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ЮРИДИЧНИЙ ЧАСОПИС
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Characteristic features of robberies against residential property committed by organised groups in rural areas

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Abstract

The relevance of the subject under study lies in the fact that under martial law, the problem of robberies against citizens' homes is exacerbated, specifically, their danger increases due to the greater probability of members of an organised criminal group having firearms than in peacetime. The purpose of this study was to identify the characteristics of robberies against residential premises in rural areas committed by organised groups, to establish the factors which influence the choice of the victim of a future attack by the perpetrators, and to identify preventive measures to reduce the commission of such crimes. To address these issues, the study employed a set of methods of scientific cognition: systemic-structural, comparative, statistical, and systemic. The study found that a characteristic feature of such attacks is that they are committed by a group consisting mainly of fellow villagers with internally stable, long-term, trusting relationships, with a willingness to systematically commit violent crimes against individuals. They are characterised by a hierarchy and preparation for robberies in rural areas. It was established that during preparation for a robbery, to obtain the necessary information, offenders often study the routes of the village, find out information about its inhabitants, and select a victim. They can even speak directly to the potential victim and/or their neighbours. Therefore, interviewing villagers during the investigation of such a criminal offence is a significant step in identifying the perpetrators. The study identified factors that influence the commission of robberies in rural areas (presence of valuable property of the victim; remoteness of their residence, absence of neighbours;

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planned power outages, physically vulnerable person, etc.). To commit attacks on people's homes in rural areas, attackers choose several villages in relatively familiar areas, which may be located in one region or in another region with which they border. It was noted that this complicates the work of law enforcement agencies in investigating this type of crime. The practical value of this study lies in the consideration by law enforcement officers of the theoretical results of this study regarding the impact on the choice of victims by criminals and the established characteristics inherent in such robberies

Keywords:

crimes against property; organised criminal group; planning of a crime; potential victim; factors of committing a criminal offence

Introduction

In 2024, robberies against people's homes in rural areas by an organised group are becoming an increasingly pressing issue for both citizens and law enforcement agencies, as the war has made weapons more easily accessible through illegal means. With police overwhelmed by investigating war-related crimes and criminals continuing to develop their illegal activities using the latest technological advances, the vulnerable population is at greater risk than before 2024. During power outages caused by Russian missile attacks (Abramova, 2024), it is particularly difficult for rural residents to call law enforcement if members of an organised criminal group invade their home. Therefore, it is crucial to investigate the characteristics of residential robberies committed by organised groups in rural areas, as this will help law enforcement agencies to investigate such crimes more effectively and take preventive measures to avert them.

In 2019-2024, scientists performed a considerable number of studies on combating robberies, but the issue of the characteristics of robberies against the homes of persons committed in rural areas was not given sufficient attention, and this issue was not considered as a separate research topic. Thus, V. Teliichuk & D. Pristupa (2019) considered both robberies and their characteristic features. A special place in this study was given to the analysis of the counteraction to such crimes organised by law enforcement agencies. The researchers emphasised that the commission of such criminal offences always attracts increased attention in the country, because it is by the prevalence of these socially dangerous acts that citizens mostly assess the state of law and order and the level of personal security, both in the village and in the district, region, and state as a whole.

M. Semenishin (2020) examined the liability for robbery in the criminal law of Ukraine, specifically from the European perspective. In his study, M. Semenishin (2020) emphasised that robbery is the most dangerous crime among property offences, as robbery is characterised by an attack on the person. The researcher noted that improvement of law enforcement activities also involves a comprehensive investigation and research of robberies to improve criminal law protection of a person from such criminal attacks which are dangerous to life, health, and property rights. The researcher covered the reasons for the development of the rules

on liability for crimes against property and, specifically, for robbery and the characteristics of property crimes, revealing their differences.

N. Basarab (2021) considered measures to prevent robberies in Ukraine. The researcher noted that the study of robberies in Ukraine involves consideration of comprehensive information on the dynamics, levels, and structure of such crimes. Basarab emphasised that knowledge of the real picture of the state of robberies is necessary to develop measures to prevent such types of crimes by the units of the National Police of Ukraine. L. Lisnychenko (2019) provided a criminological description of both assaults with intent to rob and aggravated robberies, covered their common and distinctive features, and provided a comprehensive description of each of the above-mentioned criminal offences against property.

P. Svir (2020) investigated robberies against people's homes but did not separately highlight the specific features of such crimes committed in rural areas. The researcher noted that in the context of rising unemployment and declining material living standards of citizens, which is manifested in the lack of opportunities for many individuals to satisfy a considerable part of their basic needs in a legal manner, the development of measures to counteract robberies against housing requires special attention, and it is necessary to establish the specifics of external manifestations of certain property crimes.

J. Diaz & B. Poblete (2019) considered a separate type of property crime committed by an organised group. The researchers pointed out that, considering the increasing openness and aggressiveness of criminal attacks, criminals have begun to commit increasingly elaborate, more prepared property crimes: on the one hand, those that provide quick and significant profits, and on the other hand, those that make it difficult to establish the circumstances of the crime and bring the perpetrators to justice.

In their study, B. Aqifi *et al.* (2023) highlighted a range of problems related to the regulation and protection of property rights in the Republic of Kosovo. One of the principal tasks of the Kosovo Police is to protect the lives and property of the population. Apart from general tasks related to the protection of society, the Kosovo Police is responsible for preventing the detection of criminal offences against property. This area covers the

process of identifying criminals, investigating evidence, motives, etc. Considering the significance of the property institution, Kosovo has adopted laws that protect property rights, which enjoy civil protection, criminal protection, and international protection. The researchers emphasised that without sufficient scientific research of the problems related to property rights, there can be no comprehensive practical solution.

G. Alguera & R. Meave (2021) examined the impact of the location where a robbery or assault was committed on the number of robberies in Mexico City. They analysed the difference between robberies committed in the city and its surroundings, and considered other factors that may affect the number of such crimes (availability of shops, bus stops, etc.). The researchers emphasised that all these features have a direct impact on the mechanism and frequency of robberies and assaults. S. de Oliveira (2018) also investigated preventive measures against robberies and assaults, but specifically private ones, i.e., those that a potential victim can take. The researcher emphasised that although such a person can reduce the possibility of a robbery against their home, it is impossible to eliminate such a possibility completely while unassisted.

O. Mirkovets (2021) considered the investigation of robberies committed by an organised group. The researcher identified the following elements of the methodology for investigating robberies committed by an organised group: forensic characteristics; investigative versions; typical investigative situations both at the stage of detection of a robbery and at the stages of its investigation; circumstances to be established.

The purpose of this study was to investigate and describe the specific features of robberies against the homes of persons in rural areas committed by organised groups, to identify the characteristics of persons whom the perpetrators choose as victims of future attacks, the reasons why such persons may become victims of robbery against their homes, and to outline preventive measures aimed at preventing robberies against the homes of persons in rural areas.

Materials and Methods

Both general scientific and special research methods were employed to conduct the study. Among the general scientific methods of scientific cognition, the following were used: the method of induction, deduction, analysis, classification, and systematisation methods. The study also employed such special methods of scientific research as the method of comparison, statistical method, method of extrapolation, method of system

analysis, M. Weber's method of ideal types, and the system-structural method, which helped to establish the structure of organised criminal groups committing robberies against homes in rural areas.

The statistical method was employed to collect information on this research object from the Unified State Register of Court Decisions (n.d.) and criminal proceedings on robberies against homes in rural areas by organised groups to identify the serial nature of their crimes and to record such crimes. Next, the use of system analysis methods helped to build a generalised model of the characteristics of robberies against the homes of individuals committed by organised groups in rural areas, to reflect all the elements, as well as the factors and interrelationships manifested in relation to this object of study. This method helped to consider such robberies as a system with a set of constituent elements, connections, and relations between the constituent parts of its elements, on the one hand, and, on the other hand, as a unity in an unbreakable connection with social phenomena and processes that affect it. Then, using the comparative method, the study compared robberies against citizens' homes in rural areas in different settlements, both between villages and between cities and villages. Using M. Weber's method of ideal types, the study reduced casual, isolated cases of robberies committed by an organised group in rural areas into typical characteristics of this type of crime, which simplified their study. Using the methods of systematic analysis and interpretation, the study investigated the subjective perception of individual members of their place in a criminal group.

Therefore, the Unified state register of court decisions (n.d.), which is characterised by the availability of relevant court decisions and verdicts on various types of criminal offences, including those related to the topic under study, became a prominent source for the study. For the purposes of the present study, 100 decisions of national courts from the above register for 2019-2024 were analysed – this number of cases analysed testifies to the representativeness of the sample. The criteria for selecting cases were the location and classification of the crimes committed. The sample included both cases involving a single robbery and cases involving several robberies. The regulatory framework for the study included the Constitution of Ukraine¹, the Law of Ukraine "On the National Police" No. 580-VIII²; the Resolution of the Cabinet of Ministers of Ukraine No. 877 on the National Police dated 28 October 2015³, Strategy for Combating Organized Crime in Ukraine (Order of the Cabinet of Ministers of Ukraine No. 850-p/2022)⁴, and the

¹ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вп#Text>.

² Law of Ukraine No. 580-VIII "On the National Police". (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

³ Resolution of the Cabinet of Ministers of Ukraine No. 877 "Regulations on the National Police". (2015, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/877-2015-%D0%BF#Text>.

⁴ Order of the Cabinet of Ministers of Ukraine No. 850-p "On the Approval of the Plan of Measures for Implementation of the Strategy on Fighting Organized Crime". (2022, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/850-2022-%D1%80#Text>.

Criminal Code of Ukraine¹. This study used the aforementioned sources because they regulate the social relations related to the commission and investigation of robberies against the homes of individuals in rural areas by an organised group. They form the basis from which certain types of crimes, including certain types of robbery, are studied.

Results

The study of cases from the Unified state register of court decisions (n.d.) and criminal proceedings found that robberies against homes committed by an organised group in rural areas in 2019 and 2024 were characterised by a criminal group formed, in the vast majority of cases studied (81%), by fellow villagers. The leader in such a group has a prominent level of trust and long-term relationships with their associates, which ensures unconditional compliance with their organisational instructions². This leads to the creation of a highly organised and closed group of people with internally stable relationships based on the recognition of leadership and authority.

For instance, a resident of Konotopskyi district, Sumy Oblast, decided to involve three persons he had checked, who were his fellow villagers and in relation to whom the latter had a prominent level of trust, being an older person, having leadership qualities and authority in relation to these persons. This influenced the unconditional implementation of his organisational guidelines. The group was dominated by the understanding and execution of each person's role in a single criminal plan to seize the property of citizens. The purpose was to make illegal profits. The persons involved in the organised criminal group were characterised by poor financial situation, lack of official employment, other sources of legal income, desire for quick systematic enrichment, a tendency to commit intentional acquisitive crimes, and the ability to systematically commit the same type of grave and especially grave crimes by their moral, volitional, and practical qualities. For quick and safe arrival at crime scenes, quick departure from them after robberies, transportation of tools for breaking into private homes and stolen property, the group used a VAZ-2103 car belonging to one of the participants, as well as to store the tools of criminal offences³.

The analysed robberies against residential property committed by organised groups in rural areas are characterised by the following specific features. The group members understand and perform certain roles in a single criminal plan during the seizure of citizens' property to achieve the ultimate criminal result in the form of obtaining illegal profits from this activity. All members of the group share a common purpose, and therefore are interested in reaching a common result. The combination of actions of several actors together, united by a common purpose, causes the interconnectedness of the actions of accomplices, which determines the causal link between the actions of each of the accomplices and the achievement of a single criminal result. In 94 investigated cases of robberies in rural areas, the perpetrators targeted persons belonging to particularly vulnerable groups, specifically, elderly citizens (pensioners), with the purpose of illegally seizing property, relying on their cash savings in the form of pensions or payments for the use of land shares, as well as other outsize liquid property⁴. For instance, a resident of the village of Popivka, Konotopskyi district, developed a plan of criminal activity, according to which he decided to organise the systematic illegal seizure of property of pensioners, relying on their cash savings in the form of pensions or payments for the use of land shares, as well as other outsize liquid property. When planning the commission of criminal acts, the leader of the criminal group determined that the robberies should take place outside the place of residence of the group members and in remote settlements⁵. Therewith, when selecting targets, such criminals consider the inability of older people to resist sufficiently during an unlawful attack⁶. Thus, in Donetsk Oblast in 2021, a group of people, according to the distributed roles, committed a robbery of a single pensioner, on the preliminary conspiracy to openly rob someone else's property by breaking into a home. The victim fell to her knees inside the house, while the attackers physically assaulted her, holding the victim's neck and demanding that she hand over all her money and jewellery. Fearing for her life, the pensioner was forced to comply with the offender's demands and handed over her mobile phone, gold ring, bank card, providing the pin code and explaining that the card contained funds in the amount of USD 2,000⁷.

¹ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

² Judgement of the Leninskyi District Court of Poltava in Case No. 553/1632/24. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119725893>.

³ Judgement of Kovpakivskyi District Court of Sumy in Case No. 592/6091/24. (2024, April). Retrieved from <https://reyestr.court.gov.ua/Review/118550930>.

⁴ Judgement of the Druzhkivka City Court of Donetsk Oblast in Case No. 219/10584/21. (2024, May). Retrieved from <https://reyestr.court.gov.ua/Review/119379759>.

⁵ Judgement of the City of Sumy in Case No. 574/583/20. (2024, May). Retrieved from <https://reyestr.court.gov.ua/Review/119150324>.

⁶ The verdict of the Kovpakivskyi District Court of Sumy in Case No. 592/6091/24. (2024, April). Retrieved from <https://reyestr.court.gov.ua/Review/118550930>.

⁷ Judgement of the Druzhkivka City Court of Donetsk Oblast in Case No. 219/10584/21. (2024, May). Retrieved from <https://reyestr.court.gov.ua/Review/119379759>.

Another characteristic of the crimes studied is the victims' residence in remote settlements (in 68% of the analysed cases of robberies in rural areas, the persons whose homes were attacked lived in remote settlements). For instance, in November 2020, a resident of Karlivka, Poltava Oblast, pursuing motives of illicit enrichment, created an organised group of people to engage in criminal activity for a long period of time, namely, committing grave and especially grave criminal offences for profit in remote villages of Poltava Oblast, including robberies of the homes of elderly or solitary persons¹.

Commission of criminal offences in a location other than where they live (other settlements/districts/neighbouring oblasts) to complicate detection (in 59% of the studied cases of robberies in rural areas). For instance, in June 2020, a criminal group of three people, one of whom was a driver of a vehicle from Kyiv, arrived in the village of Nova Basan, Bobrovytskyi district, Chernihiv Oblast, with a prior conspiracy to commit an attack with the purpose of seizing another's property, attacked a woman of 74 years old, knocking out the front door of her house, inflicting serious bodily injuries, after which the woman died in hospital. They took possession of UAH 10,000 and a mobile phone².

If necessary, the use of physical or psychological violence of varying degrees of intensity against victims to achieve the desired result of seizing someone else's property (in 100% of the investigated cases of robberies in rural areas). For example, in January 2023, in the Radekhivskyi district of Lviv Oblast, a group of people committed a robbery combined with breaking and entering to seize the victim's property and money by prior conspiracy. The perpetrators illegally entered the territory of a household whose front door was opened by the victim himself, attacked him, and tied the victim's hands with a cloth. Using their physical and psychological superiority over the victim and his helpless state, the perpetrators threatened him with murder and physical violence, demanded that he hand over money, and used violence against him that was dangerous to his life and health. By inflicting numerous blows to the victim's head and torso, the victim suffered severe physical injuries in the form of closed blunt trauma to the chest, the lateral surface of the abdomen on the left and the back; in addition to this, the

victim suffered physical injuries in the form of multiple bruises on the face and head^{3,4,5}.

Members of criminal groups committing robberies against citizens' homes in rural areas, in most cases (in 79 analysed cases of robberies in rural areas), are characterised by poor financial situation, lack of official employment, other sources of legal income; desire for quick, systematic enrichment, which was confirmed by the court; skills in navigating the terrain, ability to drive vehicles, compliance with internal discipline and subordination, long-term trusting relationships with each other, as indicated in court decisions. O. Matvienko (2023) noted in his study that "in the overall structure of committed crimes, almost 70% are criminal offences of acquisitive nature". The mercenary motives of such crimes can be interpreted as the desire of the offender to achieve the desired material benefit for themselves and/or for third parties by committing a criminal offence. It is worth emphasising that, according to A.L. Melnychuk (2021), the standard of living of the rural population has changed as a result of the large-scale negative impact of the COVID-2019 pandemic and the Administrative Territorial Reform in Ukraine, which is manifested in the deterioration of the socio-economic situation of territorial communities, increased unemployment, and risks to employment in rural areas. As a result, crime is on the rise.

For instance, Person 1, being near the Talant shop on Konotopska Street in the village of N., Sumy Oblast, met with his previously made acquaintances Person 2 and Person 3, who were in a poor financial situation and were consuming alcohol beverages. Person 1 also suffered from a difficult financial situation and knew a family of elderly pensioners who had cash and valuable property. Potential victims were incapable of resisting properly, had places of permanent employment and pensions, i.e., systematic income, and therefore could save significant amounts of money. In the household at the place of residence of the above-mentioned persons, the intention to enrich themselves by committing a robbery arose⁶.

Another example of a criminal group consisting of seven people who had no official sources of income and were in a poor financial situation. In November 2020, a resident of Karlivka, Poltava Oblast, who was not officially employed, created an organised group of

¹ Judgement of the Leninskyi District Court of Poltava in Case No. 553/1632/24. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119725893>.

² Judgement of the Kozeletskyi District Court of Chernihiv Oblast in Case No. 729/146/21. (2023, August). Retrieved from <https://reyestr.court.gov.ua/Review/112604246>.

³ Judgement of Mykolaivka Village of Mykolaivskyi District Court of Odesa Oblast in Case No. 494/1362/23. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119855336>.

⁴ Judgement of the Tyachivskyi District Court of Zakarpattia Oblast in Case No. 301/48/22. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119577485>.

⁵ Judgement of the Leninskyi District Court of Poltava in Case No. 553/1632/24. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119725893>.

⁶ The verdict of the Konotop City District Court of Sumy Oblast in Case No. 582/262/22. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119886006>.

seven people, previously known to him, who were not working and had no legal sources of income. There was a persistent association of a group of people to engage in criminal activity for a long period of time, namely to commit grave and especially grave criminal offences of an acquisitive nature in the territory of Poltava Oblast: theft and robbery with the purpose of seizing another's property, combined with violence dangerous to the life or health of the person who was attacked, or with the threat of such violence, in large or especially large amounts, with breaking and entering into a dwelling or storage facility. Furthermore, the leader of this group organised and independently carried out thorough preparation for the commission of criminal offences, communicating with the victims for a long time. He selected the targets of attack, examined the routes of access and escape, determined the arrangement and sequence of actions of accomplices, as well as the cover-up of criminal activity, constantly analysing the surrounding situation at the crime scene, including, based on signals from other group members, establishing and analysing the presence of obstacles and conditions conducive to the commission of thefts and robberies. The leader also organised the immediate concealment and sale of the stolen property and gave relevant instructions to his accomplices. To conceal his criminal activities, he decided to use homemade masks to cover the face, flashlights, gloves, and tools to open windows and doors. The leader of the group was directly involved in committing thefts and robberies and directed the actions of other accomplices. He ordered other members of the organised group not to use mobile phones during the attacks. He also made decisions about tying up the victims. He distributed the proceeds of crime among his accomplices¹. Thus, the leader of an organised group selects participants, considering their personal qualities – a tendency to commit intentional acquisitive crimes, the ability to unconditionally obey instructions, the state of their social and domestic life, the desire for quick enrichment, the ability to systematically commit the same type of grave and especially grave crimes by their moral, volitional, and practical qualities (in 88 cases of robberies in rural areas studied).

The leader of such a criminal group, considering the analysed cases of robberies in rural areas, creates a hierarchy of relationships between group members, which is usually a continuation of their social hierarchy that existed before, but has become much more pronounced, ensuring stability, which is the ability of the group to perform its functions for which it was created stably and for a long time, and the professionalism of the group. For example, in November 2020, a resident of Poltava Oblast created a stable association of a group

of people to engage in criminal activity for a long period of time, namely, committing thefts and robberies in the villages of Poltava Oblast with the purpose of seizing other people's property, combined with violence dangerous to the life or health of the person who was attacked, or with the threat of such violence, on a large or especially large scale, with breaking and entering into a dwelling or storage facility. He recruited unemployed residents and those without legal sources of income, previously known to him, and established close, trusting psychological relationships that transformed into special general rules of conduct and sustained criminal activity of the organised group members. The hierarchically structured organised group was based on the authority of the organiser. The organiser of this group distributed roles among its members (one of the members drove the vehicle that delivered the victims to the object of the robbery, while another member exerted moral and physical pressure, inflicting bodily harm and ordering other members of the criminal group to search the victims' households for money and valuables). The leader of the organised group searched for targets of illegal encroachment, developed plans to commit attacks on households, while clarifying the conditions and circumstances under which they should be committed². The leader manages the group, determines the timing of the criminal actions planned by him. Therewith, some aspects of the crimes are agreed upon with the group members, including the targets, the use of weapons, the method of commission, and the roles of each participant. The leader of the criminal group maintains his unquestioned authority. After receiving money during robberies, the leader distributes it among all members of the organised group (in 98 cases of robberies in rural areas that were committed by an organised group with a leader).

The leader develops and communicates to all participants a unified plan for the attack on the property of selected victims (in 83 cases of robberies in rural areas that were committed by an organised group with a leader). It states that in case of any resistance by the owners in the apartment, a certain level of physical and/or psychological violence (threats or bringing dangerous objects to the victims' body parts to demonstrate the reality of their threats, hitting, inflicting thermal burns, cuts to body parts) should be used to overcome their resistance, find out where their savings or valuable property are stored, and tie the victims up.

For example, pursuing a mercenary motive, the organiser of a criminal group with two other persons intentionally, jointly decided to commit a robbery against a family of villagers living in the village of Braha, Kamianets-Podilskyi district, Khmelnytskyi Oblast,

¹ Judgement of the Leninskyi District Court of Poltava in Case No. 553/1632/24. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119725893>.

² Ibidem, 2024.

and to implement their criminal intent, realising that they could not carry out the plan alone, decided to involve other persons in the commission of the crime. On 26 December 2019, at about 02:30, they headed out to the area where the crime was committed, taking with them items prepared in advance, including a rope for binding, balaclava masks, cloth gloves, police uniforms, a rubber baton, and a gun. While travelling in the specified direction, on the Kyiv-Zhytomyr motorway towards Zhytomyr near Kyiv, according to a preliminary agreement, they were joined by two other persons unidentified by the pre-trial investigation and agreed on the method of committing the robbery and the role of each of them. According to the final criminal plan, it was planned that one person, unidentified by the pre-trial investigation, would stay behind the wheel of the vehicle near the crime scene to ensure a quick escape after the robbery of the other participants in the crime, one of the members of the criminal group would stay on the adjacent territory of the farm to observe the surrounding situation so that their illegal actions would not be noticed by anyone, and the leader and two other unidentified persons would enter the house of the villagers and commit the robbery. They opened a metal gate, which was locked from the inside, and entered the yard. They entered the house through the unlocked door, where a resident of the house was standing at the front door of the room, one of the unidentified persons struck the victim once with the palm of his hand in the nose, and she lost consciousness, two unidentified persons tied her to the sofa with a rope. A person who was on the bed in the room struck the victim once in the chest with a baton, causing a fracture of the 6th rib. Subsequently, the victim was punched ten times. After being beaten, he was dragged to the floor and tied to the bed with a rope. While inside the house and entering each of the rooms, they found another victim on the bed, struck him four times with their fists, namely one blow to the left parietal area of the head, two blows to the left shoulder, and one blow to the chest, dragging him to the floor and tying his hands and feet with a rope. In the room where the victims were, the offender, showing a gun in his hands, asked where the money and other valuable property were kept, threatening to use the weapon if they did not provide the valuables. Another attacker grabbed an elderly woman by the hair and asked her where the money and valuables were. The daughter, worried about her mother's health, pointed out the location of the money¹.

The organisational and preparatory actions of the leader of a criminal group that commits robberies against citizens' homes in rural areas include: choosing the date and time of the criminal offence; agreeing on the chosen object of the attack; choosing, discussing,

and agreeing on the method of committing the criminal intent; thinking through and discussing the route of arrival and prompt escape from the place of the planned criminal offence by the group members; the obligation of all group members to wear gloves and disguise their appearance (collar, scarf, stockings, glasses, etc.); distribution of roles between the participants in the robbery (breaking into the house and finding other people's property in the victims' homes, if necessary, neutralising the active actions and tying up the victims during the commission of crimes); instructing the perpetrators on how to seize money, precious metal jewellery and other outsize valuable property from homes, and on the immediate seizure and smashing of victims' mobile phones at the crime scene to prevent them from calling the police; instructions to unscrew or switch off the fuses on the electric meters in the victims' homes and use only hand-held lights; commands to leave the scene; determination and distribution of the criminally obtained reward to each of the perpetrators.

For example, in early January 2020, a criminal group in Sumy Oblast committed six especially grave robberies of citizens' homes in Krolevetskyi and Burynskyi districts using weapons. In one of them, members of an organised group, disguising their appearance and wearing gloves prepared in advance, entered the household of an elderly couple at night. To prevent the victims from switching on the light and expose the offenders, the members of the criminal group, according to a previously developed plan and distribution of roles, unscrewed the "plugs" – electrical fuses and attacked the owners of the house. To overcome possible resistance, the victims were tied up using improvised means, namely a rag and a handkerchief. Subsequently, they covered the victims' faces with a sheet and held a knife to their necks, threatening to use violence, and demanded to know the location of their money and valuables. After causing the victims property damage totalling UAH 9,000 and failing to find any other valuables, the members of the organised group left the house at the command of the leader and disposed of the stolen property.

The organiser and leader of the criminal group, a resident of Konotopskyi district, Sumy Oblast, who had previously been engaged in unofficial income – buying feathers, nuts, scrap metal, etc., from the population, knowing the area of neighbouring villages, developed a plan of criminal activity, according to which he decided to organise a systematic armed illegal seizure of property of elderly citizens (pensioners) by breaking into their homes. He involved persons with whom he had long-standing relationships through the above-mentioned unofficial activities and spent his free time together on a trusting basis, which was manifested by

¹ Judgement of the Kamianets-Podilskyi City District Court of Khmelnytskyi Oblast in Case No. 676/2548/20. (2023, October). Retrieved from <https://reyestr.court.gov.ua/Review/114051539>.

the fact that all members of the group belonged to the Roma group of peoples. The organiser planned to use a car to quickly deliver the participants and the tools of the crime (forks, crowbars, screwdrivers, hand lamps, etc.) to the scene, as well as to transport the stolen property. The organiser also obliged all members of the criminal group to wear dark-coloured clothes and economic gloves, to mask their faces, not to take electronic devices from their homes, which can then be tracked by law enforcement agencies, not to say anything to each other about complicity, in case of their detention by law enforcement officers^{1,2,3}.

If an organised group is preparing to commit a robbery in a place where they do not live (i.e., they are not sufficiently familiar with the place: its geography, routes, people living there), then in 62% of the court decisions examined on the commission of a robbery in rural areas by an organised group in a place where they do not live, they carry out an additional preparatory stage of the robbery. The members of the organised group study the routes of such a village, find out information about its inhabitants, and select a victim. They try to find the most vulnerable people. For example, pensioners or people who live alone^{4,5,6}. As for the attack on a person living alone, in Radekhivskiy district of Lviv Oblast in 2023, a group of people committed a robbery with breaking and entering against a solitary citizen. Using the factor of surprise, physical and psychological superiority over the victim and his helpless state, threatening him with murder and physical violence, using violence dangerous to life and health, inflicting numerous blows to the torso and head, demanding that he hand over money and asking him where it was kept. Furthermore, against the victim's will, under psychological and physical duress, they forced the victim to go down to the basement located under the summer house of the same household and blocked the exit from the basement by placing a wooden chair on the exit lid, and locked the door to the summer house with a metal block, thus illegally depriving the resident of his liberty, restricting his freedom of movement⁷. Another noteworthy example of an attack on elderly people in Poltava Oblast in 2018, by prior conspiracy, a group of people using a vehicle arrived on the outskirts of the village of

Kybyntsi village, Myrhorodskiy district, to the pre-determined place of the criminal offence, armed with a nail drawer, to break down the door and illegally enter the home, covering their faces with masks and wearing household gloves, which they had prepared in advance, to commit the crime without a trace. The perpetrators forcibly entered the house by breaking the hinged bracket from the front door with a nail drawer, and committed sudden, unexpected for the victims aggressive acts of violence aimed at unlawful appropriation of another's property, namely, inflicted blows to the victim's body, who was born in 1945, with their fists. This criminal group has committed three other established robberies against the homes of elderly and single people in rural areas⁸.

In 76% of the judgments studied, the criminal group was very meticulous in the preparatory phase. They find out the potential victims' schedules, information about their neighbours, whether they have guests, and what savings, jewellery, or other valuable property they have. For this, they regularly drive around villages in their vehicles, and therefore it is important for law enforcement officers in rural areas to pay attention to unfamiliar vehicles that drive around without a clear purpose, but systematically. Notably, as a rule, members of criminal organisations drive rather slowly to have time to obtain all the information they need. Sometimes, they even talk to villagers to find out as many details as possible about their potential victim(s) or their neighbours.

Before a crime, criminals can even communicate with the future victim of an attack. Criminals did this in 39% of the court decisions studied. This way, they can observe at least the person's yard, and at most the house itself. They start the conversation with seemingly innocent questions: "How do I get to the next village?", "Who sells houses in the village?", "Where can I buy homemade milk?", etc. Criminals may even simply ask for water or certain tools to quickly fix the car. In this way, they try to start a casual conversation, in which they learn everything they need to know little by little. These methods, which were recorded in the court's verdict, were used by the perpetrators in 16 of the court decisions studied. For instance, in Poltava Oblast in 2020, the leader of an organised criminal group,

¹ Judgement of the City of Sumy in Case No. 574/583/20. (2024, May). Retrieved from <https://reyestr.court.gov.ua/Review/119150324>.

² Judgement of the Burynskyi District Court of Sumy Oblast in Case No. 574/218/21. (2021, October). Retrieved from <https://reyestr.court.gov.ua/Review/100530790>.

³ Judgement of Kovpakivskiy District Court of Sumy in Case No. 592/6091/24. (2024, April). Retrieved from <https://reyestr.court.gov.ua/Review/118550930>.

⁴ Judgement of the Kozeletskiy District Court of Chernihiv Oblast in Case No. 729/146/21. (2023, August). Retrieved from <https://reyestr.court.gov.ua/Review/112604246>.

⁵ Judgement of the Leninskyi District Court of Poltava in Case No. 553/1632/24. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119725893>.

⁶ Judgement of the City of Sumy in Case No. 574/583/20. (2024, May). Retrieved from <https://reyestr.court.gov.ua/Review/119150324>.

⁷ Judgement of the Radekhivskiy District Court of Lviv Oblast in Case No. 451/466/23. (2024, May). Retrieved from <https://reyestr.court.gov.ua/Review/119237458>.

⁸ Judgement of the Velykobahachanskyi District Court of Poltava Oblast in Case No. 541/531/21. (2022, December). Retrieved from <https://reyestr.court.gov.ua/Review/108089218>.

organised thorough preparation for the commission of criminal offences, and independently communicated for a long time with the victims, selected the objects of attack, examined the ways of access and escape, determined the arrangement and sequence of actions of accomplices and the cover-up of criminal activity, constantly analysing the surrounding situation at the crime scene, including signals from other group members, established and analysed the presence of obstacles and conditions that facilitated the commission

of thefts and robberies¹. The perpetrators may even pose as volunteers to get into the home of a potential victim or to ask neighbours about them. In this way, they can find out where the most physically vulnerable people live without being suspicious, because volunteers are called upon to help just such people: pensioners, people with disabilities, etc. However, no such cases were recorded during the study. The classification of factors that influence the choice of a target for a robbery in rural areas is presented in Figure 1.

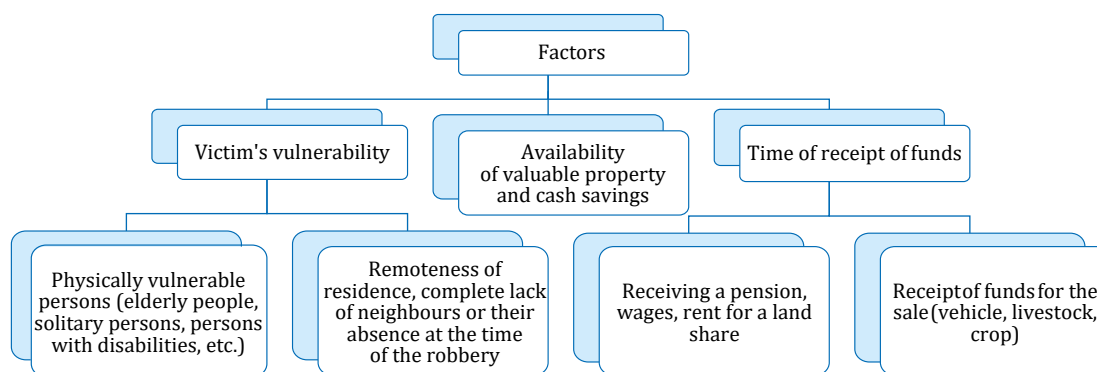


Figure 1. Factors that influence the choice of a target for a robbery in rural areas

Source: developed by the authors of this study

When investigating such a criminal offence, it should be remembered that in 57% of the cases examined in this study, the fellow villagers of the robbed persons had seen the perpetrators on several occasions. Therefore, even if the victim(s) died in the aftermath of such an attack, it does not mean that no one else in the village has ever met the perpetrators. It is also important to note that an organised group may not repeat the same crime in the same village². They may even move to another region to reduce the probability of exposure. However, such criminals usually do not travel too far. In other words, they generally choose several neighbouring districts that are relatively familiar to them, which may be located in the same region or in several regions if they border each other. This complicates the work of law enforcement agencies in investigating this type of crime. But this does not mean that the criminal group will not return to the village where they have already committed a robbery, especially if the village is relatively large.

In 76% of the cases studied, such crimes are serial, and therefore despite the possible material costs of such robberies, if they have started, law enforcement officers should regularly patrol the settlements under threat from such a criminal group, considering the geographical factor described above. That is, it is necessary to patrol both the village where the robbery took place and the neighbouring settlements.

Furthermore, law enforcement officers need to bear in mind that organised criminal groups specialising in robberies of rural dwellings know when rural residents receive rent for their land shares and pensioners receive their pensions in 64% of the cases studied. Often, they try to organise such a robbery at a time when the potential victim has not had time to spend the money. Admittedly, this is not a prerequisite for committing a robbery, as the attackers may target not only recently received funds, but also existing savings or valuable property (gold, equipment, orders, pearls, amber necklaces, religious icons, etc.). Members of the organised group know that the elderly tend to save a certain amount of money for their funerals, and therefore pensioners are a priority for them as potential victims.

Thus, interviewing villagers during the investigation of such a criminal offence is a crucial step in identifying the perpetrators. After this type of crime is committed, regular patrolling of the streets is necessary, both in the village where the criminal offence was committed and in neighbouring settlements. The above-mentioned preventive measures can significantly reduce the number of robberies committed by organised groups against people's homes in rural areas, especially considering the power outages caused by the energy crisis in the country as a result of the full-scale armed aggression of the Russian Federation, as minimal

¹ Judgement of the Leninskyi District Court of Poltava in Case No. 553/1632/24. (2024, June). Retrieved from <https://reyestr.court.gov.ua/Review/119725893>.

² Judgement of the Kamianets-Podilskyi City District Court of Khmelnytskyi Oblast in Case No. 676/2548/20. (2023, October). Retrieved from <https://reyestr.court.gov.ua/Review/114051539>.

lighting makes it easier for criminals to commit robberies. Despite the possible additional financial costs of such patrols, they are justified in terms of public safety, as rural residents will even feel safer psychologically, knowing that law enforcement officers are preventing new robberies of people's homes.

Discussion

Quite a few researchers have considered robberies against homes in rural areas by organised groups in the general context of robberies. The work of such researchers constitutes a significant basis for investigating an issue that has not received sufficient attention in the field of scientific research and requires separate coverage. O. Ostroglyadov (2020) considered property crimes in large cities from the victimological perspective. He stated that the study of the determinants of victimisation of citizens is the most important way to prevent crimes with a mercenary orientation. The researcher identified the most effective ones, including explaining to the public the characteristic psychological aspects of the behaviour of perpetrators and victims; providing practical recommendations on ways and options for protection of both physical and property integrity; developing skills to recognise threatening situations; preventing recurrence of victimisation, namely preventing new victims from being victimised. His position on the significance of studying the victimhood of victims against property is also relevant. Specifically, the characteristics of the victims of robberies committed by an organised group against the homes of individuals in rural areas were described in this study. Victimisation prevention is admittedly crucial, as this study emphasises.

In their research, M. Ihsan *et al.* (2019) analysed the vulnerability and victimisation of houses located in the vicinity of settlements and considered the possibility of using a Geographic Information System to conduct such an analysis. This study can be used to prevent robberies and assaults with intent to rob in rural areas and on the outskirts of cities. At the same time, this study pays insufficient attention to the characteristics of organised groups and does not consider the specifics of individual countries and special circumstances that may affect the commission of robberies, and in Ukraine specifically.

R. Zaloznyi (2021) paid special attention to the fact that forensic research of robberies (he considered robberies against drivers of motor vehicles) is necessary to develop a methodology for investigating a particular type of crime. This point has also been emphasised in the present study, which highlights the significance of law enforcement agencies knowing the forensic features of robberies. This will help them to investigate criminal proceedings related to this type of crime more effectively.

In his study on the prevention of robberies committed by an organised criminal group, P. Eprintsev (2021)

noted that both the prevention and investigation of robberies require knowledge of the specifics of the mechanism, the way they are committed and the use of tools, as well as the specifics of the offender's behaviour at the scene of the criminal attack, and the specifics of the object of the criminal attack to put forward versions of the person who committed the attack. The researcher proposes the revival of preventive public associations, voluntary people's guards, and public policing stations to stimulate and develop public activity, united by people's desire to protect themselves from criminal attacks, including robberies. Prevention of criminal offences is truly crucial.

M. Dzhelilova (2023) emphasises that regional organised crime requires increased attention, it has specific features, extremely dangerous methods and forms of criminal functioning, considering the specific features of both the territorial and economic factors of the relevant region. The researcher outlines the factors that have the greatest impact on regional crime, such as unemployment, income levels and their specifics in a particular territory, urbanisation, alcoholisation of the population in a particular area, the effectiveness of law enforcement agencies, and the availability of penal institutions. A. Babenko (2021) shares this opinion, arguing that the main purpose of the criminal offence prevention system is to exercise preventive control over the criminological regional environment and to influence the factors that determine not only the detection of criminal offences against property in Ukraine, but also in its regions, and to stop those crimes that are already at the stage of preparation. The researcher believes that a positive result of this will be a significant reduction in the quantitative and qualitative indicators of crimes against both persons and property, which will guarantee a long-term stabilisation of the level of criminal acts. Admittedly, crimes, including robberies, are no less widespread and dangerous in the regions, and therefore preventive control over the regional crime environment is necessary and relevant.

O. Mirkovets (2020) investigated the issue of signs and their properties of the offender's personality, which should be studied and considered within the framework of forensic characteristics. These characteristics must include data describing the processes of establishment and operation of the organised group. The distribution of roles between members of an organised group is a characteristic feature of robberies. Without consideration of the differences in the structure of organised groups, which are determined by the focus on the territorial coverage of the territories under their control, it is advisable to distinguish three levels of links in them: lower (executive links); middle (organisational and control links); upper (leader-organiser, leaders). Despite the differences in the structural arrangements of organised groups, which are determined by the focus of their criminal activity and the territorial

coverage of the territories under their control, three levels of links can be distinguished: lower (executive links); middle (organisational and control links); upper (leader-organiser, managers). Summarising the data of the criminal proceedings against members of organised groups, it can be stated that senior and partially middle-level members of the previously mentioned groups have criminal authority based on their criminal activity and experience. Admittedly, these findings of O. Mirkovets (2020) are relevant for such type of property crime as a robbery committed by an organised criminal group in rural areas.

N. Basarab (2022) covered the individual preventive measures of the National Police of Ukraine to prevent robberies. The researcher defines them as a set of various measures based on criminological knowledge of the characteristic anti-social traits of persons committing acquisitive violent criminal offences aimed at prompt diagnosis and termination, and limitation of the possibility of criminal behaviour. This researcher is correct in arguing that persons who commit crimes such as robbery by an organised criminal group have characteristic antisocial traits.

Conclusions

Thus, to investigate robberies against homes committed by organised groups in rural areas, 100 decisions of national courts from 2019 to 2024 were analysed using the Unified state register of court decisions. These decisions were analysed, and the conclusions drawn were substantiated and set out in this study. They are intended to help law enforcement agencies investigate these types of robberies more effectively in the future, as well as to take more effective preventive measures against such criminal offences.

Considering the nature of the crime of robbery of homes in rural areas by an organised group, this criminal offence is particularly dangerous, as it targets particularly vulnerable groups of people. This study emphasises that such crimes are systemic, and the

connection between the members of the criminal group is strong. As a rule, this type of robbery is not committed within a single village or settlement. Therefore, law enforcement officers need to consider the geographical factor described in this study when investigating robberies against homes in rural areas by an organised group. It should also be noted that such organised groups usually carry out a rather long and thorough preparatory stage before committing the robbery itself to obtain the necessary information to better plan their criminal actions. In preparation for the robbery, the offenders interact with the villagers in the village where they plan to commit the crime. Moreover, they can even talk to the neighbours and fellow villagers of a potential victim. This study also suggested possible measures that could help prevent a considerable number of robberies against homes in rural areas by an organised group, as well as elucidated factors contributing to the commission of this type of crime and the creation of stable organised groups with criminal goals.

In further research on this topic, it would be advisable to consider in greater detail and depth both the mental and social state of individual members of an organised group committing robberies, the victimological characteristics of victims of robberies committed in rural areas, and the ways and measures by which such crimes can be prevented, thereby reducing the crime rate in the country and regions.

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Conflict of Interest

The author of this study declares no conflict of interest.

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Характерні особливості розбійних нападів на житло осіб, вчинених організованими групами в сільській місцевості

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Анотація

Актуальність досліджуваної теми полягає в тому, що в умовах воєнного стану загострюється проблема розбійних нападів на житло громадян, зокрема посилюється їх небезпечність унаслідок більшої ймовірності наявності в учасників організованої злочинної групи вогнепальної зброї, аніж у мирний час. Мета статті полягала у виявленні характерних рис розбійних нападів на житло осіб у сільській місцевості, що вчиняють організовані групи, встановленні чинників, які впливають на вибір зловмисниками жертви майбутнього нападу, визначенні превентивних заходів для зменшення вчинення таких злочинів. Для вирішення зазначених питань у дослідженні було застосовано комплекс методів наукового пізнання: системно-структурний, порівняльний, статистичний та системний. Було з'ясовано, що характерною особливістю таких нападів є вчинення їх групою, яка складається переважно з односельців з внутрішньо стійкими, тривалими, довірчими стосунками, з готовністю систематично вчиняти насильницькі злочини проти осіб. Їм притаманна ієрархія та підготовка до вчинення розбійного нападу на житло осіб у сільській місцевості. Встановлено, що під час підготовки до вчинення розбою для отримання необхідної інформації зловмисники часто вивчають маршрути села, дізнаються інформацію про його мешканців, обирають жертву. Вони можуть розмовляти безпосередньо з потенційною жертвою та/або її сусідами. Тому опитування жителів села під час розслідування такого кримінального правопорушення є важливим кроком для виявлення особи зловмисників. Встановлено чинники, які впливають на вчинення розбійних нападів у сільській місцевості (наявність цінного майна в жертви; віддаленість її проживання, відсутність сусідів; планове відключення електроенергії, фізично уразлива особа тощо). Для вчинення нападів на житло осіб у сільській місцевості зловмисники обирають декілька сіл відносно знайомих їм районів, які можуть знаходитися як в одній області, так і в іншій, з якою межують. Зауважено, що це ускладнює роботу правоохоронних органів у розслідуванні такого типу злочинів. Практична цінність дослідження полягає у врахуванні правоохоронцями теоретичних результатів цього дослідження щодо впливу на вибір зловмисниками жертви та встановлених характерних особливостей, які притаманні таким розбоям

Ключові слова:

злочини проти власності; організована злочинна група; планування злочину; потенційна жертва; чинники вчинення кримінального правопорушення

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International legal standards and practices of European countries in combating domestic and gender-based violence

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Abstract

The relevance of this study lies in the need to improve the legal mechanisms for combating gender-based violence against the background of the increasing number of military conflicts in the world, which create favourable conditions for the latter. The purpose of this study was to analyse the regulatory provisions of international legislation and the practices of certain European countries in preventing manifestations of hatred based on sex and gender and combating domestic violence through criminal law measures. It was stated that legal standards defined by the regulations of international organisations, international treaties, and conventions underlie national and regional standards for combating domestic and gender-based violence. International legal principles of gender equality are defined by the regulatory framework of the United Nations, the Council of Europe, the European Union, and the Organisation for Security and Cooperation in Europe, and other global and European organisations. Human rights provisions recognised by the member states of these organisations through bilateral and multilateral treaties and implemented through ratification are the basis for the formation of national internal standards of the rights of women, children, and persons of all genders. The study concluded that national standards for guaranteeing and protecting human rights in the field of gender equality constitute an implementation of international standards and pan-European provisions, and their implementation in Ukrainian legislation can ensure sufficiently complete and effective implementation of legal measures to combat domestic and gender-based violence. The ideas formulated in this study are aimed at finding more effective criminal law means in lawmaking and law enforcement activities

Keywords:

international legal mechanism for combating gender-based violence; European standards; gender-based violence; prevention of domestic violence; restrictive measures

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Introduction

According to the latest report published by the International Institute for Strategic Studies in London (2023), there are 137 active military conflicts in the world. One of the largest and longest-lasting is the military conflict in Ukraine, which has been suffering from Russia's armed aggression since 2014, fighting for the sovereignty of the state and the freedom of Ukrainians. At the same time, along with the urgent problems of ensuring defence capability and protecting national sovereignty, the task of protecting human rights, ensuring rights for every person regardless of gender, guaranteeing equal opportunities for women's participation in all spheres of public and private life, including through the application of criminal law measures, is critical for the Ukrainian state. The war, internal displacement of numerous citizens, as well as the migration of millions of people around the world, mostly women and children, to the European Union, have provoked a considerable number of cases of gender-based violence in its most grave and dangerous manifestations. Among other things, an extremely sensitive issue has arisen of combating domestic violence, manifestations of cruelty towards children and women.

In legal science, considerable attention is paid to the establishment and development of international legal standards and national legal systems for responding to the phenomena of domestic and gender-based violence, which are perceived as negative in the public eye. Scientists analyse all possible means of prevention and counteraction consolidated in various sectors and institutions of the legal systems of individual countries. Thus, M. Naumenko (2023) addressed the issues of civil law protection of persons from domestic violence, N. Gridina (2020) focused on the problem of combating gender-based violence in terms of administrative legal regulation. O. Dmytrashchuk (2021) chose the problematic of preventing domestic violence by the National Police of Ukraine as an area of scientific research. Analysing the state and legal aspect of preventing domestic violence, O. Yevdokimova (2021) states that in Ukraine, the system of state protection of human rights and freedoms requires regulation and implementation of effective mechanisms, which can be fully agreed with.

In researching the practices of criminal law counteraction to gender-based violence and domestic violence, lawyers see a special role for further implementation of international legal standards. Therewith, O. Stepanenko *et al.* (2023) addressed the desirable areas for further development of international legal regulation of such counteraction both in Ukraine and in other countries. M. Bakayim (2021) shares an analogous opinion, emphasising the significance of considering international standards and foreign practices in combating domestic violence.

A prominent place in theoretical studies is occupied by the significance of the European Court of Human

Rights judgments in ensuring international standards for combating various manifestations of violence. Specifically, supporting the unity of international law in combating domestic violence, E. Demir (2021) addressed the increasing role of the European Court of Human Rights, which expands the possibility of protecting victims of domestic violence. V. Blaker Strand (2020) expressed an analogous position, emphasising the importance of integrating the regulatory framework of the European Court into the provisions of the European Convention on Human Rights. And such opinions are quite fair.

Researchers of the areas of legal counteraction to domestic and gender-based violence in the national criminal legislation of individual states also stress the issues of lawmaking and law enforcement that are important for analysis. Specifically, according to A-K. Wolf & M. Werner (2021), international and European conventions and treaties are important in shaping German criminal law aimed at protecting the rights of victims of gender-based sexual violence and domestic violence. However, not all problems have been overcome yet and the current German legislation does not fully follow international standards. Notably, analogous problematic provisions are inherent in Ukrainian criminal legislation.

Along with the analysis of international human rights law in general, the research of legal scholars is devoted to a wide range of issues, which are significant in terms of content and areas of regulation. Therewith, researchers analyse the national legislation of many countries that regulates criminal law measures to combat domestic and gender-based violence, addressing the need for legal protection of victims of violence. Thus, along with the opportunities offered by the introduction of criminal law measures and their undoubted demand, C. Barrington *et al.* (2022) note the desire of states to overcome economic insecurity as one of the ways to prevent violence against women. Considering the problem of protecting children as victims of domestic violence, I. Ismaidar & R. Rahmayanti (2023) point to the mandatory combination of legal, including criminal law, and social measures to counteract such violence. Particular attention is drawn to the significance of providing medical care and shelter, while respecting the confidentiality of the victim's identity.

The diversity of these areas of research and the theoretical provisions formulated by both domestic and foreign lawyers indicates the importance of the issues raised and confirm the need for further investigation on ways to counter domestic and gender-based violence. Despite the considerable number of theoretical studies and scientific publications devoted to the development of ways and forms of implementation of international legal standards, this issue requires priority attention of domestic lawyers. More efforts should be made to scientifically analyse the theoretical and practical factors that will contribute to the wider implementation

of both these standards and the positive experience of many countries in reducing the impact of domestic and gender-based violence on society in Ukraine.

The purpose of this publication was to analyse the problematic issues of implementation of international legal standards and to consider the practices of other countries in lawmaking in combating domestic and gender-based violence, with the subsequent formation of theoretically substantiated conclusions and recommendations for improving the current criminal legislation, the provisions of which prescribe liability for domestic violence and dangerous manifestations of gender-based violence.

Materials and Methods

To fulfil the purpose and solve the stated tasks, considering the specifics of the subject under study, the following methods were employed: terminological, systemic-structural, formal-logical, and comparative. The terms “domestic violence” and “gender-based violence” were studied using the terminological method. The systemic-structural method allowed for a comprehensive theoretical analysis of the legal acts of international law, Ukrainian legislation, and national legislation of a series of other countries for the purpose of consistent systematisation of such standards and legislative innovations. Using the formal-logical method, the study described the specific features of formation of criminal law provisions regulating liability for domestic and gender-based violence in the Criminal Code of Ukraine (the CCU)¹. The chosen methods created the basis for a comprehensive, logically structured analysis of the socially dangerous phenomenon of gender-based and domestic violence in terms of social response and deterrence by legal means.

The theoretical framework of this study included the findings of researchers and lawyers from Ukraine and a series of other countries. In preparing this study, the provisions of legislative acts were used – criminal law provisions that prescribe liability for gender-based violence, domestic violence in Article 126-1 of the CCU²; Laws of Ukraine “On Ensuring Equal Rights and Opportunities for Women and Men”³; “On Principles of Preventing and Combating Discrimination in Ukraine”⁴; Law of Ukraine No. 2227-VIII dated 6 December 2017⁵; Law of Ukraine No. 2229-VIII⁶ as well as a series of other regulations.

Based on the results of the study of these legislative acts, the study concludes that the above-mentioned regulations adopted over a period of almost two decades reflect the stages of a consistent legislative process of implementing international norms of human rights and freedoms protection into the national legal system of Ukraine. Their provisions provided legal regulation for the country’s state policy on ensuring equality between women and men in all spheres of political, social and economic life, preventing and combating gender-based violence, and countering any form of gender discrimination.

Results and Discussion

Gender-based violence is widespread in the world in its various forms. In Ukraine, an analogous tendency to commit such dangerous acts is observed. In 2023, the National Police of Ukraine received more than 291,000 reports of domestic violence. The number of criminal proceedings opened over these facts was almost twice as high as in 2022 (Department of Communication of the Ministry of Internal Affairs of Ukraine, 2023). According to the Ministry of Health, in 2023, 18% of women and girls aged 15 to 49 in Ukraine experienced intimate partner violence (All-Ukrainian action..., 2023). The considerable social danger of this phenomenon is also evidenced by the number of people convicted by Ukrainian courts for domestic violence. While in 2019 courts considered 227 proceedings with convictions for domestic violence, in 2023 the number of people found guilty was 1,537. In 2024, 138,745 offenders were brought to administrative responsibility under Article 173-2 of the Code of Ukraine on Administrative Offences⁷ (Judicial power of Ukraine, 2024). In 2020, 96,257 people in this category were identified, in 2021 – 104,928, which indicates a steady upward trend in recorded cases of domestic violence. Therewith, these data do not fully reflect the negative trends in domestic violence due to the impossibility of sufficiently recording socially dangerous manifestations of violence in the frontline and temporarily occupied territories, as noted by researchers at the JurFem Analytical Centre (2022).

It is fair to say that the current state policy of Ukraine in the field of prevention and containment of domestic and gender-based violence is characterised

¹ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

² Ibidem, 2001.

³ Law of Ukraine No. 2866-IV “On Ensuring Equal Rights and Opportunities for Women and Men”. (2005, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/2866-15#Text>.

⁴ Law of Ukraine No. 5207-VI “On Principles of Prevention and Counteraction of Discrimination in Ukraine”. (2012, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/2866-15#Text>.

⁵ Law of Ukraine No. 2227-VIII “On Amendments to the Criminal and Criminal Procedural Codes of Ukraine for the Purpose of Implementing the Provisions of the Council of Europe Convention on the Prevention of Violence Against Women and Domestic Violence and Combating These Phenomena”. (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2227-19>.

⁶ Law of Ukraine No. 2229-VIII “On Prevention and Combating Domestic Violence”. (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2229-19>.

⁷ Code of Ukraine on Administrative Offences. (1984, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/80731-10#Text>.

by constant innovations and implementation of the most effective programmes and measures. The country has created a multidisciplinary legislative framework focused on this task, and the development of a system for the prevention of gender-based and domestic violence is based on international standards and international practices.

Ensuring gender equality through counteracting such forms of violence as domestic and gender-based violence is a vital area of Ukraine's state policy in its development for a significant period¹. Furthermore, it is necessary and crucial to implement state response measures to protect the rights and interests of victims of domestic violence and gender-based violence (GBV). The state aims to develop and implement a programme of social and legal response to domestic or gender-based violence to prevent and counteract these phenomena².

The process of implementing the principle of gender equality in international law was initiated by the UN Charter, which, among other fundamental principles, proclaimed the equality of men and women, stressing that there should be no restrictions on the rights of women and men to take part in the activities of all organs and structures of the UN itself³. The principle of equality between men and women was further developed in the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights of 1966⁴, as well as in other fundamental regulations of international law. International legal standards for combating domestic and gender-based violence have been further

implemented through the adoption of a considerable number of regulations aimed at combating violence against women specifically. Such is the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women⁵, the 1995 Beijing Declaration and Platform for Action⁶, the Resolution 1325, adopted by the Security Council on October 31, 2000 and a series of others^{7,8,9,10,11}. Each of these documents emphasises the critical and urgent dangers of discrimination based on sex and gender. Thus, it is emphasised that countries have obligations to take the necessary measures to eliminate discriminatory phenomena, any restrictions based on gender, and equality of women in political, economic, social, and other spheres of public life¹²; to introduce the concept of gender equality at the legislative level¹³. The UN Declaration on the Elimination of Violence against Women, adopted in 1993¹⁴, which, among other provisions, recognises that such violence is a powerful social factor that helps to keep women in a subordinate position compared to men. At the same time, it records the intensification of discriminatory processes in the societies of different countries through the introduction of legislative regulations and social norms.

The Council of Europe also carries out quite effective work in the field of human rights protection, gender equality, empowerment, and protection of women's interests, which has resulted in the adoption of a considerable number of regulations in EU member states and beyond. The European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁵, as well as the European Social Charter¹⁶, the Declaration

¹ Decree of the President of Ukraine No. 722/2019 "On the Goals of Sustainable Development of Ukraine for the Period Until 2030". (2019, September). Retrieved from <https://www.president.gov.ua/documents/7222019-29825>.

² Decree of the Cabinet of Ministers of Ukraine No. 728 "The Concept of the State Social Program for the Prevention and Counteraction of Domestic Violence and Gender-Based Violence for the Period Until 2025". (2018, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/728-2018-%D1%80#Text>.

³ United Nations Charter. (1945, June). Retrieved from <https://www.un.org/ru/about-us/un-charter/full-text>.

⁴ International Covenant on Social, Economic and Cultural Rights. (1966, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_042#Text.

⁵ United Nations Convention on the Elimination of All Forms of Discrimination against Women. (1979, December). Retrieved from <https://ips.ligazakon.net/document/MU79K04R>.

⁶ Beijing Declaration. Adopted at the Fourth World Conference on the Status of Women. (1995, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_507#Text.

⁷ Resolution of Security Council No. 1325 "Women, Peace, Security". (2000, October). Retrieved from <https://nssu.gov.ua/genderna-rivnist/rezolyuciya-radi-bezpeki-oon-1325>.

⁸ Resolution of Security Council No. 1820. (2008, June). Retrieved from <https://regulation.gov.ua/documents/id72982/goals>.

⁹ Optional Protocol to the 1999 Convention on the Elimination of All Forms of Discrimination against Women. (1999, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_794#Text.

¹⁰ United Nations Millennium Declaration. (2000, September). Retrieved from <https://www.undp.org/sites/g/files/zskgke326/files/publications/MDGs%20Ukraine/202010/2020ukr>.

¹¹ United Nations General Assembly Resolution No. 70/1 "Transforming our world: The 2030 Agenda for Sustainable Development". (2015, September). Retrieved from <https://ips.ligazakon.net/document/MU15167>.

¹² United Nations Convention on the Elimination of All Forms of Discrimination against Women. (1979, December). Retrieved from <https://ips.ligazakon.net/document/MU79K04R>.

¹³ Beijing Declaration. Adopted at the Fourth World Conference on the Status of Women. (1995, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_507#Text.

¹⁴ The Declaration on the Elimination of Violence Against Women. (1993, December). Retrieved from <https://zakononline.com.ua/documents/show/165261-165261>.

¹⁵ Convention on the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

¹⁶ European Social Charter (Revised). (1996, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_062#Text.

on Equality between Women and Men¹ and a series of others can be considered the fundamental regulatory document of the Council of Europe that laid the foundation for legal and social standards of equality.

The Committee of Ministers and the Parliamentary Assembly of the Council of Europe have developed and adopted numerous conventions and recommendations that promote the implementation of gender equality standards in Europe. Thanks to the implementation of these documents in the national legislation of European countries, including Ukraine, they help to combat domestic and gender-based violence. The concepts were gradually formed, the content of socially dangerous manifestations was defined, specifically, the terms “violence against women”, “gender-based violence”, “sex-based violence” were legislatively consolidated, while at the same time the above terms were distinguished.

At the same time, despite certain shortcomings in the existing legislation, specifically criminal law, Ukraine has built a fairly effective and comprehensive system of legal regulation of social relations in the area of ensuring equal rights and freedoms of Ukrainians regardless of sex and gender. It includes a set of inter-related and interconnected legislative provisions that are intended to ensure the effectiveness of state and social institutions and to fill it with binding regulations and measures of legal responsibility. The structure of the regulatory framework is based on the fundamental principles of equality of rights, freedoms, and opportunities, without any preferences, exclusions, or restrictions based on sex or gender. Equality of men and women in the political, economic, social, and cultural spheres of public life is guaranteed by Article 24 of the Constitution of Ukraine².

The practical implementation of these principles is ensured by the adoption of the above-mentioned laws of Ukraine. The basic provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention of 2017³) were implemented by the Law of Ukraine No. 2227-VIII⁴. Each of the laws consistently provides legal regulation and characterisation of such socially dangerous phenomena as discrimination and its various manifestations, gender-based discrimination

and violence, sexual harassment, and domestic violence. Thus, to implement international legal provisions, the Law of Ukraine No. 2227-VIII dated 6 December 2017⁵ amended a series of articles of the Criminal Code of Ukraine regulating liability for criminal offences against human life and health, as well as against sexual freedom and sexual inviolability. This law criminalises the manifestations of such socially dangerous phenomena as domestic violence and coercion into marriage (Articles 126-1 and 151-2 of the CCU)⁶. In addition, to prevent and counteract possible forms of violence in the family and kinship circle, including gender-based violence, all forms of violence against women, the CCU⁷ has been supplemented with provisions on the implementation of restrictive measures against perpetrators of domestic violence, as well as criminal liability for failure to comply with restrictive measures, restrictive orders, or failure to complete a programme for offenders.

Furthermore, legislators in Ukraine are focusing on the implementation of a series of other crucial international legal acts, such as UN Security Council Resolution 1325 on Women, Peace, and Security, based on which the National Action Plan was developed and approved⁸. The document sets out to protect citizens from any form of violence and discrimination based on gender, and to ensure effective social and legal practices to prevent domestic and gender-based violence. The decision taken by Ukrainian legislators to introduce the National Plan, as well as a considerable number of others, clearly confirm the practice of interpenetration of various elements of the criminal legal system of Ukraine and its supplementation with provisions and requirements of international legal standards, as well as the practices of lawmaking in other countries.

Along with the analysis of international legislation, the provisions of which have created the basis for the implementation of an effective domestic system of legislative provisions to combat gender-based and domestic violence, it is necessary to investigate the terms used to describe these socially dangerous phenomena. The definition, characterisation, and interpretation of the terms “gender-based violence” and “domestic violence” according to international standards and in their regulatory descriptions deserve theoretical reflection. The

¹ Declaration of the Committee of Ministers of the Council of Europe on the Equality of Women and Men. (1988, November). Retrieved from https://zakon.rada.gov.ua/laws/show/994_903#Text.

² Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/>.

³ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2022, June). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001-11#Text.

⁴ Law of Ukraine No. 2227-VIII “On Amendments to the Criminal and Criminal Procedural Codes of Ukraine for the Purpose of Implementing the Provisions of the Council of Europe Convention on the Prevention of Violence Against Women and Domestic Violence and Combating these Phenomena”. (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2227-19>.

⁵ Ibidem, 2017.

⁶ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

⁷ Ibidem, 2001.

⁸ Resolution of Security Council No. 1325 “Women, Peace, Security”. (2000, October). Retrieved from <https://nssu.gov.ua/genderna-rivnist/rezolyuciya-radi-bezpeki-oon-1325>.

Council of Europe Convention (Istanbul Convention)¹ identifies the following forms of violence against women: domestic violence, various forms of sexual violence, rape, and forced marriage. This Convention has become the basis for criminalising a series of socially dangerous acts that are manifestations of gender-based violence. Gender-based violence is also defined in the Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action (Inter-Agency Standing Committee, 2015).

In describing gender-based violence, researchers refer to the concepts prescribed in the above-mentioned international regulatory documents and scientific publications. Lawyers in Ukraine have analysed the content and features of the legal concepts of “domestic violence” and “gender-based violence”. M. Kachynska (2020) points out that gender-based violence is any form of violence that is motivated and conditioned by the interpersonal relations between men and women based on their gender. O. Dudorov & M. Havronyuk (2019) define this type of violence through such types of its manifestations as domestic violence, rape, sexual harassment. It is worth supporting the opinion of M. Repan & L. Panchenko (2022) that in defining the content of this violence, it is necessary to speak of violence as violence committed against a person because of their gender. Admittedly, gender-based violence is manifested in the offender’s socially dangerous behaviour towards persons of a different gender or gender identity from the offender. T. Pertseva *et al.* (2021) offer a description of the content of psychological violence as a sign of domestic violence. The researchers consider threats of non-physical punishment, humiliation of human dignity, and deliberate devaluation of the victim’s role and place in the relationship with the abuser to be its most common manifestations. Therewith, researchers suggest that psychological violence is more common in the behaviour of women, who in such circumstances act as abusers towards their husbands, partners, and children, parents, and other family members.

While not defining a generalised concept or characterisation of the phenomenon, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)² lists a variety of dangerous acts that can be considered forms of gender-based violence in their various manifestations. The articles of the Convention define them in general terms as: physical violence;

psychological; sexual; economic; and domestic violence. In different circumstances, and in different ways, gender-based violence is fulfilled through the commission of socially dangerous acts, which are formalised as follows: persecution; rape; sexual harassment; female genital mutilation; forced sterilisation; forced abortion; forced marriage. Cases of sexual harassment, when committed through threats or intimidation, can also be considered a manifestation of gender-based violence³.

According to the results of the study of concrete areas of Ukrainian law enforcement and their compliance with international and European legal standards for combating these types of violence, it should be noted that there is no such term as “gender-based violence” in the criminal legislation of Ukraine. The terms “domestic violence”, “family violence”, and “sex-based violence” are used in criminal law. Also, the terms “physical and mental violence” are commonly used. With the supplementation of the Code of Ukraine on Administrative Offences with norms in Parts 1.15, 39-1 and 173-2, the term “gender-based violence” was introduced into the legal vocabulary⁴.

Most of the acts mentioned in the Istanbul Convention are criminalised by Ukrainian criminal legislation. Thus, the consolidation of coercion to marry in Article 151-2 of the CCU⁵ as an independent component of coercion to marry, as well as a series of others, is the result of the implementation of the provisions of Council of Europe Convention No. 2319-IX of 2022⁶. Furthermore, the Convention addresses the prevalence in different countries of such a socially dangerous phenomenon as forced marriage, which is primarily associated with discriminatory attitudes towards women and disregard for women’s interests and rights in society. G.G. Zhukovska *et al.* (2020) highlighted coercion into marriage and marital relations, including deprivation of liberty in the family in the content of gender-based violence, considering women as victims of such coercion. Along with the significance of legal measures to counteract any form of gender-based violence, the researchers also point to the urgent need to build public rejection of violent models of family and cohabitation relationships. I. Vasylykivska (2022) considers such negative socially dangerous phenomena as gender inequality and gender discrimination as the basis for gender-based violence, specifically, forced marriage.

Gender-based violence is counteracted by implementing a system of necessary preventive measures

¹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2022, June). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001-11#Text.

² *Ibidem*, 2022.

³ Law of Ukraine No. 2866-IV “On Ensuring Equal Rights and Opportunities for Women and Men”. (2005, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/2866-15#Text>.

⁴ Law of Ukraine No. 1604-IX “On Amendments to the Code of Ukraine on Administrative Offenses Regarding Strengthening Liability for Domestic Violence and Gender-Based Violence”. (2021, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1604-20#Text>.

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

⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2022, June). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001-11#Text.

that have been defined in the legislation of a series of European countries and Ukraine. States are looking for their own ways to minimise the negative impact of various manifestations of gender-based and domestic violence on society. And these innovations are becoming the subject of scientific research. Thus, O. Dmytrashchuk (2020) addressed the introduction of a rule on the right of Austrian law enforcement officers to forcibly evict offenders from their place of residence together with victims of violence, and to impose a ban on approaching this place. L. Ostapchuk (2023) noted that Belgian legislation prescribes a temporary ban on the abuser's residence in the same apartment as the victim of domestic violence as a restrictive measure, which justifiably results in the need to implement the positive practices of other countries in Ukrainian legislation and law enforcement practice. It is worth agreeing with the opinion of U. Mytnyk (2019), O. Lomakina (2020), V. Ladychenko *et al.* (2021) that the practices of countering legal measures, introduction of restrictive measures in the legislation of the United Kingdom, Greece, Spain, Germany, the Republic of Poland, and other European countries is also interesting for legislators and law enforcement agencies of Ukraine.

At the beginning of the first decade of the 21st century, a series of European countries introduced qualitative innovations in legislation aimed at ensuring gender equality and protecting women's rights from all forms of discrimination. These are the amendments to the legislation of the Republic of Lithuania that have been introduced to implement the above principle. Thus, a new wording of the Law of the Republic of Lithuania "On Equal Opportunities" was adopted¹. And changes and amendments to it continue to be introduced constantly.

The process of lawmaking is tireless. At any stage of development of social processes, there is both criminalisation and decriminalisation of various phenomena and acts, which is determined by the dynamics of socially dangerous acts and the intensity of their occurrence in the behaviour of citizens. The team of lawyers who worked on the draft of the new Criminal Code of Ukraine (Draft of the new Criminal Code of Ukraine, 2024) proposes to transfer concrete criminal offences from the current CCU to the future one, which prescribe liability for various manifestations of gender-based violence. These are, specifically, the proposed Article 4.5.4. Rape, 4.5.5. Acts of a sexual nature without sexual penetration, 4.6.4. Domestic violence. A new interpretation of the criminal offence is proposed by Article 4.5.7. of the Draft "Inducement of a child aged 14 to 18 to engage in sexual activity with a third party".

The provision proposed in the Draft Criminal Code on liability for "forcing or inducing a woman to remove or mutilate her genitals" (Article 4.5.9 of the Draft CCU) may be an innovation for the criminal legislation of Ukraine. This innovation raises a lot of questions. Thus, criminalised dangerous conduct is quite common in certain countries and among some peoples. This practice is mainly recorded in the countries of the African continent. However, it is necessary to answer the question of whether these phenomena are relevant or widespread in Ukrainian society. There are no such cases in the culture of Ukrainian society or in the worldview of Ukrainians, which calls into question the appropriateness of this rule. On the contrary, there are grounds to state that the proposed criminalisation of this act cannot be considered a positive step in ensuring effective counteraction to gender-based violence, as not all forms of such violence prescribed in international legal acts require criminalisation in Ukrainian legislation.

It is also important to address the shortcomings of lawmaking practice that can be observed in the work of Ukrainian legislators. An example of such a shortcoming is the merely partial resolution of the issue of implementing the recommendations made on 2 June 2017 by the European Commission against Racism and Intolerance (ECRI). In its recommendations, the ECRI suggested that Ukraine should include in the CCU, as an aggravating circumstance, the motive for committing an unlawful act related to a person's sexual orientation or gender identity (Conclusions of the Commission against Racism..., 2020). On 2 June 2020, the ECRI stated that the CCU² does not contain provisions that would establish liability for incitement to hatred or violence motivated by intolerance of a person's sexual orientation or gender identity.

Admittedly, Item 3 of Part 1 of Article 67 of the CCU³ recognises the commission of a criminal offence on the grounds of sexuality as an aggravating circumstance. This is the only circumstance in the article of the General Part of the CCU that can be considered as indicating the commission of an unlawful act because of a person's gender, and thus increases criminal liability. However, it cannot be argued that there is no other legal protection for a person based on their sexual orientation or gender identity in the CCU. And the opinion of the researcher L. Matveeva (2020), who believes that the Ukrainian legislator has ignored the above recommendations of the European Commission, is only partially agreed with.

To confirm this opinion, it is worth referring to a series of articles of the Special Part of the CCU. Thus, Part 2 of Article 127 of the CCU⁴ refers to torture

¹ Law of the Republic of Lithuania No. VIII-947 "On Equal Opportunities for Women and Men". (1998, December). Retrieved from <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/488fe061a7c611e59010bea026bdb259#:~:text=Article%201.&text=of%20the%20Law-,1,to%20marital%20or%20family%20status>.

² Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

³ *Ibidem*, 2001.

⁴ *Ibidem*, 2001.

committed for the purpose of discrimination. The provision singles out the commission of such an act for reasons of racial, national, or religious intolerance¹. The norm does not include other motives or disclosure of motivation based on affiliation, specifically, gender or sexual orientation. At the same time, the content of motivation on the grounds of discrimination involves any form or method of restricting human rights, freedoms, and opportunities, including on the grounds of sex, sexual orientation, or gender identity. Criminal liability for discriminatory acts can be discussed in the context of the norm that defines liability for violation of equality of citizens based on their race, nationality, region, religious beliefs, disability, and other characteristics. Part 1 of Article 161 of the CCU² describes various forms of restriction of rights, as well as different privileges based on gender and, what is notable, on other grounds, as a sign of the objective side of this criminal offence. The content of such signs that lead to any restriction of the rights, freedoms, or interests of a person based on their sexual orientation or gender identity may constitute the offences under consideration.

Researchers' remarks are also observed in the analysis of domestic violence in terms of the characteristics of the criminal offence. Thus, V. Melyankov & G. Usatiy (2020) believe that domestic violence, when committed through economic violence, cannot in all cases be classified as criminal offences that infringe on the life and integrity of a person. At the same time, they propose criminalising domestic violence as an independent criminal offence when committed against a child. While there is some support for the legal opinion that the victim of violence should be defined as an object of economic interest, the proposal to include an independent offence in the CCU cannot be supported. This legislative innovation seems unnecessary and insufficiently substantiated. It would be more logical and necessary to add a qualifying feature to Article 126-1 of the CCU – commission of an act against a child. It would be appropriate to supplement this article with Part 2 – “Domestic violence against a minor under the age of 14 to 18” and Part 3 – “Domestic violence against a minor under the age of 14”.

Thus, the analysis of international legal acts shows their significant impact on determining the vectors of legal policy in Ukraine to achieve the goal of gender equality, on the formation of legal standards in lawmaking and law enforcement to effectively combat domestic and gender-based violence. A comparison of the legislative provisions of Ukraine and some European countries on the prevention of domestic violence shows that Ukrainian legislators have successfully implemented criminal law measures.

Conclusions

The results of the analysis of international legal acts, certain acts of legislation of European countries, and provisions of Ukrainian legislation on preventing and combating gender-based and domestic violence allow concluding that this task stays one of the critical ones in Ukraine today. The state policy in the field of combating the social phenomenon of domestic violence is implemented through the introduction of legislative provisions and regulatory requirements to overcome social problems that give rise to domestic and gender-based violence. One of the key objectives of such a policy is to introduce effective criminal and other types of legal liability, apply restrictive measures, restraining orders, and develop effective programmes for offenders. The implementation of these areas of state policy is ensured by the implementation of international legislation, the adoption of positive foreign practices through the development by Ukrainian legislators and the use by Ukrainian law enforcement officers of the most effective and efficient legal measures and social and public influence. Legal response measures play an essential role in the implementation of the modern paradigm of combating gender-based and domestic violence. The most repressive among them are the measures of criminal legal influence provided for in the norms of both the General and Special Parts of the Criminal Code of Ukraine.

A comparison of the legislation of Ukraine and a series of European countries on the prevention of domestic violence suggests that Ukrainian legislators have a positive practice of implementing regulatory measures of a criminal law nature, restrictive civil law orders, and social programmes for offenders. It is noteworthy that the criminal legislation of Ukraine includes a series of restrictive measures for perpetrators of domestic violence, which are analogous to the special measures to combat domestic violence widely used in European countries, such as a ban on cohabitation in places where victims of domestic violence are staying; a ban on approaching the victims within a controlled distance, as well as a ban on any form of communication (correspondence, telephone calls, and other means of establishing contact), etc. It was stated that an effective measure to prevent domestic violence in most European countries is the application of restrictive measures against the offender, specifically, the forced removal of the offender from the victims' place of residence, a ban on communication, and the establishment of any contact between the offender and the victims.

The scientific analysis of the legal means of eradicating gender-based and domestic violence in terms of implementation of international legal standards and introduction of modern European practices in overcoming

¹ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

² Ibidem, 2001.

these socially negative phenomena confirms the need for prompt improvement of the provisions of Ukrainian criminal legislation regulating liability for domestic violence and gender-based violence, which will facilitate their effective and efficient application in law enforcement practice.

Further scientific research is warranted by the ongoing process of lawmaking in the paradigm of international legal regulation and the constant search by

Ukrainian legislators and lawyers of other European countries for ways to overcome the socially dangerous phenomena highlighted above.

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Conflict of Interest

None.

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Міжнародні правові стандарти й досвід європейських країн протидії домашньому та гендерно зумовленому насильству

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Анотація

Актуальність дослідження полягає в необхідності вдосконалення правових механізмів боротьби з гендерно зумовленим насильством на тлі збільшення кількості військових конфліктів у світі, що створюють сприятливі умови для останнього. Мета статті – здійснення аналізу нормативних положень міжнародного законодавства, досвіду окремих європейських країн із запобігання виявам ненависті за ознаками статі й гендера, протидії домашньому насильству із застосуванням заходів кримінально-правового характеру. Було констатовано, що правові стандарти, визначені нормативними актами міжнародних організацій, міжнародними договорами й конвенціями, є базисом для національних і регіональних стандартів протидії домашньому та гендерно зумовленому насильству. Міжнародні правові постулати гендерної рівності є визначеними нормативною базою Організації Об'єднаних Націй, Ради Європи, Європейського Союзу та Організації з безпеки та співробітництва в Європі, інших світових і європейських організацій положення щодо прав людини, визнані державами-учасницями цих організацій шляхом укладання двосторонніх та багатосторонніх договорів, імplementовані через ратифікацію, є основою для формування національних внутрішніх стандартів прав жінок, дітей, особи незалежно від статі. Сформульовано висновок, що національні стандарти гарантування та захисту прав людини у сфері гендерної рівності є впровадженням міжнародних стандартів і загальноєвропейських положень, їх упровадження в українське законодавство може достатньо повно й ефективно забезпечувати реалізацію правових заходів протидії домашньому та гендерно зумовленому насильству. Сформульовані в статті ідеї спрямовані на пошук дієвіших засобів кримінально-правового характеру в законотворчості та правозастосовній діяльності

Ключові слова:

міжнародно-правовий механізм протидії насильству за ознакою статі; загальноєвропейські стандарти; насильство за ознакою статі; запобігання домашньому насильству; обмежувальні заходи

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

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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:

rulemaking technique; principles of law; social purpose of law; rule of law; regulation

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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

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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 нормопроектування 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 нормопроектування, структуривання та формулювання нормативних положень, де правовим застереженням надається вагоме значення. Встановлено та схарактеризовано найбільш суттєві ознаки правових застережень через розуміння їх як елемента нормопроектувальної 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 нормопроектувальної 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 нормопроектування, у нормотворчій роботі – під час розроблення нормативно-правових актів

Ключові слова:

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

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Judicial lawmaking and judicial reform: Theoretical and practical aspects of the relationship

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Abstract

The intensification of legal development, increased interpenetration of legal systems, and transformation of legal and state phenomena in the context of globalisation and integration processes necessitate the investigation of the nature of judicial lawmaking and judicial reform and their correlation. The purpose of this study was to theorise the relationship between judicial lawmaking and judicial reform. This study was based on the historical, formal legal, and comparative methods employed in the context of natural law, positivist, sociological approaches, integrative type of legal understanding, theories of lawmaking and justice. The principal findings of this study lie in substantiation of a series of theoretical provisions on judicial lawmaking and judicial reform. It was found that the legal nature of judicial lawmaking is profound and multifaceted. Judicial lawmaking and judicial reform are closely interrelated. One of the manifestations of this interaction is that the introduction of judicial lawmaking is a task, vector, or result of judicial reform. The study proved that judicial lawmaking is a significant achievement of judicial reform, and not a side effect of the transformation of the judicial system. Judicial lawmaking is an essential factor that substantially affects judicial reform in material, procedural, and organisational aspects. Judicial reform, as an independent type of state transformation, is a crucial area of state-building and is aimed at transforming justice into a fair mechanism for resolving legal conflicts and disputes based on the rule of law. With each stage of judicial reform in Ukraine, the need for official recognition of judicial lawmaking becomes more urgent. The 2016 judicial reform did not positively resolve this issue. As of 2024, the need to introduce judicial lawmaking is mostly recognised at the doctrinal level, but the legislating body denies it, although there are various manifestations of the applied use of the lawmaking potential of courts in the national legal system of Ukraine. The practical value of the findings is that the highest authorities of Ukraine can use them to improve the efficiency of lawmaking, justice, and the transformation of the judicial system

Keywords:

justice; judicial practice; judicial law; reform; state reform; legal reform

Introduction

The justice system is an important and ongoing subject of transformation in countries around the world. At the beginning of the judicial reform in Ukraine in 1992, it was not fully comprehended what a tremendous set of changes needed to be made to get closer to the defined goal of fair, independent, and accessible justice.

It was expected to be completed within one to two years. However, it turned out that the idea from proclamation to full implementation had to go through a lot of resistance from established views and many compromises. Social transformations have given rise to new challenges that had to be considered. As the standards

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of justice have risen, the course of judicial reform has been constantly adjusted. Overall, the transformation of Ukraine's judicial system is ongoing and has not always been consistent. Judges and the legal community as a whole believe that this reform should be completed (Stefanchuk, 2023).

The judicial reform has once again raised the issues of judicial lawmaking, lawmaking activity of judges, and the place and role of the court in the lawmaking system (Didych, 2021). The important quality of judicial institutions in societies, especially in difficult periods of social transformation, is that the main driver of such changes is their consistent and proper protection of human rights and freedoms. Courts, as a tool for ensuring human rights, create a legal platform for expressing and protecting the interests of various social groups, using the fundamental principles of democracy, according to which a person is recognised as the highest social value. Considering this, the need to understand the theoretical and practical, doctrinal and regulatory dimensions of the interaction between judicial lawmaking and judicial reform is becoming particularly relevant in modern legal science, due to the intensification of legal development, increased interpenetration of legal systems (families, types), and transformation of legal and state phenomena (Kryvytskyi, 2023).

The topic of lawmaking is a traditional issue that is comprehensively addressed in monographs, scientific articles, textbooks, and guidelines on general theoretical and sectoral legal science (Drinóczi & Cormacain, 2021; Kolodiy & Kolodiy, 2021). The theoretical framework of this study included the scientific findings of Ukrainian and foreign researchers. Thus, S. Shevchuk (2007) focused on judicial lawmaking as a phenomenon that has common features in most modern legal systems and is historically based on the concept of judicial precedent. Of scientific interest is the monograph by D. Yasyuk (2024), which outlines the theoretical foundations of judicial lawmaking and its limits in civil proceedings in Ukraine, specifically focusing on the evolutionary development of the institution of judicial lawmaking in civil proceedings of both common and continental law.

Among the studies of foreign experts, the book by K. Sideri (2007) is noteworthy, which covers a sociological understanding of lawmaking in the European Union (EU). Sideri's research focuses on the general social function of law in the new governance structures, which promotes decentralised and flexible procedures, as well as encourages discussion, stakeholder participation, and public dialogue. The manifestations of judicial activism, in particular lawmaking, are the subject of the study by S. Grover (2020). This monograph argues that judicial activism in relation to the protection of human rights and due process is a key feature of the democratic rule of law.

A valuable source is the work by M. Florczak-Wątor (2020), which analyses the specifics of lawmaking

activities of European constitutional courts. The main hypothesis of the researchers is that constitutional courts are now positive legislators whose place in the system of state bodies needs to be updated. The book examines the lawmaking of four constitutional courts in Western countries: Germany, Italy, Spain, and France; and six constitutional courts in Central and Eastern Europe: Poland, Hungary, Czech Republic, Slovakia, Latvia, and Bulgaria; and two international courts: The European Court of Human Rights (ECHR) and the Court of Justice of the EU. The authors investigate the interaction between national constitutional courts and international tribunals in terms of their lawmaking activities.

In turn, the collective study by E. Timothy *et al.* (2023) offers a wide, in-depth, and diverse range of philosophical studies of the role of precedent in law, justice, and morality. The monograph covers the legal nature and authority of precedent and the forms of argumentation it provides in the common law and continental law systems. The chapter "Precedent and Lawmaking Powers" provides a critical overview of the debate on the relationship between precedent-setting and the use of lawmaking powers.

Therewith, some dimensions of the judicial lawmaking phenomenon, specifically, its relationship with judicial and legal reforms, stay unaddressed by researchers, which determines the purpose of this scientific study, which is to theoretically examine the relationship between judicial lawmaking and judicial reform. To fulfil this purpose, the following tasks were formulated: firstly, to characterise the legal nature of judicial lawmaking with due regard for modern contextual and conceptual approaches to understanding the lawmaking potential of a court; secondly, to determine the significance of judicial lawmaking in judicial reform; thirdly, to investigate the specific features and vectors of international and domestic judicial lawmaking activism's impact on judicial reform and legal transformation, and to analyse the prerequisites and areas of application of judicial lawmaking in the national legal system of Ukraine following the reform of the judicial system in 2016.

Materials and Methods

Considering the post-non-classical image (type) of science (Pylypiv & Semykras, 2021), the methodological tools of scientific research are represented by a set of ideological and research foundations and approaches, methodological and fundamental principles, general methods of scientific search, philosophical, general scientific, and special scientific methods and research techniques, which helped to theorise the interaction of judicial lawmaking and judicial reform, as well as to provide reasoned and highly reliable conclusions and research findings.

The basis for choosing the strategy for conducting this study was the natural law, positivist, sociological

(legal pragmatism and realism), and integrative types of legal understanding (Boyko, 2021), as well as theories of lawmaking and justice (Yusuf & Merwe, 2021). The study of the theoretical and practical foundations of judicial lawmaking and judicial reform was based on such fundamental principles of methodology as pluralism, historicism, and reliability. Considering the specific features of the subject, the purpose, and objectives of this study, a series of other key research approaches were additionally applied which are worth mentioning separately, namely: activity-based – in the content and instrumental description of judicial lawmaking and judicial reform as a type of social activity, manifestation of social creativity with the allocation of subjects, objects, goals, means, and results of such activity; a systemic approach – in determining the place of judicial activism and the transformation of justice in the system of lawmaking and state reforms, their interconnection with each other and other legal and state phenomena, such as legal reform; an anthropological approach – in establishing the role of a person, their rights and freedoms in judicial lawmaking and judicial reform, determining their objectives, goals, and limits.

Furthermore, the use of a dialectical approach helped to understand the essence, content, and forms of judicial lawmaking and judicial reform in their motion and functioning, as well as in terms of development prospects (Rastorhuiev *et al.*, 2021). The use of the historical method is aimed at reconstructing the genesis of judicial lawmaking and judicial reform in Ukraine and the world in a retrospective perspective. The formal legal method contributed to the investigation of the theoretical and practical foundations of judges' lawmaking activity and the transformation of justice through legal constructions and legal terminology. The comparative method helped to analyse the international and European experience of judicial lawmaking and judicial reform in the ratio of common and different, mass and individual.

The empirical framework of this study included regulations, contracts and laws, which, along with others, comprise the legal support of lawmaking judicial activism and judicial reform^{1,2}, as well as Ukrainian, German, and Polish judicial practice, case law, specifically the decision of the Supreme Court (SC) of Ukraine³, of the Constitutional Court (CC) of Ukraine⁴, the Federal Court (FC) of Germany and the Supreme Court (SC) of Poland (Decisions of the Federal Court of Justice, n.d.; Latest decisions, n.d.). The study analysed 200 cases, which

were systematised in databases on the respective official websites.

Results and Discussion

The legal nature of judicial lawmaking. Judicial lawmaking is a phenomenon of the legal past and legal reality. The emergence and widespread use of the term 'judicial lawmaking' is associated with the scientific definition of the phenomenon of administration of justice, when, in deciding a case or summarising judicial practice, judges formulate new legal provisions that did not previously exist in the text of the law, "binding" the general rules of objective law to the requirements of real life and the challenges of modernity, which takes place during court consideration of a particular case. It is well-known that such a prohibition on judges' participation in the creation of legal norms dates to the periods of codification of law by the Emperor Justinian I of the Eastern Roman Empire and the French Revolution of the 18th century. Furthermore, this ban was supported by the ideological basis of the Soviet government, and thus the legal system of that historical era. However, the notion that judges should apply legal norms exclusively in their literal sense and not deviate from their meaning, especially in their interpretation, does not meet the needs of the latest legal development that has prevailed in states with established democratic regimes (primarily European countries, especially since the second half of the last century) (Shevchuk, 2007).

Judicial lawmaking by courts can be considered an independent type of lawmaking, which is quite controversial. During its genesis, judicial lawmaking has always served the primary purpose of direct protection of human rights and freedoms, and courts have been guided not only by constitutional norms, but also by principles, the main of which are justice, reasonableness, natural law, equality, compliance with deontological criteria, social necessity, and the goals of legal regulation of social relations (Plavych & Plavych, 2013).

The place of the court in lawmaking has been perceived differently throughout the historical development of legal systems. The spectrum of different approaches to understanding the role of the court ranged from complete equation of the court with the actual creator of law in the common law tradition to the state body that performed the honourable role of "the mouth that proclaims the words of the law", in other words, a mechanism of direct interpretation of the text of laws, the action of which excludes the slightest element of

¹ Law of Ukraine No. 1402-VIII "On the Judiciary and the Status of Judges". (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

² Law of Ukraine No. 1401-VIII "On Amendments to the Constitution of Ukraine (Regarding Justice)". (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1401-19#Text>.

³ Resolution of the Supreme Court of Ukraine No. 2-3897/10. (2021, May). Retrieved from <https://verdictum.ligazakon.net/document/96498387>.

⁴ Decision of the Constitutional Court of Ukraine No. 1-p/2023. (2023, February). Retrieved from https://ccu.gov.ua/sites/default/files/docs/1-r2023_0.pdf.

lawmaking. This approach was typical for Europe during the period of legal etatism. In the 21st century, in the context of total and comprehensive globalisation, and as a result, the interpenetration and mutual influence of legal systems, such a wide range of differentiated approaches no longer exists, although there are quite noticeable differences in positions depending on the type of legal systems, approach to understanding law, historical tradition, etc. As a result, the role of the court in lawmaking is growing, and the features inherent in the common law and civil law systems are converging. The basis for the development of this process is the declaration and recognition of undeniable and inalienable human rights, the rule of law, and the doctrine of constitutionalism – the need to limit public power by law and entrust the function of protecting these values to the court (Bošnjak & Zajac, 2023).

According to the position of S. Shevchuk (2007), judicial lawmaking is a specific type of lawmaking activity that results from the implementation of lawmaking activity by judicial authorities together with their law enforcement and law interpretation powers in resolving a particular legal case, contained in the legal provisions defined by the court in the reasoning part of the judgement, which are binding not only on the parties to the case, but also on other subjects of law according to the law or by virtue of the principle of hierarchy of the judicial system or by virtue of their reasoning in consideration of comparable cases. The term “judicial lawmaking” is quite close to the term “judicial practice” in its narrow sense, which is often found in regulations and professional literature.

In general terms, judicial lawmaking is defined as a specific activity of the judiciary, which results in the establishment, amendment, or cancellation of legal norms. The key features of judicial lawmaking are, firstly, that the subject of judicial lawmaking is a court as a public authority on behalf of which judges who are members of a particular court function. Secondly, judicial lawmaking is an additional function of the court, since the main purpose of its activity is to consider legal disputes through law application and adoption of relevant individual legal acts, and not to create general rules of conduct through lawmaking. It is in this that the “specificity” of the judiciary’s lawmaking activity is mostly manifested. Thirdly, judicial lawmaking requires authorisation from the highest representative body of public authority, usually by adopting a special law (alternatively, by “tacit consent” of the representative body and is a kind of legal custom, akin to the legal system of the United Kingdom).

Judicial lawmaking is divided into two types by subjects: 1) carried out by courts of general jurisdiction; 2) carried out by a court of constitutional jurisdiction (Florczak-Wątor, 2020; Musella & Rullo, 2024). Judicial lawmaking acts are quite diverse: a) judicial precedent; b) quasi-precedent; c) regulation of a judicial

authority. They have in common their origin from a judicial authority and their generally binding nature, which confirms that these acts provide a general level of legal regulation, as opposed to law enforcement acts, which can only provide individual legal regulation. Notably, judicial lawmaking is not a specific feature of the functioning of individual legal systems or their creation. It has always been inherent in law at all historical stages of its development. The main purpose of law is to resolve legal conflicts and contradictions through the use of judicial procedures. Concrete legal arrays (or legal families, types, systems) have an impact exclusively on the forms and types, the actual technology of judicial lawmaking, and the legal significance of its results (Makhambetsaliyev *et al.*, 2023). Judicial lawmaking in some legal systems is official, and therefore its results have the status of a full-fledged source of law (Saparbekova *et al.*, 2024). In others, judicial lawmaking may be denied, for instance, at the level of legal ideology or legislation, but this does not deny its existence within these legal systems in the form of judicial practice (latent form), and thus be a lawmaking factor, still affecting social relations (Bihun, 2009).

According to O. Lynnyk (2020), judicial lawmaking is an exemplary activity of the judiciary to establish, amend, or repeal rules of conduct to fill gaps in legislation, increase the legal force of sub-legislative regulations, and eliminate contradictions between forms (sources) of law. Proceeding from the formulated definition, O. Lynnyk (2020) identified six key features of judicial lawmaking: 1) carried out by higher courts; 2) promotion of the principle of legal certainty; 3) derivative nature from the main judicial functions: administration of justice and application of law; 4) extension of the effect to all subjects of law; 5) embodiment of court decisions in the form of judicial legal provisions; 6) the content is the adoption of new rules of conduct, cancellation or improvement of existing ones. This position is a vivid example of understanding judicial lawmaking as a guarantee of human rights.

According to O. Kopytova (2020), the specific feature of judicial lawmaking is conditioned by a series of features that determine its role in the overall lawmaking mechanism. First of all, judicial lawmaking is an “additional” result of justice, since it is not, in essence, an independent form of judicial activity and cannot be separated from the main judicial function – the administration of justice. Furthermore, judicial lawmaking is carried out in the same procedural form. Judicial lawmaking as an additional function of the judiciary is closely intertwined with the administration of justice. Accordingly, judicial lawmaking differs from lawmaking carried out by the legislature in that lawmaking is the main and independent function of legislators. The presented point of view quite rightly reflects certain aspects of the nature of lawmaking judicial activism.

Judicial lawmaking is not a deviation from the norm, but a characteristic inherent in the nature of justice, which, albeit limited, cannot be excluded from the court's activities, as it lies in the very essence of justice. One of the key reasons for the need for judicial lawmaking is the need to clarify or detail the provisions of laws and other regulations adopted by official lawmakers, or, more precisely, to update them, in other words, to adapt them to new situations that become the subject of court proceedings, considering a wide range of factors that affect the court's decision. The process of interpreting the constitution, laws, and other legal acts cannot do without the use of certain elements of lawmaking, which is an integral feature of justice, just like lawmaking (in essence, it is its component) (Bošnjak & Zajac, 2023). Any judicial lawmaking, and especially lawmaking in so-called complex situations, when it is necessary to make a decision that may raise doubts about its compliance with the principle of separation of state powers, is carried out by the court on the basis of a comprehensive consideration and weighing of the arguments for and against, and the conclusion that the protection of the human right that is the subject of its consideration is impossible without the formation of a certain legal provision of normative content. In other words, these are situations when the arguments for ensuring human rights are higher in the list of values than the belief in the need to respect the principle of differentiation of branches of state power. According to L. Ayoub (2022) and R. Rodiyah *et al.* (2023), human rights are the basic criterion, in other words, the compass that defines the boundaries of judicial lawmaking technology. In support of the rationality of this conclusion, it is relevant to cite the statement that in the general nomenclature of humanitarian values, human rights, like the human being itself, occupy a key place and prevail over all others. Their authority and weight are unquestioned, and their role and purpose are clear.

The impact of international and national judicial lawmaking on the reform of the justice system. Justice, judicial lawmaking, and judicial reform are complex legal phenomena that exist and function both independently and in close interrelation with each other. In this regard, scholarly works emphasise the need to improve legal instruments in the field of case law. This should become one of the key tasks in the latest Ukrainian judicial reform, since the existing substantial differences and contradictions in law enforcement practice create the basis for instability in the justice system and impede the implementation of the principle of equality of all participants in the judicial process both before the law and the court, levelling the significance of such a fundamental and constitutionally consolidated principle as the rule of law (Shevchuk, 2007). The formation of the basis for the introduction of a unified judicial practice and ways to ensure its stability depend on the

lawmaking activity of judges. The judicial reform has given the problem of judicial lawmaking a new emphasis and focus on terms of strengthening the role of decisions of the highest judicial body. As of 2024, the main task for the judiciary in particular and the legal system of Ukraine in general is to outline the path along which the doctrine of judicial lawmaking and key aspects of its practical implementation will develop (Didych, 2021). The implementation of judicial reform following the principle of separation of powers necessitates clarifying the role of judicial lawmaking in the performance of justice tasks in administrative proceedings (Rastorhiev *et al.*, 2021).

According to L. Moskvych (2011), the system of comprehensive measures to optimise the judicial system within the framework of the main directions of judicial reform in Ukraine should include, among other things, granting official precedent status to the decisions of the Supreme Court upon consideration of an application for review of a court decision due to unequal application of the same legal provisions by the cassation court in respect of analogous legal relations. This scientific position, which is substantiated within the framework of the development of the concept of judicial efficiency and the theory of judicial law, deserves support. The latest practice of convergence and interpenetration of the continental and Anglo-Saxon systems of law creates the need to make relevant amendments to national legislation. As a result, in certain categories of cases, higher judicial institutions will make precedent-setting decisions.

In the context of drafting an effective judicial reform (as opposed to bureaucratic (pseudo)reforms), it is reasonable to argue that the main cause of judicial corruption is the lack of uniformity in law enforcement and predictability of court decisions. Instead, the principle of uniformity of law enforcement will ensure the predictability of court decisions. In countries with little judicial corruption, the so-called case law is in place. When considering a case, a judge is obliged to be guided by the decisions made by a higher court in the past. The judge simply cannot make a different decision than the one that has already been made in an analogous case. Otherwise, the judge will be forced to bear full responsibility for their actions. Furthermore, the introduction of a case law system in Ukraine will also help to offset the effect of the mechanisms that functioned in the past and were lost (primarily prosecutorial supervision of the judiciary and the binding nature of the SC Plenum resolutions on the courts) (Boshytskyi, 2020).

The transformation of the judicial system of Ukraine, as well as other states, is substantially influenced by the conventional legal positions of the ECHR, which review the effectiveness of existing intrastate mechanisms for ensuring human rights and freedoms, branches of substantive and procedural law, and national models of the judiciary (Bošnjak & Zajac, 2023).

The ECHR judgments help to understand why an applicant to an international judicial body failed to properly obtain protection of its violated subjective rights within the framework of national justice, what gaps in the legal system indicate that the judicial reform is incomplete and needs to be improved, and what additional tools are needed to ensure the right to adequate judicial pro-

tection. The content analysis of the ECHR judgments delivered in cases against Ukraine and individual states parties to the Convention for the Protection of Human Rights and Fundamental Freedoms allows identifying the key areas of reform and vectors for improving the Ukrainian judicial system in terms of their correlation with European standards of justice (Fig. 1).

Development of the material dimension of the justice system:

- introduction of new principles and approaches to the functioning of the justice system; improvement of the terminology used in the field of judicial protection of human rights and freedoms and their legal interests;
- enhancement of the quality of existing substantive and procedural law aimed at strengthening human rights guarantees and opportunities for their implementation;
- transformation of professional legal consciousness according to the “spirit” of the Convention, which is reflected in the awareness of the priority of protecting human rights and freedoms, and the use of the Convention rules and practice of the ECHR in law enforcement activities.

Improvement of the procedural form and progressive development of a series of procedural law institutions:

- the principles of judicial proceedings (public hearing, openness and transparency, impartial trial, legal certainty, reasonable timeframes for consideration of cases and binding nature of court decisions, etc.) and algorithms for their application;
- court procedures (optimisation and unification, improvement of certain stages);
- resolution of the problem of “competition between judicial jurisdictions” and development of an optimised model for the enforcement of court decisions.

Strengthening of the institutional components of the justice system:

- rationalisation and harmonisation of the judicial system;
- monolithic judiciary (elimination of duplication of powers and establishment of constructive interaction);
- improvement of the legal status of judges;
- increasing the significance of judicial self-government in the functioning of the justice system;
- optimisation of the forms of involvement of the population (civil society) in the judicial process

Figure 1. The primary areas of reforming and improving the justice system in Ukraine in terms of correlation with European standards of justice

Source: developed by the author of this study based on the findings of O. Khotynska-Nor (2016)

The primary task of justice – the search for law in a particular case – is fulfilled by applying and interpreting the law following certain prerequisites and further development of the law. Thus, not only national law, but also the law of the “old democracies” of continental Europe is being influenced by the Anglo-American legal family through the increasing spread of quasi-regulation by the ECHR, the Court of Justice of the EU, and the supreme and constitutional courts of a series of European states (Florczyk-Wątor, 2020). As an example, let us turn to foreign practices, specifically, the case law of the highest courts in criminal cases in Poland and Germany. While German legal science fundamentally recognises the power of the judiciary to create new law, Polish legal theory generally rejects this notion. However, the study shows that in practice, the differences

in the number and intensity with which these courts issue creative decisions are not as significant as the divergence in theoretical positions suggests. Considering the circumstances, both the German Federal Court and the Polish Supreme Court can create new rules of law, but the dimensions of judicial law represented by these judicial bodies differ from each other. In the research sample (100 judgments), the German Federal Court was more inclined to introduce legal institutions that were alien to the statutes¹ and to make decisions contrary to the will of the legislator². On the other hand, the Supreme Court of Poland (the same number of judgments) used logical conclusions more often, but also did not refrain from ruling against the clear wording of the law³, and was also ready to venture outside the wording of the law⁴. Notably, only the German Supreme Court

¹ Decision of the Federal Court of Justice of Germany No. BGH GSSt 1/04. (2005, March). Retrieved from <https://www.hrr-strafrecht.de/hrr/3/04/gsst-1-04.php>.

² Decision of the Federal Court of Justice of Germany No. BGH GSSt 1/23. (2023, May). Retrieved from <https://www.hrr-strafrecht.de/hrr/2/23/gsst-1-23.php?referer=db>.

³ Decision of the Supreme Court of Poland No. II CZ 25/07. (2007, May). Retrieved from <https://www.sn.pl/wyszukiwanie/SitePages/orzeczenia.aspx?ItemSID=12959-8dcfa950-a611-4756-8f8a-7df105220758&ListName=Orzeczenia2>.

⁴ Decision of a Seven-judge Panel of the Supreme Court of Poland No. I KZP 22/22. (2023, June). Retrieved from https://www.sn.pl/orzecznictwo/SitePages/Najnowsze_orzeczeniaIOZ.aspx?ItemSID=1796-301f4741-66aa-4980-b9fa-873e90506a11&ListName=Zagadnienia_prawne.

openly admits that it creates new rules of law¹, while the Polish Supreme Court does not consider its decisions to be lawmaking, especially when it applies the so-called “interpretation in a broad sense”² – which is essentially a “hidden” way of creating new rules of law.

Although the German supreme court is more open in its creativity and German legal science is potentially receptive to judicial lawmaking, it would be an exaggeration to claim that judge-made law plays a more significant role in German criminal justice than in Polish criminal justice. In practice, the frequency and depth of creative decisions made by the Criminal Chamber of the Supreme Court of Poland are higher than the Polish legal doctrine provides for (Table 1 number of decisions..., 2024). However, this is at least to some extent an indication of the reality of the cases that the courts have to decide, and among them, especially the higher courts. A principled position that completely prohibits courts from going beyond the written law is in fact impossible. Complete legal regulation that provides convincing solutions for all cases and keeps pace with social change may be an ideal to strive for, but it is ultimately unattainable. Judges may point out deficiencies in the statutes in the statement of reasons or even call on the legislature to act, but ultimately they must resolve the case in a satisfactory manner and cannot refrain from ruling on the merits simply because the legislature has not provided a convincing solution to a particular legal problem. It can be argued whether in a particular case the superior court has overstepped the boundaries of acceptable creativity and whether the judiciary is pushing the boundaries too far in its favour, but as long as statutory law is incomplete or flawed, judicial law, as M. Małolepszy & M. Głuchowski (2023) note, is a necessary mechanism in every legal culture.

Status and trends in the implementation of judicial lawmaking in the national legal system of Ukraine as a result of the judicial reform of 2016. The critical perception of judges involved in the formation of law, as well as the normative effect of decisions made by them, by some researchers (Serdiuk, 2017) and public officials, destroys the unity of judicial practice, uniformity of application of the law by courts, and, unfortunately, substantially slows down the establishment of an independent judiciary in Ukraine. As of 2024, the issue of granting the court lawmaking powers and recognising judicial precedent as a form (source) of law is on the agenda and may affect the system of separation of state power, which will affect the basic

principles of a rule-of-law, democratic state, as well as the existing sustainable practice of lawmaking. Thus, according to N.M. Parkhomenko (2023), the chance of a judicial precedent entering the set of forms (sources) of Ukrainian law is determined, which should be a gradual process associated with strengthening the independence of the judiciary, increasing the level of professional requirements for judges, ensuring a suitable level of legal culture of the population, etc. This reasonable opinion reflects the essence of the evolutionary approach of introducing judicial lawmaking into the national lawmaking mechanism.

The current system of justice is a logical consequence of the reforms carried out in the judiciary, which purposefully (though not always effectively) implemented ideas and measures of a diverse nature, content, and scale, sometimes with rather contradictory results (relative to the stated purpose). Ukraine has often followed a “non-linear” path of judicial reform, ignoring political, economic, and cultural factors that came to the fore at different times of the rule of law. However, it did bring about qualitative changes in the judicial system, which become clearer in retrospect. These include, first and foremost, improving the position of judges, establishing judicial self-government, functioning of administrative proceedings, modernisation of court procedures to enhance competitiveness and judicial control over the observance of the lawfulness of pre-trial investigation in criminal proceedings (Khotynska-Nor, 2016).

On 2 June 2016, the Verkhovna Rada of Ukraine adopted the Law of Ukraine “On Amendments to the Constitution of Ukraine (Regarding Justice)” No. 1401-VIII³ and, as its logical continuation, the Law of Ukraine “On the Judiciary and the Status of Judges” No. 1402-VIII⁴. The aforementioned laws came into force on 30 September 2016 and marked the next stage of the judicial system reform, which is characterised by substantial changes in its organisation. The reform of the justice system was aimed at bringing the judicial system in line with European standards and laying the groundwork for the renewal of the judiciary. The fundamental task of judicial reform is clearly to introduce such mechanisms that would ensure human rights and freedoms by providing everyone with access to impartial, effective, and independent justice, as well as guarantee that everyone receives a clear, reasoned, and substantiated court decision, in other words, a court service of proper quality (Bondar, 2018).

¹ Decision of the Federal Court of Justice of Germany No. BGH 4 StR 371/03. (2004, February). Retrieved from <https://www.hrr-straftrecht.de/hrr/4/03/4-371-03.php3?referer=db>.

² Decision of the Supreme Court of Poland No. I KZP 4/07. (2007, April). Retrieved from <https://www.sn.pl/wyszukiwanie/SitePages/e-sprawa.aspx?ItemSID=7054-63787658-a27b-4a58-b387-bf1b4a34945&ListName=esprawa2007&Search=I%20KZP%204/07>.

³ Law of Ukraine No. 1401-VIII “On Amendments to the Constitution of Ukraine (Regarding Justice)”. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1401-19#Text>.

⁴ Law of Ukraine No. 1402-VIII “On the Judiciary and the Status of Judges”. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

Therewith, the judicial reform of 2016 did not meet the decade-long expectations of the progressive legal community regarding the official (legislative) recognition of judicial lawmaking. The current version of the new Law of Ukraine No. 1402-VIII¹ is quite conservative in this regard and does not say anything original about judicial lawmaking, limiting itself to authorising courts of various instances to study case law and generalise it. Such an approach of the legislative body to non-recognition of the institution of judicial lawmaking indicates that it fears that the judiciary will take over lawmaking or will indulge certain political forces, influencing the key issues of public administration, the electoral process or regulation of important social relations through lawmaking (Kravchenko, 2021).

At the same time, after the adoption of new versions of all Ukrainian procedural codes in 2017, except for the Criminal Procedural Code of Ukraine (which was amended), the legislative body prohibited courts from refusing to consider a case (justice) on the grounds of absence, incompleteness, vagueness (ambiguity), or contradiction of the legislation regulating the disputed relations (part 11 of Article 11 of the Code of Commercial Procedure of Ukraine dated 6 November 1991²; part 10 of Article 10 of the Civil Procedural Code of Ukraine dated 18 March 2004³; part 4 of Article 6 of the Code of Administrative Procedure of Ukraine dated 6 July 2005⁴). Thus, the legislative body, albeit indirectly, still empowers judges to resort to judicial lawmaking to overcome legislative gaps, solve an exceptional legal problem (Timchenko & Kotvyakovsky, 2022), deviate from the conclusion on the application of legal norms in comparable legal relations (Yasynok, 2023), make an exemplary decision (Shumylo, 2022), and ensure the development of law. In such circumstances, judicial lawmaking includes a mechanism for filling legislative gaps, which is always based on the substantive nature of a particular branch of substantive law to which the subject matter of the dispute belongs. It is in this way that it is advisable to carry out “legal repair” work by the court to eliminate from legal circulation an “exceptional legal problem” caused by incomplete, unclear, inaccurate or contradictory content of existing legal provisions or their gaps (Yasynok, 2024).

As of 2024, courts of all instances are factually “finishing building” the law in case of conflicts or lack of provisions in legislation, the Supreme Court, summarising case law, promotes uniform application of legal norms by courts, while the Constitutional Court of

Ukraine implements negative lawmaking, recognising the unconstitutionality of legal acts and their individual elements, which entails their invalidation (e.g., the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 56 MPs of Ukraine on the compliance of the third paragraph of the second part of Article 22 of the Law of Ukraine “On Complete General Secondary Education” of 2023 with the Constitution of Ukraine (constitutionality)⁵. This activity of the judiciary of Ukraine has quasi-precedent-setting, law-interpreting, law-enforcing and, as a result, law-making nature (Lynnyk, 2020).

Fairness, reasonableness, efficiency, rationality, and the highest level of social generalisation constitute the deepest meaning of judicial lawmaking. On the other hand, judicial lawmaking acts as a procedural and legal safeguard that should always be triggered in case of the slightest gaps in legislation (Kravchenko, 2021). As of 2024, the authority and role of the Supreme Court’s practice is extraordinary. Never before has the legal community’s attention been so closely focused on the actions of the Supreme Court. It determines the vectors and is the foremost authority in shaping judicial practice and doctrinal research in the field of law. Certain rulings of the cassation instance resolve long-standing unresolved problems and formulate new questions that the legislature and legal scholarship are seeking to answer. The practice of forensic science is increasingly gaining momentum and weight, which is perceived not only in terms of the need to apply, but also in terms of the recognition and acceptance of such findings by the academic community (Shumylo, 2022). The ruling of the Civil Court of Cassation of the Supreme Court (dated 21 April 2021 in case No. 2-3897/10⁶) has stirred up professional circles in Ukraine, especially in the legal field, specialising in both family law and non-pecuniary damage (Kovalskyi, 2021). Undoubtedly, the aforementioned court decision will be analysed in both educational and scientific studies. Overall, this approach of the Supreme Court is modern, it is only at the beginning of the admission to law enforcement. The legislature should consider this legal opinion of the Supreme Court and make relevant amendments to the provisions of objective law, providing for such a possibility at the legislative level in the future. This, according to M.M. Shumylo (2021), will bring the national legal system of Ukraine closer to the requirements of anthropocentrism. It is worth supporting this opinion regarding the quasi-precedent-setting nature of the Supreme Court’s decisions

¹ Law of Ukraine No. 1402-VIII “On the Judiciary and the Status of Judges”. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

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

³ Civil Procedural Code of Ukraine. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15#Text>.

⁴ Code of Administrative Procedure of Ukraine. (2005, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2747-15#Text>.

⁵ Decision of the Constitutional Court of Ukraine No. 1-p/2023. (2023, February). Retrieved from https://ccu.gov.ua/sites/default/files/docs/1-r2023_0.pdf.

⁶ Resolution of the Supreme Court of Ukraine No. 2-3897/10. (2021, May). Retrieved from <https://verdictum.ligazakon.net/document/96498387>.

(legal opinions), considering that quasi-legal regulation is primarily its additional, subsidiary function.

Conclusions

Based on the above, the conclusion of this study is that judicial lawmaking is a significant, immanent, and specific type of lawmaking activity. In the leading states of the modern democratic international order, lawmaking judicial activism is characterised as a reliable tool provided to the judiciary within the framework of its judicial powers, and this tool is used quite effectively. Judicial lawmaking and judicial reform are closely interrelated. One of the manifestations of this interaction is that the introduction of judicial lawmaking is a task, direction, or result of judicial reform, the essence of which, as a type of state reform, is reduced to the progressive transformation of the justice system. Judicial lawmaking is about enhancing the authority of the judiciary and promoting the unity and consistency of judicial practice. Justice and judicial lawmaking are not mutually exclusive. Lawmaking judicial activism is subordinated to the goal of justice (to resolve legal conflicts based on objective law and the requirements of the principles of justice, freedom, equality, and humanism), and is one of the ways to achieve it. Furthermore, only judicial lawmaking can fill law in its specific dimensions and aspects not only with ideas, but also with the concrete essence of these fundamental principles. It follows that judicial lawmaking should be a substantial achievement of judicial reform.

International and intrastate judicial lawmaking is a constitutive factor that substantially affects judicial reform in material (substantive), procedural, and organisational (structural) aspects. Furthermore, judicial lawmaking is the basis and prerequisite for legal reform, i.e., a qualitative, progressive transformation of law. In this context, judicial lawmaking contributes to the development of legal doctrine and is an indicator for the legislator that certain legal relations need to be harmonised, that social relations have changed, become more complex, and require urgent legal regulation, and unfortunately, the legislator is already late in regulating them. The theoretical and practical significance of the impact of judicial lawmaking activism on the reform of the judicial system and legal transformation is that

judicial lawmaking is the basic, initial basis for the progressive transformation of the national justice system, judicial system, judicial authorities, and the system of law, especially the judicial branch of law.

Judicial reform, as an independent type of state transformation, is a significant area of state-building and is aimed at transforming justice into a fair mechanism for resolving legal conflicts and disputes based on the rule of law. For a long time, the Ukrainian state has been in a continuous state of change in the judicial system, the effectiveness of which is now a substantial indicator of Ukraine's readiness for integration with the EU. In the context of implementing the next stage of reforming the justice system in Ukraine, the need for regulatory consolidation of lawmaking judicial activism is of particular significance. The last transformation of justice in 2016 did not effectively address this problem. The need for wider use of the lawmaking potential of courts is mostly approved by lawyers, but denied by representatives of the legislature, although there are various manifestations of applied use of lawmaking activism of courts (primarily the Supreme Court and the Constitutional Court) in the legal system of Ukraine. The author of this study expresses hope that the recognition of judicial lawmaking in the national lawmaking system is only a matter of time.

It is promising to investigate the methodological, conceptual, practical, and comparative foundations of the theories of judicial lawmaking and judicial reform, the content and instrumental manifestations of interaction, the intersection of judicial lawmaking activity and the transformation of justice, and the distinction between judicial reform and judicial and legal reform.

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Conflict of Interest

The author of this study declares no conflict of interest.

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Судова правотворчість і судова реформа: теоретико-практичні аспекти взаємозв'язку

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Анотація

Інтенсифікація правового розвитку, посилення взаємопроникнення правових систем, трансформація правових і державних явищ в умовах глобалізаційних та інтеграційних процесів обумовлюють актуальність вивчення природи судової правотворчості й судової реформи, їх співвідношення. Мета наукової розвідки – теоретизація взаємозв'язку судової правотворчості та судової реформи. Методологічну основу статті становили історичний, формально-юридичний, компаративний методи, застосовані в контексті природно-правового, позитивістського, соціологічного підходів, інтегративного типу праворозуміння, теорій правотворчості й правосуддя. Основні результати наукового пошуку полягають в обґрунтуванні низки теоретичних положень про судову правотворчість і судову реформу. Було встановлено, що юридична природа судової правотворчості глибока та багатогранна. Судова правотворчість і судова реформа знаходяться в тісному взаємозв'язку. Один із виявів такої взаємодії зводиться до того, що запровадження судової правотворчості є завданням, напрямом або результатом судової реформи. Доведено, що судова правотворчість є вагомим здобутком судової реформи, а не побічним наслідком перетворення судової системи. Судова правотворчість є важливим чинником, що суттєво позначається на судовій реформі в матеріальному, процесуальному й організаційному аспектах. Судова реформа як самостійний вид державної трансформації є визначальним напрямом державотворення та спрямована на перетворення правосуддя на справедливий механізм вирішення юридичних конфліктів і спорів на основі верховенства права. З кожним етапом судової реформи в Україні актуалізується необхідність офіційного визнання судової правотворчості. Судова реформа 2016 року позитивно не вирішила це питання. Станом на 2024 рік потребу запровадження судової правотворчості переважно визнають на доктринальному рівні, але законодавець її заперечує, хоча наявні різні вияви прикладного застосування правотворчого потенціалу судів у національній правовій системі України. Практична цінність отриманих результатів дослідження полягає в тому, що вони можуть бути використані вищими органами влади України для підвищення ефективності правотворчої діяльності, правосуддя та перетворення судової системи

Ключові слова:

правосуддя; судова практика; судове право; реформа; державна реформа; правова реформа

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Right to work under martial law: Legislative aspect in Ukraine

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Abstract

The right to work is one of the fundamental human rights guaranteed by international documents and the constitutions of most countries, including Ukraine. However, the conditions and restrictions relating to the right to work under martial law may change. Due to the constant threat to Ukraine's independence, as well as to the lives and health of its citizens, the regulation of labour relations is substantially different from peacetime, which requires scientific substantiation. The purpose of this study was to outline the key provisions of labour law relating to the person's exercise of the right to work according to the social and legal vector of the state's activities under the legal regime of martial law. The study demonstrated the significance of ensuring stability and security under martial law but emphasised the temporary nature of restrictive measures. The importance of maintaining a balance between the interests of employers and employees was substantiated, as well as the development of labour legislation to accommodate the specifics of the situation during a military conflict. Human rights may not be violated in either peacetime or wartime. On the contrary, the state should create conditions for the free development of labour and the fulfilment of human potential. Based on formal legal analysis of wartime legislation of Ukraine, comparison of various regulatory documents and scientific positions, the study highlighted the problematic aspects of observance of the constitutional right to work. The relevant conclusions were formulated, outlining the legal ways to achieve the balance of interests of employer and employee and proposals for improving the legislation were identified. The recommendations proposed in this study may be used by the legislator to improve the current labour legislation of Ukraine

Keywords:

labour relations; coercion to work; labour rights; constitutional rights; labour code

Introduction

The decline in the number of jobs and deterioration of working conditions in the de-occupied territories of Ukraine and in the areas of active hostilities had a substantial impact on the economy and the rights of employees. Understanding the legal framework for the exercise of the right to work under martial law is key to the

effective protection of the rights and interests of citizens and ensuring stability. It is important to account for the fact that the state must strike a balance between rights and responsibilities. Thus, the investigation of the right to work in Ukraine under martial law is of great importance from both theoretical and practical perspectives.

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According to the conclusions of the Constitutional Court of Ukraine¹, freedom of labour implies the right of each person to decide independently whether to work. This is an inalienable right to secure employment under equal conditions. However, the state prescribes only equal opportunities for the exercise of the right to work but is not obliged to employ every citizen. Thus, Ukraine has adopted a modern concept of the right to work, which guarantees the possibility of free choice of the form and type of employment. However, the problem of investigating the right to work becomes relevant in the context of the full-scale invasion of the aggressor state, which has led to significant population displacement and loss of employment.

The provisions of the constitution have a historical context. They reflect society's need for stability and security, but at the same time open a discussion about limiting the power of employers to violate employees' labour rights. M. Ashri (2019), in the study of the application of international humanitarian law and human rights in the context of armed conflict, found that some international instruments do not recognise "war" or "armed conflict" as the principal reasons that may suspend or limit a state's human rights obligations. However, war is a vivid example of an emergency that can endanger the life of a nation. S. Kelbia *et al.* (2021) noted that the definition and affirmation of human rights determines the legal basis and value of a democratic society. This should be consistent with the principle of the rule of law, which defines the essence of the constitutional state. M. Hurkovskiy & M. Sydor (2020) analysed the theoretical foundations of guaranteeing human and civil rights and freedoms and the right to work in the context of the evolution of national legislation and the stability of international regulations governing these issues. L. Sotiroski (2023) examined how the exercise of these rights in Europe is hampered by socio-political crises, including the pandemic and the war in Ukraine.

Based on the findings of N.V. Kokhan (2022), the right to work is a necessary socio-economic right through which every person meets their own and their family's needs and contributes to the development of the state and society. This right, which is prescribed in international instruments, is central to the labour sphere and underlies other labour-related rights. It allows a citizen to secure their livelihood by performing work that they choose or freely agree to.

The principle of the right to work, based on the ideas of social justice and human rights, is generally accepted, reflecting both individual and collective needs to create material and spiritual values, which is important not only for satisfying personal needs but also for ensuring the existence of society. In peacetime,

the state has an obligation to provide all citizens with equal and free opportunities to fully exercise the right to work. This is expressed through the basic principles of labour law, which should be understood as the right of a person to be exclusively entitled to their skills and abilities. Every person is entitled to freely choose the form or scope of their business at will. In turn, this right creates an obligation for the employer not to require the employee to perform work that is not stipulated in the employment contract and is not part of the employee's job duties without the employee's voluntary consent (Southwick *et al.*, 2019).

N.R. Prokopchuk (2023) concluded that Ukraine has adopted a modern understanding of the right to work, which guarantees every citizen the opportunity to freely choose the form and type of employment. This is in line with international standards and current judicial practices in the country. Therewith, reviewing Part 2 of Article 64 of the Constitution of Ukraine², I.O. Taran & O.V. Pleskun (2022) stated that it concerns the restriction of certain constitutional rights in case of martial law, provided that such rights are not prescribed in this provision, i.e., the legislators are entitled to oblige or prohibit able-bodied citizens to work.

G. Khrystova & O. Uvarova (2022) argue that today most companies recognise their responsibility for negative human rights impacts within their business processes, specifically, according to the United Nations Guiding Principles on Business and Human Rights (UNGPs). In this context, the Verkhovna Rada's active legislative work aims to resolve these issues and ensure that new laws follow the constitutional rights of citizens. Thus, the purpose of this study was to analyse the problematic aspects of labour law aimed at guaranteeing the right to work under the legal regime of martial law, following the social and legal vector of the state's activities.

Materials and Methods

The study analysed the problems of legal regulation and focused on the observance of the right to work in the context of military operations and martial law. The study was based on the application of special legal scientific methods, which provide the reader with an understanding of the specifics of approaches to analysing the problem. The methodological framework of this study included a wide range of general and special methods of cognition. The study employed general scientific methods such as analysis, synthesis, comparison, analogy, deduction, induction, and abstraction. Other formal and logical methods, such as analysis, synthesis, generalisation, and abstraction, were also used. The study also included transitions from theoretical and

¹ Decision of the Constitutional Court of Ukraine No. 14-пн/2004. (2004, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/v014p710-04#Text>.

² Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

legal abstraction to specificity in the field, using normative modelling and the method of legal forecasting. The approach to the investigation of the subject matter was based on the integrated use of special methods, such as structural-functional, comparative legal and formal legal analysis.

To investigate the specific provisions of the Constitution of Ukraine¹, laws and other regulations governing the right to work under martial law, the study employed the formal legal method, which allowed for a detailed analysis of the definition of restrictions on employees' rights and the establishment of the rights and obligations of the parties in the context of emergency circumstances.

The methods of comparative and historical and legal analysis were used to analyse legal norms and approaches to the regulation of the right to work under martial law in different countries and in different historical periods – peacetime² and wartime³. This helped to identify similarities and differences in legislation, legal practice and constitutional norms, as well as to assess the effectiveness of these methods in different contexts. This approach allowed identifying the best practices of other countries in regulating labour relations under martial law and helping develop optimised strategies for Ukraine.

The application of the descriptive method in the context of this study was to systematically describe and analyse legislation and research related to the right to work under martial law in Ukraine, including a detailed review of constitutional and legislative provisions, definition of key concepts, and analysis of trends in the development and implementation of this right. The descriptive approach helped to systematise and summarise the available data, which contributed to a better understanding of the issue and the formulation of recommendations for further research or the development of legal solutions. Analysis of decisions of the European Court of Human Rights^{4,5} helped define the standards and principles recognised by the international community in the field of human rights and ensures their implementation and protection at the national level.

Furthermore, the analysis of the European Court's judgments can serve as a valuable source of information and a basis for the development and improvement of legislation aimed at protecting human rights. The use of these sources helped to fulfil the purpose of this study, as they provided the necessary legal framework, context, and analytical data to understand and analyse the issue of the right to work under martial law in Ukraine.

Results

The Constitution of Ukraine⁶ affirms the significance of the well-being, integrity, and security of citizens for society. Ensuring the rights and freedoms of individuals is a key function of the state that determines the future of the country. It is important that the interaction between the citizen and the state is predominantly determined by human rights and freedoms, and the rule of the Constitution is one of the key components. This is reflected in Article 3 of the Constitution of Ukraine⁷, which confirms the importance of the choice of the Ukrainian people and their future in the space of the social state. Article 43 of the Constitution⁸ prescribes the right to work as a fundamental human and civil right. The Labour Code of Ukraine empowers employees to exercise their labour rights but restricts employers. It has been repeatedly emphasised that to implement the idea of the rule of law, it is necessary that interactions between the individual and the state are predominantly determined by human rights and freedoms, while the rule of the Constitution is one of the key components.

It was first prescribed in modern human rights standards in the Universal Declaration of Human Rights⁹, the International Covenant on Economic, Social and Cultural Rights¹⁰, and the European Social Charter (revised)¹¹. This right is considered as an obligation of the state to create conditions and mechanisms for its implementation following international regulations. According to the decision of the Constitutional Court of Ukraine¹², the right to work is the ability of every citizen to earn a living through work that they choose or agree to freely. This right is guaranteed by the state, which must ensure equality in the choice of profession

¹ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

² Labour Code of Ukraine. (1971, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

³ Law of Ukraine No. 2136-IX "On the Organisation of Labour Relations in Conditions of Martial Law". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2136-20#Text>.

⁴ Decision of the European Court of Human Rights No. 8919/80 "Van der Musselle v. Belgium". (1983, November). Retrieved from <https://hudoc.echr.coe.int/ukr?i=001-62147>.

⁵ Decision of the European Court of Human Rights No. 73316/01 "Siladin v. France". (2021, April). Retrieved from <https://hudoc.echr.coe.int/ukr?i=001-68376>.

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 Ibidem, 1996.

⁸ Ibidem, 1996.

⁹ Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

¹⁰ International Convention on Economic, Social and Cultural Rights. (1973, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_042#Text.

¹¹ European Social Charter (Revised). (1996, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_062#Text.

¹² Decision of the Constitutional Court of Ukraine No. 14-pn/2004. (2004, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/v014p710-04#Text>.

and type of employment, as well as develop the system of professional education and training, accommodating the needs of society.

The full-scale invasion and introduction of martial law in Ukraine by Presidential Decree No. 64/2022 dated 24 February 2022¹, has created significant difficulties for the state and society in the field of legal regulation. Until now, labour legislation, specifically the Labour Code of Ukraine², did not prescribe any particular rules concerning labour relations during martial law. Therefore, in the first days of the war, the situation was regulated by the general provisions of the Code. As of 2024, one of the principal documents defining the specifics of labour relations of employees of all enterprises, institutions, organisations in Ukraine, as well as persons working under an employment contract with individuals, in times of war is the Law of Ukraine No. 2136-IX "On the Organisation of Labour Relations in Martial Law"³ dated 15 March 2022, which sets substantial restrictions for employees.

Raising living standards and social protection standards to European levels is truly a crucial step towards integration with the European Union, but changes to the right to work in times of war can only exacerbate Ukraine's predicament, as they potentially contradict the Constitution and European law. The right to work, as defined in Article 1 of the revised European Social Charter⁴, includes the ability of workers to freely choose their occupation and to receive sufficient and fair remuneration for their work.

Article 43 of the Constitution of Ukraine⁵, Article 23 of the Universal Declaration of Human Rights⁶, Article 1 of the European Social Charter (Revised)⁷, ratified by Ukraine, declare the prohibition of forced labour, while Article 8 of the Law of Ukraine No. 2136-IX⁸ prescribes restrictions on the right to work and the right to strike. Furthermore, the Law of Ukraine No. 389-VIII⁹ (Article 8) prescribes the introduction of labour service for able-bodied persons who are not involved in defence work, do not take part in the protection of critical infrastructure, and are not employed during martial law. This may include performing work related to defence tasks and responding to emergencies that occurred during martial law. Individuals can also be involved in performing socially useful work aimed at meeting the needs of the Armed Forces of Ukraine and other

military formations, law enforcement agencies, and civil defence forces. This can include protecting critical infrastructure and ensuring the normal functioning of the national economy, and it can be done without the need for specialised training. Persons engaged in conscription are guaranteed to retain their previous places of employment.

According to N.V. Kokhan (2022), solving socio-economic problems in times of war requires that each person carefully consider the aspects of security and availability of work. In such times, each employee must be ready to mobilise their strengths and skills to work effectively, constantly improving their level of skills in the field of work. The state is obliged to ensure the highest level of security in the workplace, and employers should not restrict the labour rights of employees during a period of military conflict.

The findings of the Institute for Economic Research and Policy Consultations (2021) point to a link between the war and a drop in household income. The military conflict leads to a decline in production, destruction of infrastructure and other economic obstacles, which directly affects the incomes of citizens. According to the Ukrainian Institute for Demography and Social Studies, the decline in the standard of living and quality of life in Ukraine during the military conflict has become a factor affecting the country's overall social climate. The war caused a considerable outflow of labour force from the country. Many citizens are looking for opportunities to earn money abroad due to job losses and general instability in the country (Cherenko *et al.*, 2023). Thus, the justified focus of the state authorities in Ukraine on the war has led to negative consequences: a decline in the standard and quality of life, a drop in incomes, and labour migration. This drastically reduces investment and innovation activity, as well as the country's overall economic growth potential.

According to the Social Progress Index (2024), the quality of life and income of the population in Ukraine decreased by 11 points in the global ranking compared to 2021. Together with the increase in labour migration and the stable data on the employment of Ukrainians abroad (Fig. 1), this dramatically reduces the country's overall economic growth potential. As of the beginning of March 2023, more than one million Ukrainian refugees out of about 4 million registered (50% of whom

¹ Decree of the President of Ukraine No. 64/2022 "On the Introduction of Martial Law in Ukraine". (2022, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/64/2022#Text>.

² Labour Code of Ukraine. (1971, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

³ Law of Ukraine No. 2136-IX "On the Organisation of Labour Relations in Conditions of Martial Law". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2136-20#Text>.

⁴ European Social Charter (Revised). (1996, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_062#Text.

⁵ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

⁶ Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

⁷ European Social Charter (Revised). (1996, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_062#Text.

⁸ Law of Ukraine No. 2136-IX "On the Organisation of Labour Relations in Conditions of Martial Law". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2136-20#Text>.

⁹ Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law". (2015, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/389-19#Text>.

are of working age) were employed in the EU. Analysing the above data, it can be established that, overall, 50% of Ukrainians of working age have found a job and assimilated into the country of their residence, which is consistent with the employment rates of such persons

in Ukraine. International law protects the labour rights of such persons in terms of prompt payment of wages, decent pay, protection against unlawful dismissal, balance between work and rest, etc., on a par with Ukrainian law in times of peace.

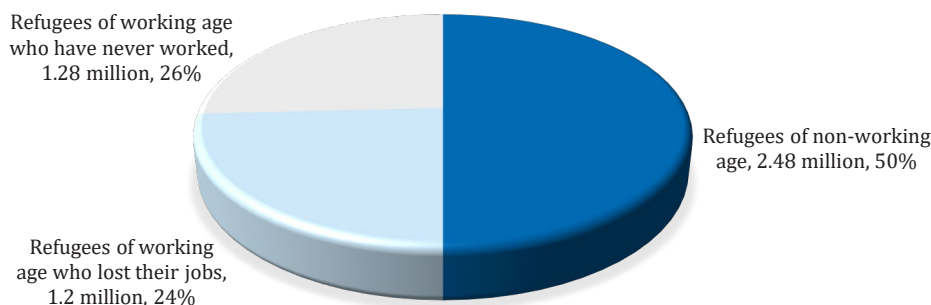


Figure 1. Diagram of employment rates of the able-bodied population who were forced to go abroad

Source: compiled by the author of this study based on data from ILO (2022)

The main problem for the labour sector during martial law is the possible risk of infringement of labour rights, including freedom of work. According to O.O. Konopeltseva (2016), for an employee, freedom of labour means the ability to choose an employer (both individual and legal entity), place of work, workplace, job function, and receive remuneration accordingly. For an employer, freedom of labour means the right to freely select employees, set wages, conduct collective bargaining and conclude collective agreements, adopt local regulations within its competence and establish employers' associations. The principle of freedom of labour, including the right to work, excludes the possibility of forced labour, since in this case there can be no talk of freedom of labour and the right to work, which everyone has can choose or to which they agree without coercion (Bozhko, 2018).

Within the framework of its international commitments, Ukraine has accepted the obligation to refrain from using any form of forced labour. This includes zero tolerance for political pressure or the use of forced labour as a means of punishment, mobilising labour for economic development, maintaining labour discipline, punitive measures for participation in strikes or other forms of protest, and discrimination based on race, social or national origin, or religion against employees¹.

The prohibition of forced labour is also prescribed in Article 43 of the Constitution of Ukraine², however, it

does not apply to military or alternative (non-military) service, and to work or service performed by a person pursuant to a court verdict (decision) or following laws on martial law or a state of emergency. Under martial law, there is a need to distinguish between the interpretation of the terms "forced" and "necessary" labour, which can actually be applied in certain cases.

In its conclusions on Ukraine's compliance with Article 1 of the European Social Charter³, the Council of Europe Committee stressed that any form of forced or compulsory labour should be inadmissible⁴. For the definition of such labour, the Committee refers to the International Labour Organization's Forced Labour Convention⁵ and the judgments of the European Court of Human Rights in "Van der Musselle v. Belgium"⁶ and "Siladin v. France"⁷.

According to Article 4 of the European Convention⁸, states shall be obliged to adopt and enforce laws that punish slavery, servitude, and forced or compulsory labour. It is vital to consider that these obligations should be understood in the context of the Council of Europe Convention on Action against Trafficking in Human Beings. Labour exploitation, which includes forced labour, slavery, and servitude, is one of the forms of exploitation covered by the definition of human trafficking.

The Committee draws on the case law of the European Court of Human Rights and international legal instruments to interpret Article 1§2 of the European

¹ Convention of Forced or Compulsory Labour No. 29. (1956, August). Retrieved from https://zakon.rada.gov.ua/laws/show/993_136#Text.

² Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

³ European Social Charter (Revised). (1996, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_062#Text.

⁴ Conclusions of European Committee of Social Rights No. 2020/def/UKR/1/2/EN. (2021, January). Retrieved from <https://hudoc.esc.coe.int/eng#%7B%22sort%22:%5B%22escpublicationdate%20descending%22%5D,%22escdidentifier%22:%5B%222020/def/UKR/1/2/EN%22%5D%7D>.

⁵ Convention of Forced or Compulsory Labour No. 29. (1956, August). Retrieved from https://zakon.rada.gov.ua/laws/show/993_136#Text.

⁶ Decision of the European Court of Human Rights No. 8919/80 "Van der Musselle v. Belgium". (1983, November). Retrieved from <https://hudoc.echr.coe.int/ukr?i=001-62147>.

⁷ Decision of the European Court of Human Rights No. 73316/01 "Siladin v. France". (2021, April). Retrieved from <https://hudoc.echr.coe.int/ukr?i=001-68376>.

⁸ European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

Social Charter¹, which imposes on States Parties the obligation to effectively protect the rights of workers to earn a living and to live in conditions of free occupation. States Parties to the Charter have positive obligations to introduce legislation to prevent forced labour and other forms of labour exploitation, to protect victims, and to investigate crimes of this kind.

At the same time, Ukraine has a labour duty established at the legislative level. According to the Decree of the Cabinet of Ministers of Ukraine No. 753 of 2011², in areas where martial law has been declared, the military command, jointly with other state bodies or independently, is entitled to impose labour service and mobilise citizens to perform socially useful tasks. The principal purpose of these duties is to carry out tasks related to the defence of the country and emergency response. The duration and remuneration of such tasks are regulated by labour law. Within the framework of these responsibilities, military commanders can use the resources, property, and facilities of various enterprises, organisations, and individuals. Labour service may be imposed on able-bodied persons who are not involved in defence or rescue operations and who do not work at enterprises, institutions, or organisations to perform work related to the country's defence. The above creates the need to establish criteria for distinguishing between the concepts of "forced labour" and "necessary labour".

The conditions of martial law lead to the institutionalisation of forced labour, which includes a system of obligations imposed on citizens during a military conflict. These responsibilities are defined and regulated by the relevant legislation and involve the performance of certain work in extraordinary circumstances, mostly under the influence of regulatory pressure from mandatory norms. In this context, the key point is the observance of the legal grounds for the use of forced labour during martial law. First of all, this concerns the key legal aspect that defines the right to work through the conclusion of an employment contract. As defined in the Forced or Compulsory Labour Convention No. 29³, forced or compulsory labour is an activity that is required of a person under the threat of punishment for refusal to perform it. On the other hand, necessary labour is legitimate and necessary, remaining free from enslavement or coercion.

Notably, the basis of the necessary work is a person's inner conviction and desire to exercise their inalienable natural right to work. At the same time, forced

labour is manifested in interference with a person's will through legal pressure and the threat of punishment for refusing to perform certain work. In wartime situations, voluntary work by volunteers who provide aid on their own initiative and conviction can be considered necessary labour. Therefore, within the meaning of the Law of Ukraine "On the Legal Regime of Martial Law"⁴, the mobilisation of persons to work by imposing labour duty or other restrictions in the field of labour organisation cannot be considered as forced labour. However, it is crucial to strike a balance between the need to protect the state and ensure human rights, including the right to freedom of work. Therefore, any restrictions on this right must be substantiated and follow the principles of proportionality.

The current Labour Code of Ukraine⁵ is somewhat outdated and in some cases unable to resolve disputes between employees and employers not only in wartime but also in peacetime. Therewith, effective regulation of labour relations requires a clear definition of the rights and obligations of the main parties to these relations – the employee and the employer or an authorised body, whose relations are based on the correspondence of the rights and obligations of one entity to the other. The quality of the regulatory framework for labour relations depends on how effectively these actors exercise their rights and fulfil their obligations according to the constitutional right to work.

Certain provisions of the "martial legislation" are quite modern and entitled to be interpreted in the new Labour Code. Thus, the innovation of the aforementioned Law of Ukraine No. 2136-IX⁶ is the expansion of the rights of the parties to labour relations in the context of freedom of contract – the right of the parties to an employment contract to determine its form independently (Part 1 of Article 2), as well as the increase in the possibility of concluding fixed-term employment contracts (Part 2 of Article 2) and the possibility for the employee and employer to terminate the employment contract at their own initiative at any time without giving two weeks or two months' notice somewhat equalises the rights of the parties to the employment contract (Article 4). These provisions should be viewed as adapted to the conditions of martial law. The law also prescribes the possibility of transferring an employee without their consent (Article 3), but this does not limit their right to refuse to follow the employer's order. Refusal may lead to termination of the employment contract without any additional sanctions,

¹ European Social Charter (Revised). (1996, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_062#Text.

² Resolution of the Cabinet of Ministers of Ukraine No. 573 "On Approval of the Procedure for Engaging Able-bodied Persons in Socially Useful Work under Martial Law". (2011, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/753-2011-%D0%BF#Text>.

³ Forced or Compulsory Labor Convention No. 29. (1956, August). Retrieved from https://zakon.rada.gov.ua/laws/show/993_136#Text.

⁴ Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law". (2015, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/389-19#Text>.

⁵ Labour Code of Ukraine. (1971, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

⁶ Law of Ukraine No. 2136-IX "On the Organisation of Labour Relations in Conditions of Martial Law". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2136-20#Text>.

coercion, or pressure. In the case of changes to the essential terms and conditions of an employment contract, the restrictions relate mainly to procedural issues rather than to the substance of the rights to freedom of work, prohibition of forced labour, and guarantees of the right to freely dispose of one's abilities to work and choose one's occupation.

According to the law, if it is not possible to pay salaries due to military operations, such payments may be suspended until the company can resume its core business. Notably, from the standpoint of labour legislation, a work stoppage caused by the lack of organisational or technical capabilities necessary to perform work, force majeure, or other circumstances is considered a period of downtime (according to Article 34 of the Labour Code of Ukraine¹).

This provision poses considerable risks for the country in the context of armed conflict, as it is intricately linked to the right to remuneration for work and is recognised in leading international documents. Specifically, Article 23 of the Universal Declaration of Human Rights² guarantees the right to just and sufficient remuneration to ensure a decent living for the worker and their family. Furthermore, States Parties recognise the right of everyone to just and equitable conditions of work, including adequate remuneration, which shall be ensured as a minimum for all workers. In addition, Article 7 of the International Covenant on Economic, Social, and Cultural Rights³ guarantees the right to just and satisfactory conditions of work, including the right to fair remuneration for work performed. The International Labour Organization Convention No. 100⁴ declares the right to equal pay for equal work without any form of discrimination, while the International Labour Organization Convention No. 131⁵ recognises the right to remuneration for work and other social security as a basic human right. Article 4 of the European Social Charter⁶ also defines the right to fair working conditions, including fair remuneration for work.

According to O.E. Kostyuchenko (2019), by revealing the essence of the terms "fair working conditions" and "fair remuneration", the international community seeks to achieve working conditions that not only

provide employees with conditions for their existence, but also contribute to their comprehensive personal development. This ultimately underlies further socio-economic progress of society as a whole.

The Law's provisions on restrictions on collective bargaining agreements during martial law (Article 11) should also be critically assessed. The partnership between employees and employers is a key component of social management of labour relations, which includes collective responsibility and interaction between both parties to achieve common and mutually beneficial goals and results. The influence of trade unions and social dialogue on the state and on the observance of guarantees is of great significance. They will also influence the struggle for social change (Kyrylov & Cherevko, 2023). Thus, the termination of the collective agreement carries the risk of violating the labour rights of employees, specifically, remuneration, which, under martial law, will lead to a decrease in the level of income of the population and increase the unemployment rate.

A detailed comparative analysis with analogous foreign regulations can help to identify common and different aspects. In the United States of America, for instance, martial law is governed by federal laws such as the War Powers Resolution⁷ and the National Defense Authorization Act⁸. These laws may impose restrictions on the right to work during a military conflict, specifically regarding the preservation of jobs and working conditions. According to C.L. Fisk (2021), martial law can create difficult conditions for employees, including issues of job security, working conditions and wages. In this context, labour legislation can provide not only a model, but also certain tools to protect workers' rights, including mechanisms to stabilise jobs in case of mobilisation, protection against arbitrary detention, and guarantees of safety in the workplace. Furthermore, organisational measures, such as the right to strike or negotiations with employers to protect the rights of employees in wartime, may be important. French legislation, specifically the Labour Code of France⁹ and the Defence Code of France¹⁰, prescribes a special status of employees during wartime, which guarantees them protection of their rights to wages, working conditions,

¹ Labour Code of Ukraine. (1971, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

² Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

³ International Convention on Economic, Social and Cultural Rights. (1973, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_042#Text.

⁴ Convention of the International Labor Organization No. 100 "On Equal Remuneration for Men and Women Workers for Work of Equal Value". (1951, June). Retrieved from https://zakon.rada.gov.ua/laws/show/993_002#Text.

⁵ Convention of the International Labour Organisation No. 131 "On the Fixing of Minimum Wages with Special Reference to Developing Countries". (1970, June). Retrieved from https://vk24.ua/regulations_and_jurisprudence/konvencii/konvenciya-mizhnarodnoi-organizacii-praci-pro-vstanovlennya-minimalnoi-zarobitnoi-plati-z-osoblivim.

⁶ European Social Charter (Revised). (1996, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_062#Text.

⁷ Federal Law of United States of America No. 50 USC 1541-1548 "War Powers Resolution". (1973, November). Retrieved from <https://www.govtrack.us/congress/bills/93/hjres542/text>.

⁸ Public Law of United States of America No. 106-398 "National Defense Authorization Act". (2001, October). <https://www.govinfo.gov/content/pkg/PLAW-106publ398/pdf/PLAW-106publ398.pdf>.

⁹ Labor Code of France. (2024, April). Retrieved from https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072050/.

¹⁰ Defence Code of France. (2024, May). Retrieved from https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071307/.

and job security. In Germany, the right to work under martial law is regulated by the laws “On Working Time”¹ and “On the Participation of Soldiers”², which prescribe compensation and aid to employees who may be affected by the conflict.

Discussion

The observance of the right to work in times of war has been the subject of research by many researchers who have come to analogous conclusions on the need to follow international law in Ukrainian legislation during the war, but each of them has a different emphasis and approach to the problem. T. Rutherford (2024) examines the impact of martial law on labour relations in the United States of America, focusing on federal laws governing this area. The researcher points to the restrictions on the right to work during military conflicts and the need to protect workers’ rights in these circumstances. One of their proposals is to include provisions in federal legislation that guarantee the preservation of jobs and working conditions for employees during wartime. The researcher also recommends developing mechanisms to stabilise jobs in case of mobilisation and to protect workers from arbitrary detention. Furthermore, Rutherford also highlights the significance of organisational measures, such as the right to strike or bargaining with employers, to protect workers’ rights during wartime. This opinion cannot be fully agreed with, as even peaceful gatherings can pose a risk to life in conditions of danger, which is unacceptable to the legislator. It is advisable to establish alternative forms of strike action, such as mediation, the use of IT technologies, and making silent strikes available in the form of work stoppages with proposals to the employer online.

Analogously, J.-P. Le Crom (2019) focused on the dynamics of labour relations in France during the wartime period. The researcher analysed a series of measures aimed at protecting wage rights, working conditions, and job security in this period of uncertainty. J.-P. Le Crom’s (2019) main proposals included amending legislation to provide greater flexibility in regulating labour relations during the war and effective protection of employees’ rights in a changing environment. Furthermore, the researcher recommended developing mechanisms for resolving labour conflicts and ensuring effective monitoring of the observance of workers’ rights during wartime to ensure their adequate implementation and protection. Notably, flexibility in labour relations in times of crisis is key to respecting employees’ rights. To this end, the author recognises that variations in the conclusion and termination of an employment contract, as well as changes to its terms

and conditions, are appropriate, modern, and promising in peacetime.

At the same time, C. Schmidt (2005) studied the impact of martial law on labour relations in Germany. The researcher stressed the need to provide compensation and support to employees affected by the military conflict. One of the key proposals was to include provisions in the legislation aimed at providing compensation and support to these workers. Furthermore, Schmidt recommended developing mechanisms to stabilise jobs in case of mobilisation and ensure safety at the workplace under martial law. The researcher also emphasised the significance of effective control over the observance of workers’ rights during a military conflict and suggested employing the practices of other countries in this area to improve the situation in Germany. It is worth agreeing with the researcher and emphasise the importance of effective monitoring of the observance of workers’ rights during military conflict and suggest using the practices of other countries to improve the situation in the country under study.

Ukrainian scholars, specifically M. Mendzhul & A. Kalko (2022), point to the significance of maintaining flexibility in the regulation of labour relations during a military conflict. They consider changes that restrict workers’ rights, but at the same time believe them necessary for the functioning of the economy and job security. Researchers propose to amend the legislation with a provision on the possibility of cancelling the suspension of an employment contract by an employee. This will provide employees with greater flexibility in restoring their jobs after the end of martial law. They are also developing a specific provision on the cancellation of the suspension of an employment contract, which may improve the situation for employees during the military conflict.

Therewith, it is important to emphasise the significance of respecting the fundamental principles of labour law and calls for any restrictions to be temporary and reasonable during this period. The study focuses on the observance of the leading principles of labour law, such as freedom of work and prohibition of discrimination in the labour sphere, identifies restrictions that may arise in a time of war and calls for the temporary nature of these restrictions to further restore the economy and develop the state. It also points to the need for changes in the legislation on remuneration and control over the observance of workers’ rights during wartime.

Analogous conclusions on the vital aspects of human and civil rights observance in wartime have been made by Y. Matvieieva (2023), who emphasises the significance of effective protection of human and civil rights in the context of military conflict. The researcher

¹ Law of Federal Republic of Germany No. I 1170 “On Working Time”. (1996, May). Retrieved from <https://www.gesetze-im-internet.de/arbztg/BJNR117100994.html>.

² Law of Federal Republic of Germany No. I 2065 “On the Participation of Soldiers”. (2016, August). Retrieved from https://www.gesetze-im-internet.de/sbg_2016/BJNR206510016.html.

stresses that without a proper mechanism for exercising these rights, they become declarative and have no real value for people. Y. Matvieieva (2023) also notes the need to punish those responsible for violating international law and to protect against the aggressor country's encroachment on territorial integrity. At the same time, the present study highlighted the significance of an effective mechanism for monitoring the observance of employees' rights in the context of military conflict and proposed a series of practical measures, such as monitoring and supervision of enterprises, development of mechanisms for resolving labour disputes and use of the practices of other countries in this area.

Conclusions

The study analysed the legal regulation of the right to work during military operations and martial law. The use of specialised scientific methods helped to thoroughly analyse the regulations and international standards, compare approaches to this issue in different countries, and help systematise and summarise existing data, which offered a better insight into the problematic and allowed formulating recommendations for future research and legal solutions. The analysis of the European Court of Human Rights judgments provided an important legal basis for understanding and analysing the problem.

It was found that martial law has a substantial impact on labour relations in Ukraine. On the one hand, temporary measures were introduced to protect workers' rights and stability in the labour market. On the other hand, there are numerous violations of labour rights. The study stated that under martial law, the state

is not entitled to restrict the right to work, but in compliance with the principle of proportionality – any such restrictions must be substantiated, temporary, and proportionate to the purpose they pursue. Thus, the state's defence cannot be built on human rights violations; the right to work must be guaranteed at all times.

The study emphasised the need for constant monitoring and updating of the legislation regulating labour relations in wartime, accommodating changes in the situation and needs of society. Only through continuous improvement and adaptation of the legal framework can the effective protection of employees' rights and stability and order be ensured during a period of military conflict. The proposed recommendations can serve as a basis for improving the labour legislation of Ukraine and ensuring stability in the labour market under martial law. For further research in this area, it is advisable to focus on the analysis of labour rights violations, the development of new control mechanisms, and the study of the impact of martial law on gender equality in the labour market.

In the context of analysing the right to work under martial law in Ukraine, it is important to consider the effectiveness and efficiency of the existing mechanisms for monitoring the observance of these rights to ensure the implementation of the regulations governing labour relations during the period of military conflict.

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None.

Conflict of Interest

None.

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Право на працю в умовах воєнного стану: законодавчий аспект в Україні

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Анотація

Право на працю є одним із фундаментальних прав людини, гарантованих міжнародними документами та конституціями більшості країн, серед яких Україна. Проте умови й обмеження, що стосуються права на працю в умовах воєнного стану, можуть змінюватися. У зв'язку з постійною загрозою незалежності України, а також життю та здоров'ю її громадян, регулювання трудових відносин істотно відрізняється від мирного часу, що потребує наукового обґрунтування. Метою роботи було окреслення основних норм трудового права щодо втілення особою права на працю відповідно до соціально-правового спрямування діяльності держави в умовах правового режиму воєнного стану. У статті засвідчено важливість забезпечення стабільності й безпеки в умовах воєнного стану, однак акцентовано на тимчасовості обмежувальних заходів. Було обґрунтовано вагоме значення збереження балансу між інтересами роботодавців і працівників, а також розвитку трудового законодавства, щоб воно враховувало специфіку ситуації під час воєнного конфлікту. Права людини не можуть бути порушені як у мирний, так і у воєнний час. Навпаки, держава повинна створювати умови для вільного розвитку праці, реалізації потенціалу людини. На основі формально-юридичного аналізу законодавства України воєнного часу, порівняння різних нормативно-правових документів і наукових позицій висвітлено проблемні аспекти дотримання конституційного права на працю. Сформульовано відповідні висновки, які окреслюють юридичні шляхи досягнення балансу інтересів роботодавця та працівника, а також визначено пропозиції з удосконалення законодавства. Запропоновані в статті рекомендації можуть бути використані законодавцем для вдосконалення чинного трудового законодавства України

Ключові слова:

трудові відносини; примус до праці; трудові права; конституційні права; трудовий кодекс

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Legal implications of oral agreements prior to the making of grant deeds

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Abstract

The significance of this study lies in recognizing the crucial role grants play within the social fabric of Indonesian communities. Despite their importance, grants, particularly in the context of land inheritance, often pose challenges, leading to complications such as the potential for withdrawal or annulment. This research aimed to dissect and comprehend the legal ramifications of verbal agreements made prior to the formulation of a grant deed, especially focusing on how such agreements influence the withdrawal of land ownership rights, as illustrated by the decision of the Kupang High Court (Case No. 23/Pdt/2017/PT.KPG). Employing a normative legal research approach, this investigation delves into secondary data and legal literature to interpret the law both as it is written and as it governs societal behavior. A comparative analysis of similar cases provides additional insights, revealing how varying interpretations of verbal agreements can impact the enforceability of grant deeds across different jurisdictions. This study proposed a detailed analysis, asserting the necessity for clearly defining real evidence in the form of authentic deeds. These deeds serve not only as conclusive proof of land ownership but also as a foundational element for any modifications to such ownership, premised on the mutual consent and responsibilities undertaken by both the grantor and grantee during the deed's creation. The grant deed emerges as a pivotal document, ensuring the grantee's rights over the land, predicated on the lawful acts executed by both parties involved in the transaction. By exploring these aspects, the research offers insights into enhancing the legal framework surrounding grants, aiming to mitigate the issues arising from oral agreements in land transactions.

Keywords:

cancellation; land transfer; social community; Kupang High Court; property transactions

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Introduction

The study of land division and property rights is of paramount importance due to the multifaceted roles land plays in economic stability, political power, legal systems, and social structures. In contemporary society, the management of land resources and ownership rights continues to provoke legal and social challenges, making it essential to develop a robust understanding of the mechanisms governing land transactions and rights conveyances. Land, as a finite and valuable resource, serves as a cornerstone for economic development, providing a foundation for agriculture, industry, and urbanization. Moreover, it holds significant political power, influencing territorial boundaries, sovereignty, and resource allocation. Legal systems around the world rely on well-defined property rights to ensure orderly land management, resolve disputes, and uphold justice. However, the complexities surrounding land ownership, inheritance laws, and land use regulations present ongoing challenges. Issues such as land grabbing, unauthorized settlements, and conflicts over resource exploitation highlight the need for effective governance frameworks and equitable distribution mechanisms.

Recent literature in the field has increasingly focused on the complexities of land rights as influenced by oral agreements and the legal consequences of such arrangements. For instance, R. Awaliyah & N. Faizah (2020) examined the non-reciprocal nature of grants, revealing how the absence of counter-obligations in such agreements can complicate legal disputes over property rights. Similarly, A. Sutedi (2019) delved into the protective nature of property rights under formal law, highlighting their resistance to external challenges. On another front, O. Moechtar *et al.* (2020) explored the legislative nuances that govern the reintegration of granted assets, illustrating the depth of legal frameworks required to manage such transitions effectively. Moreover, researchers like A. Kamalia *et al.* (2020) and R. Hidayat *et al.* (2023) have underscored the social functions of grants, emphasizing their role in wealth distribution and the potential societal impacts of their mismanagement. These studies collectively portray a landscape where the theoretical underpinnings of property law are continually being tested by practical challenges.

The primary objective of this research is to dissect and analyze the legal implications of oral agreements made prior to the creation of grant deeds, with a focus on how these agreements affect the withdrawal of land ownership rights. This involves a detailed examination of case law, notably the decision in the Kupang High Court Case No. 23/PDT/2017/PT.KPG¹, to elucidate the conditions under which oral agreements may influence

the enforceability of formal property transactions. The study aims to contribute to the enhancement of legal frameworks surrounding property transactions, particularly in contexts where oral agreements precede formal documentation, to prevent potential disputes and enhance transactional transparency.

In pursuit of this aim, the study set out several objectives: first, to systematically review and synthesize existing legal doctrines as they pertain to oral agreements and property rights; second, to conduct a comparative analysis of relevant case law to identify patterns and divergences in judicial interpretations; and third, to propose amendments or clarifications to existing legal standards to better address the complexities introduced by oral agreements in property transactions. By achieving these objectives, the research seeks to provide a grounded and comprehensive perspective on the interplay between verbal contracts and formal property rights, ultimately contributing to more stable and equitable land governance practices.

Materials and Methods

Normative legal research, often synonymous with doctrinal research, is an indispensable method within legal scholarship that primarily involves the examination of library materials or secondary data to uncover legal rules, principles, and doctrines (Zulfa *et al.*, 2023). Research relies heavily on written laws and regulations referred to as “law in books” and is used to determine norms or rules that dictate appropriate human behavior (Thioris & Dharsana, 2023). Law is often interpreted as it is codified in statutory texts, serving as a benchmark for societal conduct (Wijilestari *et al.*, 2022). Furthermore, defines normative legal research as a systematic process aimed at resolving legal issues by identifying applicable legal standards and doctrinal underpinnings (Thioris & Dharsana, 2023)

This study employs the normative research approach to explore the Legal Implications of Oral Agreements before the Creation of a Grant Deed and to analyze the characteristics of land ownership rights withdrawal by the grantor based on an oral agreement, as evidenced by the Kupang High Court Decision No. 23/PDT/2017/PT.KPG². The methodology integrates several specific legal research methods and case-study approach to achieve a comprehensive understanding of the issues at hand. Central to this study is the analysis of the Kupang High Court case, which provides a real-world application of the theoretical legal principles discussed. This method allows for an in-depth examination of how oral agreements and their subsequent formalization into grant deeds are treated under the current legal framework. This research includes a comparative study of

¹ Decision of the Supreme Court of The Republic of Indonesia No. 23/PDT/2017/PT.KPG . (2017, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

² Ibidem, 2017.

British and Australian legislation. These jurisdictions were chosen due to their significant influence on common law traditions, which underpin many legal systems, including that of the study area. Comparing these systems helps to understand different approaches to land ownership and the enforceability of oral agreements. This involves a systematic breakdown of legal documents and statutes to interpret the letter of the law as it is applied in the case study. It also examines how the statutes are implemented in the courts, providing a formalistic perspective on the legal processes involved.

The inclusion of British and Australian laws serves to shed light on the variance in legal interpretations of oral agreements concerning land ownership. Both countries offer robust frameworks for property rights, which are pivotal in understanding how such agreements are viewed and enforced in different legal contexts. The study of these systems is crucial for proposing changes or enhancements to the local legal framework, especially to address gaps or ambiguities that might exist in the interpretation and enforcement of oral agreements in land transactions.

Through these methodologies, the research aims to create a detailed legal analysis that not only clarifies the legal standing of oral agreements in the context of grant deeds but also proposes potential legislative or doctrinal changes to improve the predictability and fairness of land ownership rights. This holistic approach ensures a thorough understanding of the normative legal implications and aids in crafting more effective and equitable legal policies.

Results and Discussion

Analysis of the legal power of oral agreements prior to the making of grant deed as a basis for withdrawing land ownership rights by the grantor. In this case, property rights are referred to as hereditary rights because basically the position of property rights can be passed down or inherited to the heir or successor. It is said to be the strongest right is because property rights can be easily defended from intervention from outside parties. Full property rights mean that property rights have a range of authority that is a level higher than the various other rights, so that property rights can also be said to be the main rights of all other forms of rights, for example, such as people who have property rights to a vehicle will easily lease it to other parties. The owner's authority is forever or unlimited if there is no interference from other authorities.

One of the efforts to transfer land rights is by way of grant (Awaliyah & Faizah, 2020) Grant is a gift made

by someone to another party, when both are still alive (Afida, 2023)-Within the structure of a grant, the transaction is characterized by the absence of reciprocal exchange; the grantor relinquishes rights to ownership of either partial or full assets to another entity without expecting any form of compensation from the grantee. To address this, lawmakers have instituted regulations mandating that the grantee must account for and reintegrate any received assets back into the estate of the grantor for proper assessment (Moechtar *et al.*, 2020).

Grants in Indonesia have a social function in the life of the community, where something can be given to anyone without discrimination (Kamalia *et al.*, 2020). Therefore, many people see the use of grants as a solution to wealth distribution (Krisnantoro, 2022). However, grants in reality are often not the right solution when it comes to land inheritance, as this can lead to new problems, such as repossession or annulment (Hidayat *et al.*, 2023). In relation to the annulment of a grant as occurred in the Kupang High Court Decision No. 23/PDT/2017/PT.KPG¹ it started on September 15, 1993, Mr. J.F. (Defendant) married Ms. J.M. (Plaintiff's sister), because they did not have a house to live in, in 1997 Plaintiff allowed Defendant and his wife to occupy a house owned by the Plaintiff. Then, the Defendant requested that the land and house occupied by both of them be given to both of them, with a verbal agreement made by the Defendant and Plaintiff that the Defendant would not leave the Plaintiff's sister.

However, on January 22, 2016 the Defendant sued his wife J.M. (the Plaintiff's sister) for divorce which was registered at the Kupang District Court No. 17/PDT.G/2016/PN.KPG² and was decided on April 18, 2016 granting the Defendant's request for divorce. Because of this, the Plaintiff considered that the Defendant had violated the oral agreement that they had made previously, so the Plaintiff felt that the Defendant had violated the terms of the grant and based on that the Plaintiff filed a lawsuit which basically requested a decision to withdraw the grant that had been given. This is not in accordance with the reason why a grant can be revoked, because according to the definition contained in the Big Indonesian Dictionary, a grant is actually a voluntary gift that includes the transfer of rights to something to another individual. In addition, the revocation did not meet the requirements to declare the grant "void" as stipulated in the civil code. Article 1666 of the Civil Code of Indonesia³ defines a grant as a contract wherein the grantor voluntarily and permanently relinquishes an item for the grantee's benefit, who then accepts this contribution.

¹ Decision of the Supreme Court of The Republic of Indonesia No. 23/PDT/2017/PT.KPG . (2017, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

² Decision of the Supreme Court of The Republic of Indonesia No. 17/PDT.G/2016/PN.KPG. (2016, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

³ Civil Code of the Republic of Indonesia. (1945, August). Retrieved from https://perpustakaan.bldk.mahkamahagung.go.id/index.php?p=show_detail&id=794&keywords=.

Article 1667 of the Civil Code of Indonesia¹ articulates that grants are irrevocable except under certain conditions. Specifically, it mandates that grants must pertain to existing assets. Grants concerning assets to be acquired or created in the future are considered invalid. Then, Article 1668 of the Civil² Code, states It's stipulated that the grantor is prohibited from asserting the right to sell or donate the granted item to someone else, rendering the grant null regarding that specific item. According to Article 1670 in the Civil Code³, a grant becomes invalid if it requires the grantee to settle debts or obligations, except for those explicitly mentioned in the grant deed or an annexed document (Alvian & Mujiburohman, 2022).

Basically, grants are not part of inheritance law but part of the law of engagement which has been regulated in book III (three) chapter X (tenth) of the Civil Code⁴. In addition, in the inheritance process there is one condition that must be met according to inheritance law, namely the heir/deceased person where he leaves some form of wealth. In contrast to grants, the conditions for granting grants are that the grantee must be conscious and at the time still alive during the process of implementing the grant (Yoka, 2021).

Granting is done by making a grant deed before an authorized official. For movable goods, it is usually done before a Notary, while for immovable goods it is usually done before a Land Deed Official (PPAT) (Mandasari, 2018). PPAT is in charge of carrying out some land registration activities by making deeds as evidence of certain legal actions regarding land rights. The position of PPAT is desired in law which has the aim of assisting and serving people who need authentic written evidence related to land regarding circumstances, events or legal actions (Adjie, 2014).

Article 1688 of the Civil Code⁵ clarifies that grants are generally irrevocable but lists exceptions where a grant can be canceled: if the agreed conditions are unmet, if the grantee commits a crime against the grantor, or if the grantee fails to provide financial support to the grantor, resulting in the grantor's poverty. Under the stipulations of the cited article, a grant may be rescinded upon fulfilling specific criteria for its termination. This process involves the grantor issuing a formal declaration to the grantee, asserting a claim over the previously granted assets. During this procedure, it's

imperative for both parties to duly consider their respective rights and responsibilities (Mandasari, 2018). In specific legal contexts, there may be instances where a party fails to meet its duties to the other. Under these conditions, the affected party is entitled to assert their rights and adhere to legal procedures outlined for such situations (Zia et al., 2020).

Agreements preceding a grant must be explicitly detailed by all parties to ensure clarity and safeguard their interests, preventing potential future conflicts. The case from the Kupang High Court illustrates the complications that can arise from unclear agreements. Per Article 1666 of the Civil Code⁶, a grant's revocation is strictly limited to certain conditions. In Kupang High Court's⁷ ruling the judge determined an oral agreement as a grant condition, leading to the deed's cancellation. Despite Article 1688 of the Civil Code⁸ stating grants are irrevocable barring specific criteria, this case prompts further investigation into how oral agreements influence grant cancellation decisions within the stipulated legal framework.

The PPAT Deed plays a crucial role in legal transactions, impacting both private and public law sectors. It serves as a foundation for the National Land Agency, specifically at the Regency/City Land Agency Office level, to manage the transfer and encumbrance of land rights. For the legal transfer of land rights via grants to be recognized, documentation by a PPAT, an authorized official, is required. This process ensures legal certainty for all parties involved in a grant, establishing clear rights and responsibilities (Olanda & Nurdin, 2022). However, the Civil Code provides provisions for it, so that grantors and grantees are also subject to rights and obligations in the grants they make (Table 1).

Furthermore, a grant is a form of gift from one person to another voluntarily. In civil law, grant or "schenking" is defined as an agreement made by a grantor during his lifetime with and irrevocably, to hand over an object for the needs of the grantee to be used as personal property (Syuhada, 2019). A grant is a binding and irrevocable legal act according to the will of one of the parties. However, in the event of certain reasons a grant can be withdrawn.

Article 1688 of the Civil Code⁹ specifies that a grant can be canceled if the original terms are not met, the grantee commits a crime against the grantor, or fails to

¹ Civil Code of the Republic of Indonesia. (1945, August). Retrieved from https://perpustakaan.bldk.mahkamahagung.go.id/index.php?p=show_detail&id=794&keywords=.

² Ibidem, 1945.

³ Ibidem, 1945.

⁴ Ibidem, 1945.

⁵ Ibidem, 1945.

⁶ Ibidem, 1945.

⁷ Decision of the Supreme Court of The Republic of Indonesia No. 17/PDT.G/2016/PN.KPG. (2016, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

⁸ Civil Code of the Republic of Indonesia. (1945, August). Retrieved from https://perpustakaan.bldk.mahkamahagung.go.id/index.php?p=show_detail&id=794&keywords=.

⁹ Ibidem, 1945.

support the grantor financially if they become impoverished. Article 1667 of the Civil Code dictates that grants are valid only for existing goods at the grant's issuance. It clarifies that a grant involves: a unilateral agreement without expectation of return; its irrevocable nature; the grantor's positive intention towards the grantee;

necessity for the grantor to be alive at the grant's creation, though fulfillment may occur posthumously; and applicability to the grantor's existing tangible or intangible, movable or immovable assets. There are conditions that must be performed on the grant so that the grant agreement is valid and enforceable (Table 2).

Table 1. Obligations of grantor and grantees and rights of the grantors

Obligations	The obligation of the grantor.	After the grantor hands over the property or object that is granted to the grantee, then since then there are no more obligations that bind the grantor.
	Obligations of grantees.	1. Pay off any debts of the grantor or other objects, provided that the debts and expenses to be paid have been expressly stated in the Grant Deed.
		2. Providing maintenance to the grantor if the grantor falls into poverty.
3. Returning objects that have been granted based on the rules set forth in the Civil Code.		
Rights	Grantors also have rights related to their grants.	1. The grantor is entitled to use a certain amount of money from the property or object he grants, provided that this right has been agreed upon in the grant.
		2. The grantor has the right to take the object he has given if the grantee dies before the grantor, provided that this applies if it has been agreed beforehand.
		3. The grantor may revoke the grant, if the grantee does not fulfill the obligations specified in the grant deed or other matters stated in the Civil Code.

Source: developed by the authors

Table 2. Conditions that must be performed on the grant

Conditions for grantor	a. The item granted is the property of the grantor (it is not valid to give away someone else's property).
	b. The grantor is not a person whose rights are restricted for some reason.
	c. The grantor is a person who is capable of acting according to the law.
	d. There is no coercion received by the grantor in making the grant.
Conditions for grantees	A grantee must be a person who actually exists at the time the grant is made. What is meant by actually existing is that the person (grantee) has been born, and it is not disputed whether he is an adult, child or lack of intelligence. So that granting grants to babies who are still in the womb is invalid.
Conditions for goods that can be donated	a. The goods are already there;
	b. The item has a value;
	c. The goods can be possessed of their substance, accepted for circulation and their ownership can be transferred;
	d. The donated goods can be separated and handed over to the grantee.

Source: Structured by the authors on the basis of S. Lingga Saputra (2019)

The existence of these conditions in granting grants, giving rise to rights and obligations regarding the grants given. The emergence of rights such as in the event that the grantor is entitled to use a certain amount of money from the property or object he grants provided, that this has been promised beforehand when the grant occurs. In addition, the grantor can also take back the goods he gave if the grantee dies before the grantor. This must also be stated or agreed in advance at the time of granting. Although actually grants cannot be withdrawn except for grants given by parents to their children, there are exceptions that can be made by the grantor so that the grantor can withdraw his gift. As this has been included in the grant deed or is contained in Article 720 the Compilation of Sharia Economic Law Regulation¹ which states that there are other things in the event that the grantee does not fulfill its obligations.

After the granting of his property to the grantee, then immediately at that time the grantor has no

binding obligations on him. Due to the concept of granting grants that are made freely and irrevocably. So, in the case of canceling a grant legal action must go through the correct procedure so that the ownership status of land rights can be clearly known (Enty *et al.*, 2019). Therefore, grants of land and buildings must be made in the form of an authentic deed before a Land Deed Official (PPAT). In Article 1 paragraph 4 of Government Regulation of the Republic of Indonesia No. 24 of 2016 concerning Amendments to Government Regulation No. 37 of 1998 concerning Regulations on the Position of Land Deed Officials, explains the definition of a Land Deed Official (PPAT)² deed: "A PPAT (Land Deed Official) deed serves as proof of completed legal transactions regarding land or property rights. The deed's effectiveness is negated if the legal action it represents is annulled. There are two key scenarios for deed cancellation: 1) the deed loses its evidentiary value if the legal action it records is revoked, and 2) if a transaction

¹ The Compilation of Sharia Economic Law Regulation. (2011, August). Retrieved from <https://perpustakaan.mahkamahagung.go.id/assets/resource/ebook/02.pdf>.

² Government Regulation of the Republic of Indonesia No. 24 "On Amendments to Government Regulation Number 37 of 1998 Concerning Regulations on the Position of Land Deed Officials". (1998, November). Retrieved from <https://bphn.go.id/data/documents/98pp037.pdf>.

is annulled after being recorded at the land office, the official registration remains unchanged” (Adjie, 2014).

Canceling a deed before its registration at the land office can be executed with a notarial deed, reflecting the civil nature of the agreement documented in the PPAT deed. However, if the deed’s cancellation occurs post-registration, Article 45 of Government Regulation No. 24/1997¹ mandates that it must be executed via a court decision (Adjie, 2014). Following civil law principles, upon deed cancellation, conditions should revert to their state before the legal action documented in the deed occurred.

Article 45 of Government Regulation No. 24/1997 stipulates that cancelling a PPAT² deed during its registration at the land office requires a court decision due to the need for detailed examination. If parties mutually agree to cancel without disputes, they can approach a notary to draft an annulment deed. Disagreements necessitate seeking cancellation through the general or district court. Regardless of registration status at the land office, parties can opt for cancellation via a notarial deed if there’s no contention, subsequently requesting cancellation at the land office, which then only acts to cancel the deed’s registration without delving into the civil dispute. A grant becomes effective once issued, requiring familiarity between the grantor and grantee, and must be formalized through a grant deed by an authorized official, as mandated by Article 1682 of the Civil Code³. An authentic deed, as defined in the Civil Code, is a document created legally by an authorized official, serving as conclusive evidence for those involved. However, in the context of national land law, a PPAT’s deed, according to Government Regulation No. 24 of 1997⁴, is considered strong evidence, distinguishing its legal standing from the perfect evidence outlined in the Civil Code.

Analysis of Kupang High Court decision. Legal certainty is a fundamental principle in law that aims to provide predictability, stability, and security within legal systems. It ensures that individuals can understand their rights and obligations under the law, thereby fostering trust in the legal system (Alexy, 2015). One of the

objects that are often donated is land and house building objects. In Indonesia grants in the form of land are included in the legal act of transferring ownership of land as a fixed object or immovable object from the previous owner to the grantee later. Ownership and transfer of disputed land occurred between Mr. S.M. (Plaintiff) as the sibling of Ms. Y.M. and Mr. J.F. (Defendant) as the husband of Ms. Y.M. with the sitting of the case. On September 15, 1993 Defendant married the sister of Plaintiff on September 15, 1993 during the marriage they did not have children based on the case as stated in the Decision of the Kupang District Court No. 144/Pdt.G/ 2016/PN.Kpg⁵. After marriage they did not have a house so in 1997 Plaintiff allowed Defendant and his wife to occupy a house belonging to the Plaintiff on land belonging to the Plaintiff.

After occupying the house and land, Defendant verbally agreed with Plaintiff that Defendant would not leave the sister of Plaintiff “until death do them part”. On May 13, 2005 Plaintiff granted the aforementioned land to Defendant based on grant deed No. 23/V/KOB/2005⁶ made before Notary Public Planner, to be subsequently transferred into the name of Defendant. However, on January 22, 2016 Defendant sued his wife for divorce which was registered at the Kupang District Court No. 17/PDT.G/2016/PN.KPG⁷ and was decided on April 18, 2016 where the verdict granted the request for divorce from Defendant. Plaintiff did not accept the divorce and considered that Plaintiff had violated the oral agreement prior to the making of the grant deed before the PPAT which was considered one of the conditions of the grant.

In this case, the oral agreement in the grant before the deed was made was considered a condition of the grant, so that by suing for divorce the sister of Plaintiff, the goods that had been granted could be withdrawn. In the Kupang District Court Decision No. 144/Pdt.G/2016/ PN.Kpg⁸. rejected the claim of Plaintiff, which then Plaintiff filed an appeal where the verdict of the Kupang High Court Decision No. 23/PDT/2017/PT.KPG⁹. The decision of the Kupang High Court is self-ruling which basically grants the appeal from Plaintiff and

¹ Government Regulation of the Republic of Indonesia No. 24 “On Amendments to Government Regulation Number 37 of 1998 concerning Regulations on the Position of Land Deed Officials”. (1998, November). Retrieved from <https://bphn.go.id/data/documents/98pp037.pdf>.

² Ibidem, 1998.

³ Civil Code of the Republic of Indonesia. (1945, August). Retrieved from https://perpustakaan.bldk.mahkamahagung.go.id/index.php?p=show_detail&id=794&keywords=.

⁴ Government Regulation of the Republic of Indonesia No. 24 “On Amendments to Government Regulation Number 37 of 1998 concerning Regulations on the Position of Land Deed Officials”. (1998, November). Retrieved from <https://bphn.go.id/data/documents/98pp037.pdf>.

⁵ Decision of the Supreme Court of The Republic of Indonesia No. 17/PDT.G/2016/PN.KPG. (2016, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

⁶ Decision of the Supreme Court of The Republic of Indonesia No. 23/PDT/2017/PT.KPG. (2017, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

⁷ Decision of the Supreme Court of The Republic of Indonesia No. 17/PDT.G/2016/PN.KPG. (2016, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

⁸ Decision of the Supreme Court of The Republic of Indonesia No. 144/PDT.G/ 2016/PN.Kpg. (2016, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

⁹ Decision of the Supreme Court of The Republic of Indonesia No. 23/PDT/2017/PT.KPG. (2017, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

withdraws the object of the grant because the oral statement before making the deed is considered as one of the conditions of the grant so that by not fulfilling the conditions of the grant, in accordance with Article 1688 of the Civil Code¹, the grant can be withdrawn.

Generally, a grant once made cannot be retracted or annulled. However, as specified in Article 1688 of the Civil Code², exceptions allow for a grant's cancellation under circumstances such as unmet conditions, criminal actions by the grantee against the grantor, or the grantee's failure to provide financial support to an impoverished grantor. For an agreement to be deemed valid and enforceable, it must satisfy four criteria outlined in Article 1320 of the Civil Code³: mutual consent between parties, legal capacity to make an agreement, a specific subject matter, and a legitimate reason for the agreement.

Agreement terms are categorized into subjective and objective types. The parties' mutual consent and legal capacity to contract are subjective terms, focusing on the individuals involved. The existence of a specific item and a legitimate reason for the agreement represent the objective conditions. Adhering to the legal criteria for agreements is essential in grant implementations. Violations of these criteria can lead to legal repercussions: non-fulfillment of subjective conditions allows for cancellation by the parties concerned, whereas breaching objective conditions renders the agreement invalid. In the case at hand, Plaintiff met the agreement's legal requirements, fulfilling the grant terms per Article 1666 of the Civil Code⁴. This is supported by evidence and witness testimony confirming that the Grant Deed No. 23/V/KOB/2005⁵ was duly executed by both Plaintiff and Defendant before a Notary, indicating mutual agreement and complete documentation.

Grant is a legal act involving several parties which in practice must be able to create legal certainty regarding the rights and obligations of the parties concerned. In this case, an agreement is needed. Based on Exhibit P. 2, corresponding to Exhibit T.2, and witness testimony, it was confirmed that Grant Deed No. 23/V/KOB/2005⁶ was prepared by Notary. The witness testified that there were no stipulations in the deed indicating the grant's revocation upon divorce. Additionally, both parties personally appeared before the Notary, where the

deed was read and agreed upon without representation (Dewantara *et al.*, 2019).

The Grant Deed made before PPAT as in the decision has perfect evidentiary power, so it does not need to be made or added with other evidence (Sumangkut & Anand, 2018). If there is a party that denies it, then that party must prove their statement in accordance with applicable legal rules. In the decision, it is known that Plaintiff verbally agreed that Defendant would not leave plaintiff sister "until death do them part". However, the fact that Defendant and Ms.Y.M. had divorced based on a court decision on April 18, 2016, and because of the divorce, Plaintiff wanted to cancel the grant on the grounds that they had reneged on the oral agreement before making the grant deed before the PPAT.

Agreements that have been determined by law must be applied properly, because if they are not applied, the legal consequences are that the agreements made are invalid, so they are null and void, and do not give rise to an agreement (the agreement is considered to have never existed). Oral agreements cannot be applied in agreements that have been stipulated by the law, in other words, as long as there is no law that regulates an agreement must be in writing, then an oral agreement is still valid as an agreement that binds the parties who make it (Rumagit & Idham, 2021).

Based on this description based on Article 37 Paragraph (1) of Law No. 24 of 1997 concerning Land Registration⁷, a grant deed must be in writing and made by a PPAT authorized to do so that the grant deed has perfect evidentiary power as explained in Article 1870 of the Civil Code that for interested parties including their heirs and those who get rights from them, an authentic deed is perfect evidence according to the substance (which is contained in the authentic deed).

Attributed to the cancellation of the grant deed in the Kupang High Court Decision No. 23/PDT/2017/PT.KPG⁸. because the oral agreement before the making of the grant deed before the PPAT as the grant deed No. 23/V/KOB/2005⁹ made by Notary, is not in accordance with the provisions of evidence and based on the facts in the trial in the Decision which is reinforced by witness testimony where in the Grant Deed there are no words or information stating that the condition of the grant is that if the divorce then the grant will be

¹ Civil Code of the Republic of Indonesia. (1945, August). Retrieved from https://perpustakaan.bldk.mahkamahagung.go.id/index.php?p=show_detail&id=794&keywords=.

² Ibidem, 1945.

³ Ibidem, 1945.

⁴ Ibidem, 1945.

⁵ Decision of the Supreme Court of The Republic of Indonesia No. 17/PDT.G/2016/PN.KPG. (2016, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

⁶ Ibidem, 2016.

⁷ Government Regulation of the Republic of Indonesia No. 24 "On Amendments to Government Regulation Number 37 of 1998 Concerning Regulations on the Position of Land Deed Officials". (1998, November). Retrieved from <https://bphn.go.id/data/documents/98pp037.pdf>.

⁸ Decision of the Supreme Court of The Republic of Indonesia No. 17/PDT.G/2016/PN.KPG. (2016, November). Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>.

⁹ Ibidem, 2016.

withdrawn or canceled. So that the end of marriage due to divorce is not one of the conditions for the Grant of Plaintiff to withdraw the grant that he has given to Defendant and his wife Ms. Y.M. and request that the Grant as stated in the Grant Deed No. 223/PDT/2017/PT.KPG¹ made by Notary.

UK and Australia's legal stance on oral agreement. In the UK, the legal framework concerning oral agreements, particularly in the context of property transactions including the making of grant deeds, is primarily governed by common law principles and statutory provisions. The legal implications of oral agreements prior to the making of grant deeds are significantly influenced by the Law of Property (Miscellaneous Provisions) Act 1989,² which stipulates requirements for contracts involving the sale of land or real estate (MacKenzie & Nair, 2020).

Under the Law of Property (Miscellaneous Provisions) Act 1989, Section 2(1)³, contracts for the sale or other disposition of an interest in land must be in writing and signed by or on behalf of each party. This requirement underscores the necessity for formal documentation in property transactions and inherently limits the legal recognition of purely oral agreements concerning (MacKenzie & Nair, 2020). The sale of land or the transfer of interest in land, including the creation of grant deeds. Exceptions and Considerations

While the statutory requirement emphasizes written contracts, English law does recognize the significance of oral agreements in certain contexts, albeit with considerable limitations. In exceptional circumstances, courts may enforce oral agreements related to property under the doctrine of proprietary estoppel. This principle applies when one party has relied on a promise to their detriment, and the promisor is estopped (prevented) from reneging on that promise. However, successfully invoking estoppel requires clear evidence of reliance and detriment, making it a challenging path to enforce oral agreements. The second limitations – contract formation. Oral agreements may still play a role in the formation stage of a contract for the disposition of an interest in land, acting as a precursor to the written agreement. However, the legal enforceability of any claim based on the oral agreement would necessitate transitioning to a formal written contract compliant with the Law of Property (Miscellaneous Provisions) Act 1989⁴.

The legal framework in the UK, therefore, presents a clear preference for written documentation in property transactions, reflecting the principle that formalizing agreements in writing provides clarity, reduces

disputes, and ensures a reliable record of the transaction terms. For individuals engaging in transactions involving the disposition of land or the creation of grant deeds, the practical implication is the necessity of formalizing agreements in writing to ensure they are legally enforceable.

In Australia, the legal framework concerning property transactions, including the creation of grant deeds, significantly relies on the principles outlined in the common law, as well as specific statutory requirements. These laws collectively shape the legal implications of oral agreements made prior to the formalization of grant deeds. A pivotal piece of legislation in this context is the Property Law Act, which exists in various forms across Australian states and territories, reflecting the decentralized nature of Australia's legal system.

In Australia, the legal implications of oral agreements prior to the making of grant deeds are significant and can have far-reaching consequences. While grant deeds are typically formalized through notarial deeds to ensure legal certainty and compliance with regulations, the validity of oral agreements in land transactions is also recognized under certain conditions. Oral agreements can be legally binding as long as there is no specific requirement for the agreement to be in writing, providing a level of legal certainty for the involved parties. However, the preference for formalized notarial deeds is evident in the legal system to minimize disputes and ensure clear property rights.

A fundamental principle underpinning property transactions in Australia is the requirement for written contracts, as dictated by the Property Law Act in various states. For instance, the Property Law Act 1974 (Qld) Section 59⁵ requires that contracts for the sale of land or interest in land must be in writing to be enforceable. Similar provisions exist in other jurisdictions within Australia, such as the Conveyancing Act 1919 (NSW) Section 54A⁶. These requirements underscore the importance of formalizing property transactions through written documentation, effectively limiting the legal recognition and enforceability of purely oral agreements concerning the sale of land or the creation of grant deeds.

Exceptions and Equity Considerations Despite the general requirement for written contracts, Australian law does provide for exceptions where oral agreements related to property may have legal implications:

■ **Estoppel:** Similar to the UK, Australian courts may enforce oral agreements under the doctrine of estoppel, particularly proprietary estoppel. This legal principle

¹ Decision of the Supreme Court of The Republic of Indonesia No. 17/PDT.G/2016/PN.KPG. (2017, November) Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pn-kupang/kategori/perdata-1/page/86.html>

² Law Property. (1989, March). Retrieved from <https://www.legislation.gov.uk/ukpga/1989/34/contents>.

³ Ibidem, 1989.

⁴ Ibidem, 1989.

⁵ Property Law Act of the United Kingdom. (1974, March). Retrieved from https://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/qld/consol_act/pla1974179/s59.html.

⁶ Conveyancing Act. (1919, June). Retrieved from <https://legislation.nsw.gov.au/view/html/inforce/current/act-1919-006>.

comes into play when one party has acted to their detriment, relying on a promise or representation made by another party regarding property rights. If it would be unconscionable for the promisor to go back on their word, the court may enforce the oral agreement to prevent injustice.

■ **Part Performance:** The doctrine of part performance may allow for the enforcement of oral agreements related to land transactions in certain circumstances. If one party has taken significant steps in reliance on an oral agreement (e.g., making improvements to the property), Australian courts may recognize the agreement as binding, even in the absence of written documentation, to prevent unjust enrichment.

The legal landscape in Australia places significant emphasis on the necessity of written agreements for property transactions, aligning with principles of clarity, reliability, and dispute avoidance. However, the legal doctrines of estoppel and part performance provide avenues through which oral agreements may be recognized under specific circumstances, highlighting the courts' willingness to mitigate potential injustices arising from strict adherence to formality requirements.

In rare cases, if an oral agreement regarding land has been partly performed, courts might consider specific performance as a remedy. This would typically involve unique or exceptional circumstances where not enforcing the agreement would result in significant injustice.

Discussion

The comparative analysis conducted between the results of this research and the findings of other scholars highlights the critical role of formal grant deeds in protecting property rights, as well as the complexities introduced by prior oral agreements. A. Sutedi (2019) emphasizes the definitive and robust nature of property rights, suggesting that such rights can effectively shield against external interferences. This aligns with the current research, which also underscores the protective capabilities of formal grant deeds. However, this research extends beyond A. Sutedi's analysis by addressing the vulnerabilities introduced by verbal agreements made before the formalization of these deeds, pointing out potential legal challenges that could arise when these preliminary verbal agreements are contested.

R. Awaliyah & N. Faizah (2020) examine the nature of grant transactions, highlighting the absence of reciprocal obligations within them. Their observations correlate with this research's findings, particularly in illustrating the complexities that arise when such non-reciprocal agreements are legally challenged. This study elaborates on their findings by exploring how these non-reciprocal agreements, when contested, complicate the legal landscape, as seen in the Kupang High Court case. O. Moehtar *et al.* (2020) discusses the legislative requirements for grantees to reintegrate granted assets back into the grantor's estate, which

resonates with the need for clear documentation to cement the terms of a grant discussed in this research. However, unlike Amanat's focus, this study dives deeper into the implications of oral agreements preceding such formal documentation, potentially leading to legal disputes that challenge the initial intentions outlined in grant agreements.

The review of legal frameworks in the UK and Australia further enriches this comparative analysis. In the UK, as noted by J.A. MacKenzie & A. Nair (2020), the necessity for contracts involving land to be in writing reinforces this research's emphasis on the importance of formal documentation in property transactions. This parallel underscores the common legal requirement across jurisdictions to prevent disputes and enhance clarity in property dealings. Similarly, in Australia, while oral agreements can be legally binding under specific conditions, the overarching preference for formalized deeds mirrors the conclusions drawn in this research regarding the Indonesian legal context. The necessity for written contracts, as dictated by the Property Law Act in various Australian states, supports this study's recommendations for enhancing legal certainty through authentic deeds, aligning with international standards to minimize disputes and ensure clear property rights.

These findings suggest a global convergence on the importance of formal documentation in land transactions, aligning doctrinal insights with practical legal requirements to mitigate conflicts arising from oral agreements. The integration of international legal standards into national practices, as suggested by the comparative study, could serve as a valuable blueprint for Indonesia. This approach would not only enhance legal certainty but also reduce the potential for disputes, fostering a more comprehensive and conflict-minimizing legal framework for property transactions. This synthesis not only supports the need for robust legal frameworks, as discussed, but also sets a foundation for further research into the harmonization of legal practices across jurisdictions to ensure a more effective handling of property rights and transactions.

Conclusions

The analysis of the decision from the Kupang District High Court serves as a critical case study demonstrating the substantial evidentiary power of authentic deeds in the context of grant deeds. This case underpins the broader theoretical implications regarding the role of oral agreements and formal documentation in the legal framework governing land ownership and transfers. In essence, the case illustrates how an authentic deed, established through the formal legal processes and acknowledged by a qualified official such as a PPAT, can serve as irrefutable proof of ownership and a solid foundation for any subsequent alterations to property rights.

From a theoretical standpoint, the findings from this case emphasize the necessity of formal documentation in substantiating the rights conveyed through grants, particularly when oral agreements are involved. The inherent risks associated with relying solely on oral agreements in property transactions are manifestly evident; such agreements are susceptible to disputes due to their inherently unverifiable nature and the potential for misinterpretation. Consequently, this underscores the importance of converting any preliminary oral agreements into formally documented deeds to ensure clarity, enforceability, and legal standing in property transactions.

Further analysis legislation of the UK and Australia, reinforces these conclusions. Both jurisdictions exhibit a strong preference for written documentation in property transactions, as demonstrated by statutory requirements such as the Law of Property (Miscellaneous Provisions) Act 1989 in the UK and similar provisions under the Property Law Act in various Australian states. These laws mandate that substantial property transactions be formalized through written contracts, thereby limiting the legal recognition and enforceability of purely oral agreements.

Such requirements align with the theoretical perspectives suggested by the Kupang case, emphasizing the universal legal principle that formal documentation provides not only legal certainty but also reduces the likelihood of disputes.

In conclusion, the general theoretical implications derived from this analysis advocate for the stringent application of formal documentation in property transactions. This approach is essential to solidify the legal standing of grant deeds and safeguard the rights of all parties involved. Adhering to this principle can help mitigate the legal complexities and challenges that typically arise from oral agreements in the context of land ownership and transfers, promoting a more stable and predictable legal environment for property dealings. A promising area for further research could be the study of the problems caused by the practice of oral agreements in other regions.

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None.

Conflict of Interest

None.

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Правові наслідки усних домовленостей, що передують укладанню грантових договорів

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Анотація

Актуальність цього дослідження полягає у визнанні вирішальної ролі, яку гранти відіграють у соціальній структурі громад Індонезії. Попри їхню важливість, гранти, особливо в контексті успадкування землі, часто створюють проблеми, що призводять до ускладнень, таких як можливість відкликання або анулювання. Це дослідження мало на меті проаналізувати й осмислити правові наслідки усних домовленостей, укладених до складання акта про надання гранту, зосередившись на тому, як такі домовленості впливають на позбавлення права власності на землю, як це проілюстровано в рішенні Високого суду Купанга (справа № 23/Pdt/2017/PT.KPG). Завдяки використанню нормативно-правового підходу було ґрунтовно розглянуто вторинні джерела та юридичну літературу, щоб інтерпретувати закон так, як він написаний, і так, як він регулює поведінку суспільства. Порівняльний аналіз таких справ дав додаткову інформацію, показуючи, як різне тлумачення усних домовленостей може впливати на можливість виконання грантових договорів у різних юрисдикціях. Доведено необхідність чіткого визначення реальних доказів у вигляді автентичних актів. Ці акти слугують не лише беззаперечним доказом права власності на землю, а й основоположним елементом для будь-яких змін у цьому праві, що ґрунтується на взаємній згоді та обов'язках, взятих на себе як надавачем, так і отримувачем під час укладання акта. Договір про надання права на землю є ключовим документом, що забезпечує права отримувача на землю, які ґрунтуються на законних діях обох сторін, що беруть участь у транзакції. На підставі вивчення цих аспектів дослідження запропоновано ідеї щодо вдосконалення нормативно-правової бази, яка регулює надання земельних ділянок, з метою розв'язання проблем, що виникають у зв'язку з усними домовленостями в земельних транзакціях.

Ключові слова:

анулювання; передача землі; соціальна громада; Високий суд Купанга; майнові операції

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Genesis, current status and prospects for the development of the institution of negotiation in Ukraine

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Abstract

As of 2024, the use of alternative dispute resolution is becoming increasingly relevant caused by the complicated access to justice due to martial law. The purpose of this study was to analyse the historical experience of using negotiations in Ukraine from the Middle Ages to the present day and to identify the vectors for further development of this institution. Both general scientific and special scientific methods were employed: formal legal and comparative legal methods. It was found that the term “negotiation” can be used in several meanings: 1) the process of reaching an agreement; 2) the stage of court proceedings; 3) the stage of mediation, conciliation, or other methods of alternative dispute resolution; 4) a separate method of alternative dispute resolution. As the times of Kyivan Rus, the Ruska Pravda prescribed an analogue of negotiations – the replacement of blood revenge with a payoff; in the 16th-century Lithuanian statutes, the negotiation process was called “unity”. The “Rights by which the Little Russian people are judged” of the mid-18th century defined two forms of documents drafted as a result of negotiations: a conciliation agreement (without the participation of mediators) and a conciliation verdict (with the participation of mediators). During the Soviet era, legislation tended to establish the right to judicial protection depending on the previous use of alternative dispute resolution. However, since Ukraine’s independence, this trend has changed, and the law now prescribes the right of everyone to choose how to protect their rights. Further vectors for the development of the institution of negotiations in Ukraine may include the introduction of various types of platforms for remote participation in the negotiation process, as well as the development of the legal framework towards detailing negotiation procedures. The findings of this study can be used in teaching disciplines of the historical and legal cycle in higher education institutions of Ukraine, as well as for further forecasting the development of this institution and its improvement

Keywords:

alternative dispute resolution; conciliation; judicial process; private law relations; state-building

Introduction

Under martial law in Ukraine, citizens’ access to justice has become substantially more difficult. An increasing number of citizens are outside Ukraine due to the hostilities and forced displacement. Lengthy court

proceedings and difficulties in using electronic access to justice contribute to the fact that disputes stay unresolved. Therefore, it is important to reform the methods of alternative dispute resolution. When looking for

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effective solutions, it is important to consider not only international practices but also the specifics of the development of alternative dispute resolution in Ukraine in the past. The oldest method of alternative dispute resolution is negotiation. This is the simplest way of alternative dispute resolution, as it does not require the involvement of third-party intermediaries (arbitration, mediation, etc.).

The studies of legal science researchers are mainly focused on the functioning of certain methods of alternative dispute resolution in modern time, the issue of its reform and efficiency. However, few researchers have devoted their studies to the history of negotiations. Most often, the history of negotiations is considered simply as part of the analysis of the essence of this institution. Or researchers mostly analyse the genesis of the institution of negotiation in world history, not in the context of the history of a particular state. The scholars also make a series of useful and appropriate proposals for improving the institution of negotiations in the future, namely by developing online platforms for the negotiation process and by raising the level of legal awareness of citizens, as well as knowledge about this option of peaceful dispute resolution.

A.V. Prylutska (2023a) partially touches upon the genesis of the institution of negotiation and suggests that it emerged almost at the same time as the emergence of humankind. The researcher says that the emergence of alternative dispute resolution methods is linked to the emergence of conflicts in human history. A.V. Prylutska (2023a) also suggests that conflict is a legal, social, economic, and political category at the same time. And that reconciliation is a natural phenomenon in history. The researcher concludes that it is the human desire to benefit from life in society that motivates people to overcome competition and seek different methods of overcoming conflicts.

M.V. Vainagii (2021) investigated the theoretical issues of the institution of negotiation and the practice of using this method of alternative dispute resolution from the time of primitive society to the present day. The researcher argues that the institution of negotiation and the effectiveness of the negotiation process can be improved by improving the moral, legal, psychological, and ethical consciousness of the participants. And each negotiator is driven by their subjective interest. Dissemination of knowledge and raising the level of legal awareness and legal culture will allow participants to save time and resolve disputes in the most efficient way.

O.V. Verba-Sydor (2021) emphasised the influence of the Romano-Germanic legal tradition on the formation of the institution of negotiations. The researcher concludes that in Ukraine, the negotiation process is perceived mostly as a rivalry (i.e., either a winner or a loser). L.G. Bondar (2016) points out that such perception stems from psycho-emotional processes inherent in all people. Y.P. Liubchenko (2018) paid attention to the ter-

minology and distinguishes between several meanings of the term negotiation: as a way of resolving disputes and as a procedure or process of reaching consensus between participants. V. Bondarenko (2019) studied the out-of-court resolution of administrative disputes.

F. Lavadoux *et al.* (2021), O. Brown & M. Delmeire (2021) investigated the trend of changing the institution of negotiations during the COVID-19 pandemic and noted that negotiations at the level of the European Union institutions are mostly conducted online and are more effective than offline negotiations. Researchers conclude that the pandemic has served as an incentive to develop modern technologies and use the achievements of science and technology to conduct online negotiations. P. Sansone & A. Rudzit (2024) investigated the activities of online platforms for negotiations in the field of consumer protection and concluded that such online platforms save time for the participants in the negotiation process. This is one of the vectors for the development of the negotiation institution for Ukraine and the world as a whole.

The purpose of this study was to analyse the historical experience of using the institution of negotiation in Ukraine and to predict what benefits society may receive from its further development. Objectives of the study: 1) to distinguish between negotiation as a stage of litigation, as a stage of alternative dispute resolution, and a separate type of alternative dispute resolution; 2) to analyse the development of the institution of negotiation from the time of Kyivan Rus to the present day; 3) to draw conclusions as to how the historical experience of the development of the institution of negotiation can be useful today.

Materials and Methods

The study employed both general scientific and specialised methods. Among the general scientific methods, it is worth mentioning the method of system analysis, which helped to trace the development of the institution of negotiations in Ukraine; the historical method is useful in analysing the impact of historical events on the institution of negotiations, and it also helped to identify examples of the institution of negotiations in different historical eras; the prognostic method was used to determine further vectors of development of the institution of negotiations in Ukraine; the inductive method helped to trace the impact of a particular historical event or era on the development of the institution of negotiations in general; the hermeneutic method was useful in distinguishing between the concept of negotiations as part of the judicial process, as part of other types of alternative dispute resolution (mediation, conciliation, etc.), and as a separate method of alternative dispute resolution. Among the specialised scientific methods, the study employed the formal legal method (for analysing the legal acts of various states that included Ukrainian lands) and the comparative

legal method (for comparing examples of the use of negotiations in different historical eras).

The materials used in the study include historical sources, laws of former empires that used to include Ukrainian lands, scientific works of legal scholars, the legal framework of modern independent Ukraine, international treaties, European Union legislation, and analytical materials from the media. Historical sources, such as *Ruska Pravda* (Yushkov, 1935), “The Rights of the Little Russian People” (Vyslobokov & Shemshuchenko, 1997) and others, help to analyse the development of the negotiation process in Ukraine. The scientific studies of legal scholars strengthen the theoretical framework of the study and help to explore the conceptual framework, the evolution of the institution of negotiations and provide suggestions for improving the institution of negotiations in the future. The regulatory framework of Ukraine^{1,2,3,4} helps to understand the current state of the institution of negotiations, what gaps exist in the legislation, and what requires further rulemaking. The regulatory framework of the European Union⁵ makes it possible to determine, among other things, further vectors for the development of the institution of negotiations in Ukraine.

The study also analysed the practices of the EU and Brazil in using online platforms for negotiations, as well as changes in the development of the negotiation institution during the COVID-19 pandemic. This information is covered by analytical materials from the media (Krizhniy, 2024). Websites of various online negotiation platforms were used as sources. For instance, the platform *consumidor.gov* (n.d.) in Brazil, which specialises in consumer protection disputes and helps parties negotiate online.

Results and Discussion

Definition of the term “negotiation” in the scientific literature. N.L. Bondarenko-Zelinska (2016) believes that negotiations are almost always present in some other alternative form, and mediation is often used as a preliminary procedure before the start of litigation. This opinion can be agreed with if one considers the term “negotiation” in a broad sense, namely as a process of reaching consensus. The process of reaching a consensus is present in mediation, conciliation, and other types of alternative dispute resolution.

It can be concluded that the term “negotiation” is used in several ways: as a stage of court proceedings; as part of another alternative dispute resolution method

(mediation, conciliation, arbitration); as a separate method of alternative dispute resolution. Y.P. Liubchenko (2018) provides the following definitions of the term “negotiation”: 1) a process or procedure of dialogue (polity), the purpose of which is to listen to the claims, needs, or interests of the parties to the negotiations to resolve them or settle a dispute in the presence of a conflict between the parties; 2) a way (method) of resolving a conflict that allows the voluntary and equal participation of participants to eliminate confrontation with the best possible satisfaction of the interests of the parties, to reach a mutually beneficial solution (Liubchenko, 2018). The researcher considers the term “negotiation” in a broad sense in several aspects: as a process and as a result of reaching consensus. On the contrary, M.V. Vainagii (2021) distinguishes between the terms “negotiations” and “negotiation process” and calls negotiations only a method of alternative dispute resolution.

N.L. Bondarenko-Zelinska (2016), Y.P. Liubchenko (2018), and O. Karmaza (2020) highlight a significant feature of the negotiation process – conflict resolution without the participation of any third parties. Y.P. Liubchenko (2018) defines negotiation as an alternative dispute resolution: a process of interaction between the parties to a dispute aimed at reaching certain forms of agreements based on a common interest to resolve a legal dispute. If one considers the negotiation process in a narrow sense (as a separate type of alternative dispute resolution), then one should highlight the absence of any intermediaries. D. Pruitt (1981) describes negotiation as a specific form of social interaction and decision-making that involves two or more parties with conflicting interests and goals. This definition focuses on the number of parties and the nature of their interests.

All the above definitions are valid. Notably, negotiation is a broad term that can be used in several ways: a process of reaching a consensus between the parties; a method of alternative dispute resolution; a part of a court process or other alternative dispute resolution methods. In this study, the term “negotiation” is used mainly in the sense of “a separate method of alternative dispute resolution or a part of a court proceeding or other alternative dispute resolution (mediation, conciliation, etc.)”.

Negotiations perform the following functions: joint search for a solution to a problem; informational (conveying the essence of one’s interests and needs to the other party); communicative (serving to maintain relations between the parties); regulatory (establishing

¹ Civil Procedural Code of the Ukrainian SSR. (1963, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1501-06#Text>.

² Law of Ukraine. No. 2705-IV “On Amendments to Certain Legislative Acts of Ukraine Concerning Pre-Trial Settlement of Disputes”. (2005, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2705-15#Text>.

³ The Law of Ukraine No. 2937-IX “On Collective Bargaining Agreements and Contracts”. (2023, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2937-20#Text>.

⁴ Law of Ukraine No. 1875-IX “On Mediation”. (2021, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1875-IX#Text>.

⁵ Regulation (EU) of the European Parliament and of the Council No 524/2013 “On Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)”. (2013, May). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524>.

certain rules of conduct for participants); propaganda (influencing the opinion of other participants) (Verba-Sydor, 2021). Negotiations can save the parties' time that would otherwise be spent in court, as well as money on court fees and legal aid. In addition, they contribute to the sustainable development of communities (Zhomartkyzy, 2023), confidentiality (Vasiliev & Vasilieva, 2016), and are a way to maintain conflict-free relations between the parties. However, as M. Deineha (2022) notes, although Ukraine has already developed a national legal framework for mediation, the public relations sector still requires further improvement of the legal mechanism and institutional framework for the effective application of this practice.

Examples of the use of negotiations in the history of Ukraine. In the history of Ukrainian law, the term "negotiation" has been used as a separate method of dispute resolution, as part of other alternative dispute resolution methods, and as a stage of court proceedings. The legal acts of various states that included Ukrainian lands contain provisions on the use of the institution of negotiation. A.V. Prylutska (2023b) notes that alternative dispute resolution methods emerged almost simultaneously with the emergence of legal norms and legal relations. The researcher has developed the following classification of the stages of development of alternative dispute resolution:

- by the periods of Ukraine's statehood: Ukraine's independence – the period when alternative dispute resolution emerged and existed on the territory of independent Ukraine (during the primitive system and the end of the 20th century) and the period when alternative dispute resolution existed on the occupied territory of Ukraine (during the Middle Ages and from the 17th century to the end of the 20th century);

- by the nature of the disputes – primitive times and the Middle Ages – alternative dispute resolution was mainly applied to civil disputes, from the mid-17th century – to commercial and financial disputes, and from the mid-20th century – to almost all categories of disputes;

- by form – in the primitive system and the Middle Ages, the oral form (customary law) prevailed, and since the mid-17th century, a written form has emerged and been improved – a normative form for certain types of alternative dispute resolution procedures, including those for commercial disputes.

This classification characterises the evolution of negotiations. According to A.V. Prylutska (2023b), the development of the institution of negotiation in modern Ukraine was influenced by periods of statelessness and the practice of applying negotiation to various types of disputes. Since this was the way private law disputes were resolved in primitive and medieval times, negotiations are still used today mainly in private law relations.

O.V. Verba-Sydor (2021) notes the following specific features of the development of the legal system of

Ukraine: it was formed under the influence of the Romano-Germanic legal tradition. The researcher says that the Ukrainian people often perceive the dispute resolution process as having two only options: either win or lose, and no other way. O.V. Verba-Sydor (2021) notes that in the United States, this approach is called a "win-lose strategy". Notably, the perception of the dispute resolution process as a struggle or rivalry is too narrow, as negotiations allow for a compromise for both parties. There are situations where it is difficult to identify winners and losers. For instance, if both parents cannot reach a consensus on the child's place of residence, a compromise option would be to determine the procedure for one parent's visits with the child and any forms of participation in the upbringing.

Ruska Pravda also noted the possibility of replacing blood revenge with a monetary ransom for an insult (Yushkov, 1935). A.M. Yashchenko (2006) suggests that an example of the emergence of a conciliation procedure and reaching a compromise may be the establishment of compensation for the offended and an agreement between the offended and the offender to replace corporal punishment with a certain payment. One can agree with this opinion because even in the times of Kyivan Rus, participants entered into a dialogue to commute punishment and tried to reach a consensus. This is the so-called prototype of the modern institution of negotiations. Such a solution is beneficial for both parties, as the offender avoids corporal punishment and maintains good health, and the offended party also receives money.

The Lithuanian statutes (Kivalov *et al.*, 2002; 2003; 2004) also prescribed a procedure comparable to the modern negotiation process called "unity". Property, land, criminal, and other cases could be resolved using the "unity" procedure. Article 12, Section IX prescribed the option of exempting a rapist from death as a punishment as a result of reconciliation if the woman he raped was willing to marry him. The "unity" had to be concluded in writing, signed, and sealed by eye-witnesses (outsiders) (Krasilovska, 2015). "Unity" can also be considered one of the prototypes of the negotiation process.

In the 18th century, the "Rights by which the Little Russian people are judged" defined two variants of the legal procedure of reconciliation: with the involvement of mediators-conciliators chosen by the parties (amicable court), and without mediators (Prushchak, 2019). A conciliation agreement (a document concluded without intermediaries) and a conciliation judgement (drafted with the help of an intermediary) were the legal facts that ended the dispute. An appeal against the decision of the "amicable court" could not be filed (Item 11, Article 25, Chapter VII) (Vyslobokov & Shemshuchenko, 1997). A conciliation agreement without mediation is a prototype of the modern institution of negotiation as a separate method of alternative dispute resolution.

It was only in the second half of the 20th century that negotiations became an object of extensive scientific analysis (Bondar, 2016). The legislation of the USSR contained many provisions according to which the pre-trial dispute resolution procedure was mandatory. For instance, under Article 136 of the Civil Procedural Code of the Ukrainian Soviet Socialist Republic of 1963¹, a judge shall dismiss a statement of claim if the plaintiff has not complied with the mandatory procedure for preliminary out-of-court settlement of a dispute established by law for this category of cases, including claims arising under contracts of carriage. In this type of case, a preliminary out-of-court procedure for resolving conflicts is an objective prerequisite for the right to bring a claim in court (Golubeva, 2021). Negotiations can be either a prerequisite for litigation or a part of it. In this case, negotiations are both a separate stage of the judicial process, as they are factually the basis for going to court, and a separate method of dispute resolution. If the parties reach a compromise, the need to go to court disappears.

The development of the institution of negotiation in the 21st century. The effectiveness of mediation is conditioned by the fact that it has been developed over a long time and has incorporated a considerable number of international practices (Horislavska, 2023). According to A.V. Prylutska (2023b), for the first time, the use of alternative dispute resolution for civil and commercial disputes was regulated in the European Union at the level of soft law: in green books and many recommendations of the European Commission. Between 1998 and 2013, a series of directives were adopted at the EU level on the use of negotiation in various areas (consumer protection, other civil, and commercial matters). The EU legal framework serves as a benchmark for Ukraine, as the country is a candidate for EU membership and is pursuing its European integration.

The practice of denial of justice due to non-application of alternative dispute resolution existed long after Ukraine's independence. However, in its decision dated 9 July 2002 No. 15-пп/2002² the Constitutional Court of Ukraine (CCU) clarified the content of Article 124 of the Constitution of Ukraine³. This decision speaks to the free choice of ways to protect one's rights. The possibility of seeking judicial protection

by law or regulation should not be made contingent on whether a particular pre-trial dispute resolution procedure has been used. The obligation to use a certain method of protecting one's rights is a violation of a person's procedural rights. It can be noted that the concept of free choice of ways to protect one's rights is an embodiment of the principle of respect for human rights and freedoms in a modern state governed by the rule of law.

Until 2002, pre-trial settlement of commercial disputes was mandatory. Later, based on the CCU Decision dated 9 July 2002⁴ (case on pre-trial settlement of disputes), the Law of Ukraine No. 2705-IV⁵ was adopted, according to which the parties use pre-trial settlement measures of their choice (Spasibo-Fateeva, 2020). This approach allows the parties to the dispute to be free to protect their rights and interests.

As of 2024, one can discuss negotiations as a separate method of dispute resolution in private law relations and not only as part of litigation. O.V. Verba-Sydor notes that the negotiations are being held at the initiative of the parties to the dispute. And that they can be conducted at any stage of dispute resolution: both at the stage of pre-trial settlement of a dispute without filing an application with the court, and at the stage of trial, as well as at the stage of execution of a court decision (Verba-Sydor, 2021). Thus, the Civil Procedural Code of Ukraine contains provisions on the recognition of a claim (Article 206) and a settlement agreement between the parties (Article 207)⁶. Analogous provisions are also found in the Code of Commercial Procedure of Ukraine (Articles 191 and 192)⁷. In terms of content, it is also a negotiation process, as a result of which the parties reach a compromise.

Previously, negotiations in Ukraine were supposed to be conducted only in person, i.e., with a mandatory meeting of the parties. Due to the martial law and the complication of citizens' access to justice, the development of online platforms for organising the negotiation process between the parties and any other opportunities for remote dispute resolution will be relevant. The COVID-19 pandemic has given rise to the development of online negotiations and online platforms for them. During the first peak of the pandemic, only 10% of meetings between EU officials took place in the conventional face-to-face format (Lavadox *et al.*, 2021).

¹ Civil Procedural Code of the Ukrainian SSR. (1963, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1501-06#Text>.

² Decision of the Constitutional Court of Ukraine in Case No. 15-пп/2002 "On the Constitutional Appeal of the Limited Liability Company "Trading House "Campus Cotton Club" Regarding the Official Interpretation of the Provisions of Part Two of Article 124 of the Constitution of Ukraine (Case on Pre-trial Settlement of Disputes)". (2002, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/v015p710-02#Text>.

³ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вп#Text>.

⁴ Decision of the Constitutional Court of Ukraine in Case No. 15-пп/2002 "On the Constitutional appeal of the Limited Liability Company "Trading House "Campus Cotton Club" Regarding the Official Interpretation of the Provisions of Part Two of Article 124 of the Constitution of Ukraine (Case on Pre-trial Settlement of Disputes)". (2002, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/v015p710-02#Text>.

⁵ Law of Ukraine. No. 2705-IV "On Amendments to Certain Legislative Acts of Ukraine Concerning Pre-Trial Settlement of Disputes". (2005, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2705-15#Text>.

⁶ Civil Procedural Code of Ukraine. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15#Text>.

⁷ Commercial Procedural Code of Ukraine. (1991, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1798-12#Text>.

At the EU level, EU Regulation No. 524/2013 on the Online Dispute Resolution for Consumers (The ODR Regulation)¹ was adopted, which is dedicated to creating an effective system for resolving disputes in the field of consumer protection remotely. Consumers can file a complaint online and follow the proceedings.

An example of an online platform for negotiation is “consumidor.gov” (n.d.) in Brazil, which is controlled by the National Secretariat of Consumers under the Ministry of Justice and Public Security. The platform specialises in resolving disputes in the field of consumer protection. 80% of the complaints registered on the platform are resolved without the need for further legal action (Sansone & Rudzit, 2024). A comparable platform was created in Slovakia in 2014. It is a justice application designed to handle consumer complaints about the quality of low-value goods (Prylutska, 2023a).

Ukraine has already had experience of using electronic means of communication in negotiations. An example is the Order of the Ministry of Defence of Ukraine dated 12 June 2015 No. 257 “On Approval of the Procedure for Conducting an Experiment on the Use of Electronic Means in the Course of Negotiated Procurement Procedure”². The Order sets out the rules for using electronic platforms in the procurement process. The advantages of such electronic platforms are the ability to take part in negotiations remotely and to record the results of negotiations. However, cybersecurity is still a problematic issue, namely, how to prevent information leakage and maintain the confidentiality of participant information. Due to these factors, the level of trust in online negotiation platforms can be considerably lower. The use of such platforms would also be useful in the area of family disputes and disputes over contractual obligations (both civil and commercial), as the number of Ukrainian citizens living abroad due to the war is growing (Krizhnyi, 2024). Online could be used to resolve such issues as divorce, determining the child’s place of residence, concluding agreements on the division of property, replacing contractual obligations, determining the procedure for debt repayment, consumer protection, and many others.

Notably, the issue of negotiation as a separate method of alternative dispute resolution in Ukraine is still insufficiently regulated. There is no separate legal act that would establish a negotiation procedure. In addition, it would be worthwhile to conduct legal education work with citizens and familiarise them with the possibilities of the institution of negotiations. If such a

legal act existed, the form of the decision reached by the parties would be clearly established. And this decision could be used as evidence in case of future disputes between the parties.

There are references to the negotiation procedure in some Ukrainian regulations, e.g., in the Law of Ukraine “On Collective Bargaining Agreements and Contracts”³, which has not yet entered into force. It defines a clear procedure for negotiations, its stages, the composition of participants, the purpose of negotiations (conclusion of a collective agreement), as well as guarantees and compensation for participants in collective bargaining (Articles 9-12). It would be appropriate to create a separate regulation on the negotiation procedure (both offline and online), such as the Law of Ukraine “On Mediation”⁴, or to supplement existing legal acts in various areas (civil, family, labour, commercial disputes, etc.) with provisions on the negotiation procedure. There were many prototypes of the institution of negotiation in the history of Ukraine in previous eras, but the current conditions create a need to develop the legal framework in terms of formal certainty of the procedure, defining a clear form for the decision reached by the parties, and ways to conduct negotiations online.

The future of the institution of negotiation and ways to improve it are often the subject of scientific discussions between legal scholars, which require separate consideration. L.V. Logush (2021) argues that the negotiation procedure is regulated not by legal acts, but by the rules of business ethics, and the effectiveness of the negotiation process depends on the psychological skills and communication of the parties. In practice, however, there is an objective need to formalise the rules of negotiation and define specific legal procedures in legislation. Negotiations as a separate type of alternative dispute resolution do not involve any other parties, and therefore there is a risk that the negotiation process may turn into chaos. And with concrete rules in place, this risk is minimised.

In his thesis, M.V. Vainagii (2021) proposes to introduce the Rules of Negotiation and use the Negotiation Form and has developed his Methodological Recommendations on desirable and undesirable tactics during negotiations. Such ideas are reasonable considering that the parties to the negotiation process will be properly familiarised with the rules, and the Negotiation Form can be used later, for instance, as evidence for the court if the parties fail to reach a consensus in the

¹ Regulation (EU) of the European Parliament and of the Council No 524/2013 “On Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)”. (2013, May). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524>.

² Order of the Ministry of Defence of Ukraine No. 257 “On Approval of the Procedure for Conducting an Experiment on the Use of Electronic Means in the Course of Negotiated Procurement Procedure”. (2015, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0722-15#Text>.

³ The Law of Ukraine No. 2937-IX “On Collective Bargaining Agreements and Contracts”. (2023, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2937-20#Text>.

⁴ Law of Ukraine No. 1875-IX “On Mediation”. (2021, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1875-IX#Text>.

future. And it will record the results of the negotiations and factually act as a source of law.

There is a need to either regulate the negotiation procedure and specify in the procedural law what exactly is considered evidence of negotiations and how they should be expressed (paper or electronic form). It is also worth addressing the specifics of certain areas of disputes that are resolved through the negotiation process. R. Preston (2023) argues that negotiations are effective when there is strict adherence to the 6 stages:

1. Preparation. This includes the need to learn as much as possible about the other party and its interests, as well as thinking about what options could be a compromise for both sides.

2. Open discussion. Where each party can express its position. But it must express its position with respect for the other side.

3. Setting goals. Participants clearly identify their interests and express their wishes to the other party.

4. Negotiations. This is done in several stages of discussions, proposals, and counter-proposals. Participants find out what options are acceptable to everyone.

5. Reaching an agreement. At this stage, participants come to a concrete decision.

6. Develop an implementation plan. Concrete steps to be taken by the participants in the future are identified. And this step plays a key role in the implementation of the decision in practice and determines whether the negotiations have led to a positive result.

The above steps should form the basis of the regulations on the negotiation procedure. And planning each step will help to structure the negotiations and achieve the goals of each participant. Therefore, these stages should be taken as a basis for drafting the text of rules on the negotiation procedure both in general and in a particular area of law (labour, family, land, consumer protection, public procurement, administrative disputes where one of the parties is a public authority, etc.) The suggestion of R. Preston (2023) on step 6 – development of an implementation plan. Therefore, the form of the decision must necessarily make provision for a concrete step-by-step plan for its implementation with a time-frame and detailed actions of each party in the future.

When developing the legal framework for the negotiation process, it is also worth specifying how the parties will sign decisions online and offline (with a regular signature, electronic digital signature, etc.). Negotiations are effective when the parties clearly follow the stages and take each step in sequence. That is why it is necessary to educate citizens and familiarise them with the negotiation procedure in general. Otherwise, negotiations without rules will be chaotic and will not yield any results for the parties, and the problem of court overload will not be resolved. And if at this stage the negotiation process is not sufficiently regulated at the legislative level, the participants should agree in advance on the rules that they will follow in the process. A clear agreement on who can behave in the negotiation

process and how will have a positive result for the resolution of the dispute as a whole. The parties will respect each other, not get personal, speak to the point, and not waste time.

Conclusions

Negotiation is a universally used term that can refer to the process of reaching an agreement between the parties, a part of a court proceeding, a separate type of alternative dispute resolution, a stage of other types of alternative dispute resolution (mediation, conciliation, etc.). There are many examples of procedures similar to the negotiation process in the history of Ukraine: the possibility of ransom instead of blood revenge in Ruska Pravda, “unity” in the Lithuanian Statutes, reconciliation in the “Rights of the Little Russian People”, and negotiations in the Civil Procedural Code of the Ukrainian SSR. Initially, the results of negotiations were recorded orally, and then (since the mid-17th century) in writing. Since the beginning of Ukraine’s independence, there has been a trend in the development of the regulatory framework towards protecting the right to free choice of dispute resolution. Further vectors for the development of the negotiation institute are the creation of on-line platforms for negotiations between the parties and the creation of any opportunities for resolving disputes remotely, as well as the improvement of the existing legal framework of Ukraine by prescribing a detailed negotiation procedure, defining the form of the decision reached by the parties and the conditions under which such a decision will be legally binding.

A separate regulation should be created to prescribe the procedure for negotiations in stages, the rules of conduct for the participants, and to consolidate legislatively the form of the decision reached by the participants as a result of the negotiations. This is important, because once a unified form of decision is created, the parties can use it as evidence if disputes arise between them in the future. It is also necessary to specify the details of negotiation procedures in different areas of law and to amend a series of Ukrainian regulations. It would be advisable to create separate online platforms in Ukraine that specialise in organising negotiations in the field of labour law, consumer protection, etc., analogous to those in Brazil and Slovakia.

The key areas for further research include a comparative analysis of the legal frameworks of Ukraine and other countries on negotiation procedures, as well as the development of proposals for amendments to Ukrainian legislation on negotiation procedures and a comparison of various methods of alternative dispute resolution.

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Conflict of Interest

None.

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Гене́за, сучасний стан і перспективи розвитку інституту переговорів в Україні

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Анотація

Використання альтернативного вирішення спорів станом на 2024 рік набуває дедалі більшої актуальності через ускладнення доступу до правосуддя у зв'язку з воєнним станом. Метою статті був аналіз історичного досвіду використання переговорів в Україні від епохи Середньовіччя до сучасності та визначення векторів подальшого розвитку цього інституту. Було використано як загальнонаукові, так і спеціально-наукові методи: формально-юридичний, порівняльно-правовий. З'ясовано, що поняття «переговори» може бути використано в кількох значеннях: 1) процес досягнення домовленості; 2) етап судового розгляду справи; 3) етап медіації, консиліації чи інших методів альтернативного вирішення спорів; 4) окремий спосіб альтернативного вирішення спорів. За часів Київської Русі в «Руській правді» було передбачено аналог переговорів – заміну кровної помсти на відкуп; у Литовських статутах XVI ст. процес переговорів мав назву «єднання». У «Правах, за якими судиться малоросійський народ» середини XVIII ст. було визначено дві форми документів, складених за результатами переговорів: примирна угода (без участі посередників) і приговор мирительський (за участю посередників). За радянських часів у законодавстві сформувалася тенденція встановлювати право на судовий захист залежно від попереднього використання альтернативного вирішення спорів. Однак за часів незалежності України ця тенденція змінилася, і нині законодавство закріплює право кожного на вибір способу захисту своїх прав. Подальшими векторами розвитку інституту переговорів в Україні можуть бути запровадження різних видів платформ для участі в переговорному процесі дистанційно, а також розвиток нормативно-правової бази в напрямі деталізації переговорних процедур. Результати дослідження може бути використано під час викладання дисциплін історико-правового циклу в закладах вищої освіти України, а також для подальшого прогнозування розвитку цього інституту та його вдосконалення

Ключові слова:

альтернативне вирішення спорів; примирення; судовий процес; приватноправові відносини; державотворення

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Administrative legal principles of human rights-based approach by the police

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Abstract

One of the priority tasks of reforming law enforcement agencies is to build a preventive mechanism based on the observance of human and civil rights and freedoms, protection of society from violence and discrimination, and creation of barrier-free space for people with limited mobility. The multidimensional nature and complexity of the issues requiring statutory regulation in these areas determine the relevance of the subject under study. The purpose of this study was to model the administrative legal mechanism of police activity in which human rights would be optimally and effectively implemented. To fulfil this purpose, the methodology used included a combination of comparative rule-making, system analysis, internal and external induction, constructive cognition and content analysis. It was found that the observance of human rights in police activities is inextricably linked to the implementation of the rule of law and the provision of protective police services. Numerous cases of violations revealed during journalistic investigations and widely discussed by the public have become one of the reasons for the rapid decline in public trust in state law enforcement institutions, and as a result, a substantial obstacle to Ukraine's integration into the European space. The study analysed the key reasons affecting the effectiveness of administrative legal strategies for ensuring a human rights-based approach in the practical activities of the National Police bodies (units). Specifically, these include transition processes related to the harmonisation of national legislation with international and European standards, low level of material and social security of police officers, insufficient level of professionalism, influence of negative environment, narrow understanding of administrative legal activities in the field of human rights related to the prevention of administrative and criminal offences. The study concluded that the principles of the rule of law, respect for human rights and freedoms and partnership-based interaction with the public are crucial and interrelated in the preventive activities of police. The study outlined the key areas of improvement of national legislation in the field of development and/or optimisation of administrative legal systems for ensuring the functioning of organisational, technical, information, and economic resources as guarantees of the implementation of the declared constitutional rights and freedoms. The results of this study can be used

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to formulate and improve the norms of national legislation that regulate the activities of law enforcement agencies and determine the content of its guidelines

Keywords:

personal data; police services; administrative responsibility; rights and freedoms; police officer; information and communication system; rule of law

Introduction

In all periods of human history, security has been one of the basic human needs, and its deficit in Ukraine in the context of the war with the Russian Federation has gradually turned into a total crisis. The address of the Minister of Internal Affairs of Ukraine Ihor Klymenko (Ministry of Internal Affairs, 2024) on the occasion of the professional holiday of police officers refers to the significance of their work in performing combat missions at the front, ensuring the stabilisation of the security situation in the Ukrainian territories liberated from the occupation regime. By continuing to provide police services, they are trying to keep the population hopeful for a quick victory and peace. Despite the diversity of police activities in challenging conditions, the criterion of their effectiveness is still the level of public trust. According to official data published by the Kyiv International Institute of Sociology (2023), compared to December 2022, when the percentage of Ukrainians who trusted the bodies (units) of the National Police was 58%, as of December 2023, the number of such citizens has substantially decreased to 41%. Against the backdrop of absolute trust in the Armed Forces, distrust in police officers in Ukrainian society has increased from 14% to 29%. As a dynamic indicator assessed by the existence of a fine line between the exercise of human rights and abuse of power in the performance of official tasks, the level of public trust is not only determined by the specifics of interaction between police officers and citizens. It is influenced by the well-coordinated regulatory mechanisms of social relations arising in the law enforcement sector. The decline in public trust in state institutions hinders the building of the rule of law, and therefore the need to improve administrative legal support for human rights in the activities of the National Police has made the topic relevant.

Human rights-based approach and its fulfilment in policing have been extensively investigated in academic circles. As a subject of research, they are considered not only in works on constitutional, international law, criminal law and procedure, but also by researchers of administrative law. A. Voitsikhovskiy *et al.* (2019) emphasise that compliance of police institutions with Ukrainian legislation, the Convention for the Protection of Human Rights and Fundamental Freedoms¹, and the case law of the European Court of Human Rights is a crucial step towards increasing public trust and respect

for law enforcement agencies. According to O. Tyshchenko & I. Titko (2020), the issues of human rights observance during the detention of certain categories of persons, specifically those suffering from mental disorders, are complex and undeveloped. According to V. Senyk *et al.* (2021), the vulnerability of personal data to processing and use requires innovative approaches to the statutory regulation of the use of information support in law enforcement, the functioning of information systems, databases, information and communication technologies, the development and implementation of innovations in the collection of evidence, and the investigation of criminal offences committed using modern advances in science and technology.

According to L. Kalashnikova *et al.* (2022), the ability of a society to maintain and develop living conditions for humans within the security corridor determines its guidelines and potential for sustainable development. In such circumstances, the interconnection initiated, established, and maintained simultaneously by the bodies (units) of the National Police and the public is not just evident. It is becoming a determinant of the growth of public trust in law enforcement beyond the constant influence of various internal and external factors, which appeared in Ukraine due to the introduction of martial law. Public opinion, becoming an integral part of the rule of law and civil society, naturally begins to play the role of a barometer in reforming the law enforcement system in the country and initiates new research, seeking to enhance the human rights-based concept of policing. V. Boniak (2023) points out that issues related to ensuring the rights of internally displaced persons are of particular relevance. The service orientation of the functions of officials and authorised persons of the National Police bodies (units) in this area is continuous and requires coordination of police actions with other entities, and therefore it requires improvement of the relevant regulatory framework. P. Dikhtievskiy (2022) focuses on the mechanism of exercising the rights and freedoms of citizens, protecting their interests and ensuring law and order. The ability of citizens to exercise the right to personal inviolability, P. Dikhtievskiy (2022) notes, is a key element in the system of national interests, and just as personal inviolability is not limited to the personal security of a particular person, it is a defining guideline in the development of state policy

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights). (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/en/995_004?lang=uk#Text.

in the security sector. According to V. Kravchuk (2023), the provisions of the legislation regulating public mechanisms for processing private information and protecting personal data, including from their misuse in social media, require bringing them in line with international standards. K. Gorelkina (2021) believes that the legislator's reaction should be to address the contradictory positions of current regulations in terms of human rights during the compulsory collection of biological samples.

S. Khodak *et al.* (2024) emphasised the need to improve the national mechanism for protecting the rights of children as the most vulnerable category of the population. L. Massez *et al.* (2024) identify police presence as a significant factor in reducing the fear of crime for citizens in their place of residence, and therefore in their study, the researchers insist on improving the regulatory framework for the interaction between the public and the police based on partnership. O. Voluiko *et al.* (2024) see further development of Ukrainian society through mobilisation of efforts and effective collective interaction.

Therefore, researchers assign a special role to legislative regulation of humanitarian and social aspects of law enforcement functions to create such conditions. In the variety of aspects raised by them within the framework of scientific research on administrative law, respect for human rights appears as a criterion for the effectiveness of police services provided by law enforcement agencies to the population, which at the same time requires a rethinking of the regulatory mechanism. Accordingly, the purpose of the present study was to identify the principal administrative legal areas for improving the current regulatory framework to implement a human rights-based approach in police activities. The following objectives were identified: to assess the significance of human rights as a criterion for the effectiveness of police service delivery, to characterise its content in national legislation, to outline promising areas for further research, and to identify the legal provisions regulating police activities that need to be improved.

Literature Review

A. Tanko (2020) explains the increased public attention to the topic of human rights-based approach in police activities by the integration processes that accompany Ukraine's steps towards joining the union of democratic European countries. Interference by the state in the person of a police officer with the rights of citizens, specifically in cases of restriction of movement or house arrest, should be clearly regulated and not lead to abuse of power by law enforcement officers. Recognition

of human rights-based priorities in line with international standards, such as The Universal Declaration of Human Rights¹, the Convention for the Protection of Human Rights and Fundamental Freedoms², etc., in the regulatory framework and law enforcement is urgent for further implementation of democratic principles in Ukraine and establishment of social stability.

According to D. Hladchuk (2020), the observance of human rights and freedoms should be assessed by the consequences of the results of police activities in the field of law enforcement. Society and the state are interested not only in the actual result of police officer's actions, but also in how this result is achieved, the legality of the methods and means applied or used, including police coercive measures. Understanding violations of human rights by police officers as physical or mental violence, fabrication of evidence in cases of administrative delinquency and/or criminal proceedings, the researcher attributes the causes of cases that discredit law enforcement agencies and reduce their credibility to low material and social security of employees, insufficient professional level and the influence of a negative environment, lack of ethical standards, imperfect selection and training of personnel, and improvement of their professionalism.

Y. Vityk (2021a) argues that respect for human rights is a fundamental condition for law enforcement. Since the three-component institutional state and legal status of the police is conditioned by the legislative assignment of police services to the population, professional law enforcement by police officers is impossible if they absolutize their service goals and completely ignore the fact that an offender, regardless of the gravity of the act committed or its public danger, has rights constitutionally guaranteed by national legislation and international legal acts. In this sense, the issues of observance of rights and freedoms in social relations arising between an individual and the authorities, according to the researcher, are necessarily related to the problem of applying administrative and legal measures to prevent their violation.

Providing statistical data on the results of the inspection of the Internal Security Department of the National Police of Ukraine, T. Varga (2023) convincingly argues that the human rights-based approach of police activity is inextricably linked to the strengthening of guarantees of such constitutional values as the inviolability of a person, protection from encroachments on their rights and freedoms by others. Human rights violations, which are systemic in nature in police activities, are mostly classified as offences against the person, abuse of power, abuse of authority, etc. They are primarily manifested in the unlawful detention of

¹ The Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

² Convention for the Protection of Human Rights and Fundamental. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/en/995_004?lang=uk#Text.

citizens to obtain confessions to offences. To achieve the desired result, police officers use unregistered detention, violation of the detention period, refusal to provide a defence lawyer, and psychological pressure. T. Varga (2023) believes that the implementation of the provisions of Article 7 of Law No. 580-VIII¹ requires a review of the legal regulation of social relations arising between police structures and the population, with a complete reorientation of law enforcement powers to European values.

R. Blahuta *et al.* (2024) point out that the effectiveness of law enforcement tasks is determined by the police officer's personal respect for the individual, providing them with constitutional guarantees as an authorised person from the state authorities. The observance of fundamental freedoms is closely linked to their enforcement as a priority and strategic area of police service delivery. The means and methods used in such activities, their professional level determine the legitimacy of the National Police bodies (units) in the system of state functioning institutions and need to be improved and brought in line with international standards. R. Blahuta *et al.* (2024) identify the lack of a unified concept and generally accepted norms of morality and ethics that serve as a role model for all police officers without exception (doctrinal factor), lack of a normative definition of basic ethical norms and standards of police behaviour (legislative factor), level of legal culture and psychophysical state of the police officer (personal factor), police officers' sense of security and the availability of legal guarantees for their actions (security factor), contact with criminals, job conflict and job satisfaction, prestige of the profession (socio-psychological factors), and police performance in terms of statistical indicators (evaluation factor).

Thus, researchers consider the practice of implementing human rights in law enforcement from the standpoint of administrative and jurisdictional powers of executive authorities and the negative consequences of the use of coercive measures by law enforcement officers. The indirect understanding of the protection of human rights and freedoms through the absence of their violations has led to the factual equation of terminological units of national legislation in this area, as well as the analysis of legal definitions through phenomena that cause the replacement of the subject of research with an antagonist. As a result, despite the plurality of opinions on the content of the term "respect for human rights and freedoms" in the scientific literature, the latter still lacks a unanimous wording. It is pointed to as one of the criteria for the effectiveness of police service

delivery, but the researchers avoid addressing the issue of assessing its significance among other criteria, such as the level of public trust, openness, and transparency of police activities.

Materials and Methods

The purpose and objectives set out in the introductory part of this study were fulfilled by investigated the current provisions of national legislation, information from the section "Human Rights Observance" posted on the official website of the National Police of Ukraine (2024), and scientific publications of Ukrainian researchers. The substantive understanding of the principle of human rights was formed based on the examination of the text of the Law of Ukraine No. 580-VIII². The possibility of using it as a criterion in assessing the effectiveness of police services was determined by the results of a study of the provisions of Laws of Ukraine No. 580-VIII³, No. 2337-VIII⁴, Code of Ukraine on Administrative Offences⁵, which establish liability for police officers for human rights violations. The key areas of law enforcement activity in which police services are provided and which make provision for the establishment of administrative legal regulation in the field of human rights were systematised according to the information website of the National Police of Ukraine (2024). The empirical materials obtained helped to formulate promising areas for further research and identify provisions of national legislation that need to be improved.

The study used the methods of comparative analysis, systematic approach, legal modelling, and content analysis. The analysis of current national legislative acts and scientific publications helped to create a holistic view of the administrative legal framework of police human rights-based approach. Using the method of comparative analysis, the study identified the key differences and common features in the use of terminological units in the legal framework governing the activities of the National Police bodies (units) in the field of human rights observance. As O. Dolzhenkov (2022) notes, the positive aspect of the comparative approach is the ability to compare two (or more) objects under study (or their parts) that have similarities and conclude that there are common or different properties of the analysed phenomena. The effectiveness of the comparative analysis tools allows covering a wide range of information about the object of scientific cognition, and therefore the study considered not only the content of such terminological units as "observance of human rights", "ensuring human rights", "protection of human

¹ Law of Ukraine No. 580-VIII "On the National Police". (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

² *Ibidem*, 2015.

³ *Ibidem*, 2015.

⁴ Law of Ukraine No.2337-VIII "On the Disciplinary Statute of the National Police of Ukraine". (2018, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2337-19#Text> 1-10#Text.

⁵ Code of Ukraine on Administrative Offences. (1984, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/80731-10#Text>.

rights”, “security of human rights”, “protection of human rights”, but also the frequency of their use in legal provisions and the context.

The systemic approach provided a comprehensive vision of the problem, considering the interconnection of various elements of administrative legal regulation manifested at the internal and external levels (Yusifova, 2023). The internal aspect reflects the specific features of interconnection and interaction of elements of the legal regulation system, the specifics of its mechanisms, and the stages at which police officers implement administrative legal measures related to the observance of human rights in their professional activities. The external aspect determines the significance of human rights as a criterion for the effectiveness of the National Police in providing police services to the public, the nature of interaction between police officers and society within a given space and time frame. The application of a systematic approach helped to identify gaps in the administrative legal regulation of human rights-based approach in policing and to monitor the official website of the National Police of Ukraine, highlighting areas that need to be improved in national legislation or consolidated in regulations.

The method of legal modelling was used to formulate proposals for improving the regulatory framework. Kh. Kmetyk-Podubinska (2020) emphasised the characteristic stage-by-stage nature of this method, which allows using it in close systematic connection with other methods of scientific research, expanding the horizons of legal cognition, obtaining conclusions valuable for theory and practice not only regarding the imitation of legal behaviour of subjects, but also regarding the creation of new and correction of existing legal norms and institutions. The use of legal modelling in the study contributed to the identification and systematisation of promising areas for further research and provisions of administrative legal regulation of police activity which are human rights-oriented and need to be improved.

The method of content analysis was used in its conventional sense to test the research hypothesis through statistical calculations. According to O. Semotiuk (2020), content analysis allows providing reliable objective results in the interpretation of social reality and presenting the words and texts of legal acts, transferring them to the categories of validity and reliability.

The results of the study should reveal the subordination of the concepts of human rights and the rule of law, the architectonics of the terminological fields “human rights in police activity” – “police officer responsibility”, identify the determinants of effective activity of the National Police in the field of human rights, highlight the gaps in administrative legal support that need

to be addressed and find ways to improve to increase the level of public trust in law enforcement agencies.

Results

Police human rights-based approach is the basis of law enforcement. In Law of Ukraine No. 580-VIII¹, it is prescribed in Article 7 as a binding obligation for police officers in the performance of their duties, while specifying in Article 6 that it is a constituent element in the meaning of the term “rule of law”. Considering that the text of the Law on the implementation of human rights and freedoms in police activity contains at least 5 verbal nouns, the frequency of use of which is presented in Figure 1, this indicates that Article 7 is of key significance, which allows it to be perceived as an interpreter of the content of the administrative legal framework for the observance of human rights in the activities of bodies (units) of the National Police. It is here that the legislator indirectly explains that police human rights-based approach means that an individual with their rights and freedoms is of the highest social value, and this approach should accommodate the case law of the European Court of Human Rights.

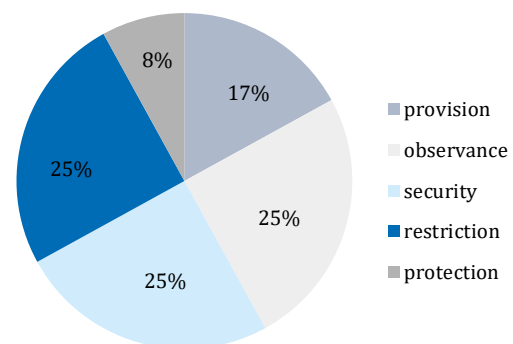


Figure 1. Distribution of powers of the police in the field of human rights, prescribed in the Law of Ukraine “On the National Police”

Source: developed by the author of this study based on the analysis of Law of Ukraine No. 580-VIII²

The graphical representation of the frequency of use of terminological combinations with the constituent elements of “human rights” in the Law of Ukraine No. 580-VIII³, presented in Figure 1, indicates that the police powers in the field of human rights are focused on their provision, observance, and protection. The “restriction – protection” ratio looks quite specific considering that the arithmetic sum of their percentage parts is equivalent to the terminology “ensuring human rights”, “observance of human rights”, “security of human rights”. In this respect, it makes sense to discuss

¹ Law of Ukraine No. 580-VIII “On the National Police”. (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

² Ibidem, 2015.

³ Ibidem, 2015.

the lack of differentiation of the terminology in the field of human rights in this Law.

The list of human rights and freedoms that the police must ensure in the performance of their tasks is not prescribed in part one of Article 7 of the Law of Ukraine No. 580-VIII¹. The legislator defines them as constitutionally guaranteed, legally prescribed in national regulations and international treaties, the binding nature of which is agreed at the highest legislative level. Part four of Article 7 of the law clarifies that the facts of facilitating, committing, inciting, or tolerating any form of torture, cruel, inhumane, or degrading treatment or punishment² entail the need to initiate an internal investigation and hold the perpetrators accountable.

O. Razdolska (2022) notes that one of the most effective ways to prevent human rights violations or restore already violated rights is the internal consistency of principles and standards for their enforcement as a holistic, undisturbed, and logically constructed system. Provided that the absolute prohibition of a particular act is defined by the supreme law³, the competence of a police officer is determined by identifying “the relevant act, stopping its commission with the subsequent possibility to prove the cause-and-effect relationship” between the identified structural elements, since “it is the evidence base of a particular event” that is an argument for the presence of an orientation towards the affirmation of human values guaranteed by the state in the actions of an authorised person from the bodies (units) of the National Police.

Y. Vityk (2021b) emphasises the integral functional property of human rights-based approach as a permanent component of police activity. Multiple rules of conduct for police officers that do not degrade a person’s

dignity affect the holistic assessment of the overall level of public trust in law enforcement. Being a normatively formalised obligation, the principle of human rights observance establishes a dynamic balance between legal regulation of police services provision to the public and the exercise of human rights and freedoms guaranteed by the constitution and prescribed in national regulations and international instruments, the binding nature of the latter being agreed at the highest legislative level.

The official web portal of the National Police of Ukraine (2024) presents three areas of police activity in the field of human rights observance in the section “Human Rights Observance”, namely creation of a barrier-free space for people with reduced mobility, implementation of the pilot project “Custody Records Information Subsystem of the Information and Communication System “Information Portal of the National Police of Ukraine” in territorial units”, prevention and counteraction to gender discrimination and sexual harassment in the workplace in law enforcement agencies. The relation of “respect for human rights” to their protection in connection with their violation or the probability of such a violation (regardless of the reason: whether as a result of illegal activity or as a result of restriction or lack of ability to perform activities in the manner or within the limits considered normal for a person⁴) clearly leaves the prevailing position that the human rights-based approach is the principle of police activity, while ensuring and protecting constitutional guarantees of a person is associated with concrete decisive actions of law enforcement officers. Figure 2 presents a system of components through which police human rights-based approach is implemented in practice in the bodies (units) of the National Police.

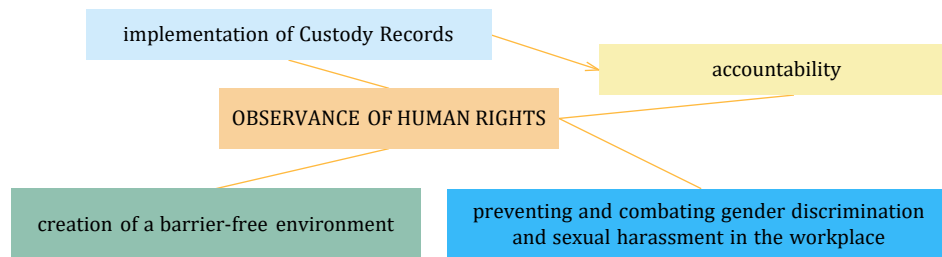


Figure 2. Component areas of human rights observance in police activities and their interrelation with the establishment of accountability

Source: developed by the authors of this study

The five-pillar framework presented in Figure 2 indicates that a breach of the chain of command between its elements necessarily triggers liability for human

rights violations. The single location of the pilot project “Information subsystem “Custody Records” of the information and communication system “Information Portal

¹ Law of Ukraine No. 580-VIII “On the National Police”. (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

² *Ibidem*, 2015.

³ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/en/254k/96-bp?lang=uk#Text>.

⁴ Declaration on the Rights of Disabled Persons. (1975, December). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-disabled-persons>.

of the National Police of Ukraine” in territorial units” (National Police of Ukraine, 2024) is conditioned by the existence of autonomous rules establishing liability for violations of human rights and freedoms related to information processing. Specifically, part two of Article 28 of the Law of Ukraine No. 580-VIII¹ prescribes personal disciplinary, administrative, and criminal liability for police officers and persons who have access to the information resources of the unified information system of the Ministry of Internal Affairs of Ukraine and other information and communication systems (information resources) and whose actions have led to a violation of human rights and freedoms related to information processing. Part one of Article 11 of the Law of Ukraine No. 2337-VIII² prescribes disciplinary liability for violation of official discipline for police officers regardless of their position and special rank. In the area of human rights observance, this may be manifested in the improper performance of the police officer’s basic duties to respect human rights, honour, and dignity, and to refrain from statements and actions that violate human rights or degrade human honour and dignity.

The Code of Ukraine on Administrative Offences³ establishes administrative liability for violation of part one of Article 188³⁹, which is expressed in “failure to notify or late notice of the Ukrainian Parliament Commissioner for Human Rights on the processing of personal data or on changes in information subject to notification according to the law, notice of incomplete or inaccurate information”, Article 212⁶, which is manifested in “unlawful access to information stored, processed, or transmitted in information (automated) systems” (part one), “in relation to information (automated) systems intended for storage and processing of restricted information” (part three), unlawful copying (part four), free illegal distribution of “information stored in information (automated) systems, in paper or electronic form” (part five), and its illegal sale (part six).

Establishing legal liability for officials for violation of the protective obligations provided by the state to a person reflects the conventional approach to building administrative legal mechanisms for ensuring human rights in the activities of law enforcement agencies. With its focus on legal regulation of practical activities, it effectively neglects the significance of legal culture and legal awareness of police officers. V. Postryhan (2022) emphasises that the latter play an essential role in shaping the human rights-based approach of police activity. Legal awareness determines the quality of law enforcement, and a prominent level of legal culture raises the police activity from the standpoint of the law to higher levels and makes it more effective.

Discussion

L. Servatiuk (2021) notes that the commonality of tasks for law enforcement agencies in Europe and the world places the same requirements on police structures to prevent and counteract offenders, promote a safe environment, and provide prompt assistance, considering the powers vested in them by the authorities. Accordingly, this necessitates the introduction of international and European standards of human rights protection into police activities. In this respect, it is appropriate to assess the quality of police services provided to the public by the level of protection of the rights, freedoms, and legitimate interests of citizens in their daily activities, as well as the possibility of exercising the rights and freedoms prescribed by the Constitution of Ukraine and national legislation in the interaction of each individual with a law enforcement officer. According to L. Servatiuk (2021), the administrative, fiscal, and punitive functions of law enforcement should be replaced by law assurance. The researchers sees the principal ways of forming the administrative legal framework for the human-centred orientation of the activities of the bodies (units) of the National Police in the consolidation of regulatory guarantees for the protection of the rights of the law enforcement officers themselves, namely: fair financial compensation for overtime work, insurance of risks to life and health, and meeting the needs of daily official activities.

E. Morozov (2023) believes that European standards of human rights observance are the most acceptable for adoption in the administrative legal activities of authorised units. In this sense, the model for implementing projects to ensure constitutional rights should be based on the direct initiative of police officers and have the ultimate purpose of creating parity between law enforcement agencies and stable local communities. The introduction of social engineering and extensive use of restorative justice methods are undoubtedly effective ways to combat crime, but the researcher’s thesis that the success of police activities should be assessed by the results of social change and reduction of crime in society is debatable, and the police officer’s own dignity with an argument in favour of the commitment they have made – the police oath⁴ – is a guarantee of human rights-based approach in the performance of official duties.

T. Marchuk & M. Babiy (2024) advocate the position that ensuring constitutionally guaranteed human rights and performing human rights functions in relation to them should not be entirely relied upon by state executive authorities. Citizens themselves should be involved. Researchers see the contribution of the latter as

¹ Law of Ukraine No. 580-VIII “On the National Police”. (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

² Law of Ukraine No. 2337- VIII “On the Disciplinary Statute of the National Police of Ukraine”. (2018, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2337-19#Text>.

³ Code of Ukraine on Administrative Offences. (1984, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/80731-10#Text>.

⁴ Law of Ukraine No. 580-VIII “On the National Police”. (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

respecting the general order and the rights of others, following the principles of social coexistence, and not causing harm to the normal functioning of public authorities. The fundamental task and legitimate monopoly of the state is to establish and regulate safe social relations and stable order. The task of the police is to prevent threats to public safety and prevent crime. According to T. Marchuk & M. Babiy (2024), the activities of law enforcement officers must follow international and European standards in the field of human rights, but the protection of citizens from violations of their rights is primarily ensured by the legality of the actions of the governing principle of public administration and management. The key provisions of the current Law of Ukraine No. 580-VIII¹ require the adoption of additional clarifying legal documents, as the control and supervisory functions of the police as an entity in the field of road safety, the conduct of procedural actions by police officers involving detained, delivered, and arrested persons, the methods of assessing the level of public trust in the police², and the procedure for public supervision (control) over its activities are still unregulated.

The differences between the above positions and those expressed in the present study are mainly conditioned by the set of materials and methods used. Specifically, the study of the National Police web portal helped to analyse new areas of activity that were not analysed by L. Servatiuk (2021), E. Morozov (2023), T. Marchuk & M. Babiy (2024). The study of the text of Laws of Ukraine No. 2337-VIII³ and No. 8073-X⁴ confirmed the findings obtained by T. Marchuk & M. Babiy (2024) on the need to improve the statutory regulation of human rights in the activities of the National Police, which is associated not only with the adoption of additional legislation, but also with the streamlining, considering the data obtained, of the terminology of the Law of Ukraine No. 580-VIII⁵.

Notably, further scientific research should be directed at addressing the issues raised by administrative scientists, but not properly reflected in modern developments. This refers to the implementation of police human centricism in the field of road safety (Marchuk & Babiy 2024), the development of methodological approaches to solving the principal law enforcement tasks of practical orientation (Morozov, 2023), the settlement of risks to the normal life of police officers, meeting the needs of performing official tasks under martial law and in a special period, the development of independent trade unions and associations that will perform human rights functions for the authorised subjects themselves (Servatiuk, 2021), etc.

Thus, the regulation of administrative legal mechanisms for observance of human rights in the activities of the National Police in the current legal acts is pro-European in nature. Therewith, the analysis allows formulating certain recommendations, which were partially reflected in the studies of L. Servatiuk (2021), E. Morozov (2023), T. Marchuk & M. Babiy (2024). Implementation of projects to create barrier-free space for people with limited mobility, prevention and counteraction to gender discrimination, sexual harassment in the workplace in law enforcement agencies, and formation of an unacceptable attitude in society towards these negative phenomena require the development of a balanced set of regulatory, organisational, managerial, and public oversight measures, considering international standards of police professional ethics. The development of new administrative legal mechanisms for the National Police will help to create conditions under which the observance of constitutional human rights will be important in assessing the effectiveness of police services to the population and will allow for the establishment of parity between society and state institutions of the law enforcement system.

Conclusions

By investigating the administrative legal mechanisms for observance of human rights in the activities of the National Police and their implementation in the national legislation of Ukraine, the study identified problematic issues that require rethinking and improvement of the existing norms. Firstly, understanding the respect for human rights in the legal acts regulating police activity is achieved through an explanation of the rule of law. At the same time, it is identified with a series of phenomena that have a different legal nature, namely, ensuring, protecting, and restricting human rights. Secondly, the fine line between observance of constitutional guarantees and abuse of power makes it difficult to investigate the topic. Human rights observance in administrative law is conventionally studied in terms of protecting a person from unlawful encroachments, restoring violated rights and freedoms as a result of law enforcement enforcement measures, as well as actions related to the collection, processing, and protection of personal data. This makes it impossible to establish the percentage of cases where the rights of individuals are fully respected by law enforcement and the court practice reflecting the consequences of such violations. Thirdly, the subordination of human rights and the rule of law does not exclude its significance for other criteria that assess the quality

¹ Law of Ukraine No. 580-VIII "On the National Police". (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

² *Ibidem*, 2015.

³ Law of Ukraine No.2337-VIII "On the Disciplinary Statute of the National Police of Ukraine". (2018, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2337-19#Text> 1-10#Text.

⁴ Code of Ukraine on Administrative Offences. (1984, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/8073>.

⁵ Law of Ukraine No. 580-VIII "On the National Police". (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

of police services. In the context of the ongoing armed threats to Ukraine from the Russian Federation, the focus on human rights-based approach determines the level of public trust in the police, which necessitates the search for innovative methodological approaches to assessing the latter. Fourthly, the examination of regulations found that the governance of activities in the field of human rights is closely related to the mechanisms of preventive counteraction to administrative delinquency and criminal offences. Other tasks of police officers, such as assisting people with limited mobility and creating barrier-free conditions for them in society, were left out of the legislator's attention.

Thus, the scientific originality of the present study lies in a comprehensive approach to the analysis of the administrative legal framework of police human rights-based approach, considering the available scientific

findings and current trends in the development of public policy.

Promising areas for further investigation on the subject under study include the development of unified methodological approaches that will allow developing a strategy for the implementation of international standards and continuing to implement pan-European values in Ukrainian legislation, bringing the reforms initiated in the law enforcement system in general and the bodies (units) of the National Police specifically to a new stage of development.

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None.

Conflict of Interest

None.

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Адміністративно-правові засади поліцейського людиноцентризму

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Анотація

Одним із пріоритетних завдань реформування правоохоронних органів є побудова превентивного механізму, основними принципами роботи якого є дотримання прав і свобод людини та громадянина, захист суспільства від насильства й дискримінації, створення безбар'єрного простору для маломобільних категорій населення. Багатоаспектність і багатогранність питань, що потребують нормативно-правового регулювання за цими напрямками, обумовлюють актуальність заявленої теми дослідження. Метою статті було моделювання адміністративно-правового механізму діяльності поліції, у якому дотримання прав людини матиме оптимальну ефективну реалізацію. Для досягнення мети було використано методологію, що поєднувала методи порівняльного нормозастосування, системного аналізу, внутрішньо- та зовнішньорівневу індукцію, метод конструктивного пізнання і контент-аналіз. Встановлено, що дотримання прав людини в діяльності поліції нерозривно пов'язано з реалізацією принципу верховенства права й надання охоронних поліцейських послуг. Численні випадки порушень, виявлені в процесі журналістських розслідувань і широко обговорювані громадськістю, стали однією з причин стрімкого зниження рівня довіри суспільства до державних інституцій правоохоронної системи, як наслідок – суттєвою перешкодою на шляху інтеграції України до європейського простору. Було проаналізовано основні причини, що позначаються на ефективності адміністративно-правових стратегій забезпечення людиноцентрованого підходу в практичній діяльності органів (підрозділів) Національної поліції. Зокрема, це перехідні процеси, пов'язані з гармонізацією національного законодавства з міжнародними та європейськими стандартами, низький рівень матеріального й соціального забезпечення поліцейських, недостатній рівень професіоналізму, вплив негативного середовища, вузьке розуміння адміністративно-правової діяльності у сфері дотримання прав людини, пов'язаної із запобіганням адміністративним і кримінальним правопорушенням. Сформульовано висновок про вагомість і взаємозв'язок у превентивній діяльності поліцейських принципів верховенства права, дотримання прав і свобод людини та взаємодії з населенням на засадах партнерства. Окреслено основні напрями вдосконалення національного законодавства у сфері розвитку та/або оптимізації адміністративно-правових систем забезпечення функціонування організаційно-технічних, інформаційних та економічних ресурсів як гарантій реалізації задекларованих конституційних прав і свобод. Результати дослідження може бути використано для формування та вдосконалення норм національного законодавства, що регулюють діяльність правоохоронних органів і визначають зміст її орієнтирів

Ключові слова:

персональні дані; поліцейські послуги; адміністративна відповідальність; права і свободи; поліцейський; інформаційно-комунікаційна система; верховенство права

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