerns about potential interference from personnel policies and various other policies that could hinder its independence. In contrast, ManaBalss.lv operates with an entrepreneurial, goal-focused motivation [32].

An interviewee from an aspiring political party, when considering a platform between an NGO- and state-run option, would choose the one that is already more widely used and has achieved tangible results. In Latvia, digital services that are early adopters tend to be more enduring and popular. Realistically, the interviewee does not see the possibility or necessity of a state-run alternative. Additionally, an NGO like MyVoice has more flexibility to say "no" to aspiring authors with content of lower quality. Thus, civic-led digital participation is associated with quality, purposefulness, provisional efficiency, and prestige [33].

Rules as institutions in e-participation: a jurisprudential perspective

A concise yet essential jurisprudential perspective on the Saeima's Rules of Procedure concerning collective submissions, alongside the lived experiences of the interviewed stakeholders, contributes to the conceptual coherence of an otherwise broad and dispersed array of normative statements, personal descriptions, insights, and evaluations. Firstly, analytical jurisprudence clarifies the object of the analysis itself.

The generic discipline of this study – political science, particularly institutional theory – provides a researcher with the tools to understand how institutions, in the broadest sense, influence policy-making and governance. However, as the research focuses on legal institutions, including the legal framework of Latvian legislation on collective submissions, analytical jurisprudence becomes indispensable.

The analysis of a law as an institutional fact requires attention to the actions, words, and even thoughts of the actors involved [17] in order to assess the sociological significance of the legislation under study [16]. Thus, the analytical jurisprudential perspective consolidates a wide range of factors under the framework of a single institutional legal fact. For cross-disciplinary research, this jurisprudential approach proves analytically valuable by enabling the comprehension of diverse phenomena and observations – such as collective submissions and their dynamics and synergies – under the unifying concept of an institutional fact.

Furthermore, a sociological jurisprudential perspective is a logical first choice for cross-disciplinary research when analysing the relationships and synergies among actors within a given legal order.

Even if a particular legal order – in this case, the system of collective submissions and its associated dynamics – does not necessitate general approbation or commitment to it [16], the interviewed politicians unanimously affirm the value of the system established since 2012, albeit from different perspectives.

As this system prominently highlights the central role of civic entrepreneurs in digital participation, it is particularly important from a sociological jurisprudence perspective to examine the exact wording – *expressis verbis* – used by a sample of interviewees. This is especially relevant when they respond to the vignette question of whether they would prefer a digital participation platform run by an NGO over one operated by the state, parliament, or another official entity.

Regarding efficiency and trust: "We know how much trust society places in state and municipal entities. Unfortunately, this trust is lower compared to organisations in the non-governmental sector, particularly when these organisations have demonstrated over time their ability to operate professionally and objectively, thereby earning public confidence. This is why a platform developed by an NGO has a greater chance of success than a similar platform created by a state institution" [30].

Regarding efficiency: "ManaBalss steps into every situation where it is needed, aiming to resolve it not based on clichés but in essence. This is my answer to the question of why such activities should not be carried out by the public sector but rather by the non-governmental sector. It is not merely about existing and processing but about achieving the goal" [31].

Regarding political neutrality: "Certainly NGO-run. Having been part of the power system, I don't believe in its complete independence. I am unsure what safeguards would need to be implemented to ensure true independence, for instance, if it were operating under the Saeima. There are personnel policies and various other considerations" [32].

Regarding quality control and consultation services: "If the state were to decide which initiatives to publish and which not to, how could it make such decisions? In the case of the state, there would need to be a right to appeal. That would be extremely complicated and would raise concerns about censorship. NGOs, in this regard, have more freedom–they can justify their decisions and state that something is not appropriate. For the state, this would be much more difficult" [33].

Another interviewee recalls the beginnings of ManaBalss.lv in 2011, when the NGO MyVoice and other civic actors initially framed the problem, proposed a legislative and technical solution, lobbied for it, and then implemented both the technical and managerial aspects, ultimately achieving the legislative change. The interviewed former politician emphasises the stark contrast between the costs, readiness to adapt, and proactivity in implementing the IT solution and associated services by the MyVoice team, compared to an official e-participation system developed at the time [37].

Although the observed civic entrepreneurship and its comparable efficiency are in a very different context from the one Roscoe Pound addresses in his seminal work on sociological jurisprudence over 100 years ago [21], they align precisely with the original legal reasoning. Pound speaks of a tendency towards critical re-evaluation in an era of reform through legislation. As described earlier, this re-evaluation – and, in the case addressed in this research, not just a reform but a governance innovation through legislation in Latvia – occurred with civic actors maintaining their pivotal role in the e-participation ecosystem. In Estonia, "Charter 12" and the Reanimation Package of Reforms in Ukraine represented a shift back to the "citizen as a user" status during their corresponding reforms.

Studying the efficiency of these and other comparable e-participation systems, as well as the synergies among the actors they create, is recommended for further research. In Latvia, however, it is evident that the civic and political actors addressed – particularly those from minority parties and parties not represented in parliament – recognise the central role of civic entrepreneurs in e-participation and

affirm Pound's fundamental assessment that "laymen know full well that they may make laws" [21, p. 12].

Whether it is the challenges of social justice in Pound's time a century ago or the power dynamics of today's network society, as conceptualised by Castells, the principle of sociological jurisprudence remains relevant. For the well-being of the law itself, a conscious regard for societal needs and values is indispensable in shaping contemporary legislation that aligns with the prevailing sense of justice within society and enhances public respect for the law [24]. Thus, from the perspective of sociological jurisprudence, civic entrepreneurs in a multi-stakeholder e-participation ecosystem are indeed pivotal in achieving its efficiency and reinforcing synergies among the actors.

In this regard, a jurisprudential perspective on the dynamics underlying e-participation in Latvia clearly enhances academic understanding by focusing on the fundamental principles, rules, and order in their precise, jurisprudential sense. At the same time, an institutional legal fact – such as the e-participation ecosystem based on collective submissions in this case – serves as both a comprehensive concept and an encompassing analysandum, aiming to capture the full spectrum of institutional, actor-specific, and personal insights into what the norms of the order are for the committed participants [17].

Conclusions

Sustainable civic e-participation in legislation, characterised by its consistent efficiency in facilitating real and multiple legislative changes, defines the Latvian system of collective submissions centred around the NGO-run platform ManaBalss.lv. This is a result of the institutional identity of the platform's creators and maintainers, who are civic entrepreneurs committed to ensuring continuous and effective civic participation in legislative and political decision-making processes.

Furthermore, a jurisprudential perspective on this particular system and legal order in Latvia as an institutional legal fact establishes the centrality of policy entrepreneurs, and specifically civic entrepreneurs, within it. As the assessment comes specifically from political actors as a class of committed participants, it not only validates the initial hypothesis from the political science perspective regarding the centrality of civic entrepreneurs but also enriches the study with a jurisprudential evaluation of the well-being of the addressed law. The established legal order clearly reinforces this well-being and holds significance for jurisprudential and political considerations in e-participation ecosystems within democratic network societies elsewhere.

The study concludes that political campaigns driven by civic initiatives on ManaBalss.lv are distinguished by their sustainability, as they are not tied to electoral cycles, and civic participation plays a crucial role in these campaigns. ManaBalss.lv, with its focus on civic entrepreneurship, requires an entrepreneurial approach from its users, particularly benefiting civic society. Therefore, the fundamental requirement for politicians to use the platform as political entrepreneurs is genuine public participation in their political campaigns. Additionally, the fee threshold for initiative publication prevents politicians from exploiting societal resources and establishes them as collegial stakeholders.

With genuine public participation and civic society as stakeholders, these campaigns fall within the interactive democracy stage of political campaigning. This stage is significantly different from previous stages, such as digital billboards and portals, which primarily involve one-way political advertising and limited participation.

Alongside genuine public participation, political campaigning in interactive democracy addresses several dilemmas. One such dilemma is the need for political parties to control messages within their communication networks to maintain a positive image, while the uncontrollable intercommunication

among the electorate in the network society poses a challenge. As a feature of monitory democracy, political campaigning in interactive democracy involves sharing both the risks of failure or suboptimal outcomes and the eventual gains and recognition of achieved policy changes among stakeholders. In such a collaborative environment, there is no need for blame games or boasting, nor for fear-driven communication control or clichéd rhetoric.

Similarly, the political logic of converting reputational capital into representative power, often requiring compromises, presents a dilemma in response to the popular demand for constant checks and balances on policies. It is a dilemma of the gold standard and fiat currency of political capital. When a civic digital initiative and its associated political campaign transition into a collective submission with a precise policy demand, there is limited room for manoeuvring and horse-trading, with the associated risk of losing reputational capital.

In addition, solid and specified popular support for the policy cause, along with the political unease of opposing it, fosters cross-party coalition building. It provides an opportunity for political competitors to join forces and share in the provisional gain of reputational capital. For political entrepreneurs leading these campaigns, it helps to gain or expand representative capital and mitigates the trial-and-error process of selecting interest groups and constituents to serve.

Regardless of whether the focus is solely on political capital or includes the dual motivation of civic entrepreneurship, initiating a civic digital initiative has the potential to substantially alter the dynamics of problem framing and power brokering for policy changes. This overarching benefit, along with the minimisation of political dilemmas in the network society, motivates political entrepreneurs to utilise ManaBalss.lv for political campaigning, thereby confirming the first two hypotheses of this research. The confirmation of the third hypothesis is evident in the earlier application of jurisprudential analysis in this study.

This study examines samples of political entrepreneurship from coalition minority partners and aspiring political actors. Further research is needed to analyse the existing and potential synergies between civil society and well-established parties, as well as coalition majority partners, through the ManaBalss.lv digital participation mechanism. A hypothesis for future research could be that acquiring substantial representative capital upon attaining power hinders both political entrepreneurship and the motivation for e-participation in political campaigning via ManaBalss.lv.

Whether the hypothesis is proven or not, further research is needed to explore the dynamics of domination and legitimation in a network society, as well as the existing and potential role of interactive democracy in addressing the conceptual dilemmas and wicked policy problems of contemporary democracies, including enhancing the well-being of the law. A hypothesis for such research could be the necessary centrality of policy entrepreneurs in fostering anticipatory innovation at both domestic and international levels.

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Adapting European Anti-Corruption Strategies: Israel's Experience and Opportunities for Ukraine

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Abstract

The Article analyzes the possibilities of implementing international experience in forming anti-corruption policy in Ukraine. The relevance of the Article is explained by the fact that effective fight against corruption is one of the key problems of Ukraine on its way to membership in the European Union and integration with the countries of the global West, as evidenced by the reports of the European Commission, the US Department of State, other official and statistical data of international organizations and officials, in the context of which the experience of Israel as a country whose anti-corruption policy is largely based on European standards can become an effective example for implementation in the national governance. The purpose of the Article is to analyze the state anti-corruption strategies of the European Union and Israel, to assess the effectiveness of Israel's implementation of the European experience and to analyze the feasibility of Ukraine's adoption of the anti-corruption practices of the countries analyzed herein. To achieve this aim and fulfill the arising tasks, several scientific methods were used, namely: formal legal, formal logical, comparative, critical analysis, and comprehensive methods. The empirical basis of the study was formed by legislation, judicial and law enforcement practices, official statistical and analytical data of the European Union, the State of Israel, international organizations and institutions, and special economic and legal literature. The authors examine key aspects of European and Israeli legislation, review the main anti-corruption mechanisms and strategic courses of the states in the field of fighting corruption. A comparative analysis of the anti-corruption strategies of the European Union and the State of Israel is made with a focus on the prerequisites for their formation and the measures taken to implement them. The authors analyze the similarities between the anti-corruption policies of the European Union and Israel, as well as the results of Israel's implementation of European practices. On the basis of this analysis, in a comparative context with the State of Israel, the authors formulate conclusions about the usefulness of applying anti-corruption practices and strategies of the European Union and Israel by Ukraine and assess the prospects for such application.

Keywords: *European Commission; United Nations; reform; policy; constitutional crisis; publicity.*

Адаптація європейських антикорупційних стратегій: досвід Ізраїлю та можливості для України

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Анотація

У статті проаналізовано можливості імплементації міжнародного досвіду у формуванні антикорупційної політики в Україні. Актуальність теми полягає в тому, що ефективна боротьба з

корупцією є однією з ключових проблем України на шляху до членства в Європейському Союзі та інтеграції з країнами глобального Заходу, що підтверджується звітами Європейської комісії, Державного департаменту США, іншими офіційними та статистичними даними міжнародних організацій і посадових осіб, у контексті чого досвід Ізраїлю як країни, антикорупційна політика якої значною мірою ґрунтується на європейських стандартах, може стати ефективним прикладом для наслідування в національній управлінсько-правовій системі. Метою статті є аналіз державних антикорупційних стратегій Європейського Союзу та Ізраїлю, оцінка ефективності імплементації Ізраїлем європейського досвіду та аналіз доцільності перейняття Україною антикорупційних практик досліджуваних країн. Для досягнення поставленої мети та виконання завдань, що з неї випливають, використовувались такі наукові методи: формально-юридичний, формально-логічний, порівняльний, метод критичного аналізу та комплексний метод. Емпіричну основу дослідження склали законодавство, судова та правозастосовна практики, офіційна статистична та аналітична інформація Європейського Союзу, Держави Ізраїль, міжнародних організацій та інституцій, спеціальна економічна та юридична література. Автори розглядають ключові аспекти європейського та ізраїльського законодавства, основні антикорупційні механізми та стратегічні курси держав у сфері боротьби з корупцією. Зроблено порівняльний аналіз антикорупційних стратегій Європейського Союзу та Держави Ізраїль з акцентом на передумови їх формування та заходи, що вживаються для їх реалізації. Автори аналізують схожість антикорупційних політик Європейського Союзу та Ізраїлю, а також результати імплементації Ізраїлем європейських практик. На основі цього аналізу, в порівняльному контексті з Державою Ізраїль, формулюються висновки щодо корисності застосування Україною антикорупційних практик і стратегій Європейського Союзу та Ізраїлю, а також дається оцінка перспективам такого застосування.

Ключові слова: *Європейська комісія; Організація Об'єднаних Націй; реформа; політика; конституційна криза; публічність.*

Introduction

During the ongoing fight against corruption, which is one of the most major problems for modern states, including Ukraine, it is important to draw on international experience in formulating an effective anti-corruption policy. Evidence suggests that the global cost of corruption is about $2.6 trillion every year, which represents about 5% of the global gross domestic product (GDP) (United Nations, 2018). In the European Union (EU), the estimated annual cost of corruption is about €120 billion, which represents about 1% of the EU GDP. In the UK, the estimated annual cost of corruption is around £193 billion (Eaves, 2016), representing about 1% of the total GDP. This shows the potential negative impacts of corruption on the economy and the wider society [1]. According to a World Bank report (World Bank, 1997), more than one trillion dollars are paid in corruption around the world (Kaufmann, 2005) [2].

The relevance of this issue for Ukraine stems primarily from the following facts:

1. The European Commission, after granting Ukraine the status of EU Member State Candidate, formulated 7 recommendations in its Membership View that Ukraine should implement to move forward with the acquisition of EU Member State status. These recommendations included: reforming the procedure for selecting judges of the Constitutional Court of Ukraine in accordance with the recommendations of the Venice Commission, completing the formation of the High Council of Justice, continuing the fight against corruption through effective and proactive investigations at all levels and bringing offenders to liability, reforming anti-money laundering legislation, introducing anti-oligarchic legislation to reduce the influence of oligarchs on social and economic processes, adopting a law on media to ensure that the media are free and fair, and finalizing the reform of the legal framework for national minorities. Following the aforementioned, at least 5 of the 7 recommendations directly or indirectly relate to preventing or counteracting corruption or corruption-related phenomena [3].

2. While continuing to monitor Ukraine's implementation of these recommendations and tracking the current state of European integration, the European Commission in 2023, along with the positive aspects of the fulfilment of most recommendations, in particular in terms of appointing the heads of the National Anti-Corruption Bureau of Ukraine (NABU) and the Specialized Anti-Corruption

Prosecutor's Office (SAPO), restoring mandatory asset declarations of public officials and making the register of declarations publicly available, emphasized the need for Ukraine to further strengthen its efforts to effectively investigate corruption offenses at all levels, convict and prosecute perpetrators, improve the selection procedures for SAPO management, increase the number of NABU and SAPO employees, and modernize criminal substantive and procedural legislation [4]

3. Ukraine's problematic issues related to the fight against corruption were also emphasized by the U.S. Department of State in its annual Ukraine 2023 Human Rights Report, which, inter alia, focuses on such issues as the limited ability of anti-corruption bodies to fully investigate corruption offenses, political pressure and corruption in the judiciary and prosecutors, weak separation of powers between the executive and judicial branches of government, and pressure on the media [5].

4. The Corruption Perceptions Index scores remain low, with Ukraine ranked 104th (out of 180) in 2023 with an index of 36 (out of 100, where 0 is the highest level of corruption and 100 is the lowest) [6].

5. Study examines that weakness of state institutions inflicted by political crises like war, which is currently affecting Ukraine, aggravates level of corruption comparing to the normal state of country's being [7].

These circumstances, despite the positive developments in the field of combating corruption, indicate the need for Ukraine to improve its current efforts in this area at the strategic level, including by drawing on the experience of foreign countries.

In this respect, the experience of Israel in anti-corruption activities deserves priority attention, as it has successfully implemented several strategies that were largely based on the best practices of the European Union. That is why the analysis of these strategies both in the context of the European Union and their implementation by the State of Israel, as well as successful and effective Israel's own steps in this area, is an appropriate and relevant issue of science and practice.

Materials and Methods

The research for this Article was based primarily on the analysis of the legislation of the European Union, the State of Israel, as well as international treaties and acts of international organizations. Therefore, the main research method was the formal legal method. This method was applied to clarify the content of the provisions of legal acts and to determine their relevance for the purpose of disclosing the topic of the article. Interpretating of legislation by using this method made it possible to highlight the key aspects of legal regulation of the principles and areas of preventing and combating corruption in the countries considered in this article.

Along with the formal legal method, the formal logical method was used to analyze the legislative strategies of the European Union and the State of Israel, and, based on their experience, to identify problematic issues in these areas in Ukraine and to find ways to resolve them.

The comparative legal method has been chosen as one of the most vital, since the topic and purpose of the Article is to compare the European and Israeli anti-corruption strategies between each other as well as to compare them with the strategies applied in Ukraine. In making such a comparison, the authors regard the relevant provisions of the legislation of each country, the public authorities authorized to prevent corruption, their structure, involvement of international organizations in these processes, an assessment of the development of the states in these areas, etc. The comparative legal method helps to identify common and distinctive aspects of the EU and Israel's activities in the field of preventing corruption, which, hence, will allow to track and evaluate the effectiveness of Israel's implementation of the experience of European anti-corruption strategies for further adaptation of ways to use such experience for the needs of Ukraine.

The application of the comparative legal method, along with the formal legal and formal logical methods, allowed us to distinguish the experience of the EU and Israel in order to improve Ukrainian instruments and institutions for preventing corruption.

Another applied was the method of crytical analysis, which made it possible to assess the compliance of the legislation of the countries considered in the article, particularly Ukraine, with international standards for preventing and combating corruption.

In addition, a comprehensive method was also used to summarize the research and formulate relevant conclusions and proposals.

The empirical basis of the research primarily grounds on legislation and judicial and law enforcement practice, as well as modern official analytics, including data from international organizations and institutions such as Transparency International, the Organization for Economic Cooperation and Development, the World Bank, and government agencies of countries around the world (in particular – the US Department of State, the European Commission, etc.), materials from special legal and economic publications, other legal literature, special media sources etc. on anti-corruption strategies and practices of the European Union.

The Article is aimed at analyzing European and Israeli anti-corruption practices, in particular, in the framework of Israel's implementation of the European Union's experience and assessing of that's effectiveness, in order to form conclusions on the usefulness and appropriacy of Ukraine's implementation of the EU and Israeli anti-corruption practices.

The first stage of the research was to define the subject and object of the study, formulate the problem and prove its relevance. The problem of the study, which arises from the relevance of the chosen research topic, is the need for Ukraine to find ways to improve anti-corruption strategies to solve acute problems in this area. Accordingly, the object of the study is social relations related to legal regulation based on the European standards of anti-corruption policy of the state and its practical application both within the EU and in third countries (in case of this research – the State of Israel and Ukraine). The subject of the study, as described above, is the legal acts, practice of their application, analytical and other scientific and practical materials related to legal relations on the regulation of state's anti-corruption activities.

The second stage is a separate analysis of relevant sources on anti-corruption strategies and anti-corruption infrastructure of the European Union and formation of the systematized information based on this analysis, which became the basis for the research in further stages.

The third stage is aimed to analyze relevant sources on anti-corruption strategies and anti-corruption infrastructure of the State of Israel in a systematic connection with the information about the European Union concluded in the prior stage, to compare anti-corruption practices of these countries and to draw conclusions about the effectiveness of Israel's implementation of the EU anti-corruption instruments.

The final stage of the research is aimed to compare certain anti-corruption strategies of the EU and Israel in the relation to the appropriacy of their implementation in the legal system of Ukraine and to assess the prospects for such implementation based on the experience of Israel's adoption of certain anti-corruption practices.

Results and Discussion

European Union's Anti-Corruption Policies

The European Union is considered one of the most progressive regions in combating corruption. Over the past decades, the European Union has developed several anti-corruption directives and recommendations aimed not only at combating corruption within the member states and at the union level, but also at ensuring effective practices at the international level.

It is important to be mentioned that corruption for the EU is not only a serious crime that may require a common coordinated intervention in cross-border cases. Rather, the EU considers it a constant threat to the rule of law that needs to be addressed no matter its dimension – petty or grand – location – national or cross-border –, and its criminal law relevance. This approach dates back more than 10

years. The first step in this direction has been the signature and ratification by the EU of the United Nations Convention against Corruption. The Convention requires the Contracting Parties to adopt measures of a criminal and administrative nature to deal with the issue of corruption and to tackle it with a holistic approach, coupling repressive measures with preventive tools and identifying corruption cases in a series of behaviors that go beyond the traditional conception of criminal law. All EU Member States are parties to this Convention and have therefore committed themselves to adopting anti-corruption laws following this approach. Moreover, all EU Member States are also parties – while the EU itself is not yet – to other similar international agreements in this field: the Organization for Economic Cooperation and Development's Anti-Bribery Convention and the Council of Europe's Civil and Criminal Conventions against Corruption [8].

Flowing from those international laws, current EU anti-corruption legislative framework includes:
– the 1997 Convention on fighting corruption involving officials of the EU or officials of EU Member States;
– the 2003 Council Framework Decision on combating corruption in the private sector, which criminalises both active and passive bribery;
– the 2008 Council Decision on a contact-point network against corruption;
– directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive") [9, p. 282-283].

The PIF Directive replaced the 1995 Convention on the protection of the European Communities' financial interests and its Protocols (the "PIF Convention"). Based on Art. 83(2) TFEU, the PIF Directive sets common standards for Member States' criminal laws. These common standards seek to protect the EU's financial interests by harmonising the definitions, sanctions, jurisdiction rules, and limitation periods of certain criminal offences affecting those interests. These criminal offences (the "PIF offences") are: (i) fraud, including cross-border value added tax (VAT) fraud involving total damage of at least €10 million; (ii) corruption; (iii) money laundering; and (iv) misappropriation. This harmonisation of standards also affects the scope of investigations and prosecutions by the European Public Prosecutor's Office (EPPO) because the EPPO's powers are defined in reference to the PIF Directive as implemented by national law [9, p. 283].

Concerning other significant instruments, aimed at combating illicit financial flows (IFF) referred to the G20's framework. In 2013 the G20 launched the High-Level Principles on Mutual Legal Assistance. Furthermore, as of 2010 the G20 published eight Anti-Corruption Action Plans, with the most recent being the G20 Anti-Corruption Action Plan 2022–2024. In the latter, the G20 emphasis its commitment to promote enhanced law enforcement cooperation and information-sharing among competent authorities to trace, freeze and confiscate proceeds of crime, and to promote the denial of safe havens [10].

Regarding the existing EU anti-corruption framework, in the respect of analyzing how Ukraine can adapt international strategies, the attention should be drawn into to the current trends in the EU anti-corruption policy presented by the European Commission in May 2023, which are reflected in the Commission's anti-corruption proposals formulated to continue the implementation of the commitments made by President Ursula von der Leyen in 2022 [11].

Among the proposals, attention is focused on such things as:
1) raising public awareness of corruption, its consequences and the importance of combating it through information and education activities;
2) ensuring the prerequisites for holding the public sector accountable at the highest level, in particular, by providing the widest possible public access to information on public officials, interaction between the public and private sectors in various areas and conflicts of interest between them;
3) creation of specialized anti-corruption bodies;

4) harmonization of legislation on criminal liability for corruption at all levels in accordance with the UN Convention against Corruption (UNCAC), strengthening sanctions for corruption-related criminal offenses;
5) ensuring effective investigation and abolition of any privileges or immunities for officials who have committed corruption offenses;
6) expanding the toolkit of international and domestic CFSP sanctions [11].

Those proposals were reflected in the draft of a new EU Directive (COM(2023)234) on the fight against corruption, which reflects the current state of anti-corruption policy and is the government's response to current challenges in this area. The Directive is currently under consideration by the EU Council, which precedes the stage of consideration by the European Parliament [12].

Thus, the EU's strategic efforts to further fight corruption are primarily aimed at harmonizing legislation between the EU and its member states based on the UNCAC, increasing transparency and openness of information on corruption-risk areas, strengthening responsibility for corruption offenses and the effectiveness of their investigation and prosecution. The above shows the similarity of the EU's anti-corruption course and the recommendations that the European Commission provides to Ukraine for the purpose of becoming the EU member state.

The European Union, along with the general anti-corruption legislation, implements and applies several institutional anti-corruption regulators, including the following:
– rules for civil servants, which contains, in particular, important provisions of Art. 22a on the obligation to report known facts of illegal activity to a senior official, the Secretary General of the Council of the EU and/or the European Anti-Fraud Office (OLAF) [13];
– the European Anti-Fraud Office (OLAF) is a specially created EU body authorized to conduct independent investigations of fraud and corruption involving EU funds, investigate serious violations by EU staff and members of EU institutions, and develop a sound EU anti-fraud policy [14];
– independent ethics committee, which is a collegial body that advises the Commission on whether the planned activities of the Commissioners after the end of their term of office are compatible with the Treaties of the European Union and the Functioning of the European Union at the request of the President of the Commission, advises the Commission on any ethical issue related to compliance with the Code of Conduct for Commissioners, and provides general advice to the Commission on ethical issues related to the Code [15];
– the transparency register is a database containing a list of "interest representatives" (organizations, associations, groups, and self-employed individuals) that carry out activities aimed at influencing EU policy and decision-making processes in a particular way. The register is intended to show the public which interests are represented at the EU level, by whom and on whose behalf, as well as the resources allocated to these activities (including financial support, donations, sponsorship, etc.) [16].

In addition, sectoral legislation is a part of the EU's overall anti-corruption mechanism, which includes:
1) the Fifth Anti-Money Laundering Directive (AMLD), which obliges all EU member states to establish centralized bank account registers and data retrieval systems, as well as centralized beneficial ownership registers. The AMLD also establishes interconnections between beneficial ownership registers to increase transparency of corporate ownership;
2) Directive (EU) 2018/1673 on the fight against money laundering in the criminal law, which sets minimum criteria for the criminalization of money laundering and determines that corruption should be a predicate offense to money laundering;
3) Directive 2014/42/EU on the freezing and confiscation of instrumentalities and means of crime, Council Decision 2007/845/JHA on cooperation between Asset Recovery Offices, Council Decision 2005/212/JHA of February 24, 2005 on confiscation of proceeds, instrumentalities and property, and Regulation (EU) 2018/1805 on the mutual recognition of asset freezing and confiscation orders, which regulates asset recovery and confiscation for the purpose of recovering the proceeds of crime, including in cases of corruption;

4) EU Directive 2019/1937 on the protection of whistleblowers (the "Whistleblower Directive"), adopted in 2019 to increase the detection of corruption and better protect whistleblowers;
5) Directive (EU) 2010/24, which provides for mutual assistance in the recovery of claims relating to taxes, fees, and other measures. Directive (EU) 2011/16 on administrative cooperation in the field of direct taxation provides for mutual assistance in combating tax evasion and avoidance, as well as measures to increase the transparency of corporate taxation [17].

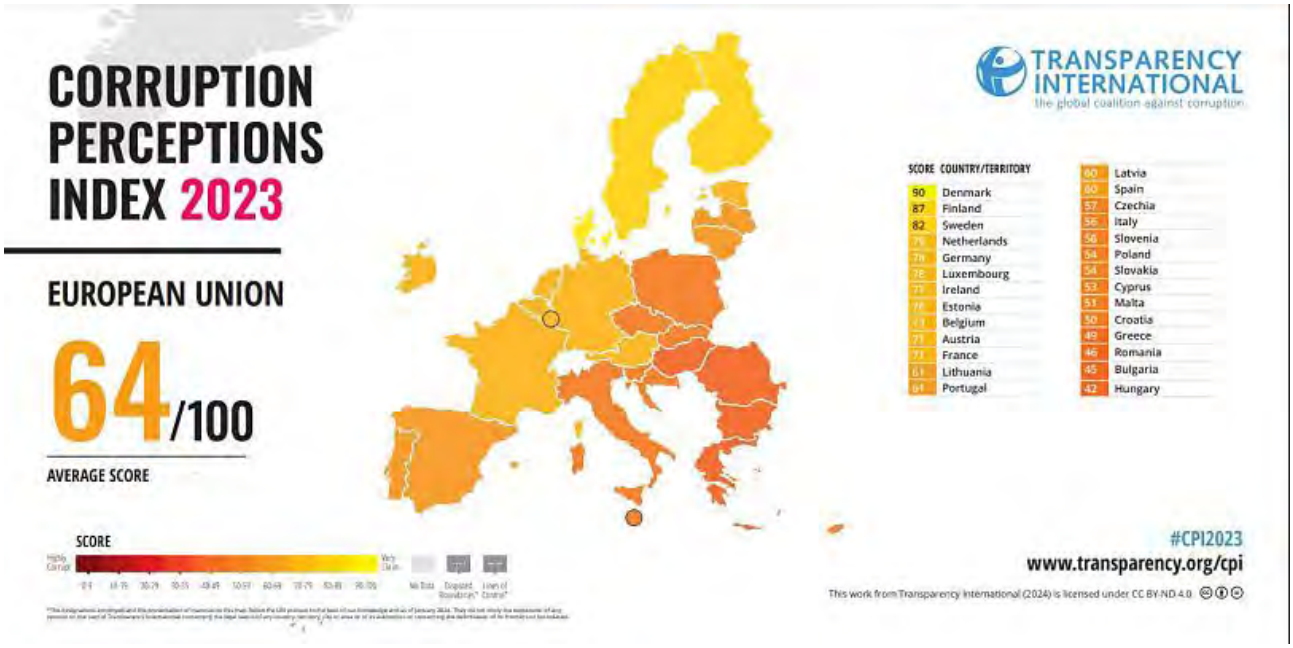
From the above-mentioned legislative acts that determine the focus of the European anti-corruption strategies is following that they are based on the principles of transparency, inevitability of responsibility for violations, good faith and comprehensive accountability. In particular, transparency refers to the openness of information about management processes, decisions and the use of public resources. Responsibility provides a mechanism for bringing offenders to justice, regardless of their status or position. Accountability is ensured through various forms of public control and audit, as well as the activities of specialized anti-corruption institutions that allow society to monitor the activities of the state and its institutions.

Due to the comprehensive application of these principles and strategies, the European Union has demonstrated significant success in reducing corruption, which should be actively implemented in Ukraine both in terms of efficiency and in terms of adapting Ukrainian practices to European ones for the purposes of future EU membership.

Israel's Practices on Combating Corruption

The State of Israel is a country that is not a member of the European Union, but whose geopolitical position and level of development are often compared to European standards. Those reasoning are made regarding such indicators of countries' development as: GDP per capita (according to the World Bank) of the European Union according to the latest data as of 2022: $57,285, and Israel – $52,133 [18], Corruption Perceptions Index (according to Transparency International) in 2023: EU – 64 (see Figure 1 for more details), Israel – 62 [6], public debt (according to the latest data from the Organisation for Economic Cooperation and Development (OECD): EU - average 89% of GDP, Israel – 83% of GDP [19].

Figure 1. Average corruption perception index in the EU in 2023 according to Transparency International



The aforementioned indicators of development of the two states indicate the usefulness of their comparison for the purposes of effective application of their experience to the needs of Ukraine.

First of all, in February 2009 and March 2009, respectively, Israel acceded to the UN Convention against Corruption (UNCAC) and the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery, in accordance with which Israel furtherly worked on harmonizing its own anti-corruption legislation [20].

The basis of all anti-corruption measures in Israel is thorough monitoring of possible corrupt practices. The monitoring is carried out by government agencies, special police units, the State Prosecutor, the State Comptroller's Office, all of them are independent of the ministries, and various non-governmental organizations. Israeli law provides significant social benefits for whistleblowers. At the same time, the penalties for officials involved in corrupt practices are severe, so that local corruption is kept under control and relatively in low level in the country [21]. Per below we will pay more attention to some of the points listed above.

The basic, principal and most important legal tools in Israel to fight corruption are the criminal laws. The anti-bribery and anti-corruption laws in Israel are the Criminal Law 1977 and the Money Laundering Law 2000, which criminalize a number of corrupt and corruption-related acts.

Bribery of national public officials is a criminal offense under Articles 290 and 291 of the Criminal Law, with Art. 290 regulating the receipt of a bribe by a public official and Art. 291 covering the offense of offering and giving a bribe. Thus, these two crimes are completely independent. Articles 292-295 of the Criminal Law define various types of offenses that will also be considered bribery, such as, for example, bribery during sports or other competitions; offering a bribe or demanding a bribe, which will be considered giving or receiving a bribe, respectively [22].

In addition, in July 2008, the Israeli Criminal Law introduced the offense of bribery of a foreign public official (Art. 291A), which prohibits offering or paying a bribe to a foreign public official for the purpose of obtaining business activity or obtaining a direct advantage in its conclusion, for instance through bribing a foreign public official who can influence the business activity. The bribe can also be given for a vicarious promotion of the business activity, for example by paying a foreign public official for unlawful disclosure of information that can give the briber an advantage in obtaining a deal. The maximum penalty for bribery of a foreign public official is up to seven years' imprisonment and/or a fine. Individuals may be fined up to ≈ €221,000 or four times the amount of the benefit intended to be obtained, whichever is greater. Legal entities may be fined up to ≈ €2,443,000 or four times the amount of the benefit intended to be obtained, whichever is greater [20].

A significant issue is that despite the rather severe sanctions for the crime under 291A of the Criminal Law, according to the OECD report for 2023, the perceived level of corruption in Israel is higher than the OECD member states average, and therefore the organization recommended that the Israeli government make criminal jurisdiction and sanctions for crimes related to bribery of foreign officials independent of the attitude of the foreign state to this crime [23].

At the same time, given the data of the OECD report and the fact that the Ministry of Justice of Israel defines the idea that corruption is transnational as the basic concept underlying international obligations to combat corruption, including foreign bribery [20], the vector of efficiency of investigation and detection of crimes involving foreign officials is a priority at the Israeli criminal anti-corruption policy and is additional evidence of the relatively low level of global corruption at state bodies within the country.

Considering the aspects of anti-corruption monitoring and prevention in Israel, the attention should also be drawn at such an institution as the State Comptroller, whose activity is to ensure that the executive branch acts in accordance with the principles of economy, efficiency, effectiveness, and moral integrity [24]. Particularly, in accordance with the State Comptroller Law of 1958, it also serves

as the Israeli Ombudsman. Thus, a person who has suffered from an action or inaction, for example, of the prosecutor's office, may file a complaint with the State Comptroller, who is authorized to investigate and publish its findings and decisions [25].

Alike the European regulation, the Israeli anti-corruption system has strict rules of conduct for judges and other public officials, which act as preventive tools against corruption.

The 2007 Judicial Ethics Rules, adopted pursuant to Art. 16a of the 1984 Law on the Courts, set out rules of ethics and integrity for the judiciary, including such provisions as:

– chapter Five stipulates that a judge may not receive material or other benefits from his or her position as a judge, directly or indirectly. In addition, Art. 20 of the same chapter prohibits the use of the judicial status to promote personal interests or to use the "title" of judge if it can be perceived as creating a favorable position for any person.
the receipt of gifts by judges is also regulated by the Law "On Civil Service" of 1979. In addition, according to Art. 21 of the Rules of Ethics, a judge may not receive a discount when purchasing goods or receiving services, unless such a discount is granted regardless of the judge's position or is approved by the general rules of court administration.
– a judge may not enjoy the benefits of free admission to events or places where admission is charged, unless the invitation comes from a family member or close friend, or when the judge accompanies one of the invitees, regardless of his or her position [25].

Alike the supervisory functions of the State Comptroller (Ombudsman), a separate Office of the Judicial Ombudsman, under the Law on the Ombudsman for Complaints against Judges, monitors judges' compliance with the Rules of Judicial Ethics. Its purpose is to improve the unique functions performed by the judiciary while preserving the independence of judges. The Law aims to combine the principles of independence and accountability of the judiciary. The Office of the Israeli Judicial Ombudsman provides an opportunity for anyone who believes that they have suffered from judicial misconduct to contact the Ombudsman. The Judicial Ombudsman investigates complaints about the behavior of judges, such as the use of offensive language in court decisions or during hearings, misconduct outside the court, as well as complaints about the way trials are conducted, such as unreasonable procedural delays [25].

In addition to the regular criminal system dealing with more severe offences, Israeli law establishes several provisions regulating the behavior of public servants in general, designed also to prevent corruption by public servants. The main ones are: The Civil Service Regulations (hereinafter referred to as the "Takshir") includes, inter alia, prohibitions on personal gain from public office and acting in a conflict of interest. The Civil Service Law of 1963 empowers the Civil Service Commissioner to prosecute civil servants for any violation of the Takshir, and the Law on the Promotion of Public Morality in the Civil Service of 1992 provides a framework for encouraging civil servants to report corruption in public administration [25].

Alike European practices, Israel has an obligation for civil servants to report information about suspected corruption, which is an integral part of the duty of loyalty of a civil servant. This notion is also enshrined in Art. 4.02 of the Code of Ethics (part of the Takshir) and Art. 17 of the Civil Service Law of 1963 [25].

While analyzing Israel's current anti-corruption course, it is important to consider the historical aspect and current challenges related to the constitutional crisis in the country.

The immediate cause of the current constitutional crisis was the November 2022 Knesset elections, which created a viable coalition after a long period of political gridlock that has been lasting since 2019. The new coalition included parties hostile to the Supreme Court. The longer historical view of the causes of the constitutional crisis favored by the Israeli government can be traced back to 1995, when the Israeli Supreme Court used the "Bank Mizrahi" case to introduce judicial review of primary legislation, although Israel does not have a constitution. Relying on the Basic Laws on Human Dignity and Freedom and Freedom of Occupation adopted in 1992, Israeli Supreme Court declared the Basic

Laws themselves to be the source of supreme law and brought about a "judiciary constitutional revolution". According to the government and its allies, this "undemocratic" step should be reversed [26, p. 2].

Thus, the role of the Supreme Court (sitting as the High Court of Justice) was to monitor the laws adopted by the Knesset and under certain circumstance to recognize them as "unconstitutional," which results in their becoming invalid. Another very important, yet controversial, Supreme Court's common practice was to scrutinize, and abolish if needed, government's decisions through the " reasonableness doctrine ". By the way, a similar practice is applied by the highest courts of Australia, Canada, the United Kingdom, and other countries [27], which seriously proves its democratic nature.

Attempting to find ways to overcome the power of the Supreme Court in Israel, the current government, initiated a so called "legal reform", led by the Minister of Justice, Yariv Levin. There were several initial proposals for the "legal reform", including: adjusting the composition of the judicial selection committee, so that it includes more parliamentary political representatives and less professional judges; allowing the Knesset to overturn judges' decisions, that abolish Knesset laws by a simple majority vote; abolishing the " reasonableness doctrine "; and allowing ministers to reject the opinions of their own legal advisors [26, p. 4].

As a result of the Knesset's ongoing attempts to limit the Supreme Court's "legislative oversight" based on Levin's proposals, a vast public protest arose in the State of Israel, including huge demonstrations. Most of the legislation has stopped (or was postponed) except of the abolishment of the " reasonableness doctrine ", a vital legal tool of the Supreme Court, in maintaining Israel's rule of law regime. However, even this attempt failed with the Supreme Court's consideration of the case "Movement for Quality Government in Israel v. the Knesset", in which on January 1, 2024 a decision was made on two important issues, namely: the first issue was whether the court has, in principle, the legal authority to strike down basic laws or amendments to basic laws; and the second was, if the court does possess this authority, whether the reasonableness constitutional amendment (to deprive the Supreme Court of the power to review and repeal government decisions - ed.) should be struck down. Given the dramatic importance of this case for Israeli constitutional law, it was the first time in the State's history that all 15 justices sat on the panel. The outcome of the decision is also dramatic: eight judges decided to grant the petition, and seven decided to reject it, as a result of which the Supreme Court's powers to review, declare "unreasonable" and, as a result, invalidate governmental acts and decisions were preserved, i.e., the "reasonableness doctrine" was saved [28]. The Supreme Court based its decision on the thesis that the challenged law caused "severe and unprecedented damage to the basic character of the State of Israel as a democratic country" [29].

In our point of view, it is impossible to disagree with the view that the doctrines (mainly reasonableness doctrine – ed.) used by the Court in this respect happen to overlap with substantive constraint on government actions and decisions, and so the rise of judicial power is associated in the public eye with the judicial role as guardian of probity. The strategy of bolstering the Court's judicial reputation in this way has been effective [26, p. 7].

It should be added that the activity of the Supreme Court in this way, provided the real independence of its judges is fulfilled, becomes a serious and influential tool in the system of checks and balances of the state of Israel, who as mentioned before does not have a constitution, designed to neutralize the consequences of dubious legislative decisions at the initial stages, leveling the negative consequences during their implementation, which is certainly a significant preventive anti-corruption factor.

Comparing the current state of anti-corruption legislation and prospects of anti-corruption policy in Israel with the European Union, there are significant similarities in the strategies chosen by these states (the EU referred to herein as a state or a country in a comparative manner). In particular, each state harmonizes its legislation in accordance with the UNCAC, takes measures to broadly involve the public in anti-corruption practices and to provide the widest possible access to information in this area. The discipline of public servants in both the EU and Israel is regulated in detail by ethics rules

with appropriate mechanisms for supervision and response to public servants. The similarities between the countries are also reflected in the special anti-corruption bodies. It should also be noted that each of the states is committed to more effective investigation of corruption offenses and bringing the perpetrators to justice. It should not be overlooked that in both the EU and Israel, one of the key anti-corruption strategies is directly related to a strict policy of combating corruption involving foreign officials.

Conclusions

Taking into account that the course of both countries is based on the UNCAC, which was adopted and ratified by the EU (2008) before Israel (2009) [30], the latter's introduction of similar anti-corruption practices following the EU shows its effectiveness in the examples of both countries, which indicates the reasonableness of adapting them to the needs of Ukraine.

Also, Israel's experience with judicial oversight of legislation, as well as other anti-corruption instruments, is appropriate for consideration and use by Ukraine, given the similarity of the geopolitical conditions of both countries - Russia's full-scale war against Ukraine and Hamas' and Hisbullha's aggressive attacks against Israel and the demonstrated effectiveness of Israeli policy in such conditions.

The strength and independence of the judicial system, as it is in Israel, and the vesting of courts with the necessary forms and scope of anti-corruption powers, following the example of Israel, could be an effective response to Ukraine's current challenges and, given, for instance, the problems with the judicial system identified in the US Department of State's Report [5], would help to radically affect the fight against corruption at the strategic level.

Israel, like the EU, demonstrates the importance of a comprehensive approach to legislative changes that include anti-corruption measures in all problematic and key areas of state and public life, which could be used as a model for Ukraine to consider implementing similar reforms.

Thus, based on the analysis of the EU and Israeli experience, Ukraine should develop and improve its existing anti-corruption strategies, focusing on the following steps: priority reform of the judiciary to guarantee its real independence; creation of mechanisms for more active participation of citizens in monitoring compliance with anti-corruption rules by public officials, as well as greater transparency of information related to the processes of preventing and combating corruption; improvement of procedures for investigating and prosecuting; wider cooperation and interaction with international partners and organizations. The implementation of these and other practices in the aggregate, provided that all branches of government, the public, and international partners work in a coordinated manner, will certainly help Ukraine make progress on existing problematic issues, which will strengthen the trust of the public, international partners, and business in national public institutions.

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Legal regulation of organ transplantation in Ukraine and the European Union

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Annotation

The purpose of our study is to determine the role of legislative regulation of transplantation in Ukraine in its development by comparing it with legal regulation in the European Union countries and ways of its possible effective change. For this purpose, the following materials were used: international standards in the field of human organ and tissue transplantation, relevant laws, by-laws and scientific articles. Among the methods and principles of scientific research, comparative legal, systemic, structural-complex, historical-legal and formal-legal methods, as well as methods of legal forecasting and content analysis were used. It was established that in Ukraine in recent years in the field of legal regulation of transplantation, the necessary legal prerequisites for the further development of this important area of medical activity have been mainly created, but they are not always effective. In European countries, there is a stable transplantation coordination service staffed by highly qualified personnel, and post-mortem donation is regulated. In addition, these countries show the opposite situation both in the field of legal regulation of processes and in its specific results. In particular, Ukraine has not yet created a comprehensive system of successful human organ transplantation, and the legal regulation of transplantology has proved ineffective. At the same time, in the member states of the European Union, the filling of measures for the legal regulation of transplantology with rational content led to the creation of an effective transplantation system.

Key words: *transplantology; posthumous donation, European Union; presumption of concent; presumption of non-concent.*

Правове регулювання трансплантації органів в Україні та країнах Європейського Союзу

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Анотація

Метою нашого дослідження є визначення ролі законодавчого регулювання трансплантації в Україні в її розвитку шляхом порівняння його з правовим регулюванням в країнах Європейського Союзу та шляхів його можливої ефективної зміни. Для цього були використані такі матеріали: міжнародні стандарти у сфері трансплантації органів і тканин людини, відповідні закони, підзаконні акти та наукові статті. Серед методів і

принципів наукового дослідження використовувались порівняльно-правовий, системний, структурно-комплексний, історично-правовий і формально-юридичний методи, а також методи правового прогнозування та контент-аналізу. Встановлено, що в Україні в останні роки у сфері правого регулювання трансплантації в основному створені необхідні правові передумови подальшого розвитку цього важливого напрямку медичної діяльності, однак вони не завжди ефективні. В європейських країнах функціонує стабільна, укомплектована висококваліфікованими кадрами служба трансплантаційної координації, врегульовано посмертне донорство. Крім того, в цих країнах виявлено протилежність ситуації як у сфері правового регулювання процесів, так і в його конкретних результатах. Зокрема, в Україні наразі не створено всеохоплюючу систему успішної трансплантації органів людини, правове регулювання трансплантології виявилось неефективним. Водночас у країнах-членах Європейського Союзу наповнення раціональним змістом заходів з правового регулювання трансплантології зумовило створення ефективної системи здійснення трансплантації.

Ключові слова: *трансплантологія; посмертне донорство; Європейський Союз; презумпція незгоди, презумпція згоди.*

Introduction

Today, transplantation is considered to be an extremely effective and, in some cases, non-alternative method of treatment for diseases of vital organs, primarily the heart, kidneys, liver, lungs, etc. That is why transplantation in developed countries is one of the areas of medicine that demonstrates the best dynamics. Ukraine is far behind such countries.

The flourishing of successful transplantation practice in the developed world in the late twentieth and early twenty-first centuries and the pronounced lagging behind in Ukraine have led to an urgent need to study this problem. The scientific and practical interest in transplantation in Ukraine is due to a large number of problems in the field. The health care sector is one of the most important sectors that require legal regulation and control, based on the fact that human life and health are the highest social value [1, p. 1]. In addition, transplantation concerns two persons at the same time – the donor and the recipient, and, in the opinion of O. Stets, O. Bilochenko and Y. Chabanenko, also medical personnel, which brings it closer to legal science and requires, among all medical disciplines, "the most clear legal regulation" [2, p. 65; 3, p. 57].

The extreme importance of the problem is also confirmed by the decisions of various international institutions, which define the basic principles of transplantology, which are recommended to all states [4, p. 308-320]. After Ukraine declared its intentions to integrate into the European Union, Ukraine pledged to take efforts to harmonize its legislation with that of the European Union, including in the area of human organ transplantation [5, p. 5]. Thus, according to Art. 428 of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand, "Ukraine is gradually bringing its legislation and practice closer to the principles of the EU acquis, in particular in the field of infectious diseases, blood services, tissue and cell transplantation, as well as tobacco. The list of relevant EU acquis acts is set out in Annex XLI to this Agreement" [6].

At the same time, the national legislation on human organ transplantation, despite the huge number of regulations, has problems that need to be addressed immediately by making the necessary changes to the legislation [7, p. 42]. That is why most studies are devoted to the problems of legal regulation of transplantation and criminal liability for violation of laws [8, p. 154].

The full-scale invasion of the territory of Ukraine by the russian federation in 2022 significantly aggravated the situation with transplantation in our country. On the one hand, the cancellation of air transport in Ukraine caused the problem of the impossibility of timely and prompt delivery of organs for transplantation, on the other hand, the war contributed to a significant increase in the number of people in need of organ, limb, and skin transplants. This applies to both military personnel and the civilian population, who received various bodily injuries as a result of explosive

and gunshot injuries, characteristic of the period of hostilities [9]. Therefore, the relevance of the problem to which this article is devoted is undoubted.

The novelty of the study consists in generalization of the features and reasons marked by the researchers for Ukraine's lagging behind the countries of the European Union in transplantology and the possibilities of effective change of the situation. The materials in this article are valuable for legislators, transplantologists, students of legal and medical institutions specializing in this area, teachers of legal and medical universities, and anyone interested in this issue.

Literature review

The problem of legal regulation of human organ transplantation has been studied to varying degrees by Ukrainian and foreign scholars: G. Anikina [10], A. Gel [11], S. Hrynchak [12], V. Shulga [8], O. Rumiantsev [13], I. Bezzub [14], V. Pishta [15], B. Pipchenko [7], A. Golovko, K. Kukharchuk [3], K. Iliushchenkova [1], M. Komarov, O. Nikonenko, R. Saliutin, S. Palianytsia [16], G. Krainyk [17, 18], M. Novitska [5, 19], B. Ostrovska [4], L. Zherzh [20], L. Dorosh [21], O. Iliashenko [22], A. Musienko [23], M. Bryukhovetska [24], A. Shevchuk [25, 26], D. Zadykhailo, V. Milash, V. Yarotskyi [27], A. Mernyk [28, 29], I. Kobza [30], I. Ptashnyk [31], O. Kyseliova [32], O. Klymenko, G. Shokha [331], O. Iliushyk, M. Baran [34], M. Dyakovych, M. Mykhayliv [35], O. Bukhanevych [36], Y. Razmetaeva, O. Sydorenko [37], B. Baluk [38], G. Didkivska [39] and others.

Thus, G. Anikina considered the peculiarities of the legal regulation of organ transplantation from a deceased donor, which is most often preferred in the modern world. In the work of A. Gel the development of Ukrainian legislation in the field of organ transplantation is examined. S. Hrynchak devoted several works to the study of criminal liability for illegal organ transplantation in historical retrospect. It was the imperfection of legislation in this area that provoked a huge amount of illegal organ harvesting for clandestine organ transplantation operations. V. Shulga studied the formation and development of state regulation of transplantation in Ukraine, O. Rumiantsev in his dissertation investigated the administrative and legal regulation of transplantation in Ukraine, its evolution and features, I. Bezzub analyzed the reform of the transplantation system in Ukraine, noted its shortcomings and possible ways to improve the situation in this area.

V. Pishta studied the legal regulation of cross-donation in Ukraine and foreign countries, he identified and grouped the shortcomings of the 2019 Law of Ukraine on Transplantation of Human Organs and Materials. B. Pipchenko addressed the controversial aspects of consent to organ and tissue donation for transplantation, A. Holovko and K. Kukharchuk focused on the political and legal aspects of the specifics of transplantation in Ukraine, K. Iliushchenkova studied the evolution of legal regulation of reproductive cell donation in Ukraine. M. Komarov, O. Nikonenko, R. Saliutin, and S. Palianytsia also tried to systematize historical milestones in the development of transplantation. G. Krainyk tried to outline the main problems in the development of transplantation in Ukraine. M. Novytska considered the implementation of international principles and standards in the field of transplantation of anatomical materials into the national legislation of Ukraine. In her monograph, B. Ostrovska highlighted the international legal regulation of the human right to life in the context of bioethics in a systematic form. L. Zherzh considered the issue of illegal trafficking in human organs or tissues committed by prior conspiracy by a group of persons or transnational organizations. L. Dorosh and I. Potapenko also addressed the issues of illegal trafficking in human organs or tissues in his works. AT. Iliashenko outlined the state and trends of illegal trade in human organs and tissues in Ukraine, A. Musienko investigated the fight against crimes in the field of transplantation of human organs or tissues.

M. Bryukhovetska studied the problem of posthumous organ donation both with the presumption of consent and non-consent. A. Shevchuk in his works touched upon the issue of the right to palliative care and the peculiarities of its realization. D. Zadykhailo, V. Mylash, V. Yarotskyi characterized the current state of health care reform in Ukraine in the context of European integration. A. Mernyk considered certain issues of legal regulation of organ transplantation in Ukraine. I. Kobza and his

co-authors examined organ transplantation in Ukraine in terms of personalities and events. I. Ptashnyk addressed the issues of legislative regulation of organ transplantation in the European Union. O. Kiselyova tried to compare the administrative and legal regulation of human organ and tissue transplantation in Ukraine and some foreign countries. O. Klymenko and G. Shokha devoted their research to the history of the development of legal regulation in the field of organ transplantation in the UK, the USA and European countries. O. Iliushyk and M. Baran addressed the issues of legal regulation of organ transplantation from a deceased person.

At the same time, there have been almost no comparative studies of the state of transplantology in Ukraine and the countries of the European Union. That is why the authors of this article set this very *goal*.

Materials and Methods

In order to determine the differences in the legal regulation of human organ transplantation in Ukraine and in the countries of the European Union, the authors used the following materials: international standards in the field of organ transplantation, laws, regulations of governments and ministries of health of the countries under study, articles by researchers, assessments by leading industry experts, as well as various theoretical legal and general scientific methods, i.e. various methods and research techniques.

First and foremost, the *comparative legal method* contributed to the generalization of the experience of Ukraine and European countries in the field of transplantation, and it was this method that contributed most to the achievement of the goal. Comparison is a cognitive operation that helps to find out whether there are identities or differences between objects or degrees of development of the same object. It is also the basis for the analogy of the logical method and serves as the starting point of the comparative legal method, which allows, by comparison, to identify the common and the different in history phenomena, to learn different degrees of development of the same legal phenomenon or different coexisting phenomena. The comparative legal method involves comparing different legal systems, institutions, and categories in order to identify similarities or differences between them. As a result of the comparison, the qualitative state of the legal system as a whole or individual legal institutions and norms is established. It was its application that helped to identify differences in the legal regulation of organ transplantation in Ukraine and the European Union, as well as its peculiarities. The *principles of determinism and retrospective analysis* helped to establish cause and effect relationships between the processes.

The *system method* contributed to the consideration of Ukraine and the countries of the European Union as equivalent units, in accordance with the requirements of which the research problem was formulated. The use of the *principle of historicism* made it possible to identify the significance of processes in the context of different periods. This principle in the study of the transplantation problem contributed to the knowledge of the legal nature of the above groups of legal acts, and to the knowledge and understanding of their content and meaning. The *method of objectivity*, along with the principle of historicism, contributed to the avoidance of assessments of events, facts, state systems, etc., traditional in Soviet science.

The *structural and complex method*, the method of classification, the dogmatic legal approach, the principles of analogy and logical analysis made it possible to study the legal acts of different states into separate groups, to identify their significance in the process under study, to formulate general conclusions, to establish differences in the legal regulation of organ transplantation in Ukraine and the European Union and to determine their specific results. The *method of content analysis* allowed for a quantitative analysis of the texts of legal acts and scientific articles in order to further interpret the patterns in the development of the organ transplantation process in the studied countries.

The *historical and legal method* is used in the study of the formation and development of organ transplantation in Ukraine and the European Union and its administrative and legal regulation. This method made it possible to better understand the dynamics of the research process and to draw

certain conclusions about the influence of the past on the current state of development of the organ transplantation institute. The *formal legal method* provided an analysis of the powers of the subjects of public administration of transplantation in Ukraine, and allowed to clarify the main concepts and categories in the field of human organ transplantation. The *method of legal forecasting* was used to determine a set of possible options for the development of transplantology in Ukraine and options for improving the state of this field. The *statistical and mathematical method* made it possible to obtain and process quantitative data on organ transplantation, to find out the dynamics of this process both in Ukraine and in the European Union.

Results and Discussion

Peculiarities of organ transplantation in Ukraine

The era of modern organ transplantation was "historically opened" by our compatriot Professor Yu. Voronyi (1895-1962), who in 1933 performed the "world's first" cadaveric kidney transplant in Kherson" [30]. In 1942, Voronyi performed a unique operation – the replantation of an arm that had been blown off in an explosion. After the war, the surgeon received a letter from a grateful patient that began with the words "I am writing with your right hand" [30].

How did transplantology develop in Ukraine later compared to other countries? More than 24,000 transplants are performed annually in the USA, more than 4,000 in Spain, and more than 1,500 in Poland [16, p. 64]. This field of medicine is also actively developing in post-Soviet countries, among which Belarus is ahead of all, with 50 transplants per 1 million inhabitants annually. In Estonia, this figure is 46.2 transplants per 1 million people, in Latvia – 36.2, in Lithuania – 22 [14, p. 1].

Ukraine is far behind these countries. "The situation in Ukraine, where only 3.1 transplants per 1 million people per year are performed, can be called catastrophic, even compared to its neighbors, emphasizes I. Bezzub. And this is one of the worst indicators in the world" [14, p. 1]. For 19 years, this field of knowledge has been almost forgotten by the legislator and the relevant ministry. The issue of legal regulation of transplantation of anatomical materials is extremely important today [5, p. 2]. "The legislator's prolonged neglect of the transplantation sphere", emphasizes M. Novytska, "has led to a situation in Ukraine in which more than 90 000 Ukrainians need a transplant of an organ, and most of them are doomed if they do not receive it" [19, p. 8].

The annual need for organ transplants in Ukraine before the full-scale invasion of russian troops was 3,653, including 2,115 kidneys, 830 livers, 30 pancreas, 89 pancreas plus kidney complexes, 328 hearts, 240 lungs, 2-3 heart-lung complexes, and 42 intestines. After February 2022 these figures increased sharply both among the military personnel who stood up to defend the sovereignty of Ukraine, and among the civilian population.

At the same time, some organ transplants accounted for only 0,8% of all surgeries by 2020. According to the Ministry of Health of Ukraine, in 2016, only 5 liver transplants, 2 cadaveric kidney transplants and 93 related transplants were performed in Ukraine [17, c. 8]. Over the past twenty years, only 8 heart transplants have been performed in Ukraine, while 1500 are needed [17, p. 701]. G. Kraynik and B. Savchuk call the situation with transplantation in Ukraine "too sad" and "too critical" [17, p. 701-703; 16, p. 64]. I. Bezzub states that "one of the most important reasons for this state of affairs is the legislative one" [14, p. 2].

Since 2020, the number of such operations in Ukraine has increased, and Ukrainian citizens are almost never sent abroad for organ transplants. In 2021, 316 operations were performed, including 231 kidney transplants (126 from living donors, 105 posthumous), 51 liver transplants (19 from living donors, 32 posthumous), 32 heart transplants, 1 lung transplant, and 1 cornea transplant. In 2022, the number of transplant operations in Ukraine increased further, 384 such operations were performed, that is, 20 percent more than in 2021: 274 kidney transplant operations (of which 134 were from a living donor, 140 posthumously), 74 operations with liver transplants (36 from a living donor, 38 posthumously), 36 heart transplant operations (*calculated by the authors*) [40].

Ukraine has gradually developed the material base for this extremely important branch of medicine. Initially, six centers were authorized to perform human organ transplants: The National Institute of Surgery and Transplantation named after A.A. Shalimov, Lviv Regional Clinical Hospital, Odesa Regional Clinical Hospital, V.I. Shapoval Regional Clinical Center for Urology and Nephrology (Kharkiv), Zaporizhzhia Regional Clinical Hospital, and Dnipro Regional Clinical Hospital named after I.I. Mechnikov, which are capable of performing up to 1000 organ transplants per year [41]. In Spain, which has the same number of residents as Ukraine, there are more than 40 centers that perform 4,500 operations per year.

Since 2020, there has been an expansion of the network of institutions that carry out transplantation of human organs and tissues in Ukraine. This was due to the adoption in 2020 of the Cabinet of Ministers Resolution "Some Issues of Implementation of the Law of Ukraine «On Transplantation of Organs and Other Anatomical Materials to Humans»" of April 24, 2000 No. 695, which approved the list of state and municipal health care institutions and state research institutions authorized to carry out activities related to the transplantation of organs and other anatomical materials to humans, which significantly increased the number of institutions authorized to transplant human organs and tissues [42]. In particular, the specified Resolution of the Cabinet of Ministers of Ukraine grants the right to conduct transplantations to healthcare and scientific institutions: activities related to the transplantation of organs and other anatomical materials to humans – to 12 institutions and establishments; activities related to human organ transplantation – to 4 institutions and establishments; activities related to human tissue transplantation – to 21 institutions and establishments; activities related to human cell transplantation – to 22 institutions and establishments; activities related to human tissue and cell transplantation for burn injuries – to 31 institutions and establishments [42].

The legislative framework for the human organ transplantation was also developed. After Ukraine gained independence, it adopted three laws regulating the transplantation process: July 16, 1999, May 17, 2018. and February 28, 2019 [43-45]. They were to be improved and supplemented by the Resolutions of the Cabinet of Ministers of Ukraine. This task was addressed by the Orders of the Ministry of Health [46-49]. The issues were also regulated by the Agreement of the Ministry of Health of Ukraine and Belarus of 17 July, 1995, the Instruction of the Ministry of Health of 25 September, 2000, and Resolutions of the Cabinet of Ministers [50; 51].

Comparing the Laws on Human Organ Transplantation in Ukraine of 1999 and 2018, it can be concluded that the latter is much more advanced than the former, together with the regulations adopted to clarify it. At the same time, we should not expect global changes in transplantology in modern Ukraine due to the fact that the new law is incomplete and creates a number of problems that will arise after its introduction [47, p. 9; 46, p. 8]. For certain reasons, the Law of 2018 could not work in full force and did not provide the expected results, that is why the legislator was forced to amend it several times in 2019 [15, p. 2]. In particular, to ensure the implementation of the provisions of the 2018 Law a number of by-laws were not adopted, the software for the Unified State Transplantation Information System was not made, the procedure for accessing information was not defined, and the electronic resources with which it will exist are not known; there was no effective transplant coordination system in Ukraine. Also, the relevant body that implements the state policy in the provision of medical care with the use of transplantation and that carries out transplantation-related activities, its composition, procedure for formation, subordination, etc. are not defined; there is no specific order of priority for obtaining consent from close relatives and family members of the donor in the event that there are several subjects from the number specified by law or radically different views of family members regarding the removal of anatomical material from their deceased relative; there is no Card of the donor of anatomical material with the content of a note on the provision of consent or non-consent on which transplantation and related activities should be carried out, the requirements for technical coverage of the equipment of these subjects, the number of accompanying documents; there is no replacement of the concept of concent with the concept of non-concent. According to M. Novytska, all this requires further work on improving

legislation in the field of human organ transplantation [19, p. 9].

A. Gel disagreed with M. Novytska's statement about the absence of bylaws that were relied upon and did not fulfill the task of improving laws. This is what led to the adoption of the 2019 Law. "There is no doubt", he emphasized, "that the main purpose of this law was an attempt by the authorities to hide their inaction behind the next numerous changes in legislation, most of which cannot be called anything other than «legislative spam»" [11, p. 8], that is, unwanted messages in any form that are sent in large numbers.

These shortcomings of the 2018 Law necessitated the adoption of the 2019 Law. Most of the provisions of the 2019 Law can be assessed as useful and motivated. Basically, we can talk about the completion of the legislative framework for the further development of transplantation. At the same time, for its full functioning, it is necessary to create and fill the state information system of organ transplantation along with the adoption of a number of bylaws, especially the introduction of the principle of "presumption of consent" into Ukrainian legislation [11, p. 1].

The main problem with the 1999 Law was the approval of the "presumption of non-consent". This is one of the two existing principles of donation used in international practice. The *presumption of consent* is understood in the following way: a person who does not wish to be a donor after his or her death must write a corresponding statement. In the absence of such a statement, it is assumed that the deceased agreed to donate by default. The presumption of non-consent, on the other hand, requires that a person document his or her consent to become an organ donor after death. In Ukraine, the *presumption of non-consent* is in effect [14, p. 3]. All laws that followed the 1999 law were aimed at improving it. According to I. Bezzub, domestic legislation generally allows for the transplantation of human organs and tissues. At the same time, the Laws, Resolutions of the Cabinet of Ministers and Orders of the Ministry of Health of Ukraine "constitute only a general concept of transplantation. And this makes it necessary to bring Ukrainian legislation in line with the standards of the 21st century" [14, c. 2].

Completing such a task requires some time. R. Saliutin, the Deputy Director of the Institute of Surgery and Transplantology named after Shalimov, is sure that the adoption of only one law will not be able to solve long-standing problems in one moment. This task will take time to accomplish. In his opinion, such a process will take two to three, or even five years. This issue seems to be very deep, complex and needs to be addressed not only at the legislative level, but also at the level of bylaws, at the level of public perception, and at the level of appropriate funding [14, p. 15].

The Ministry of Health is also not sure about the possibility of rapid changes in connection with the adoption of the law, where they admitted that nothing had been done in this direction for twenty years, in particular, no modern equipment was purchased, transplant doctors were not educated and trained, no information systems or registers of donors and recipients were created [14, p. 15].

In 2020, V. Pishta identified and grouped the shortcomings of the 2019 Law, the main problems of formation of the state policy in the field of transplantation, including the systematic lack of necessary funding; the actual lack of organizational and legal mechanisms to ensure the functioning of the transplantation system in Ukraine (lack of a transplant coordination system and the Unified State Transplantation Information System); lack of public understanding of the importance of transplantation as a method of saving lives and improving health, which is a consequence of the passive information policy of the Ministry of Health of Ukraine: lack of qualified doctors and medical staff involved in transplantation operations; lack of modern medical technologies and medicines used in transplantation operations; lack of effective international cooperation in the field of transplantation [15, p. 2-3].

At the end of 2020, the Specialized State Institution "Ukrainian Center for Transplant Coordination" (according to the Order of the Ministry of Health of Ukraine of October 28, 2020) and the Unified State Information System of Organ and Tissue Transplantation were finally launched in Ukraine based on the of the Regulation on the Unified State Information System of Organ and Tissue

Transplantation adopted on December 23, 2020 [50; 51]. The Resolution of the Cabinet of Ministers of July 07, 2021 No. 698 "On Amendments to the Resolutions of the Cabinet of Ministers of Ukraine of December 18, 2019 No. 1083 and March 3, 2021 No. 181" [51] contributed to a change in the situation regarding payment for transplantation operations (the vast majority of such operations should be carried out at the expense of the state).

Before the beginning of the armed aggression of the russian federation against Ukraine, the Republic of Belarus was Ukraine's main strategic partner in the field of transplantation, due to the high level of transplantation development in this country. An agreement was concluded between the Ministries of Health of the two countries to clearly regulate relations between them on referring patients to specialized medical centers for consultations and transplantations [13, p. 2].

Thus, in recent years, in the field of legal regulation of transplantation, the necessary legal prerequisites for the further development of this important direction of medical activity have mainly been created. At the same time, legislators often ignore the principles of law-making and the rules of legal technique, which significantly complicates, and sometimes makes impossible to apply the law.

Scientists see the main reason for the ineffectiveness of legal regulation of human organ transplantation in Ukraine in the imperfection of the legislation intended to solve the problem. What role did the relevant legislation play in the countries of the European Union?

European experience of organ transplantation

In Europe, the legal regulation of organ transplantation initially took place at the national level in individual countries. The first European country to legislate organ transplantation was Italy, which in 1932 established a ban on testicular transplantation in its Civil Code. Three decades later, in the 1960s and 1970s, European countries began to make the first attempts to legally regulate donation by adopting relevant laws on lifetime donation: Czechoslovakia (1966), Denmark (1967), Hungary (1972), Bulgaria (1973), France (1976) [33, p. 1-2].

At the European level, the Council of Europe first considered the issue of organ transplantation in 1978 in Recommendation R (78)29 on organ transplantation and the harmonization of the laws of the Member States relating to the removal, transplantation and retrieval of organs. A year later, in 1979, the Council of Europe adopted the Recommendation on the facilitation of the transport and international exchange of human organs and tissues [31, p. 71-72].

In 1997, the Council of Europe adopted the Convention on Human Rights and Biomedicine, which stated that preference should be given to the harvesting of organs from a deceased donor [46, Art. 19]. The main achievement of this Convention (the Oviedo Convention) is that it became the first legally binding international treaty to cover a huge range of ethical issues in the field of biological research, including transplantatology. It establishes the general framework for the protection of human rights in medicine and biology. This main focus is expressed in its Art. 1: "The Parties to the present Convention shall protect the dignity and identity of all human beings and shall guarantee to everyone, without discrimination, respect for their integrity and for other rights and fundamental freedoms regarding the use of biology and medicine" [53, Art. 1].

The official website of the Council of Europe emphasizes that the Convention on Human Rights and Biomedicine has created a legal basis for many ethical principles for the protection of patients and citizens that apply to any medical act (including transplantation). It emphasizes that the Convention establishes four key principles of bioethics: (1) the primacy of the human being; (2) equal access to health care; (3) the need for consent to medical intervention (and protection of those who are unable to give it); (4) confidentiality, i.e. ensuring the inviolability of private life and personal data [53].

Octavi Quintana-Trias, former Chair of the Council of Europe's Steering Committee on Bioethics, emphasizes that the Oviedo Convention is a binding treaty that is concluded at the intersection of

general conventional human rights in the sense of the Convention for the Protection of Human Rights and Fundamental Freedoms and Health Rights; it takes a comprehensive approach to bioethics and defines minimum harmonization between states in this area. This makes it possible to understand that bioethics and research ethics are inextricably linked to the principles of human rights and protect them. Thus, the answers to many questions that arise in the course of the progress of the science of life, in one way or another, relate to one of the most important questions: how do we - both an individual and society as a whole – want to live? And this question cannot be solved on the basis of rational arguments alone: emotions, cultural traditions, spiritual beliefs and worldview are also important for answering it [54].

The Oviedo Convention also establishes important standards of legitimacy and legality of transplantation:
– the sole purpose of removing organs and tussues from a living donor for the purpose of transplantation is the treatment of the recipient;
– a mandatory factual (medical) condition is the absence of the necessary organ or necessary tissue of the deceased person and other alternative method of treatment of camparable effectiveness;
– a mandatory legal condition is the free and informed concent of the donor for transplantation, which must be given clearly and specifically;
– proper protection of persons who are unable to give concent to organ removal;
– prohibition for the donor to receive financial benefit from transplantation.

It is believed that mandatory consent and the prohibition of financial gain are positive features of charity policy that respect individual autonomy and gives people the opportunity to perform significant acts of generosity [55, p. 122].

It is important to note that the Oviedo Convention laid the foundation for the adoption of the more detailed Additional Protocol on Organ Donation and Transplantation, as well as the Council of Europe Convention against Trafficking in Human Organs. An additional protocol on transplantation of organs and tissues of human origin was signed in Strasbourg on January 24, 2002, and the Convention of the Council of Europe against trafficking in human organs was concluded in Santiago de Compostela March 25, 2015 [56].

The next and one of the main acts in the field of transplantation of human tissues and organs in Europe was Directive No. 2010/45/EU of the European Parliament and the Council of the EU on the standards for quality and safety of human organs intended for transplantation, Strasbourg, (2010). This directive addresses the concepts of organ transplantation, standards for quality and safety, organ preparation organization, organ preparation procedure, organ and donor characteristics, organ transportation, organ transplant centers, the state of organ tracking, information system, transplantation process with serious adverse manifestations and reactions, medical personnel, protection of donors and recipients, principles of organ donation, voluntariness requirements, issues of quality and safety of living donors, protection of personal data, confidentiality and security of their processing, responsibilities of competent authorities and exchange of information, organ exchange organizations with third countries, European organ exchange organizations, sanctions for violation of national regulations adopted pursuant to this Directive, etc. [56]. One of the drawbacks of the Directive is the lack of attention to the regulation of xenotransplantation [31, p. 73].

The evolution of legal regulation of transplantation in the European Union has been influenced by international organizations such as the World Health Organization and the World Medical Organization. In 1991, the first of them adopted the Guidelines for Human Transplantation, which focused on the principles of voluntary donation, non-commercialization of donation, and the preference for transplantation from a deceased donor and relatives [31, p. 73-74]. The World Medical Organization in its acts paid attention to the protocols that are important for doctors performing transplantation [57].

I. Ptashnyk distinguishes three groups of EU legislation in the field of transplantation: 1) legislation

and guidelines regulating transplantation and blood donation; 2) legislation and guidelines governing organ transplantation and donation; 3) legislation and guidelines regulating transplantation and donation of cells and tissues [31, p. 75]. The second group (regarding transplantation and organ donation) consists of: "Communication from the Commission to the European Parliament and the Council organ donation and Transplantation: policy actions at EU level"; "Action plan on organ donation and transplantation (2009-2015). Strengthening cooperation between Member States"; "Recommendation Rec (2004)7 of the Committee of Ministers to Member States on organs trafficking" [31, p. 75].

In European countries, the legislation has not yet resolved the issue of determining who can be a donor. Therefore, the vast majority of countries use the WHO Guidelines for the Transplantation of Human Cells, Tissues and Organs, which state that it is preferable to take organs for transplantation from deceased persons. In cases where living donors are involved, it is better to give preference to close relatives of the recipient. The Guidelines emphasize that "patients must have a genetic, legal or emotional connection, with the exception of tissues with regenerative functions" [33, p. 2; 58].

In Europe, some countries allow the harvesting of organs from donors who are not related (have no genetic connection), provided that the donation is altruistic and free of charge (e.g., France, the Code of Public Health) [33, p. 2-3].

An important step in the development of transplantation and cooperation in this area in Europe was the creation of the International Foundation EUROTRANSPLANT in 1967. The Center received information about kidney donors and gradually this led to a huge improvement in the survival rate of kidney transplants. At the end of the 1970s of the 21st century Eurotransplant operated in 68 transplant centers in six countries: Austria, Belgium, Luxembourg, Germany, the Netherlands and Switzerland. Since the 1970s, Eurotransplant has started work with the extraction of liver, later – heart and pancreas, since 1988, – lungs, since 1999 – intestine [59].

Cooperation with Eurotransplant provides an opportunity to move the level of transplantation services to a much higher level. As of today, Eurotransplant is mainly engaged in the provision of transplant organ services from deceased, is an intermediary between donor hospitals and transplant centers and includes Austria, Belgium, Croatia, Germany, Hungary, Luxembourg, the Netherlands, and Slovenia. About 139 million people are currently served by Eurotransplant [59].

Cooperation with Eurotransplant significantly speeds up the search for donors for people in need of organ transplants, so one of the future steps of the government of Ukraine is the policy of joining this international organization.

In European countries, organ and tissue transplants are used primarily from deceased donors, with different principles of regulation of such donation. The "presumption of consent" ("presumed consent", "denial model") is used in Austria, Denmark, Belgium, Finland, Spain, Italy, France and provides that there is no need to obtain prior consent for donation after the death of a particular person. At the same time, the prior consent of a person or his or her close relatives ("presumption of non-consent") to the removal of organs for transplantation is required by the legislation of Germany, the United Kingdom, the United States, and Japan) [32, p. 48; 33, p. 4].

The "presumption of non-concent" is also supported by the European Court of Human Rights, which can be seen in its decisions [34, p. 177]. In the case of Petrova v. Latvia, a violation of the procedure for taking anatomical organs for transplantation was considered. The applicant's son, who died as a result of a car accident, had his kidneys and spleen removed after his death without his prior consent and without the consent of his mother. The court ruled on the violation of Art. 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms, namely the right to respect for personal and family life. The Court also emphasized in the judgment "that the Latvian law on organ transplantation at the time of the applicant's son's death was not clear enough, which led to circumstances whereby the applicant, as the closest relative of her son, had certain rights regarding the removal of his organs, but was not informed, let alone given any explanation of how

and when these rights could be exercised" [34, p. 177; 50].

Conclusions

Thus, in recent years, there has been a huge increase in the use of human organ transplants worldwide, and more and more attention and importance have been given to the legal regulation of the transplantation process. The comparative analysis revealed the opposite transplantation situation in Ukraine and the European Union, both in the field of legal regulation of processes and in its specific results.

The development of legal regulation in Ukraine was controversial. On the one hand, the measures to implement legal regulation of transplantatology outwardly corresponded to the main international and European requirements. On the other hand, they did not achieve their goals, created an unattractive situation, and led to some of the worst statistical indicators in Europe. Laws, Resolutions of the Cabinet of Ministers and Orders of the Ministry of Health of Ukraine provide only a general idea of transplantation. One of the most important reasons for this situation is the imperfect legislative regulation of transplantology issues. This is what led to the adoption of the 2019 Law. However, the Ministry of Health admitted that little had been done to implement its provisions. In addition, the agenda includes the problems of forming and implementing state policy in the field of transplantation, in particular: the systematic lack of necessary funding; lack of public understanding of the importance of transplantation as a method of saving life and improving health, which is a consequence of the passive information policy of the Ministry of Health of Ukraine; lack of qualified doctors and medical personnel involved in transplantation operations; lack of modern medical technologies and medicines used in transplantation operations; lack of effective international cooperation in the field of transplantation. Thus, to date, Ukraine has not created a comprehensive system for successful transplantation of human organs.

In the European Union, on the contrary, the rational content of the measures on legal regulation of transplantatology has led to the creation of an effective system for implementation of transplantation. Compliance with international standards in the field of transplantology, consistent implementation of their provisions in the system of national regulations, participation in international organizations that facilitate the rapid exchange of information on possible donors and recipients, and the provision of organs for transplantation have shaped the practices of successful solutions to the problems of human organ and tissue transplantation. At the same time, it can be stated that there are certain differences in the legal regulation of organ transplantation in the European Union, such as the presumption of consent and non-consent, but in general this does not affect the high level of successful transplantations in these countries. Almost all countries of the European Union give preference to posthumous donation. It can be assumed that the accession of Ukraine to the European Union will contribute to the possibility of joining such international organizations as Eurotransplant, which will provide opportunities to significantly improve the situation with transplantation for citizens of Ukraine who need such operations.

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The Principle of Separation of State Powers: Content and Purpose

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Abstract

The relevance of the article lies in the analysis of the content and meaning of the principle of separation of state powers. The purpose of the article is to analyze the internal content of the principle of separation of state powers, the types of its implementation in different countries, and its significance for the functioning of democratic legal statehood. To conduct the research, philosophical, general scientific, special scientific and legal methods were used, namely: dialectical method, systemic and structural-functional methods, comparative law, categories and techniques of formal logic, universal value-methodological guidelines. Based on the study of scientific developments and state legal practice, it has been determined that the principle of separation of state powers is an integral part of a democratic state, and the exercise of power is delegated to three independent branches of government. State power does not belong in its entirety to any of these branches of government, any body or person, and is concentrated in its source – the people. The delimitation of the competence of the highest state bodies is part of the organizational aspect of the theory of the separation of state powers. It is determined that according to the theory of the separation of state powers, state power is exercised through the organizational division of the institutional, functional, and subjective components of its division. The legally established system of checks and balances ensures the interconnection and coherence of the branches of state power, their interaction and mutual control. This system ensures the unity of state power. The results of this article are the justification of the need to enshrine at the constitutional level the principle of separation of state powers to ensure the sovereignty of the people, democratic and legal statehood, the presence of different models of functioning of this principle depending on the form of the state, legal traditions, historical experience, etc. The provisions of this article have both theoretical and practical significance for the activities of developing a model and consolidating the principle of separation of state powers in constitutional and legal practice.

Keywords: *separation of state powers; system of checks and balances; competence; parliament; president; body of constitutional jurisdiction.*

Принцип поділу державної влади: зміст і призначення

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Анотація

Актуальність статті полягає у аналізі змісту та значення принципу поділу державної влади. Метою статті є аналіз внутрішнього змісту принципу поділу державної влади, типів його реалізації в різних країнах та його значення для функціонування демократичної правової державності. Для проведення дослідження використовувалися філософські, загальнонаукові, спеціально-наукові та правові методи, а саме: діалектичний метод, системний та структурно-функціональний методи, порівняльно-правовий, категорії та прийоми формальної логіки, універсальні ціннісно-методологічні орієнтири. На основі вивчення наукових розробок та державно-правової практики визначено, що невід'ємною частиною демократичної держави є принцип поділу державної влади, а здійснення влади делеговано трьом незалежним гілкам влади. Державна влада не належить в повному обсязі жодній з цих гілок влади, будь-якому органу чи особі і концентрується в її джерелі – народі. Розмежування компетенції вищих органів держави входить до організаційного аспекту теорії поділу державної влади. Визначено, що згідно з теорією поділу державної влади державна влада здійснюється шляхом організаційного поділу інституційної, функціональної та суб'єктної складових її поділу. Законодавчо встановлена система стримувань і противаг забезпечує взаємозв'язок і злагодженість гілок державної влади, їх взаємодію і взаємний контроль. Ця система забезпечує єдність державної влади. Результатами даної статті є обґрунтування необхідності закріплення на рівні конституції принципу поділу державної влади для забезпечення суверенітету народу, демократичної і правової державності, наявності різних моделей функціонування цього принципу в залежності від форми держави, правових традицій, історичного досвіду тощо. Положення цієї статті мають як теоретичне, так і практичне значення для діяльності з розробки моделі та закріплення принципу поділу державної влади в конституційно-правовій практиці.

Ключові слова: *поділ державної влади, система стримувань і противаг, компетенція, президент, орган конституційної юрисдикції*

Introduction

It should be noted that the real division of state power into independent branches of power is the most important for the exercise of power in a democratic state. Article 6 of the Constitution of Ukraine states: "State power in Ukraine is exercised on the basis of its division into legislative, executive and judicial. The bodies of legislative, executive and judicial power exercise their powers within the limits established by this Constitution and in accordance with the laws of Ukraine." For any democratic state, it is mandatory to enshrine this principle at the constitutional level and implement it in the state mechanism, since without the separation of state powers and an effective system of checks and balances, there can be no rule of law and legal laws.

At the same time, it should be noted that the classical construction of the separation of powers into legislative, executive, and judicial has shown its viability and is the most optimal. However, when implemented in different countries, this model has its own differences, as modern states differ in legal traditions, legal systems, level of legal awareness and culture, etc. Therefore, the separation of state powers is not a static system of three separate branches of state power, but involves constant development, variability, and uniqueness in the conditions of each specific state, which requires interaction between branches of power and coordination of positions. Analysis of the content and essence of this principle is extremely important for the implementation of reforming the mechanism of state power in countries that seek to build a democratic legal statehood.

Therefore, the concept of the separation of state powers is relevant for modern legal science and attracts the attention of scholars, despite the rather long period of its study and practical implementation in state and legal practice. The issues of discussion in this area are the issues of understanding the essence of the separation of state power, the development of a mechanism for the separation of state power that would ensure its unity and the most optimal distribution of powers between the branches of state power. Therefore, scientific research is currently being conducted in Ukraine on the formation of the very concept of the separation of state powers, which allows us to understand its purpose, stages of development, features in certain historical periods for individual states, the content of the principle of the separation of state powers for its most optimal

implementation in the mechanism of the functioning of state power, the system of checks and balances as one of the main elements of this separation. For example, Salienko O.O. and Kozynets O., Prorochenko V. investigate historical issues related to the formation and development of this concept [25, pp. 16-19; 11, pp. 165-169], Marushchak N.V. – the principle of separation of state power as a principle of the state apparatus [17, pp. 31-33], Dzholos S.V., Skrypalovsky Ya.V. – problems and prospects of the theory of separation of power at the modern stage of state formation [7, pp. 42-58], Moskalchuk Y.G. and Chepulchenko T.O., Chalenko G.M. – the essence and purpose of the system of checks and balances as a fundamental element of the principle of separation of state power [18, pp. 12-17; 19, pp. 19-23; 31, pp. 39-44].

The purpose of the article is to clarify the essence of the separation of state powers, determine its features in order to develop recommendations aimed at establishing an optimal model of the separation of powers in democratic states, including Ukraine. To achieve this goal, tasks were set to clarify modern approaches to understanding the essence of the separation of powers and its content, the place of the system of checks and balances in the mechanism of the functioning of state power, and the importance of this principle for the functioning of a democratic government, when the people are the only source of state power.

Materials and methods.

The writing of the article was preceded by an analysis of the developments of scholars - legal theorists and constitutional law in the field of analyzing the theoretical foundations and practical implementation of the principle of separation of state powers and their consolidation at the constitutional level. It was important to analyze the modern scientific works of domestic scientists on the concept of the separation of state power to determine its essence and content, further reforming the constitutional model of the functioning of the mechanism of state power in Ukraine in order to build a legal statehood in Ukraine. The analysis of scientific works made it possible to identify the main elements of the mechanism of separation of state power, the features of its functioning in Ukraine, the determination of the special place in this system of the President of Ukraine and the body of constitutional jurisdiction - the Constitutional Court of Ukraine, the importance of the system of checks and balances to ensure the integrity and universality of state power, preventing its usurpation by one body or person, understanding this principle not as an opposition of branches of state power, but as a coordination of their activities, combining them into a single mechanism of sovereign state power.

The methodology for writing the article is based on a comprehensive approach to analyzing the content and meaning of the principle of separation of state powers, which includes a system of philosophical, general scientific, special scientific, and legal methods.

First of all, it should be noted that the dialectical method was used to conduct the study in order to clarify the essence of the main categories considered in the article, namely: the principle of separation of state power, the system of checks and balances, the subjects of the exercise of state power, their interdependence and mutual influence. Systemic and structural-functional methods were used to clarify the system of requirements arising from the principle of the separation of state powers; comparative law methods were used to analyze models of the separation of state powers; Logical methods were used to analyze concepts, categories, and formulate conclusions. In this case, the categories and techniques of formal logic are applied: concepts, definitions, proof and refutation, judgment, analysis, synthesis, comparison, generalization, etc. Universal human values and guidelines were taken into account: the priority of universal human values, the principles of a democratic legal state, the rule of law, freedom, humanism, respect for human dignity, and the affirmation of human rights.

Results and discussion.

The principle of separation of state powers as one of the foundations of democracy

A democratic state governed by the rule of law is characterized by the fact that state power, according to the theory of popular sovereignty, belongs to the people. The state apparatus transforms it into an organizationally formalized system that functions effectively. The state, represented by the state apparatus, acts as an instrument in the hands of the people, with the help of which the latter exercises constituent power. The people, through a system of free elections and other forms of democracy, establish state power and entrust its implementation on their behalf to state bodies. The concentration of state power in whole or in most of it in one body or person leads to the loss of popular sovereignty, and accordingly, the ability to exercise power by the people. Therefore, in democratic states governed by the rule of law, the principle of the separation of state powers is enshrined at the constitutional level, and its exercise on behalf of the people is delegated to three independent, mutually limiting systems of state bodies. At the same time, state power does not belong in its entirety to each of these branches of government, to any body or to any person. Each branch of government exercises only the functions and powers inherent to it, according to the law, and in the relationship between them, an appropriate system of checks and balances is established. By dividing the implementation of the functions of a unified system of state power into three interdependent parts, the people ensure their sovereignty over its implementation and keep power unified within themselves. Thus, the limitation of state power by legislation is ensured, and its individual branches by the interconnected activities of each other. The situation is that there is no unlimited power in the state that would be outside the legal field. Thus, the opinion that “the main purpose of the separation of state power is to prevent the possibility of usurpation of power and its further abuse” is correct [25, p. 19].

Analysis of the internal essence of the principle of separation of powers versus the expediency of distinguishing three main components of the separation of state power in its content - personal, institutional, and functional. They manifest themselves in the creation of separate state and government institutions with their own competence, which implement different functions. At the same time, these institutions represent different political entities. And it is clear that the options for organizational formation, interconnection, and interaction of these government institutions should be differentiated by branches in the system of separation of powers into the legislative, executive, and judicial branches of government.

Interaction between state authorities through their competence

The separation of state powers as a fundamental principle of its functioning in the full sense is possible only in a democratic state governed by the rule of law. As scientists rightly point out: “issues of separation of powers have not only important theoretical significance, but also directly affect the political regime as a way of exercising political power and methods of state activity, the basic principles of socio-political life and the socio-economic model of society, relations between central and local authorities and between the state and the individual [7, p. 47]. At the same time, the subjects of power are endowed with competence clearly defined in the provisions of the law. It should be noted here that the literature sometimes claims that “we should be talking about the delimitation of the competence of state authorities, but not about the separation of powers” [5, p. 46]. It seems that such a statement is not true, since it is precisely the delimitation of the competence of state authorities as bearers of separate branches of state power that is part of the organizational aspect of the theory of the separation of state powers.

Since it is the interaction of the relevant subjects in the mechanism of distribution of state power that occurs on the basis of the relationships between their competences, it is important to define the meaning of the concept of "competence" of a subject of power. In science, depending on the quantitative composition of the elements of the competence structure, they distinguish: the classical approach, when competence is considered as a set of powers and subjects of knowledge; the restrictive approach, when the content of competence is reduced to subjects of knowledge; the expansive approach, when its content includes tasks, functions, forms, methods of activity, etc. [26, pp. 92-94].

It seems that the classical approach to competence is the most well-argued. This is the approach taken by most modern scientists. As A. Tkachenko rightly notes: “competence is characterized by a set of legally established rights and obligations (powers) of authorities (state authorities and local self-government bodies), their officials regarding the requirement of certain behavior from individuals and legal entities and subjects of competence, enshrined in the Constitution, laws of Ukraine and subordinate acts (competent legislative acts)” [29, p. 197]. S. Seregina distinguishes 2 components in the structure of the competence of a state body: powers, which she defines as legal obligations; the competence of a separate state authority or local self-government in specific public legal relations, which makes it possible to establish the belonging of certain relations to the sphere of power of a separate body. A special element in this sense is jurisdiction – a legal indication of the territorial boundaries and substantive specifics of social relations, to which the power activities of a particular body are directed. Therefore, S. Seregina emphasizes that a significant number of bodies have identical powers, but the competence of each of them is strictly individual due to differences in jurisdiction [26, pp. 19, 22]. It is also important to note that “the competence of an authority is not the sum of its elements, but their system. At the same time, it is necessary to emphasize that each element has relative independence”[8, p.261].

Given the above considerations, the competence of a state body can be defined as a system of powers consisting of a set of rights and obligations and subjects of competence - in fact, a separate sphere of public relations in which a separate body exercises its own powers. It should be noted that a feature of such powers is that they are both a right and an obligation (authority right), which are aimed at fulfilling the obligation imposed on the subject of power. At the same time, powers must always be specific and clearly defined in terms of internal content, as well as legally limited in scope. Thus, the rights of a separate body, as opportunities to implement their functions, within the framework of legislatively established powers, coincide with obligations, that is, the need for a competent entity to take certain actions in these legal relations. As correctly noted in the literature, “the competence of a state body is a set of state and governmental powers (legal obligations) stipulated by law, which determine the methods of exercising its public functions. "Authority is the type and extent of power influence, legal obligations of a state body or official, provided for by law." [9, p. 97].

The place of the branches of state power in the mechanism of its division

In the context of our topic, it is appropriate to raise the question of equality or, instead, supremacy of individual branches among themselves in the system of separation of state powers. For example, regarding this issue, A. Kolodiy notes the following: “After all, there is no absolute balance of powers in constitutional practice. The legislative branch undoubtedly occupies a leading place in the theory of the separation of powers, which is explained by the fact that it is laws that serve as the foundation for the functioning of other branches of power, and it is precisely at the implementation of the latter that their activities are aimed. This was also emphasized by J. Locke, who proceeded from the interaction of powers in the state, but recognized their mutual subordination and believed that it is the legislative power that should be supreme, and all others, represented by some members of society, proceed from it and are subordinate to it” [12, p. 119]. L. Kryvenko also believes that the parliament has a higher level and scope of competence compared to other government bodies [16, p. 27]. However, it is thought that from the standpoint of the theory of the separation of powers, such an approach is not correct, that is, one that reflects the spirit of this theory.

At the same time, it should be noted that one of the main founders of this theory, Ch.-L. Montesquieu, indicated that the legislative branch (by virtue of its nature) occupies a decisive position in the division of state power. However, this does not mean that the legislative branch is supreme, since in this case the other branches would be subordinate, and such an approach would contradict the principle of the separation of state powers. The rule of law in the system of regulatory acts cannot be equated with the rule of the legislator. Since the adoption of laws is a complex process, in which, in addition to the legislative body, other entities also directly participate: the people, the president, the government, and others. Therefore, the legislative branch of power cannot be considered supreme, since in the

mechanism of separation of state powers there is no hierarchy between the branches of power, and the system of checks and balances established in this mechanism allows other entities, such as the head of state, a certain body of justice or a court of constitutional jurisdiction, to control the legislator through the veto rights specified in the legislation, recognition of the law as unconstitutional, etc.

As V. Tertyshnyk correctly points out, in our opinion: “There can be nothing supreme (dominant) in the legislative branch. The dominance of any branch of government contradicts the principles of a constitutional state, in which the principle of separation of powers is introduced and everything possible is done to eliminate the probable dominance of any of its branches. The legislative power itself must ensure the rule of law (natural rights and freedoms of man)”[28, p. 34].

Also, for example, R. Zippelius notes that the legislative branch is not the supreme power, but the power that "programs" within the framework of the constitution the activities of other branches (government and administration, judicial system), which act not as subordinates to the legislator, but as such, whose activities are programmed by law. Thanks to such programming and the constitutional consolidation of “programming” and “programmed” competencies, the coordinated activities of the branches of government take place [1, pp. 317-318, 320]. The separation of state powers through a system of checks and balances provides for mutual control and restraint between the branches of state power; accordingly, these branches must also take appropriate part in the lawmaking process.

It is important to pay attention to the place of the court of constitutional jurisdiction in the mechanism of separation of state powers. The unity of the entire legal system and the mechanism of its functioning are determined by the presence of a special and single highest instance of constitutional control of laws. At the same time, it should be noted that the body of constitutional jurisdiction in Ukraine is organizationally and functionally not part of either the judicial system or other branches of government, and at the same time, it is a carrier of state power, performs the function of constitutional control, acts as a guarantor of ensuring the rights and freedoms of man and citizen, maintaining a balance between the branches of government, ensuring the supremacy of the Constitution, acts as a safeguard against violations of constitutional law and order, and guarantees the effective functioning of the system of separation of powers [23, p. 87]. This is not about the supremacy of the judicial branch of power, but about cooperation and coordination between the branches of power.

Thus, it should be emphasized that, according to the theory of the separation of state powers, state power is exercised through the organizational division of the institutional, functional, and subjective components of its division without any elevation or demotion of each branch of power at the expense of each other.

The content of the principle of separation of state powers

Starting with such prominent scholars as J. Locke and C.-L. Montesquieu, who are considered the developers of the modern theory of the separation of powers, the classical three branches of power, enshrined in constitutional laws, are distinguished: legislative, executive, and judicial. Thus, Article 6 of the Constitution of Ukraine defines the following provision: “State power in Ukraine is exercised on the basis of its division into legislative, executive and judicial. The bodies of legislative, executive and judicial power exercise their powers within the limits established by this Constitution”[14].

At the same time, it is clear that the organizational and legal content of this theory undergoes corresponding modifications based on a whole range of factors: historical traditions, features of the functioning of the state mechanism, the form of the state, etc. The modern world practice of constitutionalism is based not only on the classical concept of the separation of state power and its functional purpose, but, first of all, on the prescriptions of the constitutional norms of specific states and on their state and legal practice. Today we can talk about the functioning of various models of the principle of separation of state powers, which generally corresponds to the functional purpose of the classical version of the theory of its separation.

It is necessary to pay attention to the fact that some representatives of modern science of legal theory and constitutional law have expressed proposals for the separation of additional branches of power. Such an interpretation is sometimes recognized as a necessary and natural milestone in the development of this theory. For example, some authors note that "it is not at all necessary to limit oneself to the most common separation of three branches of power when implementing the principle of separation of powers... Considering the global trends of transformation and modernization of state power, it can be assumed that electoral, control and supervisory and presidential power will become in the future as integral branches of state power as the “classical” branches” [20, p. 100]. Some authors propose to separate the control branch of government, noting that the control branch of government should include the Constitutional Court of Ukraine, the Accounting Chamber of Ukraine, and the Commissioner for Human Rights of the Verkhovna Rada of Ukraine. Pointing out, at the same time, that the classification of the above-mentioned state bodies as a special fourth branch of government will significantly increase their status and positively affect the effectiveness of their activities. In addition, in their opinion, the misunderstandings that exist today and are related to the status of the Constitutional Court of Ukraine will be eliminated[27, p. 121]. At the same time, in our opinion, in this case there is a confusion of the concepts of the functions of state power in general and a separate branch of state power. These state bodies carry out the control function of the state within a certain branch of government, and therefore it is incorrect and inappropriate to separate them into a separate branch of government. Because they are not endowed with the features that characterize a separate branch of government as such. In addition, it is worth noting that from the standpoint of the classical principle of the separation of state powers, the formation of control bodies of state power leads to an unconditional expansion of institutional guarantees of rights and freedoms, however, this statement does not mean that such state institutions should be considered an independent branch of power in the system of the separation of powers.

The question of regulatory or arbitral authority is quite interesting. The founder of this approach to understanding the internal content of the principle of separation of state powers was the 19th-century French scientist B. Constant, who outlined it in his vision of the model of constitutional monarchy. In his opinion, a representative body expresses the opinion of the people. The peoples must exercise constant and active supervision over their representatives and reserve the right to remove them from office at short intervals if they abuse their powers. A modern state in the form of a constitutional monarchy, as B. Constant believed, should have an inherent separation of powers, “which is usually a guarantee of freedom.” He justified the need to create, in fact, six branches of power[10, p. 265]. He proposed including the power of the head of state in the theory of separation of powers, calling the power of the head of state in a constitutional monarchy a "restraining" or "neutral" power. Thus, it is possible to also talk about the head of state, who is elected by the people, who to some extent organizes the functioning and interaction between the branches of government. Therefore, the president's power is called arbitral or restraining. For example, M. Savchyn notes: “The arbitration functions of the president are built on the basis of ensuring the balanced functioning of public power” [24. P.45].

Thus, certain constitutional acts directly mention such functions of the president as head of state. For example, in Part 1 of Article 30 of the Greek Constitution, the President is the regulator of the functions of the institutions of the Republic[13]. The literature directly states regarding the status and place of the President of Greece that “the main functions of the president are to represent the state and to act as political arbitrator between the various branches of state power” [4, p. 22]. Also, Article 5 of the Constitution of the French Republic states: “The President of the Republic must abide by the Constitution. He must ensure by his arbitration the proper functioning of the organs of state power, as well as their continuity” [15, p. 8]. But further analysis of this constitution does not reveal a clear content and mechanism for implementing the arbitration function of the President of France, and therefore, to a certain extent, it is a formality.

The separation of the presidential branch of power, in our opinion, would pose a threat to the functioning of democratic legal statehood, one of the foundations of which is the separation of state

power. Because the supremacy of the president over the branches of government can lead to the introduction of de facto dictatorship in the country, as evidenced by the experience of post-totalitarian states.

It is believed that any formation of a new model of the theory of the separation of state powers should be based on the postulate of division into 3 classical branches of power: legislative, executive, and judicial. Their institutional consolidation may have its own characteristics, depending on the experience of state building, the form of the state, national traditions, etc., but the most important thing should be the real separation of state power, when the branches of power are separated by their functions and powers and an effective system of checks and balances operates. Supplementing the theory of the separation of powers with new branches of government indicates its revision, can serve as a justification, as a rule, for authoritarian tendencies, and can overturn the very principle of the separation of state powers.

At the same time, it should be understood that the classical theory of the separation of powers is not always absolutely clearly enshrined in the mechanism of interaction between the branches of state power, as, for example, in parliamentary states. However, such a discrepancy with the classical concept of the separation of powers in this case indicates not the need to supplement the classical triad of branches of power with some additional fourth or fifth branch of power, but that the powers of the legislative, executive and judicial branches of power are distributed in such a way that a modified model of the separation of state powers, adapted to the relevant conditions, operates. Since there is no theoretically flawless construction of the division of state power developed once and for all for all existing states, it is necessary to take into account the historical, cultural, national, and political traditions of individual countries, forms of state, state mechanism, etc. Based on this, we can agree with the following statement regarding the implementation of the classical theory of the separation of state powers in the practice of individual states: “it would be advisable to have a flexible understanding of this theory and the mechanisms of its implementation, which follows from the inadmissibility of its dogmatic interpretation, disregard for its multifaceted nature” [30, p. 13]. Thus, it is possible to talk about the expediency, in certain cases, of supplementing the mechanism of separation of state powers, within the classical triad of branches of power, with new institutional elements that most optimally correspond to modern realities. At the same time, such changes and additions are not a revision of the classical theory of the separation of state powers, but its adaptation to the specific realities of today's existing states. What is important here is the functioning of such a mechanism for the implementation of state power that makes it impossible to concentrate, and therefore usurp, the entire fullness of state power in one state institution (even a representative and democratic one). For example, the Revolutionary Convention of the time of the Great French Revolution concentrated in itself the fullness of the highest legislative, executive and judicial branches of power and, although by nature it was a democratic representative body, nevertheless exercised this power autocratically, violating the rights and freedoms of citizens. It was this body that created the revolutionary court (revolutionary tribunal), the terms "enemy of the people", "commissar of the revolutionary convention", allowed the possibility of violating the norms and principles of law for the sake of political expediency, etc. Therefore, today, the theory of the separation of state powers has been accepted by all states that are models for building a democratic legal statehood, as well as by states that have embarked on this path and enshrined it at the constitutional level.

Important for the effective functioning of state power in the conditions of separation of state powers is the postulate of a rational relationship between the branches of power, their balance among themselves, interaction and mutual control, which is manifested in the established system of checks and balances. Regarding its understanding, one can agree with the statement that “the system of checks and balances should be understood as a set of constitutional, legal and organizational means that ensure interdependence and balance in the work of government institutions... The implementation of the mechanism of checks and balances occurs through the application by authorities of various organizational, legal, or managerial measures. It is important to understand that, functioning on the principles of interaction, interdependence and interpenetration, the system of checks and balances

must have a powerful arsenal of means aimed at preventing the usurpation of state power"[19, pp. 20-21].

The literature correctly notes that: "the system of checks and balances is a mechanism for implementing the principle of separation of powers, which is inherent in the "nature" of the rule of law. The necessity of the operation of this principle is due to the need to prevent political and legal conflicts between higher state bodies. The system of checks and balances in this aspect is a stabilizing factor in the continuous functioning of state authorities, as it prevents the concentration of power in one branch and ensures the interaction of all branches and centers of state power"[6, p.105]. The statement is also quite true: "In general, it can be stated that the implementation of the principle of separation of powers is possible and effective only when accompanied by a system of "checks and balances." It prevents attempts to usurp the powers of one government by another and ensures the normal functioning of state bodies" [31, p.43].

Therefore, we can say that in the system of separation of powers, the independence of individual branches of state power is relative, since the effective functioning of the state-power mechanism based on this principle is possible only if there is a real mechanism of checks and balances. At the same time, it is worth noting that this system is universal. The universality of the system of checks and balances is manifested in its ability to extend to the activities of all state authorities, while ensuring a systemic and unified influence on the work of government institutions [19, p. 21].

The separation of state powers, as a fundamental principle of the functioning of a democratic constitutional state, cannot be considered an absolute and cannot be viewed as a confrontation between the branches of state power. Instead, the constitutional consolidation of this principle should be carried out in such a way as to prevent deformations in its implementation. That is why the branches of government have their own special purpose, which is manifested in their functions and are endowed with clearly defined competence, while acquiring the features of autonomy and independence in the implementation of their inherent powers. The implementation of the powers of the relevant bodies belonging to individual branches of government is carried out thanks to the ability of each branch to mutually restrain and control one another. At the same time, none of the branches of government should take over the functions of another branch of government so that the functions of the branches of government do not coincide in the exercise of state power. Therefore, the branches of government must maintain interconnection and coherence, and be a single political organism.

The activities of the branches of government are manifested through the mutual complementarity of the activities of each of them in the process of exercising a single state power. Thus, in the process of implementing the classical triad of separation of state powers, the legislative branch of power will not be able to achieve the goal set in the law if its act is not implemented by the executive and judicial branches of power. Since the executive branch of government must act on legal grounds, and, in cases specified by law, on the basis of the sanction of the judicial branch of government, effective justice can only take place on the basis of the law and provided that it is ensured by legal coercion. Therefore, in the process of implementing the principle of separation of state powers, each branch of government, represented by the relevant government institution, performs its own specific function and has no direct need to involve other branches of government in this activity, which implement their own functions. Thus, individual branches of government must be autonomous and independent in the exercise of their own powers aimed at performing the functions assigned to them. The question in this aspect is only about the need for one branch of government to exercise control over another in the process of exercising the relevant powers by each separate branch of government in order to avoid violations of the law or certain abuses. Therefore, interaction occurs between the branches of government precisely to ensure mutual control and ensure their independence and autonomy through a constitutionally enshrined, balanced system of checks and balances.

In the case of the implementation of the function of one branch of government, the bodies of other branches of government should not interfere in its activities, since this can be considered as a certain violation of the classical approach to the principle of separation of state powers. However, the current

state of implementation of this principle in the activities of state authorities distinguishes between permissible and impermissible interventions. Permissible ones contribute to more effective activities of state authorities, while unacceptable ones lead to the loss of the essence of the principle of separation of powers itself. For example, presidential interference in the process of issuing laws through the possibility of a veto is allowed, since the decision rests with the parliament, which can overcome this veto in accordance with the law-making procedure established by the constitution. It is also permissible to grant relevant entities outside the parliament the right of legislative initiative, since in the end, it is the legislator who will make the final decision. At the same time, it is unacceptable to grant the head of state or government legislative competence that would allow the latter, contrary to the decision of the legislative body, to issue a by-law that would regulate these issues that should be regulated by law. Since in this case the head of state, government or other executive body actually assumes the functions of the legislative branch, competition arises between the legislative competence of the legislative branch and the subordinate competence of the executive branch.

Interaction between branches of government

Today, science raises the urgent question of the need for interaction between branches of state power as the basis for its effective functioning. For example, A. Pekhnyk notes: “The establishment of a legal state capable of ensuring effective and democratic governance and guaranteeing civil rights and freedoms largely depends on the organization of political power, its differentiation (division) into separate branches (industries) that restrain and balance each other, as well as interact on the basis of rules stipulated by the Constitution and laws, for the sake of achieving general social goals [21, p. 37]. This is also emphasized by Y. Moskalchuk, indicating that “it is important to focus attention on adhering to a certain system of separation of powers in compliance with the principles of interdependence, interaction, and historical determinism” [18, p. 16]. In this aspect, the statement that “the main requirements of the separation of powers are the separation and independence of certain types of state bodies from each other, delimited by functional characteristics, a clear definition of their special powers and legal forms of activity, their mutual influence, mutual balance, mutual restraint and mutual control” is correct[11, p. 168]. Therefore, in our opinion, it is correct to state in the literature on this subject: “Since the state power is unified, its branches must constantly interact” [2, p. 10]. In this regard, the Constitutional Court of Ukraine in its decisions focused on the following: “The exercise of state power on the basis of its division into legislative, executive and judicial means, first of all, the independent exercise by each state authority of its functions and powers. This does not exclude the interaction of state authorities, including the provision of necessary information, participation in the preparation or consideration of a certain issue, etc."[22] that the division of state power reflects the functional specificity of each of the state authorities, provides not only for the demarcation of their powers, but also for interaction, a system of mutual checks and balances aimed at ensuring their interaction; in addition, ensuring the implementation of the principle of separation of powers is a guarantee of the unity of state power, an important prerequisite for stability, maintaining public peace and harmony in the state (paragraphs two and four of subparagraph 4.1 of paragraph 4 of the motivational part of the Decision of April 1, 2008 No. 4-rp/2008) [3].

Thus, it can be argued that the principle of separation of powers in no way denies, but, on the contrary, ensures the unity of state power through the interaction of branches of power on the basis of a system of checks and balances. Therefore, in the implementation of the classical theory of the separation of state powers, an approach is defined regarding the need for interaction between branches of government to achieve the most effective exercise of state power.

The principle of separation of state powers in terms of scientific concept and practical implementation in state and legal practice

It should be noted that the separation of state powers can be analyzed in several aspects: as a principle of the organization and functioning of state power, and as a scientific concept. In the first case, it acts as an integral fundamental principle of a democratic legal state, as well as the organization of state

power within it. In this aspect, it reflects the deep democratic nature of such a state, since it is directly aimed at preventing the possible concentration of state power in the hands of one subject of power, and therefore the possibility of the latter committing arbitrariness and lawlessness against society, and ultimately serves as one of the guarantees of ensuring the political, economic, social, ideological and other freedoms of a person and citizen.

As a scientific concept, the principle of separation of state powers contains the corresponding constituent elements: ideological, scientific, and practical. This principle is the ideological basis of the theory of democratic legal statehood; in the scientific dimension, this principle acts as one of the means of understanding state and legal phenomena and processes; in the practical aspect, it acts as the fundamental principle of the organization and functioning of state power in the mechanism of a democratic legal state. Thus, all these constituent elements are inextricably linked and in practice create a single state-legal phenomenon, which is one of the most important elements of highly developed, modern, democratic states. This principle is enshrined in the constitutions of most such states as the principle of the organization and functioning of state power. Thus, we can formulate the following approach to defining the principle of the separation of state powers: it is such an organization of state power in a democratic state that ensures the supremacy and unity of this power in its source - the people, proper interaction and mutual control between the highest bodies of state power through a constitutionally established system of checks and balances. At the same time, one should agree with the opinion that: “the essence of the division of power into three branches (“branches”) is not only to divide, but also to balance state and government powers between different state bodies, thereby establishing mutual control, eliminating the possibility of usurpation of power - the concentration of all powers or most of them in one state body or official, and thereby preventing arbitrariness. Power in a democratic state is a form of expression of the will and interests of the people, and the separation of powers is a specific construction that ensures the preservation of the unity of state power. This is an indicator of the development of law and the state, a necessary prerequisite for the rule of law”[17, p.33].

Conclusions

The analysis made allows us to define the separation of powers as a fundamental principle of democratic legal statehood, which guarantees democratic governance by establishing a system of state power where none of the branches of power or individual subjects of power combine the full power, but function in interdependence and the possibility of mutual restraint in accordance with constitutional regulation. That is why, in a democracy, the exercise of power is entrusted to three systems of state bodies: legislative, executive, and judicial. State power does not belong entirely to each of these systems of state organs or to any one person. Each of them exercises its own functions and powers, and there is a system of checks and balances between them. By dividing the single system of state power into three parts and preserving it as one within itself, the people ensure their sovereignty in its possession. Thus, the unity of state power and its concentration in the bearer subject, which is the people, is ensured. This ensures a situation where the state does not have unlimited power by law. The following features are distinguished regarding the understanding of the internal content of the separation of state powers: a) the separation of state powers implies the distribution of functions and powers between the legislative, executive and judicial branches of government in the person of the relevant entities, which independently and independently carry out their own functions; b) in the system of such power, the possibility of concentrating all state power in one body or person is not allowed; c) the functioning of a system of checks and balances for the purpose of competent interaction and balancing of the branches of power among themselves, on the one hand, and control and certain constitutionally established restrictions of the highest bodies of state power belonging to the relevant branch of power, on the other hand; d) models and mechanisms for implementing the principle of separation of state powers in state and legal practice depend on historical traditions, the form of statehood, the level of legal and political culture, and the fulfillment of the main goal - preventing the usurpation of state power and depriving the people of a real opportunity to exercise their electoral power.

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Participation of the Prosecutor in Non-Criminal Proceedings: ECtHR Case Law and National Context

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Abstract

The article analyses the grounds for the prosecutor's participation in civil, commercial and administrative proceedings in Ukraine through the prism of European standards of fair trial. In the article the author uses the methods of analysis and synthesis, systemic-structural and logical-legal methods, as well as the methods of teleological and evolutionary interpretation of ECHR jurisprudence.
Structurally, the article is divided into three parts. In the first part, the author analyses the pan-European approaches to the participation of prosecutors in non-criminal proceedings as reflected in the documents of the Parliamentary Assembly of the Council of Europe (PACE), the Committee of Ministers of the Council of Europe (CoE), the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE). In the second part, the author analyses the participation of prosecutors outside the criminal justice system in the context of certain guarantees of the right to a fair trial as provided for in Article 6(1) of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) on the interpretation and application of this Article. The third part of the article analyses the recent judgment of the ECHR in the case of Shmakova v. Ukraine, which is assessed from the perspective of the right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1 to the ECHR).
The article concludes that the current trend in Ukrainian judicial practice towards an expanded interpretation of the grounds for prosecutor's participation in civil, commercial and administrative proceedings is not fully consistent with the European standards of the right to a fair trial (Article 6(1) ECHR) and the right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1 to the ECHR).

Keywords: *prosecutor; participation of a prosecutor in civil proceedings; grounds for participation of a prosecutor in civil proceedings; right to a fair trial; equality of arms, right to peaceful enjoyment of possessions.*

Участь прокурора в некримінальних провадженнях: практика Європейського суду з прав людини та національний контекст

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Анотація

У статті проведений аналіз підстав участі прокурора у цивільному, господарському та адміністративному судочинстві України крізь призму європейських стандартів справедливого судочинства. У статті використані методи аналізу та синтезу, системно-структурний та логіко-юридичний методи, а також методи телеологічного та еволюційного тлумачення практики Європейського суду з прав людини (ЄСПЛ). Структурно стаття складається із трьох частин. У першій частині автором проаналізовані загальноєвропейські підходи до участі прокурора у некримінальних провадженнях, які відбиті у документах Парламентської асамблеї Ради Європи (ПАРЄ), Комітету міністрів Ради Європи (КМРЄ), Венеціанської комісії, Консультативної ради європейських прокурорів (КРЄП) і Консультативної ради європейських суддів (КРЄС). У другій частині

автором аналізується участь прокурора поза сферою кримінальної юстиції у контексті окремих гарантій права на справедливий судовий розгляд, що випливають із п. 1 ст. 6 Європейської конвенції з прав людини (ЄКПЛ) та практики Європейського суду з прав людини (ЄСПЛ) з питань тлумачення та застосування цієї статті. У третій частині статті аналізується нещодавнє рішення ЄСПЛ у справі "Shmakova v. Ukraine", яке оцінюється з точки зору права на мирне володіння майном (ст. 1 Протоколу № 1 до ЄКПЛ). У статті робиться висновок, що помітна нині у судовій практиці тенденція до розширеного тлумачення підстав для участі прокурора у цивільному, господарському та адміністративному судочинстві не повною мірою узгоджується із європейськими стандартами права на справедливий судовий розгляд (п. 1 ст. 6 ЄКПЛ) та права на мирне володіння майном (ст. 1 Протоколу № 1 до ЄКПЛ).

Ключові слова: *прокурор; участь прокурора у цивільному судочинстві; підстави участі прокурора у цивільному судочинстві; право на справедливий судовий розгляд; рівноправність сторін, право на мирне володіння майном.*

Introduction

The legal regulation of the prosecutor's participation in civil, commercial and administrative proceedings has undergone significant changes as a result of the constitutional reform of the judiciary in 2016 and further amendments to procedural legislation in 2017, which resulted in a reduction of the prosecutor's powers in the non-criminal proceedings (Article 56 of the Civil Procedure Code of Ukraine, Article 53 of the Commercial Procedure Code of Ukraine, Article 53 of the Code of the Administrative Procedure of Ukraine).

The current legal regulation of the grounds for the prosecutor's participation in the non-criminal sphere is in connection with the adoption of the Law of Ukraine "On Amendments to the Constitution of Ukraine (Regarding Justice)" № 1401-VIII of 02 June 2016, which updated the regulation of the constitutional status of the public prosecutor's office. According to Article 131-1 of the Constitution of Ukraine, the public prosecutor's office is responsible for: 1) assisting the prosecution in court; 2) organising and conducting pre-trial investigations, resolving other issues in criminal proceedings in accordance with the law, supervising undercover and other investigative and detective activities of law enforcement agencies; 3) representing the interests of the state in court in exceptional cases and in accordance with the procedure established by law. The organisation and activities of the prosecutor's office are regulated by law.

The Constitution of Ukraine establishes the fundamental tenets governing the prosecutor's involvement in civil, commercial, and administrative proceedings. Primarily, it stipulates that the prosecutor may represent solely the interests of the state, thereby limiting the scope of their authority beyond the domain of criminal proceedings. This legal regulation has resulted in a narrowing of the scope of the prosecutor's representation in non-criminal proceedings. This is primarily due to the influence of the provisions of para 1 of Article 6 of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR), as well as general trends towards reducing the powers of the prosecutor in the non-criminal sphere in European countries.

The Civil Procedural Code of Ukraine, the Code of Commercial Procedure of Ukraine and the Code of Administrative Procedure of Ukraine contain identical provisions regarding the grounds and forms of the prosecutor's participation. In cases specified by law, the prosecutor may take the following actions:

a) file a claim to the court and participate in the consideration of cases on the basis of such a claim;

b) enter into a case in which proceedings have been initiated by another person before the commencement of the consideration of the case on the merits, on his or her own initiative;

c) file an appeal, a cassation appeal, or an application for review of a court decision due to newly discovered or exceptional circumstances.

A prosecutor who applies to the court in the interests of the state is required to provide a detailed and well-reasoned argument in support of such an application. The application should include a clear and concise statement of the specific violation of the state's interests, the necessity to protect them, and the grounds for the prosecutor's application to the court as defined by law. Additionally, the prosecutor should indicate the specific state authority empowered to perform the relevant functions (part 3-4 of the Article 56 of the Civil Procedure Code of Ukraine, part 3-4 of the Article 53 of the Commercial Procedure Code of Ukraine and part 3-4 of the Article 53 of the Code of Administrative Procedure of Ukraine). The specifics of the exercise of the prosecutor's powers in the non-criminal area are enshrined in the Law of Ukraine "On the Public Prosecutor's Office" No. 1697-VII of 14 October 2014. Conversely, an examination of the most recent case law of the ECHR reveals that the practice of prosecutors participating in non-criminal proceedings may, in certain circumstances, contravene the stipulations pertaining to the right to a fair trial and the right to the peaceful enjoyment of property.

The present article seeks to analyse the national case law in civil, commercial and administrative proceedings in terms of para 1 of the Article 6 of the European Convention on Human Rights (ECHR) and Article 1 of the Protocol No. 1 to the ECHR, as well as the case law of the European Court of Human Rights (ECtHR).

Materials and methods

In the literature the issues of participation of prosecutors in civil, commercial and administrative proceedings were examined by many authors, among which special attention should be paid to the studies of S.O. Belikova [1], O.V. Glushkov [2], K.A. Huze [3], M.V. Rudenko [4], I.V. Soboleva [5] and others. At the same time, these studies do not reflect the most recent practice of the ECHR in cases involving prosecutors in the non-criminal sphere. This determines the relevance of the chosen topic of the article and its methodology. In the article the author uses the methods of analysis and synthesis, systemic-structural and logical-legal methods, as well as the methods of teleological and evolutionary interpretation of ECHR jurisprudence. Structurally, the article consists of three parts, the first of which is devoted to a general description of the European standards on the participation of the public prosecutor in judicial proceedings outside the criminal justice system, the second - to an analysis of the case-law of the ECtHR on the participation of the public prosecutor in terms of the guarantees of the right to a fair trial enshrined in para. 1 of Article 6 of the ECHR, and the third - is an analysis of one of the most recent judgments of the ECHR in the case of "Shmakova v. Ukraine", which raises the issue of the legitimacy of the prosecutor's application on the State interests in the context of Article 1 of the the Protocol No. 1 to the ECHR.

Results and Discussion

European Standards of Prosecutor's Participation in the Non-Criminal Proceedings: Common Core

The participation of the prosecutor in the non-criminal proceedings has been addressed in the documents of many international institutions, including the Parliamentary Assembly of the Council of Europe (PACE), the Committee of Ministers of the Council of Europe (CoE), the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE), etc.

In its Recommendation 1604 (2003) 1 of 27 May 2003 on «The Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law», PACE expressed its concern about a number of features inherent in the national practice of different States in the process of exercising various functions of the public prosecutor's office outside the criminal justice system, with regard to their compliance with the basic principles (subpara V, para. 7). On this basis, PACE proposed that the governments of the Council of Europe member states should ensure the implementation of the following recommendations on the functions of public prosecutors outside the criminal justice system in order to:

«a. that any role for prosecutors in the general protection of human rights does not give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights;

b. that an effective separation of state power between branches of government is respected in the allocation of additional functions to prosecutors, with complete independence of the public prosecution from intervention on the level of individual cases by any branch of government; and

c. that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions»[1].

In para 29 of its Opinion No. 3 (2008) "The Role of Prosecution Services Outside the Criminal Law Field" of 21 October 2008, the CCPE stated that the activities of the public prosecutors outside the criminal justice system are primarily determined by society's need for adequate protection of human rights and public interests; there are no general international legal rules and regulations governing the tasks, functions and organisation of the work of the public prosecutor's office outside the criminal justice system, as the State has the sovereign right to determine its institutional and legal procedures for the exercise of its defence functions. In para 34 of this Opinion, the CCPE called on participating States where the public prosecutor's office performs functions outside the criminal law to ensure that they are carried out in accordance with the following principles:
«a. the principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights;
b. the respect of impartiality and fairness should characterise the action of prosecutors acting outside the criminal law field as well;
c. these functions are carried out "on behalf of society and in the public interest", to ensure the application of law while respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court;
d. such competencies of prosecutors should be regulated by law as precisely as possible;
e. there should be no undue intervention in the activities of prosecution services;
f. when acting outside the criminal law field, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms);
g. the action of prosecution services on behalf of society to defend public interest in non criminal matters must not violate the principle of binding force of final court decisions (res judicata) with some exceptions established in accordance with international obligations including the case-law of the Court;
h. the obligation of prosecutors to reason their actions and to make these reasons open for persons or institutions involved or interested in the case should be prescribed by law;
i. the right of persons or institutions, involved or interested in the civil law cases to claim against measure or default of prosecutors should be assured;
j. the developments in the case-law of the Court concerning prosecution services' activities outside the criminal law field should be closely followed in order to ensure that legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments.»[2]

Para 66 of the Opinion No. 12 (2009) of the CCJE and the Opinion No. 4 (2009) of the CCPE draws the attention of the Council of Europe to the relationship between judges and prosecutors in a democratic society, which contains the Bordeaux Declaration on Judges and Prosecutors in a Democratic Society: «*According to the rule of law in a democratic society, all these competences of public prosecutors as well as the procedures of exercising these competences have to be precisely*

[1] Recommendation 1604 (2003) the Parliamentary Assembly of the Council of Europe (PACE) on the role of the public prosecutor's office in a democratic society governed by the rule of law. URL: https://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=17109&lang=en
[2] Opinion No 3(2008) of the Consultative Council of European Prosecutors on the role of prosecution services outside the criminal law field. URL: https://rm.coe.int/16807474ee.

established by law. When prosecutors act outside the criminal law field, they should respect the exclusive competence of the judge or court and take into account the principles developed in particular in the case-law of the European Court of Human Rights as follows: i. the participation of the prosecution in court proceedings should not affect the independence of the courts; ii. the principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field, on the one hand, and with the role of courts to protect human rights, on the other hand; iii. without prejudice of their prerogatives to represent the public interest, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms principle); *iv. the action of prosecutors' services on behalf of society to defend the public interest and the rights of individuals shall not violate the principle of binding force of final court decisions (*res judicata*) with some exceptions established in accordance with international obligations including the case-law of the Court*».[3]

According to paragraphs 2-3 of the Council of Europe Recommendation CM/Rec (2012)11 on the role of public prosecutors outside the criminal justice system of 19 September 2012, the duties and powers of a prosecutor outside the criminal justice system are to represent the general and public interest, to protect human rights and fundamental freedoms, and to uphold the rule of law (para. 2). At the same time, the duties and powers of the prosecutor outside the criminal justice system should always be established and clearly defined by law in order to avoid any ambiguity (para. 3). Prosecutors should also exercise their duties and powers in accordance with the principles of legality, objectivity, fairness and impartiality (para. 4).[4]

Participation of Public Prosecutors in Non-Criminal Proceedings in terms to the Right to a Fair Trial (Para 1 of the Article 6 of the ECHR)

Para 1 of the Article 6 of the ECHR enshrines that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The right to a fair trial has a complex structure and consists of a number of components directly enshrined in para 1 of the Article 6 of the ECHR and developed in the case law of the ECtHR, including access to a court, an independent and impartial tribunal established by law, publicity, a reasonable time for a trial and a fair hearing (which includes equality of arms and adversarial proceedings, legal certainty, *res judicata*, enforcement of court judgements, prohibition of legislative interference in the administration of justice, prohibition of imposing an excessive burden of proof on a party, etc.)[5]

In its case law, the ECtHR has addressed the participation of the prosecutors in non-criminal proceedings in terms of various aspects of para 1 of the Article 6 of the ECHR, in particular the right of access to a court, equality of arms and the *res judicata*. In 2008, the ECHR first published a study on the participation of prosecutors in the non-criminal sphere, an updated version of which was published in 2011[6]. However, the practice of the ECHR with regard to the participation of public prosecutors in non-criminal proceedings has been developed.

[3] Opinion No. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) on "Judges and prosecutors in a democratic society". URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cfebd

[4] Recommendation CM/Rec (2012)11 adopted by the Committee of Ministers of the Council of Europe on 19 September 2012 on the role of public prosecutors outside the criminal justice system. URL: https://rm.coe.int/16807096c5.

[5] Див.: Цувіна Т. А. Право на суд у цивільному судочинстві: монографія. Харків: Слово, 2015. 281 с.; Сакара Н. Ю. Проблема доступності правосуддя у цивільних справах: монографія. Харків: Право, 2010. 256 с.; Комаров В. В., Сакара Н. Ю. Право на справедливий судовий розгляд у цивільному судочинстві: навчальний посібник. Харків: Нац. юрид. акад. України, 2007. 42 с.

[6] The role of public prosecutor outside the criminal law field in the case-law of the European Court of Human Rights. Council of Europe / European Court of Human Rights, March 2011. URL: https://www.refworld.org/pdfid/4ee1d8361a.pdf.

A) *Equality of arms* is recognised as one of the guarantees of the right to a fair trial[7]. Thus, the ECtHR notes that equality of arms implies a fair balance between the parties to the proceedings. In the legal sense, this means that each party should be given the opportunity to present its arguments on terms that do not put it at a disadvantage compared to its procedural opponent[8]. The ECtHR further elaborates that the onus is on the parties to evaluate whether a particular procedural application warrants a response, underscoring the principle of reciprocity in procedural rights. The ECtHR asserts that it is unacceptable for one party to file an application with the court without the knowledge of the other, as this would effectively prevent the other party from commenting on such application[9].

In terms of ensuring procedural equality of arms, the ECtHR pays particular attention to the issue of the prosecutor's involvement in non-criminal proceedings[10]. It refers to the incompatibility with the requirements of equality of arms and independence of judges of the situation in which the prosecutor, for example, had the right to be present during the discussion and adoption of the court judgement, regardless of whether such participation in the discussion was active or passive[11].

The examination of the jurisprudence of the ECtHR pertaining to para 1 of the Article 6 of the ECHR enables the differentiation of cases wherein the prosecutor: a) engages in court proceedings as a representative of one of the parties involved; or b) functions as an autonomous participant in the proceedings, acting in the interest of the public[12].

In the first case, the prevailing stance of the ECtHR can be summarised as follows:

«since a prosecutor or comparable officer, in undertaking the status of a procedural plaintiff, becomes in effect the ally or opponent of one of the parties, his participation was capable of creating a feeling of inequality in respect of one of the parties […]. while the independence and impartiality of the prosecutor or similar officer were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances […]. That the fact that a similar point of view is defended before a court by several parties or even the fact that the proceedings were initiated by a prosecutor does not necessarily place the opposing party in a position of "substantial disadvantage" when presenting her case. It remains to be ascertained whether, in the instant case, in view of the prosecutor's participation in the proceedings, the "fair balance" that ought to prevail between the parties was respected. […]. The Court does not exclude that support by the prosecutor's office of one of the parties may be justified in certain circumstances, for instance for the protection of vulnerable persons who are assumed to be unable to protect their interests themselves, or where numerous citizens are affected by the wrongdoing concerned, or where identifiable State assets or interests need to be protected. The Court notes in that connection that the applicant's opponent in the proceedings in question was a State-owned organisation»[13].

The ECtHR operates under the assumption that a prosecutor in non-criminal proceedings may represent the interests of the state, the public interest, or the interests of vulnerable groups within society. In each instance, the ECtHR assesses whether the grounds for such participation were justified.

In the "*Menchinskaya v. Russia"* case, the prosecutor, who had not participated in the proceedings at the court of first instance, intervened in the trial at the second instance by filing an appeal on behalf of the Employment Centre, a party to the case. Despite the appeal being directed towards the

[7] *Dombo Beheer B.V. v. the Netherlands*, № 14448/88, 27 October 1993. URL: https://hudoc.echr.coe.int/eng?i=001-57850; *Menchinskaya v. Russia*, № 42454/02, 15 January 2009. URL: https://hudoc.echr.coe.int/eng?i=001-90620; *Batsanina v. Russia*, № 3932/02, 26 May 2009. URL: http://hudoc.echr.coe.int/eng?i=001-92667.

[8] *Nideröst-Huber v. Switzerland*, № 18990/91, 18 February 1997. URL: http://hudoc.echr.coe.int/eng?i=001-58199.

[9] *APEH Üldözötteinek Szövetsége and Others v. Hungary*, № 32367/96, 31 August 1999. URL: https://hudoc.echr.coe.int/eng?i=001-58843.

[10] *Borgers v. Belgium*, № 12005/86, 30 October 1991. URL: http://hudoc.echr.coe.int/eng?i=001-57720

[11] *Martinie v. France*, № 58675/00, 12 April 2006. URL: https://hudoc.echr.coe.int/eng?i=001-73196.

[12]

[13] *Batsanina v. Russia*, № 3932/02, 26 May 2009. URL: http://hudoc.echr.coe.int/eng?i=001-92667.

applicant, who was afforded the opportunity to respond to the prosecutor's arguments, the ECtHR determined a violation of para 1 of Article 6 of the ECHR due to a violation of the principle of equality of arms. The ECtHR judgement was based on the fact that, in this case, the prosecutor was representing the state and his arguments were similar to those in the Employment Centre's appeal, which means that the prosecutor's involvement violated the right to a fair trial[14].

The ECtHR reached similar conclusions in *Korolev v. Russia (no. 2)*. In this case the applicant filed a claim for compensation for material and non-pecuniary damage caused by the refusal of the military department to reimburse the cost of the plane ticket, as well as for termination of the contract between the airline and the Ministry of Defence. In his complaint to the ECtHR, the applicant claimed interference by the prosecutor at the appeal stage. In its judgment, the ECtHR noted that the applicant's opponents in the proceedings were state authorities whose interests were defended by their representatives, at least one of whom was a lawyer. The prosecutor also supported their position in the appeal proceedings. In view of the above, the ECtHR noted that it found no grounds that would justify the prosecutor's participation in this ordinary civil case. It does not follow from the circumstances of the case that the prosecutor intended, for example, to protect any state property or interests under threat. Although it is undisputed that the prosecutor limited his participation in the proceedings to a simple statement of approval of the first-instance court's decision, the ECtHR sees no reason to assume that such intervention could have had an impact on the course of the proceedings. However, it considers that the prosecutor's mere repetition of the defendants' arguments on points of law, unless it was intended to influence the court, made no sense. Based on the above, the ECtHR concluded that the principle of equality of arms was violated in this case.[15]

On the contrary, the ECtHR concluded that the participation of the prosecutor was justified in the case of *Batsanina v. Russia*, where the prosecutor acted in defence of the public interest on behalf of the Oceanological Institute, a state institution, and a private person against the applicant and her husband in a suit to evict them from their apartment. In this case, the ECtHR concluded that the participation of the prosecutor, even alongside two private parties, was justified, as the prosecutor acted in the public interest, and the applicant and her husband were represented by lawyers and could make oral and written statements on the merits of the case. In view of the above, the ECtHR noted that in this case the groundlessness of the prosecutor's application to the court was not proved, so the principle of equality of arms, which requires a fair balance between the parties, was respected.[16]

Interesting in this context is also the case of *Mukiy v. Ukraine*, in which the applicant raised the question of the legality of the prosecutor's participation in the case of the authorities' refusal to privatise the applicant's apartment located in the territory of the nature reserve. In that case, the applicant complained about the prosecutor's interference in the case in view of the latter's appeal against the first instance court's judgement in favour of the applicants. The prosecutor's actions were justified by the need to protect the economic and social interests of the state related to the protection of the reserve area. In its judgement, the ECtHR noted that the prosecutor's interference, which the applicant complained about, did not put him in a 'significantly disadvantaged position' compared to the other party. The ECtHR saw nothing to indicate any privileged treatment by the domestic courts of the prosecutor's statements or any procedural advantages granted to him in this case. When deciding whether the prosecutor's intervention in the case was excessive, the ECtHR noted that the intervention in question was obviously in favour of the applicant's procedural opponent – the reserve administration – and, moreover, helped to ensure that the decision that was not in its favour was subject to appeal, given that the appeal of the reserve itself was denied on procedural grounds.[17]

[14] *Menchinskaya v. Russia*, № 42454/02, 15 January 2009. URL: https://hudoc.echr.coe.int/eng?i=001-90620.
[15] *Korolev v. Russia (№ 2),* № 5447/03, 01 April 2010. URL: *https://hudoc.echr.coe.int/?i=001-98016*.
[16] *Batsanina v. Russia*, № 3932/02, 26 May 2009. URL: http://hudoc.echr.coe.int/eng?i=001-92667.
[17] *Mukiy v. Ukraine*, № 12064/08, 21 October 2021. URL: https://hudoc.echr.coe.int/eng?i=001-212436

Acting on the side of one of the parties, the prosecutor is endowed with the procedural rights of the party. In the context of practical implementation of procedural rights, a violation of para 1 of the Article 6 of the ECHR in terms of equality of arms was recognised in cases where case files and information were disclosed to the prosecutor, but not to a party to the case (*Lilly France v. France*)[18], or when the time limits were suspended for the state (whose interests were represented by the prosecutor) during court adjournments, but continued to run for other parties (*Karapanagiotou and Others v. Greece*)[19].

At the same time, the establishment of more restrictive time limits for appealing against a decision for a party than for the prosecutor (*Ewert v. Luxembourg*)[20] or the availability of certain types of appeals only for the prosecutor (*Blanco Callejas contre l'Espagne*)[21] was not recognised as a violation of para 1 of the Article 6 of the ECHR. Thus, in the case of *Guigui and SGEN_CFDT v. France*, the ECtHR noted that although the ten-day period for filing an appeal was short, it was not so short as to deprive the applicants of the opportunity to effectively use this remedy. The fact that this time limit is much shorter for private individuals than for the Prosecutor General, whose position is also different, cannot, in the ECtHR's view, put the former at a 'significant disadvantage' compared to the Prosecutor, even if it is acknowledged that the Prosecutor General may be regarded as their 'opponent'[22]. The prosecutor's right to reimbursement of court costs should also not be regarded as putting one of the parties at a greater disadvantage than the other, which is explained in terms of protection of public order (*Stankiewicz v. Poland*)[23].

In the second case, at the level of national legal orders, the prosecutor may participate in the case not as a party, but as an independent participant in the process representing the state or public interest, who is involved to give an opinion in the case. In case *Kramareva v. Russia* after the termination of the employment contract, the applicant filed a lawsuit against her former employer, demanding that the termination of this contract be declared unlawful, that she be reinstated, that she be compensated for the amount of lost earnings, non-pecuniary damage and that the company be obliged to provide her with copies of documents related to her work. In accordance with the national legislation, the prosecutor in this category of cases was involved as an independent state official whose participation was required in terms of representing the interests of the state to ensure compliance with the legality. In this case, the ECtHR stressed that there was nothing to suggest that the prosecutor acted as an opposing party in the case or more than his powers. His role was limited to providing an oral opinion in the case, according to which the prosecutor requested that the applicant's claims be partially satisfied. Following the hearing, the national court granted the applicant's claim partially, including for copies of documents and non-pecuniary damage, but found that the termination of her employment contract was lawful. The applicant argued that the prosecutor's influence in this case violated the guarantees of para 1 of the Article 6 of the ECHR. The ECHR, having considered the application in this case, noted that the applicant's argument that the improper influence of the prosecutor's opinion on the court was of particular importance was not true and was not supported by any specific and convincing evidence, as well as by references to the relevant legal provisions. In addition, in the context of full compliance with the requirements of adversarial proceedings, the ECtHR stressed that the prosecutor's opinion was expressed publicly, on the record, and the parties were aware of its content, so they had a real and effective opportunity to express their objections in response to such an opinion. In view of the above, the ECtHR found no violation of para 1 of the Article 6 of the ECHR.[24]

[18] *Lilly France v. France*, № 20429/07, 25 November 2010. URL: https://hudoc.echr.coe.int/eng?i=001-101897.
[19] *Karapanagiotou and Others v. Greece*, № 1571/08, 28 October 2010. URL https://hudoc.echr.coe.int/eng?i=001-101360
[20] *Ewert v. Luxembourg*, № 49375/07, 22 July 2010. URL: https://hudoc.echr.coe.int/eng?i=001-100049.
[21] *Blanco Callejas contre l'Espagne* (dec.), № 64100/00, 18 June 2002. URL: https://hudoc.echr.coe.int/?i=001-43580.
[22] *Guigui and SGEN_CFDT v. France* (dec.), № 59821/00, 06 January 2004. URL: https://hudoc.echr.coe.int/?i=001-67568.
[23] *Stankiewicz v. Poland,* № 29386/03, 04 March 2008. URL: https://hudoc.echr.coe.int/eng?i=001-77525.
[24] *Kramareva v. Russia*, № 4418/18, 01 February 2022. URL: https://hudoc.echr.coe.int/eng?i=001-215357.

However, in the case of *Yvon v. France*, the ECtHR recognised that the participation of a prosecutor in an expropriation case, who acted both as an expert and as a party to the case, combining two procedural statuses, caused a harmful imbalance in relation to the other party to the proceedings, incompatible with the requirement of equality of arms[25].

In this context, the question also arises as to the distinction between the concepts of 'equality of arms' and 'adversarial trial', which are closely related elements of the right to a fair trial in terms of Article 6(1) ECHR. The ECHR notes that the concept of a 'fair trial' implies an adversarial trial, during which the parties to a civil case are informed of all evidence attached to the case or provided by the other party and may provide their explanations in relation to it. A party to the proceedings should generally be guaranteed free access to the observations of the participants in the civil proceedings, as well as a real opportunity to comment on those observations. 'Adversarial' means that the relevant materials and evidence should be available to both parties[26]. Thus, a violation of the adversarial principle was recognised, for example, when the parties were denied access to reports of executive bodies that were of exceptional importance in a child custody case, but which were nevertheless examined by the court and became the basis for the court judgement.[27]

In a number of judgments, the ECtHR distinguishes between the concepts of 'equality of arms' and 'adversarial trial'. Thus, in the case of *Krcmar and Others v. the Czech Republic*, where the court judgment was based on evidence collected on the court's initiative, it was noted that in this case there was no violation of equality of arms, as the parties did not participate in the formation of the evidence base. At the same time, the requirement of an adversarial trial was violated since the parties did not have the opportunity to submit their objections to the collected evidence[28]. The ECtHR drew attention to the difference between the guarantees of equality of arms and adversarial trial in *Niderost-Huber v. Switzerland*, where it found a violation of the requirement of equality of arms because one of the parties did not have access to written evidence in the case, and therefore the rights of the claimant and the defendant were unequal. The ECtHR emphasised that this situation should be distinguished from cases where both parties are unable to obtain the necessary information about the evidence to which the judge has access, which is a violation of the principle of adversarial trial[29]. Thus, in general, it can be noted that in the context of para 1 of the Article 6 of the ECHR, the adversarial nature of civil proceedings is to ensure that the parties are informed of the evidence in the case and have real access to such evidence. Meanwhile, the requirement of equality of arms is to provide equal procedural opportunities to the claimant and the defendant to present their position in the case. As we emphasized in our previous publications, adversariality occurs in the 'court' – 'parties' interaction, while equality of arms exists in the 'court'–'claimant' and 'court'– 'defendant' interaction.[30]

In the context of the prosecutor's involvement in the non-criminal sphere, the ECtHR emphasises the need to ensure that the parties to the proceedings have the opportunity to review all the evidence and comments on their case, even if they are submitted by an 'independent member of the national legal service', including the prosecutor, with the aim of influencing the court's decision[31]. This principle was originally developed in criminal cases, but later extended to the non-criminal sphere[32].

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[25] *Yvon v. France*, № 44962/98, 24 April 2003. URL: http://hudoc.echr.coe.int/eng?i=001-61053.
[26] *Ruiz-Mateos v. Spain*, № 12952/87, 23 June 1993. URL: https://hudoc.echr.coe.int/eng?i=001-57838.
[27] *McMichael v. the United Kingdom*, № 16424/90, 24 February 1995. URL: https://hudoc.echr.coe.int/eng?i=001-57923.
[28] *Krcmar and Others v. the Czech Republic*, № 35376/97, 03 March 2000. URL: https://hudoc.echr.coe.int/eng?i=001-162573.
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[30] Цувіна Т. А. Право на суд у цивільному судочинстві: монографія. Харків: Слово, 2015. С. 174-175.
[31] *Kress v. France* [GC], № 39594/98, 7 June 2001. URL: https://hudoc.echr.coe.int/eng?i=001-59511.
[32] *Lobo Machado v. Portugal*, № 15764/89, 20 February 1996. URL: http://hudoc.echr.coe.int/eng?i=001-57978; *K.D.B. v. The Netherlands*, № 80/1997/864/1075, 27 March 1998. URL: https://hudoc.echr.coe.int/eng?i=001-58148; *Goc v. Turkey*, № 36590/97, 11 July 2002. URL: http://hudoc.echr.coe.int/eng?i=001-60597; *Ruiz-Mateos v. Spain*, № 12952/87, 23 June 1993. URL: https://hudoc.echr.coe.int/eng?i=001-57838; *Vermeulen v. Belgium*, № 19075/91, 20 February 1996. URL: https://hudoc.echr.coe.int/eng?i=001-57985; *Van Orshoven v. Belgium*, № 20122/92, 25 June 1997. URL: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58055&filename=001-58055.pdf; *Kress v. France*

In this category of cases, the ECtHR examined whether, for example, the opinions of the prosecutor acting as an independent third party were communicated to the parties and whether the parties had the opportunity to respond to them. In cases where the parties were able to comment at least in writing on such conclusions of the prosecutor, the ECtHR found no violation of para 1 of the Article 6 of the ECHR. Therefore, violations of the adversarial nature in cases of involvement of the prosecutor and submission of certain conclusions or evidence in the case relate primarily to those cases when the prosecutor does not act on the side of one of the parties to the case but enters the proceedings in the public interest as an amicus curiae.[33]

Latest Ukrainian context: case "Shmakova v. Ukraine" and grounds for prosecutor's participation in non-criminal cases

In case *Shmakova v. Ukraine* the applicant alleged an unlawful deprivation of her property rights. She claimed that, following the reorganisation of the original title holder (a factory), the factory could no longer retain its title to the permanent use of the land and that the deprivation of her property lacked a legitimate aim and was disproportionate. She argued that she had acquired the land in good faith, with all the necessary permits and documentation, and that the deprivation did not respect her rights under Article 1 of Protocol № 1 to the ECHR. On the national level the prosecutor argued that the applicant's title to the land had been illegally granted and sought its revocation in order to return the land to state ownership. The prosecutor claimed that the land was intended for public use, specifically for the construction of a school and a kindergarten. However, the ECtHR found that the Government had failed to demonstrate the necessity or urgency of using the land for the stated purposes. In particular, the land had been unused for many years and there was no evidence of an urgent social need for the proposed projects. The ECtHR held that the deprivation of the applicant's property constituted a violation of Article 1 of Protocol No. 1. While accepting that the deprivation was lawful and based on detailed analyses by domestic courts, it found that the Government had failed to strike a fair balance between the requirements of the public interest and the applicant's right to peaceful enjoyment of her possessions. The applicant, as a bona fide acquirer of the land, was disproportionately burdened by the revocation of her title without any compensation or adequate reparation. The Court emphasised that a deprivation of property without adequate compensation normally violates the fair balance required by Article 1 of Protocol № 1. It also noted that the public prosecutor's claim, although ostensibly in the public interest, did not sufficiently consider the practical impact on the applicant's rights or the lack of continuity with the intended public use of the land. The Court concluded that the expropriation did not strike a fair balance and therefore violated Article 1 of Protocol № 1. This case underscores the importance of ensuring that claims made in the interest of the State, by prosecutors, are accompanied by concrete and timely public benefits and are balanced against the property rights of individuals. States have an obligation to provide compensation or other reparation when they interfere with property rights to ensure that the principle of "good governance" is upheld[34].

Although this case deals with the issue of violation of Article 1 of the First Protocol to the ECHR in the context of the right to property, in our opinion, this case allows for a broader discussion also in the context of procedural grounds for the participation of prosecutors in civil, commercial and administrative proceedings. The analysis of the Supreme Court's case law leads to the conclusion that today the grounds for prosecutor's participation are interpreted quite broadly, which allows for a fairly wide discretion of the court at the stage of admitting prosecutors to participate in such proceedings.

These figures are quite impressive, especially given that the Supreme Court's practice has repeatedly emphasised that, given the grounds and forms of participation of the prosecutor, the latter's

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[GC], № 39594/98, 7 June 2001. URL: https://hudoc.echr.coe.int/eng?i=001-59511; *Emine Araç v. Turkey*, № 9907/02, 23 September 2008. URL: https://hudoc.echr.coe.int/eng?i=001-88564.

[33] The role of public prosecutor outside the criminal law field in the case-law of the European Court of Human Rights. Council of Europe / European Court of Human Rights, March 2011. P. URL: https://www.refworld.org/pdfid/4ee1d8361a.pdf.

[34] *Shmakova v. Ukraine*, no. 70445/13, 11 January 2024. URL: https://hudoc.echr.coe.int/rus?i=001-229926.

participation in non-criminal proceedings is not an alternative but a subsidiary form of defence, and, accordingly, the prosecutor should not replace public authorities, which are primarily responsible for protecting the interests of the state in certain legal relations[35]. At the same time, the recent case law of the ECtHR suggests the need to find new approaches to the prosecutor's participation in non-criminal proceedings, which would allow to move away from the legacy of the function of comprehensive 'supervision over the rule of law', which was inherent in the prosecutor's office in the past, to new foundations of subsidiarity and extraordinary participation.

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