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Legal reservations in fulfilling the purpose of the European principle of legal certainty on the example of Ukrainian legislation

Valerii Vlasenko*

PhD in Law, Associate Professor
National Academy of Internal Affairs
03035, 1 Solomianska Sq., Kyiv, Ukraine
<https://orcid.org/0000-0002-1287-9732>

Abstract

The relevance of this study lies in the fact that the legal systems of states that recognise and enforce the rule of law are increasingly subject to integration influence: the general requirements of rule-making are unified and ensured by the common obligations of the member states of international communities. The purpose of this study was to conduct a logical and legal analysis of legal reservations as a means of designing (constructing) legal norms to fulfil the purpose of the principle of legal certainty in national legislation. The study employed various methods of scientific cognition, including axiological, analytical, systemic, special legal, hermeneutical, logical, modelling, etc. The use of these methods has provided the basis for the scientific hypothesis regarding the composition of the principle of legal certainty and the nature of legal reservations. The study summarised that the principle of legal certainty as a component of the rule of law is based on the concept of predictability, which is achieved by ensuring clarity, unambiguity, and comprehensibility of legal provisions, and completeness of their content in the normative forms of national legislation. It was found that the requirements of the legal certainty principle can be met by applying a unified technique of rule-making, structuring, and formulation of regulatory provisions, where legal reservations are given a significant importance. The study identified and characterised the crucial features of legal reservations through understanding them as an element of rule-making technique in fulfilling the purpose of the European principle of legal certainty. The study outlined the essential properties of legal reservations and general requirements to them. The legal reservations are defined in the rules of law of national legislation as an element of rule-making technique, the content of which is determined by the social purpose of law. The study proved that they take the form of linguistic constructions, specify the purpose of a legal provision and the limits of its effect, and ensure the accuracy and predictability of a regulatory prescription. The findings of this study are of practical significance, as they can be used in research – for further investigation of topical issues of rulemaking technique, in lawmaking work – in the development of regulations

Keywords:

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*Corresponding author



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Introduction

Ensuring the constructive dynamics of international law in the field of human rights and freedoms objectively necessitates the development of common approaches to the use of methodology and tools of rulemaking techniques that will ensure the implementation of the principle of legal certainty in the rules of law of legislation at various levels. One of the key aspects in the study of rulemaking technique is its social significance, which is to achieve the completeness and accuracy of the will of the people in legal acts by using the most optimised means and techniques of drafting. In a study on the rule of law as a fundamental principle of democratic states, S. Kelbia *et al.* (2021) focus on the sources of law that govern the interaction of international communities and individual states and societies, and consolidate the basic values of humanity, including human rights and freedoms. Their guarantee is ensured by adherence to the rule of law in the lawmaking and law enforcement activities of the state and other entities that ensure the performance of state functions and tasks.

The further development of international legal relations requires a truly democratic rule of law, where the observance of human rights and freedoms, protection of their interests, creation of decent living conditions, and protection from external threats constitute the principal and unchanging tasks of democratic, social, and legal states. It is from these considerations that R. Blahuta *et al.* (2022) proceed, investigating human rights issues in the activities of state bodies, who also summarised that the functions and tasks of the state, the regulatory framework should be based on the principles of the rule of law, good governance, legality, legal certainty, etc.

The above is also confirmed by the scientific ideas of O. Balynska *et al.* (2024), which are highlighted in a study on the transformation of the content of human rights in the context of globalisation, which points to the rapid dynamics of human rights development, modelled in the rules of law under the influence of universalisation and unification of human rights, the variety of mechanisms for their implementation at the supranational level, the growing role of judicial law in the protection of human rights outside the national legal system, etc.

In the EU legal system, along with primary legislation, there are relevant programmes aimed at ensuring the stable functioning of the legal regulation mechanism. In this context, in researching issues related to improving legislation, M. Iglesias (2020) identified the Better Lawmaking programme, which aims to facilitate the legislative process through inter-institutional conflict prevention mechanisms, the introduction of a common approach to the interpretation and implementation of primary law and the principles of EU rulemaking, with a special focus on achieving legal certainty as part of the rule of law.

The prominent level of quality of the regulatory framework of countries that approximate national legislation to the EU law is achieved through the implementation of European rule of law standards, among which the activities of public authorities are considered lawful if they do not contradict the written legislation published in official sources of information. In other words, high-quality legislation does not allow arbitrary, unfair, and inconsistent decisions by public authorities, and each individual legislative provision is drafted according to the European principle of legal certainty (Recommendations for Ukrainian..., 2018). O. Stasiuk *et al.* (2023), in their study of issues related to the observance of human rights in the harmonisation of national legislation with the norms of the European Union, concluded that for the adaptation of national legislation to be more effective, it is necessary to overcome a series of problems that impede the approximation of Ukrainian law to European legal standards. First of all, it is necessary to qualitatively change Ukrainian legislation so that it follows the international principles of democracy and the rule of law, i.e., ensures respect for human rights and fundamental freedoms, minority rights, etc. The clearer the rules of rulemaking and the more precise the language of rulemaking, the better the legal act will be, which will meet the national interests, society's perceptions of justice, equality, freedom, and thus be understandable to the addressee, – notes S. Lewis (2023), studying the quality of laws.

V. Yzaguirre (2023), investigating approaches to legal certainty, notes that the legislators, seeking to achieve predictability, should write out the regulatory provisions as clearly as possible, and enforceability – should consider the value-based social aspect as a substantiation for the established rules. Thus, formally defined rules of law are superior in regulating social relations at various levels. Their quality depends on a range of factors, among which the key is the effectiveness of rule-making technique, which is designed to fully reflect the content of legal norms in the forms (sources) of law.

Thus, the issues of compliance with European principles and requirements of rulemaking, the use of rulemaking techniques in the development of draft legal acts have attracted the attention of many researchers. Their contribution is crucial in integrating legal knowledge of legal technology into a single system and adding to its quality. However, the legal doctrine has hardly ever provided a theoretical understanding of the specific features of legal reservations in the implementation of the European principle of legal certainty.

The purpose of this study was to provide a logical and legal analysis of legal reservations as a means of drafting legal rules to fulfil the purpose of the principle of legal certainty in national legislation. The specified purpose led to the following tasks: to define and characterise the requirements and content of the principle

of legal certainty, to clarify the legal nature and essential properties of legal reservations in the rules of law, and to analyse their typical shortcomings.

Materials and Methods

Considering the specifics of the purpose and objectives of the study, various methods of cognition were employed, which helped to identify the most significant and meaningful scientific provisions of the study. Thus, the axiological method helped to determine the value aspect of legal reservations in the provisions of law, which is manifested through the ability to ensure the establishment and protection of basic values of society, including human rights and freedoms, and to reflect the spiritual and value essence of law.

The use of the analysis method helped to study the components of the principle of legal certainty and understand their significance. The knowledge gained contributed to the use of a special legal method that characterised the requirements of the principle of legal certainty and helped to assess their significance in the drafting of legal norms. Using legal terms, legal certainty is interpreted as a component of the rule of law. Knowledge was also gained of the crucial features of legal reservations and their definition was formulated.

The logical method and the modelling method helped to trace the systemic dependencies of semiotics and law, rule-making technique, and the results of implementing the purpose of the principle of legal certainty, the content and form of the regulatory expression of legal reservations. The abstraction and deductive methods provided the transition from general statements to individual results. Specifically, the study succeeded in highlighting the special significance of the principle of legal certainty and aspects of its implementation in national legislation through legal reservations among a series of properties and relationships that are determined by the implementation of the rule of law, the dynamics of human rights development modelled in legal norms, the complexity of mechanisms for their implementation, and the specific features of legal technique.

The hermeneutic method helped to clarify the essential properties of legal reservations by interpreting

legal texts of regulations, decisions of the European Court of Human Rights, and the Constitutional Court of Ukraine. The study attempted to provide a scientific substantiation for the significance of legal reservations in fulfilling the purpose of the principle of legal certainty, and identified and characterised the general requirements and essential features of legal reservations as an element of rule-making technique.

The systemic method helped to present a holistic picture of the interrelationships between the requirements of the principle of legal certainty as a system of legal knowledge about the rules, means, and methods of achieving maximum completeness and compliance of the forms of regulatory provisions with their content, simplicity of presentation, and accessibility for understanding. The study was based on the decision of the European Court of Human Rights¹, of the Constitutional Court of Ukraine^{2,3,4}, on substantive and procedural law and legislation of Ukraine^{5,6,7}, OSCE recommendations (2023), Venice Commission studies⁸, which in general contributed to the logical and consistent execution of tasks and the fulfilment of the specified purpose.

Results

According to A. Hurrell (2008), the paradigm of modern international legal relations is characterised by the transition to new ideas of good governance and expansion of global rule-making, changes in the understanding of the social purpose of the state and international organisations, increased attention to the implementation of the principles of international law, which ensure the unity of legal regulation of social relations, coherence of all components of the legal superstructure, strengthening the social order, and synthesising global legal experience.

The principles of law are consolidated in a system of legal norms, which in continental Europe are reflected in regulations as the main source of law. The objective form of the existence of legal principles is achieved through the use of rulemaking techniques, namely, rules, means, and methods of setting out the content of legal norms in the articles of regulations, and indicating the systemic links between them as a whole and individual regulatory prescriptions. The decisions of

¹ Judgment of the European Court of Human Right in Case No. 65518/01 "Salov v. Ukraine". (2005, September). Retrieved from https://zakon.rada.gov.ua/laws/show/980_428#Text.

² Judgment of the Constitutional Court of Ukraine No. 1-p/2021 in Case No. 1-179/2019(4094/19). (2021, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/v001p710-21#Text>.

³ Judgement of the Grand Chamber of the Constitutional Court of Ukraine No. 2-p/2017. (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/v002p710-17#Text>.

⁴ Judgement of the Constitutional Court of Ukraine No. 5-пп/2005 in Case No. 1-17/2005. (2005, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/v005p710-05#Text>.

⁵ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14/ed20010405#Text>.

⁶ Constitution of Ukraine. (1996, June). Retrieved from <https://www.president.gov.ua/documents/constitution>.

⁷ Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17/ed20120413#Text>.

⁸ Report of the Venice Commission No. CDL-AD(2011)003rev "On the Rule of Law". (2011, April). Retrieved from [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev2-ukr](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev2-ukr).

the Constitutional Court of Ukraine dated 14 July 2021 No. 1-p/2021¹ and of 20 December 2017 No. 2-p/2017² stipulate that these links in national legislation are achieved by the commonality of legal terminology, as well as background knowledge of legally significant words and phrases. The clarity, comprehensibility, and unambiguity of legal norms, specifically their predictability and stability, constitute a set of requirements of the principle of legal certainty that generally ensure the organisation and functioning of the legal system, law-making, and law enforcement processes. Investigating the status and prospects of the principle of legal certainty, L. Luts (2023) notes that in the context of the functioning of interstate and national legal systems, this principle is becoming increasingly popular, requiring a more generalised understanding, clarification of its capabilities and means of ensuring.

In seeking to achieve common goals in drafting regulations, the Member States of the European Union agree to follow the requirements of the principle of legal certainty, namely: foreseeability, proportionality, enforceability, coherence and consistency, publication and accessibility, transparency, clarity and comprehensibility³. The requirement of foreseeability in the OSCE publication (2023) means that the rules of law should be designed in such a way that the addressee can understand, predict what consequences a particular action may lead to, what action they should take and when, etc. In this case, it is advisable to formulate the regulatory provisions as specifically as possible so that there are no grounds for an alternative interpretation of the content of the norm, which may result in arbitrariness of the state. Predictability can be achieved by ensuring transparency and clarity of regulatory provisions. They should be formulated in a clear and concise manner, clearly and unambiguously, with consistent and coherent use of terminology, avoiding excessive detail. For instance, the rule of law defined in Article 148 of the Criminal Procedural Code of Ukraine⁴ (wording dated 18 November 2012) “Preventive measures shall be applied to a suspect, accused, defendant, convicted person to prevent attempts to evade inquiry, investigation, or trial, to prevent the establishment of the truth in a criminal case or to continue criminal activity, as well as to ensure the enforcement of procedural

decisions”, does not contain clearly formulated provisions that would define for a suspect, accused, defendant, convicted person the actions that are prohibited for them while in this legal status. Therefore, this wording of the law does not meet the criterion of foreseeability. Specifically, the judgment of the European Court of Human Rights dated 06 September 2005 (application No. 65518/01)⁵ states that “... a provision cannot be considered a “law” if it is not formulated with sufficient clarity to enable a person to regulate their behaviour: they must be able to foresee the consequences that a particular action may lead to...”. The Constitutional Court of Ukraine in its decision No. 5-rp/2005 dated 22 September 2005⁶ noted “... that the requirement of certainty, clarity, and unambiguity of a legal provision follows from the constitutional principles of justice and equality, since other means cannot ensure uniform application of legal provisions, understanding of their meaning during law enforcement, and this inevitably leads to arbitrariness on the part of the authorities. Human and civil rights may be restricted only if the application of the legal provisions establishing such restrictions is foreseeable”. In other words, a person must be able to separate lawful behaviour from unlawful behaviour based on certain criteria and foresee its legal consequences. Such legal influence is one of the aspects of human rights guarantees, which is achieved through rule-making, law enforcement, and justice. In this way, according to O. Barabash *et al.* (2022), the requirements of the rule of law are implemented, and national legislation converges with European standards in the field of human rights and freedoms.

The aforementioned judgment of the European Court of Human Rights⁷ also states that “... the legal provision of Article 127 of the Criminal Code of Ukraine⁸ (wording dated 06 September 2005) met the requirements of clarity and foreseeability”, which was achieved through qualitative linguistic construction and the use of rule-making techniques in the following form: “Torture, i.e., the intentional infliction of severe physical pain or physical or mental suffering by means of beatings, torture, or other violent acts to induce the victim or another person to perform acts contrary to their will, including to obtain information, testimony, or confession from them, to punish them for actions they have

¹ Judgment of the Constitutional Court of Ukraine No. 1-p/2021 in Case No. 1-179/2019(4094/19). (2021, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/v001p710-21#Text>.

² Judgement of the Grand Chamber of the Constitutional Court of Ukraine No. 2-p/2017. (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/v002p710-17#Text>.

³ Interinstitutional Agreement Between the European Parliament, the Council of the European Union and the European Commission on Better Law-making. (2016, April). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29>.

⁴ Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17/ed20120413#Text>.

⁵ Judgment of the European Court of Human Right in Case No. 65518/01 “Salov v. Ukraine”. (2005, September). Retrieved from https://zakon.rada.gov.ua/laws/show/980_428#Text.

⁶ Judgement of the Constitutional Court of Ukraine No. 5-rp/2005 in Case No. 1-17/2005. (2005, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/v005p710-05#Text>.

⁷ Judgment of the European Court of Human Right in Case No. 65518/01 “Salov v. Ukraine”. (2005, September). Retrieved from https://zakon.rada.gov.ua/laws/show/980_428#Text.

⁸ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14/ed20010405#Text>.

committed or are suspected of having committed, or to intimidate them or other persons”.

Proportionality as a requirement means that when designing prohibitions, obligations, and penalties in legal provisions, the wording of their content should always be proportionate to the purpose of legal regulation. In other words, the measures of influence contained in the rules of law must be appropriate, necessary, and permissible to achieve the desired goal (Recommendations for Ukrainian..., 2018). For instance, the legal provisions in Articles 139, 293, and 294 of the Civil Code of the Ukrainian SSR of 1963¹ contained requirements for appeals against decisions and rulings of the court of first instance, which had the right to decide on the admissibility of the appeal. Thus, the judge, having established that the appeal was not filed in compliance with the requirements, ruled to leave it without motion. For example, Article 293 of the Civil Code of the Ukrainian SSR contained the following requirements: “The appeal shall be set out in clear typewritten text. The appeal shall contain the full and exact name of other persons involved in the case, their place of residence or location, postal code, communication number...”. Undoubtedly, all the means and procedures were provided for the achievement of the objectives of justice but considering the specified requirements for the form and content of the appeal, it can be concluded that they were not proportionate to the purpose of justice. That is, the person who had grounds for the appeal had to provide a series of information that might not have been known to them, since the person who managed the property was another person.

Enforceability is based on the understanding that regulations must be implemented in practice. In other words, the entities covered by a legal provision can actually implement it in everyday life within the stipulated timeframe. In law enforcement, the enforceability of regulations is also achieved when the regulations are clear, precise, unambiguous, and consistent (Yarema, 2023). For instance, the regulatory provisions prescribed in Article 143 of the current Constitution of Ukraine² define the powers of territorial communities of villages, towns, cities, among which one can single out “ensure the holding of local referendums and implementation of their results”, as well as in part 5 of Article 7 of the Law of Ukraine No. 280/97-VR “On Local Self-Government in Ukraine”³, which specifies that “the procedure for appointing and holding a local referendum and the list of issues to be decided exclusively by

a referendum are determined by the law on referendums”, cannot be properly implemented, since as of 5 July 2024 there are no current legal provisions of a regulation that would be a logical continuation of the legal regulation of public relations in this area.

Coherence and consistency in rulemaking mean that individual regulatory provisions and regulations as a whole should not contradict each other, they are properly interrelated, and the development of new ones is possible as a result of the logical sequence of legal regulation of social relations. Compliance with this requirement allows avoiding the emergence of unnecessary regulatory provisions and optimising the subject matter of legal regulation to reduce the number of regulations in a single area of social relations. For instance, the regulatory provisions of the Law of Ukraine No. 889-IV⁴, namely, Item 4.3 of Article 4 states that “state material and social support in the form of targeted payments of funds and provision of social services pursuant to the law, contributions to compulsory insurance of the taxpayer pursuant to the law, alimony paid to the taxpayer according to a court decision shall not be included in the total monthly or annual taxable income of the taxpayer”. However, the Procedure for Completion and Submission by Tax Agents..., approved by Order of the State Tax Administration (Service) No. 451 dated 29 September 2003⁵, states that all types of income listed above are considered income from which tax is withheld. In other words, such a requirement as consistency of the provisions of regulations is not met in this case, which creates grounds for making relevant changes to the current legal provisions and official interpretation of their content.

Publication and accessibility is a requirement that refers to the need to ensure that the public can get acquainted with drafts and enforced regulations and their supporting documents in a barrier-free manner through prompt publication of information in official sources in an understandable language and in formats accessible to people with disabilities (OSCE, 2023). Thus, the principle of legal certainty as a component of the rule of law is based on the concept of predictability. In other words, legal norms should be formulated with sufficient clarity, unambiguity, and comprehensibility to enable legal entities to choose a course of conduct that follows these norms and to foresee its consequences. The above requirements of the principle of legal certainty can be met by applying a unified rulemaking technique that covers a system of elements related to

¹ Civil Code of the Ukrainian SSR. (1963, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1540-06/ed19630718#Text>.

² Constitution of Ukraine. (1996, June). Retrieved from <https://www.president.gov.ua/documents/constitution>.

³ Law of Ukraine No. 280/97-BP “On Local Self-Government in Ukraine”. (1997, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80?lang=en#Text>.

⁴ Law of Ukraine No. 889-IV “On Personal Income Tax”. (2003, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/889-15#Text>.

⁵ Order of the State Tax Service of Ukraine No. 451 “On Approval of the Form of Tax Calculation of Amounts of Income Accrued (Paid) in Favour of Taxpayers and Amounts of Tax Withheld from Them (Form N 1ДФ) and the Procedure for Completion and Submission by Tax Agents of Tax Calculation of Amounts of Income Accrued (Paid) in Favour of Taxpayers and Amounts of Tax Withheld from Them”. (2003, September). Retrieved from <https://tax.gov.ua/zakonodavstvo/podatkovye-zakonodavstvo/normativno-pravovi-akti-z-pitan-kpr/nakazi/61755.html>.

the preparation of draft regulations in the most perfect structure and form. H. Gurbanov (2022) proposes to include legal language, legal constructions, the procedure for registration of a legislative act, forms of systematisation of legislation, etc., as rule-making techniques.

The purpose of the principle of legal certainty can be fulfilled if the addressee is informed in advance of the regulations, if the legal provisions are clear, understandable, and unambiguous, if the scope of discretionary powers and the ways of exercising them are certain, if final decisions of national courts are not appealed and enforced, if the legal provisions are flexible in law enforcement, which is achieved by accommodating humanity and justice, etc.¹.

The availability of a sufficient arsenal of rulemaking techniques (principles, rules, designs, etc.) ensures that the form of regulatory provisions is consistent with their content, provides clarity of presentation and accessibility for understanding, and specifies the issues that are the subject of legal regulation of the regulations being developed. Their preparation is a key stage of rulemaking, which involves creative comprehension of human existence, determination of relevant requirements, rules, and guidelines for governing and protecting social relations. High-quality formulation of regulatory provisions is achieved by compliance with the requirements of logical consistency, proper clarity of presentation, accuracy of description, freedom from contradictions, conciseness, correct layout of the draft regulation, standardisation of language means of formal style². Thus, summarising the above, it is advisable to cite the opinion of V. Ternavska (2021) that rulemaking technique plays a vital role in the system of constitutional and legal policy tools, since its instruments form the qualitative content of legal policy and ensure the effectiveness of its implementation. Failure to follow the rules and techniques of this technique adversely affects the interaction of legal policy elements and reduces the level of development of legal life in society.

Apart from these elements of the rulemaking technique, legal reservations are also distinguished, which are interpreted in scientific sources as socially determined provisions that have a special normative and lexical form, supplement the content of a legal provision, indicate the limits of its effect in reconciling the interests of participants in social relations, and entail certain legal consequences (Shutak, 2014). In terms of the forms of legal norms, R. Mańko (2023) notes that the dynamics of social relations and their globalisation lead to adaptation to new circumstances, but with the

preservation of continuity in law and its communicative nature as unchanged internal components. This ensures the legitimacy of the rule of law and its predictability. These theoretical provisions reflect the essential properties, dynamism, and simultaneous significance of legal regulation of social relations. In the mechanism of legal regulation, legal reservations guide a person in choosing the most acceptable option for lawful behaviour, while for lawmakers, they are a method of constructing legal norms. In linguistics, reservations are defined as a speech construction used by the speaker to prevent certain negative consequences for the addressee by expressing the will to perform or not to perform a certain action(s) (Vasilieva, 2010). In a legal text, as noted by V. Lazariiev (2022), legal reservations can be interpreted as a communicative and cognitive unit that is objectified through specific linguistic means and provides a reflection of a particular legal content of a regulatory provision. Thus, the above indicates that a reservation is a certain type of speech turns (constructions) that communicate expectations from actions (inaction) and encourage the addressee to socially useful behaviour. In rulemaking, language constructions are essential to ensure the “openness” of a regulatory provision, i.e., its specification, detail, establishment of exceptions, etc.

Legal reservations are increasingly used in the construction of legal provisions in the current legislation of Ukraine to ensure clarity and comprehensibility of principles, standards, and rules. For example, in the Constitution of Ukraine³, Article 32 states that “it is not allowed to collect, store, use, and disseminate confidential information about a person without their consent, except in cases determined by law, and only in the interests of national security...”, Article 94 states that “the law shall enter into force ten days after its official promulgation, unless otherwise prescribed by the law itself, but not earlier than the day of its publication”, Article 106 states “the President shall have veto rights over laws adopted by the Verkhovna Rada of Ukraine (except for laws amending the Constitution of Ukraine)...”. In the Criminal Code of Ukraine⁴, Article 58 specifies that “punishment in the form of service restriction is applied to convicted servicemen, except for conscripts”, Article 81¹ – “... the court shall impose on the person released from serving the sentence the obligation to serve the sentence immediately, but not later than 24 hours...”. In the Commercial Code of Ukraine⁵, Article 73 states that “a state unitary enterprise shall publish information about its activities, except in cases established by law...”, Article 190 – “free prices shall be

¹ Report of the Venice Commission No. CDL-AD(2011)003rev “On the Rule of Law”. (2011, April). Retrieved from [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev2-ukr](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev2-ukr).

² Judgment of the Constitutional Court of Ukraine No. 3-p/2019 in Case No. 1-231/2018(2980/18,3728/18). (2019, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/v003p710-19%23Text#Text>.

³ Constitution of Ukraine. (1996, June). Retrieved from <https://www.president.gov.ua/documents/constitution>.

⁴ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14/ed20010405#Text>.

⁵ Commercial Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15#Text>.

determined for all types of products (works, services), except for those for which state regulated prices are established”, etc.

These provisions of law use legal reservations, which are used to implement the requirements of the principle of legal certainty in legislation and have the following form of regulatory expression: “except in cases”, “only in the interests of”, “not earlier”, “not later”, “except for”. There are also other forms, e.g., “as a rule”, “in some cases”, “if necessary”. Through legal reservations, lawmakers define the exclusive powers of public authorities and officials and build the logic of the regulatory material of a branch of law. But there are also rules of law where the use of legal reservations does not ensure foreseeability as a requirement of the principle of legal certainty. For instance, in the Civil Procedural Code of Ukraine¹, Article 106 specifies that “the procedure for conducting an expert examination and drafting expert opinions based on the results of the examination is determined according to the current legislation of Ukraine...”, Article 455 – “... the application for setting aside the award of an arbitral tribunal or international commercial arbitration shall be accompanied by a certified translation of the listed documents pursuant to the legislation”. In the Commercial Procedural Code of Ukraine², Article 42 states that “the parties to the case are entitled to take part in court hearings, unless otherwise prescribed by law”, etc. The legal and logical analysis of these provisions allows distinguishing the forms of regulatory expression of legal reservations that should not be used, specifically: “according to the current legislation”, “unless otherwise prescribed by law”, “in other cases prescribed by law”, etc. Such wording of legal reservations indicates the existence of norms of different branches of law designed to govern the same area of social relations, which creates a situation where there is no clear list of actions of the relevant entity, which facilitates the abuse of law by public authorities.

Discussion

J. Raitio (2023) associates the principle of legal certainty with a conceptual scale of balancing between foreseeability and fairness in legal decision-making. As it were, the scope of the principle of legal certainty is more specific than the scope of the rule of law. While somewhat disagreeing with the expediency of comparing the scope of these concepts, the report “The Rule of Law”, adopted by the Venice Commission at its 86th plenary session on 25-26 March 2011³, reached a consensus on the essential elements of the rule of law, among which legal certainty occupies a prominent place, indicating that it is structurally part of one comprehensive concept. In terms of the perception of legal certainty as

a means of balancing predictability and fairness in legal decision-making, it is advisable to expand the meaning of this statement for the purposes of rulemaking. Thus, the general idea of the rule of law is to prevent arbitrariness on the part of the state, and therefore when formulating regulatory provisions, the developer should clearly define the scope of discretionary powers of public authorities and the ways of their implementation to ensure protection against excessive interference with the interests of an individual, prevention of abuse of law, etc. Thus, by achieving the most optimised form of expression of the content of a legal provision, a person is provided with the opportunity to understand and foresee the consequences of a particular behaviour, to model its permissible and desirable options, which certainly has a positive impact on the state of lawfulness in the state.

According to O. Yukhimiuk (2017), the system of ensuring the effect of a legal rule in Ukrainian legislation consists of a series of ordered elements, including legal reservations that ensure the coordination of interests of subjects of legal relations, determine the legal regime for applying the provisions of a general rule to the circumstances of concrete legal facts, and ensure the accuracy and clarity of legal rules. This opinion of the researcher reflects the essential aspects of legal reservations and highlights the significance of further investigation of theoretical and practical issues of application of legal reservations in rulemaking, which correlates with the findings of the present study in determining their crucial features. These features of legal reservations in the mechanism of legal regulation mean that legal reservations contribute to effective rulemaking, law enforcement, interpretation, law enforcement, and direct implementation of legal provisions. It is the content of the rules that will determine the behaviour of a legal entity, since the rule of law determines the ability of a person to perform relevant acts to achieve a private or public interest, the legal obligations of legal entities and prohibitions, the effectiveness of which also depends on the successful determination of the limits of the rules of law.

Apart from these features, legal reservations are characterised by a series of requirements that are objectively determined by state and legal development. In general, the rulemaking technique should meet the requirements that are divided into substantive and formal in the legal literature. Thus, N.Y. Zabolotna (2016) includes legality, validity, accuracy, accessibility, expediency, unambiguity, emotional neutrality, etc., among the substantive requirements of rulemaking techniques. Formal rules include terminological, syntactic, stylistic, and grammatical rules. On this basis, and considering

¹ Civil Procedural Code of Ukraine. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15#Text>.

² Commercial Procedural Code of Ukraine. (1991, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1798-12#Text>.

³ Report of the Venice Commission No. CDL-AD(2011)003rev “On the Rule of Law”. (2011, April). Retrieved from [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev2-ukr](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev2-ukr).

the legal nature of the principle of legal certainty, it is possible to identify special requirements, specifically, reservations are considered legal if they are reasonable and permissible from the standpoint of the essence and purpose of a legal and democratic state, follow the concept of the draft regulation, and are applied only to the extent required by the purpose of the legal norm. In other words, legal reservations reinforce the spiritual and value essence of law, its ability to embody and ensure justice, freedom, and equality, and reflect the purpose and objectives of legal regulation of social relations.

According to R. Whalen (2022), the technique of rulemaking is determined by social factors, new information capabilities of modern technologies, the degree of their legality, etc. In other words, the researcher stresses the use of information technology in legal science in general and in the law-making process specifically. Undoubtedly, such trends are taking place in legal practice, but certain reservations should be expressed regarding the inadmissibility of not considering the key idea of the purpose of legal technique – to be a means of practical implementation of the essential properties of law and its principles. This means that the purpose of the rulemaking technique is to construct legal norms in such a way that they follow the general principles of law, ensure the establishment and protection of social values, and fairly reconcile the interests of legal entities. This means that legal reservations depend on the essence of law, its qualitative properties, which are manifested in its ability to reflect the general principles of establishing, ensuring, and protecting social values, to be both a universal regulator of social relations and a means of reconciling the interests of legal entities.

I. Lifante-Vidal (2020) shares an analogous opinion, emphasising that legal certainty is achieved where the regulatory provisions meet the expectations of society, are based on the values achieved by society in the field of law, are logical and systematic. In this context, the implementation of the principle of legal certainty in national legislation is absolutely possible, which at the same time indicates the validity of the requirements for legal reservations, among which it is advisable to distinguish compliance with the degree of justice, equality, and freedom recognised in society, and the ideas of a legal and democratic state.

Conclusions

To summarise the above, it is advisable to focus on the key aspects of the study. The specificity of the subject matter of this study was to investigate legal reservations in fulfilling the purpose of the European principle of legal certainty on the example of Ukrainian legislation. The content of the findings was determined by the purpose and objectives of the study. The purpose of this study was fulfilled by defining and characterising the requirements of the principle of legal certainty, clarifying its content, determining the legal nature and

essential properties of legal reservations in the provisions of national law, and analysing their typical shortcomings. Specifically, from the standpoint of the general ideas of the rule of law, the researcher describes the requirements of the European principle of legal certainty, including foreseeability, proportionality, enforceability, coherence and consistency, clarity, etc. This helped to perform a logical and legal analysis of the regulatory provisions of national legislation, to identify the optimised and negative aspects of the rulemaking technique, including the qualitative forms of regulatory expression of legal reservations.

Proceeding from the findings of the study of these requirements and judicial practice, it was found that the principle of legal certainty is a component of the rule of law and is based on the concept of predictability. In other words, legal norms must be formulated with sufficient clarity, unambiguity and comprehensibility to enable legal entities to choose a course of conduct that follows these norms and to foresee the legal consequences of their behaviour.

It was found that the fulfilment of the purpose of the principle of legal certainty in national legislation depends on the technique of rulemaking. Among the elements of this technique, a prominent place belongs to legal reservations, the content of which is determined by the social purpose of law, they take the form of language constructions, specify the purpose of the rule of law and the limits of its effect, and ensure its accuracy and predictability.

The study proposed to include the following features of legal reservations as an element of rulemaking technique: they are determined by the social purpose of law and its principles; correspond to the degree of justice, equality, freedom recognised in society, as well as the concept of a draft legal act; ensure the accuracy and predictability of legal provisions, and take the form of language constructions; specify the content and limits of a legal provision in the mechanism of legal regulation; and cause legal consequences.

Thus, considering the legal nature of the principle of legal certainty and the features of legal reservations, it is worth summarising the essence of the latter, which is that legal reservations, by enhancing the impact of formally defined legal provisions on the consciousness and behaviour of a person, ensuring the effectiveness of application of the provisions of a general rule to a concrete life situation, and achieving clarity, comprehensibility, unambiguity, foreseeability, and stability of legal provisions, embody the requirements of the principle of legal certainty in the provisions of national legislation. On this basis, the principal requirements can be identified, namely, reservations are considered legal if they are substantiated and permissible in terms of the social purpose of a rule-of-law and democratic state, follow the concept of the draft regulation, and are applied only to the extent required by the purpose of the legal norm.

Thus, the findings of this study can be used to define and streamline legal reality, to reconcile the interests of society, individuals, and the state through rulemaking, development and research of topical issues of rulemaking technique, which in general defines promising areas for further research in this area with a view to increasing scientific knowledge. Specifically, it is proposed to investigate the methodology of rulemaking, the tools

of rulemaking technique, to analyse and structure the technique of rulemaking and lawmaking, etc.

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Conflict of Interest

The author of this study declares no conflict of interest.

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Правові застереження в досягненні мети європейського принципу юридичної визначеності на прикладі українського законодавства

Валерій Власенко

Кандидат юридичних наук, доцент
Національна академія внутрішніх справ
03035, пл. Солом'янська, 1, м. Київ, Україна
<https://orcid.org/0000-0002-1287-9732>

Анотація

Актуальність дослідження полягає в тому, що правові системи держав, у яких визнається та забезпечується дія принципу верховенства права, дедалі більше зазнають інтеграційного впливу: загальні вимоги нормопроекування уніфікуються та забезпечуються спільними зобов'язаннями держав-учасниць міжнародних співтовариств. Метою дослідження було здійснення логіко-юридичного аналізу правових застережень як засобу проектування (конструювання) норм права в досягненні мети принципу юридичної визначеності в національному законодавстві. Специфіка мети дослідження зумовила застосовування різних методів наукового пізнання, серед яких аксіологічний, аналізу, системний, спеціально-юридичний, герменевтичний, логічний, моделювання та ін. Використання зазначених методів забезпечило обґрунтування наукової гіпотези щодо складу принципу юридичної визначеності та природи правових застережень. Резюмовано, що принцип юридичної визначеності як складова верховенства права ґрунтується на концепції передбачуваності, що досягається шляхом забезпечення чіткості, недвозначності та зрозумілості норм права, повноти відображення їх змісту в нормативних формах національного законодавства. З'ясовано, що реалізація вимог принципу юридичної визначеності можлива шляхом застосування єдиної техніки нормопроекування, структурування та формулювання нормативних положень, де правовим застереженням надається вагоме значення. Встановлено та схарактеризовано найбільш суттєві ознаки правових застережень через розуміння їх як елемента нормопроекувальної техніки в досягненні мети європейського принципу юридичної визначеності. Окреслено сутнісні властивості правових застережень і загальні вимоги до них. Правові застереження в нормах права національного законодавства визначено як елемент нормопроекувальної техніки, зміст яких зумовлений соціальним призначенням права. Доведено, що вони мають форму мовних конструкцій, конкретизують мету норми права та межі її дії, забезпечують точність і передбачуваність нормативного припису. Отримані результати дослідження мають практичну значущість, зокрема можуть бути використані в науково-дослідницькій роботі – для подальшого дослідження актуальних питань техніки нормопроекування, у нормотворчій роботі – під час розроблення нормативно-правових актів

Ключові слова:

нормопроекувальна техніка; принципи права; соціальне призначення права; верховенство права; нормативно-правовий акт