

Засновник:

Національна академія внутрішніх справ

Рік заснування: 2011

*Рекомендовано до друку та поширення
через мережу Інтернет Вченою радою
Національної академії внутрішніх справ
(протокол № 18 від 28 вересня 2021 р.)*

**Свідоцтво про державну реєстрацію
друкованого засобу масової інформації
серії КВ 17476-6226 ПР**

Журнал входить до переліку наукових фахових видань України
Категорія «Б». Галузь наук – юридичні, спеціальність – 081 «Право»
(наказ Міністерства освіти і науки України від 28 грудня 2019 р. № 1643)

**Журнал представлено у міжнародних наукометричних базах даних,
репозитаріях та пошукових системах:** CrossRef, ISSN International Centre, ORCID,
Open Ukrainian Citation Index (Ukraine), Index Copernicus International,
Academic Resource Index ResearchBib, Polska Bibliografia Naukowa, Google Scholar,
Центр досліджень соціальних комунікацій, Національна бібліотека України
імені В. І. Вернадського, Електронний репозитарій НАВС

Юридичний часопис Національної академії внутрішніх справ : наук. журн. / [редкол.:
С. С. Чернявський (голов. ред.) та ін.]. – Київ : Нац. акад. внутр. справ, 2021. – Т. 11, № 2. – 71 с.

Адреса редакції:

Національна академія внутрішніх справ
пл. Солом'янська, 1, м. Київ, Україна, 03035
Тел.: +38 (044) 520-08-47
E-mail: info@lawjournal.com.ua
www: <https://lawjournal.com.ua/uk>

ISSN 2519-4216

Founder:

National Academy of Internal Affairs,

Year of foundation: 2011

*Recommended for printing and distribution
via the Internet by the Academic Council
of National Academy of Internal Affairs
(Minutes No. 18 of September 28, 2021)*

**Certificate of state registration
of the print media**

Series KB No. 17476-6226 PR

The journal is included in the list of scientific professional publications of Ukraine

Category "B". Branch of sciences – legal, specialty – 081 "Law"

(order of the Ministry of Education and Science of Ukraine of December 28, 2019 No. 1643)

**The journal is presented international scientometric databases, repositories
and scientific systems:** CrossRef, ISSN International Centre, ORCID,

Open Ukrainian Citation Index (Ukraine), Index Copernicus International,
Academic Resource Index ResearchBib, Polska Bibliografia Naukowa, Google Scholar,
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Electronic repository NAIA

Law Journal of the National Academy of Internal Affairs / Ed. by S. Cherniavskiy (Editor-in-Chief)
et al. Kyiv: National Academy of Internal Affairs, 2021. Vol. 11, No. 2. 71 p.

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03035, 1 Solomianska Sq., Kyiv, Ukraine
Tel.: +38 (044) 520-08-47
E-mail: info@lawjournal.com.ua
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ЮРИДИЧНИЙ ЧАСОПИС
НАЦІОНАЛЬНОЇ АКАДЕМІЇ ВНУТРІШНІХ СПРАВ
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LAW JOURNAL
OF THE NATIONAL ACADEMY OF INTERNAL AFFAIRS
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Том 11, № 2

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LAW JOURNAL
OF THE NATIONAL ACADEMY OF INTERNAL AFFAIRS
Volume 11, No. 2

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UDC 340.12: 342.7.001.36
DOI: 10.33270/04212202.7

Modern rule of law: Basic approaches to understanding

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Abstract

The modern state governed by the rule of law in the Western legal tradition differs in a number of characteristics (instrumental and substantive), firstly, from its retrospective analogues (for example, the states of the Middle Ages), and secondly, from the understanding and perception of the state in other legal (and cultural) traditions, for example, Islamic. In addition, the process of globalisation and other features of the 21st century require mainly new approaches to understanding the state as a social phenomenon, the relevance of which remains despite significant improvements on this issue in Soviet and Ukrainian legal science. During the Soviet era, one of the most fundamental was the work of V. O. Tenenbaum "The State: a System of Categories" (1971), however, like other works of this period; its content was built on the opposition of the essence of the socialist and bourgeois states. The purpose of this paper is to study the phenomenon of the modern state and analyse the main scientific approaches to understanding its essence. The methodology of this study is an analysis of the main approaches to understanding the modern state, its essential features and the conditions of its establishment. The problems of state activity that are important for the current conditions of its functioning, in particular, the efficiency of the state, are also considered. The features (theories) of the state found in international law are investigated separately. The implementation of the Montevideo Convention of 1933 established the following four characteristics of a state: 1) a permanent population; 2) a designated territory; 3) own government; 4) capacity to enter into relations with the other states. The paper highlights the phenomenon of semi-sovereign states. Special attention is paid to the investigation of the phenomenon of the modern (national) state, which was formed in the era of bourgeois revolutions and how significantly different from previous types of state, such features as the foundation of the state in the territorial cultural space and the nation to which free citizens belong; the transformation of society into a civil society with the principle of equality and prohibition of privileges. Despite significant scientific developments in the study of this problem, the need for further investigation of the essence of this phenomenon is urgent, taking into account the realities of the beginning of the 21st century

Keywords:

modern state; state characteristics; state sovereignty; quasi-states; civil society

Article's History:

Received: 30.09.2021

Revised: 11.11.2021

Accepted: 03.12.2021

Suggest Citation:

Kopcha, V.V. (2021). Modern rule of law: Basic approaches to understanding. *Law Journal of the National Academy of Internal Affairs*, 11(2), 7-12.

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Introduction

The modern state is one of the key categories of legal science. This approach remains relevant at the beginning of the 21st century, reflecting the place and role of the state in the legal system. The concept of “state” continues to be relevant, although a number of researchers abandon it in favour of a certain concrete and effective empirical content of political formations. Despite the really broad and diverse approaches to understanding the state, there is a consensus on what the essential elements of the state are.

There is a high level of dynamics of state-forming processes in the modern world [1]. Notably, at the beginning of the 21st century, more than 250 territorial and political entities with state characteristics functioned on the globe. However, not all of them can be called proper “states”. Such formations can be classified into groups. Conceptually, the state and its criteria will be analysed below, but in this case, the concept of an “independent state” refers to a “nation that is politically organised as a sovereign state in a certain territory” [2].

The purpose of the study is to outline the main areas for understanding the modern state. What is the state in the modern world? The modern (national) state as a phenomenon is developed in the period after bourgeois (anti-feudal) revolutions, replacing the traditional state. This period in economic history is designated as the beginning of the industrial era.

Presentation of Main Material

In the general study of the nature of the national state, this concept is defined as a political organisation of society formed in the industrial era, the legitimacy of which is ensured by the representation and protection of the interests of individuals included in it based on ideas and values of socio-cultural, spiritual, historical, linguistic, territorial cohesion and a single level of economic development [3]. Living in developed countries (Germany, the United Kingdom) in the 19th century, Karl Marx and Friedrich Engels observed an unattractive picture of the state of that time, in particular, the considerable property and social differentiation (proletarians – bourgeois) and the lack of voting rights for the vast majority of the adult population. Their views were formed in the conditions of that time and rationally reproduced reality. Indeed, when only the wealthy had the right to vote, democracy was fake and the state was only formed by those strata (classes). This reality of the 19th century dictated the development of classical theses of Marxism.

In addition, such ideas were common in Western Europe at the beginning of the 20th century. German researcher A. Menger, in his “New Doctrine of the State” (1905), outlined the main parameters of the so-called “socialist” and “communist” states of the future. In particular, he planned “the transfer of property rights from individuals to broad social groups”, “equality

of means of consumption in communist society”, “the implementation of the socialist idea through constant reforms”, “socialist public property”, “the weakening of the Roman concept of property in legal order” [4].

The Marxist-Leninist theory provided, first, for the recognition that the state as a social institution did not exist forever. The primitive system, in which the universal unit of society was the ancestry, did not know and could not know the state. The emergence and existence of the latter is connected with the division of society into classes. The state arises from the need for one ruling class to keep other, oppressed classes in subjection. Secondly, revealing the content of the state, the Marxist-Leninist theory states that the state consists of a special category of people who have special means for systematically applying coercion and subjugation of people in society. According to F. Engels, “the state is nothing more than a machine for suppressing one class by another”. Later V. Ulyanov-Lenin (“The State and the Revolution”, 1917) clarified: “the state is a machine for maintaining the dominance of one class over another”. Later, he noted that the state is a special category of people “who are allocated to manage others and that in the interests, in order to manage systematically, constantly possess a well-known instrument of coercion, an instrument of violence, which is now armed detachments of troops, prisons, and other means of subjugating someone else's will by violence – this is the essence of the state”. Third, the state has special functions that consist in managing society. The state acts as an instrument of suppression of political opponents of the ruling class. On the other hand, the state performs functions in which it acts as an official representative of the entire society. In the end, Marxism-Leninism justified the inevitability of the complete extinction of the state, which is associated with the complete elimination of classes, with the transition to communist public self-government [5].

At the same time, Max Weber did not perceive the essence of the state in its functional orientation, that is, from the “content of activity”. Thus, in 1918, he noted that there are almost no tasks that the political union would not be involved in. Therefore, it is possible to give a sociological definition of the modern state, in the end, only considering the specific means used by it – physical violence. In his view, a state should be called a human society that claims (with success – the author emphasised) a monopoly on physical violence within a certain branch. In other words, the only source of the “right” to violence is the state. Max Weber also emphasised that this refers to such “relations of domination of people over people who rely on legitimate (that is, what is considered legitimate) violence as a means. For a state to exist, people under its rule must submit to the authority claimed by those who rule” [6].

As Christopher Pierson notes, transnational forces in general and the globalised market economy, in particular, have decisively limited the “free hand” of the

state in both internal and external affairs. However, states remain the main players in national politics and in the international arena, although there is a huge difference between states in terms of their ability to act independently on the world stage. This does not refer to the “decline of the state”, but rather to a change in its essence and mode of activity. The same researcher argued that a state should be considered a political organisation that performs continuous actions and can claim the state level if its administrative staff successfully supports claims to the monopoly of the legal use of physical force in the event of execution of an order. Christopher Pearson identifies the following features of the state:

- 1) control (monopoly) over the use of violence;
- 2) territorial character;
- 3) sovereignty;
- 4) constitutionality;
- 5) rule of law and non-personalised force;
- 6) state bureaucracy;
- 7) powers/legitimacy;
- 8) citizenship; an additional feature is taxation [7].

The idea of the state as a phenomenon specific to modern times is based on one position, which, meanwhile, is shared by followers of different schools. This is depicted, for example, in the works of V. Chetvernin, who separately studied the evolution of Western scientists' views on the modern state. Its position is that the state is a phenomenon of the modern era, although it has adopted the ideas and institutions of antiquity and the medieval period. At the same time, the French researcher P. Birnbaum gives the following definition of the state: “The state is an institutional political and legal machine, served by functionaries who identify with their role, separated from civil society, over which it tries to exercise full custody, controlling it through its administrative bodies and through its own law, dominating it through its police, setting it in motion through economic intervention, subjugating it eventually through mastering thoughts and linking them with its own values” [8]. Together with his colleague B. Badi outlines the following elements of the modern state:

- 1) a system of institutionalised roles that constantly functions;
- 2) a single legitimate holder that uses force to control the territory in which it exercises its sovereignty, exercising protective power over the territory of the most remote of the provinces, protecting also the borders;
- 3) a political and administrative machine that operates through functionaries who are recruited on an impersonal basis according to meritocratic criteria [9].

The Austrian and American scientist Hans Kelsen notes that the ideologised science of the state “cannot master its essence except by comprehending this social picture as a certain system of human behaviour”. Usually, he continues, “the state is defined as a kind of political organisation. But even this expresses only

the idea that the state is a compulsory order. After all, the specific “political” component of this organisation consists in coercion, which is carried out from person to person and regulated by this procedure, consists in coercive acts that establish this procedure. These are exactly the compulsory acts that the legal order links with the conditions defined by it. The state as a political organisation is a legal order” [10]. Therefore, G. Kelsen defines the state as a “relatively centralised legal order”. According to the researcher, it is precisely this centralisation that distinguishes the state legal order from the original pre-state and supranational (or interstate) order of general international law.

The same scientist develops his argument, opposing other schools of understanding the state. Thus, he notes: “If we understand the state as a certain social community, then this community, as noted earlier, can be constituted only through a certain regulatory procedure. And that a community can be constituted only through one such order (and even identified with this order), then the normative order that constitutes the state can only be a relatively centralised compulsory order, that we recognise it as a state legal order”. He continues: “the state as a social community consists – according to traditional political science – of three components: the state population, the state territory, and the so-called state power, which is exercised by the independent government of the state. And all three components are defined only in legal terms – that is, they can only be understood as the validity and scope of the legal order” [10]. At the same time, G. Kelsen, like G. Cohen, with his idea of “the state as a form of law”, believed that the state does not belong to empirical reality, but corresponds to a certain legal order and personifies it. In other words, with this approach, the state and law are identified. In his opinion, the state as an organisation of coercion is identical to the rule of law and is itself generated by law. Thus, he concludes that any state is constitutional, including authoritarian. According to G. Kelsen, it is possible to understand the state through the prism of international law. It determines what a state is and what are the necessary conditions for its existence, in particular: “law and order”, “efficiency of territory management”, “independence of society from other societies”. In this sense, states have relative sovereignty, and are also subordinate to subjects of international law (supranational organisations) [11].

However, in a monographic study on the problem of state sovereignty, the famous soviet researcher I. Levin noted as early as 1948 that sovereignty is the state of full autonomy of a state on its territory and its independence from other states. He also defined the following features of the sovereignty of public authority acting on behalf of the state:

- 1) unity of power, which is expressed in the presence of a higher body or system of bodies that collectively make up the highest state power;

2) monopoly or concentration of power coercion in the hands of the state in the person of its bodies;

3) unlimited state power (as noted by I. Levin, these three features constitute the sovereignty of state power);

4) external independence of state power. He also believed that “sovereignty and independence of the state” are manifested in the exercise of state functions and provide for the existence of sovereign rights that legally ensure the implementation of these functions. This includes such rights as the right to create their own authorities, the right to conduct external relations, the right to be considered a belligerent party, the right to make laws, the right to a fair trial, and the right to maintain order on their territory [12].

A legally independent state differs from a quasi-state entity precisely in the completeness of the actual exercise of sovereign rights. To denote quasi-states, the concept of “semi-sovereign state” is widely used in international law [13].

In the Ukrainian scientific community, the concept of the state is understood in different ways. Thus, P.M. Rabinovich in one of the latest studies presented the following definition of this issue: “the state is an organisation of political power of the dominant part of the population in a socially heterogeneous society, which, ensuring its integrity and security, organises the satisfaction of general social needs and manages society primarily in the interests of this part of it” [14]. Ukrainian researcher O.F. Skakun noted that it is impossible to define a general concept of the state, which would contain all the features and properties characteristic of each of its periods in the past, present and future, without exception. At the same time, any state has a set of universal features that manifest themselves at all stages of its development, for example, territory, population, and power. However, the researcher still formulates the appropriate definition:

“The state is a sovereign political and territorial organisation of society with power, which is carried out by the state apparatus on the basis of legal norms that ensure the protection and coordination of public, group, and individual interests with legal coercion if necessary” [15]. Prominent Ukrainian researcher V. Sirenko noted that a state-organised society can only be considered a society that, by organising and isolating state power from its environment, has endowed this power with the power of supremacy, completeness and general obligation in all aspects of the functioning of society. First of all, this refers to the potential possibility of state power to show its supremacy, the general obligation of its requirements on any issue of public life [16].

In the international legal aspect, a number of features (criteria) of a state are determined by international law, in particular, the Montevideo Convention of 1933 establishes four features:

- 1) a permanent population;
- 2) a defined territory;

3) own government;

4) capacity to enter into relations with the other states. Although this convention has an inter-American character, it has de facto become the standard of international legal understanding of the state as a subject of international relations. The text of this document contains several other basic characteristics of the state, which are the embodiment of its essential nature, in particular:

1) the political existence of the state does not depend on recognition by other states.

Even before recognition, the state has the right to protect its integrity and independence to ensure its preservation and prosperity, and therefore, to organise its own life as it sees fit, take legislative measures based on its interests, administer its services, and determine the jurisdiction and competence of its courts. The exercise of these rights has no other restrictions than the exercise of the rights of other states under international law (Article 3 of the Convention);

2) states are legally equal, enjoy the same rights and have equal ways of exercising them. The fundamental rights of states may not be violated in any way (Articles 4, 5 of the Convention);

3) recognition of a state means that the state that recognises it accepts another with all the rights and obligations defined by international law. Recognition is unconditional and irrevocable. In addition, the recognition of a state can be direct or tacit (Articles 6, 7);

4) no state has the right to interfere in the internal or external affairs of another (Article 8) [17].

Conclusions

Thus, the conducted study provides the following conclusions about the conditions of establishment and characteristics of the modern state, which naturally arise in the last few centuries:

1) the state form of society is organised mainly within the area of permanent existence (territory) of a certain national culture. This does not refer to an ethnic group, but about a certain society, designated by a common culture, economic market, a certain style of relations between differentiated groups (religious, ethnic, etc.). The nation-state is defined as “an organisation to govern a nation (or possibly two or more closely related nations) whose territory is defined by national borders, and whose right is determined, at least in part, by national customs and expectations”;

2) “national” in the sense of “national state” reflects a new understanding and new practice of organising the state. The idea, which was put forward and first recorded at the constitutional level during the bourgeois revolutions (especially the French Revolution at the end of the 18th century), about the “origin of all power from the nation” was so revolutionary in itself that de facto for the next two centuries human civilisation followed the path of filling it with content and implementing it in practice. In this context, the national state, in contrast to the traditional one with its elitist content and aversion

to the people, declares itself a “state from the people”. Moreover, the power of the nation (people) as a people is consolidated in the constitution for the first time in history – it is at this time that the first written constitutions were adopted – another civilisational achievement associated with the national state. The meaning of the “first wave” of constitutions is obvious – a contract between the people and the state regarding mutual rights and obligations. An example of consolidating the concept of national sovereignty is the French Constitution of 1790, which stipulates: sovereignty is one, inseparable, inalienable, and essential. It belongs to the nation; no part of the people, no individual can appropriate its implementation. Such a decision allows separating the state from the face of the king;

3) society in such a state becomes different, acquiring mainly a civil character. The idea of legal equality and civil rights significantly and favourably

distinguishes it from all previous public organisations. As a result, it should be recognised that it becomes more effective. Overcoming internal status and spatial obstacles is an expression of social progress and contributes to the consolidation of society. Common ideas and values permeate all its layers, forming a modern nation. The idea of a civil society that granted all men equal legal and political rights became the main prerequisite for the establishment of a modern nation. The key demands of this idea in the 19th century are the abolition of class society privileges and participation in state decision-making through democratic male suffrage, which was combined with universal military service. Thus, the “nation and national state” covered the wider segments of the population. The modern state is based on a nation, and, consequently, gradually acquires not a national, but a national-political character.

References

- [1] Otreshko, V. (2013). The concept of “state formation” in modern political discourse. *Hileia*, 78, 376-379. Retrieved from http://nbuv.gov.ua/UJRN/gileya_2013_78_115.
- [2] Zhvakin, K. (Ed.). (2005). *The latest information about all countries and territories of the world*. Ekaterinburg: U-Faktoriia.
- [3] Blinov, A.S. (2003). *The nation state in the context of globalization: The contours of building a political and legal model of the emerging global orde*. Moscow: MAKS Press.
- [4] Menger, A. (1905). *New doctrine of the state*. Moscow: Kolokol.
- [5] Petrov, V.S. (1964). Theoretical questions of the general concept of the state. *Pravovedenie*, 1, 27-39.
- [6] Davydova, Iu.N., & Gaydenko, P.P. (Eds.). (1990). *Selected works*. Moscow: Progress.
- [7] Pierson, C. (2004). *The modern state* (2nd ed.). Retrieved from <http://psi424.cankaya.edu.tr/uploads/files/Pierson,%20The%20Modern%20State,%202nd%20ed.PDF>.
- [8] Birnaum, P. (1982). *The logic of the state*. Paris: Fayard.
- [9] Chetvernin, V.A. (1992). Reflections on theoretical ideas about the state. *Soviet State and Law*, 5, 3-11.
- [10] Kelzen, H. (2004). *Pure jurisprudence*. Kyiv: Yunivers.
- [11] Afonasin, E.V., & Didikin, A.B. (2006). *Philosophy of law*. Novosibirsk: Novosibirsk State University.
- [12] Levin, I.D. (2003). *Sovereignty*. St. Petersburg: Publishing House “Legal Center Press”.
- [13] Oppengeym, L. (1948). *International law: Peace*. Moscow: Inostrannaya literatura.
- [14] Rabynovych, P.M. (2008). *Fundamentals of the general theory of law and the state*. Lviv: Krai.
- [15] Skakun, O.F. (2001). *Theory of state and law*. Kharkiv: Konsum.
- [16] Sirenko, V.F. (2013). *State: Democratic, legal, social (Essays. Discussion questions)*. Kyiv: V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine.
- [17] Montevideo Convention “On the Rights and Duties of States”. (1933, December). <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>.

Список використаних джерел

- [1] Отрешко В. Поняття «державотворення» в сучасному політологічному дискурсі. *Гілея*. 2013. № 78. С. 376–379. URL : http://nbuv.gov.ua/UJRN/gileya_2013_78_115.
- [2] Новейшая информация о всех странах и территориях мира / ред. К. Жвакин; пер. с англ. Екатеринбург: У-Фактория, 2005. 697 с.
- [3] Блинов А. С. Национальное государство в условиях глобализации : контуры построения политико-правовой модели формирующегося глобального порядка. М. : МАКС Пресс, 2003. 150 с.
- [4] Менгер А. Новое учение о государстве / под ред. В. Л. Шанцер; пер. с нем. М. : Колокол, 1905. 264 с.
- [5] Петров В. С. Теоретические вопросы общего понятия государства. *Правоведение*. 1964. № 1. С. 27–39.
- [6] Избранные произведения / под ред. Ю.Н. Давыдова, П.П. Гайденко. М. : Прогресс, 1990. 808с.
- [7] Pierson C. The modern state. Second edition. 2004. URL : <http://psi424.cankaya.edu.tr/uploads/files/Pierson,%20The%20Modern%20State,%202nd%20ed.PDF>.
- [8] Брнаум П. Логика государства. Париж : Файярд, 1982, 234 с.

- [9] Четвернин В. А. Размышления по поводу теоретических представлений о государстве. *Советское государство и право*. 1992. № 5. С. 3–11.
- [10] Кельзен Г. Чисте правознавство. Київ : Юніверс, 2004. 496 с.
- [11] Афонасин Е. В., Дидикин А. Б. Философия права : учеб. пособие. Новосибирск: Новосиб. гос. ун-т, 2006. 92 с.
- [12] Левин И. Д. Суверенитет : монография. Спб : Юрид. центр Пресс, 2003. 373 с.
- [13] Оппенгейм Л. Международное право: мир / под ред. С.Б. Крылов; пер. с англ. Г. Лаутерпахт. М. : Иностр. лит., 1948. Т.1: Полут 1. 407 с.
- [14] Рабинович П. М. Основи загальної теорії права та держави: навч. посіб. Вид. 10. Львів : Край, 2008. 224 с.
- [15] Скакун О. Ф. Теорія держави і права: підручник / пер. з рос. Харків: Консум, 2001. 656 с.
- [16] Сиренко В. Ф. Государство: демократическое, правовое, социальное (Очерки. Дискуссионные вопросы): монография. Киев : Ин-т государства и права им. В. М. Корецкого НАН Украины, 2013. 339 с.
- [17] On the Rights and Duties of States: Montevideo Convention from 1933-12-26. URL : <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>.

Сучасна правова держава: основні підходи до розуміння

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Анотація

Сучасна правова держава в західній правовій традиції за низкою характеристик (інструментальних і сутнісних) вирізняється, по-перше, від ретроспективних її аналогів (наприклад, держав середньовіччя), по-друге, від розуміння та сприйняття держави в інших правових (і культурних) традиціях, наприклад ісламській. Крім того, процес глобалізації та інші ознаки ХХІ століття потребують переважно нових підходів до розуміння держави як суспільного феномену, актуальність дослідження якого зберігається попри значний доробок із цього питання в радянській та українській правничій науці. За часів СРСР однією з найгрунтовніших була праця В. О. Тененбаума "Держава: система категорій" (1971), однак, як й інші праці цього періоду, її зміст було вибудовано на протиставленні сутності соціалістичної та буржуазної держав. Мета публікації – вивчення феномену сучасної держави, аналіз основних наукових підходів до розуміння його сутності. Методологію цієї статті становить аналіз основних підходів до розуміння сучасної держави, її сутнісних ознак й умов її формування. Також порушено проблеми діяльності держави, які мають значення для сучасних умов її функціонування, зокрема ефективності держави. Окремо досліджуються особливості (теорії) держави, що приховані в міжнародному праві. реалізація в Конвенції Монтевідео 1933 р. закріпила такі чотири ознаки держави: 1) постійне населення; 2) визначена територія; 3) власний уряд; 4) вплив на підтримання відносин з іншими державами. У статті висвітлюється феномен напівсуверенних держав. Особлива увага приділяється дослідженню феномену сучасної (національної) держави, що сформувався в епоху буржуазних революцій і як істотно відрізнявся від попередніх типів держави, такими ознаками, як заснування держави в територіальному культурному просторі та нація, до якої належать вільні громадяни; перетворення суспільства на громадянське суспільство з принципом рівності та заборонаю привілеїв. Попри вагомий науковий доробок у дослідженні окресленої проблеми, актуальною є необхідність подальшого вивчення сутності цього феномену з огляду на реалії початку ХХІ століття

Ключові слова:

сучасна держава; ознаки держави; державний суверенитет; квазідержави; громадянське суспільство

UDC 340.12
DOI: 10.33270/04212202.13

Methodological foundations of the cognition of children's rights

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Abstract

The purpose of the study is to explore techniques and methods of the cognition of legal phenomena, scientific analysis of children's rights as a legal phenomenon, identification of general patterns, and formalisation and generalisation of children's rights at the world and national levels. The methodological basis of the study was the use of a set of methods necessary for the implementation of the scientific goal and the fulfilment of the tasks set, in particular: analysis of the rights of the child in international documents and legislation of Ukraine, the method of generalisation, hermeneutics regarding the interpretation and processing of texts of normative and doctrinal sources, and other philosophical, general scientific, and special methods. The scientific originality lies in the fact that the author has for the first time considered the rights of the child as legal phenomena that have specific features, depending on the subject, types, and age of the child. The methodological foundations of cognition of the rights of the child at each stage of its development are highlighted and the application of a number of the above methods is proposed. The scientific tools of cognition of children's rights are structured. The study of children's rights is a complex and multifaceted process of human thinking, which is necessary for improving legal mechanisms and protecting the rights of minors. Techniques and methods of cognition depend on the specifics of the legal phenomenon and the sphere of cognition. However, the scientific approaches, methods and principles of scientific research on children's rights considered in our study should be applied in a complex, preventing contradictions and refuting the results obtained by using various tools. All these methodological tools prove their value at every stage and in every segment of the study. Depending on the object of knowledge, the predominance of a certain methodological tool for implementing a specific research task is evident. Based on the conducted research, a number of generalisations are formulated, including the following: scientific cognition of children's rights is impossible without a well-chosen methodology; the methodology of scientific cognition of children's rights is a complex phenomenon that covers the structure and system of legal scientific knowledge of its theories and concepts. Methodological foundations of knowledge of children's rights form a multi-level system, which is developed by the principles of scientific cognition, dominant worldview, type of scientific thinking, philosophical foundations, scientific paradigms, methodological approaches, and scientific methods

Keywords: methodology; foundations; rights of the child; cognition process; research; philosophical method; general scientific method; special method of cognition

Introduction

The dynamism of social processes, ideological discomfort, and logical and methodological contradictions are associated with a rapid change in value orientations and the globalisation of the world. The need to find effective solutions to problems and quick solutions do not always optimise the process, complicating conflict and crisis situations. These are the realities of our time, the problems of human existence, the preservation and development of the individual, their inner world, ideological and methodological culture. In this context, logical and epistemological, and logical and methodological problems

occupy an important place. The development of science, the search for new ways of its knowledge and changing attitudes to science actualise interest in the methodology of scientific cognition, require constant rethinking and improvement of methodological research. The main vectors of the methodology of cognition were studied by M.A. Damirli [1], M.V. Kostitskyi [2], O.F. Skakun [3]; the specifics of the methodology of the cognition of children's rights were discussed by N.M. Krestovska [4].

In recent years, Ukraine has implemented a number of reforms, including the creation of an effective state-legal mechanism for the protection of children's

Article's History:

Received: 07.09.2021
Revised: 20.10.2021
Accepted: 16.11.2021

Suggest Citation:

Maksymenko, O.V. (2021). Methodological foundations of the cognition of children's rights. *Law Journal of the National Academy of Internal Affairs*, 11(2), 13-17.

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rights. At the level of theory, such phenomena are subject to knowledge and rethinking in order to further improve them.

The purpose of the study is to explore methods of cognition of legal phenomena, to carry out a scientific analysis of children's rights as a legal phenomenon, to identify general patterns, and to formalise and generalise the children's rights at the world and national levels. To achieve this goal, the following tasks were defined: 1. Summarise the current problems of the methodology of cognition of children's rights. 2. Systematise methodological levels of knowledge of children's rights. 3. To substantiate the peculiarities of the methodological foundations of knowledge of the rights of the child.

Materials and Methods

Methods are one of the elements of the theory of knowledge. In the study of scientific knowledge, its methods and forms are an important study of empirical and theoretical levels, which will be considered on the example of knowledge of children's rights using specific tools.

Modern knowledge of childhood is interdisciplinary clarifying its specifics is impossible without applying the methodology and results of anthropology, genetics, cultural studies, demography, pedagogy, ethnography, psychology and other sciences [5]. The latest legal methodology prompts researchers to timely modify paradigmatic approaches in evaluating two concepts of modern communication – government and society [6].

The law is a source of knowledge of childhood, and legal science, investigating the interaction of “a child in contact with the law” and “a child in conflict with the law”, turns to generalizations, conclusions, empirical material acquired in legal scientific disciplines. Some researchers suggest considering the “interests of the child” as a legal category, and this opinion is well-argued [7].

In the theory of law, general, special and private methods of the process of knowledge are distinguished. Fundamental, general theoretical concepts define methods of cognition that retain their own independence and are general philosophical laws or categories that highlight general, separate methods in specific circumstances. An important element of the methodology is the step-by-step process of learning. The first stage of knowledge involves obtaining complete, objective, reliable information, and the second one covers the comparative aspect. In this case, the information is analysed to detect inconsistencies. The next stage is based on the generalization of stable features obtained during the comparison. The step-by-step approach is completed by defining the abstraction and establishing generalized results. Methodological levels are correlated with the main stages of cognition [8].

The methodology of learning the rights of the child is a multi-level system that covers the levels of paradigms, approaches, methods and principles (sources for methods) and the level of theories and concepts. Some researchers believe that general scientific theory should be considered separately as a designation of a field of scientific theory that applies equally to all sciences, is a theory about all scientific fields, is used to distinguish science from science, and defines the criteria of scientificity. Every researcher has a scientific theory; it affects

their actions and therefore affects scientific results [9]. The latter arise simultaneously as a result of research and the beginning of further research. Knowledge of the peculiarities of the child's legal relationship in the field of law and child rights is possible only if methodological pluralism is used.

Approaches to the methodological level of scientific knowledge are interpreted by E.P. Semenyuk as a logical-epistemological, and a methodological formation that expresses only the direction of scientific research, limiting it mainly to one aspect (in the extreme case – to several interconnected spheres), but, unlike method, is based on the methodological level of scientific knowledge, fundamentally devoid of any restrictions and even a clear fixation of the means by which research is conducted [10]. The multiplicity of approaches (not opposite, not contradicting each other) within the framework of one study provides an understanding and explanation of the phenomenon under study. The complexity of the phenomenon of childhood as a socio-cultural phenomenon requires an in-depth study of the philosophy of childhood, history of childhood, ethnography of childhood, psychological history, anthropology of childhood, and history for its comprehensive and objective knowledge. pedagogy, etc. In this regard, V.M. Syrykh notes that “a theoretical analysis of the essence, social purpose of law, laws of its functioning and development are impossible without taking into account the connection of law with other social phenomena and processes” [11]. In general, sharing the position of other researchers, the study shows that it is more effective to study the rights of the child based on the methods of learning not only legal sciences.

Most researchers claim that the choice of cognition methodology depends on the concentration of attention on a separate perspective of the subject of cognition [12]. In particular, from the standpoint of the existential-humanistic approach, it is possible to consider the knowledge of the rights of the child, which is manifested in:

- awareness of the child as a legal entity in the process of continuous development and establishment of legal personality – at the philosophical and legal level of research;
- the interpretation of the child as an independent, albeit special subject of law in the dynamics of changes in its legal properties (legal capacity, legal capacity, tortious capacity) – at the level of theoretical legal research;
- identification of peculiarities of legal relations and other forms of legal behavior with the participation of children, determined by the state of childhood – at the level of sectoral – applied legal research.

The existential-humanistic approach is closely related to the axiological approach, primarily the latter focuses on a person as a socio-legal value [13].

The level of methods and principles of learning the rights of the child covers general scientific and special scientific methods and principles, including: dialectical, historical, formal-logical and comparative-legal method.

The dialectical method, developed at the beginning of the development of science as one of the types of human activity, retains its importance even at the modern stage of research. The dialectical method is used in research at the same time as other methods. Its components

are such principles as objectivity and comprehensiveness of research, patterns of transition of quantitative changes into qualitative ones, unity and struggle of opposites, negation. In relation to this research, the principle of objectivity consists primarily in the researcher's desire to be objective and impartial (although this does not exclude his value orientations), the principle of complexity is manifested in the identification and scientific analysis of all components of legal regulation, all legal relations involving children or regarding the protection of rights children, various manifestations of legal life in relation to children.

Knowing the rights of the child as a whole and the legal status of the child as its core is impossible without an analysis of the historical origins of these legal phenomena, which presupposes the use of the historical method. It covers the following research methods: retrospective; historical comparison; historical analogy; historical typification; historical periodization.

The synthesis of the evolutionary paradigm and the historical method is embodied in another aspect of the study – in determining the place of the child's rights in the legal system of Ukraine. The starting point in this sense is the idea of J. Raz, later developed by J. Harris, regarding momentary and non-momentary legal systems. According to J. Razom, the momentary system is a time span or a momentary section of the legal system, which covers all the legal standards in force at that time, and the non-momentary system, in addition, also covers obsolete and canceled standards, which are legal heritage. Any instant legal system necessarily belongs to non-instant [14].

The anthropological essence of the child and its rights is specific to legal science; therefore, it requires a special jurisprudence of the formal legal method – the basis of legal thinking [15]. The formal legal method performs several equally important functions in legal research. It is the main tool for the interpretation of existing norms that protect children's rights, formulates specific categories and concepts of the institution of child rights in legal science, classifies norms and sources of law, and identifies gaps in regulatory regulation. The method of comparative analysis is actively used to understand the rights of the child at different levels: doctrinal, normative, institutional and at the level of practical application. The comparative legal method is increasingly used in legal science. A scientifically based understanding of legal comparativistics is the proposed definition of O.F. Skakun, according to which the comparative legal method appears as a comparison of linear legal concepts and processes, clarification of similarities and differences between them [16].

In other words, the comparative legal method is a comparison of legal concepts, phenomena, processes of the same order and clarification of similarities and differences between them. Depending on the objects, the latter is used selectively, provided that the objects are comparable. The process of learning the law on a global scale is objectively necessary, that is, an inter-ethnic comparison of different legal systems that exist in the states of the world community [3].

Knowing the rights of the child, it can be argued that these are universally recognized ethical and legal

values that are established at the global level. In addition, from the standpoint of the functional approach, the criteria of comparative analysis are met by legal norms that have a single goal, namely, ensuring the conditions for survival, normal development and socialization of children, regardless of whether they belong to different legal families. For comparison, you can choose objects that are close in place in the legal systems of your countries: first of all, norms, institutions and sources of law, legal institutions that apply them, interpretive acts and doctrines.

The use of the comparative legal method in the study of the rights of the child makes it possible to compare, for example, the provisions of the laws of Ukraine on the protection of the rights of the child with the legislation of other countries, on the basis of which it is possible to conduct a comparative analysis and draw the necessary conclusions. The research shows that the value of the rights of the child in modern society unites all countries in order to create an effective mechanism for their protection. The comparative legal method is appropriate in the study of children's rights both statically and dynamically. After all, society is rapidly developing; new legal phenomena appear, which are subject to comparison with the previous ones, and for an in-depth study of the rights of the child, it is necessary to determine the range of compared elements.

D.A. Yagofarov singles out status and situational methods. The first of them is based on the fact that the legal status of a minor is not static, it changes significantly with the transition to other age and social groups. Depending on the child's age, his interaction with the state and society also changes. The second is to consider typical manifestations of the personality of minors as subjects of legal relations, typical situations in which they may find themselves [17].

For example, minors under the age of 16 are not subject to administrative liability in accordance with the Code of Criminal Procedure, as they are recognized as incapable of realizing the meaning of their own actions and managing them. The administrative responsibility of a child can arise only if he/she reaches 16 years of age at the time of committing the offense, and not at the time of issuing a decision to hold him/her criminally liable. The law stipulates those measures of influence have an educational direction and can be applied to children aged 16 to 18 who have committed an administrative offense, if the body of administrative jurisdiction reaches a conclusion about the possible correction of the offender without applying punishment – this is a more severe administrative penalty. Collectively, these measures form a system that is formed depending on the increasing severity of coercive measures – from less strict to stricter [18].

The novelty of the study is due to the fact that for the first time the concept of "child's rights" was considered as a legal phenomenon that has specific characteristics depending on its type and age of the child. The methodological foundations of learning the rights of the child at each stage of its development are highlighted and the application of a number of the above-mentioned

methods is proposed. The scientific toolkit for learning the rights of the child is structured.

Conclusions

Therefore, the study of the rights of the child is a complex and multifaceted process of human cognition, necessary for the improvement of legal mechanisms for the protection of the rights of minors. The researcher, relying on previously acquired knowledge, masters others – through cognition. In the process of cognition, self-knowledge also occurs – self-reflection of the subject of cognition occurs.

Techniques and methods of cognition depend on the object – signs of the legal phenomenon. However, the scientific approaches, methods and principles of scientific research on children's rights considered in this study should be applied in a complex manner, which allows to prevent contradictions and refute the obtained results using various means. All these methodological tools demonstrate their value at every stage and in every segment of research. Depending on the object of knowledge, it is obvious that one or another methodological

tool prevails for the realization of one or another research goal.

The same ideological and organizational principles within different methodologies have different content and meaning.

Based on the results of the research, the following conclusions were formulated:

- the methodology of scientific knowledge – a dynamic phenomenon;
- scientific knowledge of the rights of the child is impossible without the right methodology;
- the methodology of scientific knowledge is a complex phenomenon that covers the structure and system of legal scientific knowledge of its theories and concepts;
- the methodological foundations of the knowledge of the rights of the child are a necessary element of the system of ensuring and protecting the rights of the child, which is a multi-level system formed from the foundations of scientific knowledge, the dominant worldview, the type of scientific thinking, philosophical foundations, scientific paradigms, methodological approaches and scientific methods.

References

- [1] Damirli, M.A. (2009). Specifics of comparative-legal hermeneutics. *Current Issues of State and Law*, 50, 31-36.
- [2] Kostytsky, M.V. (2013). Some issues of methodology of legal science. *Scientific Bulletin of the National Academy of Internal Affairs*, 1, 3-11.
- [3] Skakun, O.F. (2001). *Theory of state and law*. Kharkiv: Konsum.
- [4] Krestovskaya, N.M. (2009). Juvenile legal status. *Scientific Works of Odessa National Law Academy*, 8, 278-284.
- [5] Sapogova, E.E. (2004). *Cultural sociogenesis and the world of childhood*. Moscow: Akadempromekt.
- [6] Andrieiev, D.V., & Ivanchenko, D.V. (2019). Philosophical and legal methodology for establishing effective communication between government and local communities in the information society. *Filosofski ta Metodologični Problemi Prava*, 2(18), 18-26. doi: 10.33270/02191802.18.
- [7] Bondarenko, O.A. (2017). "The interests of the child" as a legal category. *Legal Paradigm*, 1(16). doi: 10.15688/lc.jvolsu.2017.1.7.
- [8] Koretskyi, O.P. (2020). Methodological approach to the theory of cognition in criminal proceedings. *Subcarpathian Law Herald*, 3(32), 88-92. doi: 10.32837/pyuv.v0i3(32).610.
- [9] Kelman, M.S., Kelman, L.M., & Romanska, I.V. (2019). Understanding the methodology of cognition of scientific theories in jurisprudence. *Philosophical and Methodological Problems of Law*, 1(17), 32-42. doi: 10.33270/01191702.32.
- [10] Semeniuk, E.P. (1988). *Informational approach to the knowledge of reality*. Kyiv: Naukova dumka.
- [11] Strykh, V.M. (2000). *Logical foundations of the general theory of law*. Moscow: Iustitsinform.
- [12] Bilozorov, Ye.V. (2021). Methodological approach as a tool of knowledge of law. *Current Problems of State and Law*, 90, 32-37. doi: 10.32837/apdp.v0i90.3204.
- [13] Bihun, V.S. (2004). Human in law: An axiological approach (PhD thesis, V. M. Koretsky Institute of State and Law of National Academy of Sciences of Ukraine, Kyiv, Ukraine).
- [14] Markova-Murashova, S.A. (2005). Instant and non-instant legal systems: Theories of differentiation. *Legal Policy and Legal Life*, 4, 77-84.
- [15] Zhol, K.K. (2001). *Methods of scientific knowledge and logic (for lawyers)*. Kyiv: Atika.
- [16] Skakun, O.F. (2006). *The place of general comparative jurisprudence in the system of legal sciences and its official status*. Retrieved from <http://comparativelaw.org.ua/docl/skakun.doc>.
- [17] Iagofarov, D.A. (2003). Juvenile law. *Foundations of State and Law*, 3, 44-49.
- [18] Maksymenko, O.V. (2020). The child as a special subject of administrative law in the process of implementing the juvenile policy of Ukraine. *Public Law*, 2(38), 37-44. doi: 10.32782 / 2020-38-04.

Список використаних джерел

- [1] Дамірлі М. А. Специфіка компаративістсько-правової герменевтики. *Актуальні проблеми держави і права*. 2009. Т. 50. С. 31–36.
- [2] Костицький М. В. Деякі питання методології юридичної науки. *Науковий вісник Національної академії внутрішніх справ*. 2013. № 1. С. 3–11.
- [3] Скакун О. Ф. Теорія держави і права. Харків : Консум, 2001. 656 с.
- [4] Крестовська Н. М. Ювенальний правовий статус. *Наукові праці Одеської національної юридичної академії*. 2009. Т. 8. С. 278–284.

- [5] Сапогова Е. Е. Культурный социогенез и мир детства: учеб. пособие. Москва : Академпроект, 2004. 496 с.
- [6] Андреев Д. В., Иванченко Д. В. Філософсько-правова методологія налагодження дієвої комунікації влади та місцевих громад в інформаційному суспільстві. *Філософські та методологічні проблеми права*. 2019. Т. 2(18). С. 18–26. doi : 10.33270/02191802.18.
- [7] Бондаренко О. А. «Интересы ребенка» как правовая категория. *Правовая парадигма*. 2017. № 1(16). doi : 10.15688/lc.jvolsu.2017.1.7.
- [8] Корецький О. П. Методологічний підхід до теорії пізнання у кримінальному процесі. *Прикарпатський юридичний вісник*. 2020. № 3(32). С. 88–92. doi : 10.32837/руув.v0i3(32). 610.
- [9] Кельман М. С. Кельман Л. М., Романська І. В. Осмислення методології пізнання наукових теорій у правознавстві. *Філософські та методологічні проблеми права*. 2019. № 1(17). С. 32–42. doi : 10.33270/01191702.32.
- [10] Семенюк Э. П. Информационный подход к познанию действительности. Киев : Наук. думка, 1988. 239 с.
- [11] Сырых В. М. Логические основания общей теории права: в 2 т. М. : Юстицинформ, 2000. Т. 1. 528 с.
- [12] Білосороз Є. В. Методологічний підхід як інструмент пізнання права. *Актуальні проблеми держави і права*. 2021. № 90. С. 32–37. doi : 10.32837/apdp.v0i90.3204.
- [13] Бігун В. С. Людина в праві : аксіологічний підхід : автореф. дис. ... канд. юрид. наук: 12.00.12. Київ, 2004. 20 с.
- [14] Маркова-Мурашова С. А. Моментальные и немомментальные правовые системы : теории разграничения. *Правовая политика и правовая жизнь*. 2005. № 4. С. 77–84.
- [15] Жоль К. К. Методы научного познания и логика (для юристов). Киев : Атика, 2001. 288 с.
- [16] Скакун О. Ф. Место общего сравнительного правоведения в системе юридических наук и его официальный статус. URL : <http://comparativelaw.org.ua/docl/skakun.doc>.
- [17] Ягофаров Д. А. Ювенальное право. *Основы государства и права*. 2003. № 3. С. 44–49.
- [18] Максименко О. В. Дитина як спеціальний суб'єкт адміністративного права у процесі реалізації ювенальної політики України. *Публічне право*. 2020. № 2(38). С. 37–44. doi : 10.32782/2020-38-04.

Методологічні засади пізнання прав дитини

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Анотація

Актуальність дослідження полягає в тому, що нині використання негласного співробітництва для Метою статті є дослідження прийомів і способів пізнання правових явищ, науковий аналіз прав дитини як правового явища, виявлення загальних закономірностей, формалізація та узагальнення прав дитини на світовому й загальнодержавному рівнях. Методологічною основою публікації стало застосування комплексу методів, необхідних для реалізації наукової мети й виконання поставлених завдань, зокрема: метод аналізу прав дитини в міжнародних документах і законодавстві України, метод узагальнення, герменевтики щодо тлумачення та опрацювання текстів нормативних і доктринальних джерел, а також інші філософські, загальнонаукові та спеціальні методи. Наукова новизна полягає в тому, що автор уперше розглянув права дитини як правові явища, яким притаманні специфічні ознаки, залежно від предмета, видів і віку дитини. Виокремлено методологічні засади пізнання прав дитини на кожному етапі її розвитку й запропоновано застосування низки перелічених вище методів. Структуровано науковий інструментарій пізнання прав дитини. Дослідження прав дитини є складним і багатограним процесом людського мислення, який є необхідним для вдосконалення правових механізмів та захисту прав неповнолітніх осіб. Прийоми й способи пізнання залежать від особливостей правового явища та сфери пізнання. Однак розглянуті в нашому дослідженні наукові підходи, методи та принципи наукового дослідження прав дитини слід застосовувати в комплексі, що дає змогу запобігти суперечності та спростуванню результатів, отриманих шляхом застосування різноманітного інструментарію. Усі ці методологічні інструменти засвідчують свою цінність на кожній стадії та в кожному сегменті дослідження. Залежно від об'єкта пізнання очевидним є переважання певного методологічного засобу для реалізації конкретного завдання дослідження. На підставі здійсненого наукового дослідження сформульовано низку узагальнень, серед яких такі: наукове пізнання прав дитини неможливе без вдало обраної методології; методологія наукового пізнання прав дитини є складним явищем, яке охоплює структуру й систему юридичного наукового знання його теорій та концепцій. Методологічні засади пізнання прав дитини становлять багаторівневу систему, яку формують принципи наукового пізнання, домінуючий світогляд, тип наукового мислення, філософські засади, наукові парадигми, методологічні підходи й наукові методи

Ключові слова: методологія; засада; права дитини; процес пізнання; дослідження; філософський метод; загальнонауковий метод; спеціальний метод пізнання

UDC 351.95

DOI: 10.33270/04212202.18

The system of organs of state power for the protection of human rights in the sphere of national security

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Abstract

The purpose of the study is to provide scientifically based conclusions on the definition of the system of state authorities for protecting human rights in the field of national security in the context of modern challenges and threats based on scientific research. The methodological basis of the study is a complete and coordinated system of methods, which allowed properly analysing the subject matter; in particular, methods of analysis, synthesis, induction, and deduction were used. The theoretical basis of this publication is the papers by Ukrainian researchers devoted to the study of state authorities on the protection of human rights in the field of national security. The scientific originality of the publication is conditioned by the fact that it included a systematic analysis of legal enactments in the field of legal regulation of the system of state authorities for the protection of human rights in the field of national security. It is established that the activities aimed at the protection of human rights and national security are bilateral in nature: the protection of human rights guarantees state security – and protection of state security safeguards human rights. The study highlights the incompleteness of the reform of this system of bodies that certify the shortcomings of the legal regulation of their activities, in particular: 1) the National Guard of Ukraine has the status of a military formation. At the same time, the National Guard of Ukraine is a military formation with law enforcement functions, which belongs to the system of the Ministry of Internal Affairs of Ukraine; 2) the National Police of Ukraine as the central executive authority belongs to the security and defence sector. At the same time, the Law of Ukraine “On Central Executive Authorities” does not specify the National Police as the central executive authority; 3) the subjects of the intelligence community among others, according to the Law of Ukraine “On intelligence”, is the security service of Ukraine. However, in Part 2 of Article 12 of the Law of Ukraine “On National Security of Ukraine”, the Security Service of Ukraine is defined as a separate body in the field of ensuring national security. It is noted that the double indication of the same bodies in the system of state authorities for the protection of human rights in the field of national security is legally unsound

Keywords:

state authority; protection of human rights; National Security; National Guard of Ukraine; Ministry of Internal Affairs of Ukraine; National Police of Ukraine; Security Service of Ukraine

Article's History:

Received: 14.09.2021

Revised: 27.10.2021

Accepted: 19.11.2021

Suggest Citation:

Chizhov, D.A. (2022). The system of organs of state power for the protection of human rights in the sphere of national security. *Law Journal of the National Academy of Internal Affairs*, 11(2), 18-23.

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Introduction

Protection of human rights in the field of national security has become increasingly relevant in recent years. This is conditioned by the military aggression of the Russian Federation, increased threats in the information sphere, cyber-attacks, etc. Reforms are underway in public authorities, in the way administrative services are provided and in the transition to a new, digital reality. This refers to the creation of services such as the Diia app, eMalyatko, eCase, etc.

Therefore, the protection of human rights in the field of national security should be carried out considering the processes of digitalisation taking place in the country.

The dictionary of modern Ukrainian language and slang defined the word of 2019 as “digitalisation” [1]. Such a choice is quite appropriate, primarily due to the frequency of use of this word by representatives of society and authorities. The neologism, which appeared in the Ukrainian language only a few years ago, and according to the dictionary definition, means changes in all spheres of public life related to the use of digital technologies. The word is a simplified form of the term “digital transformation” and a manifestation of the global digital revolution [1].

The term “digitalisation” is still almost not used in Ukrainian legal science. However, it is obvious that modern science cannot stay away from these processes, primarily due to the fact that for any changes it is necessary to develop a scientific basis.

Separately, it should be noted about the relationship between digital transformation and the protection of human rights in the field of national security. This connection can be traced in the fact that new challenges are constantly emerging – not only in the field of law enforcement and the state border, but also in the field of information technology. That is why ensuring information and digital security is a component of national security in the context of digitalisation.

In this regard, it is necessary to investigate the topic of defining the system of state authorities to protect human rights in the field of national security in the context of reforming the national security system and digital transformation of the state.

The chosen topic is related to scientific and practical tasks that include: the determination of the list of bodies responsible for the protection of human rights in the field of national security, their competence, and identification of law enforcement problems.

Analysis of scientific sources indicates the existence of fragmentary research on this issue. In particular, I. Doronin devoted his study to the theoretical and legal investigation of the national security of Ukraine in the information age. The author considered the actual scientific problem of developing a conceptual approach to the legal regulation of public relations in the field of national security in the information age. He focused on

the legal and organisational principles of the development of the system of subjects of ensuring the national security of Ukraine [2]. S. Drobotov analysed the constitutional and legal support of national security in Ukraine [3]; O. Kubetska, T. Ostapenko, Ya. Paleshko defined the conditions for ensuring the national security of the state [4]; V. Antonov studied the constitutional and legal foundations of the national security of Ukraine at the monographic level. Among other things, he highlighted the political and military components of the national security system, the protection of constitutional human rights and ensuring their personal security in the face of modern challenges and threats, etc. [5].

Despite a significant number of studies in this area, the system of state authorities for the protection of human rights in the field of national security in the context of modern challenges and threats has been underinvestigated.

The purpose of the study is to provide scientifically based conclusions on the definition of the system of state authorities for protecting human rights in the field of national security in the context of modern challenges and threats based on scientific research.

To achieve this goal, the following tasks were set:

- carry out a systematic analysis of legal enactments in the field of legal regulation of the system of state authorities for the protection of human rights in the field of national security;
- determine the state authorities responsible for the protection of human rights in the field of national security;
- determine the correlation between the activities of various bodies for the protection of human rights and national security;
- determine the shortcomings of the legal regulation of the list and the competence of state authorities for the protection of human rights in the field of national security

Presentation of Main Material

Article 3 of the Constitution of Ukraine recognises a person, his or her life and health, honour and dignity, inviolability and security as the highest social value [6], which also provides for ensuring security in general, that is, national security. Recognition as the highest social value requires the protection of human rights, in particular, in the field of national security. It is possible to establish a two-way link between the protection of human rights and ensuring national security. After all, only in a country that ensures national security at the proper level, it is possible to talk about the protection of human rights.

In the Law of Ukraine “On National Security of Ukraine”, national security is defined as “protection of state sovereignty, territorial integrity, democratic constitutional order, and other national interests of Ukraine from real and potential threats” (paragraph 9

of Part 1 of Article 1) [7]. In fact, at the level of ensuring national security, it is necessary to discuss the security of its main objects, the list of which is not exhaustive. Researchers claim that the triad of objects of national security of the state consists of the security of the individual, society, and the state [8].

This law defines the principles of democratic civil control in Article 4. In particular, “the civil control system consists of control carried out by the President of Ukraine; control carried out by the Verkhovna Rada of Ukraine; control carried out by the National Security and Defence Council of Ukraine; control carried out by the Cabinet of Ministers of Ukraine, executive authorities, and local self-government bodies; judicial control; public supervision” [7]. The cited legislative provisions determine the list of state authorities whose powers include ensuring national security in the field of civil control:

- Verkhovna Rada of Ukraine;
- National Security and Defence Council of Ukraine;
- Cabinet Of Ministers Of Ukraine;
- executive authorities and local self-government bodies; judicial authorities.

The President of Ukraine is a special subject in the field of ensuring national security. However, taking into account the subject of the study – state authorities, this issue will not be considered in the paper.

After the constitutional reform of 2016 and the clarification of the functions of the prosecutor’s office, it is no longer subject to civil control over the security and defence sector.

In addition to civil control, the Law of Ukraine “On National Security of Ukraine” defines the security and defence sector. In particular, “the security and defence sector includes: the Ministry of Defence of Ukraine, the Armed Forces of Ukraine, the State Special Transport Service, the Ministry of Internal Affairs of Ukraine, the National Guard of Ukraine, the National Police of Ukraine, the State Border Service of Ukraine, the State Migration Service of Ukraine, the State Emergency Service of Ukraine, the Security Service of Ukraine, the Anti-Terrorist Centre under the Security Service of Ukraine, the Judicial Protection Service, the State Security Service of Ukraine, the State Service for Special Communications and Information Protection of Ukraine, the staff of the National Security and Defence Council of Ukraine, intelligence agencies of Ukraine, the central executive authority that ensures the establishment and implementation of the national military-industrial policy” (Part 2, Art. 12) [7].

Thus, the system of state authorities for the protection of human rights in the field of national security covers two groups of bodies: civil control bodies and security and defence bodies.

Commenting on Article 12 of this Law, researchers claim that after updating the legislation in the field of national security and defence in 2018, the system of the

security and defence sector was partially changed by introducing new terms: “security and defence sector”, “security forces”, and “defence forces”. All state bodies that ensure the national security of Ukraine belong to the security and defence sector and, accordingly, to its individual components. According to, I. Doronin, it is necessary to consider the composition of the security and defence sector and the corresponding powers of its components, based on the systematisation defined by a legislative act. In contrast to the simple list of subjects of ensuring national security of Ukraine in the Law of Ukraine

“On the fundamentals of national security of Ukraine”, the current legislative act proposes to build a certain system of the security and defence sector, which contains four components. In particular:

- security forces;
- defence forces;
- military-industrial complex;
- citizens and public associations.

The first two components of the security and defence sector are not differentiated in the requirements of Part 2 of Article 12 of the Law of Ukraine “On National Security of Ukraine”. At the level of terminological explanation, Article 1 of the Law notes that the “security forces” include: law enforcement agencies, intelligence agencies, special-purpose state bodies with law enforcement functions, civil protection forces, and other bodies that are entrusted by the Constitution and Laws of Ukraine with the functions of ensuring national security of the state. The defence forces include: the Armed Forces of Ukraine, military formations, law enforcement agencies, and intelligence agencies, organs of special purpose with law enforcement functions, which are assigned by the Constitution and laws of Ukraine to ensure the defence of the state [2]. Cited above Part 2 of Article 12 of the Law of Ukraine

“On National Security of Ukraine” actually provides two formulations – security bodies and defence bodies, in general, it has 17 relevant state bodies. Two of them have the status of ministries – the Ministry of Defence of Ukraine, the Ministry of Internal Affairs of Ukraine, the rest – different bodies and formations.

The Armed Forces of Ukraine have the status of a military formation. The National Guard of Ukraine also has the status of a military formation. At the same time, the National Guard of Ukraine is a military formation with law enforcement functions, which belongs to the system of the Ministry of internal Affairs of Ukraine. Since the legislator refers the Ministry of Internal Affairs of Ukraine to bodies in the field of national security, the question arises about the expediency of specifying in the law its structural divisions as separate bodies entrusted with powers in this area [9].

The National Police of Ukraine belongs to the security and defence sector.

The National Police of Ukraine [10] is a central executive authority that serves society by ensuring the protection of human rights and freedoms, countering crime, and maintaining public security and order (Part 1 of Article 1 of the Law of Ukraine “On the National Police”) [10]. At the same time in the Law of Ukraine

“On Central Executive Bodies” does not refer to the National Police as the central executive body.

Unlike other bodies whose names are used in their legislative formulation, the legislator uses a generalising concept for intelligence agencies. Until 2020, a specialised law – “On Intelligence Agencies of Ukraine” – was in force, but it became invalid on the basis of Law No. 912-IX of September 17, 2020. The intelligence agencies previously included the following: the Foreign Intelligence Service of Ukraine, the intelligence body of the Ministry of Defence of Ukraine, the intelligence body of the specially authorised central executive body for the protection of the state border. On September 17, 2020, the Law of Ukraine “On Intelligence” came into force, Article 4 of which states that in order to effectively perform intelligence tasks, an intelligence-gathering community operate in Ukraine. The subjects of the intelligence community are: 1) the coordinating body for intelligence issues; 2) intelligence agencies defined by Law; 3) the Security Service of Ukraine; 4) other components of the security and defence sector defined by the National Security and Defence Council of Ukraine, which are attracted by intelligence agencies to perform intelligence tasks and strengthen the intelligence capabilities of the state [11]. Consequently, the question arises about the appropriateness of using the term “intelligence agencies”, since it has been replaced by “intelligence community”.

The analysed legislative provisions also refer to such a body as the Security Service of Ukraine. However, in Part 2 of Article 12 of the Law of Ukraine “On National Security of Ukraine”, the Security Service of Ukraine is defined as a separate body in the field of ensuring national security. It is noted that the double indication of the same bodies in the system of state authorities for the protection of human rights in the field of national security is legally unsound.

Developing the topic of defence bodies, attention should be focused on the digital transformation of the Armed Forces and ensuring information security. In particular, in September 2021, the President of Ukraine V. Zelensky [12] approved the Strategic Defence Bulletin of Ukraine [13], which defines the digital transformation of the Armed Forces and ensuring information security as one of the priorities. Based on the above, it can be stated that the defence sector is beginning its reform in accordance with the challenges of our time towards information security of a person, society, and state bodies.

Among the listed shortcomings in the field of identifying bodies that ensure national security, it is

also advisable to highlight the need to coordinate the activities of these bodies. In addition to duplicating bodies in different structural units, their powers are also duplicated. At the same time, the legislator does not provide advantages to a particular body.

In addition, there are no uniform requirements for the order, urgency, specific officials of state bodies who will prepare relevant reports, and most importantly – the method of communicating the report as a generalised result of the activities of state authority to the public. It seems that such a report should provide for an open format, that is, accessible to citizens at any time. The only exception is information that constitutes a state secret.

The paper provides a systematic analysis of legal enactments in the field of legal regulation of the system of state authorities for the protection of human rights in the field of national security. It is established that the activities aimed at the protection of human rights and national security are bilateral in nature: the protection of human rights guarantees state security – and protection of state security safeguards human rights. After all, only in a country that ensures national security at the proper level, it is possible to talk about the protection of human rights.

The study of relevant regulations indicated that the system of state authorities for the protection of human rights in the field of national security covers two groups of bodies: civil control bodies and security and defence bodies. It was established that the defence sector has begun its reform in accordance with the challenges of our time towards information security of a person, society, and state bodies.

Conclusions

The system of state authorities for the protection of human rights in the field of national security and their competence is determined by special legislation. It can be stated that the reform of this system of bodies is incomplete, as evidenced by the shortcomings of the legal regulation of their activities, in particular:

- the National Guard of Ukraine has the status of a military formation. At the same time, the National Guard of Ukraine is a military formation with law enforcement functions, which belongs to the system of the Ministry of Internal Affairs of Ukraine. Since the legislator refers the Ministry of internal affairs of Ukraine to bodies in the field of national security, the question arises about the expediency of specifying in the law its structural division as a separate body entrusted with powers in this area;

- the security and defence sector includes the National Police of Ukraine as a central executive authority that serves society by ensuring the protection of human rights and freedoms, countering crime, and maintaining public security and order. At the same time, the Law of Ukraine “On Central Executive Authorities” does

not specify the National Police as the central executive authority;

– the subjects of the intelligence community, among others, in accordance with the law of Ukraine “On Intelligence”, are the Security Service of Ukraine. However, in Part 2 of Article 12 of the Law of Ukraine “On National Security of Ukraine”, the Security Service of Ukraine is defined as a separate body in the field of ensuring national security. It is noted that the double indication of the same bodies in the system of state authorities for the protection of human rights in the field of national security is legally unsound; legal enactments do not have a coordinated system of interaction

between the relevant state authorities, there is a duplication of bodies in different structural units, and their powers are also duplicated;

– uniform requirements have not been formed regarding the procedure, urgency, specific officials of state bodies who will prepare relevant reports, and most importantly, the method of communicating the report as a generalised result of the activities of state authority to the public. The study suggests that such a report should provide for an open format, that is, it should be available to citizens at any time. The only exception is information that constitutes a state secret.

References

- [1] “Digitalization” is the word of 2019 in Ukraine according to the online dictionary “Myslovo”. (2019). Retrieved from <https://itc.ua/news/didzhitalizacziya-slovo-2019-roku-v-ukra%D1%97ni-za-versi%D1%94yu-onlajn-slovnika-mislovo/>.
- [2] Doronin, I.M. (2020). *National security of Ukraine in the information age: theoretical and legal research*. (Doctoral thesis, Research Institute of Informatics and Law of the National Academy of Legal Sciences of Ukraine, Kyiv, Ukraine).
- [3] Drobotov, S.A. (2020). Constitutional and legal support of national security in Ukraine. *Science Rise: Juridical Science*, 2(12), 24-29. doi: 10.15587/2523-4153.2020.210858.
- [4] Kubetska, O., Ostapenko, T., & Paleshko, Ya. (2020). Conditions for ensuring the national security of the state. *Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs*, 2, 321-327. doi: 10.31733/2078-3566-2020-2-321-327.
- [5] Antonov, V.O., & Shemshuchenko, Yu.S. (Ed.). (2017). *Constitutional and legal principles of national security of Ukraine*. Kyiv: Talkom.
- [6] Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.
- [7] Law of Ukraine No. 2469-VIII “On National Security of Ukraine” (2018, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2469-19#Text>.
- [8] Dosenko, S.D., & Shevchenko, T.O. (2021). Rights and freedoms of man and citizen as an element of the system of national security. *Scientific Notes of Lviv University of Business and Law*, 29, 127-133. doi: 10.5281/zenodo.563641.
- [9] Law of Ukraine No. 876-VII “On the National Guard of Ukraine” (2014, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/876-18#Text>.
- [10] Law of Ukraine No. 580-VIII “On the National Police” (2015, July). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T150580.html.
- [11] Law of Ukraine No. 912-IX “On Intelligence” (2020, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/912-20#Text>.
- [12] Volodymyr Zelensky opened the All-Ukrainian Forum “Ukraine 30. Country Security”. (2021). Retrieved from <https://drive.google.com/drive/u/1/folders/14shchqt3g6PfiUIvWhzCi9FmULvWw8>.
- [13] Decree of the President of Ukraine No. 473/2021 “On the Decision of the National Security and Defense Council of Ukraine of August 20, 2021 “On the Strategic Defense Bulletin of Ukraine”. (2021, September). Retrieved from <https://www.president.gov.ua/documents/4732021-40121>.

Список використаних джерел

- [1] «Діджиталізація» слово 2019 року в Україні за версією онлайн-словника «Мислово». URL : <https://itc.ua/news/didzhitalizacziya-slovo-2019-roku-v-ukra%D1%97ni-za-versi%D1%94yu-onlajn-slovnika-mislovo/>.
- [2] Доронін І. М. Національна безпека України в інформаційну епоху : теоретико-правове дослідження : автореф. дис. д-ра юрид. наук: 12.00.01. Київ, 2020. 39 с.
- [3] Дроботов С. А. Конституційно-правове забезпечення національної безпеки в Україні. *Science Rise : Juridical Science*. 2020. № 2(12). С. 24–29. doi: 10.15587/2523-4153.2020.210858.
- [4] Кубецька О., Остапенко Т., Палешко Я. Умови забезпечення національної безпеки держави. *Науковий вісник Дніпропетровського державного університету внутрішніх справ*. 2020. № 2. С. 321–327. doi: 10.31733/2078-3566-2020-2-321-327.
- [5] Антонов В. О. Конституційно-правові засади національної безпеки України : монографія / наук. ред. Ю. С. Шемшученко. Київ : Талком, 2017. 576 с.

- [6] Конституція України: Закон України від 28.06.1996 р. № 254к/96-ВР. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.
- [7] Про національну безпеку України : Закон України від 21.06.2018 р. № 2469-VIII. URL: <https://zakon.rada.gov.ua/laws/show/2469-19#Text>.
- [8] Досенко С. Д., Шевченко Т. О. Права та свободи людини і громадянина як елемент системи забезпечення національної безпеки. *Наукові записки Львівського університету бізнесу та права*. 2021. № 29. С. 127–133. doi: 10.5281/zenodo.563641.
- [9] Про Національну гвардію України : Закон України від 13.03.2014 р. № 876-VII. URL: <https://zakon.rada.gov.ua/laws/show/876-18#Text>.
- [10] Про Національну поліцію : Закон України від 02.07.2015 р. № 580-VIII. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/T150580.html.
- [11] Про розвідку : Закон України від 17.09.2020 р. № 912-IX. URL: <https://zakon.rada.gov.ua/laws/show/912-20#Text>.
- [12] Володимир Зеленський відкрив Всеукраїнський Форум «Україна 30. Безпека країни». URL: <https://drive.google.com/drive/u/1/folders/14shchqt3g6PfiUivWhzCi9FmULvwIWw8>.
- [13] Про рішення Ради національної безпеки і оборони України від 20 серпня 2021 року «Про Стратегічний оборонний бюлетень України» : Указ Президента України № 473/2021 від 17.09.2021 р. URL: <https://www.president.gov.ua/documents/4732021-40121>.

Система органів державної влади щодо забезпечення прав людини у сфері національної безпеки

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Анотація

Мета статті – на підставі наукового дослідження надати науково обґрунтовані висновки стосовно визначення системи органів державної влади із забезпечення прав людини у сфері національної безпеки в умовах сучасних викликів і загроз. Методологічне підґрунтя наукової статті становить цілісна й узгоджена система методів, що дала змогу належно проаналізувати предмет дослідження, зокрема використано наукові методи аналізу, синтезу, індукції та дедукції. Теоретичним підґрунтям цієї публікації стали праці вітчизняних учених, присвячені дослідженню органів державної влади щодо забезпечення прав людини у сфері національної безпеки. Наукова новизна публікації полягає в тому, що в роботі було виконано системний аналіз нормативно-правових актів у сфері правового регулювання системи органів державної влади щодо забезпечення прав людини у сфері національної безпеки. Встановлено, що діяльність із забезпечення прав людини й національної безпеки має двосторонній характер: забезпечення прав людини забезпечує державну безпеку – забезпечення державної безпеки забезпечує права людини. У статті констатовано незавершеність реформування означеної системи органів, що засвідчують недоліки правової регламентації їхньої діяльності, зокрема: 1) статус військового формування має Національна гвардія України. Водночас Національна гвардія України є військовим формуванням із правоохоронними функціями, що належить до системи Міністерства внутрішніх справ України; 2) до складу сектору безпеки й оборони належить Національна поліція України як центральний орган виконавчої влади. Водночас у Законі України «Про центральні органи виконавчої влади» немає вказівки на Національну поліцію як центральний орган виконавчої влади; 3) суб'єктами розвідувального співтовариства поміж інших, відповідно до Закону України «Про розвідку», є Служба безпеки України. Утім у ч. 2 ст. 12 Закону України «Про національну безпеку України» Службу безпеки України визначено як окремий орган у сфері забезпечення національної безпеки. Вбачається, що подвійне зазначення одних і тих самих органів у системі органів державної влади щодо забезпечення прав людини у сфері національної безпеки є юридично некоректним

Ключові слова: орган державної влади; забезпечення прав людини; національна безпека; Національна гвардія України; Міністерство внутрішніх справ України; Національна поліція України; Служба безпеки України

UDC 343.98
DOI: 10.33270/04212202.24

The identity of the criminal as an element of the forensic characteristics of the crime under Article 368 of the Criminal Code of Ukraine

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Abstract

The purpose of this research is a systematic analysis of the identity of the criminal as an element of the forensic characteristics of the crime provided for in Article 368 of the Criminal Code of Ukraine. Terminological, systemic-structural, formal-logical, comparative-legal, statistical methods were used during the processing of materials in the research. It has been proven that the identity of the criminal is one of the most important elements of the forensic characterization of the crimes provided for in Article 368 of the Criminal Code of Ukraine. It was determined that the criminal's identity as an element of his forensic characteristics in the case of acceptance of an offer, promise or receipt of an unlawful benefit is distinguished by specific features in the set of biological, psychological and social properties of the individual. It is claimed that criminals of this kind are: mostly men, who in most cases occupy managerial positions; persons with a low level of cultural awareness, focused on meeting personal financial and economic needs, commit crimes mostly alone, less often in small groups of persons, more often as an official, and one who provides or offers to provide an illegal benefit, while equally trying to hide the commission of such crimes. The necessity of studying all elements of their forensic characteristics and establishing relationships between them is substantiated

Keywords:

forensic characteristics; identity of the criminal; illegal benefit; corruption

Introduction

In At the current stage of Ukraine's development as an independent, legal, democratic state, under the influence of political, economic, social and other factors, a number of threats arise that pose a real threat to national security and the transformation of Ukraine on the path of European integration.

The phenomenon of corruption is a particular public danger, since the commission of corruption offenses leads to the destruction of the financial system, undermines the trust of citizens in the state, and destroys

the ability of officials to conscientiously fulfil their duties to protect national interests. than for personal enrichment.

Today, the fight against corruption is a priority task of national policy, as it affects all spheres of society and requires systemic institutional changes aimed at changing public consciousness. Only the elimination of corruption as a phenomenon will contribute to the introduction of new standards of behavior of civil servants and the restoration of trust in state institutions. The current state of development of systemic corruption

Article's History:

Received: 02.09.2021
Revised: 27.10.2021
Accepted: 24.11.2021

Suggest Citation:

Polyakh, A.M. (2022). The identity of the criminal as an element of the forensic characteristics of the crime under Article 368 of the Criminal Code of Ukraine. *Law Journal of the National Academy of Internal Affairs*, 11(2), 24-29.

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in Ukraine requires drastic changes in the organization of anti-corruption measures [1].

One of the types of corruption offenses, the consequences of which have become particularly relevant today, is the acceptance of an offer, promise or receipt of an illegal benefit by an official (Article 368 of the Criminal Code of Ukraine), which differs from other self-interested crimes by a high level of latency, which significantly complicates its course investigation. As a rule, two persons are involved in the commission of such crimes – the one who provides the unlawful benefit and the one who receives it. They are equally interested in concealing criminal activities. The purpose of this research is a systematic analysis of the identity of the criminal as an element of the forensic characteristics of the crime provided for in Article 368 of the Criminal Code of Ukraine.

To achieve this goal, it is necessary:

1. Reveal the concept of “person of the criminal” as an element of the forensic characteristics of the crime provided for in Article 368 of the Criminal Code of Ukraine.
2. Provide a description of the criminal's identity as an element of the forensic description of the crime provided for in Article 368 of the Criminal Code of Ukraine.

Presentation of Main Material

The commission of crimes provided for in Article 368 of the Criminal Code of Ukraine encroaches on the foundations of the social order, guarantees of constitutional rights and freedoms of man and citizen, on the functioning of the relevant branch of government and the state administration system as a whole.

Obtaining an undue advantage has various forms. According to the criminal law, the subject of such a crime is all kinds of material goods, for example: 1) property, in particular, seized from free circulation – money, valuables and other things; 2) the right of ownership (for example, documents giving the right to receive property, use it or demand the fulfilment of obligations, etc.); 3) any actions of a property nature (for example, transfer of property assets, refusal of them, refusal of ownership rights, free provision of services, payment of sanatorium-resort or tourist vouchers, admission and education of children in foreign or domestic educational institutions), construction or repair work, etc.) [2]. Thus, according to case No. 520/15000/19 of the Kyiv District Court of Odesa, PERSON_1 is charged with the fact that on 01/14/2019 in the period from 3:30 p.m. to 3:35 p.m., for selfish reasons and for the purpose of personal enrichment, realizing the illegality of his own actions, using the official position given to him, while being in room 501 of the Kyiv VP in the city of Odesa of the GNP of the Odesa region at the address N appealed to the citizen PERSON_2 with a request to provide himself with an unlawful monetary benefit in the amount of 800 US dollars. 02/04/2019 at approximately 9:30 p.m. under the same circumstances, while staying at the

address indicated above, PERSON_1 independently reduced and finally determined the amount of illegitimate benefit in the amount of USD 300 (which according to official NBU data as of 02/04/2019 amounted to UAH 8,271.21) for his failure to act in the interests of PERSON_2, as one who provides an unlawful benefit by using the official position given to him, namely: for not conducting an investigation on the basis of the mandate of the Investigative Committee of the Kyiv District. GUNP in Odesa GUNP of Odesa region in criminal proceedings No. 12019160480000159 dated 01/13/2019 under Part 3 of Art. 185 of the Criminal Code of Ukraine regarding the conduct of investigative actions aimed at establishing the involvement of PERSON_2 in the commission of the specified criminal offense. Later, on 02/07/2019, in the period from 7:19 p.m. to 7:26 p.m., while on the fifth floor near office No. 501 in the building of the Kyiv Regional State Administration, Odesa, at the address: Odesa, str. Akademika Filatova, 15a, acting deliberately, for selfish reasons and for the purpose of personal enrichment, PERSON_1, in the manner established by him, personally received an unlawful benefit in the form of money in the amount of 300 US dollars from a citizen of Ukraine, PERSON_2 (which according to official NBU data as of 02/07/2019 amounted to UAH 8,08922) for not taking actions in the interests of PERSON_2 using the given official position, namely: for not conducting criminal proceedings No. 12019160480000159 dated 01/13/2019 under part 3 of Article 185 of the Criminal Code of Ukraine, investigative (search) actions, aimed at establishing the involvement of PERSON_2 in the commission of the specified criminal offense [3]. The results of the data analysis of the conducted survey of practical workers indicate that investigators, operational workers, medical experts, prosecutors quite often faced difficulties during pre-trial investigation in criminal proceedings regarding the acceptance of an offer, promise or receipt of undue benefit by an official. This is due, firstly, to the fact that practitioners do not have a sufficient amount of knowledge about the mechanism of committing a crime to accept an offer, promise or receive an undue benefit from an official regarding the means used by the subjects of such a crime, the peculiarities of the trace picture, etc.; secondly, the lack of a single method of investigation, the basis of which is the establishment of the forensic characteristics of this type of crime, which affects the effectiveness of their investigation.

Having analysed the materials of criminal proceedings on the fact of acceptance of an offer, promise or receipt of an illegal benefit by an official, in order to understand the specifics of the investigation of this crime, it is first necessary to investigate the forensic characteristics of this type of crime.

Aspects of the issue of forensic characterization of acceptance of an offer, promise, or receipt of undue benefit by an official were considered by such researchers

as V.I. Boyarov [4], V.A. Zhuravel [5], O.Yu. Tatarov [6], A.N. Khalikov [7], D.O. Shumeiko [8] and others. At the same time, the results of their research do not fully reveal the essence of such crimes, and also do not solve the problematic issues that arise in practice during the investigation of the facts of acceptance of an offer, promise or receipt of an undue benefit by a criminal or an official, since some researchers considered relevant issues in the conditions of the Criminal Code of 1960 and without taking into account the provisions of the current criminal procedural and criminal legislation of Ukraine, while others focused only on certain elements of the forensic characteristics of accepting an offer, promise or receiving an illegal benefit by an official.

Despite the large number of scientific approaches to defining the concept and content of forensic characteristics, the study agrees with the opinion of V.Yu. Shepitko, which is considered relevant today. Thus, the researcher defines the forensic characteristics as a system of information about certain types of crimes, features of the subject of the crime, motives, the object of the offense, the environment, criminal law techniques, which are important for the detection and disclosure of such acts in a forensic way. Means and methods. The essence of forensic characterization is that it is considered as a system containing signs and data about the natural connections of traces, which are expressed by the appropriate degree of reliability, established on the basis of the generalization of these materials of criminal proceedings, verified by investigative practice [9].

As noted by A.V. Starushkevich, forensic characterization reproduces data on individual elements of the composition of the crime mainly at the probable level, in particular: the identity of the criminal and the victim; ways of preparing, committing and concealing certain types of crimes; situationally determined, causally or otherwise connected with the crime event, the results of relevant changes in the situation, which have evidentiary value; attempts to hide traces of crimes used by criminals and information about other circumstances that may be useful for a full, comprehensive and objective investigation of criminal proceedings. An important factor in the formation of the forensic characteristics of crimes is the prediction of new ways of committing them, the identification of typical methods of criminals [10]. The study shows that the identity of the criminal is one of the most important elements of the forensic characterization, since its other elements: the method of commission, the situation, the place, the time, the identity of the victim – are derived from the criminal intent and the criminal act committed by the criminal.

It should be noted that the concepts of “person of criminal” and “subject of crime” are not equated here, since “subject of crime” is a criminal law concept (natural person who has committed a crime at the age from which criminal responsibility can arise), and

“personality of a criminal” is a criminological concept (it includes biological, psychological, and social characteristics of an individual).

The question of the concept of “the person of a criminal” remains debatable among criminologists, since there is no single clear approach to its definition.

Yes, A.V. Ivanytsia notes that the “personality of a criminal” is a broad concept that encompasses the essence of a person, a set of signs characterizing his moral and spiritual world in interaction with social and individual conditions of life, which in one way or another influenced the commission of a crime, criminality [11].

According to A.F. Zelinskyi, the person of the criminal can only be discussed in relation to a person guilty of committing a crime, who committed one or more deliberate, purposeful actions, provided for by the law on criminal liability, for the realization of a common motive [12].

As noted by I.M. Danshin and A.P. Zakaliuk, the personality of a criminal is a set of essential and established social properties and signs, socially significant biological and psychological features of an individual, which, objectively realized in a specific committed crime, give the specified act signs of public danger, and the culprit is socially dangerous, taking into account that the person is subject to criminal liability provided for by the criminal law [13].

Such approaches to determining the identity of a criminal are somewhat imprecise and contradictory from the point of view of criminology and require more detailed study, analysis and clarification. There are other, more accurate and acceptable forensic theories of defining and characterizing the identity of a criminal.

In particular, M.V. Saltevsky proposed to consider the personality of the criminal as a sociobiological system, the properties and signs of which are embodied in the material environment and are used for the detection and investigation of crimes. These are physical, biological and social properties [14].

Investigating the identity of the criminal as an element of the forensic sign of acceptance of an offer, promise or receipt of undue benefit by an official, it is appropriate to note that such a sign is a combination of factors: gender, age, nationality, personality of the criminal, personality of the criminal, marital status, place of residence, social status, method life (circle of communication, habits, value priorities), economic situation (income level), etc. Under the influence of time and as a result of changes in the general political, economic, cultural and social conditions of public life, the characteristics of the criminal as an element of the forensic characteristics of acceptance of an offer, promise, receipt of undue benefit by an official have undergone some changes [15].

Data on the identity of the criminal, in particular, his behavior before, during the commission and after the acceptance by the official of an offer, promise or receipt of an unlawful benefit of accepting an offer,

promise or receipt of an unlawful benefit by an official are of great importance for the forensic characterization of crimes. The relationship between the person of the criminal and the person in whose interests the official commits criminal acts is also of great importance for forensic characterization. This enables the investigation to clearly plan the investigation, to put forward objective versions, to consistently and qualitatively carry out separate investigative (search) actions for the further disclosure of the crime and the exposure of the criminals. In the interrelationship and dependence between the elements of the forensic characteristics of the crime, the person of the criminal is a key link in the mechanism of obtaining an unlawful benefit, that is, deliberate and prepared actions. The person of the criminal – an official – will form the quantitative and qualitative content of other elements of forensic characteristics, which will influence the establishment of material and ideal traces of the crime [16].

Out of the investigated 56 (100%) criminal proceedings, in 68% of cases the offer, promise or acceptance of an illegal benefit by an official was made by a man, and only in 32% of cases by a woman. This can be explained by the fact that, firstly, the number of male officials, who occupy mainly management positions, exceeds the number of female officials, and secondly, women are less prone to the risk of accepting an offer, promise or receiving an undue benefit.

Among officials who commit such crimes, as a rule, officials with higher education and a high level of professional experience predominate [17].

Acceptance of an offer, promise, or receipt of an illegal benefit by an official is important for the criminalistic characterization of a criminal, when receiving an illegal benefit is a social deformation of a person, which manifests itself in a deviation from generally accepted principles of morality and ethics, a conscious and purposeful disregard for the principles of legality in official activities [18].

Note that for the person of a criminal who commits the crimes provided for in Article 368 of the Criminal Code of Ukraine, moral-psychological and social-role characteristics are of particular importance. Corruptors are mainly sociable people who easily establish social relationships, know how to control their own behavior, are not prone to manifestations of impulsivity, aggressiveness, emotional instability. The basis of motivation is a hypertrophied desire to satisfy one's own material needs, spiritual underdevelopment, indifference to the interests of others people, ambition, envy, greed, careerism, extortion, cult of money and other material values, thirst for the accumulation of profit and power [19].

The study agrees with researchers who distinguish the following main types of attitudes toward power that a criminal person has: the first type is characterized by a free, lawless attitude that allows violations bordering on abuse or crime (a person has a sense of

permissiveness and confidence that he has the right demand an unlawful benefit, and the right to receive it is considered as an indispensable concomitant attribute of his activity); the second type is characterized by the official's attitude towards his power with fear, which is associated with the fear of responsibility, loss of place, position (a person rarely makes decisions in power, trying to transfer them to another, especially decisions that are illegal, such persons involve intermediaries in crimes in order to to relieve oneself of possible responsibility); the third type of attitude of officials to their power is characterized as a norm, i.e. the disposition of power within the parameters and limits established by law and official functions. Such persons take a rather responsible attitude to their official duties, that is why they rarely become subjects of this category of crime [20].

The person of the criminal as an element of the forensic characteristic of accepting an offer, promise or receiving an illegal benefit is distinguished by a special social position, that is, giving the person of the criminal power, authorised to carry out administrative activities, which is conditioned by corruption risks. The social status of the criminal person is also important, which gives them specific social functions. It is the social status, position, and authority that determines the amount of illegal benefits [21].

It is proved that the identity of the criminal is one of the most important elements of the forensic characteristics of crimes under Article 368 of the Criminal Code of Ukraine.

Conclusions

1. Taking into account the above, it was established that the criminal's identity as an element of his criminalistic characteristics in the case of acceptance of an offer, promise or receipt of undue benefit is distinguished by specific features in the set of biological, psychological and social properties of the individual.

2. In view of the above, it can be concluded that the perpetrator in case of acceptance of an offer, promise or receipt of an illegal benefit is an official: mainly a man who holds a managerial position; a person with a low level of cultural awareness, focused on meeting personal financial and economic needs, commits a crime mostly alone, sometimes in small groups of people, often as an official or a person who provides or offers to provide an illegal benefit, and also tries to hide the commission of this type of crime.

3. In order to fully and comprehensively find out the circumstances of the acceptance of an offer, promise or receipt of an illegal benefit by an official, which are important for the further investigation, to perform the practical tasks assigned by the investigation, namely: planning the investigation, building investigative actions, exposing a criminal or a group of criminals, it is necessary to study all the elements of their criminal-legal characteristics and establish correlations between them.

References

- [1] Zakaliuk, A.P. (2007). *Course of modern Ukrainian criminology: Theory and practice*. Kyiv: In Yure.
- [2] Oliinyk, S.V. (2016). Some elements of forensic characteristics acceptance of an offer, promise or receipt of illegal benefit by an official. *Bulletin of the Chernivtsi Faculty of the National University "Odessa Law Academy"*, 1, 307-317.
- [3] The decision of the Kyiv district court of Odessa. Case No. 520/15000/19. (2019, October). Retrieved from <https://zakononline.com.ua/court-decisions/show/84980108>.
- [4] Boyarov, B.I. (2017). On some features of extremist creation. *Scientific Works of the National University "Odesa Law Academy"*, 19, 54-61.
- [5] Zhuravel, V.A. (2017). Forensic methods of judicial review of certain categories of criminal cases: Problems of formation and implementation. *Scientific Works of the National University "Odesa Law Academy"*, 19, 130-138.
- [6] Tatarov, O.Yu. (2015). Conducting covert investigative (search) actions against a certain category of persons. *Scientific Bulletin of Kherson State University*, 1(2), 205-208.
- [7] Khalikov, A.N. (2012). *Official crimes: Characterization, investigation, warning (forensic aspect)*. Moscow: Yurlitinform.
- [8] Shumeiko, D.O. (2017). Legal regulation and law enforcement practice of special criminal proceedings in some foreign countries. *Prykarpattya Legal Bulletin*, 16(4), 311-317.
- [9] Hlibko, V.M., Dudnikov, A.L., & Zhuravel, V.A. (2001). *Forensics*. Kyiv: In Yure.
- [10] Starushkevych, A.V. (1997). *Forensic characteristics of crimes*. Kyiv: Pravnyk-NAVSU.
- [11] Ivanytsia, A.V. (2013). The identity of the offender as an element of forensic characteristics. *Scientific Bulletin of Dnipropetrovsk National University of Internal Affairs*, 4(68), 374-381.
- [12] Zelinskiy, A.F. (1999). *Criminal psychology*. Kyiv: Iurinkom Inter.
- [13] Danshin, I.N. (2005). *General theoretical problems of criminology*. Kharkiv: Prapor.
- [14] Saltevskiy, M.V., Lukashevych, V.H., & Hlibko, V.M. (1994). *Training manual on criminology*. Kyiv: VIPOL.
- [15] Holovko, M., & Khadiieva, E. (2020). Forensic characteristics of obtaining illegal benefits. *Integración de Las Ciencias Fundamentales y Aplicadas en el Paradigma de la Sociedad Postindustrial*, 5, 68-70. doi: 10.36074/24.04.2020.v5.25.
- [16] Davydenko, V.S. (2017). Forensic support to clarify the circumstances of obtaining illegal benefits by an official. *Legal Journal of the National Academy of Internal Affairs*, 1(13), 36-45.
- [17] Denysova, T.A. (2006). The concept of punishment functions and their general characteristics. *Journal of Khmelnytsky University of Management and Law*, 1, 222-227.
- [18] Alieksieiev, O.O., Veselskyi, V.K., & Piaskovskiy, V.V. (2014). *Investigation of certain types of crimes*. Kyiv: Thentr uchb. lit.
- [19] Shostko, O. (2014). Criminological characteristics of corruption crime in Ukraine. *Questions of the Fight Against Crime*, 28, 69-78.
- [20] Official website "Department of State Labor in Kirovograd region". (2019). *On the most typical items of illicit gain*. Retrieved from <https://kr.dsp.gov.ua/index.php/4769-mu21-10-1>.
- [21] Tarkan, O. (2020). Peculiarities of conducting investigative (search) actions during the investigation of obtaining an illegal benefit by an official of a police body. *Legal Scientific Electronic Journal*, 3, 416-419. doi: 10.32782/2524-0374/2020-3/101.

Список використаних джерел

- [1] Закалюк А. П. Курс сучасної української кримінології : теорія і практика. Теоретичні засади та історія української кримінологічної науки. Київ : Видавничий Дім «Ін Юре», 2007. 424 с.
- [2] Олійник С. В. Деякі елементи криміналістичної характеристики прийняття пропозиції, обіцянки або одержання неправомірної вигоди службовою особою. *Вісник Чернівецького факультету Національного університету «Одеська юридична академія»*. 2016. № 1. С. 307–317.
- [3] Ухвала Київського районного суду м. Одеси від 16.10. 2019 р. Справа № 520/15000/19. URL : <https://zakononline.com.ua/court-decisions/show/84980108>.
- [4] Бояров В. І. Щодо деяких особливостей створення екстремістських. *Наукові праці Національного університету «Одеська юридична академія»*. 2017. Т. 19. С. 54–61.
- [5] Журавель В. А. Криміналістичні методики судового розгляду окремих категорій кримінальних справ : проблеми формування та реалізації. *Наукові праці Національного університету «Одеська юридична академія»*. 2017. Т. 19. С. 130–138.
- [6] Татаров О. Ю. Проведення негласних слідчих (розшукових) дій стосовно окремої категорії осіб. *Науковий вісник Херсонського державного університету*. 2015. Т. 1. № 2. С. 205–208.
- [7] Халиков А. Н. Должностные преступления : характеристика, расследование, предупреждение (криминалистический аспект). Москва : Юрлитинформ, 2012. 312 с.

- [8] Шумейко Д. О. Правове регулювання та правозастосовна практика здійснення спеціального кримінального провадження у окремих зарубіжних країнах. *Прикарпатський юридичний вісник*, 2017. Т. 16. № 4. С. 311–317.
- [9] Глібко В. М., Дудніков А. Л., Журавель А. Криміналістика. Київ : Ін Юре, 2001. 684 с.
- [10] Старушкевич А. В. Криміналістична характеристика злочинів : навч. посіб. Київ : Правник-НАВСУ, 1997. 44 с.
- [11] Іваниця А. В. Особа злочинця як елемент криміналістичної характеристики. *Науковий вісник Дніпропетровського національного університету внутрішніх справ*. 2013. № 4(68). С. 374–381.
- [12] Зелінский А. Ф. Кримінальна психологія : науч.-практ. изд. Киев : Юринком Интер, 1999. 240 с.
- [13] Даньшин И. Н. Общетеоретические проблемы криминологии : монография. Харьков : Прапор, 2005. 224 с.
- [14] Салтевський М. В., Лукашевич В. Г., Глібко В. М. Навчально-довідковий посібник з криміналістики. Київ : ВІПОЛ, 1994. 180 с.
- [15] Головка М., Хадієва Е. Криміналістична характеристика одержання неправомірної вигоди. *Integración de las ciencias fundamentales y aplicadas en el paradigma de la sociedad post industrial*. 2020. № 5. С. 68–70. doi : 10.36074/24.04.2020.v5.25.
- [16] Давиденко В. С. Криміналістичне забезпечення з'ясування обставин одержання неправомірної вигоди службовою особою. *Юридичний часопис Національної академії внутрішніх справ*. 2017. № 1(13). С. 36–45.
- [17] Денисова Т. А. Поняття функцій покарання та їх загальна характеристика. *Часопис Хмельницького університету управління та права*. 2006. № 1. С. 222–227.
- [18] Алексєєв О. О., Весельський В. К., Пяковський В. В. Розслідування окремих видів злочинів : навч. посіб. 2-ге вид., переробл. та доповн. Київ : Центр учб. літ., 2014. 320 с.
- [19] Шостко О. Криминологічна характеристика корупційної злочинності в Україні. *Питання боротьби зі злочинністю*. 2014. Т. 28. С. 69–78.
- [20] Про найтипівші предмети неправомірної вигоди. Управління Держпраці у Кіровоградській області. URL : <https://kr.dsp.gov.ua/index.php/4769-mu21-10-1>.
- [21] Таркан О. Особливості проведення слідчих (розшукових) дій під час розслідування одержання неправомірної вигоди службовою особою органу поліції. *Юридичний науковий електронний журнал*. 2020. № 3. С. 416–419. doi : 10.32782/2524-0374/2020-3/101.

Особа злочинця як елемент криміналістичної характеристики злочину, передбаченого статтею 368 Кримінального кодексу України

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Анотація

Метою цієї статті є системний аналіз особи злочинця як елемента криміналістичної характеристики злочину, передбаченого статтею 368 Кримінального кодексу України. Під час опрацювання матеріалів статті застосовано термінологічний, системно-структурний, формально-логічний, порівняльно-правовий і статистичний методи. Обґрунтовано, що особа злочинця є одним із найважливіших елементів криміналістичної характеристики злочинів, передбачених статтею 368 Кримінального кодексу України. Визначено, що особа злочинця як елемент її криміналістичної характеристики в разі прийняття пропозиції, обіцянки або одержання неправомірної вигоди вирізняється специфічними ознаками в сукупності біологічних, психологічних і соціальних рис особистості. Аргументовано, що особою злочинця в таких злочинах є: переважно чоловіки, які здебільшого обіймають керівні посади; особи з низьким рівнем культурної свідомості, орієнтовані на задоволення особистих фінансово-економічних потреб, вчиняють злочин переважно одноосібно, інколи нечисленними групами осіб, часто як службова особа або яка надає чи пропонує надати неправомірну вигоду, причому однаково намагаються приховати вчинення такого роду злочинів. Обґрунтовано потребу в дослідженні всіх елементів їх криміналістичної характеристики та встановлення кореляційних зв'язків між ними

Ключові слова:

криміналістична характеристика; особа злочинця; неправомірна вигода; корупція

UDC 343.983:004
DOI: 10.33270/04212202.30

Modern possibilities of forensic examination in the process of investigation of crimes in the field of computer systems and telecommunication networks

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Abstract

The purpose of the study is to investigate the current issues of attracting special knowledge in the investigation of crimes in the use of computer systems and telecommunication networks. The methodological basis of the study is the use of a set of methods and methodological approaches, in particular: formal legal, structural-functional, system and comparative legal, analysis, synthesis, forecasting, etc. As part of the coverage of problematic issues in the fight against computer crime, negative factors that are common in Ukraine are highlighted. It is emphasised that computer crime as a new form of antisocial behaviour poses a serious threat to the security and normal functioning of society. Therefore, the main goal of the national policy in countering criminal offences in the use of computer systems and telecommunication networks is the interaction and coordination of efforts of expert structures with law enforcement agencies, and providing them with the necessary resources and facilities. Specialised expert research is fundamentally important for solving and investigating crimes in the field of computer technologies, telecommunication systems and networks. The correct definition of the object and purpose of the expert examination and the correct formulation of the expert's questions, which depend directly on the tasks of the expert examination, play an important role in the assignment of these types of expert examinations. In this regard, errors in asking questions to the expert constitute an error in determining the task that the expert examination should perform. Crimes in the use of computers and telecommunication networks are a complex anti-social phenomenon that covers almost all spheres of human life and directly concerns such a concept as information security. Effective detection and investigation of these criminal offences require, first of all, high-quality involvement of qualified specialists in the field of computer technology in the investigation process. Currently, almost no recommendations have been developed in forensic science that would relate to the specifics of investigating and conducting forensic examinations in these categories of cases. This is primarily conditioned by the novelty of the outlined problem, the availability and rapid increase in the number of varieties of computer and mobile devices, their services and mobile communication tools. Effective investigation of crimes in the field of information and computer technologies depends on timely and correct conduct of the necessary expert investigation. In addition to traditional forensic research, specialised expertise that implements a number of searches diagnostic and identification tasks related to the analysis of both electronic computing equipment and forensic information that they contain is important in the detection and investigation of crimes in the field of computer technology

Keywords:

electronic computer; forensic examination; criminal offence; computer crime; information security

Article's History:

Received: 20.09.2021
Revised: 02.11.2021
Accepted: 18.11.2021

Suggest Citation:

Teplytskyi, B.B. (2022). Modern possibilities of forensic examination in the process of investigation of crimes in the field of computer systems and telecommunication networks. *Law Journal of the National Academy of Internal Affairs*, 11(2), 30-37.

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Introduction

Defining the main directions of the national policy in the field of information security is extremely relevant for modern Ukraine. Given the rapid progress in the development of ICT, it should be borne in mind that the life of society directly depends on the security of its information environment.

The search for new, more effective ways to detect and neutralise influences on information, in particular, in the world's open networks, is a natural defensive reaction of society, and Ukraine is no exception.

According to leading international organisations, the losses caused by criminal offences in the use of electronic computers and telecommunication networks can be compared with the income from illegal trafficking in narcotic drugs and weapons. In the United States alone, the annual economic losses from these types of criminal acts amount to more than USD 100 billion. Moreover, many torts in this area remain hidden, which indicates their high latency [1].

The purpose of the study is to investigate the current issues of attracting special knowledge in the investigation of crimes in the use of computers and telecommunication networks. The achievement of this goal involves completing the following tasks:

- to determine the main goal of the national policy on countering criminal offences in the field of computer technologies;
- to investigate the main form of using special knowledge in criminal proceedings during the investigation of crimes in the field of computer technologies;
- to analyse the object and main tasks of forensic research in the investigation of crimes in the field of computer technologies.

Presentation of Main Material

The Outlining the problematic issues of combating computer crime in the modern world, the following negative factors inherent in Ukraine were identified:

- lack of a well-established system of legal, organisational and technical support for the legitimate interests of citizens, the state, and society in the field of Information security;
- limited opportunities for budget financing of work on creating a legal, organisational and technical base for information security;
- inadequate coordination of actions in countering computer crime by law enforcement agencies and insufficient training of their personnel to effectively prevent, detect, and investigate such illegal acts;
- imperfect system of unified accounting of offences committed with the help of informatisation tools;
- the lag of the domestic information technology industry and their databases from the world level [2].

Computer crime as a new form of antisocial behaviour poses a serious threat to the security and

normal functioning of society. Given this, the main goal of the national policy on countering criminal law violations in the use of computers and telecommunication networks should be to interact and coordinate the efforts of expert structures with law enforcement agencies, and provide them with the necessary resources and facilities.

The interaction of the relevant authorities is mainly reduced to an episodic exchange of information. The most important thing is missing – a complete system of continuous monitoring of the situation in the field of information security of various systems and timely (preventive) decision-making to identify and stop such types of criminal offences. Evidently, the creation of a complete system is impossible if effective interaction of domestic expert structures with expert and law enforcement agencies of foreign countries that fight computer crime is not established. In addition, any system, even the most technologically advanced, will not be able to achieve its goal if it is not provided with highly qualified personnel [3].

Unfortunately, law enforcement agencies in Ukraine do not have a sufficient number of specialists who understand modern technology and are able to quickly identify and solve crimes in the field of computer technology. Therefore, the creation of a holistic system of training and retraining of specialists in countering computer offences is a priority task of the law enforcement bodies.

Moreover, the processes of effective detection, investigation, and prevention of crimes committed using computer capabilities require the creation of all the necessary methodological and technical means [4]. Given the weak development of the relevant tools, this task is of paramount importance in the implementation of measures to adequately counteract computer crime. This area is closely related to the problem of improving the regulatory framework, the lack of development of which so far does not allow properly resisting illegal actions in the computer sphere.

In addition, the lack of a clear criminal legal qualification of crimes in the sphere of use of computers and telecommunication networks creates difficulties in interpreting and applying the provisions of the law, which restricts the actions of law enforcement agencies to implement tasks to counteract computer crime. Ultimately, one of the main tasks of effectively combating criminal offences in the use of computers and telecommunication networks is to conduct a complex of studies to improve and create software, hardware, and technical means that will ensure the effective protection of computer networks and their databases.

The results of the analysis of expert practice in Ukraine show that the tension of the criminal situation in the field of computer technology use is constantly

increasing. This circumstance gives rise to the assertion that:

- firstly, information becomes the subject of criminal encroachment, since its use, distribution, or sale gives high profits;

- secondly, expert and law enforcement agencies are gradually accumulating experience in combating these criminal offences, and therefore, they are developing more effective ways to detect, disclose, and stop them [5].

During the investigation of such high-tech crimes, it is necessary to identify and extract traces and physical evidence presented in the form of information in electronic computing, telecommunications systems, magnetic media, software products, and computer equipment. In this regard, there is an urgent need for investigators to attract special knowledge and skills in using the latest information technologies, that is, such scientific, technical, and other professional knowledge that is not generally known to the investigator, prosecutor, court, and other participants in the process.

In this regard, A. F. Koni in his book "Court – Science – Art" noted that judicial practice quite often necessitates the use of special studies, concentrating on them the core of the case and resorting to the involvement of experts from various special fields of knowledge, art, crafts [6]. In this context, B.M. Shaver in 1940 stated that effective detection and investigation of crimes directly depends on the use of knowledge and achievements of technical sciences in the investigation process [7].

In Ukrainian criminal procedure, special knowledge is used in three forms, namely:

- if specialists are involved in conducting certain investigative, procedural, or judicial actions (Article 71 of the Criminal Procedure Code of Ukraine);

- within the framework of conducting expert examinations (Articles 242-245, 332 of the Criminal Procedure Code of Ukraine);

- during the interrogation of the expert (Part 7 of Article 5, Part 7 of Article 101, Article 356 of the Criminal Procedure Code of Ukraine) [8].

The main procedural form for attracting and using scientific, technical, and other special knowledge in criminal proceedings is considered to be expertise, which is based on a special study and the corresponding qualified expert opinion directly related to pre-trial investigation [9]. For the first time in 1949, A.I. Winberg raised the issue of introducing such a procedural figure as a specialist into criminal proceedings together with an expert.

According to the Ukrainian criminal procedure legislation, a specialist is a person who has special knowledge and skills in using technical or other means and can provide advice during pre-trial investigation and judicial proceedings on issues that require appropriate special knowledge and skills (Part 1 of Article 71).

The specialist implements special knowledge in two forms, namely: non-procedural – oral explanations and methodological consultations on special issues; procedural – direct application of special knowledge and forensic technology, other scientific and technical means during the identification, seizure, consolidation, and analysis of evidence.

Conducting a forensic examination in Ukrainian legislation is regulated by: the Law of Ukraine "On Forensic Examination" of February 25, 1994, No. 4038-XII [10]; the Criminal Procedure Code of Ukraine (Art. 69, 70, 101, 102, 232, 242-245, 518) [8]; Civil Procedure Code of Ukraine (Art. 72, 73, 102-115, 255, 237, 239, 298) [11]; Regulation on the Expert Service of the Ministry of Internal Affairs of Ukraine of November 3, 2015, No. 1343 [12]; Instruction on the appointment and conduct of forensic examinations and expert research and Scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert research of October 8, 1998, No. 53/5 [13]; Instruction on the specifics of the implementation of forensic expert activities by certified forensic experts who do not work in state specialised expert institutions of December 12, 2011, No. 3505/5 [14].

In accordance with the provisions of these regulations, forensic expertise is considered to be a research based on special knowledge in the field of science, technology, art, craft, etc., objects, phenomena and processes in order to provide an opinion on issues that are or may be the subject of judicial proceedings [10]. Based on this definition, it can be concluded that a forensic examination in criminal proceedings is appointed when the establishment of specific circumstances in a criminal proceeding requires specialised knowledge of the relevant persons, i.e., experts. This is also emphasised by the norm of Article 242 of the Criminal Procedure Code of Ukraine [15], which states that forensic expertise is carried out by the relevant specialised expert institution or certified forensic experts who do not work in these institutions, if special knowledge is needed to clarify the circumstances relevant to criminal proceedings [8].

Specialised expert research is fundamentally important for solving and investigating crimes in the field of computer technologies, telecommunication systems and networks [16]. Scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert research, approved by the Order of the Ministry of Justice of Ukraine of October 8, 1998 No. 53/5, define: 1) expertise of computer equipment and software products; 2) expertise of telecommunications systems and equipment [6], including them to the class of engineering and technical expertise (that is, by origin electronic computer equipment belongs to engineering and technical developments).

Thus, the object of forensic research in the investigation of crimes in the field of using computer technologies is not only computer-based equipment but also the information contained in electronic media. Moreover, the development of mobile and computer technologies has given a wide range of digital and fully portable devices, their mobile applications, services, and mobile communication tools. As a result, this allowed carrying out operations for receiving, processing, and transmitting information in almost all spheres of human life. Consequently, the problem of information security has become more acute due to the processes of penetration of technical means of processing and transmitting information into almost all spheres of society's life. Therefore, the object of forensic examinations in the detection and investigation of crimes in the field of use of computers and telecommunication networks depends primarily on the method and mechanism of committing and concealing a crime.

An important role in the appointment of an expert examination in the investigation of crimes in the use of computers and telecommunication networks is played by the correct formulation of questions to the expert, which directly depends on the tasks of expert research. In this regard, an error in stating questions to the expert is actually an error in determining the task performed by the expert examination. The range of tasks and questions that may be posed to the expert when appointing computer forensic examinations is sufficiently well covered in the forensic literature [17]. These recommendations may well be used when assigning an expert examination.

In particular, the main tasks to be considered are identification and non-identification (diagnostic or situational) tasks consisting of: setting the intended purpose and functionality of devices belonging to the computer; installation of the intended purpose and functionality of the software; establishing the fact of development and the chronology of software development; establishing the fact of development and chronological characteristics of the production of text documents; detection and recovery of deliberately destroyed text files of different formats or their fragments; establishing the facts of receiving and transmitting facsimile messages via modem connection, restoring texts and the chronology of information exchange; establishing the facts of the implementation of photomontage, editing of video and audio recordings; establishing authorship and chronological characteristics of the performance of these works; establishing the facts of the production of seals, stamps, letterheads, and other graphic products and determining the chronology of the production of graphic documents; establishing the facts of development, authorship and chronological characteristics of video products (video films, commercials,

etc.) made using 3D technologies; restoration and analysis of low quality video information taken with insufficient exposure, insufficient illumination of objects or damaged for other reasons; restoration and analysis of low quality audio information recorded in high noise conditions, with insufficient microphone sensitivity, spoiled for some other reason; restoration and analysis of information contained in databases (information systems, accounting, directories, etc.); restoring intentionally deleted information or its fragments; recovery and analysis of information protected from unauthorised access (overcoming codes, passwords, etc.); setting the purpose and functionality of Internet applications; establishing technological sessions in the Internet, detection, analysis and recovery of information obtained under the protocols NTTR, FTP, UUCP, POP (files, e-mail messages, visits to internet sites, etc.); establishing the facts of software development intended for unauthorised access to computer networks; establishing the facts of software development for unauthorised access to distributed databases and database servers; establishing the facts of manufacturing or availability on the computer of software intended for unauthorised payment of credit cards in the e-commerce industries; establishing the facts of manufacturing and deliberate distribution of computer viruses and programmes that are dangerous from the standpoint of disruption of computer networks; establishing the facts of manufacturing information on the internet, the content and methods of distribution of which do not comply with the current legislation of Ukraine (pornography, videos, photos, texts, etc.); analysing the security of internet applications that use HTML, Java, VBA, XML, ASP, Sybase, Oracle, MS jet, PostgreSQL, etc.; establishing the facts of unauthorised access to information resources of corporate networks and the Internet; determining the computer from which unauthorised access to information resources is carried out, etc.

In some cases, when investigating crimes in the field of using electronic computers and telecommunication networks, comprehensive and commission examinations may be appointed. To perform tasks related to the economic and financial activities of institutions, a comprehensive computer-technical and forensic accounting expertise is carried out. In order to establish the device on which the document was executed and compare the document with the image in the file of institutions, a comprehensive computer-technical and forensic technical examination of documents is assigned. To investigate consumer properties, storage conditions, and the cost of computer tools and software, a comprehensive computer-technical and forensic commodity expertise is carried out. To establish the source of origin of software products, video and audio products, a comprehensive

computer-technical expertise and expertise of intellectual property objects are assigned.

In addition, research in recent years shows that more and more often during the investigation of crimes in the field of computer technology, the investigation faces the need for expert research of speech information transmitted by computer networks. In these cases, forensic scientists recommend appointing forensic linguistic examinations, the object of which, in their opinion, is speech (text) information recorded on a certain material medium. At the same time, additional opportunities for collecting the necessary evidence can be provided by both modern capabilities of traditional (forensic author's expertise) and relatively new recently formed examinations (semantic and textual expertise), in order to identify extremist statements, inciting national, religious and racial hatred, violation of intellectual property rights, etc.

To investigate the information contained on computer media, the expert is provided with a computer media and a computer complex, which includes the media under study. In some cases, it would be sufficient to provide only a computer medium. If possible, an expert should be consulted in advance of such a study.

To determine the compliance of software products with certain parameters, and the cost of the software product, the expert is provided with a media with a copy of the software product under study and a reference (distribution) copy of the software product. If a distributive copy of a software product is not available, an examination should not be refused, as in some cases it can be carried out with a copy of the software product.

To investigate the technical condition and determine the cost of computer equipment, the expert is provided with computer equipment, as well as technical documentation for it. The removal of computer equipment blocks should be entrusted to an expert.

To establish the authorship of the software product under study, the expert is provided with programmes in the form of source texts, library, and executable modules, and programmes (source texts, library and executable modules) created by the person in respect of whom the version is being checked whether or not he is the author of the product under investigation

To determine which objects should be provided to the expert in each specific case, it is advisable to get advice from an expert (specialist) in the field of computer technology. Based on the results of the expert examination, the expert draws up and signs an expert opinion. This conclusion is important in the system of means of proof in criminal proceedings. Therefore, the specifics of the investigation of crimes in the computer sphere actualise the need for competent and effective work of the investigator to collect and study material evidence, documents, and other material information

about the crime, which is mainly contained in certain electronic computing and software media. At the same time, the investigative bodies must fully obtain and document verbal criminally significant information in order to establish the involvement of a certain person in the crime committed.

As part of the coverage of problematic issues in the fight against computer crime, negative factors that are common in Ukraine are highlighted. It is emphasised that computer crime as a new form of antisocial behaviour poses a serious threat to the security and normal functioning of our society, and therefore the main goal of the national policy in countering criminal offences in the use of computers, systems, and computer and telecommunication networks is the interaction and coordination of efforts of expert structures with law enforcement agencies, and providing them with the necessary resources and facilities.

Specialised expert research is fundamentally important for solving and investigating crimes in the field of computer technologies, telecommunication systems and networks. The correct definition of the object and purpose of the expert examination and the correct formulation of the expert's questions, which depend directly on the tasks of the expert examination, play an important role in the assignment of these types of expert examinations. In this regard, errors in asking questions to the expert constitute an error in determining the task that the expert examination should perform.

Conclusions

A crimes in the use of computers and telecommunication networks are a complex anti-social phenomenon that covers almost all spheres of human life and directly concerns such a concept as information security. Effective detection and investigation of these criminal offences require, first of all, high-quality involvement of qualified specialists in the field of computer technology in the investigation process.

Currently, almost no recommendations have been developed in forensic science that would relate to the specifics of investigating and conducting forensic examinations in these categories of cases. This is primarily conditioned by the novelty of the outlined problem, the availability and rapid increase in the number of varieties of computer and mobile devices, their services and mobile communication tools. Effective investigation of crimes in the field of information and computer technologies depends on timely and correct conduct of the necessary expert research. In addition to traditional forensic research, specialised expertise that implements a number of search diagnostic and identification tasks related to the analysis of both electronic computing equipment and forensic information that they contain is important in the detection and investigation of crimes in the field of computer technology.

References

- [1] Computer crime in the United States. (n.d.). Retrieved from https://www.crime-research.ru/library/usa_crime.htm.
- [2] Pashniev, D.V. (2007). The use of special knowledge in the investigation of crimes committed with the use of computer technology. (Doctoral thesis, Kharkiv National University of Internal Affairs, Kharkiv, Ukraine).
- [3] Meshcheriakov, V.A. (2002). *Crimes in the field of computer information: The foundations of the theory and practice of investigation*. Voronezh: Voronezh State University.
- [4] Shcherbakovskiy, M.G. (2005). *Forensic examinations: Purpose, production, use*. Kharkov: Espada.
- [5] Motliakh, O.I. (2005). *Questions of methods of investigation of crimes in the field of information technologies*. (Doctoral thesis, Academy of Advocacy of Ukraine, Kyiv, Ukraine).
- [6] Koni, A.F. (1923). *Court – science – art (from the memoirs of a judicial figure)*. Petrograd: Polarnaia zvezda.
- [7] Shaver, B.M., & Vinberg, A.I. (1940). *Criminalistics*. Moscow: Iuridiceskoe izdatelstvo NKIU SSSR.
- [8] Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon0.rada.gov.ua/laws/show/4651-17>.
- [9] Rossinskaia, E.R., & Usov, A.I. (2001). *Forensic computer-technical expertise*. Moscow: Pravo i zakon.
- [10] Law of Ukraine No. 4038-XII “On Forensic Examination”. (1994, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/4038-12#Text>.
- [11] Law of Ukraine No. 1618-VI “Civil Procedure Code of Ukraine”. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15>.
- [12] Order of the Ministry of Internal Affairs of Ukraine No. 1343 “On the Statement of the Situation on Expert Service of the Ministry of Internal Affairs of Ukraine”. (2015, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/z1390-15#Text>.
- [13] Order of the Ministry of Justice of Ukraine No. 53/5 “On Approval of the Instruction on Appointment and Carrying Out of Forensic Examinations and Expert Researches and Scientific and Methodical Recommendations Concerning Preparation and Appointment of Forensic Examinations and Expert Researches”. (1998, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0705-98#Text>.
- [14] Order of the Ministry of Justice of Ukraine No. 3505/5 “On the Statement of the Instruction on Features of Implementation of Judicial Expert Activity by the Certified Judicial Experts Who Do Not Work in the State Specialized Expert Institutions”. (2011, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0705-98#Text>.
- [15] Cherniakhovskiy, B.V. (2020). Features of the investigative review during the investigation of unauthorized interference in the work of computers, automated systems, computer networks or telecommunication networks. *Scientific Herald of National Academy of Internal Affairs*, 2(115), 58-68. doi: 10.33270/01201152.58.
- [16] Palamarchuk, L.P. (2004). Forensic support for the investigation of illegal interference in the work of electronic computers (computers), systems and computer networks (PhD thesis, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine).
- [17] Polishchuk, V.A. (2018). Features of expert experiment during forensic computer and technical examinations. *Forensic Bulletin*, 30(2), 116-121. doi: 10.37025/1992-4437/2018-30-2-116.

Список використаних джерел

- [1] Комп'ютерні злочини у США. URL: https://www.crime-research.ru/library/usa_crime.htm.
- [2] Пашнев Д. В. Використання спеціальних знань при розслідуванні злочинів, вчинених із застосуванням комп'ютерних технологій : дис. ... канд. юрид. наук: 12.00.09. Харків, 2007. 228 с.
- [3] Мещеряков В. А. Преступления в сфере компьютерной информации : основы теории и практики расследования. Воронеж : Воронеж. гос. ун-т, 2002. 408 с.
- [4] Щербаковский М. Г. Судебные экспертизы : назначение, производство, использование. Харьков : Эспада, 2005. 544 с.
- [5] Мотлях О. І. Питання методики розслідування злочинів у сфері інформаційних технологій : дис. ... канд. юрид. наук : 12.00.09. Київ, 2005, 221 с.
- [6] Кони А. Ф. Суд – наука – искусство. Петроград : Полярная звезда, 1923. 68 с.
- [7] Шавер Б. М., Винберг А. И. Криминалистика. Москва : Юрид. изд-во НКЮ СССР, 1940. 200 с.
- [8] Кримінальний процесуальний кодекс України : Закон України від 13.04.2012 р. № 4651-VI. URL : <http://zakon0.rada.gov.ua/laws/show/4651-17>.
- [9] Россинская Е. Р., Усов А. И. Судебная компьютерно-техническая экспертиза. Москва : Право и закон, 2001. 416 с.
- [10] Про судову експертизу: Закон України від 25.02.1994 р. № 4038-XII. URL : <https://zakon.rada.gov.ua/laws/show/4038-12#Text>.

- [11] Цивільний процесуальний кодекс України : Закон України від 18.03.2004 р. № 1618-VI. URL : <https://zakon.rada.gov.ua/laws/show/1618-15>.
- [12] Про затвердження Положення про Експертну службу МВС України: Наказ МВС України від 03.11.2015 р. № 1343. URL: <https://zakon.rada.gov.ua/laws/show/z1390-15#Text>.
- [13] Про затвердження Інструкції про призначення та проведення судових експертиз та експертних досліджень та науково-методичні рекомендації з питань підготовки та призначення судових експертиз та експертних досліджень: Наказ Міністерства юстиції України від 08.10.1998 р. № 53/5. URL : <https://zakon.rada.gov.ua/laws/show/z0705-98#Text> (дата звернення 05.03.2021).
- [14] Про затвердження Інструкції про особливості здійснення судово-експертної діяльності атестованими судовими експертами, що не працюють у державних спеціалізованих експертних установах : Наказ Міністерства юстиції України від 12.12.2011 р. № 3505/5. URL: <https://zakon.rada.gov.ua/laws/show/z0705-98#Text>.
- [15] Черняхівський Б. В. Особливості проведення слідчого огляду під час розслідування несанкціонованого втручання в роботу комп'ютерів, автоматизованих систем, комп'ютерних мереж чи мереж електрозв'язку. *Науковий вісник Національної академії внутрішніх справ*. 2020. Т. 2. № 115. С. 58–68. doi : 10.33270/01201152.58.
- [16] Паламарчук Л. П. Криміналістичне забезпечення розслідування незаконного втручання в роботу електронно-обчислювальних машин (комп'ютерів), систем та комп'ютерних мереж : дис. ... канд. юрид. наук : 12.00.09. Київ, 2004, 214 с.
- [17] Поліщук В. А. Особливості експертного експерименту під час проведення судових комп'ютерно-технічних експертиз. *Криміналістичний вісник*. 2018. Т. 30, № 3. С. 116–121. doi: 10.37025/1992- 4437/2018-30-2-116.

Сучасні можливості судової експертизи в процесі розслідування злочинів у сфері використання електронно-обчислювальних машин (комп'ютерів), систем та комп'ютерних мереж і мереж електрозв'язку

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Анотація

Мета статті полягає в дослідженні актуальних питань залучення спеціальних знань під час розслідування злочинів у сфері використання електронно-обчислювальних машин (комп'ютерів), систем та комп'ютерних мереж і мереж електрозв'язку. Методологічною основою дослідження є використання комплексу методів і методичних підходів, зокрема: формально-юридичного, структурно-функціонального, системного й порівняльно-правового, аналізу, синтезу та прогнозування тощо. У межах висвітлення проблемних питань боротьби з комп'ютерною злочинністю виокремлено негативні чинники, що поширені саме в Україні. Акцентовано, що комп'ютерна злочинність як нова форма антигромадської поведінки становить серйозну загрозу безпеці й нормальному функціонуванню нашого суспільства, а тому основною метою державної політики в протидії кримінальним правопорушенням у сфері використання електронно-обчислювальних машин (комп'ютерів), систем та комп'ютерних мереж і мереж електрозв'язку є взаємодія та координація зусиль експертних структур із правоохоронними органами, а також забезпечення їх необхідною матеріально-технічною базою. Принципово важливе значення для розкриття та розслідування злочинів у сфері використання комп'ютерних технологій, систем і мереж електрозв'язку мають спеціалізовані експертні дослідження. Важливу роль у призначенні цих видів експертиз відіграють правильне визначення об'єкта та завдання експертного дослідження, а також правильна постановка питань експерту, які безпосередньо залежать від завдань експертного дослідження. У зв'язку із цим, помилки в постановці питань експерту становлять помилку у визначенні завдання, яке має виконати

експертиза. Злочини у сфері використання електронно-обчислювальних машин (комп'ютерів), систем та комп'ютерних мереж і мереж електрозв'язку є складним антисоціальним явищем, що охоплює майже всі сфери життєдіяльності людини та безпосередньо стосується такого поняття, як інформаційна безпека. Ефективне розкриття та розслідування цих кримінальних правопорушень потребують передусім якісного залучення до процесу розслідування кваліфікованих фахівців у галузі використання комп'ютерних технологій. Нині в криміналістичній науці майже не розроблено рекомендацій, які стосувалися б особливостей розслідування та проведення судових експертиз за цими категоріями справ. Пов'язано це насамперед з новизною окресленої проблеми, доступністю та стрімким збільшенням кількості різновидів комп'ютерно-мобільних пристроїв, їх сервісів і засобів мобільного зв'язку. Результативне розслідування злочинів у сфері інформаційно-комп'ютерних технологій залежить від своєчасного та правильного проведення необхідних експертних досліджень. Крім традиційних криміналістичних досліджень, важливе значення в розкритті та розслідуванні злочинів у сфері використання комп'ютерних технологій мають спеціалізовані експертизи, які реалізують низку пошукових діагностичних й ідентифікаційних завдань, що стосуються дослідження як електронно-обчислювальної техніки, так і криміналістичної інформації, яка на них міститься

Ключові слова:

електронно-обчислювальна машина; судова експертиза; кримінальне правопорушення; комп'ютерна злочинність; інформаційна безпека

UDC 343.13
DOI: 10.33270/04212202.38

Recognition of inadmissibility of evidence obtained in the course of monitoring the commission of an offence in criminal proceeding in the field of official activities

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Abstract

The purpose of the study is to consider the problems of ensuring the admissibility of evidence obtained in the course of monitoring the commission of an offence in criminal proceedings concerning crimes in the sphere of official activities. Attention is focused on the fact that the institute of secret investigative (search) actions has a double operational-search and criminal procedural content, since operational-search measures were the basis of secret (investigative) search measures by transforming the procedure for their implementation, which differs in the subjects and directions of further use of the information obtained. It is noted that the complex and underinvestigated procedural essence of control over the commission of crimes causes problems in ensuring the admissibility of evidence obtained during its conduct. It was found out that the Criminal Procedure Code of Ukraine defines a special criterion for the inadmissibility of evidence obtained during the control over the commission of a crime as a result of provoking a person to commit this crime by law enforcement agencies. Based on the analysis of materials of criminal proceedings, it is established that provocation of a crime is often a circumstance that excludes the admissibility of evidence, and becomes the basis for passing acquittals. It is proved that, according to the practice of the European Court of Human Rights, provocation of a crime exists when law enforcement officers do not limit themselves to passively establishing the circumstances of a person's possible commission of a crime in order to collect relevant evidence and, if there are grounds for it, bring a person to justice, but incite that person to commit a crime, undermining the principle of fairness of proceedings. The study argues for the need to apply criteria for distinguishing permissible interference and provocation in the course of monitoring the commission of a crime, which are formed according to the practice of the European Court of Human Rights. Typical violations of the requirements of the Criminal Procedure Law during control over the commission of a crime are considered, which entails, in particular, an insufficient level of regulation by departmental bylaws of the procedure for conducting and recording secret investigative (search) actions. Such violations based on the results of the analysis of investigative and judicial practice include: 1) provocation of a crime – cases when officials involved, who are either employees of security agencies, or persons acting on their behalf, do not limit their actions only to the investigation of criminal proceedings in essence in an implicit way, but influence the subject to commit a crime that would otherwise not have been committed, in order to make it possible to detect a crime, that is, to obtain evidence and open criminal proceedings (in accordance with the practice of the European Court of Human Rights); 2) lack of proper procedural documents in the materials of criminal proceedings certifying the right of operational employees to exercise control over the commission of a crime; 3) violations in the choice of methods and procedures for recording the progress and information obtained during the control over the commission of a crime. It is summed up that the imperfection of normative regulation of control over the commission of a crime in the provisions of the Criminal Procedure Code of Ukraine and subordinate acts leads to procedural and tactical errors on the part of the prosecution in the process of conducting them. In turn, this leads to the inadmissibility of using the information obtained in court proceedings when proving it. As a result, the efforts and resources of the law enforcement system are nullified, and the constitutional rights of a person not to be subjected to criminal punishment are violated until the guilt is legally proven

Keywords:

control over the commission of a crime; special investigative experiment; provocation of a crime; admissibility of evidence; proof

Article's History

Received: 19.08.2021

Revised: 30.09.2021

Accepted: 20.10.2021

Suggest Citation:

Gladiy, E.V. (2021). Recognition of inadmissibility of evidence obtained in the course of monitoring the commission of an offence in criminal proceedings in the field of official activities. *Law Journal of the National Academy of Internal Affairs*, 11(2), 38-44.

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Introduction

The current Criminal Procedure Code of Ukraine has provided for a new institution for the doctrine of domestic criminal procedure of secret investigative (search) actions (SISAs), which has a double operational-search and criminal procedural essence, since operational-search measures that are outside the current criminal procedural form, was the basis of the SISAs by transforming the procedure for their conduct, which differs in the subjects and directions of further use of the information obtained.

As a result of this approach, SISAs can be conducted both for the purpose of investigating crimes, and for the purpose of searching for and recording information about preparing crimes or persons preparing to commit a crime. Among such procedural actions, control over the commission of a crime should also be singled out.

The purpose of the study is to investigate the common law regulation and identify procedural errors typical of investigative and judicial practice in conducting control over the commission of a crime as SISAs in criminal proceedings in Ukraine.

The theoretical and legal foundations and certain problems of SISAs, including control over the commission of a crime, were the focus of research of a number of scientists, including: Yu. P. Alenin, [1] O.A. Bilichak, [2] Motsnyi [3], O.B. Sibal [4], M.E. Shumylov [5], et al.

Presentation of Main Material

The scientific community is reserved about assessing the quality of procedural regulation of SISAs. The current level of regulation of the relevant provisions in the Criminal Procedure Code of Ukraine does not meet the needs of the investigative practice. At the same time, Yu.M. Chornous suggests that the legal regulation of control over the commission of a crime in criminal proceedings will not fully eliminate the problems of its practical implementation. For the successful implementation of criminal procedure by pre-trial investigation bodies and operative units, it is necessary to develop scientifically based methodological guidelines, since crime control actions are introduced in criminal proceedings, the above task should be assigned to forensics, one of the directions of which is to provide investigative (search) actions [6].

The complex and insufficiently developed procedural nature of control over the commission of crimes cause a number of problems related to ensuring the admissibility of evidence obtained during its conduct. According to Article 86 of the Criminal Procedure Code of Ukraine, evidence is considered admissible if it is obtained in accordance with the procedure established by the Criminal Procedure Code of Ukraine. At the same time, Article 87 of the Criminal Procedure Code of Ukraine stipulates that "inadmissible is evidence obtained as a result of a significant violation of human

rights and freedoms guaranteed by the Constitution and laws of Ukraine, international treaties, the consent to be bound by which was provided by the Verkhovna Rada of Ukraine, as well as any other evidence obtained through information obtained as a result of a significant violation of human rights and freedoms". In addition, according to Part 3 of Article 271 of the Criminal Procedure Code of Ukraine, "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 with the aim of further exposing it, helping a person to commit a crime that he or she would not have committed if the investigator had not contributed to this, or for the same purpose to influence his behaviour by violence, threats, blackmail. Items and documents obtained in such a way cannot be used in criminal proceedings" [7]. That is, this provision also defines a special criterion for the inadmissibility of evidence obtained as a result of monitoring the commission of a crime.

The analysis of investigative and judicial practice gives grounds to identify typical and common violations in the course of monitoring the commission of a crime, which at the stage of judicial proceedings exclude the possibility of using the information obtained in the process of conducting them when making a reasoned and reasoned court decision. Among them, a prominent place is occupied by the provocation of a crime by law enforcement agencies, which is referred to in Article 271 of the Criminal Procedure Code of Ukraine. Law enforcement agencies of Ukraine, as noted by M.A. Pogoretskyi, systemically use provocations to commit crimes, primarily related to corruption and drug trafficking. Basically, this happens within the framework of control over the commission of a crime (Article 271 of the Criminal Procedure Code of Ukraine). The researcher expresses concern that 56% of the surveyed prosecutors, 65% of investigators, and 72% of operational employees consider it appropriate to expand the possibilities of using provocation in law enforcement activities [8]. Analysis of the studied materials of criminal proceedings shows that provocation of a crime is often a circumstance that excludes the admissibility of evidence, as a result – this becomes the basis for passing acquittals.

Provocation in the context of our research and within the framework of the practice of the ECHR should be considered cases when officials involved, who are either employees of security agencies or persons acting on their behalf, do not limit their actions only to the investigation of criminal proceedings in an implicit way, but influence the subject in order to provoke him or her to commit a crime that would otherwise not have been committed, in order to make it possible to detect a crime, that is, to obtain evidence and open criminal proceedings. The ECHR notes that secret operations should be carried out passively in the absence of pressure on the applicant to commit a crime. Assessing the actions

of law enforcement officers in committing a crime, the ECHR examines the moment when they began to carry out the relevant measure in order to determine whether they “joined” a crime that the person has already begun to commit without any participation on their part, or by their deliberate actions provoked the person to commit such a crime [9].

Provocation basically occurs when law enforcement officials go beyond passive identification of the circumstances in which a person may have committed an offence with a view to gathering relevant evidence and, if warranted, prosecuting that person, to inciting that person to commit an offence which undermines the principle of a fair trial. The ECHR emphasises that a situation where a person is pushed by law enforcement agents, who are supposed to prevent him or her from committing a crime, and then held criminally responsible for doing so, is not consistent with a fair trial.

In order to correctly distinguish between permissible interference and provocation in each case, the ECHR offers a verification algorithm that provides an answer to two questions: a) whether representatives of the law enforcement agency have limited themselves “predominantly passive conduct”, whether such boundaries were breached; b) the question of whether the applicant had had a real opportunity to report provocation by law enforcement authorities during the domestic proceedings and how the domestic courts had reacted to that statement (paragraphs 67-79 of the ECHR judgment in “Bannikov v. Russia”) [9].

Consequently, in its decisions, the ECHR has developed criteria to distinguish provoking the commission of a crime contrary to Article 6 of the Convention from permitted behaviour during legitimate secret methods in criminal investigations. In particular, if the allegation of incitement is found to be implicitly without merit, the court needs to ascertain whether the investigation was “essentially passive”, whether the crime would have been committed without the intervention of the authorities, and whether there was any inducement from the authorities of the person before the crime was committed, such as showing initiative in contacting the person, repeated offers despite the person's initial refusal, persistent reminders, a higher than average price; the significance of the reasons for the operational procurement, whether law enforcement had objective evidence that the person was involved in criminal activity and the likelihood of him or her committing an offence was substantial. The burden of proving that there was no incitement is placed on the prosecution [10].

For example, in the materials of Case No. 626/407/17 of the Krasnohrad district court, it was established that “the witness PERSON_10 and PERSON_6 themselves were the initiators of telephone conversations, meetings, transfer of funds to the accused PERSON_4, which indicates that it was the law enforcement agencies who clearly persuaded the accused to illegal actions through PERSON_10 and PERSON_6, although

there was no objective evidence for the assumption that PERSON_4 or PERSON_3 were engaged in illegal activities. It is also established that the only source of information about the corruption activities of PERSON_4 and PERSON_3 was the statements of PERSON_10 and PERSON_6. There is no evidence in the case file that would confirm that the accused had previously committed acts related to corruption.

In connection with the above, having analysed the testimony of PERSON_6 and PERSON_10 provided at the court session, as well as their statements to law enforcement agencies, the court considers that they were provocative in nature, which was planned by law enforcement agencies. In this case, the actions of witnesses PERSON_10 and PERSON_6 were aimed at inciting a crime, and therefore the court considers that such criminal proceedings would not have been opened if not for the actions of the witnesses. That is, there was a provocation that violated paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This consisted in the fact that PERSON_6 was not going to write a statement to law enforcement agencies at all, since no one demanded money from them, but wrote it only after communicating with the SSU officers who came to their home, there were also certain disagreements about the date of its writing, the corresponding registration and the terms of entering it in the unified state register of legal entities.

Regarding the application of PERSON_10 on the basis of their testimony, it can be argued that they also wrote it a few days after the official appeal to the SSU, at first such a statement was not accepted from them, instead they were given two voice recorders to record the conversation, and only a few days after listening to it, they were called to write a written statement, which also did not pass any official registration procedure [11].

Another common violation is related to the lack of proper procedural documents certifying the right of employees of operational units to exercise control over the commission of a crime in the form provided for by the Criminal Procedure Code of Ukraine. The dual nature of the SISAs already mentioned above in some cases also leads to incorrect interpretation and, as a result, exceeding by operational units of their powers provided for specifically by the Criminal Procedure Code of Ukraine, and not by the Law of Ukraine “On Operational Search Activities”, either on their own initiative or on behalf of an investigator or prosecutor. According to Article 41 of the Criminal Procedure Code of Ukraine, the SISAs in criminal proceedings are conducted by operational employees only on the written instructions of the investigator, prosecutor, and the division of detectives, operational and technical division and internal control unit of the NABU – on the written instructions of the detective or prosecutor of the Specialised Anti-Corruption Prosecutor's Office [12]. In addition, judicial practice contains examples of going beyond the limits of authority in matters related to the SISAs, the investigator, and the prosecutor.

According to the verdict of the Sloviansk city district court of November 1, 2019, in case No. 243/6086/18, “according to the court, the prosecutor violated the mandatory order of Article 275 of the Criminal Procedure Code of Ukraine, which defines the powers exclusively of an investigator in criminal proceedings to involve persons in confidential cooperation. The court notes that the involvement of PERSON_3 in confidential cooperation, which was carried out by the prosecutor's decision of January 16, 2018, occurred through the prosecutor's exercise of powers not provided for by the Criminal Procedure Code of Ukraine.

According to the legal position set out in the decision of the Grand Chamber of the Supreme Court in case No 640/6847/15-k of 16 October 2019, if the prosecution has taken all necessary and dependent measures aimed at declassifying the procedural documents which were the basis for the SISAs, but they were not declassified before the case was brought to court for reasons beyond the control of the will or the procedural conduct of the prosecutor, in such case, there is no violation of Article 290 of the Ukrainian CCP by the prosecution. The court should evaluate the evidence obtained as a result of the SISAs in conjunction with declassified procedural documents that became the basis for their conduct, and should not automatically recognise such evidence as inadmissible” [13].

In addition, a significant number of acquittals issued based on the results of judicial review of materials of criminal proceedings in which control over the commission of a crime was carried out are associated with violations of the methods and procedure for recording the course and the results obtained during control.

For example, in the acquittal of the Bolhrad district court of November 27, 2019, in case No. 497/1260/18, “... during these procedural actions: SISAs-audio-video monitoring of a person both on March 26, 2018, and on March 30, 2018, all the requirements of the Criminal Procedure Code of Ukraine were not met, taking into account the following. The senior operational commissioner drew up these protocols on the results of secret investigative (search) actions, but the progress of this procedural action was not recorded in the SISA protocol. That is, the entire course of the procedural action was not systematically reflected, and the senior operational commissioner limited himself to reflecting only the results obtained during the SISA”.

During the conduct of such SISAs as monitoring the commission of a crime, it was not specified:

- the date and time when the person involved in confidential cooperation arrived at the premises of the relevant operational unit to participate in the SISA – control over the commission of a crime;
- who exactly among the operational employees or specialists involved installed special audio and video surveillance equipment on this person;
- what specific audio or video surveillance equipment was installed on the person (the name and technical characteristics of this equipment are not specified);

- the time when that person left the premises of the operational unit, and the route of their movement to meet with the person in respect of whom the SISAs are being conducted,

- control over the commission of a crime;
- the route of returning a person to the operational unit after monitoring the commission of a crime is not specified;

- an employee of the operational unit who directly removed video surveillance equipment from a person involved in confidential cooperation is not specified;

- no persons present during these actions are indicated [14].

As audio and video recording, in particular, SISAs, are required under the provisions of the Criminal Procedure Code of Ukraine, there is also a violation of the rules regarding these forms of recording of the progress and results of crime control. In particular, “during the appeal review, the panel of judges examined the letter attached by the prosecutor of the deputy head of the main department for combating corruption and organised crime of the Security Service of Ukraine dated August 15, 2019, from which it can be seen that in the process of conducting audio and video monitoring activities in criminal proceedings No. 42016000000002150, technical means were used that are on the material register in the Department of operational and technical measures of the Security Service of Ukraine and were camouflaged accordingly.

Disclosure of information about the technical means that were used to conduct the SISAs may lead to the decoding of the forms and methods of work of the Security Service of Ukraine. That is why data on their use is not specified in the protocols. Thus, during the appeal review, the panel of judges found that the technical media available in the materials of criminal proceedings on which the course and results of the SISAs that were recorded in relation to PERSON_2 and PERSON_1 in criminal proceedings No. 42016000000002150 are copies. The original materials on audio and video monitoring of these persons have not been attached to the materials of criminal proceedings and the prosecution has not opened them to the defence in accordance with Article 290 of the Criminal Procedure Code of Ukraine.

Considering the provisions of Part 3 of Article 99, Part 3 of Article 107 and Part 4 of Article 254 of the Criminal Procedure Code of Ukraine (as amended on April 13, 2012 No 4651-VI), according to which the production of copies of the protocols on conducting the SISAs and their appendices is not allowed, the panel of judges concludes that copies of technical media available in the materials of criminal proceedings within the meaning of Article 86 of the Criminal Procedure Code of Ukraine cannot be recognised as admissible evidence” [15].

The study suggests that typical violations during the SISAs are also associated with an insufficient level of regulation by departmental bylaws of the procedure for conducting SISAs. For example, currently there are

no regulations on the procedure and legal issues of the procedure and tactics for conducting such a form of control over the commission of a crime as a special investigative experiment. The instruction on the organisation of secret investigative (search) actions and the use of their results in criminal proceedings dated November 16, 2012, defines only the concept of certain forms of control over the commission of a crime. In particular, a special investigative experiment is defined as the creation by an investigative and operational unit of appropriate conditions in an environment as close as possible to the real one, in order to verify the true intentions of a certain person, in whose actions signs of a serious or particularly serious crime are seen, to monitor his or her behaviour and make decisions regarding the commission of a crime. In the future, the text of the instruction sets out general provisions on the authorisation, and procedure for conducting and fixing the SISAs, attention is not focused on the specifics of implementing each one separately [12].

The study defines that, according to the practice of the European Court of Human Rights, provocation of a crime exists when law enforcement officers do not limit themselves to passively establishing the circumstances of a person's possible commission of a crime in order to collect relevant evidence and, if there are grounds for it, bring a person to justice, but incite that person to commit a crime, undermining the principle of fairness of proceedings. The study argues for the need to apply criteria for distinguishing permissible interference and provocation in the course of monitoring the commission of a crime, which are formed according to the practice of the ECHR. Typical violations of the requirements of the Criminal Procedure Law during control over the commission of a crime are considered, which entails, in particular, an insufficient level of regulation by departmental bylaws of the procedure for conducting and recording secret investigative (search) actions.

References

- [1] Alenin, Y.P. (2012). *Features of the beginning of the pre-trial investigation under the new CPC of Ukraine*. URL: <http://dspace.onua.edu.ua/bitstream/handle/11300/5357/Alen%D1%96n%20Osooblivost%D1%96%20pochatku%20dosudovogo%20rozsl%D1%96duvannja.pdf?sequence=1&isAllowed=y>.
- [2] Bilichak, O.A. (2017). Control over the commission of a crime: Concepts and forms. *Scientific Notes of Tavriya National University named after V. I. Vernadsky. Series "Legal Sciences"*, 28((67)2), 51-55. URL: http://nbuv.gov.ua/UJRN/UZTNU_law_2017_28%2867%29_2_13.
- [3] Motsnyi, D.O., & Davydenko, S.V. (2018). Provocation of committing a crime during the conduction of covert investigative actions concerning the protection of human rights. *Forum of Law*, 2, 90-97. doi: 10.5281/zenodo.1286093.
- [4] Sybal, O.B. (2020). Law enforcement control over the commission of a crime: Criminal law aspect. *Legal Scientific Electronic Journal of Zaporizhia National University*, 10, 337-342 doi: 10.32782/2524-0374/2020-3/81.
- [5] Shumylo, M.E. (2001). *Rehabilitation in the criminal process of Ukraine*. Kharkiv: Arsis.
- [6] Chornous, Yu.M. (2017). *Forensic support of crime investigation*. Vinnytsia: Nilan-LTD.
- [7] Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon3.rada.gov.ua/lws/show/4651-17>.
- [8] Pohoretskyi, M.A. (2016). The use of provocation in covert investigations: The question of legality. *Bulletin of Criminal Proceedings*, 1, 33-43.

Conclusions

The imperfection of the regulatory regulation of control over the commission of a crime in the provisions of the Criminal Procedure Code of Ukraine and subordinate acts leads to procedural and tactical errors on the part of the prosecution in the process of conducting them.

Such violations based on the results of the analysis of investigative and judicial practice include:

1) provocation of a crime as cases when officials involved, who are either employees of security agencies or persons acting on their behalf, do not limit their actions only to the investigation of criminal proceedings in essence in an implicit way, but influence the subject in order to provoke him or her to commit a crime that otherwise would not have been committed, in order to identify the crime, that is, to obtain evidence and open criminal proceedings (in accordance with the practice of the ECHR);

2) lack of proper procedural documents in the materials of criminal proceedings certifying the right of operational employees to exercise control over the commission of a crime;

3) violations in the choice of methods and procedures for recording the course and information obtained during the control over the commission of a crime. Such violations, in turn, lead to the inadmissibility of using the information obtained in court proceedings when proving it. Therefore, the efforts and resources of the law enforcement system are nullified, and there is also a violation of the constitutional rights of a person not to be subjected to criminal punishment until the guilt is legally proven.

Therefore, a promising area of further research is the scientific development of issues related to improving the regulatory support for monitoring the commission of a crime, in particular, considering the current practice of the ECHR.

- [9] Judgment of the European Court of Human Rights No. 18757/06 "Case of Bannikov v. Russia". (2010, November). Retrieved from <https://ips.ligazakon.net/document/S0001077>.
- [10] Resolution of the Criminal Court of Cassation of the Supreme Court in the Case No. 314/2926/17. (2021, September). Retrieved from <https://reyestr.court.gov.ua/>.
- [11] The verdict of the Krasnograd district court of the Kharkiv region in case No. 626/407/17. (2019, December). Retrieved from <https://zakononline.com.ua/court-decisions/show/86259096>.
- [12] Order of the Prosecutor General's Office of Ukraine, Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, State Border Guard Service of Ukraine, Ministry of Finance of Ukraine, Ministry of Justice of Ukraine No. 114/1042/516/1199/936/1687/5 "On Approval of the Instruction on Organization of Covert Investigative (Search) Actions and Use of Their Results in Criminal Proceedings". (2012, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0114900-12#Text>.
- [13] The verdict of the Slovyansk city district court of Donetsk region in case No. 243/6086/18. (2019, November). Retrieved from <https://zakononline.com.ua/court-decisions/show/77403415>.
- [14] The verdict of the Bolgrad district court of Odessa region in case No. 497/1260/18. (2019, November). Retrieved from <https://zakononline.com.ua/court-decisions/show/85968502>.
- [15] The decision of the Kyiv Court of Appeal in the case No. 761/34909/17. (2019, October). Retrieved from <https://zakononline.com.ua/court-decisions/show/85389209>.

Список використаних джерел

- [1] Аленін Ю. П. Особливості початку досудового розслідування за новим КПК України. 2012. URL : <http://dspace.onua.edu.ua/bitstream/handle/11300/5357/Alen%D1%96n%20osoblivost%D1%96%20pochatku%20dosudovogo%20rozsl%D1%96divannja.pdf?sequence=1&isAllowed=y>.
- [2] Білічак О. А. Контроль за вчиненням злочину : поняття та форми. *Вчені записки Таврійського національного університету імені В. І. Вернадського. Серія «Юридичні науки»*. 2017. № 28(67), № 2. С. 51–55.
- [3] Моцний Д. О., Давиденко С. В. Провокація вчинення злочину при проведенні негласних слідчих (розшукових) дій у контексті захисту прав людини. *Форум права*. 2018. № 2. С. 90–97. doi : 10.5281/zenodo.1286093.
- [4] Сибаль О. Б. Контроль за вчиненням злочину: кримінально-правовий аспект. *Юридичний науковий електронний журнал Запорізького національного університету*. 2020. № 10. С. 337–342. doi : 10.32782/2524-0374/2020-3/81.
- [5] Шумило М. Є. *Реабілітація в кримінальному процесі України*. Харків : Арсіс, 2001. 320 с.
- [6] Чорноус Ю. М. *Криміналістичне забезпечення розслідування злочинів* : монографія. Вінниця: Нілан-ЛТД, 2017. 492 с.
- [7] Кримінальний процесуальний кодекс України : Закон України від 13.04.2012 р. № 4651-VI. URL : <http://zakon3.rada.gov.ua/lws/show/4651-17>.
- [8] Погорецький М. А. Застосування провокації в ході негласних розслідувань : питання правомірності. *Вісник кримінального судочинства*. 2016. № 1. С. 33–43.
- [9] Рішення Європейського Суду з прав людини у справі «Банніков проти Росії» від 4 листоп. 2010 р. URL : <https://ips.ligazakon.net/document/S0001077>.
- [10] Постанова Касаційного кримінального суду Верховного суду від 15.09.2021 р. у справі № 314/2926/17. URL : https://zakon.cc/court/document/read/99714450_b23b2dc7.
- [11] Вирок Красноградського районного суду Харківської області від 10.12.2019 р. у справі № 626/407/17. URL : <https://zakononline.com.ua/court-decisions/show/86259096>.
- [12] Про затвердження Інструкції про організацію проведення негласних слідчих (розшукових) дій та використання їх результатів у кримінальному провадженні: наказ Генеральної прокуратури України, МВС України, Служби безпеки України, Адміністрації державної прикордонної служби України, Міністерства фінансів України, Міністерства юстиції України від 16.11.2012 р. № 114/1042/516/1199/936/1687/5. URL : <https://zakon.rada.gov.ua/laws/show/v0114900-12#Text>.
- [13] Вирок Слов'янського міськрайонного суду Донецької області від 01.11.2019 р. у справі № 243/6086/18. URL : <https://zakononline.com.ua/court-decisions/show/77403415>.
- [14] Вирок Болградського районного суду Одеської області від 27.11.2019 р. у справі № 497/1260/18. URL : <https://zakononline.com.ua/court-decisions/show/85968502>.
- [15] Ухвала Київського апеляційного суду від 21.10.2019 р., справа № 761/34909/17. URL : <https://zakononline.com.ua/court-decisions/show/85389209>.

Визнання недопустимими доказів, отриманих у ході контролю за вчиненням злочину, у кримінальних провадженнях щодо злочинів у сфері службової діяльності

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Анотація

Мета статті – розглянути проблеми забезпечення допустимості доказів, отриманих у ході здійснення контролю за вчиненням злочину під час кримінальних проваджень щодо злочинів у сфері службової діяльності. Увагу акцентовано на тому, що інститут негласних слідчих (розшукових) дій має подвійний оперативно-розшуковий та кримінальний процесуальний зміст, оскільки оперативно-розшукові заходи було покладено в основу негласних (слідчих) розшукових заходів шляхом трансформації порядку їх проведення, що різниться суб'єктами та напрямками подальшого використання отриманих відомостей. Зазначено, що складна й недостатньо вивчена процесуальна сутність контролю за вчиненням злочинів спричиняє проблеми в забезпеченні допустимості доказів, отриманих під час його проведення. З'ясовано, що Кримінальний процесуальний кодекс України визначає спеціальний критерій недопустимості доказів, отриманих під час контролю за вчиненням злочину внаслідок провокування особи на вчинення цього злочину з боку правоохоронних органів. На підставі аналізу матеріалів кримінальних проваджень встановлено, що провокація злочину часто є обставиною, що виключає допустимість доказів, і стає підставою для винесення виправдувальних вироків. Доведено, що, відповідно до практики Європейського суду з прав людини, провокація злочину наявна тоді, коли працівники правоохоронних органів не обмежуються пасивним встановленням обставин можливого вчинення особою злочину з метою збирання відповідних доказів і, за наявності на те підстав, притягнення її до відповідальності, а підбурюють цю особу до вчинення злочину, підриваючи принцип справедливості судового розгляду. Аргументовано потребу застосування критеріїв розмежування допустимого втручання та провокації в ході контролю за вчиненням злочину, які сформовано за практикою Європейського суду з прав людини. Розглянуто типові порушення вимог кримінального процесуального закону під час проведення контролю за вчиненням злочину, що спричиняє, зокрема, недостатній рівень урегульованості відомчими підзаконними актами порядку проведення та фіксації негласних слідчих (розшукових) дій. До таких порушень за результатами аналізу слідчої та судової практики належать: 1) провокація злочину – випадки, коли задіяні посадові особи, що є або працівниками органів безпеки, або особами, що діють за їх дорученням, не обмежують свої дії лише розслідуванням кримінального провадження по суті неявним способом, а впливають на суб'єкт з метою спровокувати його на вчинення злочину, який в іншому випадку не було б учинено, задля того, щоб уможливити виявлення злочину, тобто отримати докази й відкрити кримінальне провадження (відповідно до практики Європейського суду з прав людини); 2) відсутність у матеріалах кримінального провадження належних процесуальних документів, які засвідчують право оперативних працівників здійснювати контроль за вчиненням злочину; 3) порушення в обранні способів і порядку фіксації ходу та отриманих під час контролю за вчиненням злочину відомостей. Підсумовано, що недосконалість нормативного регулювання контролю за вчиненням злочину в положеннях Кримінального процесуального кодексу України й підвідомчих актах призводить до процесуальних і тактичних помилок зі сторони обвинувачення в процесі їх проведення. Своєю чергою це призводить до недопустимості використання в судовому провадженні під час доказування отриманих відомостей. Унаслідок цього зводяться нанівець зусилля та ресурси правоохоронної системи, відбувається порушення конституційних прав особи не бути підданою кримінальному покаранню, доки вину не буде доведено в законному порядку

Ключові слова:

контроль за вчиненням злочину; спеціальний слідчий експеримент; провокація злочину; допустимість доказів; доказування

UDC 349.2
DOI: 10.33270/04212202.45

Problems of legal regulation of control measures over employees

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Abstract

The study analyses the statutory provisions of national and European legislation, the practice of the ECHR and national courts in protecting employees' right to privacy in the performance of labour functions. The problem of preserving the "private autonomy" of employees when the employer exercises control over the performance of such functions using technical means and methods is investigated. The need for a normative definition of the limits of restrictions on workers' rights and freedoms in the context of such control has been argued. The purpose of the study is to substantiate the expediency of normative consolidation in the national legislation of certain guarantees for employees in the event of interference of the employer's economic (disciplinary) authorities in the sphere of their private autonomy during the use of technical means. The scientific originality of the study is conditioned by the fact that the issue of the legality of wiretapping telephone conversations, control over electronic correspondence and communication of employees in social networks during the performance of their work functions is part of a set of publications on the limits of employer intervention using technical means in the private life of employees. The subject of the study shows the relevance of the regulatory definition of private autonomy of employees and its boundaries by national legislation regarding legal guarantees against employer encroachments. Protection of the rights of employees during the performance of their work functions from interference by the disciplinary authorities of the employer in the sphere of their private autonomy, surveillance of communication in electronic information networks, the content of telephone conversations, electronic, and other correspondence cannot be effective without a regulatory definition of the permissible limits of such interference in the private life of employees

Keywords:

employer; employee; employment contract; employee's workplace; essential working conditions; secrecy of correspondence; secrecy of telephone conversations; secrecy of electronic, telegraph, and other correspondence; audio surveillance (wiretapping) of the employee; protection of human and civil rights and freedoms; personal data

Article's History:

Received: 25.09.2021
Revised: 08.11.2021
Accepted: 30.11.2021

Suggest Citation:

Kravchenko, I.M. (2021). Problems of legal regulation of control measures over employees. *Law Journal of the National Academy of Internal Affairs*, 11(2), 45-55.

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Introduction

The rapid development of technologies, and consequently – the expansion of technical capabilities for removing information from transport telecommunications and electronic information networks, public and hidden wiretapping, control over electronic correspondence and communication of individuals in social networks, considering the provision of state and public security, are becoming an integral part of modern life. The use of special means to monitor the lives of citizens helps to solve many problems: record (document) events and/or acts of persons; control the situation and/or prevent events that lead to negative consequences, etc. At the same time, it poses a threat to the privacy of every citizen's life.

The problem of expanding the scope of use of special means has become acute due to anti-terrorist and anti-epidemic measures, which provide for total control over the population of the state and/or its individual strata in almost all spheres of public, and sometimes personal life. In connection with the establishment of quarantine in Ukraine and the introduction of long-term restrictive anti-epidemic measures to prevent the spread of COVID-19 caused by the SARS-CoV-2 coronavirus on its territory, the issue of monitoring the performance of labour functions in conditions when all or a significant part of employees are forced to introduce a remote form of work [1] has been updated.

Unfortunately, the number of such threats and challenges to humanity will continue to increase. At the same time, a logical and fundamental question arises regarding the boundaries of the use of special means of control in such conditions, that is, the boundaries between the general public danger as a “public good” and private life as a “personal good” of a particular person [2].

Therefore, there is an extremely difficult, but urgent problem of fixing in the labour legislation such norms that would, on the one hand, provide an opportunity for the employer to control the performance of employees' duties, in particular using technical means of surveillance, and on the other – ensure the implementation of the labour rights and guarantees of employees provided for by the Constitution of Ukraine, in particular, the right to a personal zone at the time of performing their labour duties, not allowing actions that degrade their honour and dignity [3].

It is important that video surveillance, wiretapping and other measures of control over employees are not discriminatory, which now has various forms and manifestations [4-8].

Aspects of this problem became the subject of research by specialists of various branches of law. In particular, the issue of violation by employers of the right to respect for the private life of employees was considered by O.M. and O.V. Drozdovs [9], problems on the right to respect and secrecy of correspondence: O. Belichak, D. Bushkov, I. Vietuhova [10], D. Sergeeva,

I. Smolkova, N. Ustymenko, O. Fatyanov, V. Fedorenko [11], P. Shevchuk, et al.

At the same time, comprehensive research in the field of labour law on the problems of ensuring the right of employees to privacy and a personal zone at the time of performing their work duties is not enough.

Considering the existence of an objective need to regulate labour relations regarding the control powers of the employer over the performance of employees' duties through recordings of their telephone conversations with corporate phones, control over their electronic correspondence and communication in social networks, provided that their labour rights and guarantees are implemented, including the right to a personal zone at the time of performing such duties, *the purpose of this study* is a comprehensive analysis of theoretical and practical problems and the formulation of scientifically based conclusions and proposals for improving the current and prospective legislation in this area of law.

Presentation of Main Material

In the context of the economic crisis, the narrowing of sales markets for products and services and, as a result, the reduction of business entities, the demand for the use of labour is rapidly decreasing. This means that the actual dependence of employees on employers is only increasing. Taking advantage of this dominant position, employers believe that they can use their power without any restrictions in organising and controlling the production process.

Employers apply the following control measures: recording employees' phone conversations with corporate phones; monitoring their email correspondence and communication in social networks, and collecting other personal data. Due to quarantine measures, when new types (forms) of hired labour are used and the possibility (necessity) of performing labour functions outside the “stationary” workplaces of employees, such control is becoming more and more relevant.

Disciplinary power of the employer, according to the definition of I.V. Lazor, provides for the organisation of hired labour and its management, the use of legal and organisational means to ensure compliance with the established order in production when employees perform the work assigned to them. Such powers of the employer are not only appropriate, but also necessary in the conditions of market relations [12]. During the implementation of such guiding functions of the disciplinary authorities, the employer will try to control employees as much as possible, using available technical capabilities, while not restricting their rights and freedoms.

The expansion of the scope of application of special means of control over employees is a global trend. For example, since January 2020, in accordance with the provisions of regulation 2016/679, amendments to

the Polish labour code, employers have received a legal mechanism with extensive opportunities for supervision of employees. In particular, employers can control their employees by monitoring their email, recording their phone calls, or tracking employees' corporate instant messaging directly at the workplace. The new corporate rules include provisions prohibiting the use, for example, of official mail for personal purposes or mandatory labelling of sent personal messages, etc. [13].

The author shares the position of I.M. Vaganova, who notes that the compulsory nature of the use of technical means of control is based on psychological influence, which is legitimate, since it implies a voluntary volitional perception of observation by an employee. The compulsoriness of these measures is manifested in the fact that with the help of special systems, a person is forced to voluntarily refuse to perform illegal actions against the employer's property, and the use of special control systems mobilises the employee during the performance of labour duties, encourages clearer compliance with internal labour regulations [14].

Although the latest technologies make it easier for the employer to exercise control over the employee, in particular, over their private life, but they make it more difficult for the employee to identify this control, to protect their right, and this problem is aggravated by objective inequality between the parties to the employment relationship. Therefore, the priority area for the development of modern labour legislation in Ukraine is the renewal of the national legal system, the creation of an effective mechanism for guaranteeing and ensuring the rights of employees during the implementation of the employer's control functions to determine the grounds, conditions, purpose, and limits of the use of such control, and therefore, the scope, features and grounds of existing restrictions on the rights and freedoms of employees guaranteed by law.

To determine the limits of such interference and, as a result, the restriction of the employee's rights, it is necessary to clarify the concept of "the right to privacy of the employee during the performance of their work functions", because only this is the line beyond which the employer's economic (disciplinary) power no longer operates.

Defining is the provisions of Articles 8-11 of the Convention for the protection of human rights and fundamental freedoms ratified by Ukraine on November 4, 1950, according to which the exercise of rights by a person is not subject to any restrictions other than those provided for by law and necessary in a democratic society in the interests of national security and public peace, in order to prevent crimes, protect health and morals, or protect the rights and freedoms of others [15]. According to Part 1 of Article 8 of the convention, everyone has the right to respect for their private and family life, their home and correspondence.

The right to this privacy is also provided for in Articles 28, 31, 32 of the Constitution of Ukraine, specified in the provisions of Article 270 (the right to inviolability of personal and family life, the right to respect for dignity and honour, the right to secrecy of correspondence, telephone conversations, telegraph and other correspondence), Article 301 (the right to privacy and its secrecy), Article 302 (the right to information) and Article 307 of the Civil Code of Ukraine. According to the rules of Article 271 of the Civil Code of Ukraine, the content of an employee's personal non-property right is their ability to freely, at their own discretion, determine their own behaviour in the sphere of private life [16].

In addition, Part 4 of Article 23 of the Law of Ukraine "On Information" prohibits the collection of information about a person without his/her prior consent, except in cases provided for by law [17]. According to the decision of the Constitutional Court of Ukraine No. 5-zp of October 30, 1997, it is prohibited not only to collect, but also to store, use, and distribute confidential information about a person without his/her prior consent [18].

At the same time, I.M. Vaganova, studying the issues of compliance with the rights of citizens to their privacy, shares the thesis of civil law specialists who consider "private life" a category that cannot exist within the framework of labour relations, because the main purpose of establishing control systems in places where the employer's property is concentrated is to record: the facts of theft both during working and non-working hours; actions that can further provide the owner with an evidence base in cases of disputes with counterparties or persons who have committed mercenary offences [14]. The study strongly disapproves this position, because, firstly, performing labour functions, the employee does not lose their human rights and freedoms, and therefore the right to their privacy, and secondly, considering the content of Part 2 of Article 9 of the Civil Code of Ukraine, according to which the provisions of this code apply to labour relations, if they are not regulated by other legislative acts (in particular labour). Due to the lack of regulatory regulation by labour legislation of the right of employees to their personal (private) life and its secrecy, in particular, the secrecy of correspondence, telephone conversations, telegraph and other correspondence, etc. during the performance of labour functions, it is considered quite reasonable and logical to apply the norms of civil legislation to these legal relations.

In national legislation, the concept of "personal life" is mainly used as a synonym for the concept of "private life" or, along with family life, as part of private life (Article 15 of the Criminal Procedure Code of Ukraine), but there is no regulatory definition of it. According to the definition contained in the academic Explanatory Dictionary of the Ukrainian language, "personal" is one that directly concerns a person, is associated with them [19]. At the same time, according to the provisions of Article 9

of the Constitution of Ukraine, Article 19 of the law of Ukraine "On International Treaties of Ukraine" of June 29, 2004 No. 1906-IV [20], Article 17 of the law of Ukraine "On the Execution of Decisions and Application of the Practice of the European Court of Human Rights" of February 23, 2006 No. 3477-IV, the norms of international law are part of the national legislation, they are applied in accordance with the procedure provided for the norms of national legislation, and the courts apply when considering cases the convention and the practice of the court as a source of law. However, there is no definition of "private life" in European legislation, which also applies to the decision of the European Court of Human Rights (ECHR). In particular, the ECHR decision in "Peck v the United Kingdom" states that the convention does not cover the content of the term "private life", since it describes it as "a term with a broad meaning that cannot be defined" [21]. According to D. Vitkauskas, a lawyer for the ECHR Secretariat, the European Court of Justice does not give a clear definition of the concept of private life, because the court quite deliberately avoids such attempts and prefers to focus mainly on a specific issue, considering it necessary to note that "private life" is a broad concept that is not subject to an exhaustive definition [22].

An example is the ECHR's decision in "Nimit v Germany", which states that it would be too strict to limit privacy to an intimate circle where everyone can live their personal life as they prefer, rather than completely exclude the outside world from this circle. At the same time, the concept of "private life" cannot be interpreted in a restrictive sense; respect for personal life should also partially cover the right to establish and develop relationships with other people; it is not always possible to clearly distinguish between these concepts and because you can also carry out activities that relate to both professional and business, and, conversely, it is possible to do things that do not belong to the professional sphere in the office or commercial office premises [23].

Based on the study of judicial precedents of the ECHR regarding the rights of employees in the performance of their duties, it can be stated that the concept of private life belongs to the sphere of direct personal autonomy, which includes aspects of moral integrity, goes beyond the narrow limits of guarantees of life free from unwanted publicity. Given this concept, the ECHR considers that the right to respect for "private" life also implies psychological integrity of a person, and the use of technical means of control is precisely coercive in nature and is based on psychological influence, which can be legitimate, because it implies a voluntary volitional perception of observation by an employee.

It is seen that the personal (private) life of an employee is a special part of the private sphere of their life (private zone), covering the time of performance of his labour functions and consists in various relations, phenomena, events, behaviour, etc., that do not have

public significance, including the sphere of their work, defined and regulated by a person. Considering the fact that employers naturally seek to protect their business, their confidential information, the practice of the ECHR confirms the legality of monitoring employees during the performance of their work functions and prior warning about such surveillance, in particular, reading their work correspondence, listening to conversations, etc. And although actions regarding supervision on the part of the employer can be recognised as legal and keep the entire labour collective in "good shape", however, this is not unlimited. The employer's economic right ends where such actions begin to affect the rights and freedoms of employees, that is, there must be boundaries. Although for whatever purpose it would not justify what methods and means of surveillance the employer would not use (records of telephone conversations with corporate phones; control over electronic correspondence and communication in social networks, etc.), in fact, this is access, collection, processing, accumulation and storage, use, deletion or destruction, transfer of personal (personal) data of the employee in the meaning of the Law of Ukraine "On personal data protection" of June 1, 2010 No. 2297-VI [24]. In addition, the employee's personal data obtained as part of such surveillance is confidential information, since it is information about them as an individual, and its processing without the consent of this person, according to the law, is unacceptable, except in cases clearly defined by law.

Considering personal conversations, communication using messaging programmes (Viber, WhatsApp, Skype, etc.) and in social media, checking their own email distracts employees from performing work functions (although a well-known researcher on the organisation of management D. Meister defends a different opinion) [25], as well as the ability to transfer trade secrets to unauthorised persons, employers try to control employees by tapping corporate phones, perustration of correspondence (secret printing and viewing of private letters), etc. Admittedly, it is not a fact that the disclosure of corporate information can occur exclusively with the use of corporate means of communication, it is possible mainly by negligence. Although for the most part, such disclosure occurs outside the employer's control, there is a question of access to and use of corporate (confidential) information, and this is the exclusive competence of the employer. An interesting practice of the ECHR has developed in this regard.

The ECHR judgment of 25 June 1997 in "Alison Halford V. the United Kingdom of Great Britain and Northern Ireland" on the protection of private life while using the office telephone states that the ECHR case-law certifies that telephone conversations from office premises and from home fall within the meaning of Article 8 of Section 1 of the Convention, and therefore, Article 8 is applicable to this part of the complaint. In addition, the court noted that it was reasonable that

the applicant's calls from her office were tapped by the police with the primary aim of collecting materials that would help them defend themselves in the gender discrimination proceedings brought against them [26].

The decision of the ECHR in the case "Uzun v. Germany" is relevant from the standpoint of protecting the personal data of employees regarding tracking the movement of a person using GPS tools. The court found that monitoring the applicant through a global system of positioning and processing and using the information obtained in this way was an interference with the exercise of his right to privacy, protected by Article 8 of Section 1 of the Convention [27].

Important is the decision of the Grand Chamber of the ECHR of September 5, 2017, in the case "B. Mihai Bărbulescu v. Romania" regarding the protection of privacy when using a company phone and correspondence using the Yahoo Messenger online chat service via the internet, sent from the workplace. The court noted that Article 8 of the Convention guarantees the right to "private life" in a broad sense, covering the right to lead a "private social life", that is, the ability of an individual to develop their social identity, and this right establishes the ability to get closer to others to establish and develop relations with them. The court considers that the concept of "private life" may include professional activities or activities taking place in a public context. Restrictions in a person's professional life may fall under Article 8 if they affect the way they build their own social identity by developing relationships with others, because it is in the process of working life that most people have almost the highest opportunity to develop interaction with the outside world, and for the legality of verification, the employee must be warned about all the features before starting it.

The ECHR has defined the criteria for assessing the proportionality of the measures used to control the correspondence of employees, the purpose of whether employees are sufficiently protected from the possible arbitrariness of employers, namely: (1) whether the employee was warned in advance and clearly about the nature of the inspection; (2) the scope of such inspection and the degree of interference in the privacy of the employee (the content of the correspondence is checked; the whole or only part of the correspondence, or the check is limited in time and by the number of persons involved in the check); (3) whether the employer has legal grounds for justifying the need to check the content of the correspondence, because since the check of the content of the correspondence involves a more significant "interference", it should have a weightier justification; (4) whether a less intrusive control system than direct access to the content of the employee's correspondence could have been implemented; (5) whether the employee had adequate guarantees, especially in cases where the inspection by the employer was of the nature of "intervention",

and in the absence of a warning, the inspection is impossible; (6) the employee's unconditional opportunity to challenge in court actions regarding the employer's inspection of such correspondence [28].

Consequently, telephone calls and personal correspondence from premises where economic activities are carried out probably fall under the concepts of "private life" and "correspondence" under Article 8 of the Convention. It is logical to conclude that electronic messages sent from work should also be protected under Article 8 of the Convention, and information obtained as a result of monitoring a person's use of the Internet ("Copland v. the United Kingdom") [29]. This approach of the ECHR corresponds to Parts 1 and 2 of Article 306 of the Civil Code of Ukraine [16]. It is seen that such "surveillance" within the enterprise, organisation, institution of employees can also be prevented by prescribing an appropriate provision in the internal labour regulations, which are developed and approved by the employer not alone, but only in agreement with representatives of the labour collective, which should indicate the purpose of recording telephone conversations, monitoring electronic correspondence and visiting social networks, etc., with restrictions provided for by the established norms. If the information collected in this way is considered "risky" (it poses a particular risk to the rights and freedoms of personal data subjects, contains, in particular, information about the location, state of health, political views, etc.), its processing should be notified within thirty working days from the date of the beginning of such processing in accordance with the established procedure to the Commissioner for the processing of personal data (Part 1 of Article 9 of Law No. 2297-VI).

National judicial practice is also being formed regarding the violation of the right to privacy of telephone conversations, which causes mental suffering and is a presumption of causing moral harm to a person, if the offender does not prove the absence of their guilt. The content of the decision of the Supreme Court of Ukraine dated September 27, 2017 in case No. 6-1435cs17, according to which a telephone conversation involving the use of obscene language took place between the plaintiff and an employee of a car service, is indicative. The plaintiff was warned that the conversation would be recorded, and he agreed. After some time, the recording of the conversation was posted on the YouTube video hosting site without the plaintiff's consent. The Supreme Court of Ukraine, guided by the presumption of guilt of the offender (defendant) in this type of tort, noted that it is the defendant (the employer of the rude person) who must prove the absence of their guilt in the fact that as a result of their violation of the right to secrecy of telephone conversations, the plaintiff experienced emotional unrest, because only then there are no grounds for collecting moral damage from the offender. The APU also noted that the plaintiff's proof of

mental suffering is unacceptable, given the legal essence of the constitutional right to secrecy of telephone conversations. The court showed the need to take into account Article 276 of the Civil Code of Ukraine, according to which the violated personal non-property right must be restored by the court with compensation for moral damage caused by its violation. In this case, the restoration of the plaintiff's personal non-property right to the secrecy of the telephone conversation would be the removal of its recording from free access on the network, that is, from YouTube, and the defendant would have to provide relevant evidence to the court in this regard [30].

Although, in this case, it was a violation of the private life of another person (client of the employer), when the employee himself could violate these rights of another person, it is important that the judicial practice regarding the secrecy of telephone conversations during work is formed primarily considering the requirements of Part 2 of Article 13 of the Law of Ukraine "On the Judicial System and Status of Judges" of June 2, 2016 No. 1402-VIII regarding the obligation to execute court decisions that have entered into legal force by everyone, as for individuals and legal entities throughout Ukraine [31].

Therefore, based on the analysis of judicial practice, the following conclusion is obtained: if before listening/recording/viewing, the employer receives consent from all participants in the conversation (in particular, the employee), then the ban on surveillance does not work, because if all persons have agreed to track their communication (that is, that it will not be secret), then the constitutional guarantee to ensure the employee's right to privacy is not applied. However, if such consent is not obtained, and surveillance is conducted, in particular hidden, then for violation of this right of the employee, the employer's officials face criminal punishment: under Article 163 (violation of the secrecy of correspondence, telephone conversations, telegraph or other correspondence transmitted by means of communication or through a computer); Article 182 (violation of privacy); for viewing in social networks – Article 361 (unauthorised interference in the operation of electronic computers (computers), automated systems, computer networks or telecommunication networks) of the Criminal Code of Ukraine of April 5, 2001 year No. 2341-III [32].

At the same time, the right to private life, the personal zone of the employee during the performance of their duties, along with determining the terms of the employment contract, are absolutely unchanged, even when the employee can give consent to interfere in such a private zone. An example is the current Swiss law, which provides for the establishment of mandatory norms aimed not only at protecting the fundamental rights of the employee as the weakest party to the contract, but also at developing the entrepreneurial autonomy of the employer and the state economy as a whole.

According to Article 319 of Title X of the Swiss law of obligations of March 30, 1911 (with subsequent amendments), the protection of an employee's identity means the protection of life, health, and respect for the personal moral rights of an employee, it is carried out imperatively. These mandatory legislative norms that restrict the autonomy of the will of the parties when concluding or changing an employment contract are aimed at protecting the social and personal rights of the employee. The content of these norms cannot be changed by the will of the parties to the employment contract either in the direction of deterioration of the situation of both parties, or in the direction of deterioration of the situation exclusively of the employee, primarily in the aspect of protecting their personality [33].

Therefore, even if the employer, using its dominant position, finds convincing words for the employee about the possibility of violating the boundaries of his private life, the latter, according to the requirements of the law, cannot grant such permission. If, without receiving the employee's alleged objection, the employer still violates such limits, this should be considered an offence.

Since the Verkhovna Rada of Ukraine is delaying the adoption of the Labour Code, the study suggests that the analysed practice of the ECHR gives grounds to regulate legal relations between employers and employees to ensure the right to privacy of the latter right now. At the same time, in order to prevent discrimination and violation of the right to privacy of an employee (personal data subject) in the draft Labour Code of Ukraine of December 27, 2014 No. 1658, prepared for the second reading, is provided for in Article 29 "Control over the performance of employees' labour duties" [34]. If there are no objections to Part 2 of this Article, even after taking into account the proposals to the content of this Article between readings from the standpoint of observing the rights of the employee, the proposed version of Part 1 of this norm is still not perfect. The legislators did not consider the fundamental and practical comments contained in the analytical note of the National Institute for Strategic Studies, either regarding the term "features of production", or regarding the ban on the collection and storage by the employer of information about the personal life of an employee (the need to determine the list of information that is considered confidential, the establishment of a ban or at least strict regulation of the possibility and procedure for its publication, except in cases defined by law), or regarding the restriction and regulation on the installation of such technical means [35]. Consequently, the adoption of Article 29 of this draft law, taking into account these comments, will be aimed at protecting the labour rights of employees and strengthening the guarantees of their rights to privacy when performing their labour functions.

The scientific originality of the study lies in the fact that the issue of the legality of the employer's control over an employee using technical means has been comprehensively investigated, considering their types, legal requirements, in particular, the practice of the ECHR and national judicial practice. This actualises the need for a thorough study of the regulatory regulation of technical control of employers over employees using the removal of information from transport telecommunications and electronic information networks, wiretapping, control over electronic correspondence and communication of persons in social networks. The study substantiates the expediency of normative consolidation in the legislation of Ukraine of the concept of private life of an employee during the performance of labour functions, defines possible limits for restricting the rights and freedoms of employees from interference by the employer's economic (disciplinary) authorities in the sphere of its private autonomy.

Conclusions

Ukraine, as a state governed by the rule of law, must ensure the fulfilment of its international obligations, in particular, in the field of human labour rights, and the protection of employees from the arbitrariness of employers when they exercise control over employees using technical means.

Legal regulation of the protection of personal data of employees obtained, in particular, during the recording of their telephone conversations on corporate phones agreed with them; control over their electronic correspondence and communication in social networks, etc., needs to be developed based on the experience of the countries of the European Union, which have gone through the process of developing an effective mechanism for ensuring the right of employees to a personal zone during the performance of their duties. The studied practice of the ECHR allows regulating these relations between employers and employees in Ukraine to ensure the latter's right to privacy. At the same time, without a high-quality settlement of

such legal relations at the state level, there are risks of a significant number of disputes (conflicts) regarding the violation of employees' rights, in particular, the protection of their personal data, which requires resolution at the legislative and local levels.

Therefore, it seems appropriate to define the concepts of "private life" and "personal zone of the employee at the time of performing work duties" at the legislative level. Article 2 of the Labour Code of Ukraine "Basic labour rights of employees" should be supplemented with Part 3, which provides for additional guarantees for protecting the right of employees to respect for their private life and the secrecy of personal correspondence, communication in electronic information networks, telephone conversations, electronic and other correspondence.

Supplement Article 2 (Basic principles of legal regulation of labour relations) of the draft Labour Code of Ukraine of December 27, 2014 No. 1658 with subparagraph 6-1, stating it in the following wording: "6-1) ensuring the right to the private life of an employee during the performance of their labour functions, including the right to a personal zone at the time of performance of such duties by an employee".

The last sentence of Part 1 of Article 29 of the draft should read as follows: "During the exercise of control, including video, audio, etc., actions that degrade the honour and dignity or violate other rights of employees, including their right to privacy, the secrecy of personal correspondence, communication in electronic information networks, telephone conversations, electronic and other correspondence, in particular, using telephones and other technical means of the employer are not allowed".

Part 1 of Article 29 of the draft should be supplemented with paragraph 2, stating it in the following wording: "During the exercise of control, it is not allowed to collect, store and disclose information about the personal (private) life of employees without their written consent. The list of such confidential information is established by law".

References

- [1] Resolution of the Cabinet of Ministers of Ukraine No. 1236 "On Establishment of Quarantine and Introduction of Restrictive Disease Measures with the Purpose of Prevention of Distribution on Territory of Ukraine of Sharp Respirator Illness of COVID-19, Caused Koronavirusom Sars-Cov-2". (2020, December). Retrieved from <https://www.kmu.gov.ua/npas/-1236-091220>.
- [2] Kravchenko, I. (2021). Problems of normative determination of concept "private life", taking into account admission of limits of limitation of rights for workers during realization of control measures an employer after them with application of hardwares and methods. *Scientific Bulletin of the National Academy of Internal Affairs*, 1(118), 82-93. doi: 10.33270/01211181.82.
- [3] Decision of ECHR in business No. 59320/00 "Hannover v. Germany". (2004, June). Retrieved from https://zakon.rada.gov.ua/laws/show/980_324#Text.
- [4] Nesterovych, V.F. (2020). Prohibition of discrimination as an important international and constitutional principle in the field of human rights. *Expert: Paradigms of Legal Sciences and Public Administration*, 5, 86-122. doi: 10.32689/2617-9660-2020-5(11)-86-122.

- [5] Beschastnyi, V.M. (2019). Ethnic behavior of the police: Europe and the United States. *Law Journal of Donbass*, 4(69), 176-182. doi: 10.32366/2523-4269-2019-69-4-176-182.
- [6] Kaminska, N., & Dzhuska, A. (2020). Implementation of the constitutional human right to secrecy of telephone conversations in Ukraine. *Scientific Bulletin of the National Academy of Internal Affairs*, 114, 100-109. doi: 10.33270/01201141.100.
- [7] Kortukova, T., Kaminska, N., Dei, M., & Blahodarnyi, A. (2020). COVID-19: Regulation of migration processes in the European legal area. *Cuestiones Políticas*, 38, 321-332. doi: 10.46398/cuestpol.38e.20.
- [8] Manzhosova, O.V. (2019). Specific aspects of implementing the right to respect to honor and divine in social networks. *Journal of Civilization*, 32, 81-85. doi: 10.32837/chc.v0i32.24.
- [9] Drozdov, O.M., & Drozdova, O.V. (2018). *Reference book from application of the article 8 of European convention on human rights. A right is on respect to private and domestic life, habitation and correspondence*. Retrieved from https://unba.org.ua/assets/uploads/1259d4263dac852ef056_file.pdf.
- [10] Vietukhova, I., & Kaplina, V. (2019). Control of the personal correspondence of worker by an employer: A production necessity or violation of the article of 8 Convention is about defence of human rights and fundamental freedoms. *Enterprise, Economy and Right*, 3, 105-109.
- [11] Fedorenko, V.L., & Nesterovych, V.F. (2019). Affirmation and constitutional consolidation of the right to information: From ancient times to the present. *Scientific Bulletin of the International Humanities University*, 41, 47-51. doi: 10.32841/2307-1745.2019.41-1.11.
- [12] Lazor, I.V. (2011). Disciplinary power of employer: A concept and value is in the conditions of market relations. *State and Right*, 52, 315-321. Retrieved from <http://dspace.nbuv.gov.ua/bitstream/handle/123456789/34040/52-Lazor.pdf?sequence=1>.
- [13] Gazeta Prawna. (n.d.). Retrieved from <https://polskapraca.in.ua/articles/polshcha-robotodavtsi-zmozhut-kontrolyuvati-svoikh-pratsivnikiv-za-dopomogoyu-videokamer/>.
- [14] Vahanova, I.M. (2016). To the question about the use of hardwares of supervision in the labour right of Ukraine. In M.I. Inshyn, V.I. Scherbyna, & I.S. Sakharuk (Eds.), *Trends in the development of the science of labor law and social security law* (pp. 39-43). Kyiv: Print-Service.
- [15] Convention is about Defence of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
- [16] Civil Code of Ukraine. (2003, January). Retrieved from <https://cis-legislation.com/document.fwx?rgn=8896>.
- [17] Law of Ukraine No. 2657-XII "On Information". (1992, October). Retrieved from <https://cis-legislation.com/document.fwx?rgn=12087>.
- [18] Decision of Constitutional Court of Ukraine in business in relation to official interpretation of the articles 3, 23, 31, 47, to a 48 Law of Ukraine "On information" and Article 12 of the Law of Ukraine "On the Prosecutor's Office" (the case of K. G. Ustimenko) No. 5-зп. (1997, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/v005p710-97#Text>.
- [19] Dictionary of Ukrainian: In 11 volumes. (1970-1980). In *Dictionary of Ukrainian* (Vol. 9), (p. 778). Kyiv: Naukova dumka.
- [20] Law of Ukraine No. 1906-IV "On the International Treaties of Ukraine". (2004, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1906-15#Text>.
- [21] Decision of ECHR in business No. 44647/98 "Peck v. the United Kingdom". (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/980_165#Text.
- [22] Vitkauskas, D. (2003). Right on respect to private life in accordance with the article 8 of European Convention of defence of human rights and basic freedoms. In *New aspects of right on a detail and improvement of the Ukrainian legislation*. Retrieved from <https://khp.org/1094815937>.
- [23] Decision of ECHR No. 13710/88 in business "Niemietz v. Germany". (1992, December). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/SO2132.html.
- [24] Law of Ukraine No. 2297-VI "On the Protection of the Personal Data". (2010, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2297-17>.
- [25] Jeane Meister "Want to be a more productive employee? Get on social networks". (2013). Retrieved from <https://www.forbes.com/sites/jeannemeister/2013/04/18/want-to-be-a-more-productive-employee-get-on-social-networks/?sh=7dd969a8753d>.
- [26] Judgment of the European Court of Human Rights by Ms. Alison Halford v. the United Kingdom of Great Britain and Northern Ireland (application No. 20605/92). (1997, June). Retrieved from <https://ol.zt.court.gov.ua/sud0618/pres-centr/13/394562/>.
- [27] Decision of ECHR in business No. 35623/05 "Uzun v. Germany". (2010, September). Retrieved from <https://www.slideshare.net/pravotv/8-20152019>.
- [28] Judgment of the European Court of Human Rights by Mr. Bohdan Mihai Barbulescu v. Romania "On the Protection of Privacy When Using a Business Telephone and Correspondence Via the Yahoo Messenger Online Chat Service Via the Internet, Sent from the Workplace" (application No. 61496/08). (2017, September) Retrieved from <http://kmp.ua/uk/analytics/echr/employer-s-review-of-the-employee-s-correspondence/>.

- [29] Decision of ECHR No. 62617/00 in business “Copland v. the United Kingdo”. (2007, April). Retrieved from <http://www.nsj.gov.ua/files/1529653122>.
- [30] Supreme Court of Ukraine ruling in case No. 6-1435tss17. (2017, September). Retrieved from <https://ukrainepravo.com/law-practice/>.
- [31] Law of Ukraine No. 2899-IV “On Sudoustriy and Status of Judges”. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.
- [32] Criminal code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.
- [33] Frenkel, E.B. (2002). *Labour and social right for foreign countries: Basic institutes. Comparative-legal research*. Moscow: Iurist.
- [34] Project of the Labour code of Ukraine No. 1658. (2014, December). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221.
- [35] An analytical message is “In relation to the separate innovations of the Labour code of Ukraine”. (n.d.). Retrieved from <http://old2.niss.gov.ua/articles/2194/>.

Список використаних джерел

- [1] Про встановлення карантину та запровадження обмежувальних протиепідемічних заходів з метою запобігання поширенню на території України гострої респіраторної хвороби COVID-19, спричиненої коронавірусом SARS-CoV-2 : Постанова Кабінету Міністрів України від 09.12.2020 р. № 1236. URL : <https://www.kmu.gov.ua/npas/pro-vstanovlennya-karantinu-ta-zaprovadzhennya-obmezhuvalnih-protiepidemichnih-zahodiv-1236-091220>.
- [2] Кравченко І. М. Проблеми нормативного визначення поняття «приватне життя» з огляду на допустимість меж обмеження прав працівників під час здійснення роботодавцем заходів контролю. *Науковий вісник Національної академії внутрішніх справ*. 2021. № 1(118). С. 82–93. doi : 10.33270/01211181.82.
- [3] Рішення Палати ЄСПЛ у справі «Ганновер проти Німеччини» від 24.06.2004 р. Заява № 59320/00. URL : https://zakon.rada.gov.ua/laws/show/980_324#Text.
- [4] Нестерович В. Ф. Заборона дискримінації як важливий міжнародний та конституційний принцип в галузі прав людини. *Експерт : парадигми юридичних наук і державного управління*. 2020. № 5. С. 86–122. doi : 10.32689/2617-9660-2020-5(11)-86-122.
- [5] Бесчастний В. М. Етична поведінка поліцейських: європейський і вітчизняний досвід. *Правовий часопис Донбасу*. 2019. № 4(69). С. 176–182. doi : 10.32366/2523-4269-2019-69-4-176-182.
- [6] Камінська Н., Джуська А. Реалізація конституційного права людини на таємницю телефонних розмов в Україні. *Науковий вісник Національної академії внутрішніх справ*. 2020. № 114. С. 100–109. doi : 10.33270/01201141.100.
- [7] Kortukova T., Kaminska N., Dei M., Blahodarnyi A. COVID-19: Regulation of migration processes in the European legal area. *Cuestiones Políticas*. 2020. Vol. 38. P. 321–332. doi: 10.46398/cuestpol.38e.20.
- [8] Манжосова О.В. Окремі аспекти реалізації права на повагу до честі та гідності в соціальних мережах. *Часопис цивілістики*. 2019. № 32. С. 81–85. doi : 10.32837/chc.v0i32.24
- [9] Дроздов О. М., Дроздова О. В. Довідник із застосування статті 8 Європейської конвенції з прав людини. Право на повагу до приватного і сімейного життя, житла і кореспонденції. 2018. URL : https://unba.org.ua/assets/uploads/1259d4263dac852ef056_file.pdf.
- [10] Ветухова І., Капліна В. Контроль особистої кореспонденції працівника роботодавцем : виробнича необхідність чи порушення статті 8 Конвенції про захист прав людини і основоположних свобод. *Підприємництво, господарство і право*. 2019. № 3. С. 105–109.
- [11] Федоренко В. Л., Нестерович В. Ф. Утвердження та конституційне закріплення права на інформацію : від найдавніших часів до сучасності. *Науковий вісник Міжнародного гуманітарного університету*. 2019. № 41. С. 47–51. doi : 10.32841/2307-1745.2019.41-1.11.
- [12] Лазор І. В. Дисциплінарна влада роботодавця: поняття та значення в умовах ринкових відносин. *Держава і право. Серія «Юридичні і політичні науки»*. 2011. Т. 52. С. 315–321. URL : <http://dspace.nbuv.gov.ua/bitstream/handle/123456789/34040/52-Lazor.pdf?sequence=1>.
- [13] Gazeta Prawna. URL: <https://polskapraca.in.ua/articles/polshcha-robotodavtsi-zmozhut-kontrolyuvati-svoikh-pratsivnikiv-za-dopomogoyu-videokamer/>.
- [14] Ваганова І. М. До питання про використання технічних засобів спостереження у трудовому праві України. *Тенденції розвитку науки трудового права та права соціального забезпечення: тези доп. II Міжнар. наук.-практ. конф. (м. Київ, 21-22 квіт. 2016 р.)*. Київ, 2016. С. 39–43.
- [15] Конвенція про захист прав людини і основоположних свобод: міжнар. док. від 04.11.1950 р. URL : https://zakon.rada.gov.ua/laws/show/995_004.
- [16] Цивільний кодекс України : Закон України від 16.01.2003 р. № 435-IV. URL : <https://cis-legislation.com/document.fwx?rgn=8896>.

- [17] Про інформацію : Закон України від 02.10.1992 р. № 2657-XII. URL : <https://cis-legislation.com/document.fwx?rgn=12087>.
- [18] Рішення Конституційного Суду України у справі щодо офіційного тлумачення статей 3, 23, 31, 47, 48: Закону України «Про інформацію» від 30.10.1997 р. № 5-зп. URL: <https://zakon.rada.gov.ua/laws/show/v005p710-97#Text>.
- [19] Словник української мови : в 11 т. Київ : Наук. думка, 1970–1980. Т. 9. С. 778.
- [20] Про міжнародні договори України : Закон України від 29.06.2004 р. № 1906-IV. URL : <https://zakon.rada.gov.ua/laws/show/1906-15#Text>.
- [21] Рішення ЄСПЛ по справі «Пек проти Сполученого Королівства» від 28.01.2003 р. № 44647/98. URL : https://zakon.rada.gov.ua/laws/show/980_165#Text.
- [22] Віткаускас Д. Право на повагу до приватного життя відповідно до статті 8 Європейської Конвенції захисту прав людини та основних свобод. *Нові аспекти права на приватність та удосконалення українського законодавства*: виступ на Міжнар. просвіт. семінарі (м. Київ, 6-7 жовтня 2003 р.). URL : <https://khp.org/1094815937>.
- [23] Рішення ЄСПЛ у справі «Німіц проти Німеччини» від 16.12.1992 р. № 251-В заява № 13710/88. URL : http://search.ligazakon.ua/l_doc2.nsf/link1/SO2132.html.
- [24] Про захист персональних даних : Закон України від 01.06.2010 р. № 2297-VI. URL : <https://zakon.rada.gov.ua/laws/show/2297-17>.
- [25] Jeane Meister «Want to be a more productive employee? Get on social networks». URL: <https://www.forbes.com/sites/jeanemeister/2013/04/18/want-to-be-a-more-productive-employee-get-on-social-networks/?sh=7dd969a8753d>.
- [26] Рішення ЄСПЛ громадянки Великобританії пані Елісон Хелфорд проти Сполученого Королівства Великобританії і Північної Ірландії «Про захист приватного життя при користуванні службовим телефоном» від 25.06.1997 р. Заява № 20605/92. URL : <https://ol.zt.court.gov.ua/sud0618/prescentr/13/394562/>.
- [27] Рішення ЄСПЛ у справі «Узун проти Німеччини» від 02.09.2010 р. Скарга № 35623/05. URL : <https://www.slideshare.net/pravotv/8-20152019>.
- [28] Рішення ЄСПЛ п. Богданом Михай Барбулеску проти Румунії «Щодо захисту приватного життя при користуванні службовим телефоном та листування за допомогою сервісу онлайн-чатів Yahoo Messenger через мережу Інтернет, надісланих з робочого місця» від 05.09.2017 р. Заява № 61496/08. URL : <http://kmp.ua/uk/analytics/echr/employer-s-review-of-the-employee-s-correspondence/>.
- [29] Рішення ЄСПЛ у справі «Копланд проти Сполученого Королівства» від 03.04.2007 р. Скарга № 62617/00. URL : <http://www.nsj.gov.ua/files/1529653122>.
- [30] Постанова Верховного Суду України від 27.09.2017 р. № 6-1435цс17. URL : <https://ukrainepravo.com/law-practice/>.
- [31] Про судоустрій і статус суддів : Закон України від 02.06.2016 р. № 1402-VIII. URL : <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.
- [32] Кримінальний кодекс України: Закон України від 05.04.2001 р. № 2341-III. URL : <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.
- [33] Френкель Э. Б. *Трудовое и социальное право зарубежных стран: основные институты. Сравнительно-правовое исследование*. Москва: Юристъ, 2002. 687 с.
- [34] Проект Трудового кодексу України від 27.12.2014 р. № 1658. URL : https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221.
- [35] Аналітична записка «Щодо окремих новацій Трудового кодексу України». URL : <http://old2.niss.gov.ua/articles/2194/>.

Проблеми правового регулювання заходів контролю за найманими працівниками

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Анотація

У статті здійснено аналіз норм національного та європейського законодавства, практики Європейського суду з прав людини й національних судів щодо захисту права працівників на приватне життя під час виконання трудових функцій. Досліджено проблему збереження «приватної автономії» працівників під час здійснення роботодавцем контролю за виконанням таких функцій із застосуванням технічних засобів і способів. Аргументовано необхідність нормативного визначення меж обмеження прав і свобод працівників в умовах такого контролю. Метою дослідження є обґрунтування доцільності нормативного закріплення в національному законодавстві певних гарантій для працівників у разі втручання хазяйської (дисциплінарної) влади роботодавця у сферу їхньої приватної автономії під час використання технічних засобів. Наукова новизна дослідження полягає в тому, що питання правомірності прослуховування телефонних розмов, контролю за електронним листуванням і спілкуванням працівників у соціальних мережах під час виконання ними трудових функцій є частиною комплексу публікацій щодо меж втручання роботодавця з використанням технічних засобів у приватне життя працівників. Предмет дослідження засвідчує актуальність нормативного визначення національним законодавством приватної автономії працівників та її меж щодо правових гарантій від зазіхань роботодавця. Охорона та захист прав працівників під час виконання ними трудових функцій від втручання дисциплінарної влади роботодавця у сферу їхньої приватної автономії, стеження за спілкуванням в електронних інформаційних мережах, змістом телефонних розмов й електронної та іншої кореспонденції не можуть бути ефективними без нормативного визначення допустимих меж такого втручання в приватне життя працівників

Ключові слова:

роботодавець; найманий працівник; трудовий договір; робоче місце працівника; істотні умови праці; таємниця листування; таємниця телефонних розмов; таємниця електронної, телеграфної та іншої кореспонденції; аудіоспостереження (прослуховування) працівника; захист прав і свобод людини й громадянина; персональні дані

UDC 342.951:351.785
DOI: 10.33270/04212202.56

Administrative and legal status of the state inspectorate for architecture and urban planning in proceedings on administrative offences provided for in Article 96 of the Code of Ukraine on Administrative Offences

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Abstract

Having analysed the reform in the field of urban planning, this study aims to investigate the administrative and legal status of the State Inspection of Architecture and Urban Planning in cases of administrative offenses provided for in Article 96 of the Code of Ukraine on Administrative Offenses and the specifics of its powers; to systematize proposals for improving the activities of the State Inspection of Architecture and Urban Planning regarding proceedings, detection of violations and bringing to administrative responsibility under Article 96 of the Code of Ukraine on Administrative Offenses. In accordance with the purpose and specificity of the research subject, a number of methods were used, which include: descriptive, systematic analysis, generalization, comparative method, functional and other methods of scientific knowledge. The scientific originality of the study is due to the fact that the author has for the first time investigated the administrative and legal status of the State Inspection of Architecture and Urban Planning in cases of administrative offenses provided for by Article 96 of the Code of Ukraine on Administrative Offenses. The relevance of improving the activities of not only the divisions of the State Inspection of Architecture and Urban Planning, but also other divisions that implement state policy in the field of construction is substantiated. It is proposed to make changes to the legislation of Ukraine regarding the expansion of the powers of the State Inspectorate of Architecture and Urban Planning in detecting violations and conducting proceedings in the field of construction, and it is also proposed to harmonize the Law of Ukraine "On Regulation of Urban Planning Activities". Development of activities with the resolution of the Cabinet of Ministers of Ukraine dated December 23, 2020 No. 1340 "Some Issues of the Functioning of Architectural and Construction Control and Supervision Bodies". On the basis of the conducted study of the administrative and legal status of the State Inspection of Architecture and Urban Planning, a conclusion was formulated, according to which the Law of Ukraine "On Regulation of Urban Planning Activities" dated February 17, 2011 needs to be supplemented, since its content does not reflect the administrative status of the State Inspection of Architecture and Urban Planning as a central of the executive authority, which carries out control and supervision in the field of urban planning

Keywords:

administrative and legal status; urban planning; State Inspectorate for Architecture and Urban Planning; subject; proceedings; Article 96 of the Code of Ukraine on Administrative Offences

Article's History:

Received: 07.09.2021
Revised: 22.10.2021
Accepted: 11.11.2021

Suggest Citation:

Marchenko, O.L. (2021). Administrative and legal status of the state inspectorate for architecture and urban planning in proceedings on administrative offences provided for in Article 96 of the Code of Ukraine on Administrative Offences. *Law Journal of the National Academy of Internal Affairs*, 11(2), 56-62.

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Introduction

The construction industry in Ukraine is important for supporting the national economy. The quality of life of the population depends on the success of its functioning. At the same time, one of the most significant obstacles in this area is corruption.

According to research, the field of urban planning is one of the most complex and corrupt in Ukraine, and therefore a source of illegal enrichment. In general, losses from corruption in the field of urban planning amount to UAH 2.7 to 3.5 billion per year [1]. Considering the above, the authors share the opinion that “corruption was, is and, obviously, will be (at least in the near future) one of the biggest and most global problems in Ukraine” [2]. Therefore, it is necessary to work on reducing its level, since “otherwise one of the largest countries in Europe in terms of the potential of human and natural resources will be one of the poorest on the continent” [3]. In this connection, reformation takes place in various spheres of social life. Therefore, it is necessary to reform the construction industry.

The development of national policy in the field of urban planning requires clear legislative regulation of the activities of all participants and determination of their administrative and legal status, transparency and liberalization of their functioning and accountability. V.V. Stukalenko emphasizes the need to harmonize the mechanism of bringing to administrative responsibility in the field of urban planning with current international standards [4]. Effective implementation of this policy is impossible without ensuring effective regulation of control and supervisory functions in the field of urban planning. Taking into account the above, a completely expected step is the creation of a new central body of executive power, the activity of which is directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Community and Territorial Development and implements state policy in the field of state architecture and construction, control and supervision – this is the State Inspection of Architecture and urban planning of Ukraine (hereinafter – DIAMP).

In the science of administrative law, problems of the functioning and legal status of state bodies in the field of urban planning were considered by V.B. Averyanov [5], M.I. Braginskyi [6], O.E. Yershov [7], P.V. Kivalov [8], V.K. Kolpakov [9] and others. The researchers outlined the powers and theoretical foundations of the activities of the state architectural and construction control bodies. However, after the reform in the field of urban planning, the administrative and legal status of DIAUP and the prospects for improving the control function of this state body in the context of modern processes of decentralization of Ukrainian politics were quite neglected.

The purpose of the study is to investigate the administrative and legal status of the DIAP in conducting cases on administrative offenses provided for by Article 96 of the Code of Ukraine on Administrative Offenses. To achieve the goal, the following tasks are planned:

- 1) consider the specifics of the powers of SIAUP;
- 2) to systematize proposals for improving the activities of the DIAP in the conduct of cases on administrative offenses provided for in Article 96 of the Code of Ukraine on Administrative Offenses.

Presentation of Main Material

The study of the administrative and legal status of SIAUP makes it possible to highlight the specifics of the powers of state bodies that carry out administrative control over compliance with the requirements of legislation regarding building regulations, standards, and rules during construction.

As for the scientific category “administrative-legal status”, there is no clear definition of it in science, which causes separate discussions among researchers. In particular, D.M. Bachrach and V.B. Averyanov assume that the administrative-legal status contains three blocks of elements: a) targeted; b) structural and organizational; c) competent [5]. In this study, the authors lean towards the position of researchers who in the textbook “Administrative Law of Ukraine” (under the general editorship of Academician S.V. Kivalov) consider the administrative-legal status of the executive power body through the prism of functions, tasks and competence [8]. Therefore, this study will highlight the functions, tasks and competence of DIAP as a subject of administrative control in accordance with Article 96 of the Code of Ukraine on Administrative Offenses.

The administrative and legal status of the Inspection of Architecture and Urban Planning was formed under the influence of the requirements of modern society. In the end, corruption and non-transparent performance of official duties by employees of the state architectural and building inspection led to its liquidation and the beginning of reforms. In March 2020, at an off-site meeting of the government, the President of Ukraine announced the liquidation of the State Architectural and Construction Inspection (SDAI) and the adoption of a resolution of the Cabinet of Ministers of Ukraine on the creation of three new bodies instead of DIAUP: the State Town Planning Inspection, the State Technical Regulation of Town Planning and the State Service of Town Planning. Each organ has special functions. The functions of control and supervision in the construction system are assigned to the State Urban Planning Inspectorate. Subsequently, the created bodies were optimized and a new central body of executive power was formed in the field of implementation of the architectural and construction policy of the state – the State Inspection of Architecture and Urban Planning of Ukraine. The administrative and legal status of the newly created body is special. In their activities, inspectors use a single state electronic system in the field of construction. The main components of the system include a new Register of construction activities, a public portal, electronic offices and automated construction services on the Diya portal.

There are no corruption risks under the new system. The single state electronic system in the field of construction minimizes contacts between process participants as much as possible. Thanks to this system, construction processes are carried out clearly and transparently. The urban planning reform is based on two key theses: the liberalization of certain construction processes, and on the other hand, the criminalization of responsibility for violations, as noted by the Minister of Community and Territorial Development Oleksiy Chernyshov [10].

The newly created body – the State Inspection of Architecture and Urban Planning – reflects the need of society, developers and the state to introduce new approaches to activity and control in the field of urban planning. Minister O. Chernyshov noted during a press conference in Ukrinform: “SIAUP is not a substitute for SACI. This is a completely new body, with a new structure, with new powers, with new principles of work” [11].

Unlike the State Architectural and Construction Inspection, which had four main functions: architectural and construction control, implementation of permit procedures, implementation of licensing and regulatory activities [12], DABI is a central body of executive power, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister development of communities and territories and implements state policy on issues of state architectural and construction control and supervision. It was formed on the basis of the resolution of the Cabinet of Ministers of Ukraine No. 1340 dated 12/23/2020 [13] instead of the State Construction Inspectorate and the State Urban Planning Service. On March 13, 2020, instead of the State Architectural and Construction Inspection of Ukraine, the Cabinet of Ministers allowed DABI to carry out state architectural and construction control and supervision dated 09/15/2021, finally liquidating DABI [14].

The administrative and legal status of DIAUP can be outlined with the help of the tasks performed by the newly created body, namely: implementation of state policy on state architectural and construction control and supervision, in particular: implementation of state architectural and construction control; of state architectural and construction supervision, licensing of types of economic activity in the construction of objects, according to the class of consequences (responsibility) belong to objects with medium (CC2) and severe (CC3) consequences, and the implementation of control over compliance by business entities with licensed according to the conditions of carrying out types of economic activity for the construction of objects, according to the class of consequences (responsibility), they belong to objects with medium (CC2) and severe (CC3) consequences.

Since this study aims to investigate the administrative and legal status of the DIAP in the proceedings in cases of administrative offenses provided for in Article 96 of the Code of Ukraine on Administrative Offenses, it

is worth noting that this work includes violations of legislative requirements, building norms, standards and rules during construction. SIAUP has the authority to conduct inspections; issue orders to eliminate violations of legislative requirements, stop preparatory and construction works, eliminate violations of license conditions; carry out licensing; cancellation or suspension of the decision of the objects of supervision, etc. It has the ability to exercise its powers directly and through territorial bodies formed in accordance with the established procedure.

In accordance with the Regulation approved by the Resolution of the Cabinet of Ministers of Ukraine dated December 23, 2020 No. 1340 “On the State Inspection of Architecture and Urban Planning of Ukraine”, the administrative and legal status of this state body can be determined through its administrative powers:

- preparation and submission to the Minister of proposals to ensure the formation of state policy on the issues of state architectural and construction control and supervision. The central body is endowed with such powers, its proposals cannot be ignored by an official;

- implementation of state architectural and construction control over compliance by customers, enterprises that provide engineering support for the construction site, architects and other designers, contractors, experts, expert organizations responsible for executors of works, consulting engineers, within the limits of the powers defined by law owners of buildings and linear structures in compliance with the requirements of legislation in the field of urban planning, building regulations, standards and rules during the performance of preparatory and construction works [3];

- implementation of state architectural and construction supervision over compliance with the requirements of legislation in the field of urban planning activities, construction norms, standards and rules by territorial bodies of DIAUP, authorized bodies of urban planning and architecture, structural subdivisions of the Kyiv and Sevastopol regional state administrations, administrations and executive bodies of village, settlement, city councils from issues of state architectural and construction control, other bodies exercising control in the field of urban planning activities (hereinafter referred to as objects of supervision), during the implementation of urban planning activities;

- licensing of types of economic activity for the construction of objects, which according to the class of consequences (responsibility) belong to objects with medium (CC2) and high (CC3) consequences, control over compliance by economic entities with license conditions for carrying out types of economic activity with construction of objects, according to the class of consequences (responsibility), belong to objects with medium (CC2) and severe (CC3) consequences;

- implementation of licensing and registration functions in construction in cases specified by legislation. In addition, the competence of SIAUP includes:

conducting inspections of the compliance of preparatory and construction works with the requirements of construction norms, standards, rules, and the requirements of the approved project; verification of compliance with the order of inspection and certification of objects, implementation of measures to ensure reliability and safety during their operation; implementation of control over compliance by business entities with license conditions for carrying out types of economic activity in the construction of objects that, by the class of consequences (responsibility), belong to objects with medium (CC2) and severe (CC3) consequences; to check compliance by architects, design engineers, experts, other responsible executors of the requirements of legislation, construction regulations, standards and rules, requirements for compliance with qualification certificates of the class of consequences (responsibility) of objects determined by qualification requirements for the corresponding or lower category of employees, as well as legality decisions in the field of urban development, adopted by the objects of supervision [15]. Among the administrative and power functions of DIAUP, which determine its special administrative and legal status in proceedings in accordance with Article 96 of the Code of Ukraine on Administrative Offenses, the following can be distinguished:

- the ability to give binding instructions regarding:
- elimination of violations of the requirements of legislation in the field of urban development, building regulations, standards and rules;
- suspension of preparatory and construction works;
- elimination of violations of legislation requirements in the field of urban planning by objects of supervision;
- elimination of violations of the licensing conditions for the implementation of types of economic activity for the construction of objects, which according to the class of consequences (responsibility) belong to objects with medium (CC2) and severe (CC3) consequences;
- elimination of violations of legal requirements in the field of urban planning by enterprises providing technical conditions for engineering support of the construction object, architects, other designers, contractors, experts, expert organizations, responsible executors of works, consulting engineers, owners of buildings and linear structures, customers.

DIAP cancels or terminates the effect of the decisions taken by the objects of supervision regarding the violation of the requirements of legislation in the field of urban planning activities, with the simultaneous drawing up of a protocol in accordance with the Code of Ukraine on administrative offenses and the subsequent publication of such information on the official website of SIAUP. In addition, inspectors are authorized to draw up reports of inspections, protocols on the commission of offenses, to consider cases of offenses in the field of improvement and cases of administrative offenses with the adoption of relevant resolutions, to impose fines in

accordance with the legislation. DIAP, in the course of supervision, may submit a request to the body that granted such right to deprive an official of the subject of supervision of the right to perform certain types of work. An important function of DIAUP is that inspectors have the right to prohibit the operation of completed construction facilities that have not been put into operation by a motivated written decision. It is necessary to monitor the execution of the issued instructions. The newly created central body of the executive power – DIAUP – must develop and participate in the preparation of international agreements of Ukraine on matters of state architectural and construction control, conclude interdepartmental international agreements of Ukraine in accordance with the law, and carry out international cooperation on issues within its competence. SIAUP registers the notification of the start of preparatory work, the notification of the start of construction work, makes changes to them, and also cancels the right to start the preparatory or construction work acquired on the basis of the submitted notification. DIAUP also exerts administrative and legal influence by issuing permits for construction works, registering notices of changes to them or refusing to issue such permits, canceling permits for construction works. Accepts completed construction objects into operation in the established order (issues acts of acceptance into operation of completed construction objects or refuses to issue them, registers declarations about the object's readiness for operation, makes changes to them, returns such declarations and cancels them registration). Considers in the order of supervision the decision of the state architectural and construction control bodies on registration or return of the declaration of readiness of the object for operation (without the right to register declarations), the decision on issuing or canceling a permit to perform construction works (without the right to issue a permit), the decision on refusal in the issuance of the act of acceptance into operation of the facility completed by construction (without the right to issue a certificate). The powers of SIAUP are clearly defined by law [15]. Summarizing the tasks, functions and powers of SIAUP, we can conclude that it is a powerful state body whose activities are based on European values. The priority in the body's activities is to overcome corruption risks in the field of urban planning.

It is the administrative and legal status of SIAUP that determines the state's ability to ensure quality organization of urban development activities. However, after analysing the content of the Law of Ukraine "On Regulation of Town Planning Activities" dated February 17, 2011 [1], its provisions must be supplemented by defining the administrative and legal status of DIAUP as the central body of the executive power that exercises control and supervision in the field of town planning.

The originality of the study is due to the fact that the administrative and legal status of the DIAP in cases of administrative offenses provided for by Article 96

of the Code of Ukraine on Administrative Offenses was investigated for the first time. The need to improve the activities of not only DIAUP divisions, but also other divisions that implement state policy in the field of construction is argued. It is proposed to make changes to the legislation of Ukraine regarding the expansion of the powers of the DIAP when bringing to administrative responsibility for offenses in the field of construction.

Based on the results of the study, it can be stated that the detection of administrative offenses in the construction sector is a key to the prevention of criminal offenses [16].

The study agrees with the opinion of V.V. Stukalenko that during the reformation of the urban planning industry, it is necessary to create a new paradigm with several vectors of activity and a combination of the obtained results, in particular: a) rethinking of the main scientific and theoretical foundations of the institute of administrative responsibility (purpose, tasks, principles, subjects, etc.); b) inventory and codification of a large array of current administrative and tort legislation taking into account theoretical developments of legal science in general and norms of administrative law and urban planning legislation in particular [4].

Yu.V. Tarasyuk proved that the regulation of legal relations in the construction sector is a guarantee of a high level of statehood. The improvement of administrative responsibility in the field of housing construction is aimed at increasing the efficiency and effectiveness of this type of responsibility as one of the most important tools for ensuring the proper level of legality and discipline in this area, increasing the level of legal

awareness and culture of citizens, subjects of legal relations that are formed in it [17].

Conclusions

Based on the analysis of the outlined problems, the following conclusions were drawn:

1) several approaches to the interpretation of the administrative-legal status as a complex legal phenomenon were considered, the specific position of scientists was chosen as the basis;

2) the content of DIAUP activity was investigated and the state policy regarding its development, functions, powers and tasks in the field of construction was outlined;

3) proposals for improving the activities of SIAUP were systematized.

It is proposed to make changes to the legislation of Ukraine regarding the expansion of the powers of the DIAP in the detection of offenses in the field of construction, as well as to harmonize the Law of Ukraine "On Regulation of Urban Development Activities" with the Resolution of the Cabinet of Ministers of Ukraine of 12/23/2020 No. 1340 "Some issues of the functioning of architectural and construction control and supervision".

On the basis of the conducted study of the administrative and legal status of DIAUP, a conclusion was formulated, according to which the Law of Ukraine "On Regulation of Urban Development" dated 02/17/2011 needs to be supplemented, since its content does not reflect the administrative status of DIAUP as a central body of executive power, which carries out control and supervision in the field of urban planning.

References

- [1] Fedorov, M. (2021). How the Ministry of Finance is reforming the construction industry, and what is the anti-corruption effect. *Ukrainska Pravda*. Retrieved from <https://www.pravda.com.ua/columns/2021/03/18/7286994/>.
- [2] Vozniuk, A.A. (2020). Corruption criminal offenses: Conceptual problems in the context of reforming the criminal legislation of Ukraine. *Legal Journal of the National Academy of Internal Affairs*, 2(20), 21-32. doi: 10.33270/04202002.21.
- [3] Cherniavskiy, S., & Vozniuk, A. (2019). Foreign experience of legal counteraction to illegal enrichment. *Legal Journal of the National Academy of Internal Affairs*, 1(17), 79-89. doi: 10.33270/04191701.79.
- [4] Stukalenko, V.V. (2020). Some issues of the mechanism of proceedings in cases of administrative offenses in the field of urban planning. *Legal Scientific Electronic Journal*, 2, 277-279. Retrieved from <http://lsej.org.ua/index.php/arkhiv-nomeriv?id=123>.
- [5] Averianov, V.B. (2002). *Executive power and administrative law*. Kyiv: In-Yu-re.
- [6] Braginsky, M.I., & Vitryansky, V.V. (2000). *Contract law. Book one: General provisions*. Moscow: Statut.
- [7] Ershov, V.O. (2010). *Polish memoir literature of the Right Bank of Ukraine in the Romantic era*. Zhytomyr: Polissya.
- [8] Kivalov, S.V. (2003). *Administrative law of Ukraine*. Odesa: Yurydychna literatura.
- [9] Kolpakov, V.K. (2004). *Administrative-tort legal phenomenon*. Kyiv: Yurinkom Inter.
- [10] Urban planning reform: DABI will be finally liquidated in a week. (2021). *Yurydychna Gazeta*. Retrieved from <https://yur-gazeta.com/golovna/reforma-mistobuduvannya-vzhe-za-tizhden-dabi-bude-ostatochno-likvidovano.html>.
- [11] Regarding the liquidation of the DABI and the start of the work of the State Inspection of Architecture and Urban Planning of Ukraine. (2021). Retrieved from <https://www.ukrinform.ua/rubric-presshall/3315310-sodo-likvidacii-dabi-ta-startu-roboti-derzavnoi-inspekci-arhitekturi-ta-mistobuduvanna-ukraini.html>.
- [12] Marchenko, O.L. (2019). Problems of bringing to administrative responsibility for violation of legislation, building codes, standards and rules during construction. *Scientific Bulletin of the National Academy of Internal Affairs*, 4(113), 97-103. doi: 10.33270/01191134.97.

- [13] Resolution of the Cabinet of Ministers of Ukraine No. 1340 "On Approval of the Regulations on the State Inspectorate for Architecture and Urban Planning". (2020, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1340-2020-%D0%BF#n30>.
- [14] Press conference on the liquidation of DABI and the start of the State Inspectorate for Architecture and Urban Planning of Ukraine. (2021). Retrieved from <https://www.minregion.gov.ua/press/news/preskonferenciya-shhodo-likvidacziyi-derzhavnoyi-arhitekturno-budivelnoyi-inspekczii-dabi-ta-startu-roboty-derzhavnoyi-inspekczii-arhitektury-ta-mistobuduvannya-ukrayiny-diam/>.
- [15] Resolution of the Cabinet of Ministers of Ukraine No. 1340 "Some Issues of the Functioning of Architectural and Construction Control and Supervision". (2020, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1340-2020-%D0%BF#Text>.
- [16] Zapototskyi, A.P., Vozniuk, A.A., & Kuchmenko, S.V. (2017). *Investigation of misappropriation, misappropriation of property or taking it by abuse of office in the field of construction*. Kyiv: National Academy of Internal Affairs.
- [17] Tarasiuk, Yu.V. (2021). Administrative and legal support of housing construction in Ukraine. (PhD thesis, Sumy State University, Sumy, Ukraine). Retrieved from https://essuir.sumdu.edu.ua/bitstream/download/123456789/83684/1/diss_Tarasiuk.pdf.

Список використаних джерел

- [1] Федоров М. Як Мінцифра реформує будівельну галузь, і яким є антикорупційний ефект. *Українська правда*. URL: <https://www.pravda.com.ua/columns/2021/03/18/7286994/>.
- [2] Вознюк А. А. Корупційні кримінальні правопорушення: концептуальні проблеми в контексті реформування кримінального законодавства України. *Юридичний часопис Національної академії внутрішніх справ*. 2020. Т. 2. № 20. С. 21–32. doi : 10.33270/04202002.21.
- [3] Чернявський С., Вознюк А. Зарубіжний досвід правової протидії незаконному збагаченню. *Юридичний часопис Національної академії внутрішніх справ*. 2019. Т. 1, № 17. С. 79–89. doi : 10.33270/04191701.79.
- [4] Стукаленко В. В. Окремі питання механізму провадження у справах про адміністративні правопорушення у сфері містобудівної діяльності. *Юридичний науковий електронний журнал*. 2020. № 2. С. 277–279. URL : <http://lsej.org.ua/index.php/arkhiv-nomeriv?id=123>.
- [5] Авер'янова В. Б. Виконавча влада і адміністративне право. Київ : Ін-Ю-ре, 2002. 668 с.
- [6] Брагинский М. И., Витрянский В. В. Договорное право. Книга первая : Общие положения. М. : Статут, 2000. 848 с.
- [7] Єршов В. О. Польська мемуаристична література Правобережної України доби романтизму. Житомир : Полісся, 2010. 454 с.
- [8] Ківалова С. В. Адміністративне право України : підручник. Одеса : Юрид. літ., 2003. 896 с.
- [9] Колпаков В. К. Адміністративно-деліктний правовий феномен : монографія. Київ : Юрінком Інтер, 2004. 528 с.
- [10] Реформа містобудування : вже за тиждень ДАБІ буде остаточно ліквідовано. *Юридична газета*. URL : <https://yur-gazeta.com/golovna/reforma-mistobuduvannya-vzhe-za-tizhden-dabi-bude-ostatochno-liknvidovao.html>.
- [11] Щодо ліквідації ДАБІ та старту роботи Державної інспекції архітектури та містобудування України. URL: <https://www.ukrinform.ua/rubric-preshhall/3315310-sodo-likvidacii-dabi-ta-startu-roboti-derzhavnoi-inspekczii-arhitekturi-ta-mistobuduvanna-ukraini.html>.
- [12] Марченко О.Л. Проблеми притягнення до адміністративної відповідальності за порушення вимог законодавства, будівельних норм, стандартів і правил під час будівництва. *Науковий вісник Національної академії внутрішніх справ*. 2019. № 4(113). С. 97–103. doi : 10.33270/01191134.97.
- [13] Про затвердження Положення про Державну інспекцію архітектури та містобудування : Постанова Кабінету Міністрів України від 23.12.2020 р. № 1340. URL : <https://zakon.rada.gov.ua/laws/show/1340-2020-%D0%BF#Text>.
- [14] Прес-конференція щодо ліквідації ДАБІ та старту роботи Державної інспекції архітектури та містобудування України. Укрінформ. 2021. URL : <https://www.minregion.gov.ua/press/news/preskonferenciya-shhodo-likvidacziyi-derzhavnoyi-arhitekturno-budivelnoyi-inspekczii-dabi-ta-startu-roboty-derzhavnoyi-inspekczii-arhitektury-ta-mistobuduvannya-ukrayiny-diam/>.
- [15] Деякі питання функціонування органів архітектурно-будівельного контролю та нагляду : Постанова Кабінету Міністрів України від 23.12.2020 р. № 1340. URL: <https://zakon.rada.gov.ua/laws/show/1340-2020-%D0%BF#Text>.
- [16] Запотоцький А. П., Вознюк А. А., Кучменко С. В. Розслідування привласнення, розтрата майна або заволодіння ним шляхом зловживання службовим становищем у сфері будівництва : метод. рек. Київ : Нац. акад. внутр. справ, 2017. 78 с.

[17] Тарасюк Ю. В. Адміністративно-правове забезпечення житлового будівництва в Україні: дис. ... канд. юрид. наук. : 12.00.07. Суми, 2021. 228 с. URL: https://essuir.sumdu.edu.ua/bitstream-download/123456789/83684/1/diss_Tarasiuk.pdf.

Адміністративно-правовий статус Державної інспекції архітектури та містобудування в провадженні у справах про адміністративні правопорушення, передбачені статтею 96 Кодексу України про адміністративні правопорушення

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Анотація

Проаналізувавши реформу у сфері містобудування, ставимо за мету в цій статті дослідити адміністративно-правовий статус Державної інспекції архітектури та містобудування в провадженні у справах про адміністративні правопорушення, передбачені статтею 96 Кодексу України про адміністративні правопорушення, а також особливості її повноважень; систематизувати пропозиції з удосконалення діяльності Державної інспекції архітектури та містобудування в провадженнях, виявленні порушень і притягненні до адміністративної відповідальності за ст. 96 Кодексу України про адміністративні правопорушення. Відповідно до поставленої мети та специфіки предмета дослідження, автор використав низку методів, серед яких: описовий, метод системного аналізу, узагальнення, порівняльний метод, функціональний та інші методи наукового пізнання. Наукова новизна публікації полягає в тому, що автор уперше здійснив наукове дослідження адміністративно-правового статусу Державної інспекції архітектури та містобудування в провадженні за справами про адміністративні правопорушення, передбачені ст. 96 Кодексу України про адміністративні правопорушення. Аргументовано необхідність удосконалення діяльності не лише підрозділів Державної інспекції архітектури та містобудування, а й інших підрозділів, які реалізують державну політику у сфері будівництва. Запропоновано внести зміни до законодавства України щодо розширення повноважень Державної інспекції архітектури та містобудування під час виявлення порушень і здійснення проваджень у сфері будівництва, а також запропоновано узгодити Закон України «Про регулювання містобудівної діяльності» з постановою Кабінету Міністрів України від 23 грудня 2020 року № 1340 «Деякі питання функціонування органів архітектурно-будівельного контролю та нагляду». На підставі здійсненого дослідження адміністративно-правового статусу Державної інспекції архітектури та містобудування, сформульовано висновок, за яким потребує доповнення Закон України «Про регулювання містобудівної діяльності» від 17 лютого 2011 року, адже в його змісті не відображено адміністративний статус Державної інспекції архітектури та містобудування як центрального органу виконавчої влади, який здійснює контроль і нагляд у сфері містобудування

Ключові слова:

адміністративно-правовий статус; містобудування; Державна інспекція архітектури та містобудування; суб'єкт; провадження; стаття 96 Кодексу України про адміністративні правопорушення

UDC 342.7
DOI: 10.33270/04212202.63

Legal regulation of the use of euthanasia: Foreign experience and Ukrainian realities

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Abstract

The purpose of the study is to analyse the legal regulation of the use of euthanasia in foreign countries and to outline the prospects for the introduction of euthanasia in Ukraine. In the furtherance of this goal, it was necessary to perform the following tasks: to find out the content of the concept of euthanasia, to determine the constitutional basis for its introduction in foreign countries; to characterise the legal mechanisms for the introduction of euthanasia. The methodological basis of the research was a set of general scientific and special methods, and their complex application was aimed at achieving the goal and fulfilling the tasks of research. Constitutional and legal regulation of the use of euthanasia has also become the object of contemporary research in Ukraine. Defining in this paper is the comparative legal method, which allowed comparing approaches to the use of euthanasia in different countries. The forecasting determined the possible consequences of the use of euthanasia in Ukraine. Scientific originality consists in forming on the basis of studying the content of the concept of "euthanasia", analysing and systematising the views of opponents and supporters of legalising euthanasia the position that the introduction of euthanasia is not a component of the right to life, but, on the contrary, is a violation of this right and denies the idea that human life is the highest social value. In the context of legal regulation of euthanasia, it should be clearly defined that the state encourages the termination of a person's life at will, and therefore departs from the postulate that a person's life is the highest value. The trend towards legalising euthanasia is observed in states with high living standards. It is probably related to circumstances that are outside the scope of legal science, so there is an urgent need to consider such processes by psychiatry, psychology, and sociology. In states that have legalised euthanasia, there are many problems, including cases of abuse by medical personnel, pressure from relatives of patients pursuing illegal interests, the relativity of doctors' conclusions about the condition of a sick person, and the inability to adequately assess what is happening to patients in serious condition. In connection with the above, the study suggests that legal regulation, including at the level of international legal standards, should address issues related to the use of artificial maintenance of human life, so there is a need to develop its procedure, conditions for application, start and termination. The issue of euthanasia as the termination of a person's life at their request due to illness, old age or due to a person's self-perception should be reviewed, and a number of states where it is legalised can already analyse the consequences of such a decision. It should also be borne in mind that the absolute inadmissibility of euthanasia in Ukraine does not solve issues related to the suffering of terminally ill people. Therefore, the study of this topic is important for Ukraine

Keywords: euthanasia; legalisation of euthanasia; forms of euthanasia; palliative care; "right to die"; active euthanasia; passive euthanasia

Article's History:

Received: 26.08.2021
Revised: 06.10.2021
Accepted: 26.10.2021

Suggest Citation:

Kulik, T.O., & Mironyuk, T.O. (2021). Legal regulation of the use of euthanasia: Foreign experience and Ukrainian realities. *Law Journal of the National Academy of Internal Affairs*, 11(2), 63-69.

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Introduction

In the context of the liberalisation of the world, and in connection with the rapid pace of technological development, the issue of euthanasia and granting a person the “right to die” as an integral element of the right to life is becoming increasingly relevant. At one time, in 1991, American doctor J. Kevorkian was deprived of his license to practice medicine for developing the Mercitron device to perform euthanasia, and subsequently, his case was heard four times in court; nowadays, more than a dozen countries have consolidated the possibility of euthanasia procedure in a certain form at the legislative level.

At the same time, most countries traditionally oppose euthanasia, arguing for a variety of reasons. Ukraine also belongs to the list of countries where euthanasia is prohibited by law. However, as a member of the international community, it cannot ignore global trends in which disputes continue over the feasibility of legalising the “right to death”. Despite the fact that the ideas of legalising euthanasia are spreading around the world, there is no unambiguity about this issue. Thus, scientists, philosophers, and lawyers were divided into supporters and opponents of euthanasia. Despite this, the problem of legalising euthanasia remains insufficiently investigated, which determines the relevance of the study.

The purpose of the study is to analyse the views of scientists on the problems of life and death, to investigate the experience of legal regulation of euthanasia in foreign countries, to identify its general patterns and determine the possibility of using it in modern conditions in Ukraine.

In order to reach the objective, the following tasks need to be solved:

- consider the theoretical and legal aspect of understanding the concept of euthanasia;
- investigate the legal aspects and experience of foreign countries that have legalised this procedure;
- analyse the negative and positive consequences of legalising the “right to death” for Ukraine.

Aspects of the elements of the human right to life were studied by A. Kolodiy [1], M. Maleina [2], Yu. Todyka [3]. Many researchers have considered the right to life in the aspect of the death penalty. There is a growing body of work that treats the right to death as an implementation of the right to life. This aspect and the issue of euthanasia were analysed by O. Dombrovska [4], M. Kovaleva [5] et al.

The fundamental human right, according to Article 27 of the Constitution of Ukraine, is the right to life, which guarantees the inviolability of its physical existence. According to Article 3 of the Basic Law, a person, their life and health, honour and dignity, inviolability and security are recognised as the highest social value [6].

There is still a discussion about the moment of the beginning of a person's life, but it is mainly in the legal and political planes. In Particular, A. Dzhuska and

A. Paliukh, exploring the current approach to the constitutional human right to life, consider suicide, euthanasia, and abortion to be problematic issues related to the human right to life. Researchers note that a person has the opportunity to manage their life at their own discretion, first of all, to use all legitimate means and resources for the prevention of premature mortality, etc. [7].

In turn, the official website of Princeton University published the conclusions of scientific research on the beginning of human life: “Life begins with conception. A new human embryo, the starting point of human life, appears with the formation of a single-celled zygote” [8].

The issue of the beginning of a person's life is important, and it can be stated that in different legal relations, in different branches of law, different approaches to solving this issue have developed. One important aspect is that the issue of the legality and permissibility of abortion has long been relevant, but there is no unified approach at the international level. Abortion advocates simply ignore the conclusions of researchers regarding the fact that a person's life begins with conception. This is only indirectly related to the subject of this study, but it is also significant.

Medicine in the world has made significant progress, so now there are real ways and means of intervening in the processes of conceiving a child, and the possibility of artificially maintaining human life.

However, the primary task of medical professionals to preserve a person's life and maintain their health loses its meaning with the advent of auxiliary medical technologies that help a person pass away, thereby levelling the main tasks of the doctor.

The problem of euthanasia, which has become increasingly common in European countries in recent years, is also finding supporters in Ukraine. However, this problem requires a detailed analysis, since the possibility of euthanasia is on the verge of morally permissible and has a deep spiritual component both for each individual and for the people as a whole.

The subject of the right to life is a person, a person who naturally, that is, through birth, acquires this right. Euthanasia is the practice of stopping the life of a person who has an incurable disease by a doctor to satisfy their request in a painless or minimally painful form to stop suffering.

Despite the fact that theoretical research on the right to life is carried out in Ukraine, there are many issues related to the implementation of this right that require detailed legal regulation. In particular, they include the problems of legal boundaries of life, the definition of new elements of crimes related to the abuse of modern medicine and the use of euthanasia [6].

Presentation of Main Material

The term “euthanasia” (from the Greek “eu” – “good” + “thanatos” – “death”), which literally means “a good, easy death” was proposed in the 16th century by the

English philosopher F. Bacon, who, discussing the purpose and objectives of medicine in one of his works, focused on the issue of incurable diseases. He also wrote: “the duty of a doctor is not only to restore health, but also to alleviate the suffering and torment caused by illness...” [9].

Part 8 of Article 52 of the Law of Ukraine “Fundamentals of legislation of Ukraine on Health Care” prohibits euthanasia, consolidating its definition in the legal field. In particular, the Law interprets “euthanasia” as the deliberate acceleration of the death or killing of a terminally ill person in order to stop their suffering [10].

The Oxford English Dictionary offers three definitions of the word “euthanasia”: “calm and easy death”, “means for it”, “actions for its implementation” [11].

The concept of “euthanasia” by R. Stefanchuk interprets it as a type of behaviour of a medical worker (action, omission, or decision), committed consciously and intentionally, and also aimed at stopping unbearable suffering (physical, mental, moral, etc.), carried out by repeated and unambiguous request of the patient (and in cases provided for by law, their legal representative), provided that the person is fully, timely, and objectively aware of the consequences of such intervention, resulting in death [12].

Analysing the definition, the main components of euthanasia can be distinguished: actions (active actions, passive inactivity), intent (termination of life), subject (medical worker), and consequence (death of the patient).

The emergence of bioethics was conditioned by increased attention to human rights in the context of the active creation of new medical technologies, which create a significant number of problems that need to be solved from the standpoint of both law and morality. In addition, the establishment of bioethics was due to significant changes in medical practice, which were made possible by the success of genetic engineering, transplantology, the emergence of equipment for artificial support of patient life, and the accumulation of relevant practical and theoretical knowledge. All these processes have sharpened the moral issues facing the doctor and patient. Are there any limits to providing medical care in maintaining the life of a terminally ill person? From what exact moment does death occur? Is euthanasia acceptable? [13].

For a long time (until the middle of the 19th century), death was stated not by doctors, but by priests or hired people. Subsequently, representatives of the medical profession received the right, and then the obligation, to state death. At the same time, there is a problem of establishing the actual moment of death, which was difficult at all times. For thousands of years, in practice, the criteria for death were considered cardiac arrest, respiratory arrest, lack of sensitivity, etc. The imperfection of these ideas about the essence of death was that

the lack of functions of individual organs was identified with the death of the organism as a whole [14].

Scientific studies offer a variety of classifications of euthanasia. They can be distinguished according to the following criteria:

– by type of service provision:

a) active (carrying out any actions, administration of drugs that accelerate the fatal outcome. Active medical euthanasia can take three forms [15], it is performed without the patient's consent (for example, if the patient is in a coma), when close relatives or a doctor approve the procedure instead; with the help of a doctor; self-euthanasia, in which the patient injects themselves with a drug or turns on a device that helps them commit suicide);

b) passive (this is the non-use of drugs and non-fulfilment of medical manipulations that would support a certain time of life of a seriously ill patient. The authors do not share this position, because the right to refuse medical intervention is a subjective legal right of the patient, which can be realised by not agreeing to medical intervention, but euthanasia is a combination of the individual freedom of one person and the duty of another. Thus, passive euthanasia requires certain actions on the part of a medical professional, which determines the presence of a social component) [15].

– by mode of implementation:

a) positive (or “filled syringe method”) (the use of special means or other actions to a terminally ill person that entails a quick and painless death);

b) negative (or “delayed syringe method”) (refusal of measures that contribute to maintaining life, its meaning is to stop providing medical care aimed at prolonging life, which accelerates the onset of natural death);

– according to the subject's will:

a) voluntary (i.e., the use of medicines or other means to a terminally ill person, which leads to an easy and peaceful death at the request of a patient who is aware of their own actions and can direct them);

b) forced (means causing an easy death to a terminally ill person by appropriate means and actions, but by decision of family members, legal representatives, or public institutions) [16].

The following countries approve euthanasia: Albania, Belgium, the Netherlands, Luxembourg, Switzerland (Zurich only), Sweden, Germany, and some US states. In addition, the United States did not legalise euthanasia at the state level, entrusting this complex decision separately to the government of each of the states. Currently, it is allowed in the states of Oregon, Missouri, New Jersey, Vermont, Washington, Montana, and Georgia. Japan and Colombia supported the legalisation of euthanasia, but did not legalise it. There are also countries that adopted the law, but later repealed it. These include France, which supported euthanasia in 2014 and completely abandoned it in the spring of 2016.

Some researchers believe that only active euthanasia can be considered as real euthanasia, and passive can not be considered as a type of euthanasia at all, since in essence such actions of a medical worker are not directly aimed at causing death to a terminally ill person, but only at relieving them of suffering. However, there are categorical positions regarding passive euthanasia.

Polish state consultant in the field of Palliative Medicine Ya. Yutak suggests that the most important thing is the motive for such activities, and not the use or termination of such activities [17]. A negative attitude towards passive euthanasia was also expressed by Tadeusz Brzezicki, who noted: "Passive euthanasia is an unjustified medical termination of treatment in order to accelerate death, motivated by a sense of compassion for the sufferer" [17].

Another classification of euthanasia is carried out depending on the patient's will. According to this criterion, euthanasia is divided into voluntary (which is carried out with the free consent of a person), involuntary (which is carried out without the consent of a person), and forced (which is carried out against the person's will).

The world's first attempt to legalise euthanasia was made in 1906 in Ohio (USA). However, the legislative assembly voted against the bill. Since 1998, the state of Oregon (USA) has a law that allows active euthanasia, but the implementation of euthanasia is complicated by some legal formalities [18].

The world's first Law "On the Human Right to Death" was adopted in 1977 in the state of California (USA). If the list of certain mandatory conditions is met and strict control over suicide with medical assistance is not prosecuted, it is not punishable under the laws of the states of North Carolina, Utah, and Wyoming. In the state of Indiana, there is a so-called "lifetime will", in which the patient officially confirms their desire to not support their life artificially and under certain circumstances.

In Australia, a law on euthanasia was proposed by an MP as a 1995 "Bill on the rights of the terminally ill". Although this law was passed in July 1996, however, since the idea of the project contradicted the position of the Australian Medical Association and social groups that protect the right to life, it was repealed in 9 months.

In the Netherlands, the law "On Termination of Life at Will or Assistance in Suicide" was adopted in 2002. Notably, the Netherlands is the only country in the world where both physician-assisted suicide and voluntary active euthanasia are openly practiced. In the fall of 2016, the Dutch government began drafting a bill that would legalise suicide among people who feel that their "life is over" but are not necessarily terminally ill [19]. In November 2015, the German Bundestag voted to pass a law that allows, under a number of conditions, to help people voluntarily pass away. According to the law, citizens, in particular, relatives of terminally ill people, have the right to facilitate euthanasia "on an individual basis, guided by altruistic motives". At the same time, the

provisions of the law prohibit promoting euthanasia on a commercial basis and provide for a penalty of up to 3 years in prison for the violator. For Germany, euthanasia is an extremely sensitive topic, since the last time this procedure was allowed under the Nazis. At that time, more than 200 thousand people with physical disabilities or mental illnesses were executed [20].

The criminal codes of Uzbekistan and Georgia establish criminal liability for euthanasia [21]. In other countries, including the CIS countries, euthanasia is outside the scope of legal legalisation.

Thus, the analysis of the legislative experience of foreign countries gives grounds to assert that most countries qualify euthanasia as a crime against life, while the public of foreign countries gradually approves of euthanasia.

The study of the provisions of the national criminal legislation gives grounds to assert that euthanasia is prohibited by the current legislation, its commission is considered a crime in Ukraine – premeditated murder (Part 1 of Article 115 of the Criminal Code of Ukraine), for the commission of which a penalty of imprisonment for a period of 7-15 years is provided).

In legal science, medical practice, and moral norms, the issue of attributing failure to provide medical care to a terminally ill patient due to the lack of special medical equipment, medicines, or money from relatives to passive euthanasia remains debatable. The position that passive euthanasia is the failure to provide medical care due not to lack of funds, but to a conscious desire to direct their actions to stop the suffering of an incurable patient by death is justified.

The problem of euthanasia is becoming more and more urgent in the context of improving medical services, resuscitation, which allows endlessly fighting for human life and the total ageing of the population. In this regard, there are many questions about the maintenance of elderly people, terminally ill people, their supervision and treatment. Among these individuals, the largest number is those who want to end their lives.

The issue of the painful course of a number of diseases that medicine considers incurable, moral and physical suffering experienced by patients, is solved differently in different countries, depending on the economic situation, religion, national traditions, respect for old age, etc. For this purpose, special medical institutions are created in which patients feel comfortable, because they are alive, and do not live out their lives. Such special medical institutions are called hospices.

Unlike hospitals, there are no restrictions in a hospice: patients can keep an animal, receive relatives and friends, spend any holidays, etc. In such institutions, a special method of tracking the patient's moral state is used.

S. Boldizhar, analysing euthanasia as a way to end a person's life, comes to the conclusion that Ukraine will soon also face the issue of legalising euthanasia,

then there will be a need for a clear administrative and legal regulation of these processes to avoid abuse of the “right to death” for any selfish reasons. As long as active euthanasia is prohibited at the legislative level, the right to life remains one of the fundamental rights, an inalienable and absolute right that the state has undertaken to protect [22].

The study suggests that, first of all, constitutional and legal regulation of this issue should be ensured. Currently, Part 2 of Article 27 of the Constitution of Ukraine stipulates that no one can be arbitrarily deprived of life. The duty of the state is to protect a person's life; if it is impossible to take a person's life arbitrarily, then there is a possibility of non-arbitrary deprivation of life, but the protection of human life is consolidated as the duty of the state.

In countries where euthanasia is legalised, one of the conditions for its use provides that a person must be ill with an incurable disease, and this disease must cause them unbearable suffering. That is, if a person's suffering does not lead to death, it means that they can be sustained.

Considering that one of the achievements and priorities of democratic states is the protection of human rights, ensuring the rule of law to meet first of all the individual needs and interests of each individual, and Article 3 of the Constitution of Ukraine defines that a person, their life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value, euthanasia should not be legalised in Ukraine.

Scientific originality consists in forming on the basis of studying the content of the concept of “euthanasia”, analysing and systematising the views of

opponents and supporters of legalising euthanasia the position that the introduction of euthanasia is not a component of the right to life, but, on the contrary, is a violation of this right and denies the idea that human life is the highest social value. In the context of legal regulation of euthanasia, it should be clearly defined that the state encourages the termination of a person's life at will, and therefore departs from the postulate that a person's life is the highest value.

Conclusions

The trend towards legalising euthanasia is observed in states with high living standards. It is probably related to circumstances that are outside the scope of legal science, so there is an urgent need to consider such processes by psychiatry, psychology, and sociology.

In states that have legalised euthanasia, there are many problems, including cases of abuse by medical personnel, pressure from relatives of patients pursuing illegal interests, the relativity of doctors' conclusions about the condition of a sick person, and the inability to adequately assess what is happening to patients in serious condition.

In connection with the above, the study suggests that legal regulation, including at the level of international legal standards, should address issues related to the use of artificial maintenance of human life, so there is a need to develop its procedure, conditions for application, start and termination.

The issue of euthanasia as the termination of a person's life at their request due to illness, old age or due to a person's self-perception should be reviewed, and a number of states where it is legalised can already analyse the consequences of such a decision.

References

- [1] Kolodiy, A.M. (1998). *Principles of Ukrainian law*. Kyiv: Yurinkom Inter.
- [2] Maleina, M.N. (2000). *Personal non-property rights of citizens: The concept, implementation, protection*. Moscow: MZ Press.
- [3] Todyka, Yu.N. (2004). *Constitutional and legal status of a person and a citizen in Ukraine*. Kyiv: Publishing House “In Yure”.
- [4] Dombrovskaya, O.A. (2013). Socio-economic significance of lease relations in agricultural land use in Ukraine. *Bulletin of Kharkiv National University V.N. Karazina*, 39(1084), 155-159.
- [5] Kovaleva, M.L. (2019). Logistics management: Features and principles. *Scientific Economic Journal "Intellect XXI"*, 5, 45-49.
- [6] Dombrovska, O.V. (2011). Characteristics of the elements of the content of the constitutional human right to life. *Bulletin of the Academy of Labor and Social Relations of the Federation of Trade Unions of Ukraine*, 4(4), 129-135.
- [7] Dzhuska, A., & Paliukh, A. (2019). The constitutional human right to life in Ukraine: A modern approach. *Scientific Bulletin of the National Academy of Internal Affairs*, 4(113), 48-56. doi: 10.33270/01191134.48.
- [8] Life Begins at Fertilization. (n.d.). Retrieved from <https://www.princeton.edu/~prolife/articles/embryoquotes2.html>.
- [9] Koval, M. (2015). Countermeasure of euthanasia – palliative treatment. *Bulletin of Social Hygiene and Health Care Organization of Ukraine*, 3(65), 54-58.
- [10] Law of Ukraine No. 2801-XII “Fundamentals of the Legislation of Ukraine on Health Care”. (1992, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/2801-12#Text>.

- [11] Fuko, M. (1998). *The birth of the clinic*. Moscow: Smysl.
- [12] Stefanchuk, R. (2008). *Personal intangible rights of individuals (concept, content, system, features of implementation and protection)*. Kyiv: KNT.
- [13] Hubernko, H. (2012). Problems of euthanasia in a bioethical context. Retrieved from <http://www.info-library.com.ua/books-text-11629.html>.
- [14] Rachels, J. (n.d.). *Active and passive use of euthanasia*. Retrieved from https://sites.ualberta.ca/~bleier/Rachels_Euthanasia.pdf.
- [15] Bishop, J.P. (2006). Euthanasia, efficiency, and the historical distinction between killing a patient and allowing a patient to die. *Journal of Medical Ethics*, 32(4), 220-224.
- [16] Sereda, S. (2010). *Euthanasia: Experience of legal regulation in foreign countries and expediency of permission in Ukraine*. In *Medical law of Ukraine: Problems of palliative care and medical and social services: Materials of the 5th All-Ukrainian scientific and practical conference* (pp. 196-200). Lviv: Medytsyna i pravo.
- [17] Brzezicki, T. (2002). *Etyka lekarska*. Warszawa: Wydawnictwo Lekarskie PZWL.
- [18] Kapinus, O. (2006). *Euthanasia as a social and legal phenomenon* (Doctor thesis, Institute of International Law and Economics named after A. S. Griboyedov, Moscow, Russian Federation).
- [19] The Netherlands can legalize euthanasia for people without deadly diseases. (2016). Retrieved from <https://www.unian.ua/world/1569942-niderlandi-mojut-legalizuvati-evtanaziyu-dlya-lyudey-yaki-ne-mayut-smertelnih-zahvoryuvan.html>.
- [20] Ivchenko, O. (2002). Responsibility for euthanasia under the criminal legislation of foreign countries (comparative legal analysis). *Legal Science and Practice*. Retrieved from http://pravgos.narod.ru/pravgosH/rules_criminal/ivchenko01_cr_0302.htm.
- [21] Declaration on Euthanasia: Adopted by the 39th World Medical Assembly. (1987, October). Retrieved from <http://www.medicusamicua.com/index.php?action=laws8>.
- [22] Boldizhar, S.O. (2019). Features of euthanasia and the issue of end of life. *Law and Society*, 5(2), 9-14. doi: 10.32842/2078-3736-2019-5-2-2

Список використаних джерел

- [1] Колодій А. М. Принципи права України : монографія. Київ : Юрінком Інтер, 1998. 208 с.
- [2] Малеина М. Н. Личные неимущественные права граждан : понятие, осуществление, защита. М. : МЗ Пресс, 2000. 244 с.
- [3] Тодыка Ю. Н. Конституционно-правовой статус человека и гражданина в Украине. Киев : Вид. Дім «Ін Юре», 2004. 368 с.
- [4] Домбровська О. А. Соціально-економічне значення орендних відносин у сільськогосподарському землекористуванні в Україні. *Вісник Харківського національного університету ім. В. Н. Каразіна*. 2013. № 39(1084). С. 155-159.
- [5] Ковальова М.Л. Логістичне управління : особливості та принципи. *Науковий економічний журнал «Інтелект XXI»*. 2019. № 5. С.45-49.
- [6] Домбровська О. В. Характеристика елементів змісту конституційного права людини на життя. *Вісник академії праці і соціальних відносин Федерації професійних спілок України*. 2011. Т. 4, № 4. С. 129-135.
- [7] Джуська А., Палюх А. Конституційне право людини на життя в Україні : сучасний підхід. *Науковий вісник Національної академії внутрішніх справ*. 2019. № 4(113). С. 48-56. doi : 10.33270/01191134.48.
- [8] Life Begins at Fertilization. URL: <https://www.princeton.edu/~prolife/articles/embryoquotes2.html>.
- [9] Коваль М. Контрміра евтаназії – паліативне лікування. *Вісник соціальної гігієни та організації охорони здоров'я України*. 2015. № 3(65). С. 54-58.
- [10] Основи законодавства України про охорону здоров'я : Закон України від 19.11.1992 р. № 2801-XII. URL : <https://zakon.rada.gov.ua/laws/show/2801-12#Text>.
- [11] Фуко М. Рождение клиники. М. : Смысл, 1998. 310 с.
- [12] Стефанчук Р. Особисті немайнові права фізичних осіб (поняття, зміст, система, особливості здійснення та захисту): монографія. Київ : КНТ, 2008. 625 с.
- [13] Губернко Г. Проблеми евтаназії в біоетичному контексті. 2012. URL: <http://www.info-library.com.ua/books-text-11629.html>.
- [14] Rachels J. Active and passive use of euthanasia. URL: https://sites.ualberta.ca/~bleier/Rachels_Euthanasia.pdf.
- [15] Bishop J. P. Euthanasia, efficiency, and the historical distinction between killing a patient and allowing a patient to die. *Journal of Medical Ethics*. 2006. Vol. 32, No. 4. P. 220-224.
- [16] Середя С. Евтаназія: досвід правового регулювання в іноземних країнах та доцільність дозволу в Україні. *Медицне право України: проблеми паліативної допомоги та медико-соціального обслуговування населення: матеріали IV Всеукр. наук.-практ. конф. (м. Львів, 2010 р.)*. Львів, 2010. С. 196-200.
- [17] Brzezicki T. *Etyka lekarska*. Warszawa: Wydawnictwo Lekarskie PZWL, 2002. P. 219.

- [18] Капинус О. Эвтаназия как социально-правовое явление : дис. ... д-ра юрид. наук : 12.00.08. Москва, 2006. 344 с.
- [19] Нідерланди можуть легалізувати евтаназію для людей, які не мають смертельних захворювань.
URL : <https://www.unian.ua/world/1569942-niderlandi-mojut-legalizuvati-evtanaziyu-dlya-lyudey-yaki-ne-mayut-smertelnih-zahvoryuvan.html>.
- [20] Ивченко О. Ответственность за эвтаназию по уголовному законодательству зарубежных стран (сравнительно-правовой анализ). *Юридическая наука и практика*. URL : http://pravgos.narod.ru/pravgosH/rules_criminal/ivchenko01_cr_0302.htm.
- [21] Декларація про евтаназію: прийнята 39-ю Всесвітньою медичною асамблеєю від 10.1987 р.
URL : <http://www.medicusamicua.com/index.php?action=laws8>.
- [22] Болдіжар С. О. Особливості евтаназії та питання закінчення життя. *Право і суспільство*. 2019. № 5. Ч. 2. С. 9–14. doi : 10.32842/2078-3736-2019-5-2-2.

Правове регулювання застосування евтаназії: зарубіжний досвід й українські реалії

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Анотація

Мета статті – проаналізувати правову регламентацію застосування евтаназії в зарубіжних країнах, окреслити перспективи запровадження евтаназії в Україні. Для її досягнення необхідно було виконати такі завдання: з'ясувати зміст поняття евтаназії, визначити конституційні засади запровадження її в зарубіжних країнах; схарактеризувати правові механізми запровадження евтаназії. Методологічною основою дослідження стала сукупність загальнонаукових та спеціальних методів, прийомів і засобів наукового пізнання, причому комплексне їх застосування спрямоване на досягнення мети й виконання завдань дослідження. Конституційно-правова регламентація застосування евтаназії стала об'єктом і сучасних вітчизняних досліджень. Визначальним у цій статті є порівняльно-правовий метод, що дає змогу порівняти підходи до застосування евтаназії в різних країнах. За допомогою принципу прогнозування вдалося окреслити можливі наслідки застосування евтаназії в Україні. Наукова новизна полягає у формуванні на підставі дослідження змісту поняття «евтаназія», аналізу й систематизації поглядів противників і прихильників легалізації евтаназії позиції про те, що запровадження евтаназії не є складовою права на життя, а, навпаки, є порушенням цього права та заперечує ідею, що життя людини є найвищою соціальною цінністю. За умов нормативного регулювання евтаназії має бути чітко визначено, що держава заохочує припинення життя людини за її бажанням, а отже, відступає від постулату, за яким життя людини є найвищою цінністю. Тенденція до легалізації евтаназії спостерігається в державах із високими показниками рівня життя. Вона, імовірно, пов'язана з обставинами, що знаходяться поза межами юридичної науки, тож актуальною є потреба дослідження таких процесів з боку психіатрії, психології та соціології. У державах, що легалізували евтаназію, постає чимало проблем, серед яких випадки зловживання з боку медичного персоналу, тиск родичів хворих, що переслідують незаконні інтереси, відносність висновків лікарів щодо стану хворої людини, неможливість адекватної оцінки того, що відбувається, хворим, який перебуває у важкому стані. У зв'язку з викладеним вище, вважаємо, що правове регулювання, зокрема й на рівні міжнародно-правових стандартів, має стосуватися питань, пов'язаних із застосуванням штучного підтримання життя людини, тому постає необхідність розроблення його порядку, умов застосування, початку та припинення. Питання евтаназії як припинення життя людини на її прохання через хворобу, літній вік або у зв'язку зі самосприйняттям людини слід переглянути, причому низка держав, у яких її легалізовано, уже може проаналізувати наслідки такого рішення. Варто також ураховувати, що абсолютна недопустимість евтаназії в нашій країні не вирішує питань, пов'язаних зі стражданнями невиліковно хворих людей. Тому дослідження цієї теми, на наш погляд, є важливою потребою для нашої країни

Ключові слова: евтаназія, легалізація евтаназії, форми евтаназії, паліативна допомога, «право на смерть», активна евтаназія, пасивна евтаназія

ЮРИДИЧНИЙ ЧАСОПИС
НАЦІОНАЛЬНОЇ АКАДЕМІЇ ВНУТРІШНІХ СПРАВ

Науковий журнал

Том 11, № 2. 2021

Заснований у 2011 р. Виходить двічі рази на рік

Оригінал-макет видання виготовлено у відділі підготовки навчально-наукових видань
Національної академії внутрішніх справ

Редагування англomовних текстів:

С. Воровський, К. Касьянов

Комп'ютерна верстка:

К. Сосєдко

Підписано до друку 28 вересня 2022 р. Формат 60*84/8
Умов. друк. арк. 4,42
Наклад 50 прим.

Адреса видавництва:

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пл. Солом'янська, 1, м. Київ, Україна, 03035
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www: <https://lawjournal.com.ua/uk>

LAW JOURNAL
OF THE NATIONAL ACADEMY OF INTERNAL AFFAIRS

Scientific Journal

Volume 11, No. 2. 2021

Founded in 2011. Published two times per year

The original layout of the publication is made in the Department of Preparation of Educational and Scientific Publications of National Academy of Internal Affairs

Editing English-language texts:

S. Vorovsky, K. Kasianov

Desktop publishing:

K. Sosiedko

Signed for print of September 28, 2021. Format 60*84/8
Conventional printed pages 4.42
Circulation 50 copies

Editors office address:

National Academy of Internal Affairs
03035, 1 Solomianska Sq., Kyiv, Ukraine
Tel.: +38 (044) 520-08-47
E-mail: info@lawjournal.com.ua
www: <https://lawjournal.com.ua/en>