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SECTION 1

**CURRENT ISSUES OF CONSTITUTIONAL  
AND LEGAL STATUS OF HUMAN AND CITIZEN**

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**DEVELOPMENT OF THEORETICAL AND LEGAL APPROACHES TO UNDERSTANDING THE  
ESSENCE OF SOMATIC HUMAN RIGHTS IN THE PROCESS OF BIOMEDICAL RESEARCH**

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**Summary**

It is pointed out that theoretical ideas about the relationship between man and the field of biomedical research inevitably affect the coverage of aspects that are not reduced to the subjects of constitutional and legal regulation. Accordingly, it was methodologically unjustified to limit the idea of realization of somatic rights of citizens only to the analysis of the norms of constitutions. The essence of the implementation of somatic rights of citizens in the process of biomedical research as effective elements in the development of society and in accordance with one category of constitutional law determines the need to review them from the standpoint of ontology, epistemology and axiology of rights. Thus, studies of these complex relationships do not take into account that they determine approaches to their knowledge, explore the order and principles of their implementation and protection, socio-legal “existence”, analyze the value of political and legal image.

Certainly, in order to create a reliable modern scientific foundation for understanding the essence of somatic human rights in the process of biomedical research, it is advisable to influence historical excursions in the specialty that studies a particular legal issue, constitutional and legal foundations of individual somatic rights, , on the basis of and formulated previously existing and current legislation. This will exclude certain trends in the development of both legal doctrine and rule-making activities, the results of which are a thorough improvement of current legislation of Ukraine, including codified content, solve certain problems while opening ways to solve them in different historical periods to avoid in the future. negative and borrow positive experiences.



The authors argue, based on the analysis of theorists of state and rights, constitution-  
alists, natives who are involved in the study of somatic human rights, religious scholars  
who can achieve the result that the historiography of somatic human rights in biomedical  
research in the broad scientific field of knowledge development of constitutional and legal  
science and its regularities; in the narrow sense, it is a set of works on various problems of  
the history of modern constitutionalism, human rights, the influence of religion on human  
rights and the mechanism of their implementation and protection in a certain historical  
period.

At the same time, the *aim of the work* is to study the constitutional and legal principles  
and the influence of various factors on the mechanism of realization of somatic rights in the  
process of biomedical research.

The *methodological basis of the study* was the worldview dialectical, general scientific  
and specific scientific methods of cognition of the phenomena of state and legal reality.  
Thus, in particular, formal-logical methods of analysis and synthesis allowed to reveal the  
content of the concepts that make up the subject of research, to classify them, as well as to  
formulate intermediate and general conclusions. The systematic method allowed to study  
the role and significance of somatic human rights among other human and civil rights and  
freedoms. Using the historical method, the doctrinal basis of the study was analyzed, and  
the main stages of the formation of biomedical research with human participation were  
identified. The structural-functional method allowed to clarify the internal structure of the  
mechanism of constitutional and legal support of somatic rights and freedoms of man and  
citizen in the process of biomedical research, as well as to determine the functional pur-  
pose of each element of this mechanism. The content of legal regulations governing social  
relations, within which the organization and functioning of the mechanism of protection of  
somatic human rights in the process of biomedical research, was revealed using a special  
legal method of cognition. The comparative method made it possible to identify similar  
features and differences in the constitutional and legal regulation of the mechanism of pro-  
tection of somatic human rights in the process of conducting biomedical research.

**Key words:** human rights and freedoms, fourth generation human rights, somatic hu-  
man rights, historiography, legal doctrine, constitutionalism.

.....

## 1. Introduction

In order to create a reliable modern scien-  
tific foundation for understanding the essence of  
somatic human rights in the process of biomed-  
ical research, it is advisable to digress into the  
specifics of the study of a legal issue of consti-  
tutional and legal principles of consolidation of  
individual somatic rights. previous and current  
legislation. This will highlight certain trends  
in the development of both legal doctrine and  
rule-making activities, the result of which is a  
radical improvement of current legislation of  
Ukraine, including codified content, to outline  
certain issues while clarifying ways to solve them  
in different historical periods. to avoid negative  
in the future and borrow positive experiences.  
Taking into account the historical experience of  
doctrinal research of certain legal phenomena,

according to V. Kolpakov, allows to form a per-  
fect modern scientific basis for improving the  
constitutional and legal status of a legal institute.  
(Kolpakov, 2009, p. 62).

## 2. 2. Theoretical approaches to the category "legal doctrine".

Historiographical analysis as a scien-  
tific method of historical research, L. Berezivska  
rightly points out, has become widespread in his-  
torical and legal research. Today, historiography  
in historical science has become a separate scien-  
tific field and is included in the list of disciplines  
studied by future historians. At the same time,  
the application of the historiographical method  
in historical and legal works is accompanied by  
a number of problems: unpreparedness of re-  
searchers to apply the historiographical method,

as the vast majority of them have no historical education; misunderstanding of the importance and necessity of historiographical analysis; the absence of a historiographical section in some dissertations, which reduces the probability of novelty of the study, etc. It should be noted, the scientist writes, that historiographical analysis allows to identify unexplored or little-studied scientific problems, to concentrate research efforts around them, provides relevance and theoretical significance of research, in addition, the application of this method is a manifestation of researcher culture. Historiographical analysis, which involves the study of historians in the field of law, differs from source analysis, which focuses on primary sources (Berezivska, 2018, p. 5).

Creating a historiography of any field of knowledge, say V. Chernysh and V. Stepanenko, is an indicator of the maturity of a science, a necessary element of its self-awareness: following the historical development of the institute, scientists have the opportunity to better understand its current state, problems and contradictions. Therefore, it is natural that as the science of human rights develops, interest in its history grows, and the emergence of historiographical works is evidence of this. (Chernysh, Stepanenko, 2010, p. 5).

History and methodology of legal science, according to E. Yarkova – a new discipline for the system of domestic legal education. Its appearance is due to a number of reasons. One of the main reasons can be considered a radical, in comparison with the scientific revolution, a change in the paradigmatic foundations of domestic jurisprudence. The essence of this change can be defined as a transition from the monistic model of legal science, in which historical and dialectical materialism qualified as the only truly scientific theory and methodology, and the history of science emerged as the history of the Marxist-Leninist scientific paradigm; to a pluralistic model based on the idea of theoretical and methodological diversity and the idea that the way to create a true theory and methodology of legal science lies through the study of the history of this science (Yarkova, 2012, p. 7).

Historical and legal knowledge is the basis of modern and future legal culture, provides coordinates and tools for orientation in the problems of jurisprudence. Accordingly, the modern

historian in the field of legal knowledge must be clearly aware of the commonalities and differences between historiography and the source base of research. Therefore, a necessary component of the professional training and skills of a historian of law is the scientific organization and high culture of elaboration and use of historiographical works and sources. Helplessness in their practical use has a negative impact not only on the quality of research, but also on the effectiveness of scientific activity in general. A historian in the field of law must be able to find the necessary historiographical works and sources, thoroughly research and correctly interpret them, objectively assess the level of reliability and information capabilities of relevant documents, is have the skills of scientific criticism. (Petrenko, 2018, p. 11).

Source studies, notes O. Petrenko, has its own specific subject and uses a special method of cognition of objective reality. The main task of source studies is to study cultural objects as sources of information about people and society (Petrenko, 2018, p. 11). At the same time, the basis of source studies in the field of human rights is the understanding of the source of law as a product of purposeful human activity, as a phenomenon of legal culture. In turn, writes O. Petrenko, it focuses on the systematic study of sources, to appeal to works of culture created in the process of human activity, which reflected the social, psychological, managerial, pedagogical and other aspects of society and personality, power and law, morality, motives and stereotypes of human behavior in certain conditions. Sources contain the full amount of social, political, cultural, historical and pedagogical, etc. information, which serves as a basis for obtaining new factual knowledge (Petrenko, 2018, p. 11). Thus, in the study of somatic human rights and the mechanism of their implementation in biomedical research, it is important not so much the interpretation of the content of the text, as the interpretation of the source as a phenomenon of legal culture.

Comparative analysis of the disciplinary historiography of the Institute of Somatic Human Rights (here we fully share the opinion of T. Demetradze ) contribute to a better vision of the whole block of legal disciplines, their hierarchy in the legal science system, in the humanities in general, overcoming “disciplinary barriers”.



In the scientific activity of lawyers, the ability to predict transformation processes, search for different options for interdisciplinary and multidisciplinary synthesis in the specialization of legal research on the institute of somatic human rights and the mechanism of their implementation in biomedical research (Demetradze, 2015, p. 34).

The history of legal science, writes T. Popova, in this case has a special place, because it acts not only as a "means of analysis" of the disciplinary history of the whole "family" of legal disciplines, but also plays on the very system of legal professional knowledge. "Integrative role". The disciplinary jurisprudence of the history of legal science, taking into account its national and regional specifics helps to identify the typological diversity of its disciplinary images in the system of European and world legal practices, to provide a clearer understanding of the structure of reflective disciplines, development of optimal principles including at the stage of its disciplinary development. That is why, the scientist notes, the creation of "cartography" of historiographical disciplinary legal traditions in order to find their place in legal science will contribute to identification stability, improving the paradigmatic foundations of the "historiographical basis", strengthening the epistemological status of the legal institution (Popova, 2008, p. 233).

According to O. Mikhno, the study requires systematization of sources not on a chronological or typical basis, but on the nature of the reflection of legal reality in them. Carrying out such historical and legal research, it is necessary to clearly distinguish the main processes. Thus, official documents, recommendations, instructions, dissertations, monographs, etc. reflect mainly theoretical and legal and partly educational and methodological aspects. But the result of this study - the actual research - draws up a scientist in the form of an official document. Therefore, invisible in the flow of officialdom, but the most interesting side - the internal - is presented in the texts themselves, which are the result of study and are of particular research interest. (Mikhno, 2018, p. 17).

### **3. The concept of "historiography of somatic human rights"**

Polysemantism of the concept of "historiography of somatic human rights" involves

the concretization of the institution of somatic rights within the mechanism of protection of human and civil rights and freedoms in general, which reveals one of its possible meanings - the history of legal knowledge. In this coordinate system it is necessary to position the historiography of the Institute of Somatic Rights in the process of biomedical research as an intellectual history, which, according to T. Sidorova studies the process of understanding the historical past in space-time systems and subjective-personal perceptions: personalities, their subject of study, epistems, technologies, scientific tools in the study of the institute of notary as a body for the protection of human and civil rights and freedoms. In this case, the history of science, the scientist notes, is characterized by the function of retransmission in a concentrated form of clumps of collective memory of its past, if we mean the combined experience of understanding the "historical", reproducing images of the past, reflected in theories and concepts the seal of the individuality of their creators and the "signs" of their time. Modern qualitative research on the history of science is complex, systematic, based on an interdisciplinary approach that synthesizes the possibilities of related legal sciences (Sidorova, 2008, p. 236).

That is, as we see, the history of the formation and development of the mechanism of realization and protection of somatic human rights is an integral part of the historical and legal process. The study of positive experiences in this field, which has deep historical roots and is closely linked to socio-economic and political processes, is important for both theory and practice. An integral element of scientific intelligence of any level and direction is a thorough source base, critical analysis and systematization of which is the primary task of a true scientist. This is what makes it possible to carry out objective and impartial research in the field of jurisprudence, as modern scholars emphasize. (Hamanko, 2018, p. 23).

If we talk about the analysis of the main sources on the subject of our study, we should first highlight the works of D. Belov, Y. Voloshin and A. Krusyan on the general theory of modern constitutionalism.

D. Bielov in his dissertation research "Paradigm of Ukrainian constitutionalism" (Bielov,

2012) highlights the features of the category paradigm of modern Ukrainian constitutionalism, taking into account the constitutional and legal realities of domestic practice. The problems of formation and development of the paradigm of modern Ukrainian constitutionalism are studied. Using a historical approach, the concept and genesis of the scientific and practical paradigm of constitutionalism are revealed. Based on the analysis of the constitutional legislation of Ukraine, judicial and administrative practice, scientific and theoretical research, the author reveals the content of constitutionalism and provides a description of its structure. The components of modern Ukrainian constitutionalism are identified and studied, in particular, it is established that the concept of "constitutional order" as the main and integrating category of the science of constitutional law, which has a more normative content. The legal properties of the norms enshrining the principles of the constitutional order are revealed. Scholars, in particular, have proved that the Constitution defines the entire paradigm of constitutional and legal relations. The legal nature of the transformation of the constitution is studied, three main ways of transforming the content of constitutional norms without changing the text of the constitutions themselves are identified. D. Bielov reveals the peculiarities of the evolution of constitutional models of power in Ukraine, defines the conceptual foundations of constitutional transit, as well as the peculiarities of constitutional reform in Ukraine as a consequence of the formation of a new paradigm of Ukrainian constitutionalism.

In our opinion, Yu. Voloshyn's work "Constitutional and Legal Support of European Interstate Integration: Problems of Theory and Practice" is interesting (Voloshyn, 2010), where scientists consider the process of formation of the constitutional and legal mechanism of integration in the context of globalization. The author pays special attention to the constitutionalization of international law, as well as its internationalization. The scholar rightly concluded that the constitutional and legal provision of integration absorbs a complex and dynamic system that encompasses norms, means and doctrine, thus enabling this process, and globalization affects even constitutionalism. The concept of "supranational constitutionalism"

is characterized as the constitutional and legal support of state participation in integration processes, and the law should set the vectors in this progressive development. The dissertation also considers the issue of transformation of sovereignty in modern conditions, which is related to political, economic and social elements.

A. Krusian in his dissertation "Modern Ukrainian constitutionalism: theory and practice" (Krusian, 2010) for the first time proposed the periodization of the genesis of the scientific and practical paradigm of constitutionalism, its development and formation. Analyzed the constitutional and legal freedom of man, his protection, turning to protection from the state and protection by the state itself (this is important when analyzing the admissibility of state interference in the life of the individual), and proposed a functional mechanism of modern Ukrainian constitutionalism.

An important part of our research has been work in the field of somatic rights. At the same time, it is necessary to single out such scientists as V. Kruss and M. Lavryk, Y. Turyanski and V. Pishta. In particular, the general approaches of somatic rights were gradually introduced into scientific circulation by the scientist V. Kruss, namely as an opportunity of the person to dispose of the body independently. His work "Theory of Constitutional Law Enforcement" is especially noteworthy. (Kruss, 2000). At the same time, we should agree with Yu. Turyanski, that the topic of somatic human rights has been the subject of research by many scientists in the post-Soviet space, but in Ukraine at present we can not state the intensification of its development (Turianskyi, 2020, p. 34).

Extremely important for our study are the works of M. Lavrik, among them, in particular, we can highlight "Guarantees of constitutional human rights (somatic aspect)" (Lavrik, 2006), where somatic human rights are analyzed through the prism of constitutional guarantees, which seems acceptable given their component composition. The author also reveals the concept of constitutional human rights, seeing under the guarantees and legal, and political, economic and spiritual components that ensure the implementation and protection of constitutional human rights, which are the basis of human ability to dispose of their bodies. It is quite thoroughly

noted that the legal guarantees of somatic (constitutional) human rights are contained in the constitution of a state and in other legislation, which can be demonstrated by the domestic example. (Turianskyi, 2020, p.34).

In our opinion, the dissertation work of Yu. Turyanskyi "Somatic human rights in the modern doctrine of constitutionalism: theoretical and legal research" is also important (Turianskyi, 2020, p. 34). In the dissertation, among other things, on the basis of the analysis of international regulations, monitoring reports, practice of foreign countries, national legislation and law enforcement practice, statistical data, author's public opinion poll, analysis of scientific doctrine the complex theoretical and legal research of somatic human rights in modern doctrine of constitutionalism is carried out. Scientists have identified the prerequisites for the emergence and further development of the group of somatic human rights: scientific and technological progress, the complementarity of scientific research, changes in social psychology and the correction of moral and ethical norms. It is proved that in the modern doctrine of constitutionalism the formation of a group of somatic rights can be traced, which does not yet have a clear scientifically formed structure. This is due, in particular, to the progress of technical capabilities in the field of human corporeality. Then the author's position on the structure of the group of somatic rights is presented and the following are singled out: the right to one's own genome; reproductive human rights; sexual human rights; the right to transplant organs, tissues, cells; the right to gender identity; the human right to modify one's body; the right to a painless death; the right to dispose of one's body and its parts after death; the right to use drugs and psychotropic substances to alleviate suffering.

Interesting, from the point of view of the subject of our research, is the work of V. Pishta "Administrative and legal regulation of transplantation in Ukraine". In his dissertation, the scientist conducted a study of administrative and legal regulation of transplantation in Ukraine. Theoretical and practical problems are determined and the directions of their improvement are worked out. The development of administrative and legal norms in the field of transplan-

tation in Ukraine is studied. Scientists focus on the period of existence of the Ukrainian Soviet Socialist Republic, because at this time the field of transplantation first became the object of administrative regulation, and later formed a full administrative and legal framework governing the transplantation of kidneys, lungs, intestines, gastrointestinal tract. costal cartilage, bones, as well as issues of international legal cooperation in this area. It is also important that the paper examines the case law of the European Court of Human Rights in the field of transplantation on the example of the cases "Petrova v. Latvia" and "Elberte v. Latvia". In both cases, the European Court of Human Rights found a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in *Elberte v. Latvia*, a violation of Article 3 of the Convention. In a separate opinion in the case of *Petrova v. Latvia*, K. Voitishchek emphasizes that the European Court of Human Rights did not answer the question of the further role of the deceased's relatives in deciding whether or not to remove anatomical materials from the corpse donor: whether whether the relatives are autonomous subjects, or they are only expressions of the will of the deceased. This is where we see the further development of the case law of the European Court of Human Rights in the field of transplantation.

In our opinion, the work "Protection of constitutional human rights and freedoms in the process of conducting biomedical research", which we co-authored with S. Kozodaev, D. Belov and Y. Bisaga, deserves special attention (Bysaha, Belov, Hromovchuk, Kozodaiev, 2018). Thus, in particular, the paper examines the features of the essence and content of the constitutional principles of human rights as a basis for legal regulation of biomedical research. The authors reveal the essence and content of international and national legal standards for human biomedical research. Scientists have found that there are currently no standards for legal regulation of human rights in biomedical research at the national level and at the level of international instruments in this field. The monograph logically reveals the features of the content of biomedical research as an object of constitutional and legal regulation, as well as identifies the features of the constitutional and legal status

of participants in biomedical research. It is established that the terms "medical experiment", "clinical study", "clinical trial", "human experiments" are used in domestic legislation and scientific sources as single-order categories, meaning the same phenomenon, but more accurate. is the use of the term "biomedical research". Scientists have studied the limits of permissible interference in conducting biomedical research with human participation, as well as identified the ethical examination of biomedical research as a way to protect human rights. We would like to note that a significant part of the scientific material related to the actual biomedical research was used just from our joint work with the above scientists

#### 4. Conclusions

Based on the analysis of the works of theorists of state and law, constitutionalists, scientists directly involved in the study of somatic human rights, religious scholars, we can conclude that the historiography of somatic human rights in biomedical research in a broad sense is a field of scientific knowledge. Studies the development of constitutional and legal science and its patterns; in the narrow sense, it is a set of works on various problems of the history of modern constitutionalism, human rights, the influence of religion on human rights and the mechanism of their implementation and protection in a certain historical period.

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РОЗРОБКА ТЕОРЕТИКО-ПРАВОВИХ ПІДХОДІВ ДО РОЗУМІННЯ СУТНОСТІ СОМАТИЧНИХ ПРАВ ЛЮДИНИ В ПРОЦЕСІ БІОМЕДИЧНИХ ДОСЛІДЖЕНЬ

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**Анотація.**

Вказується, теоретичні уявлення про відносини людини та сфери біомедичних досліджень неминуче будуть охоплювати аспекти, які не зводяться до предмета конституційно-правового регулювання. Відповідно



методологічно невиправданим було б обмежувати уявлення про реалізацію соматичних прав громадян лише аналізом норм конституції. Сутність реалізації соматичних прав громадян у процесі біомедичних досліджень як важливого елемента в розвитку кожного суспільства та відповідно однієї з категорій конституційного права визначає необхідність розгляду їх з позицій онтології, гносеології та аксіології права. Таким чином, дослідження цих досить складних відносин неминуче передбачає визначення підходів до їхнього пізнання, дослідження порядку та принципів їх реалізації та захисту, соціально-правового «буття», аналіз тих цінностей, які набувають політико-правове вираження.

Визначено, задля створення надійного сучасного наукового фундаменту розуміння сутності соматичних прав людини у процесі біомедичних досліджень доцільним вбачається історичний екскурс у специфіку дослідження того чи іншого правового питання конституційно-правових засад закріплення окремих соматичних прав, виділення певних пріоритетів дослідження, формулювання доктринальних положень, на підставі яких і формувалося раніше діюче та чинне законодавство. Це дозволить виділити певні тенденції розвитку як правової доктрини, так і нормотворчої діяльності, результатом якої є докорінне вдосконалення чинного законодавства України, у тому числі й кодифікованого змісту, окреслити певні проблемні питання із одночасним з'ясуванням шляхів їх вирішення у різні історичні періоди із тим, щоб уникнути в майбутньому негативного та запозичити позитивний досвід.

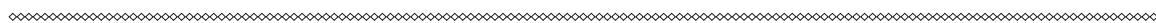
Автори стверджують, на основі аналізу праць теоретиків держави та права, конституціоналістів, вчених, що безпосередньо займаються вивченням соматичних прав людини, вчених-релігійних діячів можна зробити висновок про те, що історіографія соматичних прав людини в процесі біомедичних досліджень в широкому розумінні – це сфера наукових знань, яка вивчає розвиток конституційно-правової науки та її закономірності; у вузькому – це сукупність напрацювань із різних проблем історії сучасного конституціоналізму, прав людини, впливу релігії на права людини та механізм їх реалізації та захисту у певний історичний період.

У міру ускладнення суспільних взаємовідносин, питання біомедичних досліджень нерідко стали розглядатися як складова частина медичного права – нової галузі, що поетапно формується в сучасній Україні. У зв'язку з цим автором були вивчені питання побудови системи права, а також проблеми комплексного правового регулювання проведення біомедичних досліджень, які отримали висвітлення в працях А. Билиці, С. Болдіжар, С. Булеци, П. Вітте, Н. Кашканової, О. Кашинцевої, С. Козодаєва, А. Концовенко, А. Куліша, Ю. Кундієва, М. Менджул, С. Пустовіт, І. Сенюти, Ю. Турянського, Е. Труханової та ін.

При цьому, метою роботи є вивчення конституційно-правових засад та впливу різних факторів на механізм реалізації соматичних прав в процесі біомедичних досліджень.

Методологічну основу дослідження склали світоглядний діалектичний, загальнонауковий та конкретно-наукові методи пізнання явищ державно-правової дійсності. Так, зокрема, формально-логічні методи аналізу та синтезу дозволили розкрити зміст понять, які складають предмет дослідження, провести їх класифікацію, а також сформулювати проміжні та загальні висновки. Системний метод дозволив дослідити роль та значення соматичних прав людини серед інших прав і свобод людини і громадянина. За допомогою історичного методу було проаналізовано доктринальну базу дослідження, а також визначено основні етапи формування біомедичних досліджень за участю людини. Структурно-функціональний метод дозволив з'ясувати внутрішню будову механізму конституційно-правового забезпечення соматичних прав і свобод людини і громадянина в процесі проведення біомедичних досліджень, а також визначити функціональне призначення кожного з елементів цього механізму. Зміст нормативно-правових приписів, що регулюють суспільні відносини, в межах яких здійснюється організація та функціонування механізму захисту соматичних прав людини в процесі проведення біомедичних досліджень, був розкритий за допомогою спеціально-юридичного методу пізнання. Компаративістський метод дозволив визначити схожі риси та відмінності у конституційно-правовому регулюванні механізму захисту соматичних прав людини в процесі проведення біомедичних досліджень.

**Ключові слова:** права та свободи людини, права людини четвертого покоління, соматичні права людини, історіографія, правова доктрина, конституціоналізм.



## CONVENTIONAL AND CONSTITUTIONAL REGULATIONS OF LAWFUL DETENTION OF A PERSON WITHOUT A COURT DECISION: CRIMINAL PROCEDURE ASPECT

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### Summary

The article compares the requirements for the lawful application of detention without a court decision as a criminal procedure established in Article 5 § 1 (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms and in the second sentence of Article 29 part 3 of the Constitution of Ukraine. In particular, the content of the concept of "detention" of a person is studied, the list of subjects who have the right to detain a person without a court decision and the legal content and list of legitimate grounds for detention of a person without a court decision as a criminal procedure are studied and compared. Conventional, constitutional and criminal-procedural norms are also studied, as well as the necessity of mandatory further judicial review of the legality of the detention of a person, including the terms of such review.

Based on a detailed analysis of these provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution of Ukraine, relevant decisions of the European Court of Human Rights and the Criminal Procedure Code of Ukraine, it is established that the grounds for the detention of a person by a general entity, defined by paragraph 2 of Article 207 of the Criminal Procedure Code of Ukraine, and a special entity, defined by subparagraphs 1 and 2 (except subparagraph 3) of paragraph 1 of Article 208 of the Criminal Procedure Code of Ukraine, in general, correspond to the grounds for lawful detention of a person enshrined in Article 5 § 1 (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, it cannot be qualified as unlawful interference with the human right to liberty and security of person. At the same time, proposals are formulated to make changes and additions to subparagraph 3 of paragraph 1 of Article 208 of the Criminal Procedure Code of Ukraine.

It is also proved that the provisions of paragraph 2 of Article 12 and Articles 209 and 211 of the Criminal Procedure Code of Ukraine are critical provisions of the current legislation of Ukraine regarding the lawful application of detention of a person without a court decision. These provisions actually eliminate some shortcomings and establish the necessary legal and procedural grounds for the clarified application of the provision of the second sentence of part 3 of Article 29 of the Constitution of Ukraine, in accordance with the provi-

sions of paragraph 3 of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the practice of their application developed by the European Court of Human Rights.

**Key words:** detention of a person, subjects and grounds for lawful detention of a person without a court decision, right to liberty and security, Convention for the Protection of Human Rights and Fundamental Freedoms, Constitution of Ukraine, Criminal Procedure Code of Ukraine.

## 1. Introduction

Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter - the Convention), which was ratified by the Verkhovna Rada of Ukraine in 1997 (Law of Ukraine «On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. First Protocol and Protocols, 2, 4, 7 and 11 of the Convention», 1997), in accordance with Article 9 of the Constitution of Ukraine (Constitution of Ukraine, 1996) is part of the national legislation of Ukraine and is subject to mandatory application in our country. At the same time, one of the most important fundamental and inalienable human rights is the right to liberty and security of person, which is guaranteed by Article 5 of the Convention and Article 29 of the Constitution of Ukraine. However, at present in the domestic legal system the issue of actual observance and proper protection of the human right to liberty and security of person, and in particular, ensuring the guarantee of exclusively lawful detention of a person without a court decision, remains a significant challenge.

It should be noted that the issue of effective protection of the right to liberty and security of person has been studied in the works of many scholars. For example, in the special literature consideration of the specified legal institute was carried out by such scientists and practitioners as: Y. Bisaga, N. Karpachova, M. Kozyubra, A. Kolodiy, M. Orzikh, V. Pogorilko, B. Poshva, P. Rabinovych, V. Tatsiy, Y. Todyka, O. Frytsky, V. Shapoval and others.

However, the problem of comparative study of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Constitution and the current Criminal Procedure Code of Ukraine on the range of subjects and grounds for lawful deten-

tion without trial remains insufficiently investigated. That is why the study of this issue is determined by the purpose of this scientific article.

## 2. Definition of «detention» of a person

Examining the provisions of Part 3 of Article 29 of the Constitution of Ukraine, it should be noted that its second sentence only indirectly indicates the possibility of applying without a court decision such a measure as "detention" of a person and does not establish the grounds and procedure for its application. In particular, the second sentence of Part 3 of Article 29 of the Constitution of Ukraine states: «A detained person shall be released immediately if he is not served with a reasoned court decision on detention within seventy-two hours from the moment of detention» (Constitution of Ukraine, 1996).

In this regard, the Constitutional Court of Ukraine in paragraph 3.5. Decision № 10-rp / 2011 of 11 October 2011 states: «the analysis of the above constitutional provision shows that in this case it is a question of detention of a person as an exceptional temporary precautionary measure, the maximum duration of which should not exceed seventy-two hours without a reasoned court decision». In paragraph 3.4. of the same decision, the national body of constitutional jurisdiction states: «the words «detain», «hold» mean to leave, keep someone for some time in a certain place, position» (decision of the Constitutional Court of Ukraine № 10-rp / 2011 of 11 October 2011).

Therefore, in accordance with the legal position of the Constitutional Court of Ukraine set out in paragraph 6 of the judgment of 26 June 2003 № 12-rp / 2003: «detention should be understood both as a temporary precautionary criminal procedure and as an administrative procedure, the application of which restricts the

right to liberty and personal integrity of the individual».

Analyzing the detention of a person as a measure that is applied without a court decision in the criminal procedure aspect, it is worth paying attention to the following.

According to the norms of the current Criminal Procedure Code of Ukraine (Criminal Procedure Code of Ukraine, 2012), detention is a measure that has a dual procedural purpose and purpose. Thus, Article 131 of the current Criminal Procedure Code of Ukraine defines the detention of a person as one of the «measures to ensure criminal proceedings» used to achieve the effectiveness of these proceedings, while paragraph 2 of Article 176 of this Code defines the detention of a person as a single «temporary measure» grounds and in the manner prescribed by this Code».

### **3. Subjects and legal grounds for the application of detention of a person without a court decision**

Accordingly, paragraphs 2 and 3 of Article 207 of the Criminal Procedure Code of Ukraine indicate: “2. Everyone has the right to detain without the decision of the investigating judge, the court any person other than those referred to in Article 482 of this Code:

1) when committing or attempting to commit a criminal offense;

2) immediately after the commission of a criminal offense or during the continuous prosecution of a person suspected of its commission.

3. Everyone who is not an authorized official (a person who has the right to detain by law) and has detained the relevant person in the manner prescribed by part two of this article, must immediately deliver it to the authorized official or immediately notify the authorized official of detention and whereabouts of a person suspected of committing a criminal offense” (Criminal Procedure Code of Ukraine, 2012).

At the same time, paragraph 1 of Article 208 of the Code of Criminal Procedure of Ukraine states: «An authorized official has the right to detain a person suspected of committing a crime punishable by imprisonment without the decision of the investigating judge or court, only in the following cases:

1) if this person was caught during the commission of a crime or an attempt to commit it

2) if immediately after the commission of the crime an eyewitness, including the victim, or a set of obvious signs on the body, clothing or scene indicate that this person has just committed the crime

3) if there are reasonable grounds to believe that it is possible to escape in order to evade criminal responsibility of a person suspected of committing a serious or especially serious corruption crime, which is under the jurisdiction of the National Anti-Corruption Bureau of Ukraine» (Criminal Procedure Code of Ukraine, 2012). In addition, the specifics of detention of certain categories of persons are determined by Chapter 37 of the Criminal Procedure Code of Ukraine.

As you can see, in accordance with the above provisions of the Criminal Procedure Code of Ukraine, the right to detain a person without the decision of the investigating judge, the court is given not only a special entity – «authorized officials», but also a general entity – «everyone» (any person). At the same time, the general entity has an obligation to immediately deliver the detained person to an authorized official or to notify him of the detention and whereabouts of the suspect.

It should be noted that neither Article 5 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in general, nor its § (c), in particular, contain any indication as to the extent to which persons may apply permissible measures of imprisonment. specified paragraph cases. In addition, it should be noted that the judgment of the European Court of Human Rights (hereinafter the ECtHR) of 7 January 2010 in paragraphs 319-321 of the judgment of the European Court of Human Rights in the Case of Rantsev v. Cyprus and Russia, states: «consent to the loss of a person's liberty through private individuals or in case of inability to resolve the situation». Whereas in paragraph 239 of the later judgment of 13 December 2012 in the Case of El Masri v. the former Yugoslav Republic of Macedonia, the Grand Chamber of the European Court of Human Rights emphasized: «the first sentence of Article 5 § 1 establishes a positive the obligation of the state not only to refrain from actively violating these rights, but also to take appropriate measures to ensure protection against unlawful interference with these rights by all persons within its jurisdiction».



Given that the obligation of the state is to ensure protection not from any interference, but only from «illegal» interference with these rights of «all persons within its jurisdiction», it can be concluded that in the practice of the ECtHR There is no mandatory provision in the provisions of Article 5 § 1 of the Convention that any interference by individuals with the right to liberty of another person is, a priori, an unlawful violation of such a right. Therefore, we can assume that provided that the interference of individuals with the right to liberty of another person without a court decision is carried out in accordance with the procedure established by law and clearly meets the grounds for lawful detention of a person defined in Article 5 § 1 (c). Convention, such interference will be recognized as lawful.

This conclusion is further confirmed by the fact that in paragraph 1 of the «Rules on the Application of Detention, the Conditions in Which It Occurs and the Implementation of Safeguards against Abuse», provided by Recommendation REC (2006) 13 of the Committee of Ministers of the Council of Europe of 27 September 2006, which apply to all persons suspected of committing an offense - the "right of civil arrest" is given as an example of the application of the initial short deprivation of liberty «by anyone other authorized to apply such a measure», except the police or another law enforcement officer.

Guided by the above and in order to determine the legality of the grounds for detention without a court decision, both general and special entities defined in paragraph 2 of Article 207 and paragraph 1 of Article 208 of the Criminal Procedure Code of Ukraine, it is advisable to examine their compliance with the grounds for lawful detention. Article 5, paragraph 1, subparagraph (c), of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, the norms of the Criminal Procedure Code of Ukraine define quite similar lists of grounds for detention by both general and special entities, although, of course, the list of these grounds for the right to detain by special entities is somewhat broader. In particular, it can be argued that the grounds for detention of a person by a general entity provided for in subparagraph 1 of paragraph 2 of Article 207 of the Criminal Procedure Code of Ukraine and a special entity

provided for in subparagraph 1 of paragraph 1 of Article 208 of this Code are generally almost identical. grounds for lawful arrest or detention of a person as «reasonably considered necessary to prevent the commission of an offense», which is enshrined in Article 5 § 1 (c) of the Convention.

In turn, examining the provision of subparagraph 2 of paragraph 2 of Article 207 of the Criminal Procedure Code of Ukraine, it is seen that it establishes the existence of two alternative circumstantial-temporal features, namely – «immediately after the commission of a criminal offense» and «during continuous prosecution of a suspect. its commission» for application by the general subject of detention of the person. These signs, in our opinion, can be defined as objective and reasonable grounds for a person's suspicion of committing a criminal offense. Similarly, it can be argued that the provision of subparagraph 2 of paragraph 1 of Article 208 of the Criminal Procedure Code of Ukraine contains several such alternative circumstantial features for use by a special subject of detention. In particular, it is: if «immediately after the crime» «eyewitness,... victim» or «a set of obvious signs on the body, clothing or scene» indicate that «this person has just committed a crime». These signs can undoubtedly be defined as objective and reasonable grounds for suspicion of the specified person in committing a crime. And although none of the provisions of the two provisions of the Criminal Procedure Code of Ukraine contains a direct (formal) indication of the suspicion of a criminal offense, or mandatory, in the sense of the Convention, signs of suspicion as its «reasonableness», but in our opinion, they , taken as a whole, are fully covered by such grounds for detention as set out in Article 5 § 1 (c) of the Convention as: «if there is a reasonable suspicion that he has committed an offense... or fled after it has been committed».

This allegation is further substantiated by the fact that, in accordance with paragraph 32 of the judgment of the European Court of Human Rights in the Case of Fox, Campbell and Hartley v. The United Kingdom: «A reasonable suspicion of a criminal offense presupposes the existence of facts or information objective observer that the person concerned could have committed the crime». At the same time, in our opinion, the

alternative circumstantial-temporal features enshrined in subparagraph 2 of paragraph 2 of Article 207 of the Criminal Procedure Code of Ukraine and subparagraph 2 of paragraph 1 of Article 208 of this Code are, in their legal content, alternative circumstantial-temporal features, in their legal content, are precisely those that directly indicate the existence of «facts or information that could convince an objective observer that the person concerned could have committed a crime».

A slightly different conclusion can be reached by analyzing the provision of subparagraph 3 of paragraph 1 of Article 208 of the Criminal Procedure Code of Ukraine. Thus, its content shows that the basis for the use of special subjects of detention is not the validity of suspicion of committing a crime of appropriate severity, but only reasonable grounds to believe that the possible escape of the suspect. At the same time, the detained person did not attempt or actually escape. Therefore, in our opinion, due to the lack of instructions on the mandatory presence of a «reasonable» suspicion of a person committing a crime and the absence of the fact of escape or attempted escape of this person, it cannot be stated unequivocally that the grounds for detention are defined in subparagraph 3 1 of Article 208 of the Criminal Procedure Code of Ukraine corresponds to at least one of the grounds for detention of a person enshrined in Article 5 § 1 (c) of the Convention.

#### **4. The maximum permissible period and judicial control over the detention of a person without a court decision**

An equally important issue in the study of the criminal procedural aspect of such a measure as the detention of a person without a court decision is to determine the maximum period of its application and the need to establish mandatory judicial control over it. It should be noted that in this context, the prescription of the second sentence of Part 3 of Article 29 of the Constitution of Ukraine contains a rather interesting semantic construction. In particular, it shows that within seventy-two hours from the moment of detention, a person must either be released or be served with a reasoned court decision to detain him. Thus, in fact, a maximum period of seventy-two hours is established, during which

a person may be detained without a court decision. At the same time, the analyzed constitutional provision does not contain an instruction to conduct a mandatory judicial review of the validity and legality of the very fact of detention. In addition, the provision of the second sentence of Part 3 of Article 29 of the Constitution of Ukraine does not establish the mandatory need to bring the detained person to court. Instead, it is mandatory only to serve the person with a reasoned court decision on his / her detention.

In this connection, it should be emphasized that the exercise of immediate and automatic judicial control over the detention of a person is determined by the European Court of Human Rights for the purposes of Article 5 § 3 of the Convention. At the same time, this provision of the Convention stipulates that such a judicial review procedure includes mandatory delivery of the detainee to court, and as a general rule, the delivery time should not exceed four days, and in the absence of special difficulties or exceptional circumstances preventing delivery. judge before, its term should not exceed three days.

At the same time, it should be noted that the European Court of Human Rights, in interpreting the provisions of Article 5 § 3 of the Convention, in its judgment of December 1979 in Case of Schisser v. Switzerland, stated in paragraph 31: «official to listen to the person who was delivered before making a decision». This legal position of the European Court of Human Rights is applied in a number of its later judgments (Guide on Article 5 of the European Convention on Human Rights. 2016, p. 25), including paragraph 50 of the judgment of the Grand Chamber of the European Court of Human Rights in the already mentioned Case of Aquilina v. Malta (1999), as well as in paragraph 46 of the judgment in the Case of Kornev and Karpenko v. Ukraine (2011).

In view of this, there are sufficient grounds to state that the provision of the second sentence of part 3 of Article 29 of the Constitution of Ukraine only partially meets the requirements of paragraph 3 of Article 5 of the Convention. Thus, the maximum term established in this provision of the Constitution of Ukraine, lasting seventy-two hours, during which a person may be detained without a court decision, generally does not exceed the time limit for bringing a person to a judge (court) for judicial control



over detention or arrest, applied in the case law of the European Court of Human Rights. However, the provision of the second sentence of Part 3 of Article 29 of the Constitution of Ukraine does not provide instructions on the mandatory judicial review of the validity and legality of the fact of detention, as well as the mandatory delivery of the detained person to court. And, this contradicts not only the provisions of paragraph 3 of Article 5 of the Convention, but also the main purpose of this provision, which is established and strictly observed in the case law of the European Court of Human Rights.

At the same time, it should be noted that the provision of the second sentence of Part 3 of Article 29 of the Constitution of Ukraine is developed in the norms of the Criminal Procedure Code of Ukraine. Thus, Article 12, paragraph 2, of the Code states: «Everyone who is detained on suspicion or accusation of committing a criminal offense or otherwise deprived of liberty must be brought before an investigating judge as soon as possible to decide on the lawfulness and justification of his detention, other deprivation of liberty and further detention. A detainee shall be released immediately if he or she has not been served with a reasoned detention order within seventy-two hours of his or her detention». Article 211 of the Criminal Procedure Code of Ukraine states: «The period of detention of a person without the decision of the investigating judge, court may not exceed seventy-two hours from the moment of detention, which is determined in accordance with Article 209 of this Code. A person detained without the decision of the investigating judge or the court must be released or brought to court no later than sixty hours from the moment of detention for consideration of a request to take a measure of restraint against him». In turn, Article 209 of the Criminal Procedure Code of Ukraine states: «A person is detained from the moment when he is forced to stay by force or through compliance with the order by an authorized official or in a room designated by an authorized official».

In our opinion, the above provisions of the Criminal Procedure Code of Ukraine are more in line with the provisions of paragraph 3 of Article 5 of the Convention and the case law of the European Court of Human Rights than the provision of the second sentence of part 3 of Article 29

of the Constitution. This is explained by the fact that, in contrast to the constitutional provision, the provisions of paragraph 2 of Article 12 of the Criminal Procedure Code of Ukraine investigating judge. This is explained by the fact that, unlike the constitutional provision, the provisions of paragraph 2 of Article 12 of the Criminal Procedure Code of Ukraine not only establish a total maximum of seventy-two hours during which a person may be detained without a court decision. They also establish the mandatory need to deliver the detainee to the investigating judge as soon as possible. Moreover, the provisions of Article 211 § 2 of the Criminal Procedure Code of Ukraine set a maximum time limit for bringing a detainee to court, sixty hours from the moment of detention, stipulating that if they are violated, the detainee must be released. Thus, the provisions of Part 2 of Article 211 of the Criminal Procedure Code of Ukraine, as norms of a special domestic legislative act, divide the procedure of judicial control over the validity of detention and detention into two stages, namely: bringing a person to court and court proceedings as this is regulated by Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In addition, the provisions of Article 211 part 1 and Article 209 of the Criminal Procedure Code of Ukraine are fully consistent and even more specific than the provisions of the case law of the European Court of Human Rights on the interpretation of detention under Article 5 § 3 of the Convention. Thus, in a number of judgments, including paragraphs 23 and 24 in *Case of Solmaz v. Turkey* (2007), the ECtHR states: “In determining the period of detention pending trial, in accordance with Article 5 § 3 of the Convention, the period should be taken into account, starting on the day of the accused's detention and ending on the day of sentencing, even if it was passed only by the court of first instance». Whereas, the provision of Article 209 of the Criminal Procedure Code of Ukraine determines not the day of detention, but the moment of detention, which is extremely important given the need to establish the beginning of the seventy-two-hour period of detention.

## 5. Conclusions

Guided by the above, we conclude that in accordance with the provisions of the Criminal

Procedure Code of Ukraine, detention is both a measure of criminal proceedings and the only temporary measure of restraint. At the same time, the right to detain a person without the decision of the investigating judge, the court is given not only a special entity – «authorized officials», but also a general entity – «everyone». In our opinion, the grounds for detention of a person by a general entity are defined in paragraph 2 of Article 207 of the Criminal Procedure Code of Ukraine and a special entity defined in subparagraphs 1 and 2 (except subparagraph 3) of paragraph 1 of Article 208 of the Criminal Procedure Code of Ukraine, in general, correspond to the grounds for the lawful detention of a person enshrined in Article 5 § 1 (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms. In this regard, there are sufficient grounds to claim that the detention of a person without a court decision, based on the above provisions of the Criminal Procedure Code of Ukraine, is a lawful and lawful detention of a person in accordance with the provisions of the European Convention. human rights and therefore cannot be classified as unlawful interference with the human right to liberty and security of person guaranteed by Article 5 of the Convention.

At the same time, in order to ensure compliance with the provisions of § 1 (c) of Article 5 of the Convention, the provisions of part 3 of paragraph 1 of Article 208 of the Criminal Procedure Code of Ukraine, it seems appropriate to amend this paragraph and state it as follows: «3) grounds to believe that it is possible to escape in order to evade criminal responsibility of a person in respect of whom there is a reasonable suspicion of committing a serious or especially serious corruption crime, referred by law to the jurisdiction of the National Anti-Corruption Bureau of Ukraine».

At the same time, it should be noted that the provisions of paragraph 2 of Article 12 and Articles 209 and 211 of the Criminal Procedure Code of Ukraine are critical and positive provisions of current legislation of Ukraine on the lawful application of detention without a court decision. The provisions of these articles of the Criminal Procedure Code of Ukraine actually eliminate certain shortcomings and establish the necessary legal and procedural grounds for clarified

application of the provision of the second sentence of Part 3 of Article 29 of the Constitution of Ukraine, in accordance with Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights.

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- deputata Ukrayiny» ta za konstytucijny`m podannym Ministerstva vnutrishnix sprav Ukrayiny` pro oficijne tлумачення polozhennya chasty`ny` tret`oyi statti 80 Konstytuciyi Ukrayiny` stosovno zatry`mannya narodnogo deputata Ukrayiny` (sprava pro garantiyi deputats`koyi nedotorkannosti) [Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 56 people's deputies of Ukraine on official interpretation of the provisions of parts one, three of Article 80 of the Constitution of Ukraine, part one of Article 26, parts one, two, three of Article 27 of the Law of Ukraine "On Status of People's Deputy of Ukraine" and on the constitutional petition of the Ministry of Internal Affairs of Ukraine on the official interpretation of the provision of part three of Article 80 of the Constitution of Ukraine concerning the detention of a People's Deputy of Ukraine (case on guarantees of parliamentary immunity)] (2003) № 12-рп/2003. Oficijny`j visny`k Ukrayiny`. 2003. № 28. [in Ukrainian].*
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КОНВЕНЦІЙНА ТА КОНСТИТУЦІЙНА РЕГЛАМЕНТАЦІЯ  
ПРАВОМІРНОГО ЗАТРИМАННЯ ОСОБИ БЕЗ РІШЕННЯ СУДУ:  
КРИМІНАЛЬНО-ПРОЦЕСУАЛЬНИЙ АСПЕКТ

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**Анотація**

У статті здійснюється компаративістське дослідження вимог щодо правомірного застосування затримання особи без рішення суду, як кримінально-процесуального заходу, які встановлені у підпункті «с)» пункту 1 статті 5 Конвенції про захист прав людини і основоположних свобод та у другому реченні частини 3 статті 29 Конституції України. Зокрема, досліджується зміст поняття «затримання» особи, вивчається та порівнюється перелік суб'єктів, які наділені правом затримувати особу без рішення суду та юридичний зміст і



перелік правомірних підстав затримання особи без рішення суду, як кримінально-процесуального заходу. Також досліджуються конвенційні, конституційні та кримінально-процесуальні норми, що необхідності обов'язкового проведення подальшої судової перевірки правомірності застосування затримання особи, включно із строками проведення такої перевірки.

На основі детального аналізу вказаних положень Конвенції про захист прав людини і основоположних свобод, Конституції України, відповідних рішень Європейського суду з прав людини та Кримінального процесуального кодексу України встановлюється що підстави для застосування затримання особи загальним суб'єктом, визначені пунктом 2 статті 207 Кримінального процесуального кодексу України, та спеціальним суб'єктом, визначені підпунктами 1 та 2 (за винятком підпункту 3) пункту 1 статті 208 Кримінального процесуального кодексу України, загалом, відповідають підставам застосування правомірного затримання особи закріпленим у підпункті «с» пункту 1 статті 5 Конвенції про захист прав людини і основоположних свобод, а отже не може кваліфікуватися як незаконне втручання в право людини на свободу та особисту недоторканність. Водночас, формулюються пропозиції щодо внесення змін та доповнень до підпункту 3 пункту 1 статті 208 Кримінального процесуального кодексу України.

Також обґрунтовується, що положення пункту 2 статті 12 та статей 209 і 211 Кримінального процесуального кодексу України є критично важливими положеннями чинного законодавства України, щодо правомірного застосування затримання особи без рішення суду. Вказані положення фактично усувають окремі недоліки та встановлюють необхідні юридично-процесуальні підстави для уточненого застосування припису другого речення частини 3 статті 29 Конституції України, відповідно до вимог положень пункту 3 статті 5 Європейської конвенції про захист прав людини і основоположних свобод, а також практики їх застосування напрацьованої Європейським судом з прав людини.

**Ключові слова:** затримання особи, суб'єкти та підстави правомірного затримання особи без рішення суду, право на свободу та особисту недоторканність, Конвенція про захист прав людини і основоположних свобод, Конституція України, Кримінальний процесуальний кодекс України.

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## MEASURES TO COUNTER THE COVID-19 PANDEMIC AND THE PERMISSIBILITY OF HUMAN RIGHTS RESTRICTIONS

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### Summary

Following the declaration of a pandemic caused by the SARS-CoV-2 virus, the EU and Ukraine have taken various measures to prevent infection and protect the health of citizens, including: mandatory observation (most countries); introduction of the rules of responsibility for violation of quarantine restrictions (usually administrative, but criminal liability is also possible); closure of educational and entertainment facilities, as well as public catering establishments (remote operation of educational facilities is allowed, as well as operation of public catering establishments with food delivery); obligation to wear masks; prohibition of movement of groups of persons; maximum transfer of employees to remote work; ban on operation of most companies (introduced by Italy and Spain); closing borders; curfew (introduced in Italy, Spain and Georgia); self-isolation of persons belonging to risk groups. Ukraine has implemented all these measures, except for curfew and closure of all enterprises.

Implemented measures in most countries have restricted: freedom of movement and peaceful assembly of citizens; the right to private and family life; protection of personal data; freedom of religion (most European countries and Ukraine have banned services and other religious ceremonies with gatherings); the right to medical care (in many countries, citizens have limited access to non-life-saving medical services, including dental, preventive medical services, non-urgent operations, etc.) and others.

In the context of the fight against the COVID-19 pandemic, states relied on various types of measures, which allowed us to distinguish three models: “hard” model (USA and most European countries and Ukraine); the “minimum intervention” model (introduced in South Korea); the “maximum public awareness” model (in Sweden). The question of the proportionality of measures taken by the state to counter the COVID-19 pandemic may be considered by the ECtHR regardless of whether the state has made a declaration of derogation, and the establishment of a violation of a particular right will depend on the specific situation in the country, scope and length of applied measures, as well as their feasibility and effectiveness.

**Key words:** COVID-19, pandemic, human rights, proportionality, ECtHR.



## 1. Introduction

WHO declared the COVID-19 pandemic on March 11, 2020, when the number of infected in 114 countries reached more than 118.000 cases, killing 4.291 people. A month later, on April 11, the number of infected cases in the world was 1.610.909, the death toll was 99.690 (Coronavirus disease 2019). Almost a month later, on May 8, the number of infected reached 3.759.967 cases, 259.474 died. As of March 16, 2021 new cases continued to rise globally, increasing by 10% in the past week to over 3 million new reported cases (Weekly epidemiological update, 2021). In the face of threats to human health, states have taken various measures to stop the spread of the SARS-CoV-2 virus, including those that have led to intrusion into private life and restrictions on other individual rights.

Following the declaration of a pandemic caused by the SARS-CoV-2 virus, the EU and Ukraine have taken various measures to prevent infection and protect the health of citizens, including: mandatory observation (most countries); introduction of the rules of responsibility for violation of quarantine restrictions (usually administrative, but criminal liability is also possible); closure of educational and entertainment facilities, as well as public catering establishments (remote operation of educational facilities is allowed, as well as operation of public catering establishments with food delivery); obligation to wear masks; prohibition of movement of groups of persons (for example, in Ukraine the maximum movement of a group of two adults is allowed, without limiting the number of children they accompany); ban on visiting parks and recreation areas; maximum transfer of employees to remote work; ban on operation of most companies (introduced by Italy and Spain); closing borders; curfew (introduced in Italy, Spain and Georgia); self-isolation of persons belonging to risk groups. Ukraine has implemented all these measures, except for curfew and closure of all enterprises. It is necessary to study the extent to which the implementation of measures to combat the COVID-19 pandemic restricts human rights and whether such interventions are permissible.

Identify if the measures taken by States to combat the COVID-19 pandemic and the permissible limits for such measures correspond those

limits allowed by the human rights standards within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The study is based on an interdisciplinary approach to the analysis of the problem of applying measures to combat the COVID-19 pandemic by various states and the admissibility of such measures to interfere with fundamental human rights using dialectical, comparative law, systemic and statistical methods. The study used scientific developments in the field of legal protection of human rights in the European Court of Human Rights (hereinafter - ECtHR), the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - ECHR), official information on measures taken by states to combat the virus SARS-CoV-2, Ukrainian legislation, case law of the European Court of Human Rights, official WHO statistics.

## 2. Measures to counter the pandemic and restrict human rights

Implemented measures in most countries have restricted: freedom of movement and peaceful assembly of citizens (mass gatherings, mass events, stopped traffic between states and restricted movements within the states have been banned in the EU and Ukraine); the right to private and family life (restriction of movement, closure of borders led to the fact that a number of families found themselves in different cities and even states, and could communicate only by phone or via the Internet); protection of personal data (for example, in Ukraine for the period of national quarantine it is allowed to process personal data without the consent of the person, in particular - information on health status, place of hospitalization, surname, name, patronymic of the patient, date of birth, place of residence, work or training); freedom of religion (most European countries and Ukraine have banned services and other religious ceremonies with gatherings); the right to medical care (in many countries, citizens have limited access to non-life-saving medical services, including dental, preventive medical services, non-urgent operations, etc.) and others.

At the same time, there are states that have introduced rather liberal measures, such as clos-

ing only schools, isolating patients and restricting the movement of people at risk (South Korea (Dennis Normile, 2020)), or recommending social distancing, isolation of patients and not closing educational institutions (Belarus (Minsk zdavnya pered koronavirusom i zaprovadyvshyrokі obmezhenya) and Sweden (Salnikov, 2020)).

Undoubtedly, the measures implemented in most European countries and Ukraine in the fight against the COVID-19 pandemic have affected the right to education, as well as the labor rights of citizens. On the one hand, learning takes place remotely, on the other hand, the quality of such learning, especially for children of primary school age, raises many questions. As a result, a recommendation has already been adopted at the level of ministries in a number of countries to repeat the distance learning program in September 2020. The COVID-19 pandemic, combined with the economic crisis, has also led to rising unemployment in all European countries.

These measures to combat the COVID-19 pandemic have led to interference and restrictions on fundamental human rights, which may result in appeals against the actions of states to the European Court of Human Rights.

Convention for the Protection of Human Rights and Fundamental Freedoms (Article 15 states that in cases of public danger threatening the life of the nation, the state may waive its obligations other than guaranteeing the right to life (Article 2), prohibition of torture or inhuman or degrading treatment, degrading treatment, punishment or punishment (Article 3), prohibition of slavery (Article 4, paragraph 1) and prosecution without lawful grounds (Article 7). With regard to other rights, including the right to family and private life (Article 8), freedom of thought conscience and religion (art. 9), freedom of expression (art. 10), freedom of assembly and association (art. 11), freedom of movement (art. 2 of Protocol 4) and others, such interferences are possible, if they are based on the law, have a legitimate purpose and are proportionate and necessary in a democratic society.

As of May 8, 2020, ten States have made a declaration of withdrawal from their obligations under the Convention under Article 15: Latvia (March 16), Romania (March 18), Arme-

nia (March 20), Estonia (March 20), Moldova (March 20), Georgia (March 23), Albania (April 1), Macedonia (April 2), Serbia (April 7) and San Marino (April 14). Ukraine has not yet made such a statement. States which have derogated from Article 15 of the ECHR shall inform the Secretary General of the Council of Europe of the measures taken. At the same time, it is necessary that the restrictions on rights introduced be proportionate, despite even claims of derogation. In the case of "Mehmet Hasan Altan v. Turkey" The ECtHR argued that a declaration of derogation did not imply the possibility of imposing measures without legal grounds and without respecting the constitutional guarantees established in the State (paragraph 140, Case of Mehmet Hasan Altan v. Turkey, 2018).

Thus, the ECtHR will take the above criteria into account when considering cases, and States that have made a declaration of derogation must still comply with the constitutional and other legislative guarantees of the rights of their citizens.

### **3. Legality and proportionality of measures restricting human rights**

As for legality, both European states and Ukraine take restrictive measures in accordance with international acts and national legislation. For example, the state of emergency situation was introduced in Ukraine on March 25 by a government order (Pro perevedennya yedynoyi derzhavnoyi systemy tsyvilnoho zakhystu u rezhym nadzvychaynoyi sytuatsiyi, 2020). In addition, according to the Law of Ukraine "On Protection of the Population from Infectious Diseases" (Pro zakhyst naselennya vid infektsyynykh khvorob, 2000) and the Civil Protection Code of Ukraine in case of emergency, citizens must adhere to the anti-epidemic regime, which also allows quarantine and traffic restrictions (Kodeks tsyvilnoho zakhystu Ukrayiny, 2012). Therefore, in an emergency situation, the imposed regime may in fact restrict the exercise of a number of human rights, and in the case if sufficient legal grounds are available (in this case - the fight against the COVID-19 pandemic), the established measures meet the criterion of legality as required by the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the ECtHR.

The legitimate aim according to the Convention for the Protection of Human Rights and Fundamental Freedoms will be to protect health, and given the rapid spread of the SARS-CoV-2 virus, this cannot be doubted.

It is necessary to analyze whether the implemented measures are proportional and necessary in a democratic society.

The principle of proportionality has already been the subject of scholar researches. Most scholars believe that the principle of proportionality is a general guiding idea of compliance, the relevance of applied legal instruments to achievement of a legitimate goal (Fufal'ko, 2011, p. 71), which is especially important for human rights (Jean-François Renucci, 2005, p. 128). To establish proportionality, scholars, taking into account the practice of the ECtHR, propose a test of proportionality: 1) the instrument designed to achieve the goal must be suitable for achieving this goal (appropriateness); 2) from all suitable means, the one that least restricts the right of an individual (necessity) should be chosen; 3) the damage to an individual from the restriction of his right must be proportional to the benefit that the state will receive to achieve the goal (proportionality in the narrow sense) (Pogrebnyak, 2012, p. 51). Thus, proportionality is aimed at ensuring the effectiveness of legal regulation and ensuring the balance of private and public interests.

In its case law, the ECtHR has concluded that the notion of necessity means that the intervention meets an urgent social need and that it is proportionate to the legitimate aim pursued (p. 50 «Gnahoré v. France»; p. 60, p. 61 «W. v. the United Kingdom»). If the principle of proportionality is not respected, the intervention cannot be considered necessary in a democratic society.

In order to establish if COVID restrictive measures were necessary and proportional than relevant statistical data must be analyzed.

Table I shows data on the rate of spread of SARS-CoV-2 virus, as well as the state of infection in the countries that introduced quarantine (Spain, Italy, Germany, France, Great Britain, Czech Republic, Poland, Romania, Ukraine, Hungary and Slovakia) and those countries that have not introduced quarantine measures (Belarus, Sweden and South Korea). We have added

to the table for comparison non-European countries, namely the United States, where tough measures have been introduced, and South Korea, where the containment of COVID-19 infection has been achieved through fairly liberal steps and the so-called partnership policy and public awareness work with the population. A similar model of measures was used in Europe by Belarus and Sweden, which have not even closed schools. When comparing the data for six months (Table I), in South Korea the figure rose to only 0.04%. Therefore, it can be concluded that the situation with the COVID-19 pandemic in South Korea is under control, which has been achieved through liberal measures and minimal human rights interference.

In European countries that have imposed strict restrictions the number of infected cases as compared to the total population has increased during the month (for six months) by: in Italy – 0.16% (0.23%), in Spain the figure increased by 0.17% (0.7%), in the UK – by 0.22% (0.43%), in France – by 0.08% (0.34%), in Germany – by 0.08% (0.17%), in Romania – by 0.05% (0.46%), in Poland – by 0.03% (0.15%), in the Czech Republic – by 0.02% (0.21%), in Hungary – by 0.02% (0.075%), in Ukraine – by 0.027% (0.31%), in Slovakia – by 0,01%(0.07%). At the same time, in Sweden, which has not introduced quarantine, the percentage of infected people increased by 0.15% over the month (for six months by 0.74%), in Belarus by 0.2% (for six months by 0.75%) of the total population.

At the same time, regarding Ukraine, experts have pointed attention on the inaccuracy of official COVID-19 statistics in the country for various reasons: low quality of purchased tests (Ispaniya povernula v Kytay neyakisni testy na koronavirus. Tochno taki kupuvav Kyyiv), cases of erroneous testing results (Testuvannya na koronavirus: chomu PLR-analiz mozhe davaty khybnyy rezul'tat), insufficient number of tests performed and the use of tests only in the case of sufficient symptoms or contact with the infected or arrival from the "epicenters of infection" («Try symptomy»: Lyashko nazvav pidstavy dlya testuvannya na koronavirus).

As for the percentage of mortality to the total number of infected as of May 8, 2020, in Ukraine the figure is 2.54%, in Poland - 5.01%, the United States - 5.52%, Spain - 11.77%, Swe-

den - 12.34 %, Italy - 13.87%, in the UK - 14.8%, and in France - 19.08%. As of September 9, the number of deaths to the total number of infected is declining in a number of countries: in

Ukraine - 2.09%, in Poland - 3.01%, the United States - 3.03%, Spain - 5.89%, Sweden - 6.86 %, Italy - 12.85%, in the UK - 12.07%, and in France - 10.16% (data for all countries is in Table I).

**Table I.** State of infection in some countries

Country	Total population	The total number of infected (8 April 2020) / Percentage of the infected to the total population (8 April 2020)	The total number of infected (8 May 2020) / Percentage of the infected to the total population (8 May 2020)	The total number of infected (8 June 2020) / Percentage of the infected to the total population (8 June 2020)	The total number of infected (8 Juli 2020) / Percentage of the infected to the total population (8 Juli 2020)	The total number of infected (8 August 2020) / Percentage of the infected to the total population (8 August 2020)	The total number of infected (9 September 2020) / Percentage of the infected to the total population (9 September 2020)	Total deaths (9 September 2020) / The percentage of deaths from the total number of infected (9 September 2020)
USA	330 627 484	766128 / 0,23 %	1215571 / 0,37 %	1 915 712 / 0,58 %	2 923 432 / 0,88 %	4 836 930 / 1,46 %	6 144 138 / 1,86 %	186 663 / 3,03 %
Spain	46 754 778	140510 / 0,30 %	221447 / 0,47 %	241550 / 0,52 %	252 130 / 0,54 %	314 362 / 0,67 %	498 989 / 1,06 %	29 418 / 5,89 %
Italy	60 461 826	135586 / 0,22 %	215858 / 0,38 %	234998 / 0,39 %	241 956 / 0,40 %	249 756 / 0,41 %	276 338 / 0,45 %	35 534 / 12,85 %
Germany	83 783 942	103228 / 0,12 %	167300 / 0,19 %	184193 / 0,20 %	197 341 / 0,23 %	215 336 / 0,25 %	249 985 / 0,29 %	9 325 / 3,73 %
France	65 273 511	77 226 / 0,12 %	135980 / 0,20 %	150315 / 0,23 %	159 909 / 0,24 %	185 353 / 0,28 %	300 515 / 0,46 %	30 546 / 10,16 %
The United Kingdom	67 886 011	55246 / 0,08 %	206719 / 0,30 %	286198 / 0,42 %	286 353 / 0,42 %	309 009 / 0,45 %	344 168 / 0,51 %	41 549 / 12,07 %
Republic of Korea	51 260 707	10 384 / 0,02 %	10822 / 0,02 %	11 814 / 0,023 %	13 244 / 0,028 %	14 562 / 0,028 %	21 177 / 0,04 %	334 / 1,57 %
Sweden	10 099 265	7693 / 0,08 %	24623 / 0,23 %	44 730 / 0,44 %	73 344 / 0,72 %	82 323 / 0,81 %	84 985 / 0,82 %	5 835 / 6,86 %
Czechia	10 708 981	5 017 / 0,05 %	8031 / 0,07 %	9 628 / 0,08 %	12 685 / 0,11 %	18 060 / 0,16 %	27 752 / 0,26 %	431 / 1,55 %
Poland	37 846 611	4 848 / 0,01 %	15047 / 0,04 %	26 561 / 0,07 %	36 412 / 0,09 %	50 324 / 0,13 %	70 387 / 0,16 %	2 113 / 3,01 %
Romania	19 237 691	4417 / 0,02 %	14499 / 0,07 %	20 479 / 0,1 %	29 620 / 0,15 %	59 273 / 0,30 %	93 864 / 0,48 %	3 850 / 4,1 %
Ukraine	43 733 762	1668 / 0,003 %	14195 / 0,03 %	27 462 / 0,06 %	50 414 / 0,11 %	79 750 / 0,18 %	135 894 / 0,31 %	2 846 / 2,09 %



Hungary	9 660 351	895 / 0,01 %	3178 / 0,03 %	3 970 / 0,04 %	4 210 / 0,044 %	4 621 / 0,047 %	7 892 / 0,08 %	624 / 7,9 %
<b>Belarus</b>	<b>9 465 300</b>	<b>861 / 0,01 %</b>	<b>20168 / 0,21 %</b>	<b>48630 / 0,51 %</b>	<b>64 003 / 0,67 %</b>	<b>68 614 / 0,72 %</b>	<b>72 663 / 0,76 %</b>	<b>705 / 0,97 %</b>
Slovakia	5 459 642	598 / 0,01 %	1445 / 0,02 %	1 528 / 0,02 %	1 767 / 0,03 %	2 523 / 0,04 %	4 526 / 0,08 %	37 / 0,81 %

As of March 16, 2021, the statistics on the total number of infected are as follows: USA - 29 063 401; Spain - 3 183 704; Italy - 3 201 838; Germany - 2 569 245; France - 3 975 989; The United Kingdom - 4 253 824; Republic of Korea - 95 635; Sweden - 712 527; Czechia - 1 399 078; Poland - 1 906 632; Romania - 855 326; Ukraine - 1 460 756; Hungary - 516 490; Belarus - 301 328; Slovakia - 337 503 [18]. Mortality rates do not increase in the number of infected, thanks to developed approaches to treatment and vaccination.

This statistics is important because it can show the effectiveness of various measures in the fight against the COVID-19 pandemic. Statistics can be analyzed in the European Court of Human Rights in the event of an appeal against the legitimacy of measures to restrict human rights by the state through quarantine measures.

Kanstantsin Dzehtsiarou came to the correct conclusion that the European Court of Human Rights has a limited set of tools to influence the current emergency situation, so other political bodies of the Council of Europe can better respond to it (Kanstantsin Dzehtsiarou, 2020). At the same time, the Convention for the Protection of Human Rights and Fundamental Freedoms should not be underestimated, as the very possibility of carefully examining the actions of Council of Europe member states in the event of potential appeals to the ECtHR is already a precautionary factor.

From the standpoint of the analysis of the case law of the ECtHR, it can be concluded that the long duration of restrictive measures may be grounds for recognizing such measures disproportionate. Therefore, the position of a number of European states on the gradual lifting of restrictive measures is quite correct.

#### 4. Conclusions.

In the context of the fight against the COVID-19 pandemic, states relied on various types

of measures, which allowed us to distinguish three models: “hard” model (USA and most European countries and Ukraine), which provides for strict restrictive measures, quarantine, administrative and criminal liability for violations of anti-epidemic rules, closure of most facilities and maximum transfer to a remote system of work, education and obtaining of the number of services; the “minimum intervention” model (introduced in South Korea) and combines restrictive measures in case of emergency and maximum testing of the population for the presence of SARS-CoV-2 virus; the “maximum public awareness” model (in Sweden) does not provide for quarantine, but for a mass information and awareness campaign on the COVID-19 pandemic, ways of transmitting the virus and preventing infection.

The question of the proportionality of measures taken by the state to counter the COVID-19 pandemic may be considered by the ECtHR regardless of whether the state has made a declaration of derogation, and the establishment of a violation of a particular right will depend on the specific situation in the country, scope and length of applied measures, as well as their feasibility and effectiveness. In addition, measures implemented in the state that restrict human rights cannot be discriminatory (for example, against the Roma community, due to social or economic status, political beliefs or any other feature).

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## ЗАХОДИ ПРОТИ ДІЇ ПАНДЕМІЇ COVID-19 ТА ДОПУСТИМІСТЬ ОБМЕЖЕНЬ ПРАВ ЛЮДИНИ

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### **Анотація**

*Після оголошення пандемії спричиненої вірусом SARS-CoV-2 держави ЄС та Україна вдалися до різних заходів з метою попередження інфікування та захисту здоров'я громадян, зокрема: обов'язкова обсервація (більшість держав); застосування відповідальності за порушення правил карантину (як правило адміністративної,*



## HUMAN TRAFFICKING AND SURROGATE MOTHERHOOD: CHALLENGES

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### Summary

Owing to modern scientific advances prospective parents, among other opportunities, enjoy the opportunity, which has not been available before. It consists in giving birth to a child by using another woman's reproductive capacity when the situation seems hardly improvable.

The paper examines surrogate motherhood as one of the reproductive methods through the prism of human trafficking. It aims at studying and differentiating such legal phenomena as the sale of human beings and surrogate motherhood, which is provided primarily on a paid-for basis, whose consequences (transferring irrevocably a child from one person to another), are externally similar.

The comparative legal and formal legal methods have been employed to provide a general description of international experience in regulating surrogate motherhood. Examples of absolutely opposite ways of pursuing state policy on the legalization of this type of reproductive methods in foreign countries are suggested: from a complete ban to legislative approval and even further simplification of the applying procedure.

It has been proved that there is no connection between acknowledgement of the legality of this procedure and the geographical location of states, the level of their economic development, the specifics of the legal system, and the like. It has been stated that none of the countries can be considered a universal example of solving these issues.

Based on the example of Ukrainian legislation, the author suggests distinguishing between the objective aspect of selling human beings and surrogate motherhood, which is provided, first of all, for a fee. It is emphasized that due to the peculiarities of reproductive technologies only a child should be the object of trade, not a person's gametes, zygote, embryo or fetus. When a child is sold, in view of the objective aspect, the child is illegally transferred from one person to another. In legal surrogate motherhood agreements the object of the agreement concluded between the surrogate mother and the future parents is not the child, but the service related to embryo implantation, pregnancy and childbirth, *id est*, a long process.

Based on criminal law, there have been modelled the peculiarities of surrogate motherhood and its assessment used in determining the signs of human trafficking largely depending on genetic relationship between a child and customers (potential parents), as well as a child and a surrogate mother.

The mental element making the distinction between surrogacy and the trafficking of newborns is described. It is emphasized that qualifying as «trafficking in human beings» necessitates the proof of direct intent to unlawfully «transfer» a child, primarily in return for a fee.

It has been concluded that the legal regulation of surrogacy requires further improvement and consolidation at the legislative level. Investigators and prosecutors should investigate all the circumstances that were associated with the surrogacy methods applied in order to establish whether child trafficking occurred in each specific case.

**Key words:** human rights, reproductive rights, surrogate motherhood, surrogate mother, human trafficking, child trafficking

## 1. Introduction

Over the last decade reproductive technologies have become quite widespread. More and more childless people are referring to doctors for help to exercise their natural right to reproduction. Modern medicine offers several ways to solve the problem of childlessness, including in vitro fertilization. However, surrogacy remains the most controversial method.

This method allows separating the functions of a woman as a person who produces the female gamete and a person who gives birth to a child (Abdullah, 2019, p. 2).

The world community does not have common approaches to this type of reproductive technology. In some countries surrogacy is a criminal offense, in others it is a legal procedure. The study of foreign legislation testifies to the dynamism and diversity of legal regulation in this area. Some countries introduce additional stringent requirements for surrogacy, while others, on the contrary, simplify the grounds and conditions for its application.

Supporters and opponents of surrogacy often use the same facts, however they provide different arguments, trying to prove the need for liberalization or, on the contrary, the prohibition of surrogacy.

As a result, some call surrogacy a business or human trafficking, others a miracle or the last chance (Kopeltsiv-Levytska, 2019, p. 46). One of opponents' main arguments, in addition to the moral aspect, is that surrogacy is by nature trafficking in a newborn baby, which is recognized as one of the most serious crimes. For instance, F. M. Abdullah considers that pregnancy and giving birth to a child for another man or woman solely out of financial gain is immoral, illegal and insults the fundamental values of a democratic society such as the value of protecting women from exploitation and protecting the child born in this way (Abdullah, 2019, p. 4).

With this regard, it becomes necessary to study the relationship between human trafficking and surrogacy. This topic is of pressing concern to the post-Soviet countries, which have a fairly liberal legislative regulation on the use of reproductive technologies.

The purpose of the paper is to study and distinguish between such outwardly similar in consequences (irreversible transfer of the child from one person to another) legal phenomena as human trafficking and surrogacy which is primarily fee-based.

In addition, law enforcement agencies in several post-Soviet countries, including Georgia, Ukraine, and the Russian Federation, have recently launched criminal prosecutions for human trafficking of persons who organized or turned to surrogacy.

Hence, this study has not only a specific theoretical purpose, but also practical significance which consists in identifying and elucidating the differences between human trafficking and surrogacy.

In order to do this the author has resorted to the methodological potential available in legal science, first of all, comparative legal and formal legal methods, the methods of legal analysis and modelling.

Today there are many research papers that cover current issues of surrogacy and combating human trafficking. However, only in some of them the issue of human trafficking has been viewed through the prism of paid surrogacy, in particular, as a legal procedure. It has to be admitted that this topic was studied by such scholars as: I. Y. Veres, Ye. D. Kopeltsiv-Levytska, Fatma Mohamed Abdullah and others. However, their research is concerned with the substantiation of ranking paid surrogacy as child trafficking, rather than revealing the relationship between these acts which are outwardly similar.

## 2. The Legality of the Methods of Surrogate Motherhood

The analysis of the international regulation proves that there is no connection between acknowledging the legality of surrogacy and the geographical position of countries, the level of their economic development, the specifics of the legal system, etcetera. Each country attempts to develop its own approach to solving the issue of legalization of surrogacy, taking into account its historical experience, development conditions, ideology and morality which prevail in society. In some countries this reproductive method is being liberalized (first of all, by expanding the grounds and range of entities that can use it), while in others, on the contrary, attempts are being made to limit it (including the protection of their own citizens from surrogate tourism).

Notably, surrogacy is prohibited under the laws of Bulgaria, Spain, Italy, Latvia, Lithuania, Malta, Norway, Germany, Switzerland and other countries (Präg, Mills, 2017).

In the Swiss Confederation the use of surrogacy is regulated at the constitutional level (Article 119 of the Federal Constitution of the Swiss Confederation, 1999). This country provided for the prohibition of surrogacy in the Constitution (Checherskiy, 2019, p. 82).

In France surrogacy is prohibited under the decree of 1991 passed by the Constitutional Council of the French Republic in compliance with which any agreement, even if it does not provide for remuneration, according to which a woman agrees to conceive, bear and give birth to a child and then abandon it, contradicts public policy, the principle of inviolability of the human body and the individual's personal status. The same provisions are enshrined in the Law of the French Republic «On Respect for the Human Body» adopted on July 29, 1994 (The Law of the French Republic «On Respect for the Human Body», 1994). Art. 16-7 of the French Civil Code states: «Any agreement concluded for the purpose of conceiving or bearing a child in favor of a third party is void» (Article 16-7 of the French Civil Code, 1804). The violation of these norms is punishable by imprisonment and fines (Article 227-12 of the French Criminal Code, 1992).

To the countries where surrogacy is allowed and where it is widely practiced belong: some states of Australia and the United States,

Great Britain, Canada, Portugal, the Russian Federation, Uganda, Ukraine, etc.

For example, in Israel, surrogacy is allowed only in cases when the surrogate mother has no genetic relationship with the child. The agreement must be approved by the committee consisting of social workers, doctors and religious figures. Although some monetary compensation is allowed, legal agreements must be altruistic and non-profit. All parties to the agreement must be citizens of Israel (Chernysheva, 2012, p. 209).

In Canada in 2004 The Assisted Human Reproduction Act was passed. It aims at regulating the use of assisted reproductive technologies and conducting the relevant research. This act allows surrogacy, establishes liability for violations of the legislation in this area and so on (The Assisted Human Reproduction Act, 2004).

In some countries, surrogacy is allowed only on a gratuitous basis, i. e. the surrogate mother cannot receive a financial reward for carrying and giving birth to a child (Australia, Belgium, Great Britain, Greece, Canada, etc.). In other countries, paid surrogacy is legally allowed (Armenia, Belarus, Georgia, Kazakhstan, Cyprus, Kyrgyzstan, Ukraine, etc.).

Another difference between countries in view of access to surrogacy is that many of them require both partners to provide their gametes when using surrogates, while others require gametes of only one biological parent. Thus, in the first case, single people, as a rule, cannot have a child using this method.

Article 146 of the Code of the Republic of Kazakhstan «On Public Health and Healthcare System» declares that a woman or a man who is not married has the right to resort to assisted reproductive methods and technologies if her (his) informed consent to medical intervention is available (Article 146 of the Code of the Republic of Kazakhstan «On Public Health and Healthcare System»). However, governmental orders stipulate that only spouses have the right to surrogacy.

In the Russian Federation, a single woman has the right to make use of assisted reproductive technologies in case of availability of her voluntary informed consent to medical intervention (Article 55 of the Federal Law of the Russian Federation «On the Fundamentals of Protection of Public Health in the Russian Fed-



eration»). Thus, single men are excluded from the list of subjects who are entitled to exercise this right.

However, in accordance with Art. 12 of the Law of the Republic of Armenia «On Reproductive Health and Reproductive Rights», a person entitled to use assisted reproductive technologies may also be one of the biological parents (Article 12 of the Law of the Republic of Armenia «On Reproductive Health and Reproductive Rights», 2012).

In international practice, there appear more and more precedents of giving birth to a child by a surrogate mother, not only for a married couple, but also single ones, under certain conditions. These include the death of their loved one, after which the genetic material remained, and the deceased person's will to use it, the unwillingness of single men to marry at the same time having a natural need for reproduction, etc (Checherskiy, 2019, p. 284).

Thus, K. Zakharova from the Russian Federation used donor eggs, her late son's cryopreserved sperm and the method of surrogacy in order to become a grandmother. (Svitnev, 2009).

A completely different approach has been introduced at the international and national levels regarding human trafficking, which is considered illegal and strict legal liability is envisaged for it. The prohibition of trafficking in human beings, in particular children, is a worldwide practice and is enshrined both in international law, such as the Convention on the Rights of the Child and the Optional Protocol to it dated 1 January 2000, and in national legislation.

### **3. The Objective Aspect of the Distinction between Surrogate Motherhood and Human Trafficking Based on the Example of Ukrainian Legislation**

Legal regulation of surrogate motherhood in Ukraine is too general and needs significant improvement, as a result there are many loopholes and therefore opportunities for abuse.

Another situation occurs with regard to the regulation of combating human trafficking, where the legislation of Ukraine largely duplicates the requirements of the international acts and establishes criminal liability for this.

Notably, Art. 149 of the Criminal Code of Ukraine envisages liability for human trafficking, as well as the recruitment, transportation, transfer, harbouring or receipt of a person with the aim of exploitation through force, fraud, coercion or deception, blackmailing, material or other dependence of the victim, the victim's vulnerable condition, corruption of a third party that controls the victim in order to obtain consent for his / her exploitation.

Responsibility for recruiting, transporting, harbouring, transferring or receiving a minor or a juvenile arises regardless of whether such actions were committed with the use of coercion, abduction, deception, blackmail or the vulnerable condition of these persons or with the use of violence, or threat of violence, the use of official position, or by a person, on whom the victim was financially or otherwise dependent, or corruption of a third party that controls the victim with the purpose of obtaining his / her consent to exploiting a person (Article 149 of the Criminal Code of Ukraine, 2001).

Thus, in case of the trafficking of juveniles or minors, neither the form of the crime (recruitment, transportation, transfer, harbouring, transfer or receipt of a person) nor the method (using coercion, abduction, deception, blackmail, material or other dependence of the victim, his / her vulnerable condition, corruption of a third party who controls the victim), nor the purpose (the person's further exploitation) matters.

Similar provisions are found in the Law of Ukraine «On Combating Trafficking in Human Beings», which defines the trafficking of juveniles (minors) (The Law of Ukraine «On Combating Trafficking in Human Beings», 2011).

In view of the peculiarities of reproductive technologies, it must be emphasized that a child should be the object of such trade, not a person's gametes, zygote, embryo or fetus. If there are grounds, illegal agreements, when the latter are involved, may be qualified under other articles of criminal law.

Surrogacy necessitates the requirement lying in the fact that an agreement has to be concluded before implanting the embryo into a woman who assumes the responsibility of a surrogate mother.

Child trafficking involves the conclusion of an appropriate civil agreement regarding it

at any stage, including fertilization, pregnancy, carrying of pregnancy and birth. However, in point of fact, this agreement contradicts the content and principles of national and international law, in particular those specified in the above-mentioned Law of Ukraine, i. e. is illegal. These can be purchase and sale agreements, mine-related and gift agreements or any other similar act according to which the child is illegally transferred from one person to another (Melnyk, Khavroniuk, 2019, p. 451).

When a child is trafficked, with respect to the objective aspect an illegal irrevocable transfer of the child from one person to another occurs.

The lawful transfer of a child from one person to another is not a criminal offence. In legal surrogacy agreements, the child is legally transferred because the object of such an agreement, which has been concluded between the surrogate mother and the intended parents, is not the child, but services related to embryo implantation, pregnancy, childbirth, i. e. a long process.

Admittedly, it is necessary to distinguish between paying for surrogacy services and child trafficking with receiving a remuneration fee.

In the first case, the talk is about providing paid services by a surrogate mother and the baby must be given (returned) to its parents, where the transfer of the child is a logical legal completion of the entire medical procedure related to ensuring reproductive rights. In the second case, the talk is about the initially illegal transfer of a child from one person to another for a fee, where the main purpose is the illegal transfer of the child, and the purpose is to obtain unlawful gain.

It should be stressed that receiving remuneration for surrogacy services should also be distinguished from receiving compensation for these services, which are only outwardly similar in content. At the same time, Ukrainian legislation does not particularly focus on this distinction. On the other hand, in some countries (for example, the United Kingdom) there is only the possibility of compensation for the inconvenience and expense incurred, otherwise the surrogacy service is illegal and may entail liability.

In view of the above said, taking into account the objective aspect, the mere fact of paying for surrogacy services cannot indicate child trafficking.

#### **4. Genetic Relationship and Surrogate Motherhood**

Modern medical science distinguishes two types of surrogacy:

- full or gestational surrogacy – transferring a human embryo conceived by spouses, wife and a donor, donors to a surrogate mother's body. In this case, the surrogate mother has no genetic relationship with the child;

- partial or gender surrogacy implies genetic relation to the baby because the surrogate mother's egg is used.

Taking into account Article 123 of the Family Code of Ukraine, the method of surrogate motherhood provides for the transfer of a human embryo conceived by spouses (genetic parents) to a surrogate mother's body. Hence, Ukrainian legislation establishes only one type of surrogacy, i. e. full (gestational) surrogacy (Article 123 of the Family Code of Ukraine, 2002). This condition is provided by the vast majority of other national legislations.

It is reckoned that the prerequisite for legal paid surrogacy which does not contain any characteristics of human trafficking in view of the objective aspect, is the absence of genetic relationship between the child and the surrogate mother.

However, the evaluation of the actions of the surrogate mother, who was initially an egg donor, of other persons should be provided on the basis of all the circumstances of the case and does not exclude human trafficking.

The issue of obligatory genetic relationship between the child and the persons who resorted to the method of surrogacy requires a separate solution.

The ideal option is when both spouses are the biological parents of the unborn child. However, sometimes only one of the customers ordering this medical procedure has genetic relation with the child. Indeed, it is used by couples in which only the husband is fertile, single people who have used donor gametes, and so on.

Thus, in the absence of genetic relation between the child and both parents, there may be other types and combinations of artificial insemination, including the use of embryo or gamete donation, which in itself does not entail the illegality of surrogacy, refusal to acknowledge

parenthood and the automatic establishing of the fact of human trafficking.

An exception is the case when such a newborn child is «sold» by genetic parents (one of them) to other persons. However, in this case, the situation is similar to the usual illegal sale of a baby, irrespective of the method of conception.

The current Ukrainian legislation does not define a clear procedure for using surrogate motherhood for the birth of a child who is not genetically related to either parent.

From our perspective, the combination of surrogacy and the use of only donated gametes is in fact a «hidden form of adoption» and is not related to the exercise of one's natural right to reproduction. However, while agreeing to the fact that the application of the methods themselves is illegal, it cannot be asserted that there is undoubtedly «child trafficking».

So, if a person has resorted to these hybrid methods because of reluctance to adopt a child (inter alia, for preventing future risks of property claims which can be imposed the adopted child's relatives, or the removal of the child by his / her parents, or for other objective or subjective reasons (quite often it is used for the purpose of concealing his /her own infertility), however, for the purpose of parenthood, then the chance of proving particularly the case of child trafficking in court is minimal. Moreover, in this case there is no agreement on the transfer of one's own child to another person (that is, the trade itself) since the child formally does not belong to a surrogate mother (who has no genetic relationship), by whom a newborn baby is transferred under the relevant legal agreement.

It has to be underlined that there are cases when pregnant women sell their children, falsifying documents for surrogacy. In this case, such actions should be classified as human trafficking.

To exemplify this, there can be mentioned an indictment against a citizen on charges of trafficking minors which was referred to court by Kyiv Local Prosecution Office in February 2021. Participating in a surrogacy program, she, contrary to the terms of the agreement, knowing for sure that she is the biological mother of a newborn baby, in order to receive 15 thousand dollars illegally gave it to foreign customers who were unaware of the fraud and believed that the baby was genetically connected with them.

## **5. The Subjective Aspect of the Distinction between Surrogate Motherhood and Human Trafficking Based on the Example of Ukrainian legislation**

One of the main criteria in distinguishing between human trafficking and paid surrogacy is the subjective aspect.

The subjective aspect presupposes the presence of direct intent to illegally «alienate» the child, primarily for the sake of payment.

The offender must be aware that he is illegally transferring the child to third parties, including the fact of a fee-paying basis (for example, a surrogate mother realizes that she is a genetic mother, but sells it under a sham surrogacy agreement) or a surrogacy program is conducted with the purpose of further trafficking of the child (i. e. the birth of a child is not aimed at the emergence of parenthood in the situation with persons who have resorted to this method, primarily genetic parents, but at selling the child to persons who will involve him / her in the practice of begging, the use of the child's stem cells or organs, etc.

However, provided a person has used artificial insemination methods for the purpose of parenthood and paid for artificial insemination services, then, in our opinion, no human trafficking in these actions is identified.

Among the exceptions there are cases in which one of the genetic parents consciously renounces parenthood by transferring the child to another person for a fee. For example, a mother sells a newborn child, or one of the genetic parents refuses from a child and refuses to acknowledge her / his genetic parenthood in favor of another person for a certain fee. In this context, child trafficking occurs if the genetic mother (egg donor) when using surrogacy services deliberately received a payment not only for a fictitious marriage, but also for the «selling» her own child, i. e. a conscious act of trafficking in a newborn child.

It should be noted that no person, including a surrogate mother, officials who ensured the implementation of the surrogacy program, can be responsible for further actions of parents who made use of surrogacy, and their treatment of the child if such actions do not involve a common criminal intent to commit the crime.

## 6. Conclusions.

Currently, at the international level, there is no consensus regarding the legality of using the surrogacy methods and their correlation with such a particularly serious crime as child trafficking. Nevertheless, none of the countries can be a universal example of solving this problem.

Issues that arise in the field of commercial surrogacy in Ukraine and other countries, the existing abuses in it are a substantial reason to improve the system and not to lead to banning this medical procedure.

Paid surrogate motherhood, whether acknowledged or not by the state as a crime, should be distinguished from trafficking of humans, including children. In view of both objective and subjective aspects, surrogacy significantly differs from human trafficking, and therefore these components must be investigated by law enforcement bodies in each case to accurately qualify the committed act.

Within the criminal justice aspect, it is necessary to prove the fact of deliberate violation by the subjects participating in the program, of the procedure and grounds for surrogacy with the purpose of further trafficking of newborns.

Investigators and prosecutors should study all the circumstances connected with the surrogacy methods, which were used, in order to determine whether child trafficking has occurred in each particular case.

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## ТОРГІВЛЯ ЛЮДЬМИ ТА СУРОГАТНЕ МАТЕРИНСТВО: ПРОБЛЕМНІ ПИТАННЯ

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### Анотація

Сучасні наукові досягнення надали майбутнім батькам, серед іншого, можливість, яка не існувала до цього часу – народити дитину у майже безнадійній ситуації за допомогою використання репродуктивних можливостей сторонньої жінки.

У статті розглядається сурогатне материнство, як одна з репродуктивних методик, через призму торгівлі людиною. Її метою є дослідження та розмежування таких ззовні подібних за наслідками (у виді безповоротної передачі дитини від однієї особи до іншої) правових явищ, як торгівля людиною і сурогатне материнство, перш за все оплатне.

Із використанням порівняльно-правового та формально-юридичного методів надано загальну характеристику міжнародного досвіду регулювання сурогатного материнства. Наведено приклади абсолютно протилежної державної політики щодо легалізації цього виду репродуктивної методики у зарубіжних країнах: від повної заборони до законодавчого погодження та навіть подальшого спрощення процедури її застосування.

Доведено, що не спостерігається будь-якого зв'язку між визнанням легальності цієї процедури і географічним розташуванням держав, рівнем їх економічного розвитку, специфікою правової системи тощо. Констатовано, що жодна з країн не може бути універсальним прикладом вирішення цієї проблематики.

На прикладі українського законодавства автором запропоновано розмежування об'єктивної сторони торгівлі людиною і сурогатним материнством, у першу чергу оплатним. Підкреслено, що враховуючи особливості репродуктивних технологій об'єктом торгівлі має бути дитина, а не гамети особи, зигота, ембріон чи плід. При торгівлі дитиною з об'єктивної сторони відбувається незаконна безповоротна передача дитини від однієї особи до іншої. В законних угодах сурогатного материнства об'єктом договору, що укладається між сурогатною матір'ю і майбутніми батьками, є не дитина, а послуги, пов'язані з імплантацією ембріона, виношуванням та народженням дитини, тобто тривалий процес.

З погляду кримінального права змодельовано особливості сурогатного материнства та його оцінки при визначенні ознак торгівлі людьми залежно від генетичного споріднення між дитиною та замовниками (потенційними батьками), а також між дитиною і сурогатною матір'ю.

Надано характеристику суб'єктивній стороні, яка розмежує сурогатне материнство та торгівлю новонародженою дитиною. Наголошено, що для кваліфікації «торгівля людиною» необхідним є доведення прямого умислу на протиправне «відчуження» дитини, перш за все за оплату.

Зроблено висновок, що правове регулювання сурогатного материнства потребує подальшого удосконалення та закріплення саме на законодавчому рівні. Слідчі та прокурори повинні досліджувати всі обставини, що були пов'язані із застосованою методикою сурогатного материнства для того, щоб встановити чи мала місце торгівля дитиною у кожному конкретному випадку.

**Ключові слова:** права людини, репродуктивні права, право на репродуктивне відтворення, сурогатне материнство, сурогатна матір, торгівля людьми, торгівля дітьми

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## SECTION 2

# CONSTITUTIONALISM AS MODERN SCIENCE

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### ISSUES OF IMPLEMENTATION OF EQUALITY OF ARMS PRINCIPLE IN CASE OF DECLARING THE APPLIED LAW UNCONSTITUTIONAL

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#### Summary

The Article considers the issue of ensuring the constitutional principle of equality of litigants before the law and the court during review of the judgement in view of the exceptional circumstances after consideration of the case by the Constitutional Court. Based on the study of legal nature of such consequences of nullity of the law as *pro futuro*, *ex nunc*, *ex tunc*, the risks of violation of the constitutional right of a person to judicial protection shall be established. The *aim* of the Article is to detect the objective demonstration of the constitutional principle of equality of litigants before the law and the court. The *methods of the study*: system, dialectical, integrative, interdisciplinary and scientific methods applied to detect the interrelation between the constitutional principle of equality of arms and its practical demonstration in litigation process. The *main results of the study*. Two components affecting the efficiency of protection of such right have been established: future ef-

fect of the judgement of the Constitutional Court of Ukraine and impossibility to consider the application in view of exceptional circumstances if before appeal to the Constitutional Court of Ukraine a person's claim was dismissed in full under the applicable laws and was further declared unconstitutional by the Constitutional Court. The erroneous legal position of the supreme court in the system of the judiciary of Ukraine was proved in terms of the impossibility of initiating proceeding in exceptional circumstances after delivery of the judgement of the Constitutional Court of Ukraine due to the fact that the person's claim had previously been dismissed and such a judgement does not provide for its enforcement. This conclusion deprives a person of the right to a final trial at the national level in accordance with the procedure of applying to the court (Articles 8, 24, 55, paragraph 1 Part 2 of Article 129 of the Constitution of Ukraine). It is proposed to develop a special law establishing the grounds and procedure for compensation by the state of moral and financial damages caused by the law recognized as the unconstitutional one.

**Key words:** judicial proceedings, legal dispute, equality of arms, unconstitutionality of the law, exceptional circumstances.

## 1. Introduction

In our days every democratic state has an active demand of society to ensure effective protection of violated, unrecognized or disputed rights, freedoms or interests of individuals, rights and interests of legal entities, interests of the state (Bumcman, 1987).

For example, due to the 2016 constitutional changes related to the justice (section III of the Constitution) in Ukraine, the novelties happened in the section which enshrines the fundamental rights, freedoms and responsibilities of a man and citizen (section III of the Fundamental Law). Namely: the right of everyone to file a constitutional complaint with the Constitutional Court of Ukraine (hereinafter referred to as the "CCU") on the grounds established by the Constitution of Ukraine and in the manner prescribed thereby (Part 4 of Article 55). In its turn, Article 151-1 of the Constitution of Ukraine stipulates that the CCU shall resolve the issue on compliance of the Constitution of Ukraine (constitutionality) with the law of Ukraine upon the constitutional complaint of a person who considers *that the law of Ukraine applied in the final court judgment in his/her case contradicts the Constitution of Ukraine*. A constitutional complaint may be filed if all other domestic remedies have been exhausted. At the same time, Article 129 of the Fundamental Law of Ukraine (Section VIII) establishes that a judge administering justice is independent and guided by the rule of law, as well as enshrines a number of constitutional principles of court proceeding.

For the purposes of this article, the scientific interest is the constitutional principle of judicial proceeding – the equality of all litigants before the law and the court (cl. 1, Part 2 of Article 129 of the Constitution of Ukraine). This principle is important for revealing the issue of ensuring the effectiveness of judicial protection of a person at the national level in whose favour the judgment of the CCU was made, in case of his/her further application to the court in connection with the review of the court judgement in view of exceptional circumstances.

It comes to two key components of the effectiveness of protection of such a right: 1) whether the judgment of the CCU shall be applied *ex tunc* (retroactive effect) to the moment when the law applicable to the case has begun to violate the fundamental rights of a person; 2) and the issue of protection of a plaintiff's rights, if he/she applied to the CCU after the supreme court (or a court of appeal that makes the final judgment in the case) dismissed the claim. The second component requires additional clarifications regarding Ukraine, as the procedural codes of our state enshrine the rule that one of the grounds for review of court judgments in view of exceptional circumstances is the "established by the CCU unconstitutionality (constitutionality) of a law, another legal act or their separate provisions applied (not applied) by the court while considering the case, *if the court judgment has not yet been enforced*" (cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine; cl. 1 of Part 3 of Article 423 of the Civil

Procedure Code of Ukraine; cl. 1 of Part 3 of Article 320 of the Commercial Procedure Code of Ukraine). However, if the claim is dismissed, the court judgement is not enforceable in principle.

## 2. Constitutional Principle of Equality of Arms

Equality of all not only before the law (Article 24 of the Constitution of Ukraine) as a constitutional principle but also equality of all as litigants (a derivative manifestation of the comprehensive principle of equality) have been repeatedly considered by the CCU. Since within the framework of this article we consider the practical manifestation of the constitutional principle of equality of litigants before the law and the court, we shall focus on the official constitutional doctrine regarding the stated issue.

In particular, while considering cases the CCU repeatedly concluded that “equality and inadmissibility of discrimination against a person are not only constitutional principles of the national legal system of Ukraine but also fundamental values of the world community, as emphasized in international legal acts on rights and freedoms of a man and citizen, in particular in the International Covenant on Civil and Political Rights of 1966 (Articles 14, 26), the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Articles 14), Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Article 1) and the Universal Declaration of Human Rights of 1948 (Articles 1, 2, 7). The equality of all people in their rights and freedoms guaranteed by the Constitution of Ukraine means the need to provide them with equal legal opportunities of both material and procedural nature for realization of the rights and freedoms being the same in context and scope. In a state governed by the rule of law, applying to a court is a universal mechanism for protecting the rights, freedoms and legitimate interests of individuals and legal entities. The main principles of court proceeding are, in particular, legality, equality of all litigants before the law and the court, adversarial parties and freedom to provide a court with evidence and to prove their strength (cl. 1, 2, 4 of Part 3 of Article 129 of the Fundamental Law of Ukraine). Nobody may be restricted in the right of access to justice which

includes the ability of a person to initiate court proceeding and participate directly in the proceedings or be deprived of such a right (pp. 4–7 of cl. 2.2 of the substantiate part of Judgment of the Constitutional Court dated 12 April 2012 No. 9-пп/2012 (Judgment No. 9-пп/2012, 2012).

In another judgement, the CCU emphasized that “the principle of equality of all litigants before the law and the court provides guarantees of access to justice and the exercise of the right to judicial protection enshrined in Part 1 of Article 55 of the Constitution of Ukraine. This principle arose from the general principle of equality of citizens before the law as defined by Part 1 of Article 24 of the Fundamental Law of Ukraine and concerns, in particular, the field of court proceeding. Equality of all litigants before the law and the court provides for a single legal regime that ensures the exercise of their procedural rights. Justice in commercial courts is administered on the principles of equality of all litigants before the law and the court; court proceeding in commercial courts is conducted on the adversarial principles according to which the commercial court must create equal conditions and opportunities for the parties and other persons involved in the case to exercise their rights (Judgment No. 11-пп/2012, 2012). These citations are the most complete illustration of the CCU’s vision of the importance of the studied principle of court proceeding.

We state that this constitutional principle has continued its legislative enshrinement in all the procedural codes of Ukraine since the adoption of the Constitution of Ukraine (since 1996): cl. 7.2 of Article 2 of the Code of Administrative Judicial Procedure of Ukraine, Article 7 of the Commercial Procedure Code of Ukraine, Article 6 of the Civil Procedure Code of Ukraine.

At the same time, a modern novelty of the procedural codes became the review of judgements on the basis of exceptional circumstances after the CCU checked the compliance of the legislative rule with the Fundamental Law of Ukraine. We remind that a constitutional complaint is currently the most common claim filing with the CCU, and therefore it is not just legislative but a deeply doctrinal issue of effectively ensuring the constitutional principle of equality before the law and court that appeared for the first time in Ukraine, and it has currently declar-

ative nature in special cases which we shall review below.

### **3. Void and Null Law: (*pro futuro*), (*ex nunc*) or (*ex tunc*)**

Social relations always need to be arranged, in spite of their development and simultaneously constant changeability (Kolomiitcev, 2020). Such arrangement requires lawful conduct of litigants based on the law and constitutional legitimacy. The constitutional order is the core of the system of justice (Wet, 2006) and is a result of realization of constitutional legitimacy. In general, it comes to realization by all legal persons of the right under the rules of the Constitution, fulfilment by them of actions upon its grounds and for its implementation (Basiev, 2007; Narutto, 2018). As noted by Yu. V. Tkachenko, the stability of legislation and practice of its application has its expression in the steadiness of legal regulation of essentially important social relations, in the absence of fluctuation in the practice of considering and making decisions by authorised bodies in legal cases. The stability reveals itself as the steadiness of the current legislation, absence of sharp fluctuations in law-making policy, unchangeability that provides for the unity in understanding and applying legal rules (Tkachenko, 2010; Kolomiitcev, 2020).

We state that for properly implementing laws there are presumption of the Constitutional Law as one of significant components of presumption of the truth of law. Traditionally, the truth of legal act means true reflection by the act of real conditions, relations which require legal effect and correct legal assessment of such assessments. The presumption of the truth of a legal act includes presumption of constitutionality, presumption of legitimacy and validity of statute (a kind of synonymic categories), as well as presumption of legitimacy and good faith of the activity of participants of legal relations (Babaev, 1974).

All these elements are in organic interconnection between each other and, of course, shown themselves in industry-specific legislation. The presumption of constitutionality of a legal act (first, law) indirectly arises from the provisions of the Constitution and shown itself in substantive and legal procedural aspects. The specificity of the constitutional substance is that

only the body of the constitutional jurisdiction is the main means of both establishment and rebutment of the presumption of the constitutionality of the law. This is the Constitutional Court that is authorised to declare unconstitutionality of a legal act, and law is deemed constitutional until other is enshrined in a judgement of the Constitutional Court (Berestova and other, 2020).

In light of it, protection of the rights and freedoms of a man and citizen requires special form if a person in judicial proceeding for protection of the right emphasized that law applied in the case contradicted the Constitution. At the same time, the courts of different instances systematically applied it, in particular with mark that a court did not have any doubts about contradiction of that law to the Constitution until the Constitutional Court indicated the opposite in its decision. We'd like to axiomatically remind the thesis that the very court judgement but not arguments of Parties is the legal fact which impact on rights and obligations of a man and citizen in a certain disputable situation.

Recognition of the separate provisions or the whole law unconstitutional creates a number of legal consequences in addition to the fact of disqualification of a rule. And this again brings us back to the question: how to restore a violated right of a person who noted since the time of proceedings in the first court instance that the content of the law is constitutionally defective. In such a case, it should investigate the issue of regular or exceptional possibility of application of a judgement of the Constitutional Court of Ukraine back in time – until the moment of the beginning of violating such a right.

“For example, if the Federal Constitutional Court of Germany established unconstitutionality of a certain law, thus, it recognizes such a law void and null (see sentence 1 of § 78 of Law on Federal Constitutional Court of Germany)”, Dr Lars Brocker, the president of the Federal Constitutional Court of Germany, notes (Digest of Articles, 2020). “Void and null legal rule” means “general invalidity of a legal rule” from the outset (*ex tunc*). Therefore, law is usually unconstitutional from the moment of its promulgation. However, the Federal Constitutional Court is powered to define invalidity of law with its effect in the future (*pro futuro*) or since the moment of promul-



gation of its invalidity (*ex nunc*). As a rule, things are done in such a way so that “worse unconstitutional condition” will not occur in case of validity of a judgement *ex tunc* or in the event that due to it other persons can be deprived of legal position that is worthy of protection (for example, in the sphere of rendering social services). Under such an approach, a law-maker also get the possibility independently (of course, in the nearest future) and in compliance with determinations in the relevant judgement of the Federal Constitutional Court to adjust improprieties of the Constitution by adopting a new law. In other words, if recognition of law void and null is *pro futuro* або *ex nunc*, the relevant judgement of the Federal Constitutional Court will not contradict a judgement of competent judges who were governed the relevant law and judgements of whom already came into effort and force (Digest of articles, 2020).

In spite of the fact that Ukraine predominantly copied the model of German constitutional claim (it is only normative in Ukraine), the Constitution of Ukraine strictly stipulates that “laws, other acts or their separate provisions declared unconstitutional shall cease to be valid from the date of the CCU’s judgement on their unconstitutionality, unless otherwise established by the judgement itself, but not earlier than the date of its taking” (part 2 of Article 152 of the Constitution of Ukraine) (Constitution, 1996). This is the substantive legal component of the presumption of the constitutionality of a normative act in Ukraine: *ex nunc*, as a rule, (unless the CCU has postponed the loss of validity of the law) and *pro futuro*.

In this context, we cite the opinion of M.V. Savchin who points to the existence of another situation with the legal force of the judgements of the Constitutional Court to consider constitutional complaints inter partes what is related to the restoration of the violated right. There is ongoing legal relations since the moment of violation of human rights, due to which the court has an obligation to restore the violated subjective public right. In this situation, the force of the *ex tunc* decision imposes on the state a positive obligation to restore the subjective public right from the moment of its violation with the payment of fair compensation. If to say about something else in this case, it will be a denial of

the essential content of the right – the idea of a constitutional complaint as a means of protecting violated constitutional rights loses its significance. However, the main obstacle here is the wording of Article 152.2 of the Constitution (Digest of articles, 2020).

Thus, the presumption of the constitutionality of the law, the effect of the judgements of the CCU *ex nunc* and *pro futuro* under Part 2 of Article 152 of the Constitution of Ukraine is evidence that persons whose rights were violated by application of the law in the final court judgement, which was later declared unconstitutional, cannot expect fair satisfaction due to the application of the CCU’s judgement to them, because their right was violated before the CCU judgement. In this regard, the Supreme Court has already formed a legal position:

*“analysis of the rules of Section XII of the Constitution of Ukraine (“the Constitutional Court of Ukraine”) and the Law of Ukraine dated 13 July 2017 No. 2136-VIII “On the Constitutional Court of Ukraine” gives grounds to conclude that the CCU’s judgement has direct (prospective) effect in time and applies to those legal relations that continue or arose after its taking. If the legal relations are long-lasting and arose before the CCU’s judgement but continues to exist after its taking so they are subject to such a judgement of the CCU. That is, the CCU judgement applies to legal relations that arose after its taking, as well as to legal relations that arose before its taking but continue to exist (continue) after that. At the same time, the current legislation stipulates that the Constitutional Court of Ukraine may establish the procedure and terms of execution of the taken judgement directly in the text of its judgement. The established unconstitutionality (constitutionality) by the CCU of the law, other legal act or their separate provision applied (not applied) by a court in resolving a case is important, first of all, as a general decision which determines the legal position for resolving subsequent cases, and not as grounds for reconsideration of the case with retrospective application of the new legal position and thus change in the state of legal certainty already established by the final court judgement (p. 9.9 of the Commercial Court of Cassation within the Supreme Court dated 29 October 2019 in case No. 922/1391/18) (Judgment No. 4819/49/19, 2020)*

Concluding the above, the Supreme Court observes Part 2 of Article 152 of the Fundamental Law of Ukraine, however, avoids the issue of providing the constitutional guarantee of judicial protection of constitutional rights and freedoms of a man and citizen directly on the ground of the Constitution of Ukraine (Part 3 of Article 8) which is enshrined in the legal rule of the power of the rule of law what belongs to general principals. Since the persons who have justified the violation of their right by applying to them a constitutionally defective law and what was subsequently established by the CCU remain without any protection of the law. And also, in general, the significance of the constitutional complaint as a new legal instrument of protection of the constitutional right of the person is reduced.

#### **4. Review based on Exceptional Circumstances in Case of Claim Dismissal**

The clause “*if the court judgement has not yet been executed*” in cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine; cl. 1 of Part 3 of Article 423 of the Civil Procedure Code Ukraine; cl. 1 of Part 3 of Article 320 of the

Commercial Procedure Code of Ukraine is inherited from the previous Ukrainian procedural legislation if this condition was first enshrined and the unconstitutionality of the law established by the CCU was considered a newly discovered circumstance: cl. 5 of Part 2 of Article 245 of the Code of Administrative Judicial Procedure of Ukraine; cl. 5 of Part 2 of Article 112 of the Commercial Procedure Code of Ukraine; cl. 4 of Part 2 of Article 361 of the Civil Procedure Code of Ukraine; cl. 4 of Part 2 of Article 459 of the Criminal Procedure Code of Ukraine (procedural codes as amended until 2017).

The issue of admissibility of an application based on exceptional circumstances if the decision was not enforceable is related to legislative regulation. Therefore, it necessarily arises in the process of judicial interpretation else at the stage of initiating proceedings on exceptional grounds and now belongs to the functions of the Supreme Court but not to the CCU. Thus, the issue of accepting an application for consideration on exceptional grounds in a case concern-

ing a decision that was not enforceable was first identified in the Supreme Court as an exceptional legal problem (Court order No. 808/1628/18, 2020; Court order No. 808/1628/18, 2020). The Supreme Court finally formulated a legal opinion which in fact established discrimination against the person and on the grounds of lack of enforcement of the decision.

*“The Panel of Judges notes that the provisions of clause 1 of Part 5 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine contain an imperative provision that the unconstitutionality (constitutionality), established by the Constitutional Court of Ukraine, of a law, other legal act or their separate provision applied (not applied) by the court in resolving cases may be the ground for review of the decision on the basis of exceptional circumstances **only if such a court judgement has not yet been executed.**”*

*It should be noted that the phrase “not yet fulfilled” which is used in clause 1 of Part 5 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine does not provide for its multiple interpretation or multiple understanding, as well as “extended interpretation”... The said procedural rule has imperative nature, is clear and cannot be applied otherwise than provided by procedural law.*

...

*According to Part 2 of Article 152 of the Constitution of Ukraine, laws, other acts or their separate provisions that are declared unconstitutional shall cease to be valid from the date of the Constitutional Court’s judgement on their unconstitutionality, unless otherwise established by the judgement itself, but not earlier than the date of its taking. Similar provisions are contained in Article 91 of the Law of Ukraine “On the Constitutional Court of Ukraine” dated 13 July 2017 No. 2136-VIII.*

*According to the operative part of the Judgement of the Constitutional Court of Ukraine No. 1-p(II)/2019 dated 25 April 2019 in the case No. 3-14/2019 (402/19, 1737/19), the phrase “valid term”... contained in provisions of Part 3 of Article 59 of the Law of Ukraine “On the Status and Social Protection of Citizens Affected by the Chernobyl Accident” dated 28 February 1991 No. 796-XII declared unconstitutional and expired on 25 April 2019, as established by Article 91 of the Law*

of Ukraine “On Constitutional Court of Ukraine”, i.e. from the date of taking the Judgement by the Constitutional Court of Ukraine in the case No. 3-14/2019 (402/19, 1737/19) which is also directly established by this judgement.

The existence of the Judgement of the Constitutional Court of Ukraine No. 1- p(II)/2019 dated 25 April 2019 in the case No. 3-14/2019 (402/19, 1737/19) does not change the legal regulation of the disputed legal relationship and does not prove the fact that the court made the mistake in resolving the dispute, besides the provisions of this rule were in force and subject to application at the time of occurring the disputed legal relations and taking the decision by the court of first instance.

Taking into account the above provisions of the current legislation, as well as the dismissal of the claim by the decision of the Zaporizhzhia District Administrative Court dated 6 July 2018 (upheld by the Order of the Third Administrative Court of Appeal dated 7 November 2018) in the case No. 808/1628/18, concerning the review of which based on exceptional circumstances with the corresponding application of PERSON\_1, the panel of judges notes that the court judgement that came into force and by which the claim was dismissed cannot be considered unfulfilled according to the provisions of paragraph 1 of Part 5 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine, **because such a decision does not provide for its enforcement**”(-Judgment No. 808/1628/18, 2021).

We declare that by such an interpretation of the phrase “if the decision has not yet been executed”, in fact the Supreme Court deprived a person of the right to review the judgment on exceptional grounds and, as a result, deprived of the right to a final trial at the national level as the party to the litigation. We believe that the clause in cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine (similarly as in other procedural codes) that the decision is subject to review based on exceptional circumstances which “has not yet been executed”, concerns not decisions on dismissal of the claim, but those decisions that were enforceable and gave grounds for issuing writ of execution, the opening of enforcement proceedings, but the enforcement of the decision was not carried out for one or another reason.

Another interpretation narrows the content of cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial Procedure of Ukraine (and similar provisions of any other procedural code) and, as a consequence, – the content of the constitutional right of a person to review

a court judgement on the grounds of the unconstitutionality of the law applied in the final court judgement taken in the case of that person whose claim was rejected. This legal conclusion of the Supreme Court violates the constitutional principle of judicial proceedings – the equality of all litigants before the law and the court (cl. 1 of Part 2 of Article 129 of the Constitution of Ukraine).

Refusal to review a court judgement based on exceptional circumstances on the grounds that the Order of the Supreme Court in the case was not enforceable due to dismissal of a person`s claim – puts this person in a different (discriminatory) condition compared to a defendant (if he/she lost case but the decision was not executed) what violates the specified constitutional principle of court proceedings (cl. 2 of Part 2 of Article 129), will contradict Article 55 of the Fundamental Law of Ukraine which enshrines the constitutional right of everyone to judicial protection, as well as the general constitutional right of equality of all before the law (part 1 of Article 24 of the Constitution of Ukraine). In addition, the refusal of review directly violates the binding nature of the CCU’s decision: “Decisions and conclusions made by the Constitutional Court of Ukraine are binding, final and cannot be appealed” (Article 151-2 of the Constitution of Ukraine). It is in connection with the dismissal of a claim of a person, the constitutional right to judicial protection at the national level are usually exercised *in full* through applying to the Constitutional Court of Ukraine (part 4 of Article 55, Article 151 of the Constitution of Ukraine).

And if the CCU concludes that the law is unconstitutional, it enshrines it in the operative part of its judgement, thus the CCU promotes protection of the applicants’ rights at the national level. The practical realization of such a constitutional right to judicial protection at the national level is in the only possible actions of the complainant with a constitutional complaint (former plaintiff) – in his/her further going to the Supreme Court based on exceptional circum-



stances within the term defined by the Code of Administrative Judicial of Ukraine. Filing such an application is a conscientious exercise of the rights and obligations of a litigant and the active exercise of the right to a fair trial as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “Convention”).

This arises from the fact that the decision in such cases was not enforceable after its review by the Court of Cassation, and therefore contradictions to the constitutional rule concerning the binding nature of the court judgement to be enforceable stipulated by part 1 of Article 129-1 of the Fundamental Law of Ukraine *does not appeared*.

Moreover, the actions of these persons do not create grounds for violation of the constitutional order, for example, suspension of a court judgement during its execution, etc. Another interpretation of cl. 1 of Part 4 of Article 361 of the Code of Administrative Judicial of Ukraine (as well as similar provisions in other procedural codes) violates the constitutional right of a person to judicial protection, which remains illusory, despite the binding nature of the decision of the Constitutional Court of Ukraine, and contradicts Articles 6 and 13 of the Convention.

As prospects not for restoration, but for compensation for the violated constitutional right of a person, we can see development and adoption of a special law for the legislative development of the constitutional provision of Part 3 of Article 152 of the Constitution of Ukraine. According to this rule, “material or moral damage caused to individuals or legal entities by acts and actions declared unconstitutional shall be reimbursed by the state in accordance with the procedure established by law” (Constitution, 1996). This rule is unchanged and is effective from the date of entry into force of the Constitution of Ukraine – since 28 June 1996. However, unfortunately, all this time it does not work in practice, because after almost 14 years the state of Ukraine has not been able to pass a special law that would establish a procedure for compensation, in particular to plaintiffs in the cases illustrated above, for material and moral damages caused by the rules of laws that are declared unconstitutional. We declare the importance of a special law in this direction, because

the compensation will be at the expense of the state. Therefore, it is necessary to keep in mind the allocation of such funds to the State budget for the relevant calendar year, the order of undisputed write-off of funds for individuals and entities, the possibility of other options for fair satisfaction, etc.

## 5. Conclusion

Analysing the criteria and ways to protect the subjective rights and freedoms of a man and citizen which are actively requested by civil society, we have proved that the constitutional principle of equality of litigants before the law and the court is the key one. The implementation of this principle ensures effective judicial protection of everyone at the national level, in particular for a person in whose favour (or who is in an identical legal relations) the judgement of the Constitutional Court has been taken, if he/she further applies to the court in connection with the review of the court judgement on the grounds of exceptional circumstances. We have revealed two components affecting the effectiveness of the protection of this right: 1) the prospects or retroactivity of the effect of the CCU’s judgement; 2) the possibility of considering the application based on exceptional circumstances if, before applying to the CCU, the person’s claim was dismissed in full under the applicable law which was subsequently declared unconstitutional by the CCU.

We have demonstrated that the equality of all as litigants (a derivative manifestation of the comprehensive principle of equality) has been repeatedly considered by the CCU. Its legal position notes that no one has to be restricted in the right of access to justice which includes the ability of a person to initiate legal proceedings and participate directly in legal proceedings, or *deprived of such a right*. This constitutional principle has continued its legislative enshrinement in all procedural codes of Ukraine since the adoption of the Constitution of Ukraine (1996): cl. 7.2 of Article 2 of the Code of Administrative Judicial of Ukraine, Article 7 of the Commercial Procedure Code of Ukraine, Article 6 of the Code of Civil Procedure of Ukraine, as well as in the legal opinions of the Supreme Court.

The legal conclusion of the Supreme Court, according to which a court judgement cannot

be deemed an unexercised court judgement that came into force and by which the claim is dismissed because such a decision does not provide for its enforcement, and therefore the commencement of proceedings on the basis of exceptional circumstances is impossible, cannot be considered unenforced, in fact deprives a person of the right to a final trial at the national level as a litigant.

This legal conclusion of the Supreme Court violates the constitutional principle of judicial proceedings – the equality of all litigants before the law and the court. We have proved that the clause “*if the decision has not yet been exercised*” concerns not decisions on dismissing the claim, but those decisions that were enforceable and gave grounds for issuing a writ of execution, commencement of enforcement proceedings but the decision has not been executed for one or another reason. Another interpretation narrows the content of a person’s constitutional right to review a court judgement on the basis of unconstitutionality of the law applied in the final judgment in that person’s case if the claim was dismissed.

Refusal to review the court judgement based on exceptional circumstances on the grounds that the judgement of the Supreme Court in the case was not enforceable in connection with dismissal of a person’s claim – puts this person in a different (discriminatory) condition compared to a defendant (if the latter lost case but the decision did not be executed) what violates the specified *constitutional* principle of court proceeding (cl. 2 of Part 2 of Article 129). This contradicts Article 55 of the Fundamental Law of Ukraine which enshrines *the constitutional right of everyone to judicial protection*, as well as the general constitutional *right of equality of all before the law* (Part 1 of Article 24 of the Constitution of Ukraine). Cumulatively, this also *contradicts Articles 6 and 13 of the Convention*.

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## ПРОБЛЕМИ РЕАЛІЗАЦІЇ ПРИНЦИПУ РІВНОСТІ СТОРІН СУДОВОГО СПОРУ У РАЗІ ВИЗНАННЯ ЗАСТОСОВАНОГО ЗАКОНУ НЕКОНСТИТУЦІЙНИМ

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### Анотація

У статті розглядається проблема забезпечення конституційної засади рівності сторін перед законом і судом під час перегляду судового рішення за виключними обставинами після розгляду справи Конституційним Судом. На підставі дослідження правової природи застосування наслідків нікчемності закону: (*pro futuro*), (*ex tunc*), (*ex tunc*), встановлюються ризики порушення конституційного права особи на судовий захист. Метою статті є розкриття об'єктивного прояву конституційної засади рівності сторін судового спору перед законом і судом. Методи дослідження: системний метод, діалектичний, інтегративний, міжгалузевий методи нау-



## COLLISIONS IN LOCAL LAWMAKING

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### Summary

The study is devoted to clarifying the problem of existing collisions in local lawmaking, which allowed to substantiate the common understanding of this problem, as well as to identify new theoretical and applied conclusions and positions related to the need to resolve collisions in local lawmaking, their specifics and special characteristics. It is established that the country has adopted and operates a large number of regulations, many of which contradict each other, have internal inconsistencies and inconsistencies. Legal science and practice face the task of in-depth analysis of the causes of municipal legal collisions, finding ways to prevent and resolve them. It is pointed out that the emergence and increasing severity of conflicts in local lawmaking in most cases due to incomplete legal regulation of public relations, violation of the rules of legal technique in the adoption of local acts, insufficiently effective ways to prevent and resolve the latter. In addition, it is established that the method of settling and resolving local conflicts through the prism of legislative establishment of the priority of application of the norm and act is the most clear and effective.

In the course of the research the systematic analysis of views on the collisions in law in general is carried out, the basic signs of the conflict in local law-making, its place among the specified categories in the plane are defined; analysis of the process of evolution of the social contradiction into a legal one with the subsequent transformation into a collision and a gap; legal conflict is defined as a subjective-objective phenomenon of legal reality. Among the existing large number of classifications of legal conflicts are local-legal, which are legal contradictions that arise due to subjective and objective reasons and errors in the exercise of powers to resolve the population directly and (or) through local governments, local issues, which is manifested in the adoption of regulations of local governments and their officials. Based on the analysis, the characteristic features of local-legal conflict are determined, which are detailed by the specified provisions on the connection of partial and general, manifestation in various forms and types, depending on the specifics of causes and solutions, local self-government issues of local significance and the emergence of the implementation of powers and the adoption of relevant municipal legal acts of local governments and their officials, with its own specific set of elements of the resolution mechanism.

**Key words:** conflict in law, legal contradiction, local-legal collision, mechanism for resolving local collisions, local act, local rule-making.

## 1. Introduction

No matter how perfect the modern legislation with a high degree of regulation of public relations, it still from time to time there are contradictions and inaccuracies, which call the term «collision». Recently, the problem of presence of the latter has become important in local acts during the implementation of local lawmaking. Appearing local legal collisions are marked by their severity and lead to uncertainty and inconsistency in the regulation of social relations of local importance. The growing severity of collisions in local acts is due to a number of reasons, including incomplete legal regulation of public relations, and violation of the rules of legal technique in the adoption of relevant acts, and the lack of effective ways to prevent such. All these determine the need to analyze the causes of collisions in local acts, finding out the ways to prevent and resolve them.

The current method of resolving local collisions by establishing norms in the legislation that determine the conditions of application of the act in case of contradictory regulation of the same social relations, unfortunately, was not properly reflected in the law-making process. Therefore, due to the need to develop general and special conflict procedures for the detection and resolution of local collisions this area of research is particularly relevant. The purpose of the research is to carry out constitutional and legal analysis of collisions in local lawmaking, their place among other legal phenomena, to study the causes of their occurrence, in particular those that are the most typical of the local act, as well as to identify effective elements of their resolution mechanism. their prevention, detection and full-fledged overcoming. The purpose of the study is achieved by solving the following tasks: the study of the concept of legal collision, its features and characteristics; identification of collision factors in local lawmaking; define the concept of local-legal collision, reveal its main features and specific features; describe the basic principles of conflict resolution in local lawmaking.

The methodological basis of the research were general methods of scientific knowledge, namely dialectical, analysis and synthesis, structural-logical, logical-semantic and formal-logical. Besides, the study is characterized by the methods used in legal science: comparative law

and formal dogmatic. Thanks to the dialectical method it was possible to study the nature of legal collision as a legal phenomenon, to determine its main features and specific features. The dialectical method was widely used to determine the general rules of prevention, avoidance and elimination of conflicts in local lawmaking. The logical-semantic method is used to deepen the general conceptual and definitive apparatus.

The degree of scientific development of the topic. In the science of constitutional and municipal law, the problem of legal collisions was regarded to only in a theoretical and constitutional context. At the general theoretical level, legal collisions were considered by: A.M. Kolodii, O.Yu. Buiakov, V.V. Denysenko, M.M. Korkunov, L.A. Morozova, I.A. Pokrovskiy, V.I. Savin, S.S. Alekseev, V.S. Nerseiants, I.M. Starodubtseva, Ye.V. Sukhov, N.I. Matuzov, O.F. Skakun, S.V. Bobrovnyk, O.V. Moskaliuk, Yu.M. By-saha, O.Ya. Rohach, Ya.O. Berzaniuk. The study of contradictions in law, legal conflicts, as well as collisions in laws were examined by the following scholars: V.H. Kartashov, O.V. Boikov, M.I. Brun, M.M. Varlomova, M.O. Baimuratov, N.A. Vlasenko, O.V. Dmytriiev, V.N. Kudriavtsev, O.V. Batanov, V.L. Fedorenko, V.I. Bordeniuk, P.M. Liubchenko, H.V. Padalko, I.V. Drobush, A.A. Tile, S.V. Bobrovnyk, O.V. Skrypniuk, N.V. Mishyna, O.V. Sovhyria, Yu.A. Tykhomyrov, Yu.S. Semshuchenko, M.I. Koziubra, etc.

## 2. Presenting main material.

Defining local collision as a contradiction in the relations appearing during the exercise by the territorial community of its right to resolve issues of local importance both independently and through local authorities, as well as in their interaction with public authorities, it should be noted that the latter are extremely heterogeneous by their structure. The most significant and valuable of them are those that arise between local legal and (or) law enforcement acts. This provision is explained by the fact that the contradictions that arise on the basis of mutually exclusive regulations and law enforcement local legal acts are a prerequisite for the emergence of new social contradictions of local importance, strengthen modern relatively stable social relations and lead to violations of legal regulation in general.



In order to be able to fully respond to the state of affairs with the presence of contradictions, it is necessary to reasonably identify the causes and main factors that cause contradictions and instability of social relations in the state. It is a well-known fact that contradictions in law act only as a part of social contradictions, but are the most significant and significant part of these contradictions. This is due to the influence that has the right to develop social relations.

Defining contradictions in normative-legal acts as contradictions in the public relations regulated by norms of law (Bobrovnyk, 2012, p.35), it should be said that they are extremely heterogeneous in their structure. The most significant and significant contradictions in law are legal conflicts - contradictions that arise between legal and (or) law enforcement acts (Bobrovnik, 2012, p. 40). This provision is explained by the fact that contradictions arising on the basis of mutually exclusive regulations and law enforcement acts are in themselves a prerequisite for the emergence of new social contradictions that exacerbate and reinforce the instability of social relations (Zaiets, 2005, p. 88). Due to the urgent need to create an effective legal mechanism to prevent and overcome local legal conflicts, it is necessary to study carefully the causes and preconditions of contradictions in law to understand not only the consequences but also the very basis that caused to these legal contradictions. At the same time to create a real mechanism for overcoming local legal conflicts it is necessary, first of all, to create a regulatory framework that allows to resolve legal conflicts within the legal field (Lenher, 2017, p. 28).

To create a regime to prevent local legal conflicts the principle of ensuring the supremacy of the constitution and the law, observance of legal priorities, inevitability of responsibility for violation of the rule of law, widespread use of procedures for reaching agreement and social harmony and the formation of a high legal culture play an important role.

During the research it was identified that in order to maintain a single coherent legal system it is necessary to create clear legal mechanisms governing the overcoming legal contradictions. The creation of these mechanisms is a complex

and multifaceted problem that cannot be clarified without studying, first of all, the causes of these contradictions as phenomena of legal reality.

The study identified that in order to maintain a single, integrated legal system, it is necessary to create clear legal mechanisms governing the overcoming of legal contradictions. The creation of these mechanisms is a complex and multifaceted problem that cannot be clarified without studying, first of all, the causes of these contradictions, as phenomena of legal reality.

At the current stage of legislative development there is a large number of legal acts, as well as actively developing local lawmaking. Most often in the process of lawmaking and law enforcement there are legal conflicts. They are contradictions between legal norms, between legal acts (Koziubra, 2012, p. 33).

Numerous conflicts of legal acts indicate broken links, especially within the system of legislation which indicates the problems of its development and effectiveness.

The causes of legal conflicts are laid both in the law-making process and in the law enforcement activities. Currently, the prevailing reasons are caused by shortcomings in the application of legal rules, methods, techniques which leads to numerous local collisions. In turn, as practice shows, the adoption of a large number of regulations leads to frequent changes to them which contributes to legal inconsistencies.

Most often, the proper interaction of public authorities with each other, as well as between public and local authorities is complicated by emerging legal collisions in the field of delimitation of their competence. First of all, a complete and detailed analysis of the causes of local legal collisions allows you to apply correctly one or another way to resolve these contradictions.

General rules for resolving legal collisions are important in resolving local legal conflicts. They are that in case of contradiction of normative-legal acts of different legal force, the act having higher legal force is applied (Lysiutkyn, 2001, p. 75); in case of contradiction between general and special normative legal acts the special normative legal act is applied; in case of contradiction between the normative legal act adopted earlier and the normative legal act adopted later, the normative legal act adopted

later shall apply on the same issue; laws and other legal acts should not contradict the Basic Law of the state (Constitutional Court Decision, 2009). General rules for resolving legal collisions play an important role in overcoming and resolving them.

Currently, the legislation needs to resolve legal collisions in a timely manner. Overcoming and eliminating local legal collisions is achieved through effective ways to resolve the latter. Ways to resolve local legal conflicts are aimed at identifying, overcoming and eliminating the latter. Monitoring is very important as the way to identify legal collisions in the law-making process and in law enforcement activities (Shemshuchenko, 1996, p. 10). Such monitoring functions as observation, collection, study, analysis of legal acts, drawing up plans and programs of normative design activities, legal forecasts, allow timely detection of contradictions (inconsistencies) between legal acts and apply the most effective ways to resolve them.

Legal conflicts can be detected by maintaining a register of regulations.

The prevention is aimed to debar legal collisions and, in our opinion, includes conducting a preliminary legal examination of regulations and their coordination; drawing up plans and programs of bills, legal forecasts, etc.

With the help of effective ways to resolve all possible legal collisions in public law their timely overcoming is ensured. The latter consists in the existence of conflict rules that establish: the procedure for applying legal acts and norms in case of their inconsistency; conciliation procedures; temporary or special regimes; appeals against regulations in courts of general and special jurisdiction.

The nature of the development of the legal system today has objectively determined the development of collision of laws, which primarily contributes to the resolution of legal collisions. The law of collision is a complex legal institution that combines the rules of different branches of law (constitutional, administrative, financial, municipal, etc.), performs a function aimed at streamlining the legal system to overcome legal conflicts, providing ways to prevent and resolve them. Ensuring the hierarchy of regulations, legal monitoring, widespread use of conciliation procedures, the creation and application of con-

flikt rules - these are the main guidelines for the development of legislation. In turn, the active and comprehensive use of methods aimed at preventing, detecting, overcoming and eliminating legal conflicts, will maintain the stability of the legal system of the country. The legal mechanism for resolving legal collisions is the system of interconnected special legal means by which legal influence on legal conflicts is exercised in order to resolve them. Elements of the mechanism for resolving legal collisions in the field of local lawmaking are the principles of conflict resolution, procedures for their prevention and resolution. The principles of resolving legal collisions in the field of local lawmaking are the basic principles that determine the resolution of contradictions in the legal system that arise when the population resolves issues directly and (or) through local governments.

Legal collisions in the field of local lawmaking have the following features:

1) dependence on the legal system of the country and, accordingly, to the legislative regulation of issues of local importance;

2) the sphere of public relations in which legal collisions arise – the issues of local importance and state powers delegated to local authorities;

3) most often legal collisions arise in the regulation of the following typical issues: setting tariffs for various services, land management, municipal land control, participation in the prevention and elimination of the consequences of emergencies, ownership, use and disposal of municipal property.

Legal collisions in the field of local lawmaking are divided into groups: legal collisions in lawmaking (in local legal acts) and legal collisions in law enforcement (between elements of the legal system relating to the activities of local authorities and arise in resolving issues of local importance) (Rybikova, 2008, p. 75).

The main patterns of legal collisions in the field of local lawmaking are:

1) the absence of legally enshrined in regulations strategy and forecast of socio-economic development of the relevant territorial communities and administrative-territorial unit;

2) disregard to some extent the specifics of a particular administrative-territorial unit in the adoption of regulations;

3) insufficient development of the mechanism of interaction between state authorities and local authorities;

4) dependence of legal conflicts on the qualification of subjects at the level of local self-government (exceeding the powers of local self-government bodies, violation of the rules of legal technique).

The institute of resolving local-legal collisions has features that are inherent in complex inter-sectoral institutions (homogeneity of factual content, legal unity (complexity) of norms of different branches of law, allocation of sub-institutions in the structure of the institute).

Legal relations that arise in the process of resolving legal collisions in the field of local lawmaking are a special type of social relations. They are characterized by features that distinguish them from other legal relations, and have a special purpose: to prevent and resolve inconsistencies in the legal system that arise when the population resolves directly and (or) through local authorities issues of local importance.

The content of the mechanism for resolving local legal collisions is the rights and responsibilities of the subjects of legal relations, which are implemented in law enforcement activities (Lenher, 2017, p. 24). The powers of the subjects of legal relations are different. Some of them have broad rights to identify and resolve legal conflicts in the field of local lawmaking, while the activities of others - aimed only at resolving collisions, others - have only the right to go to court to resolve legal collisions in local acts.

The content of the mechanism for resolving collisions in the field of local lawmaking includes methods of identifying and resolving collisions, based on the respective powers of state and local authorities.

Based on a theoretical study of legal regulation and legal relations that arise in resolving legal collisions in the field of local lawmaking, the ways to improve legislation and law enforcement are made.

The following points are offered to improve the legal institution of resolving legal collisions in the field of local lawmaking. Firstly, to enshrine in law the temporal collisional principle and the principle of priority of authority. The temporal collisional principle establishes the priority of a legal norm adopted later, that is in case of con-

flict between legal norms (or acts) that have the same legal force, but adopted at different times, the norm adopted later has priority.

When conducting a legal examination, take into account that the main signs of violations of the local legal act of legislation are: a) the lack of legal grounds necessary for the issuance of a local act; b) incorrect choice of the law applied at adoption of the local act, issue of the local act on execution of the canceled law; c) adoption of an act by a body within whose competence it is not included, or publication in excess of the powers granted to this body; d) violation of the procedure for adoption and entry into force of a local act.

To prevent legal collisions in the field of local lawmaking, it is recommended to use coordination more widely as coordination of public authorities at different levels (decisions and actions, action plans, forms of training of civil and municipal officials).

Implementation of the above proposals to improve legislation and law enforcement will prevent local legal conflicts, increase the effectiveness of the legal mechanism for resolving legal collisions, develop cooperation between public authorities at various levels.

### **3. Ways to resolve local conflicts.**

Methods of resolving legal conflicts that arise between legal acts can be considered appropriate such as the interpretation of law. In turn, interpretation is a complex process, as a result of which an accurate and complete definition of the content of the provision enshrined in the legal act is given. The process of interpretation is that the subject who interprets, first realizes the content of the legal act for himself, determines the direction of its activities, and then in order to uniformly understand and apply the legal act explains its meaning and content to other stakeholders. Such an explanation objectifies the results of the clarification. Objectification-related objectification finds its expression in writing in the form of an official document, legal act, or orally in the form of advice or recommendation.

Prevention - used at the stage of preparation, adoption and implementation of laws. Preventive measures for conflicts: 1) forecasting and planning of rule-making activities; 2) im-

provement of legislative technique; 3) conducting legal examination of draft regulations (coordinating them with the system of existing acts); 4) systematization of legislation.

Elimination - complete release from conflicts in the process of legislative activity, their elimination. Ways to eliminate conflicts: 1) cancellation of one (or several) conflict acts; 2) making changes to the legal act; 3) adoption of a new norm (or normative legal act); 4) judicial review (recognition by a court - the Constitutional Court and administrative courts - of a normative act as not corresponding to an act of higher legal force).

Overcoming - temporary resolution of conflicts with the application of a certain legal norm, but without the final removal of contradictions between them (the conflict between the norms does not disappear). Ways to overcome conflicts: 1) the use of conflict rules (rules-arbitrators); 2) interpretation of legislative acts, especially when the choice between norms cannot be made on the basis of conflicting norms; 3) application of general rules for overcoming conflicts: temporal (temporal), hierarchical (subordination), semantic, mixed, types of conflicts in legislation and general rules for overcoming them.

Local conflicts are resolved through interpretive activities. Thus, bringing clarity to the content of the interpreted norm, the act of interpretation thus resolves the legal conflict in the understanding of law, pointing to the only correct version of its understanding and appropriate application. A special role in the process of overcoming legal conflicts through the interpretation of the rule of law belongs to the Constitutional Court of Ukraine. The specificity of constitutional proceedings as a means of resolving legal conflicts is that, eliminating conflict rules, the body of interpretation does not create an independent rule of law. In our opinion, the interpretation of a normative legal act is not a process of creating independent norms, and the provisions that arise during the interpretation are inseparable from the norms of the Basic Law and other acts, we can say that they are a kind of continuation. The resolution of a legal conflict occurs by depriving a norm recognized as unconstitutional of legal force. This provision is enshrined in the Constitution of Ukraine.

However, it should be noted that, as a way of overcoming a legal conflict, interpretation does not guarantee a complete resolution of the contradictions.

Even in the Constitutional Court, which is called upon to interpret the relevant legal norms and acts, there is no unity of opinion, and some of its judges formally declare their special position on certain issues. Thus, there is inevitably a subjective point in the interpretation of law.

Legal conflicts can also be resolved through the adoption of a «new» act instead of a contradictory one, or the abolition of one of the contradictory ones.

For example, you can appeal against legal acts of public authorities by applying to the body or official who has the right to cancel or suspend the issued act.

In contrast to the repeal of a legal act, the suspension of a legal act provides for the need to apply to the court of the body or official who suspended the act, in order to definitively determine the fate of this legal act.

An effective way to eliminate local conflicts can also be considered to make changes or clarifications or additions to the legal act. Currently, there is a trend of frequent and large-scale changes in legislation on the separation of powers between public authorities and local governments. It should be noted that amendments to the laws on amendments become a permanent legislative practice, which significantly complicates law enforcement practice.

#### **4. Conclusions.**

The causes of legal conflicts are laid both in the law-making process and in law enforcement activities. Currently, the prevailing reasons are caused by shortcomings in the application of rules, methods, techniques of legal techniques, which leads to numerous local conflicts. In turn, as practice shows, the adoption of a large number of regulations leads to frequent changes in them, which contributes to legal inconsistencies. Most often, the proper interaction of public authorities with each other, as well as between public authorities and local governments is complicated by emerging legal conflicts in the field of delimitation of their competence. First of all, a complete and detailed analysis of the causes of legal conflicts in local lawmaking allows you to



correctly apply one or another way of resolving these contradictions.

The general rules for resolving legal conflicts are important in resolving local conflicts. They consist in the fact that: in case of contradiction of normative-legal acts of different legal force, the act having higher legal force is applied; in case of contradiction between general and special normative legal acts the special normative legal act is applied; in case of contradiction between the normative legal act adopted earlier and the normative legal act adopted later, the normative legal act adopted later shall apply on the same issue; laws and other legal acts must not contradict the Constitution. General rules for resolving local conflicts play an important role in overcoming and resolving them.

Currently, the legislation needs to resolve legal conflicts in a timely manner. Overcoming and eliminating local collisions is achieved through effective ways to resolve such. Ways to resolve local conflicts are aimed at identifying, overcoming and eliminating the latter.

Monitoring is of particular importance as a way to identify legal conflicts in the process of local lawmaking and law enforcement. Such monitoring functions as observation, collection, study, analysis of legal acts, drawing up plans and programs of normative design activities, legal forecasts, allow timely detection of contradictions (inconsistencies) between legal acts and apply the most effective ways to resolve them.

Also in conclusion, it should be noted that more attention should be paid to the prevention of legal conflicts in local lawmaking. Prevention is aimed at preventing legal conflicts and, in our opinion, includes: conducting a preliminary legal examination of regulations and their coordination; drawing up plans and programs of bills, legal forecasts, etc.

With the help of effective ways to resolve all possible legal conflicts in public law, their timely overcoming is ensured. The latter consists in the existence of conflict rules that establish: the procedure for applying legal acts and norms in case of their inconsistency; conciliation procedures; temporary or special regimes; appeals against regulations in courts of general and special jurisdiction.

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## КОЛІЗІЇ В ЛОКАЛЬНІЙ ПРАВОТВОРЧОСТІ

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### Анотація

Дослідження присвячене з'ясуванню проблеми існування колізій в локальній правотворчості, що дало змогу обґрунтувати єдине розуміння вказаної проблеми, а також виокремити нові теоретичні та прикладні ви-



## THE CONCEPT AND CONTENT OF THE CONSTITUTIONAL PRINCIPLE OF JUSTICE

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### Summary

The purpose of the article is to study the concept and content of the constitutional principle of justice, its impact on constitutional relations, identifying problems that arose during the implementation of this principle during quarantine restrictions due to the pandemic of COVID-19.

This goal was achieved through the use of such methods as analysis of comparative law and formal law method.

The study found that the principle of justice, although not enshrined in the Basic Law of Ukraine, but it goes through the Constitution of Ukraine and procedural codes. The problematic issue is that there is no legislative definition of «justice». The practice of the Constitutional Court of Ukraine on the application of the principle of justice in its decisions is analyzed. It is substantiated that justice is a concept much broader than law and is a criterion for the legitimation of state power.

The problems of realization of the constitutional principle of justice are investigated. It was found that the principles of law, which are enshrined in the Constitution of Ukraine and current legislation of Ukraine, are not properly implemented in our country. The reason for this is the mentality of Ukrainians, which is characterized by low legal and political culture, violation of the law, distrust to the authorities, devaluation of moral and spiritual values. On the part of officials, it is a misuse of office positions.

It is justified that justice requires equal application of the law for all. However, everyone has his/her own understanding and vision of justice. This led to problems during the coronavirus pandemic. Violations such as the violation of the constitutional right to education have been identified, namely distance learning leads to a violation of the principles of justice and equality. Restrictions on small and medium-sized businesses during the COVID-19 pandemic discriminated against entrepreneurs compared to large businesses.

As a result of the study, it was concluded that justice is a legal value and a fundamental principle of law, which permeates both the Constitution of Ukraine and current legislation. The realization of justice can be done only by observing the law. In Ukraine, it is quite difficult to implement this principle, because the laws are often unfair. During the quarantine restrictions, violations of constitutional human rights were revealed. Overcoming corruption and raising the legal culture and legal awareness of Ukrainians should be a necessary step for the effective implementation of the principle of justice.

**Key words:** justice, the Constitutional Court of Ukraine, law, legal value, principle of law, pandemic COVID-19, Constitution of Ukraine.

## 1. Introduction

The principle of justice is a fundamental principle in the constitutional law of Ukraine, which permeates all spheres of public life. In connection with Ukraine's desire to become a full member of the EU and NATO, the study of the essence of this fundamental principle is a topical issue today. The above topics have been studied by many constitutional scholars, such as O. Golovchenko, M. Kozyubra, A. Petryshyn, S. Pogrebnyak, P. Rabinovych, M. Savchyn, Y. Todyka and others. However, in our opinion, this issue is not sufficiently studied in view of the pandemic of the coronavirus COVID-19, which has made its adjustments. It has affected the lives of the whole world, which has changed significantly during the pandemic. Therefore, the study of problematic issues of the implementation of the constitutional principle of justice during the COVID-19 pandemic is an important issue of today.

The purpose of the article is to study the essence, content of the constitutional principle of justice, its impact on public relations. We set ourselves the following research tasks: to find out the place and significance of the constitutional principle of justice in the legal system, its essence and impact on law, to identify problematic issues of its implementation during quarantine restrictions and to indicate effective ways to overcome them. Our methods include description, comparison, analysis, synthesis, system-structural method, formal-legal method, which gave us the opportunity to solve our problems.

Thus, the methods of formal logic: description, comparison, analysis, synthesis were used by the author to characterize the normative content of the constitutional principle of justice. Due to the system-structural method, we have considered the regulatory significance of the constitutional principle of justice. The formal-legal method made it possible to investigate the problems of implementation of this principle during the COVID-19 pandemic.

## 2. The essence of the constitutional principle of justice

Constitutional law occupies a special place in the entire legal system. V. Chervonyuk notes: «Obviously, this branch of law cannot be recog-

nized as a single-ordered opposed to other profile branches – it is a fundamental basic branch of law that reflects the general legal regimes, legal means and methods of regulation, which are specifically embodied in other branches of law, including those related to the relevant branches of law» (Chervonyuk, 2004). G. Komkova believes that constitutional law itself has such global categories, «which are important ideological attitudes for all other branches of law» (Komkova, 2008, p. 26).

The Constitution is not only the basic legal act in the country, but it plays a more important role, because it is the constitution that enshrines the basic legal principles that are fundamental to the entire legal system of the country (Kravets, 2005).

The category of law is being looked upon in law as the principle of law (Yavich, 1989, p. 150) and as the «quality of law» (Baranov, 2003, p. 312-313).

Considering the relationship between justice and law, L. Yavich noted that we can talk about the relationship within the two planes. Thus, he writes that on the one hand «it is a question of assessing the law in terms of the economic, political and other factual relations he protects... In the second aspect, the problem of law and justice is more specific, it foresees the understanding of justice not as an outside towards the legal activity factor, but as a special legal principle of law, which expresses some properties, aspects of the legal form» (Yavich, 1976, p. 156).

G. Maltsev believes that «the relationship between law and justice is based on the fact that the legal relationship can always be interpreted as a special type of distributive relationships. The object of division here are the rights and responsibilities of the participants of mutual social communication» (Maltsev, 1977, p. 14). «Justice means accepted by society as a morally justified and correct scale for comparing the actions of the subject for the benefit (or harm) of society and others with the corresponding actions of the latter» (Maltsev, 1977, p. 54). A. Ekimov understands justice as a «morally justified criterion for comparing the actions of subjects, in accordance with which everyone is paid off for his actions in the form of certain consequences» (Ekimov, 1980).

According to G. Maltsev, «the connection between law and justice is based on the fact that legal relations can always be interpreted as a special type of distributive relations. The object of division here are the rights and responsibilities of participants in mutual social communication» (Maltsev, 1977, p. 143).

Z. Berbeshkina believes that justice is «a concept of moral consciousness, which characterizes the legitimacy of assessment of economic, social, legal phenomena of reality and actions of people...» (Berbeshkina, 1983, p. 147).

M. Rutkevich notes that «the concept of justice fixes the moral and legal idea of what corresponds and does not correspond to laws, norms of law and social, prevailing in society morality...» (Rutkevich, 1986, p. 148).

It should be noted that there is no direct norm in the Constitution of Ukraine that enshrines the principle of justice. However, some constitutional requirements follow from this principle and this indicates its indirect consolidation. According to S. Pogrebnyak, «for example, the idea of justice is concretized in the principle of non bis in idem, enshrined in Art. 61 of the Constitution of Ukraine. The principle of justice also stipulates the obligation to promulgate regulations (Part 3 of Article 57 of the Constitution), the general prohibition of retroactive laws (Part 1 of Article 58 of the Constitution), the right not to be forced to testify against oneself (Part 1 of Article 63 of the Constitution), the right to judicial protection (Article 55 of the Constitution), etc.» (Pohrebniak, 2009, p. 31-32).

From the standpoint of constitutional axiology, justice is a controversial category. This is a legal value that is considered simultaneously with such values as freedom, humanism, the rule of law, equality, and so on. Justice is a measure of equality and freedom, so it is often associated with equality and freedom.

E. Renyov notes: «Consolidating the instrumental set of means for resolving social contradictions, the Constitution of Ukraine simultaneously acts as an axiological basis for removing social contradictions, which is reflected in the practical and applied activities of public authorities through the criteria of constitutionality of their decisions. A special place in the system of constitutional criteria for resolving social contradictions belongs to the requirements of justice.

The requirement of justice possesses, according to the content of the Constitution of Ukraine, a multifaceted, universal content, which has different legal forms of its manifestation. It acts as an institution of the legal status of man and citizen, and as a principle of the rule of law, and moreover, as a political and legal basis of civil society, a special form of achieving legal balance based on the balance of interests of different social groups» (Renyov, 2016, p. 93).

Justice is a constitutional principle of justice. Thus, in the decision of the Constitutional Court of Ukraine of January 30, 2003 №3-rp/2003 (Rishennia Konstytutsiinoho Sudu Ukrainy, 2003) in the case of consideration by the court of certain rulings of the investigator and prosecutor it is noted that «justice is defined as such only that it meets the requirements of justice and ensures effective restoration of rights».

S. Alekseev notes: «Justice in its essence as a socio-moral phenomenon in our society – in its specifically class, socialist expression, it acquires the meaning of the legal principle to the extent that it is embodied in the normative-legal way of regulation, in those principles «proportionality», «equal scale», etc., which are inherent in the very construction of legal instruments. Justice has an independent meaning in legal practice: it is one of the leading principles in resolving legal cases, when the court or other competent authorities are given «discretion», i.e. when they perform a function of individual regulation (for example, in determining the amount of alimony paid on maintenance of parents, when establishing the exact measure of punishment, etc.». (Alekseev, 1972, p.108-109).

Justice is essentially broader than law. The specificity of justice in normativeness, because if a just idea receives normative consolidation, it changes to law, that is, it becomes law. Law is normatively enshrined justice (Kuravshvili, 1988).

Justice is a criterion for legitimizing of state power. In constitutional and legal relations, this principle is embodied by providing access to positions of civil servants. V. Vasylchuk believes that the «reflection of the principle of «everyone» in the activities of state bodies is the distribution of competence between different branches of government, as well as the definition of the limits of authority and scope of each



of them. Observance by authorized entities in their professional activity of the requirement of proportionality, prohibition of exceeding the necessary measure, requirement of equal treatment and prohibition of abuse of rights ensures the exercise of state power on the basis of justice» (Vasylchuk, 2013).

### **3. Implementation of the principle of justice in constitutional and legal relations**

The principles of law are enshrined both in the current legislation of Ukraine and in the Constitution of Ukraine. However, the requirements that enshrine these principles are not being implemented properly. This is due to the mentality of Ukrainians. Disadvantages include low culture, non-compliance with the law, devaluation of spiritual and moral values, distrust of government, and so on.

In our opinion, a necessary factor in the realization of justice is a person's awareness of this justice, its value in society, the benefits that people will receive if justice is realized in practice and the state is ruled by a just law. This is what our state is striving for at the moment. A democratic state always tries to instill in its citizens the observance of such a value as justice. However, it also depends on the personal data of citizens, the level of their legal culture, legal awareness, etc.

We fully agree with the opinion of S. Suniegin that «one of the most important reasons for such a crisis of consciousness of many Ukrainians, in our opinion, is the subjects of law ignoring the objective moral content of these principles or distorted and one-sided perception of basic moral postulates, based, as a rule, on a purely selfish way of thinking. Thus, the problem of correct understanding of the essence of the moral content of justice, freedom, equality and humanism as fundamental principles of law becomes especially relevant in today's conditions» (Suniehin, 2012, p. 275).

We fully agree with the opinion of S. Suniegin that:

«1) firstly, the fundamental principles of law are manifested primarily in their moral content, which has an objective basis that should correct the subjective perception of their content. One-sided, distorted subjective perception and understanding of the ideas of justice, equal-

ity, freedom and humanism, as a rule, is based on the selfish desire to satisfy only the personal (private) interests of a person;

2) secondly, positive law must take into account and enshrine these fundamental principles, based on the content of their objective moral dimension, consistent with the fundamental laws of natural human coexistence;

3) thirdly, the fundamental principles of law will only have a high positive effect in their implementation in the relevant legal, law enforcement activities and legal relations, when they are filled with traditional moral content, i.e. will be consistent with the requirements and principles of prevailing morality in society. It is the moral dimension of the fundamental principles of law that ensures their proper implementation, and directs the use, implementation, observance and application of legal requirements to achieve the public good, rather than private and often immoral interests of the individual or persons who, in our opinion, lie in based on their distorted subjective perception and understanding» (Suniehin, 2012, p. 278).

Justice embodied in the rule of law requires that the law was applied equally to all. However, we should not forget that the law can not take into account all the diversity of social relations. Therefore, in the decision-making process, officials should be guided by the letter of the law, and their idea of justice, and which of these decisions will be the most correct.

The problem in practice is that everyone understands and perceives justice in their own way. What is right for one is unfair for another. For example, in the context of quarantine restrictions, it is advisable to consider such an issue as distance learning. Yes, on the one hand, it provided an opportunity, though not fully, but to teach students. On the other hand, low-income families are unable to provide their children with gadgets and computers. In addition, there is no Internet in remote mountain villages. In this case, is it not a violation of the constitutional right to education? In our opinion, the state should take this problem into account and take measures to overcome it. The consequence of the pandemic is an economic crisis and growing inequality in society.

It was a violation of the constitutional right to work that during the pandemic, large shop-

ping centers operated and small shops were closed for quarantine. We believe that this approach was a violation of the principle of justice, and the state needs to reduce tax and administrative pressure on small and medium-sized businesses.

The principle of justice implies a system that cannot be violated, because it will lead to negative consequences. Systematic means the simultaneous realization of the values of the principle of justice in the legislative, law enforcement spheres. It is interesting that the principle of justice is enshrined in law. However, if the rule of law does not comply with this principle, the legislator is not obliged to change or repeal it. Therefore, in practice, very often unfair rules of law can be implemented, which leads to violations of human and civil rights.

It is important to study the implementation of the principle of justice in law enforcement, because life is changing, judicial practice is evolving and many issues are currently unexplored. At present, we are witnessing what unfair laws are often passed by the Verkhovna Rada of Ukraine. An unjust law is not accepted by society and is not a right. It is impossible to build a state governed by the rule of law without just laws. Unfair court decisions are also not perceived as justice. They undermine the authority of the judiciary and are not justice. It is on the basis of the analysis of court decisions that society has an idea of whether there is justice in the state. It is thanks to fair court decisions that the rights of citizens are protected.

So, if the laws are fair, then the law enforcement acts are also fair. If the laws are unfair, the law enforcement acts are unfair. This quite logically follows from the interrelation of laws and law enforcement acts. Justice and legality are different concepts. Sometimes we witness legitimate but not fair decisions. And this is a big problem.

If law enforcement acts are fair, then the authority of law and trust in government by society increases. Such an act will be carried out because it finds the moral approval of all members of society, as opposed to the unjust. Therefore, the issue of justice in the practice of government should be the number one issue in a democracy.

O. Vlasova rightly states: «The principle of justice, arising in the ethical and moral environment, imposes on the subjects of the law enforcement process (judges, lawyers, plaintiffs, defendants, accused, victims, etc.) the requirement to comply with ethics and morality. Any manifestations of humiliation of human dignity committed by the participants in law enforcement cause great harm and undermine the just beginning of the law enforcement process. Justice is based on the «golden» rule of morality: «do not do to others what you do not wish for yourself» and is a vocation of equality of all members of this society in their dignity and rights. Justice as a spiritual and moral principle contains in its content the ability of each person to feel a sense of self-worth. The main thing that the principle of justice requires is respect for the rights and dignity of the people» (Vlasova, 2008, p. 23).

The problem of justice has always aroused interest in society and scientists. Therefore, clarifying the essence of justice in law is an urgent issue today. It's because the activity of all branches of government in Ukraine is reduced to the application of the principle of justice in practice. Justice is aimed at satisfying not only certain segments of the population, but also the interests of society as a whole.

#### **4. Conclusions**

Therefore, based on the above, we come to the following conclusions. Justice is a fundamental legal value. This is a legal principle that permeates all areas of law. Although there is no direct enshrinement in the Constitution of Ukraine, its influence can be traced in the procedural codes, in fact in the Constitution itself. As a legal value, justice can only be achieved and ensured by complying with the law. However, the problem in Ukraine is that the laws themselves are often unfair. Justice is a criterion of the legitimacy of the law. Another problem is that the Ukrainian mentality is quite specific. The result is a violation of constitutional human rights during the COVID-19 pandemic. Therefore, it is quite difficult to implement the constitutional principle of justice in life. After all, this is opposed, first of all, by corruption, low legal culture and consciousness of Ukrainians, as well as abuse of office by officials.

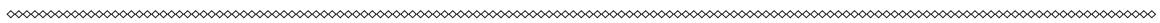
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## ПОНЯТТЯ ТА ЗМІСТ КОНСТИТУЦІЙНОГО ПРИНЦИПУ СПРАВЕДЛИВОСТІ

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### Анотація

Мета статті полягає у дослідженні поняття та змісту конституційного принципу справедливості, його впливу на конституційно-правові відносини, виявленні проблем, які виникли при реалізації цього принципу під час карантинних обмежень внаслідок пандемії COVID-19.

Дану мету було досягнуто завдяки застосуванню такого методу як аналіз, порівняльно-правового та формально-юридичного методу.

При дослідженні встановлено, що принцип справедливості хоча і не закріплений у Основному Законі України, проте він пронизує як Конституцію України, так і процесуальні кодекси. Проблемним питанням є те, що відсутнє законодавче визначення поняття «справедливість». Проаналізовано практику Конституційного Суду України щодо застосування принципу справедливості у його рішеннях. Обґрунтовано, що справедливість є поняттям значно ширшим, ніж право та є критерієм легітимації державної влади.

Досліджено проблеми реалізації конституційного принципу справедливості. При цьому виявлено, що принципи права, які закріплені в Конституції України та діючому законодавстві України, не реалізуються належним чином в нашій державі. Причиною цього є менталітет українців, який характеризується низькою правовою та політичною культурою, порушенням вимог закону, недовірою до влади, знеціненням моральних та духовних цінностей. Зі сторони чиновників – зловживанням своїм посадовим становищем.

Обґрунтовано, що справедливість вимагає однакового застосування закону для всіх. Проте у кожної людини є своє розуміння і бачення справедливості. Це призвело до проблем під час пандемії коронавірусної інфекції. Виявлено такі порушення як порушення конституційного права на освіту, а саме дистанційне навчання призводить до порушення принци-



пів справедливості та рівності. Обмеження для малого та середнього бізнесу під час пандемії COVID-19 поставило у дискримінаційне становище підприємців у порівнянні з великим бізнесом.

У результаті дослідження зроблено висновок про те, що справедливість є правовою цінністю та основоположним принципом права, який пронизує як Конституцію України, так і чинне законодавство. Реалізація справедливості може бути здійснена лише шляхом дотримання закону. В Україні доволі складно реалізувати цей принцип, бо і закони часто є несправедливими. Під час карантинних обмежень виявлено порушення конституційних прав людини. Необхідним кроком для ефективної реалізації принципу справедливості має стати подолання корупції та підвищення правової культури та правової свідомості українців.

**Key words:** справедливість, Конституційний Суд України, право, правова цінність, принцип права, пандемія COVID-19, Конституція України.

## SANCTIONS AS A LEGAL PHENOMENON IN THE LAW OF UKRAINE AND INTERNATIONAL STANDARDS OF THEIR APPLICATION

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### Summary

The article examines the theoretical and practical issues of application of the Law of Ukraine «On Sanctions» of August 14, 2014 and analyzes the existing views on the legal nature of such «legal phenomenon» as sanctions - special economic, financial and other restrictive measures (sanctions) provided by this Law. The article specifies the main issues facing the researchers of the Institute of Sanctions. The purpose of the article is coverage of the state of legal regulation and legal nature of such a phenomenon as sanctions (economic, financial) in the right to Ukraine. In order to achieve this goal, the author used a set of general and special methods that are characteristic of legal science.

The article covers the issue of Ukraine's sovereign right to protection, in particular through the application of economic and other restrictive measures (sanctions) «to protect national interests, national security, sovereignty and territorial integrity of Ukraine, counter terrorist activity, as well as prevention of violations, restoration of violated rights and freedoms and legitimate interests of citizens of Ukraine, society and the state». The range of subjects against which sanctions can be applied has been studied, namely: a) foreign states; b) foreign legal entities; c) legal entities under the control of a foreign legal entity or a non-resident individual, foreigners, stateless persons; d) entities engaged in terrorist activities.

Sanctions are defined as legal measures to respond immediately to violations of various rights, from encroachment on state sovereignty to the commission of a crime of an international nature, which are temporary, which are applied primarily through coercive measures, which are implemented using constitutional, financial, administrative, economic, criminal procedural, executive, economic procedural and other branches of law. The issues of the grounds for application of sanctions, their types and criteria for their delimitation, the term of application of sanctions, as well as the range of authorized entities in the field of their application are covered. The main approaches of scholars to the characterization of sanctions as measures of influence are investigated. It is noted that sanctions are measures of influence different from measures of legal responsibility, which may have a “non-criminal” nature. It is stated that sanctions are measures of influence that are applied,

albeit in parallel, but in a systematic connection with the criminal prosecution imposed by the state or executed by it as a subject of international cooperation in the fight against crime.

Their application is, firstly, due to the decision at the international or regional level on the application of international economic (financial) sanctions, personal sanctions in the course of criminal prosecution for acts of an international crime. However, Ukraine is obliged to adhere to international standards of the legal mechanism for the application of sanctions at the domestic level, to improve the procedural principles of their application, appeal procedures and amendments to the decision. We consider the participation of the Commissioner for Human Rights in the process of reviewing the decision on the application of sanctions and appealing the decisions necessary. Amendments to the Law of Ukraine "On Sanctions" are proposed in order to establish among the necessary grounds for the application of sanctions to individuals the opening of criminal proceedings against them, and for legal entities - the opening of criminal proceedings against related persons, as well as amendments to the Criminal Procedure Code of Ukraine, as it does not contain provisions on such preliminary measures (securing and stopping) as "sanctions". In addition, in general, the sanctions procedure requires greater transparency, and it is concluded that sanctions can be applied to Ukrainian citizens only if they are suspected of involvement in terrorist activities.

**Key words:** sanctions, international cooperation in the fight against crime, economic (financial) sanctions, personal sanctions, sectoral sanctions.

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## 1. Introduction

With the adoption of the Law of Ukraine «On Sanctions» of August 14, 2014 [1] and the application of its provisions in society, among scholars and legal practitioners there are quite heated discussions about such a concept, «legal phenomenon» as sanctions – special economic, financial and other restrictive measures (hereinafter – sanctions) provided by this Law. The main issues that concern researchers are: 1) the legitimacy of sanctions (Volodymyr Yavorsky, [2]); 2) the functions performed by sanctions – they are measures of a preliminary (precautionary) nature, «different from measures of legal responsibility» (Volodymyr Yavorskiy [2]), measures of a political nature – «political instrument» (Darya Sviridova [2]) whether measures of legal responsibility (Bogutskiy Pavlo [3]) or a complex phenomenon, as some of them may belong to different of these groups of coercive measures; 3) legal uncertainty regarding the sphere of legal relations, within which public relations take place regarding the application of economic (financial) sanctions, which is the subject of legal regulation of constitutional, administrative, financial, criminal procedure, economic procedure, civil procedure, execu-

tive, international (international) criminal), international legal law, etc; 4) the problem of the separation of the process of imposing economic (financial) sanctions from the criminal process; 5) the legitimacy of the application of economic (financial) sanctions to citizens of Ukraine, primarily in the context of the necessity of guaranteeing by the President of Ukraine the observance of human rights (Maksym Tomochko [2]), as well as to Ukrainian legal entities (Yevhen Zakharov) [2] – the residents; 6) the competence of the subject of decision-making on the application of economic (financial) sanctions, the constitutionality of its legal status as an authorized entity (Lev Semyshtsky [3]); 7) the possibility of litigation or appeal in international commercial arbitration against the application of sanctions or actions (decisions) related to its application (Olena Koch [5]), and many others. However, everyone agrees that the legal structure of the legal nature of economic (financial) sanctions and the mechanism of their application, as well as removal, is very weak. The purpose of this article is not to answer all the questions, but we will focus on the state of legal regulation and the legal nature of such a phenomenon as economic (financial) sanctions in the law of Ukraine.

## 2. The state of legal regulation of the application of sanctions in Ukraine

Such mechanisms of influence are used in individual states and their unions (in particular Poland, the European Union), and they do not relate to fulfillment or non-fulfillment of bilateral agreements or commercial agreements by their partners, but are conditioned by the necessity of avoiding formed or potential influence on their own national interests, both political and economic.

As of today, the main legislative act of Ukraine regulating the grounds and procedure of application of sanctions is the Law of Ukraine dated August 14, 2014 № 1644-VII [1], which has only 6 articles which define only the basic provisions of application of sanctions, in particular the following.

1. The Law establishes *Ukraine's sovereign right to protection* – the right to apply special economic and other restrictive measures (hereinafter referred to as the Law - sanctions) «in order to protect national interests, national security, sovereignty and territorial integrity of Ukraine, to counter terrorist activities, as well as to prevent violations, restore violated rights, freedoms and legitimate interests of citizens of Ukraine, society and the state» (Part 1 of Article 1 of the Law);

2. The law sets sanctions *in a number of other measures to protect national interests*, national security, sovereignty and territorial integrity of Ukraine, its economic independence, rights, freedoms and legitimate interests of citizens of Ukraine, society and the state, in particular, in part 3. 1 of the Law states that the application of sanctions does not exclude the application of other above-mentioned measures. This emphasizes their autonomy as a measure of influence, but there is no detail on which such other measures of protection are mentioned – political, diplomatic, legal, etc.;

3. In Part 2 of Art. 1 of the Law outlines *the range of subjects to which sanctions can be applied, namely*: a) foreign states; b) foreign legal entities; c) legal entities under the control of a foreign legal entity or a non-resident individual, foreigners, stateless persons; d) entities engaged in terrorist activities.

We will note that citizens of Ukraine to whom sanctions can be applied, proceeding

from the content of Part 2 Art. 1 of the Law, may belong exclusively to the last group - entities engaged in terrorist activities. This is important because the Law does not specify the category to which a natural person belongs (citizen, foreigner, stateless person), or the general term «subject» is used (Part 3 of Article 3, Paragraph 1 of Part 1 of Article 3 and Part 3 of Article 5 of the Law) whether there is a clarification «non-resident individual» (Part 3 of Article 3 of the Law);

4. The law defines *the grounds for the application of sanctions, in particular*: a) «acts of a foreign state, foreign legal or natural person, other entities that create real and/or potential threats to national interests, national security, sovereignty and territorial integrity of Ukraine, promote terrorist activity and/or violate human and civil rights and freedoms, the interests of society and the state, lead to the occupation of territory, expropriation or restriction of property rights, the task of property loss, the creation of obstacles to sustainable economic development, the full exercise by citizens of Ukraine of their rights and freedoms (Paragraph 1, Part 1 of Article 3 of the Law); b) the commission by a foreign state, a foreign legal entity, a legal entity under the control of a foreign legal entity or a non-resident natural person, a foreigner, a stateless person, as well as entities engaged in terrorist activities referred to in paragraph 1 Part 1 of Art. 3 of the Law (*mentioned above*), in relation to another foreign state, citizens or legal entities of the latter (Part 3 of Article 3 of the Law); c) terrorist activity (Part 2 of Article 1 of the Law); d) resolutions of the General Assembly and the Security Council of the United Nations (paragraph 2, part 1, article 3 of the Law); e) decisions and regulations of the Council of the European Union (paragraph 3, part 1, Article 3 of the Law); f) facts of violations of the Universal Declaration of Human Rights, the Charter of the United Nations (paragraph 4, part 1, article 3 of the Law).

It should be noted that the Law provides for different legal facts – its own unlawful actions, the actions of which cause the application of sanctions, and acts of reaction to such unlawful acts, in particular, international organizations in the form of appropriate decisions.

5. The law defines in Part 1 of the Article 4 of the Law *types of sanctions, the list of which is open*, as in the Paragraph 25 of Part 1 Article



4 of the Law it is noted that in addition to the explicitly stated types of sanctions, «other sanctions that comply with the principles of their application established by this Law» may be applied. However, this is a matter of concern, as the question remains open: 1) who determines how «unnamed» sanctions will meet the principles of their application; 2) to what extent the application of «unnamed» sanctions will comply with the principle of legality, which in Part 2 of Art. 3 of the Law is enshrined as a principle of application of sanctions along with such principles as: transparency, objectivity, compliance with the purpose and effectiveness. The principle of legality stipulates that the authorized body acts «only on the basis, within the powers and in the manner provided by the Constitution and laws of Ukraine» (Article 19 of the Constitution of Ukraine) [6].

Most sanctions are aimed at limiting the legal capacity of persons to whom they apply to: 1) the acquisition of property rights; 2) free disposal of property («blocking of assets - a temporary restriction of the right of a person to use and dispose of property belonging to him» (Paragraph 1 of Part 1 of Article 4)); 3) freedom of management («restriction of trade operations» (Paragraph 2, Part 1 of Article 4)); 4) freedom of establishment of legal entities («prohibition to increase the authorized capital of companies, enterprises in which a resident of a foreign state, foreign state, legal a person whose participant is a non-resident or a foreign state owns 10 percent or more of the authorized capital or has an influence on the management of a legal entity or its activities» (Paragraph 16, Part 2 of Article 4) [1], etc. The imposition of such sanctions stipulates that state bodies are obliged to monitor operations and, if detected, to stop (block) them (active activity), or in the case of a person subject to sanctions, not to take actions prescribed by law (passive activity).

However, a separate group of sanctions is aimed directly at establishing additional responsibilities of state bodies, providing for their active action, in particular: 1) implementation of additional control actions, in particular: introduction of additional measures in the field of environmental, sanitary, phytosanitary and veterinary control (Paragraph 17 Part 1 of Article 4 [1]); 2) cancellation of permits issued by

them, decisions in particular: cancellation of visas for residents of foreign states, application of other bans on entry into the territory of Ukraine (Paragraph 21, Part 1 of Article 4 [1]); cancellation of official visits, meetings, negotiations on the conclusion of contracts or agreements (Paragraph 23, Part 1 of Article 4); deprivation of state awards of Ukraine, other forms of celebration; 3) establishment of certain prohibitions (restrictions) for state bodies in relations with persons subject to sanctions, in particular such as: refusal to issue visas to residents of foreign states, application of other prohibitions on entry into the territory of Ukraine (paragraph 21, part 1 of Art. 4 [1]).

Some sanctions established by this Law are financial in nature – those that directly affect the financial and legal relations, in particular they include such as: 1) a ban on issuing permits, licenses of the National Bank of Ukraine to invest in foreign countries, placement of currency values on accounts and deposits in the territory of a foreign state (Paragraph 13, Part 1 of Article 4 [1]); 2) termination of issuance of permits, licenses for import to Ukraine from a foreign state or export from Ukraine of currency values and restriction of cash issuance on payment cards issued by residents of a foreign state (paragraph 13, part 1 of Article 4 [1]); 3) prohibition of registration by the National Bank of Ukraine of a participant in an international payment system, the payment organization of which is a resident of a foreign state (paragraph 13, part 1 of Article 4 [1]); 4) «prohibition of public and defense procurement of goods, works and services from legal entities-residents of a foreign state of state ownership and legal entities, the share of the authorized capital of which is owned by a foreign state, as well as public and defense procurement from other business entities, selling goods, works, services originating from a foreign state to which sanctions have been applied in accordance with this Law» (paragraph 10, part 1 of Article 4 [1]).

In addition, sanctions are divided into two groups: 1 «sectoral sanctions» (Part 2 of Article 5 of the Law [1]) - provided for in paragraphs 1-5, 13-5, 17-19, 24-1, 25 Part 1 of Art. 4 of the Law of Ukraine «On Sanctions» (Part 2 of Article 5 of the Law [1]); 2) «personal sanctions» - provided for in paragraphs 1-21, 23-24, 25 Part 1 of Art. 4

of the Law of Ukraine «On Sanctions» (Part 3 of Article 5 of the Law [1]).

6. Contains provisions on the *duration of sanctions*, but this issue is not clearly regulated. Part 5 of Art. 5 of the Law of Ukraine «On Sanctions» states that «a decision on the application of sanctions must contain the term of their application, except in cases of application of sanctions that lead to termination of rights and other sanctions that cannot be applied temporarily». Thus, if some sanctions are in the nature of temporary restrictions and play the role of measures to stop the violation or prevent the violation of public interests or legal rights, others - restrictive measures of a permanent nature, forcing the subjects to whom they apply to be restricted in personal or property rights.

6) *determines the authorized entities in the field of sanctions*, which include:

a) subjects of initiation of application - the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, the National Bank of Ukraine, the Security Service of Ukraine (paragraph 1 of Article 5 of the Law [1]). They make proposals for the application of lifting and amending sanctions. We will note that among the specified only Security Service of Ukraine belongs to law enforcement agencies [7]. In this case, only the President of Ukraine may initiate the termination of international agreements, the consent to the binding nature of which was given by the Verkhovna Rada of Ukraine, as a sanction provided by this Law (Part 4 of Article 5 of the Law [1]);

b) the subject of consideration (Part 1 of Article 5 of the Law [1]) and decision-making on the application, repeal or amendment of sanctions (Parts 2, 3 of Article 5 of the Law [1]) – the National Security and Defense Council of Ukraine (hereinafter – the National Security and Defense Council), except for such a sanction as «termination of international agreements, the binding nature of which was approved by the Verkhovna Rada of Ukraine». Regarding this moment of the Law, lawyers have the most questions and complaints: 1) according to the Constitution of Ukraine, the National Security and Defense Council does not belong to the executive branch of state, but is a «coordinating body for national security and defense under the President of Ukraine», which «coordinates and controls the

activities of executive bodies in national security and defense» (Art. 107 of the Constitution of Ukraine [6]), headed by the President of Ukraine (paragraph 18 of Article 106, Article 107 of the Constitution of Ukraine [6]) and «the competence and functions of the National Security and Defense Council of Ukraine are determined by law». In particular, Lev Semyshtsky quite reasonably raises the question of the constitutionality of the powers of the National Security and Defense Council in the field of sanctions, given the lack of constitutional powers of the President of Ukraine and the National Security and Defense Council of the judiciary, quasi-judicial body or a body regulating property or economic relations» [4];

c) the subject of enforcement of the decision on the application of personal sanctions, which takes effect from the date of issuance of its Decree [8] and is binding – the President of Ukraine (Part 3 of Article 5 of the Law [1]);

d) the subject of enforcement of the decision on the application of sectoral sanctions, which enters into force upon its approval by a resolution of the Verkhovna Rada of Ukraine – the President of Ukraine (Part 3 of Article 5 of the Law [1]);

e) the subject of consideration and decision-making on the application of such a sanction as «termination of international agreements approved by the Verkhovna Rada of Ukraine», which comes into force from the moment of adoption of the resolution - the Verkhovna Rada of Ukraine (Part 4 of Art. 5 of the Law [1]);

f) the subject of approval of the decision on the application of sectoral sanctions (approval takes the form of a resolution [9] within 48 hours from the date of the decree of the President of Ukraine) – the Verkhovna Rada of Ukraine (Part 2 of Article 5 of the Law [1]) as the Parliament of Ukraine.

### 3. The legal nature of sanctions

As of today, the views of scholars and practitioners on the legal nature of sanctions are divided. Therefore, sanctions are considered as: measures of influence different from measures of legal responsibility, the application of which, as Volodymyr Yavorsky notes, «does not abolish the obligation of the state to conduct a criminal investigation and prosecute citizens of Ukraine

*if there are appropriate grounds» [2]. Under this approach, sanctions can be considered as measures of a preliminary (security) nature (stopping the offense and ensuring prosecution). The researcher believes that «a sufficient basis for the application of sanctions is a reasonable suspicion of committing illegal activities, which arises on the basis of information, which often can not be evidence in criminal proceedings. The second distinguishing feature is their temporary nature, and the third - «reactivity» - prompt, rapid application, which is due to the need to avoid the negative consequences of certain activities, the occurrence of greater social damage and so on. Thus, we can note that sanctions under such an approach refer to measures of suspension and measures to ensure the application of measures of legal responsibility, if the fact of committing an offense (crime or misdemeanor) is proved» [2];*

Sanctions may be «non-criminal». Thus, Mykola Khavronyuk notes regarding the legal nature of sanctions that it is, with one exception, not criminal, but administrative-legal, given that: 1) sanctions in the law are abbreviated as «special economic and other restrictive measures» and based on from the name of these measures and other provisions of the law, it is not a penalty, but a restriction of economic and other related activities that promote terrorism, other encroachments on national interests, national security, sovereignty and territorial integrity of Ukraine; their introduction had «rather, a political goal – to emphasize the readiness of the Ukrainian state to respond to hostile actions, taking into account the peculiarities of hybrid warfare»; 2) in contrast to criminal liability measures, «special economic and other restrictive measures» provided by the Law «On Sanctions» do not consist in depriving a person of liberty, property or other constitutional rights and freedoms; 3) «restrictive measures, which are listed in Article 4 of the Law of Ukraine» On Sanctions», were contained in the laws of Ukraine long before 2014 under the same or similar name and applied to violators of the law by the relevant authorities» [10]. It should be agreed with M. Havronyuk that the grounds for the application of these restrictions are different from those provided by the Law «On Sanctions», and the listed laws do not contain references to

the grounds for the application of sanctions provided by this law. This means that they cannot be applied directly on the basis of the decision of the National Security and Defense Council and the decree of the President, for their application it is necessary to make additions to the relevant laws, which would indicate that the relevant restrictions may be applied to the implementation of the Law «On Sanctions». While these additions are not available, the application of the relevant restrictions and prohibitions may be declared unfounded by the court» [10]. However, we also note that primarily the basis for the application of «non-criminal» sanctions, which include sanctions as special economic and other restrictive measures, based on the provisions of Art. 3 of the Law of Ukraine «On Sanctions» are resolutions of the General Assembly and the Security Council of the United Nations and decisions and regulations of the Council of the European Union, which they adopt by virtue of international treaties. Thus, under Chapter VII of the UN Charter, the Security Council may apply coercive measures to maintain or restore international peace and security. According to Art. 41 sanctions include a wide range of non-military coercive options. The Security Council imposes sanctions to ensure peaceful transitions, prevent unconstitutional change, deter terrorism, protect human rights and promote the nuclear non-proliferation regime. There are currently 14 sanctions regimes in place to support political conflict resolution, nuclear non-proliferation and the fight against terrorism. Each sanctions regime is chaired by a specific sanctions committee headed by a non-permanent member of the Security Council. In 2005 World Summit Declaration, the General Assembly called on the Security Council to ensure, with the support of the Secretary-General, the adoption of fair and clear procedures for the imposition and lifting of sanctions [11].

Measures of influence are applied in parallel, but in a systematic connection with the criminal prosecution initiated by the state or carried out by it as a subject of international cooperation in the fight against crime. Therefore, sanctions are enforced both by the country that introduced them and through the mechanisms of international cooperation - and other states and international organizations. Such an approach

is justified when it comes to such grounds for imposing sanctions as a decision of a resolution of the General Assembly and the United Nations Security Council (Paragraph 2, Part 1, Article 3 of the Law [1]) and decisions and regulations of the Council of the European Union (Paragraph 3, Part 1, Article 3 of the Law [1]), or on sanctions imposed by the decision of the National Security and Defense Council, as a result of which the relevant international organizations are appealed to initiate the inclusion of certain persons in the sanctions lists, which takes place in accordance with with organized crime, money laundering and corruption. Thus, the European Union once applied sanctions against Ukrainian officials precisely on the grounds that criminal proceedings have been opened against them in Ukraine and an investigation is under way. Accordingly, the EU Court did not overturn the decision to impose sanctions on those persons subject to criminal proceedings, and on others who provided documents certifying the absence of any criminal proceedings against them in the Ukrainian legal system - canceled.

#### **4. International standards for the application of sanctions at the state level**

Apparently, for the first time the freezing of bank accounts as a type of financial sanction was introduced by UN Security Council Resolution 841 (1993) in connection with the need to resolve the political and economic situation in Haiti [12, p. 2-3]. However, today, according to Yulia Malysheva, the regimes of financial (economic) sanctions of the UN Security Council include a wide range of coercive measures aimed at restricting international capital movements - «freezing foreign assets of the government, enterprises and institutions of the offending state, restricting access to financial markets, termination of financial assistance, as well as blocking the bank accounts of individuals and legal entities specified in the sanctions resolution» [13, p. 89]

The tactical purpose of freezing the assets of coercive measures is to deprive their listed owners of the opportunity to use cash, other financial assets or economic resources to carry out illegal activities, such as the acquisition of weapons or the development of their own production, support for terrorism. or the imple-

mentation of other measures in connection with which sanctions are imposed [13, p. 90]

Thus, in the course of international cooperation in the fight against terrorism, the UN Security Council established a committee authorized to prepare and update in due time the lists of individuals and legal entities associated with Osama bin Laden and the Taliban [14]. Resolution 1333 (2000) called on all States to prosecute individuals and legal entities, and to apply appropriate penalties, to provide information to the Committee for the exercise of its powers, as well as information on the measures taken by them, and to freeze funds and other financial assets Committee of individuals and legal entities, including funds and assets of Al-Qaeda organizations, as well as funds received or raised through property owned or directly or indirectly controlled by them [14]. The Sanctions Committee was established on the basis of UN Security Council Resolution 1267 (1999) [15] and has worked effectively.

According to Yulia Malysheva, «the legal shortcomings of the procedure introduced by the resolutions were the deprivation of persons included in the list, the opportunity to learn about the decision, the grounds taken into account by the Committee when listing them, and the inability to provide objections, explanations and evidence of non-involvement in terrorist organizations» [13]. In addition, the established mechanism did not provide for a procedure for appealing the decision to include in the lists, including to an independent competent body authorized to verify the validity of the decision, as well as procedures for its cancellation.

The European Union, in turn, has introduced rules of EU law that provide for the freezing of assets and other economic resources of individuals and organizations whose names are on the UN list [16]. The European Union has expressed the view that sanctions may be imposed on foreign governments of third countries or non-state legal and natural persons, including terrorist movements, groups or persons involved in terrorist activities [17]. These measures affected a large number of people. The UN Special Rapporteur on Human Rights and Terrorism stated that the list regime «has resulted in hundreds of individuals or bodies having their property frozen and other fundamental rights



restricted» [18]. However, despite the inconsistency of the listing procedure with generally accepted international norms on the protection of the right to a fair trial, the courts of a number of European countries refused to examine the applicants' arguments for unjustified inclusion in the sanctions list under UN Security Council Resolutions 94 (1999) and 1373 (2001), citing lack of jurisdiction. In this case, the courts, as a rule, relied on the provisions of Article 103 of the UN Charter, which establishes the priority of obligations of member states under the UN Charter, over obligations under any other international agreement [13, p. 94]. With regard to the mechanism for imposing sanctions, it should be noted that Member States may at any time provide the Committee with the names of individuals and legal entities for inclusion in the sanctions list in accordance with UNSCR 1844 (2008) [19].

Over time, a structure (central office) was established within the UN Sanctions Committee, which was responsible for reviewing the complaints of persons included in the lists. UNSCR 1735 (2006) introduced a more thorough and complete preparation of materials for inclusion in the lists, as well as the obligation to notify a person or organization of inclusion in the sanctions list and as a supplement to this notification a copy of the decision stating the circumstances of the case and informing about the consequences of sanctions [20 p. 4-5], as well as procedures for exclusion from the list [13, p. 95]. In addition, the Office of the UN Security Council Ombudsman was established separately in accordance with Resolution 1904 (2009) (the powers of which have been extended by a number of other documents), and its mandate is enshrined in UN Security Council Resolution 2368 (2017) [21]. It should be noted that as a result of consideration of applications for exclusion from the sanctions lists, a significant number of applicants received a positive result [22, p. 5]. Decisions of the EU Council are more relevant for Ukraine, such as: 1) EU Council Decision 2014/145 / CFSP of 17 March 2014 (in connection with actions that undermine or threaten the territorial integrity, sovereignty and independence of Ukraine (provides for so-called personal sanctions)); 2) EU Council Decision 2014/386 / CFSP dated 23.06.2014 (sanctions in connection with the illegal annexation of the Autonomous Republic of Crimea and the city

of Sevastopol); 3) EU Council Decision 2014/512 / CFSP of 31.07.2014 (sanctions in connection with the actions of the Russian Federation to destabilize the situation in Ukraine (so-called sectoral sanctions)); 4) EU Council Decision 2014/119 / CFSP of 05.03.2014 (EU sanctions against former high-ranking officials of Ukraine and their immediate entourage) [23] and others, from 1 July and 19 December 2016, 28 June and 21 December 2017, 05 July and 21 December 2018, 27 June and 19 December 2019 year, June 29 and December 17, 2020 and July 12, 2021 [24].

Thus, sanctions are imposed both at the level of international organizations and by states themselves, which may be the basis for states to appeal to the relevant international states and through interstate cooperation, and it is the mechanism of sanctions imposed by states that is of most concern today.

In his study, Thomas Hammamberg points out that in 2007 Council of Europe parliamentarian Dick Marty prepared a report criticizing exclusion procedures and restrictions on remedies for individuals or organizations on those lists [16]. Maksym Tymochko also draws attention to the fact that «international sanctions should not be considered to be automatically enforceable» and to the fact that the Resolutions of the Parliamentary Assembly of the Council of Europe of 2008 refer to certain standards that sanctions must meet. It states that they «must meet certain criteria, including legal certainty, providing a fundamental guarantee of the process, informing the person subject to sanctions that he or she is subject to certain indirect charges, such as terrorism, and being able to challenge such measures» [2].

Thus, PACE Resolution 1597 (2008) states that «targeted sanctions (such as restrictions on the movement and freezing of bank accounts) have a direct impact on personal human rights, such as personal freedom and protection of property. It is not yet clear and debatable whether such sanctions are criminal, administrative or civil in nature, and their implementation, in accordance with the European Convention on Human Rights and the International Convention on Civil and Political Rights, must take into account minimum standards of procedural protection and legal certainty». Paragraph 5 of the same resolution enshrines the following procedural and substantive standards to be guaranteed to

ensure the credibility and effectiveness of targeted sanctions: «5.1). The minimum procedural standards in accordance with the rule of law are the following rights: 5.1.1. be duly informed and fully informed of the charges against the person and of the decisions taken, as well as of the reasons for such a decision; 5.1.2. have the fundamental right to be heard and to have the right to defend themselves against these charges; 5.1.3. have the right to review a decision affecting personal rights as soon as possible by an independent and impartial body with a view to amending or revoking it; 5.1.4. receive compensation for wrongful violation of rights; 5.2) Minimum substantive standards require a clear definition of the reasons for the imposition of sanctions and relevant evidence» [25]. In addition, PACE Resolution 1597 (2008) emphasizes that the «blacklist» procedure should be limited in time. It is unacceptable that a person remains blacklisted for years, while the investigating authorities, after a long investigation, have not found any evidence against him «(paragraph 5.3), and it is noted that» procedural and substantive standards that are now their applied by the UN Security Council and the Council of the EU, with the exception of some recent improvements, do not in any way meet the minimum standards set out above and violate fundamental principles of human rights and the rule of law «(paragraph 6) [25].

In turn, PACE Resolution 2087 (2016) states that: 1) «any sanctions against persons must meet the requirements of legal certainty and be accompanied by appropriate procedural guarantees» (paragraph 10); 2) «all restrictive measures must comply with the requirements of international law, the principles of good governance and respect for the law».

The Committee of Ministers of the Council of Europe reaffirmed that «it is important that these sanctions be accompanied by the necessary procedural guarantees» [26]. There have been repeated appeals to the courts to protect those who believe that the sanctions were applicable to them both unreasonably and unlawfully.

On August 3, 2008, the EU Court of Justice ruled on the controversy over the jurisdiction of the sanctions list in the case of Yassin Kadi and the Barakaat International Foundation. The Court found that, under European law, the provisions contained in resolution 1267 (1999) vio-

lated procedural and human rights by depriving the persons to whom they applied of the opportunity to obtain information on their inclusion in the sanctions lists and, therefore, which do not provide for any mechanisms for appealing the decisions of the Committee [27].

Thus, the Court of Justice of Luxembourg found that the regulations of the European Council, on the basis of which their funds and other economic resources were frozen, violated their fundamental rights, in particular their right to property and their right to a judicial review of these decisions. The Court recognized that the importance of the global fight against terrorism could not be underestimated and that all member states of the Council of Europe had a full duty to combat terrorism and had a positive obligation to protect the lives of their citizens [Ottoman case], but stated that «human rights is a condition for the legality of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community». A court ruling in the Qadi and Al Barakaat case set a two-month deadline for the EU to correct shortcomings in the listing process. At the same time, the legislation of the European Community is based on basic human rights. The measures taken to uphold peace and security must comply with these rights, as stated in the European Convention for the Protection of Human Rights and the EU Charter on fundamental Rights [16].

Pavlo Bogutsky notes that «the unity of two requirements, which actually form the legal content of sanctions, is decisive for national and international legal orders: 1) compliance of sanctions with the provisions in the first case of national legislation, in the second case with international legal acts and principles of international law; 2) observance of legal procedure or legal procedural form of application of sanctions». And also emphasizes that procedure of application of sanctions for protection of national (economic, political, state, etc.) interests by the state often cannot have judicial character, <...> however the efficiency and urgency of such sanctions in no way deny the principles of the rule of law and legality, but on the contrary affirm the implementation of these principles on the basis of protection of national interests, achieving the necessary security level for sustainable development of society [3].

On the important provision of Part 2 of Art. 6 of the Law of Ukraine «On Sanctions», which states that «laws and other regulations of Ukraine operate in part that does not contradict this Law» notes Lev Semyshotsky, who believes that this «crosses the whole array of rights and guarantees to protect a person from arbitrary actions on the part of his own state» [4].

Yulia Malysheva expressed a fairly common position among researchers of international law, noting that «individuals and legal entities under international law, although endowed with certain powers and rights, but, unlike states and international organizations, can not carry international legal liability, except for criminal (for individuals), for the most serious crimes against humanity» [13 p. 36], and therefore we believe that the sanctions applied to them within the mechanism of international legal cooperation in the fight against crime should be applied as an integral part of the mechanism of criminal prosecution of individuals and legal entities.

## 5. Conclusions

Sanctions are legal measures to respond immediately to violations of various rights, from encroachment on state sovereignty to the commission of a crime of an international nature, which are temporary, which are applied primarily through coercive measures, which are implemented using constitutional, financial, administrative, economic, criminal procedural, executive, economic procedural and other branches of law. The grounds for applying the type of sanctions under Ukrainian law depend on the category of the entity to which they apply and the mechanism of execution of the decision - on the type of sanction and the scope of its application (in accordance with domestic or international law). Their application is, firstly, due to the adoption at the international or regional level of decisions on the application of international economic (financial) sanctions, personal sanctions in the course of criminal prosecution for acts of an international crime (crimes of an international nature), which prompted the adoption of international documents referred to in paragraphs 2 and 3 of Art. 3 of the Law of Ukraine «On Sanctions», the implementation of which Ukraine carries out by virtue of its obligations as a subject of international law, and secondly, due to the need to protect

sovereignty and its own public interests, and respond to crimes, including including actions that undermine the national security, sovereignty and territorial integrity of Ukraine, or are related to terrorism and the application of sanctions at the domestic level, as well as to initiate their application at the international and regional levels.

However, Ukraine is obliged to adhere to international standards of the legal mechanism for the application of sanctions at the domestic level, to improve the procedural principles of their application, appeal procedures and amendments to the decision. We consider the participation of the Commissioner for Human Rights in the process of reviewing the decision on the application of sanctions and appealing the decision necessary. The Law of Ukraine «On Sanctions» should also be amended in order to establish among the necessary grounds for the application of sanctions to individuals the opening of criminal proceedings against them, and for legal entities – the opening of criminal proceedings against related persons. According to Article 2, which defines the legal basis for the application of sanctions, the modest word «laws» should be replaced by «Criminal Procedure Code of Ukraine and other laws», and part 2 of Article 6 should be stated in the wording «Laws and other regulations of Ukraine operate in part, which does not contradict the Constitution of Ukraine, the Criminal Procedure Code of Ukraine, this Law». Accordingly, the Criminal Procedure Code of Ukraine needs to be amended, as it does not contain provisions on such preliminary measures (securing and stopping) as «sanctions».

In addition, the sanctions procedure in general needs to be more transparent. In practice, we see that sanctions are often applied to citizens of Ukraine, while the Decisions of the National Security and Defense Council of Ukraine, enacted by decrees of the President of Ukraine do not explicitly state the grounds for applying appropriate sanctions, while the content of part 2 of Article 1 of the Law of Ukraine «On Sanctions» they can be applied to them only in case of suspicion of their participation in terrorist activities.

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## САНКЦІЇ ЯК ПРАВОВИЙ ФЕНОМЕН В ПРАВІ УКРАЇНИ ТА МІЖНАРОДНІ СТАНДАРТИ ЇХ ЗАСТОСУВАННЯ

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### Анотація

*В статті досліджено теоретичні та практичні питання застосування Закону України «Про санкції» від 14 серпня 2014 року та проаналізовані існуючі погляди на правову природу «правового феномену» санкцій - спе-*

ціальних економічних, фінансових та інших обмежувальних заходів (санкції), передбачені зазначеним Законом. В статті зазначено основні питання, що постають перед дослідниками інституту санкцій. Метою статті є висвітлення стану правового регулювання та правової природи такого явища як санкції (економічні, фінансові) в праві України. Для досягнення цієї мети було застосовано комплекс загальнонаукових і спеціальних методів, що є характерними для правової науки.

В статті висвітлено питання суверенного права України на захист зокрема шляхом застосування економічних та інших обмежувальних заходів (санкцій) «з метою захисту національних інтересів, національної безпеки, суверенітету і територіальної цілісності України, протидії терористичній діяльності, а також запобігання порушенню, відновлення порушених прав, свобод та законних інтересів громадян України, суспільства та держави». Досліджено коло суб'єктів стосовно яких може бути застосовано санкції, а це: а) іноземні держави; б) іноземні юридичні особи; в) юридичні особи, які знаходяться під контролем іноземної юридичної особи чи фізичної особи-нерезидента, іноземців, осіб без громадянства; г) суб'єкти, які здійснюють терористичну діяльність.

Санкції визначено як правові заходи негайного реагування на порушення права різного роду, від посягання на державний суверенітет до вчинення злочину міжнародного характеру, що мають тимчасовий характер, застосування яких відбувається передусім шляхом здійснення заходів примусу, які реалізуються зі застосуванням норм передусім конституційного, фінансового, адміністративного, господарського, кримінального поцесуального, виконавчого, господарського процесуального та інших галузей права. Висвітлено питання підстав застосування санкцій, їх види та критерії їх розмежування, строку застосування санкцій, а також кола уповноважених суб'єктів у сфері їх застосування. Досліджено основні підходи вчених до характеристики санкцій як заходів впливу. Відмічено, що санкції є заходами впливу відмінними від заходів юридичної відповідальності, що можуть мати "некримінальний" характер. Зазначено, що санкції є заходами впливу, які застосовуються хоч і паралельно, але у системному зв'язку із кримінальним переслідуванням, що запроваджуються державою або виконуються нею як суб'єктом міжнародного співробітництва у боротьбі зі злочинністю.

Їх застосування, по-перше, обумовлено прийняттям на міжнародному чи регіональному рівнях рішення про застосування міжнародних економічних (фінансових) санкцій, персональних санкцій в ході кримінального переслідування за вчинення діянь, що мають характер міжнародного злочину (злочину міжнародного характеру). Однак, при цьому Україна зобов'язана дотримуватися міжнародних стандартів правового механізму застосування санкцій на внутрішньодержавному рівні, вдосконалити процесуальні засади їх застосування, процедури оскарження та внесення змін до рішення. Необхідною вважаємо участь Уповноваженого з прав людини в процесі розгляду рішення про застосування санкцій та оскарження прийнятих рішень. Запропоновано зміни до Закону України «Про санкції» з метою закріплення серед необхідних підстав застосування санкцій до фізичних осіб відкриття щодо них кримінального провадження, а щодо юридичних осіб – відкриття кримінального провадження щодо пов'язаних з ними осіб, а також зміни до Кримінального процесуального кодексу України, оскільки в ньому відсутні положення про такі заходи попереднього характеру (забезпечення та зупинення), як «санкції». Окрім цього загалом процедура накладення санкцій потребує більшої прозорості, а також зроблено висновок, що до громадян України можуть бути застосовані санкції виключно в разі підозри їх участі в терористичній діяльності.

**Ключові слова:** санкції, міжнародне співробітництво у боротьбі зі злочинністю, економічні (фінансові) санкції, персональні санкції, секторальні санкції.

## SECTION 2

# CONSTITUTIONALISM AS MODERN SCIENCE

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### PRINCIPLES AND PROCEDURE FOR FORMING TEMPORARY INVESTIGATION COMMISSIONS OF THE VERKHOVNA RADA OF UKRAINE

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#### Summary

Realization an investigation by temporary investigative commissions of the Verkhovna Rada of Ukraine is one of the leading forms of parliamentary control in Ukraine. Nevertheless, their legal framework still needs to be improved, and parliamentary investigations are relatively infrequent with insufficient efficiency. In this regard, there is a need to study the current legal framework for the formation of temporary investigative commissions.

*The purpose* of the work is an in-depth analysis of the principles and procedure for forming temporary investigative commissions of the Verkhovna Rada of Ukraine, determination their essence and features, as well as substantiation the priority directions for improving the constitutional and legal framework of their organization and activities.

*Methods.* To solve the problems of the research, a number of methods of scientific knowledge were used, including formal-legal method, which determined the current state and problems of legal regulation of the formation of temporary investigative commissions. System-structural method – the unity and interrelation of the procedure of formation and termination of powers of temporary investigative commissions, staffing of their personnel are characterized; logical-semantic method – the essence of the grounds for the formation of temporary investigative commissions is revealed.

*Results.* It is established that the formation of temporary investigative commissions for investigation certain «issues of public interest» allows to take into account the variability of such public interest and the objective impossibility of its exhaustive legal definition. However, this does not preclude the abuse of the right to form temporary investigative commissions in the absence of established parliamentary practice, traditions and political culture. The formation of the staff of the temporary investigative commissions based on



proportional representation of each parliamentary faction (group) provides a majority in the temporary investigative commissions to the parliamentary coalition, which may be disinterested in conducting a thorough parliamentary investigation.

Conclusions. It is substantiated that the development of constitutional and legal bases for the formation of temporary investigative commissions of the Verkhovna Rada of Ukraine should include expansion of constitutional guarantees for the formation of temporary investigative commissions and clarification of issues that cannot be the subject of parliamentary investigation. Other measures should be bringing the rules of procedure of the parliament in line with the relevant Law of Ukraine, taking into account the modern parliamentary practice of Ukraine and the experience of democratic countries, as well as application of disciplinary measures to members of the temporary investigative commission in case it fails to submit a report. It is also advisable prohibition of conducting parliamentary investigations into issues pending before the court, guaranteeing the opposition at least half of the seats in the temporary investigative commission, as well as legislative establishment of its minimum and maximum quantitative composition. The following measures should be establishing requirements for the professionalism and competence of the members of the temporary investigative commission and prohibition of combining senior positions in temporary commissions and committees of parliament.

**Key words:** legal status, parliamentary investigation, control, public interest, People's Deputy of Ukraine

## 1. Introduction

The complexity and responsibility of the control and other functions of the Verkhovna Rada of Ukraine make increased demands on the organization of its work, an integral part of which today is the functioning of temporary parliamentary committees. Their activity constitutes the optimal form of thorough professional preparation and preliminary research of issues considered by the Verkhovna Rada of Ukraine. At the same time, temporary investigative commissions differ from committees (as well as temporary special commissions) of the Verkhovna Rada of Ukraine not only by a more complex and problematic (often resonant and politicized) subject of their activity, but also by less development of this legal institution, some instability and fragmentary constitutional and legal regulation. As a result, it should be noted the relatively low intensity of the formation of temporary investigative commissions of the Verkhovna Rada of Ukraine and often the nominal nature of their activities with contradictory efficiency. Although, as rightly noted by O.O. Maidannik, ensuring the fundamental human rights and freedoms (as well as the proper functioning of the system of checks and balances) depends not least on the quality of control activities of the temporary investigative commissions of the parliament (Maidannik, 2008). Thus, in the context

of improving the constitutional and legal status of the temporary investigative commissions of the Verkhovna Rada of Ukraine, the modern peculiarities of their organization and activity are considered actual.

It should be noted that we have already considered the general issues of the legal nature of the temporary investigative commissions of the parliament in Ukraine and some features of foreign experience of their formation (Zozulia, 2019). In addition, the issue of organization and activity of temporary investigative commissions of the parliament in Ukraine and foreign countries has already been considered in scientific works of domestic and foreign scientists. In particular, S.V. Boldyrev investigated the role of temporary investigative commissions as subjects of parliamentary control in Ukraine (Boldyrev, 2011); O.V. Marcelliak – the status of parliamentary investigative commissions in different countries (Marcelliak, 2006). In addition, R.I. Mateychuk investigated the peculiarities of functioning of temporary investigative commissions of the Verkhovna Rada of Ukraine (Mateychuk, 2016); A.B. Medvid – the main elements of their constitutional and legal status (Medvid, 2008); M.P. Rachynska – ways of ensuring the effectiveness of control activities of temporary investigative commissions (Rachynska, 2014). At the same time, their research reveals mostly

only certain aspects of the legal status of temporary investigative commissions. They do not disclose the current state of the legal basis for formation and functioning temporary investigative commissions as working bodies of the Verkhovna Rada of Ukraine, the impact of relevant procedures for their formation on the effectiveness of parliamentary investigation and significance for further development of parliamentarism in Ukraine.

In turn, after discussing the results of the work of the temporary investigative commission, the Verkhovna Rada of Ukraine must decide on the completion or continuation of its work (Part 6 of Article 3 of the Law of Ukraine of December 19, 2019 № 400-IX). Taking into account the collegial nature of decisions by the Verkhovna Rada of Ukraine, cases of non-adoption by parliament of any of these decisions should also be identified – for example, automatic termination of the temporary investigative commission if parliament fails to continue its work.

The constitutional right of at least one third of the constitutional composition of the Verkhovna Rada of Ukraine to form temporary investigative commissions to investigate issues of public interest is one of the key means and guarantees of parliamentary control by a minority in the current lack of institutionalization of the parliamentary opposition. Such a broad definition of the subject of activity of temporary investigative commissions generally corresponds to the foreign practice of conducting parliamentary investigations of «cases of general importance» or issues of «state»/»public» interest, etc. As indicated in the scientific literature, «issues of public interest» are definitively uncertain and have an evaluative nature, depending on the specific situation and time requirements (Barabash, 2004, p.104; Martselyak, 2006; Mitskevich, 2002, p.86; Rachynska, 2014, p.79). Therefore, in general, we can say that such investigative commissions deal with quite different issues of state and political life, which have a public resonance (Shemshuchenko, 2001, p.171), and their functioning contributes to resolving the constitutional and political crisis (Mateychuk, 2016, p.78, 80).

We believe that the abstractness of the category of «issues of public interest» as a basis for the formation of temporary investigative commissions, on the one hand, allows us to take into

account the variability of public interest and the objective impossibility of its comprehensive legal definition. However given in Parts 2, 3 of Article 4 of the Law of Ukraine of December 19, 2019 № 400-IX the list of grounds for the formation of temporary investigative commissions (reports of violations by public authorities, the threat to sovereignty, mass violations of human rights, etc.), should be considered as no exhaustive, but as a generalizing and indicative. Thus, Part 7 of Article 76 of the Rules of Procedure of the Verkhovna Rada of Ukraine of February 10, 2010 № 1861-VI additionally provides for the establishment of a temporary investigative commission to collect or verify information concerning the issue of recall of the Chairman of the Verkhovna Rada of Ukraine.

At the same time, the Proposals of the President of Ukraine of September 23, 2019 explicitly emphasized that the absence of clearly established by law criteria for determining the public interest and the grounds for creation a temporary investigative commission does not comply with the Constitution of Ukraine. We have to disagree with this, because the Constitution of Ukraine does not set requirements for legislative detailing of the grounds for the formation of temporary investigative commissions, in fact leaving the decision on this issue to the discretion of parliament within its competence. Therefore, the Verkhovna Rada of Ukraine, as the authorized representative body of the Ukrainian people, considering the establishment of a temporary investigative commission, directly in each case determines the presence or absence of public interest.

On the other hand, arbitrary interpretation of «issues of public interest» does not preclude the abuse of the possibility of setting up temporary investigative commissions in the absence of established parliamentary practice, traditions and political culture. Therefore, in the parliamentary practice of Ukraine, as stated by Yu.G. Barabash, there are numerous examples of the decision to establish temporary investigative commissions without proper reasoning (Barabash, 2004, p.107). To prevent cases of groundless creation of temporary investigative commissions, some scholars propose to provide by law a clear list of grounds for their formation (Nazarenko, 2011). There are other proposals for the

legislative specification of the subject of parliamentary investigation (Boldyrev, 2011, p.147). However, we believe that such an approach may result in an artificial restriction of the dynamic and changing constitutional category of «issues of public interest» as a basis for the establishment of temporary investigative commissions, thereby reducing the capacity of parliamentary investigation as a means of parliamentary control. Here we should agree with V.S. Zhuravsky that parliamentary investigation, as the most acute form of parliamentary control, should be conducted only in emergencies in case of impossibility to use the usual forms of parliamentary control (Zhuravsky, 2001, p.18).

Undoubtedly, the possibility of creating a temporary investigative commission by a relatively small number of people's deputies of Ukraine causes the problem of abuse of this right. However, we do not share the position of Yu.G. Barabash and Ya.M. Nazarenko on the establishment of mandatory preliminary verification by the regulatory committee of the validity of proposals to create a temporary investigative commission (Barabash, 2004, p.107; Nazarenko, 2011). On the one hand, such verification will in fact allow the regulatory committee at its discretion to block the creation of separate temporary investigative commissions (primarily those initiated by opposition parliamentary forces). On the other hand, the regulatory committee is unlikely to be able to actually prevent the «groundless» formation of a temporary investigative commission if a significant number of people's deputies of Ukraine (for example, a parliamentary majority) supports its formation. Therefore, we believe that the question of the validity of the creation of temporary investigative commissions should depend largely on the political and legal culture of the deputies and their political responsibility.

In general, effective parliamentary investigation in Ukraine requires in-depth analysis of the principles and procedure for forming temporary investigative commissions of the Verkhovna Rada of Ukraine, determination their essence and features, and substantiation priority directions for improving the constitutional and legal framework for organization and activity of temporary investigative commissions. This

is the purpose of the article. Its novelty lies in the formulated directions of improving the constitutional and legal status of temporary investigative commissions of the Verkhovna Rada of Ukraine based on comprehensive generalization of advantages and disadvantages of the current constitutional and legal regulation and relevant draft practice taking into account current needs of effective parliamentary investigation. The objectives of the article are to analyze and characterize the procedure for the formation of temporary investigative commissions of the Verkhovna Rada of Ukraine and the termination of their powers, as well as the peculiarities of the formation personnel of these parliamentary investigation bodies.

The subject and purpose of this research, taking into account the state of scientific development of the legal status of temporary investigative commissions of the Verkhovna Rada of Ukraine determine our use of dialectical, formal-legal, comparative, system-structural, logical-semantic and other methods of scientific knowledge.

## **2. Formation of temporary investigation commissions and termination of their powers**

First, it should be noted that the legal consequences of failure to submit a report to the parliament by the temporary investigative commission within the specified period (according to Part 8 of Article 3 of the Law of Ukraine of December 19, 2019 № 400-IX) are insufficient, limited to automatic termination of such commission. The failure of the temporary investigative commission to submit a report is most likely indicate improper exercise of its powers by its management and members. Therefore, in this case, it would be appropriate to apply to them (in particular at the initiative of the Regulatory Committee) certain disciplinary measures (eg, termination of reimbursement of expenses related to the exercise of deputy powers, restriction of the right to be a member of temporary commissions, etc.). The parliament must also provide an appropriate political and legal assessment of the work of this temporary investigative commission. The need to regulate responsibility for evasion of the powers of the temporary investigative commission and its members is also

generally noted by M.P. Rachynska (Rachynska, 2014, p.81).

In addition, according to Part 7 of Article 3 of the Law of Ukraine of December 19, 2019 № 400-IX, the maximum term of office of the temporary investigative commission is one year from the date of its formation, which is explained by the volume and nature of tasks, its special powers. However, the expiration of this term, taking into account Part 2 of Article 9 of this Law of Ukraine, does not automatically terminate the powers of such a commission. At the same time, in case of timely submission of a report by the temporary investigative commission in the intersessional period, it will formally continue to retain its status, which can be used politically by the members of this commission. So, this should be taken into account in the existing rules of completion of the work of the temporary investigative commission.

Conceptually, it is necessary to agree with the defined Part 4 of Article 4 of the Law of Ukraine of December 19, 2019 № 400-IX issues, on which a temporary investigative commission cannot be created. For example, it cannot be formed on the issues of realization of justice by a court or defining the presence of guilt of a person in a criminal offense. Although in some foreign countries, the activities of temporary investigative commissions are aimed at exercising parliamentary control over the activities not only of the government but also of the judiciary (Martselyak, 2006, p.7). We believe that in Ukraine this could be seen as parliamentary interference in the realization of justice and a violation of the constitutional guarantees of the independence of courts and judges. At the same time, a ban on conducting a parliamentary investigation into issues pending before the court would also be justified (Barabash, 2004, p.122). First, it will eliminate duplication and indirect influence of the temporary investigative commission on the court. In addition, the trial of a case compared to a parliamentary investigation should a priori ensure not only compliance with procedural standards of proof, but also legal professionalism and impartiality of the assessment of the collected evidence. Therefore, taking into account the different nature of parliamentary investigation and proceedings, today it is unlikely to be appropriate to provide temporary inves-

tigative commissions procedural rights equal to judicial powers, a proposal on which at one time, for example, was supported by O.O. Maidannik (Maidannik, 2001, p.130).

Regarding the legislative restriction of the subject of activity of the temporary investigative commissions, we note Part 5 of Article 89 of the Constitution of Ukraine, in which the subject of legislative regulation includes only the «organization and procedure of activity» of temporary investigative commissions, and not the restriction of the constitutional basis (purpose) of their formation. The Constitution of Ukraine also does not directly establish on which issues temporary investigative commissions cannot be established. In view of this, in order to ensure compliance with such constitutional and legislative bases, as well as to prevent potential abuse of the legislative narrowing of the subject of parliamentary investigation, becomes relevant the constitutional definition of those issues on which temporary investigative commissions of the Verkhovna Rada of Ukraine cannot be established.

In the parliamentary practice of Ukraine, is actually quite common blocking by the leadership of the Verkhovna Rada of Ukraine and representatives of the parliamentary majority the creation of certain temporary investigative commissions. Thus, as noted, during the work of the Verkhovna Rada of Ukraine of the VII convocation, out of 34 initiated temporary investigative commissions, only three were actually created (LIGA.net, 2013). Another example is the artificial delay in setting up the Temporary Investigative Commission to investigate possible wrongdoing by officials that could have led to evasion of responsibility by members of «Wagner's private military company» (draft resolution of September 16, 2020 № 4105). This issue, despite receiving the Opinion of the profile committee dated October 7, 2020, was not actually included in the agenda of the Verkhovna Rada of Ukraine for more than six months. After all, as rightly emphasizes M.P. Rachynska (Rachynska, 2014, p.79), despite the fact that the decision to establish a temporary investigative commission is made by parliament, the appearance of this issue on the agenda depends on the regulatory committee.

Although according to Part 3 of Article 85, Part 2 of Article 87 of the Rules of Procedure



of the Verkhovna Rada of Ukraine of February 10, 2010 № 1861-VI the principle of proportional representation of factions and groups in the temporary investigative commission takes into account cases of failure to submit their proposals on its composition in due time. This allows the formation of a temporary investigative commission without the participation of representatives of such factions (groups). Moreover, the issue of forming a temporary investigative commission should be included in the agenda of plenary sessions without a vote (Part 1 of Article 87 of the Rules of Procedure of the Verkhovna Rada of Ukraine of February 10, 2010 № 1861-VI). We believe that the prevention of such abuses primarily requires not only the elimination of gaps and clarification of the procedure for establishing temporary investigative commissions, but also raising the level of culture, political and legal responsibility of the deputies.

Also, as noted by Yu.G. Barabash, previously the rights of the temporary investigative commission were widely granted to the committees of the Verkhovna Rada of Ukraine (Barabash, 2004, p.121). Similarly, the Special Control Commission on Privatization in accordance with the Resolution of the Verkhovna Rada of Ukraine of July 15, 1998 № 44-XIV simultaneously acquired the status of a temporary investigative commission and a committee. In our opinion, this not only did not correspond to the constitutional principles of organization of committees, temporary investigative and temporary special commissions as separate working bodies of the parliament, but also hindered the development of independent legal status of temporary investigative commissions (temporality of functioning, own order of formation, forms and guarantees of activity, etc.). In addition, although such bodies concentrated additional powers that were not typical of them, in practice they were usually unable to conduct parliamentary investigation effectively enough, as they had to perform other functions at the same time.

### **3. Peculiarities of forming the composition of temporary investigation commissions**

First, it should be noted the principle of proportional representation in the temporary investigative commission of each parliamen-

tary faction (group). In general, this approach (including a ban on holding several senior positions in the temporary investigative commission by members of the same faction/group) reflects the current heterogeneous political structure of parliament in the composition of temporary investigative commission, taking into account as much as possible the diverse interests of voters of all parliamentary political forces. However, in this case, the majority in the temporary investigative commission (including in leading positions) will have a parliamentary coalition, whose probable lack of interest in conducting a thorough parliamentary investigation may negatively affect its effectiveness as a form of opposition activity. Although, as rightly noted by K.O. Kolesnyk (Kolesnyk, 2003, p.170, 171), the formation of temporary investigative commissions is one of the constitutional guarantees of the parliamentary opposition, designed to ensure its control over the government. After all, according to O.M. Peklushenko (Peklushenko, 2005), conduction an investigation by a minority significantly strengthens the role of temporary investigative committees (commissions) as effective tools for monitoring the executive branch.

Therefore, since the Constitution of Ukraine already allows the establishment of a temporary investigative commission by a parliamentary minority, it would be entirely acceptable in the interests of an objective parliamentary investigation to guarantee it at least half of the seats (including leading positions) in the temporary investigative commission. Ya.M. Nazarenko, M.P. Rachynska and others takes a similar position, noting the expediency of basing the formation of the staff of temporary investigative commissions not on the principle of proportionality, but on the principle of parity of the parliamentary majority and minority (Nazarenko, 2011; Rachynska, 2014, p.79; Agency for Legislative Initiatives, 2009, p.7, 8). At the same time, the real implementation of this principle of forming the composition of temporary investigative commissions is possible only if the Verkhovna Rada of Ukraine would be more structured and the parliamentary minority (opposition) would be institutionalized. In addition, in view of the recommendations of the Parliamentary Assembly of the Council of

Europe set out in Resolution 1601 (2008), it is possible and appropriate to legally guarantee the position of the chairman of the temporary investigative commission to a representative of the parliamentary minority (opposition). Other scientists (Nazarenko, 2011; Slovka, 2014) generally support this.

Also, given the likely presence in the Verkhovna Rada of Ukraine of a significant number of non-factional people's deputies of Ukraine, it would be democratic to provide them (for example, if their number is not less than the minimum number of one faction/group) opportunity to determine candidacy for the temporary investigative commission.

In our opinion, it is also expedient to establish by law the minimum and maximum quantitative composition of the temporary investigative commission. This will contribute to its balance and the real ability of the temporary investigative commission quickly and thoroughly perform all tasks, avoiding excessive increase its staff.

Defined by Part 7 of Article 4 of the Law of Ukraine of December 19, 2019 № 400-IX list of grounds on which the people's deputy of Ukraine may not be a member of the temporary investigative commission, generally covers various cases of his actual or potential conflict of interests with parliamentary investigation. According to O.V. Marcelliak, real compliance of banning the inclusion of deputies, who have various conflicts of interest, in the temporary investigative commission «will be very difficult to implement» given the representative order of its formation (Marcelliak, 2006, p.8, 9). We have to disagree with this, taken into account the importance of ensuring the most objective parliamentary investigation, as well as the relatively large number of deputies and traditionally the small number of personnel of temporary investigative commissions.

In addition to the need to harmonize this list of grounds for banning the inclusion of deputies in the temporary investigative commission with similar grounds set out in Part 3 of Article 87 of the Rules of Procedure of the Verkhovna Rada of Ukraine of February 10, 2010 № 1861-VI, their clarification is also relevant. In particular, taking into account the terminology used in the Law of Ukraine of December 19, 2019 № 400-IX, the ban on election to the temporary investiga-

tive commission should apply to the people's deputy of Ukraine, who is a close person not only of an official but also of a servant, working in the relevant body under parliamentary investigation. One of such grounds is also the existence of a private interest in the body under parliamentary investigation. Obviously, the term «private interest» in this case should be used in the meaning given in the Law of Ukraine «On Prevention of Corruption» of October 14, 2014 № 1700-VII, but the reference to this in Part 4 of Article 1 of the Law of Ukraine of December 19, 2019 № 400-IX for some reason is absent.

It should also be noted that according to Part 7 of Article 87 of the Rules of Procedure of the Verkhovna Rada of Ukraine of February 10, 2010 № 1861-VI, a people's deputy of Ukraine in approval with the relevant faction (group) may be elected as a member of only one temporary investigative commission. Agreeing with principle of membership of a deputy in only one temporary investigative commission, we consider this procedure of «approval» superfluous and inappropriate, because it is the factions and groups (not deputies in agreement with them) submit their proposals on the temporary investigative commission (Part 6 of Article 4 of the Law of Ukraine of December 19, 2019 № 400-IX). At the same time, it would be appropriate to establish the currently missing requirements for the level of professionalism and competence of the people's deputies of Ukraine, which are proposed to the composition of temporary investigative commission.

In our opinion, there is somewhat inconsistent the ban on electing to the position of the chairman temporary investigative commission the chairman of a parliament committee (Part 10 of Article 4 of the Law of Ukraine of December 19, 2019 № 400-IX), but not the chairman of the temporary special commission or special temporary investigative commission. In addition, in order to ensure greater purposefulness in the work of the bodies of Verkhovna Rada of Ukraine, we consider it appropriate to extend this ban to the combination of any senior positions in the temporary commissions and committees of the Verkhovna Rada of Ukraine. Similar to parliamentary committees (Part 4 of Article 6 of the Law of Ukraine of April 4, 1995 № 116/95-VR), a ban on holding senior posi-

tions in temporary investigative commissions by the heads of deputy factions (groups) would be appropriate. The same applies to the ban on electing the leadership of the Verkhovna Rada of Ukraine to the temporary investigative commission, which would contribute not only to impartiality, but also to the maximum intensity of the work of its personnel.

Compared with the Rules of Procedure of the parliament of Ukraine of February 10, 2010 № 1861-VI it should be noted as positive the possibility of recall not only the chairman, his deputy and secretary, but also a member of the temporary investigative commission (Part 13 of Article 4 of the Law of Ukraine of December 19, 2019 № 400-IX). At the same time, the cases of their obligatory replacement remain unresolved, which, in our opinion, should take place, for example, in the event of a conflict of interests in a member (official) of the temporary investigative commission. It also needs further elaboration of the issue of political and legal consequences that would be applied in case of concealment of a conflict of interests by a member (official) of the temporary investigative commission. Moreover, the current ban on participation in the voting of a member of the temporary investigative commission if he has a conflict of interest (Part 2 of Article 21 of the Law of Ukraine of December 19, 2019 № 400-IX) is mostly declarative and does not provide means of confirmation this conflict or the consequences of voting by such person.

In case of systematic evasion of a member of the temporary investigative commission from performing his duties according to Item 8 Part 1 of Article 14 of the Law of Ukraine of December 19, 2019 № 400-IX the chairman of the temporary investigative commission only informs about it the chairman of the relevant faction (group) and the Speaker of Parliament. However, this does not imply a mandatory legal response to such cases, which, in our opinion, should be expressed at least in initiating the recall of this member of the temporary investigative commission.

#### 4. Conclusions

Today, temporary investigative commissions of the Verkhovna Rada of Ukraine are formed relatively infrequently, and their activities are often nominal with contradictory

efficiency. The establishment of temporary investigative commissions to investigate certain «issues of public interest» makes it possible to take into account the variability of such public interest and the objective impossibility of its exhaustive legal definition. However, this does not preclude the abuse of the right to form temporary investigative commissions in the absence of established parliamentary practice, traditions and political culture. The formation of the staff of the temporary investigative commission based on proportional representation of each deputy faction (group) provides a majority in the temporary investigative commission to the parliamentary coalition, which may be disinterested in conducting a thorough parliamentary investigation.

The development of the constitutional and legal bases for the forming of temporary investigative commissions of the Verkhovna Rada of Ukraine in the context of modern constitutional reform should include:

1) expansion of constitutional guarantees for the formation of temporary investigative commissions, clarification of their tasks in the field of parliamentary control and issues that cannot be the subject of parliamentary investigation;

2) bringing the rules of procedure of the parliament in line with the Law of Ukraine of December 19, 2019 № 400-IX, taking into account the modern parliamentary practice of Ukraine and the experience of democratic countries;

3) clarification of the right of the parliament to hear the report of the temporary investigative commission ahead of time, which should not allow early termination of its powers;

4) automatic termination of the powers of the temporary investigative commission in case of inability of the parliament to make any decision based on the results of the discussion of its report;

5) application of disciplinary measures against members of the temporary investigative commission in case it fails to submit a report;

6) ban on conducting a parliamentary investigation into issues pending before a court;

7) guaranteeing the parliamentary minority (in case of its greater institutionalization) at least half of the seats in the temporary investigative commission;

8) legislative establishment of the minimum and maximum quantitative composition of the temporary investigative commission;

9) establishing requirements for the level of professionalism and competence of people's deputies of Ukraine, which are proposed to the composition of temporary investigative commission;

10) prohibition of combining any leading positions in temporary commissions and committees of the Verkhovna Rada of Ukraine or deputy factions (groups);

11) obligatory recall of a member of the temporary investigative commission in case of his conflict of interests.

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## ЗАСАДИ ТА ПОРЯДОК ФОРМУВАННЯ ТИМЧАСОВИХ СЛІДЧИХ КОМІСІЙ ВЕРХОВНОЇ РАДИ УКРАЇНИ

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### Анотація

Постановка проблеми. Проведення розслідування тимчасовими слідчими комісіями Верховної Ради України є однією з провідних форм парламентського контролю в Україні. Попри це законодавчі засади їх діяльності все ще потребують удосконалення, парламентські розслідування проводяться порівняно нечасто з суперечливою ефективністю. У зв'язку із цим існує необхідність дослідження сучасних правових засад формування тимчасових слідчих комісій.



## CONSTITUTIONAL COURT PROCEDURE AND CONSTITUTIONAL CONTROL IN THE FIELD OF LUSTRATION

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### Summary

The article considers the constitutional court procedure and constitutional control in the field of lustration. These issues are considered through the prism of the rule of law, its understanding by the Constitutional Court of Ukraine in its practice. It is emphasized that the application of the principle of publicity and the requirements of increased publicity is due to the importance of cases heard by constitutional courts, as well as the results of judicial activity. Along with this, the issue of long-term consideration by the Constitutional Court of Ukraine of the law determining lustration is analyzed in detail. The study is updated by the fact that the European Court of Human Rights on the complaints of citizens of Ukraine found a violation of the right of the lustrated to a fair trial due to excessive time of national trials for their release. It is concluded that the Law on Lustration should serve its most important function in establishing the rule of law in the country.

In legal science there is a situation when the views of scholars on the essence of judicial procedure are contradictory, which gives rise to different understandings of this legal phenomenon by representatives of different scientific schools. For a long time, the problem of judicial procedure was inextricably linked with the consideration of the category of the process, the essential idea of which significantly influenced the understanding of the limits of the procedure in law.

The constitutional Court as the only organ of the constitutional-judicial control may be seen as a special (organized on a state basis), the carrier of the intellectual potential of theories of constitutional law.

**Keywords:** constitutional court procedure; Rule of Law; constitutional control; lustration; the right to a fair trial; Ukraine; ECtHR.

### Introduction

The strategic priority of the policy of the modern European state is to establish the right to a fair trial as a real guarantee of protection of human

rights and fundamental freedoms and to restore public confidence in the courts, which requires comprehensive judicial reform at the constitutional, legislative and organizational levels. You



should also note that in the constitutional doctrine of Ukraine, the concept of “lustration” was not the object of research were not applied in practice. But in connection with the change of political regimes there is a need to restore confidence in the institutions of state power, which usually takes the form of legislative restrictions of political rights for supporters of the previous government, first and foremost, the right to hold public office, to vote and to be elected to the authorities. On the issue of lustration, it should be borne in mind that the process of purification of power is complex, controversial and lengthy. This should improve laws solely on the rule of law and to study and introduce international best practices.

### 1. Literature Review

The problem of constitutional judicial procedure was investigated in the works (Ichsan *at. al.* 2020, Shcherbanyuk 2020, Yusa *at. al.* 2020, Boiko *et al.* 2019), but the problem of resolving the constitutionality of the issue of lustration still needs to be solved.

The purpose of the study is to analyze the constitutional court procedures from the standpoint of the European standard of the rule of law and analysis of the complex issue of lustration in Ukraine, which is the subject of constitutional proceedings.

The category of “judicial process” was studied in the XIX century in the scientific legal doctrine and the legislation that is directly related to the emergence of the concept of judicial law. In turn formed by scientists in the second half of the XIX century the doctrine of judicial law should be considered not only as a universal General theory of judicial law and procedural law, and as a theoretical and methodological framework for the development of a unified conceptual apparatus of the judiciary and procedural law and how the development of theoretical and applied problems of justice, including to define the characteristics of judicial procedures. Therefore, it is logical that the doctrine of judicial law was regarded not as a theory of justice, but as a General theory of judicial power and procedural law. Discussion on the allocation process and procedural component of substantive law began in the late 60-ies of XX century. At this time has been scientifically proved theoretical and legal approaches to the major of which include: “wide”, “the theory of

legal process”, the essence of which comes down to a combination of virtually all forms of legal activities, including law-making and enforcement; “intermediate” – “General theory of procedural law”, whereby the process is understood as a jurisdictional activity and of other law enforcement agencies to overcome the abnormal, conflict manifestations of public relations; the “narrow” – “the concept (theory) of the judicial law.”

According to the “broad” approach, the procedure in the legal sphere is understood as a regulated, consistent action aimed at achieving a specific goal. This includes not only law enforcement (both jurisdictional and positive), but also lawmaking and control over the application of law. That is, procedural can be legal institutions in the field of substantive law, as well as legal institutions that have not only protected but also regulatory nature. The essence of the “narrow approach” is to combine the legal regulation of the judiciary and all types of proceedings into a single whole - judicial law. At the same time, proponents of the “broad” and “intermediate” approaches believe that the procedures also cover law enforcement activities in non-judicial bodies, law-making, control and other legal activities, which are called legal procedures - types of process. We are convinced that the proposed opinion cannot be considered indisputable, as it calls into question the purity of the process as such. In the theory of law there is a definition of the legal process through activity, which, in our opinion, is substantively and methodologically incorrect. In modern conditions, approaches to procedural law should be grouped by essential characteristics, in particular: procedural law - the rules that serve the jurisdictional activities of the judiciary, is an instruction for the implementation of substantive law. In our opinion, in modern conditions the concept of procedural law should be derived from the standpoint of pluralism, philosophical consistency and understanding of the concept under study.

Judicial procedures in the modern process are an urgent problem not only as the main criterion for differentiation of the process, but also the main tool for its further development, acquisition of a new quality. It is judicial procedures that can act as a universal way of optimal combination of private and public law principles in the methods of judicial protection. This shows their main applied value. It can be formulated differently: the

actualization of the problem of court proceedings is demonstrated by the materialization of procedural law; judicial procedures provide a way to achieve internal harmony in the process.

It should be noted that the procedure is a mandatory mechanism for the effective functioning of the judicial system, a tool for implementing the provisions enshrined in substantive and procedural rules. Procedures can be more than just court proceedings. But their presence in the judicial process (constitutional, civil, criminal, economic, administrative) is obvious.

Judicial procedure can be defined as a tool that is a measure of democratic society. Judicial procedure - a way to substantialize the law; this is its theoretical value. Procedures are a way of concrete implementation of the law - this is due to their applied value in lawmaking and law enforcement. Thus, judicial procedures become a legal reality, acquire important and independent significance both as an element of process differentiation and as an element of the exercise of judicial power.

## **2. Methodology**

The main methodological tool in the constitutional judicial procedure and constitutional control in the field of lustration is a comparative legal approach, due to the problem and the need to understand the nature of the constitutional procedure in the EU; legal pluralism, which involves operating different positions of scientists and practitioners; balancing, as lustration issues are closely linked to the human rights dilemma and values in law. A comparative analysis of the regulation of lustration has shown that the application of specific measures by the state depends on political will, which is not consistent with guaranteeing the rights of everyone. Doctrinal legal analysis is based on a dual method: first of all descriptive and analysis that explains all points of view, and secondly, neutral and critical assessment of some academic debates and legal considerations.

## **3. Case studies/experiments/ demonstrations/ application functionality**

According to Art. 8 of the Constitution of Ukraine, state power in Ukraine is exercised on the basis of its division into legislative, executive, judicial. The implementation of this constitutional principle in legislation and legal practice must

be ensured by the existence of an independent and strong judiciary, which is able to perform its tasks and act as an effective guarantor of human and civil rights and freedoms. This is especially important in the context of Ukraine's European choice, recognition and commitment to guarantee European values, leading among which is the right to a fair trial, proclaimed in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Judicial procedure as a multifaceted concept is a fundamental category of legal science, the study of which requires a systematic structural study as a complex legal phenomenon.

The main purpose of the court as a body of justice is enshrined in the Constitution of Ukraine, imposes an obligation on the state in the face of all its branches, including the judiciary - to affirm and ensure human rights - directly enshrined in Articles 3, 19, 55 (Constitution of Ukraine).

The European Court of Human Rights in its judgment *Ruiz-Mateos v. Spaine* stated on 23 June 1993 that the requirements of a fair trial established by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms also apply to the procedural law of the European constitutional courts. This, as well as the fact that these requirements usually apply only to the procedural law of courts of general jurisdiction, to the so-called classical proceedings, allows a new analysis of the proceedings of the constitutional courts of European states.

Procedural relations in constitutional proceedings are pronounced publicly-legal character that can be attributed to constitutional litigation before the so-called inquisitorial and not dispositive, adversarial type of process. The reasons for this are, first, existence as a subject of procedural relations (except the constitutional court) of the public authorities, which can act on the side of the plaintiff and the defendant, and secondly, that constitutional proceedings (with the exception of the consideration of the constitutional complaint) is the guarantee of the Constitution supremacy, not the rights and freedoms of the individual. That is the nature of the constitutional legal proceedings is conditioned by the material law for the protection of which is the constitutional judicial process, namely, public or objective law, and not subjective or private interests of specific individuals. Classic

procedural aspects of the inquisitorial process types are manifested in the distribution of rights and duties between the court, on the one hand, and the parties and other participants that discretionary processes, characterized by the dominant role of the court and not the parties in the administration of the judicial process. Thus, the inquisitorial type of process or method, to which we refer constitutional litigation, characterized by the fact that such classic elements of the judicial process as claims, arguments and causes of action, which is classically determined by the parties and the modification of which is prohibited by the court, is not the exclusive competence of the parties to the process. In this case, the constitutional court has the rights to these elements of the process, and the right to change them. This statement applies not only to the object (in the broad sense) litigation (claims, reasons, evidence, etc.), but also control the trial process. Thus, in contrast to the classical types of dispositive judicial process where parties have the right not only to appeal but also the right to refuse the claim of constitutional justice has the last word belongs to the constitutional court, which is to protect the public interest may deny parties the right to premature suspension of the process by means of rejection of the claim.

Special requirements for the procedure of consideration of cases, which are expressed in the requirement of increased publicity (publicity) of constitutional proceedings are also a feature of constitutional proceedings. This feature is common to all constitutional courts of the European model of constitutional justice, which allows us to assert the existence of a common model of European constitutional justice. The application of the principle of publicity and the requirements of increased publicity is related to the importance of cases heard by constitutional courts, as well as to the results of judicial activity. The result of such activities is the adoption of decisions that have absolute legal force. Based on the above, in European countries there are common features for the constitutional judiciary and based on them models of constitutional justice.

The world practice of constitutionalism since ancient times, in particular in Europe since the early twentieth century, has tried to introduce the institution of constitutional judicial control as the most important function of the judiciary and

formal legal protection of human and civil rights and freedoms. The main purpose of constitutional control is to ensure, both earlier and in the present state, the immutability and stability of the Basic Law, as for the state and society the value of this function is manifested in two aspects.

The first aspect concerns the translation of political conflicts into the plane of law. The second aspect involves the use of the creative potential of judges in identifying the content of constitutional legal relations, which, in our opinion, deal with constitutional principles, in particular, the “rule of law” and the use of the potential of “judicial constitutionalization” in the national legal system.

According to article 8 of the Constitution of Ukraine is recognized and guaranteed by the rule of law that the doctrine is treated as the combination of certain formal and material requirements of legal acts and actions of public authorities. According to the existing *opinio juris* (accepted legal thought), which is expressed in the Report of the Venice Commission from March 24-25, 2010 (Report of the Rule of Law, 2011), the rule of law includes such formal and substantial characteristics: legality, legal certainty, prohibition of arbitrariness, rights and freedoms of the individual, access to justice (justice) before an independent and impartial Tribunal, equality and non-discrimination. Meaningful expression of the rule of law is promotion of human rights and fundamental freedoms, which is the reason of judicial activism, including constitutional courts. According to B. Tamanaha, formal concept focus on the proper sources and form of legality, and the material include, in addition, the quality requirements of the law. As a rule, a substantive theory of the rule are based on the idea of inalienability and inalienability of rights and freedoms, the constitutional consolidation which means their recognition by the state, since they are based on equality of each person. On the other hand, Would. Tamanaha stresses the danger of excessive activation of the courts through review of laws to ensure human rights, because under these conditions may occur interference in the sphere of law (Tamanaha 2007, 107). Balancing the rule (sovereignty) of Parliament and the judicial constitutional control is the Central problem of the modern understanding of the Constitution in the doctrine of continental

Europe. In the jurisprudence of the constitutional Court of Ukraine the rule of law expresses the essence of the judicial constitutional control as it lays down the substantive and formal criteria to verify the constitutionality of legal acts in accordance with paragraph 1 of article 150 of the Constitution of Ukraine. In its Decision in the case of the appointment by the court lighter punishment, the constitutional Court of Ukraine has determined that the rule of law requires the state of its implementation in law-making and enforcement activities, in particular laws, which by their nature must be infused primarily by the ideas of social justice, freedom, equality and the like (Judgment of the Constitutional Court of Ukraine).

According to the substantive criterion, the principle of the rule of law expresses the requirements of quality for legislation, administrative and judicial practice. In particular, by decisions of June 29, 2010 № 17-rp / 2010 and October 11, 2011 № 10-rp / 2011 the Constitutional Court of Ukraine recognized as one of the elements of the rule of law the principle of legal certainty, according to which the restriction of fundamental human and civil rights and implementation these restrictions are permissible in practice only if the application of the legal norms established by such restrictions is predictable. Later, the Constitutional Court of Ukraine in its Decision of 11 October 2011 № 10-rp / 2011 stated that the legislation on administrative liability does not meet the requirements of legal certainty and the prohibition of administrative arbitrariness, as it establishes the possibility of administrative detention for longer than Article 29 of the Constitution of Ukraine (up to 72 hours). According to the Constitutional Court of Ukraine, the legislator left out of its scope the issue of deadlines for drawing up a protocol on an administrative offense and sending it to the body or official authorized to consider the case of such an offense and make a decision, leaving it to the bodies (officials), authorized to respond to administrative offenses, the right to determine such deadlines at their own discretion, which created the basis for possible abuse by the latter.

By the way, indirectly, in these decisions the constitutional Court of Ukraine in new ways gave an interpretation of its jurisdiction regarding the decision on the constitutionality of gaps

and conflicts in legislation, recommending that the Verkhovna Rada of Ukraine to amend the current legislation. The Constitution indirectly we are talking about the principle of legal certainty in article 57, according to which everyone is guaranteed to know their rights and responsibilities regardless of this legal act, the act of individual action. The second third of this article establish the procedures for the entry into force of normative legal acts that are necessarily related to their disclosure. While the Constitution obliges the Parliament to adopt a special law that would determine the procedure for publication of normative legal acts, however, that until today is not accepted, it is a violation of the Basic Law. Consequently, the lack of legal regulation, gaps and conflicts in current legislation violate the requirements of article 8 and article 57 of the Constitution, in this context should be interpreted in correlation, because under these conditions any person can know for certain about the content and scope of their rights and duties, and it violates the principles of legal certainty. In turn, the Parliament in such situations, delaying the implementation of its legislative function rather than violate human rights and fundamental freedoms. According to the Final report 14 of the Conference of European constitutional courts in the gaps, conflict and weaknesses of current legislation is a violation of the principles of the rule of law, in particular human rights and fundamental freedoms, and regarded the whole as an anomaly in the law (General Report of the XIV Congress of the Conference of European Constitutional Courts). From the point of view of the supremacy of the Constitution, the gaps in the law exists because the Constitution recognizes that the list of human rights and fundamental freedoms is not exhaustive, and they must be interpreted by the constitutional courts or similar institutions in accordance with social dynamics on the basis of equality, justice and balanced distribution of responsibilities between individuals and public authorities. In such a situation and a dilemma of parliamentary and judicial constitutional control, since, from the point of view of democratic legitimacy, the Parliament, the responsibility of proper legislative regulation. At the same time acts of Parliament is subject to judicial constitutional review, and therefore they must meet the



requirements of the Constitution and constitutional jurisprudence, which expresses the concretization and development of constitutional provisions in the legal acts of the constitutional Court of Ukraine. In order to prevent obstruction and exert any pressure (even under the pretext of formally legal procedures) on the activities of the Constitutional Court of Ukraine, it is necessary to borrow the experience of some European countries (Lithuania, Slovakia, Czech Republic), in which disciplinary chambers (senates) are established. Investigation of the circumstances of violation by constitutional judges of the oath, incompatibility rules or business ethics. A judge under investigation shall be removed from office until the investigation is completed.

The question of removal of a judge is decided at the session of the constitutional court, which shall consider the conclusion of the disciplinary chamber (Senate) in the case of establishing the circumstances of the violation by the judge of the constitutional court to make submissions regarding dismissal of a judge, the authority which appointed him

The constitutional Court of Ukraine can not be a Creator of constitutional reforms in the state, but its unique role is reflected as a subject of constitutional democracy and stability in the state, which must comply with generally accepted standards of government and of government built on democratic principles in the interests of the Ukrainian people. The constitutional Court of Ukraine, constitutional jurisdiction by applying the control, a recognition of the rule of law and the Supreme legal force and direct action of the Constitution of Ukraine, showing the obligation of the state or any officer to obey the Constitution, be responsible for the implementation of its laws of Ukraine. This means that any entity must operate as required by the Constitution (article 19), on the basis, within powers and in a method specified by constitutional law (Selivanov, 2006, 4). The decision of the constitutional Court of Ukraine give an estimate of the acts and actions of a public body, when there is a dispute on the law and law enforcement, a study of the legal conditions and circumstances of implementation of the functions and powers of an entity are always checked for their compliance with the Basic Law of the state.

The rule of law has an independent content

and functional orientation. The content of this principle cannot be considered solely in terms of natural law and legal positivism. We believe that reasonable is an integrative approach to the definition of law in the context of the disclosure of the content of this principle that the rule of law, it is advisable to understand how political and legal state in which public power institutions of the state, civil society and other social actors act solely on the basis of law.

In addition, the rule of law is a dynamic phenomenon that can be filled with new content in connection with possible socially conditioned changes in the content of law itself, ie the emergence of new values, customs and traditions; this process of constant filling and renewal cannot be limited, just as humanity's desire for progress and perfection cannot be limited. In the context of constitutionalism, the rule of law must also act as a constraint on public power in the interests of civil society, human rights and freedoms, ie power in a society in which the rule of law is recognized and functions, limited by law as the embodiment of truth and justice.

The definition of the rule of law through the constant restriction of arbitrary state power is one of the leading and is due to the fact that the rule of law arose to solve the fundamental problem of constitutional law - the proper control of state coercion against individuals.

Based on this understanding, the directions of measures to uphold the rule of law in the context of the implementation of European standards in the modern conditions of the constitutional process in Ukraine are the reform of public institutions and the establishment and protection of human rights and freedoms.

Given that the phenomenon of the rule of law is a terra incognita in jurisprudence, the Constitutional Court of Ukraine in its Decision of November 2, 2004 № 15-рп / 2004 (case on imposition of a milder punishment by a court) formulated a legal position: "The rule of law is the rule of law in society. The rule of law requires the state to implement it in law-making and law-enforcement activities, in particular in laws, the content of which must be permeated primarily by the ideas of social justice, freedom, equality, etc" (Judgment of the Constitutional Court of Ukraine, № 2-рп / 2005 ).

Based on this legal position on the definition of the principle of the rule of law, the Con-

stitutional Court of Ukraine specifies it in subsequent decisions, thus formulating the signs of the rule of law even without a textual reference to the basic definition.

Thus, the signs of the rule of law, based on the analysis of the decisions of the Constitutional Court of Ukraine, include: justice and dimension as a criterion of the ideology of justice in a democratic state (tax lien case); “Respect and inviolability of human rights and freedoms” (the case of permanent use of land) (Judgment of the Constitutional Court of Ukraine of September 22, 2005 № 5-rp / 2005); “Establishment of law and order, which should guarantee everyone the establishment and protection of rights and freedoms” (the case of permanent use of land); “Certainty, clarity and unambiguity of the rule of law, as otherwise can not ensure its uniform application, does not preclude unlimited interpretation in law enforcement practice and inevitably leads to arbitrariness” (the case of permanent use of land; the admissibility of “By applying legal means, if” it aims not to narrow the scope of rights and freedoms, but to clarify the content and regulation of procedural issues and to outline the general boundaries of fundamental rights “(the case of the formation of political parties in Ukraine), etc.

However, the analysis of the European approach to understanding the rule of law and the practice of the Ukrainian body of constitutional justice suggests that the implementation of the fundamental principles of European constitutionalism, in particular through the interpretation of these principles, has not always been effectively carried out by the Constitutional Court. Thus, as of June 1, 2020, the Constitutional Court of Ukraine adopted a total of 358 decisions. The case law of the European Court of Human Rights was cited and analyzed during this period in 5 decisions: one - in 2007 and 2011, in two decisions - in 2010, 2012 and 2016.

It should be noted that references to the Convention and the case law of the European Court of Human Rights were given in separate opinions of Judges V. Horodovenko, V. Kamp, D. Lilak, V. Lemak, M. Markush, V. Shishkin, S. Shevchuk. However, the events of recent years indicate positive changes in the relevant statistics. If we analyze the activity of the Constitutional Court of Ukraine in the direction of Europeanization of constitutional legislation, a very favorable

trend emerges. Decisions have been taken in recent years, each of which contains, in particular, references to European standards (Judgment of the Constitutional Court of Ukraine of March 14, 2014 № 2-rp / 2014, Decision of the Constitutional Court of Ukraine of March 20, 2014 № 3-rp / 2014, Decision of the Constitutional Court of Ukraine of April 22, 2014 № 4-rp / 2014), ratified by Ukraine, and two of them also refer to the relevant case law of the European Court of Human Rights.

In our opinion, increasing the activity of the Constitutional Court of Ukraine as an important participant in the constitutional process and focusing judges on European standards and practice of the European Court of Human Rights can significantly accelerate democratic transformations in the state and increase the effectiveness of the rule of law at the current stage of the constitutional process.

However, it is necessary to pay attention to rather long consideration of the case on lustration. On September 16, 2014, the Parliament of Ukraine - the Verkhovna Rada of Ukraine adopted the Law of Ukraine «On the Purification of Power» (Law of Ukraine «On the Purification of Power», 2014).

In November 2014, the Supreme Court of Ukraine and people’s deputies appealed to the Constitutional Court of Ukraine with constitutional petitions on the constitutionality of the provisions of paragraph 6 of part one, paragraphs 2, 13 of part two, part three of Article 3 of the Law of Ukraine «On the Purification of Power» September 16, 2014 № 1682-VII.

The subjects of the constitutional petition asked to open proceedings on the constitutional petition on the constitutionality of certain provisions of the Law of Ukraine of September 16, 2014 № 1682-VII «On the Purification of Power» and check for compliance with the requirements of part one of Article 8, Article 61, part one, item 5 of part five of Article 126 of the Basic Law of Ukraine and recognize as unconstitutional (are unconstitutional), the provisions of item 6 of part one, item 2 of part two, item 13 of part two, part three of Article 3 of the Law of Ukraine of September 16, 2014 № 1682-VII «On the Purification of Power».

October 23, 2015 the constitutional Court of Ukraine has postponed indefinitely consideration of a question on constitutionality of certain provisions of the Law of Ukraine «On the Purification of Power». The first session in this case on

two constitutional concepts and Supreme Court of Ukraine and representation of 47 people's deputies of Ukraine in the constitutional Court of Ukraine held on 16 April 2015, however, the trial was postponed. The next meeting of the constitutional Court of Ukraine on this issue began on 22 October 2015, but on October 23, 2015 the consideration of the question postponed again. This decision the Chairman of the constitutional Court of Ukraine Yuriy Baulin explained that the CCU should examine the question of admissibility of the petition of the representative of the Verkhovna Rada of Ukraine, people's Deputy. Sobolev, 22 October 2015 about removal of the Chairman and six judges of the constitutional Court from reviewing this issue because they themselves fall under the lustration law. Only after that, on the date of consideration by the Constitutional Court of Ukraine the case will be announced later. The constitutional Court of Ukraine should review the provisions of the law of Ukraine «On the Purification of Power», which refers to the prohibition to hold public office, the authorities of the presidency. Yanukovich, including the judges who took action against participants Bromide in late 2013 or early 2014 At the conclusion of the Supreme Court of Ukraine of 20 November 2014, part of the lustrating the provisions of the act reverses the effect of the legislation, which is a violation of the Constitution. In addition, representatives of the Supreme Court of Ukraine is also concerned about establishing the fact of work of a civil servant in a position as grounds for dismissal without consideration of the lawfulness or unlawfulness of actions of the official in the performance of their official powers, that is, without proof of a crime. The Judge Of The Constitutional Court Of Ukraine N. Chaptala noted that these provisions of the law indicate a part of Ukrainian lawyers who were interviewed, the constitutional Court of Ukraine. Another part of them refers to the European practice: in the Czech Republic and in some EU countries, the lustration law had the opposite effect: it provides for liability for itself only through the cooperation with the previous government, that is called in the law the offense committed, when this law did not exist.

The decision of the constitutional Court of Ukraine on this issue today, expect all sectors of society. Those who endorses and strongly con-

tributes to the process of lustration, waiting for the constitutional Court of Ukraine support their efforts along the way. Those who oppose (not so much the process of lustration as such, as the forms and means of its implementation) – believe that the constitutional Court of Ukraine should make the decision that will be the basis for protection from “such” lustration. And even ordinary members of society who are most deeply imbued with the process of lustration, hope to hear the decision of the constitutional Court of Ukraine is a clear message as to which direction will come into the process of cleansing of power in Ukraine.

March 2, 2020 became aware of the planned review of the constitutionality of the Law «On the Purification of Power», but its consideration was again postponed. The situation is complicated by the fact that individuals who got under lustration, began to challenge this decision in administrative court. Moreover, the European court of human rights has found a violation of the rights lustrated to a fair trial due to excessive timing of the trials relative to their release. Five Of The Claimants (V. Would. Fields – the First Applicant, D. V. Bacalov – the Second Applicant, A. A. Yas – Third Applicant, G. A. Jakubowski – the Fourth Complainant, S. I. Bondarenko – the Fifth Applicant) had applied to the European court of human rights complaining of violations with respect to them of article 8 of the Convention due to the dismissal from office of the public service in the course of lustration; the first three Applicants further complained of a violation of article 6 of the Convention due to failure to observe the reasonable time of court proceedings; the Second Applicant also complained under article 13 of the Convention. Despite the similarity of the statements, the European court of human rights has considered them in the same solution.

The applicants dismissal according to the law of Ukraine «On the Purification of Power» he held the positions of public service. At the time of the dismissal of the First Applicant held the position of head of the organization of work with documents of the Prosecutor General of Ukraine, the Second Applicant is the first Deputy chief of investigative management of financial investigations of regional management of the Ministry of revenue and duties of Ukraine, the Third Applicant – the Deputy Prosecutor of the region, the Fourth Applicant - the position

of chief of city Department of the State tax inspection of Ukraine, the Fifth Applicant, the post of Deputy head of Department of agroindustrial development of regional state administration.

On the basis of according to the law of Ukraine «On the Purification of Power» the first three Applicants were dismissed in 2014, Fourth and Fifth Applicants in 2015, the Applicants turned to the courts with claims for reinstatement; proceedings of the first three Complainants was suspended until the Constitutional Court of Ukraine the question of the constitutionality of the law of Ukraine «On the Purification of Power»; in satisfaction of the claims of the Fourth and Fifth Applicants were denied.

The European court of human rights stressed that an effective remedy should function without excessive delay, and acknowledged that in the cases of the first three Applicants for the submission of claims in the administrative courts in conjunction with the procedure of the constitutional Court of Ukraine was an effective remedy. According to the national legislation, the constitutional Court of Ukraine had to consider the constitutionality of the Law of Ukraine «On the Purification of Power» for 3 months.

The European court of human rights found that the interference in the private lives of all the Applicants (article 8 of the Convention) was not necessary. The European court of human rights noted that the basis for the dismissal of the Applicants was the fact of working in the public service during Viktor's Yanukovich presidency; in addition to the dismissal of the Applicants were prohibited from holding positions of public service for a period of 10 years, and information about them was made public on the Internet registry. The European court of human rights stressed that these measures had a very serious impact on social and professional reputation of the Applicants, who worked many years in public service, lost existing awards and future prospects; these measures were extremely restrictive and broad in scope.

The European court of human rights stressed that the lustration may not be used for punishment, retribution or revenge, and had to restore the credibility of public institutions. The European court of human rights stated that enshrined in the Law of Ukraine «On the Purification of Power» principles (including the presumption of innocence and individual responsibility) off-

set by other provisions. The European court of human rights has expressed doubts as to the legitimate purpose of the intervention, and after analyzing all the circumstances, found that the perfect interference was not necessary in a democratic society, was not proportional (in particular, the European court of human rights drew attention to the fact that the basis for the dismissal of the Applicants was not a specific criminal actions, and that they occupied positions of public service during Viktor's Yanukovich presidency).

According to article 2 of the Law of Ukraine «About implementation of decisions and application of practice of the European court of human rights» (Law of Ukraine «On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights», 2006), the decision is binding on Ukraine under article 46 of the Convention.

In this case, the constitutional Court of Ukraine can not get together and resolve this issue.

Such processes in post-Soviet countries lustration (lat. *lustratio* – “purification by sacrifice”). Similar processes occurred in Western Europe after the second world war (denazification), which aimed to limit the legal status of certain categories of citizens to protect public interests.

The Lustration means “purification”, and it allows “to exclude persons who lack integrity (even judges) from public institutions”. Lustration is a tool of transitional that applies after the transition from dictatorship to democracy to protect democracy against a possible return trip.

Lustration is to limit the rights of certain categories of persons to hold certain positions in state public service, including the limitation of the right to be elected to a certain position.

The problem also arises when it comes to people who hold “protected” positions in independent authorities. A clear definition of the narrow range of grounds for dismissal in this case is a guarantee of independent and objective activity of such a body. This applies to judges. The grounds for their dismissal are exhaustively defined by the Constitution, and therefore the procedure defined in this law does not meet the criteria of independence and raises doubts. This procedure essentially undermines the functioning of such independent oversight institutions and creates a clear conflict between the executive, the legislature and the judiciary.



According to the Venice Commission, “Lustration procedures, despite their political nature, should be designed and carried out only by legal means, in accordance with the Constitution and taking into account European standards concerning the rule of law and respect for human rights. If this is followed, lustration procedures can be compatible with a democracy based on the rule of law” (CDL-AD(2009)044, § 149).

European standards in the field of lustration mainly stem from three sources: the European Convention for the Protection of Human Rights and Fundamental Freedoms (in particular Articles 6, 8, 10 and 14, Article 1 of Protocol No. 12) and the case law of the European Court of Human Rights. The European Court of Human Rights in a number of cases relating to the relevant legislation adopted in Slovakia (ECtHR, *Turek v. Slovakia*, application № 57986/00, 14 February 2006), Poland (ECtHR, *Matiek v. Poland*, application № 38184/03, 30 May 2006, ECtHR, *Luboch v. Poland*, application № 37469/05, 15 January 2008, ECtHR, *Bobek v. Poland*, application № 68761/01, 17 July 2007, ECtHR, *Schultz v. Poland*, application № 43932 / Lithuania, ECtHR, *Sidabras and Jiautas v. Lithuania*, applications №№ 55480/00 and 59330/00, 27 July 2004, ECtHR, *Rainis and Gasparavičius v. Lithuania*, applications №№ 70665/01 and 74345 / 01, 7 April 2005, ECtHR, *Žičkusi v. Lithuania*, application № 26652/02, 7 April 2009, Latvia (ECtHR, *Ždanok v. Latvia*), 58278/00, 16 March 2006, ECtHR, *Adamsons v. Latvia*, application № 3669/03, 24 June 2008) and more recently in Romania (ECtHR, *Naidin v. Romania*, application № 38162/07, 21 October 2014); case law of national constitutional courts (Lustration case law in the Venice Commission’s); Resolutions of the Parliamentary Assembly of the Council of Europe, namely Res. 1096 (1996) on measures to eliminate the legacy of the former communist totalitarian systems and Res. 1481 (2006) on the need for international condemnation of totalitarian communist regimes. PACE in Res. 1096 (1996) cited the Guidelines for Compliance with Lustration Law and Similar Administrative Measures with the Rule of Law-Based State (“Lustration Guidelines” or “Guidelines”) as a reference. Thus, the right of equal access to (or equal opportunities to serve in) public office as such is not guaranteed by the ECtHR, but follows from the right not to be discriminated against on

the basis of political conviction (Article 14 in conjunction with Article 10 of the ECHR or Article 1 of Protocol 12). In addition, the right of access to the civil service is recognized in international law (Article 21 (2) of the Universal Declaration of Human Rights - “Everyone has the right to equal access to the civil service in his country” - and Article 25 lit. c.) ICCPR - Every citizen must have the right and the opportunity, [...] without unreasonable restrictions: [...] to have access on general terms of equality to the civil service in his country”. The right to participate in the management of state affairs, in all all-Ukrainian and local referendums, to freely elect and be elected to public authorities and local self-government bodies, as well as the right to access civil service and service in local self-government bodies are also enshrined in Article 38 of the Constitution of Ukraine.

European standards for lustration procedures are, in particular: guilt must be proved in each case; the right to defense, the presumption of innocence and the right to appeal to a court must be guaranteed; on the one hand, the various functions and objectives of lustration must be respected, namely the protection of the new democracy, and on the other hand, criminal law, which means the punishment of the people of persons whose guilt has been proved; lustration must meet strict time limits for both the period of its validity and the period to which it applies.

Of course, Lustration Laws are always a mixture of a legal act and a political document. An appropriate balance needs to be struck between these two elements if the Lustration Law is to serve its important role in establishing the rule of law in the country.

It should be noted that the constitutional and legal responsibility is realized in the field of political relations, which confirms the relationship between law and politics. Constitutional and legal responsibility should be imposed only in the case of recognition of the existence in the action of the subject of constitutional and legal relations of the legally established composition of the constitutional tort. This is the basis for distinguishing between constitutional and political responsibility.

Political responsibility has no signs of legal responsibility. In particular, the constitutional and legal responsibility is subject to the basic principles common to all types of legal respon-

sibility: justice, humanism, legality, inevitability of punishment, guilt of an act that is not inherent in political responsibility.

Third, compliance with the rules of political responsibility is ensured not by means of state coercion, but by measures of public, including political influence, negative public assessment, and so on.

Fourth, the constitutional-legal liability may occur only if the act of the subject has all the elements of a constitutional tort. If there is no fault, then the use of constitutional and legal responsibility is impossible, however, to such entity it is possible to apply the measures of political responsibility.

Fifth, the application of constitutional law sanctions always strictly regulated and takes place according to the statutory procedure, the deviation from the requirements of procedural rules is not allowed. Political responsibility may be imposed in a more simple manner, without complying with legal formalities.

So, the political and constitutional-legal responsibility are not identical. Political responsibility for the scope is broader than the constitutional-legal responsibility and relates to the last both generic and specific phenomenon.

Constitutional and legal responsibility, political responsibility, but not any, but one that acquires constitutional forms. To avoid the transformation of the constitutional and legal responsibility of the legal institution into an instrument of political struggle, the implementation of measures of constitutional and legal responsibility should be limited to a constitutional legal order.

The idea of democracy involves a constant, continuous relationship between civil society and government. The peculiarity of this relationship lies in the fact that civil society in a democracy is primary, the total premise of the legitimacy of state power (article 5 of the Constitution of Ukraine), which is designed to perform a variety of functions to meet his needs and requests. Otherwise, the civil society addresses the ruling political forces from power, replacing them with others. It looks like the institution of the political responsibility of those in power to civil society.

What kind of responsibility is mentioned in the Law of Ukraine «On the Purification of Power»: political, constitutional and legal or some other? The Law of Ukraine “On Purifica-

tion of Power”, which is being considered by the Constitutional Court of Ukraine, has its effect on top officials of the presidency of V. Yanukovych and judges. But judges, according to the principle of separation of powers, must be held accountable under a special procedure. Since the independence and fairness of justice are ensured by independent judges, their independence, in turn, as provided by the legislature, is largely the result of granting immunity. The form of responsibility of judges should in no way restrict the independence of the judiciary.

The Law on the Purification of Power places the responsibility for inspecting judges on the chairmen of the respective courts. For the sake of division of powers, the procedure of scrutiny by decentralized supervisory bodies should not apply to judges. However, if the information provided by a judge in accordance with Article 13, paragraph 13, is inaccurate, the body must send a report to the Minister of Justice, who submits it to the High Council of Justice (now the High Council of Justice) and the High Qualifications Commission of Judges. However, according to the Constitution, the High Council of Justice may not be bound by this proposal and must assess the merits of each case.

The grounds for termination of judicial powers can be divided into two groups: the first group includes objective obstacles to the further performance of official duties of a judge (paragraphs 1, 2, 3, 7, 8, 9, paragraph 5 of Article 126 of the Constitution of Ukraine), the circumstances of the second group are directly related to the offenses committed by the judge (paragraphs 4, 5, 6, paragraph 5 of Article 126 of the Constitution of Ukraine), namely: violation by the judge of the requirements of incompatibility; violation of the oath by a judge; entry into force of a conviction against him.

Evaluating the above situation, it is worth noting that the constitutional responsibility of judges is highly political, which borders the pressure on the court related to the consideration of a particular case. For today the current legislation of Ukraine concerning the application of such measures of constitutional legal responsibility of judges as dismissal from office in connection with violation of oath, failure to comply with the requirements concerning the incompatibility or the entry into force of conviction against a judge, there is uncertainty in the settlement procedures for its implementation.

The Constitution gives the power of dismissal of a judge – including in the procedure of bringing to legal responsibility – the authority which he was elected or appointed.

Moreover, Lustration the law imposes liability for acts which, at the time of its Commission was not wrongful. The prohibition of retroactivity and the principle of *nulla poena sine lege* expressly provided for by the constitutions of most States that adopted the law on lustration. Under those principles, no one can be recognized in the offense, if in accordance with applicable at the time of committing the act of domestic or international law it was not considered illegal. Violation of the principle of non-retroactivity of the law were marked by the bodies of constitutional control in Poland, Czech Republic, Hungary, Slovenia, and Slovakia. The principle of non-retroactivity in time of legal acts contained in article 58 of the Constitution of Ukraine and exalted from the status of doctrinal principle at common law. It implies that you can not have any retroactive effect of legal norms that establish new rights and duties or prohibitions, because the violation of such rights, failure to comply with such obligations, the violation of these prohibitions will always be a new species, a new “composition” of offenses.

In Ukraine, the Law on the Purification of Power was adopted by the Verkhovna Rada on September 16, 2014, signed by President Poroshenko on October 9, 2014, published in the Official Gazette on October 15, and entered into force on October 16, 2014. According to the judgments of the European Court of Human Rights in the cases of Zdanok v. Latvia, Sidabras and Jiautas v. Lithuania, Mathieu v. Poland, and PACE Resolution №1096, lustration is contrary to the legal principle of retroactive effect. In order to respect human rights, the rule of law and democracy, lustration must strike a fair balance between “protecting a democratic society on the one hand and protecting the rights of individuals on the other” (ECtHR, Zhdanovska v. Latvia).

The European Court of Human Rights has repeatedly drawn attention to the imperfection of current legislation in Ukraine and the need to adhere to the principle of legal certainty. Thus, the judgment of 6 November 2008 in the case of Yeloyev v. Ukraine states as follows: “The Court considers that there is no clear statement of pro-

visions as to whether it is possible to properly continue (if so, under what conditions) the application at the stage judicial review of a pre-trial detention measure chosen for a specified period at the pre-trial stage does not meet the criterion of “predictability of the law” for the purposes of Article 5 § 1 of the Convention. The Court also recalls that a practice which has arisen in connection with a legislative gap which requires a person to be detained for an indefinite and unforeseeable period in circumstances where such detention is not provided for by any specific provision of law or any court decision is itself contradicts the principle of legal certainty, which is implied by the Convention and which is one of the main elements of the rule of law”.

In paragraphs 51 and 56 of the judgment in “Shchokin vs Ukraine”, the European Court of Human Rights stated that, referring to “the law”, Article 1 of Protocol No. 1 to the Convention referred to the same concept as in other provisions of the Convention. “Spaček v. The Czech Republic” (Spaceks.rov The Czech Republic), № 26449/95, § 54, 9 November 1999). This concept requires the quality of the law, requiring it to be accessible to stakeholders, clear and predictable in its application (see Beyeler v. Italy, № 33202/96, § 109, ECtHR 2000). Even assuming that the interpretation of those rules by the domestic authorities was correct, the Court is not satisfied with the general state of national law in force at the time in the present case. The Court notes that the relevant legal acts clearly contradicted each other. As a result, national authorities have, at their own discretion, taken opposing approaches to the correlation of these legal acts. In the Court’s view, the lack of the necessary clarity and precision in national law, which provided for the possibility of differing interpretations of the issue in question, violates the “quality of law” requirement of the Convention.

In the judgment “Lyubokh v. Poland”, the ECtHR emphasizes that the lustration procedure cannot serve as a punishment, as it is the prerogative of criminal law. If the provisions of national law allow for the introduction of restrictions on the rights guaranteed by the Convention, such restrictions must be sufficiently individual. In addition, lustration procedures must meet accessibility criteria, and lustration cases must comply with all fair trial standards and the requirements

of Article 6 of the Criminal Procedure Convention. In particular, the person subject to lustration must be provided with all the guarantees inherent in criminal prosecution. Such guarantees must first and foremost be the presumption of innocence.

Thus, in my opinion, certain provisions of the Law of Ukraine “On Purification of Power” contradict the principle of individual responsibility provided for in Article 61 of the Constitution of Ukraine.

In understanding the modern theory of constitutional control in Ukraine, the concretization of terms and concepts that characterize constitutional judicial control gives grounds to characterize it from the standpoint of “divided justice”, when in accordance with the competence of the Constitutional Court of Ukraine its powers are related exclusively to judicial control “Legality”, which is inherent in the jurisdiction of public law disputes in administrative courts. In Ukraine, the volume of critically contradictory public-law relations has grown rapidly in recent years, when the legal acts of the Verkhovna Rada of Ukraine, the Government and the President of Ukraine are challenged.

Conflicts in the field of lustration procedures have exacerbated the question of the boundary between the procedures of constitutional and administrative proceedings, which requires increased attention not only to the proper use of constitutional concepts and terms, as clarified above, but also dictate the need to develop theoretical provisions on the conceptual issue - “presumption constitutionality”, as the practice of legislative regulation of public rule-making does not yet accept this important principle in conducting constitutional judicial review.

What would you like to pay attention to in our study?

In the theory of constitutional control is not the final opinion with relevant reasoning about the problem, which is dictated by the necessity of selection of the most appropriate (universal) the principle that the “next” or “previous” constitutional control. Judges of the constitutional Court with sufficient scientific research experience of its own judicial competence in his numerous publications give no clear theoretical answers and recommendations (ratings) to this issue. With regard to the existing advantages and disadvantages of one of these types of constitutional con-

trol, because the practical use of this theoretical direction is confirmed by the fact that the practice is ahead of theory, as to the constitutional competence of the Court entered the citizen’s right to appeal in constitutional proceedings unconstitutional a law that abolishes or limits the rights and freedoms of man and citizen. Amendments to the Constitution of Ukraine (Section VIII and Section XII) upgrade (upgrading the status of the constitutional Court of Ukraine) aims to become efficient and effective judicial body of constitutional control. Indeed, this explains the fact that the Verkhovna Rada of Ukraine Law of Ukraine on amendments to the Constitution of Ukraine seized during the reform of justice in 2016 from the competence of the constitutional Court of Ukraine the authority to conduct an official interpretation of the laws of Ukraine. At the same time was provided with a “compensation” to strengthen Supervisory functions in respect of acts of Central bodies of state power and therefore it cannot be excluded that, accordingly, the new Law of Ukraine “On the constitutional Court of Ukraine” is possible will appear among the questions subordinate the constitutional jurisdiction of the control relative to the “important large-scale public events” (we are talking about administrative reform and T. I.). Evaluated in the event of a dispute, it may also be the validation of the results of voting of voters in a national referendum, elections to Parliament, when challenged, their outcomes and other issues. If you take into account this circumstance, when the corresponding case in the Supreme administrative court of Ukraine considers a narrow panel of judges, then it would be time for such a case the constitutional Court would have to be considered in plenary meeting, a complete procedure for oral hearings and procedures of the constitutional proceedings.

Attention should also be paid to the expansion of preliminary constitutional control, when it comes not only to review the constitutionality of proposed amendments to the Constitution in accordance with Articles 157 and 158 of the Constitution of Ukraine, but also the constitutionality of international treaties submitted by authorized legal entities to the Verkhovna Rada of Ukraine. consent to their binding. The analysis showed that only in the fifth year of its activity, ie in 2001, a preliminary constitutional review was carried out and an opinion was issued on



the compliance of the Rome Statute of the International Criminal Court with the Constitution of Ukraine. In its opinion, the Constitutional Court noted that the reservations directly deserve further clarification, but this requires a stable platform of “constitutional precautions”.

### Conclusions and Further Research

The modern theory of constitutional judicial control indicates such a feature of constitutional proceedings, when the issues of admissibility and sufficiency of grounds, evidence and the existence of a real dispute in their entirety are subject to review in the order of normative control over constitutional submissions and appeals. But this issue is often, as the analysis shows, resolved by the court without the participation of the subjects of the right to make such petitions. At the same time, one circumstance seems paradoxical, when the constitutional control remains outside the adoption of “negative” decisions on formal legal circumstances formulated by judges who are appointed to conduct court cases. Thus, as evidenced by the practice of constitutional judicial review, confirms the generalized legal position for a theoretical conclusion: the effectiveness of the Constitutional Court has not reached the required level of protection of the Constitution of Ukraine.

The scientific doctrine of constitutional control, as a dynamic legal phenomenon should not be deterred by traditional models and institutions of constitutional stability, steel canning views on state-legal relations, which are still perceived as a convenient and useful understanding of power relations. Therefore, it is relevant, we think, in modern conditions for constitutional rights is the problem of “constitutional activism”. We are talking about the orientation of the development of the legal system of the embodiment of the values of the Constitution, as constitutional legal science requires new approaches and ideas that would have enriched the theory of Constitution and constitutionalism, reflected and deepened not only the legal but also the state governance system based on democratic-social orientation. It is impossible to leave without a new understanding of constitutional review, the principle of direct action of norms of the Constitution and its role as the primary source of industry legislative and other legal regulation.

Thus, constitutional judicial control, which is based on the constitutional provisions and must ensure the protection of the Constitution of Ukraine in doctrinal understanding has properties state legal rule, intellectual perfection in the interpretation of the Constitution of Ukraine and of its institutional commitment, which gives grounds to fill the scientific legal doctrine of knowledge regarding the “judicial constitutionalism”.

In our opinion, the lawmakers need to respond to the decision of the European court of human rights and the conclusions of the Venice Commission, to consider the proposals of experts and to revise the provisions of the Law of Ukraine «On the Purification of Power» to eliminated the need for consideration of the case by the Constitutional Court of Ukraine. Otherwise, the constitutional Court of Ukraine should declare the Law of Ukraine «On the Purification of Power» that does not meet the Constitution of Ukraine and to implement the decision of the European court of human rights.

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## КОНСТИТУЦІЙНА СУДОВА ПРОЦЕДУРА ТА КОНСТИТУЦІЙНИЙ КОНТРОЛЬ В СФЕРІ ЛЮСТРАЦІЇ

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### Анотація

У статті розглядається процедура конституційного суду та конституційний контроль у сфері люстрації. Ці питання розглядаються крізь призму верховенства права, його розуміння Конституційним Судом України у своїй практиці. Підкреслюється, що застосування принципу гласності та вимог підвищеної гласності пояснюється важливістю справ, що розглядаються конституційними судами, а також результатами судової діяльності. У юридичній науці склалася ситуація, коли погляди науковців на сутність судового процесу суперечливі, що породжує різне розуміння цього правового явища представниками різних наукових шкіл. Тривалий час проблема судочинства була нерозривно пов'язана з розглядом категорії процесу, суттєва ідея якого суттєво вплинула на розуміння меж процесуального законодавства. Конституційний Суд як єдиний орган конституційно-судового контролю може розглядатися як особливий (організований на державній основі), носій інтелектуального потенціалу теорій конституційного права.

Поряд з цим детально аналізується питання довгострокового розгляду Конституційним Судом України закону, що визначає люстрацію. Дослідження поповнюється тим фактом, що Європейський суд з прав людини за скаргами громадян України встановив порушення права люстрованих на справедливий судовий розгляд через надмірний час національних процесів щодо їх звільнення. Зроблено висновок, що Закон про люстрацію повинен виконувати свою найважливішу функцію у встановленні верховенства права в країні.

**Ключові слова:** конституційна процедура; верховенство права; конституційний контроль; люстрація; право на справедливий суд; Україна; ЄСПЛ.



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