

Право. Людина. Довкілля

Науково-практичний журнал
Том 13, № 3



ISSN 2663-1350
E-ISSN 2663-1369

Засновник:

Національний університет біоресурсів і природокористування України

Рік заснування: 2010

*Рекомендовано до друку та поширення
через мережу Інтернет Вченою радою*

*Національного університету біоресурсів і природокористування України
(протокол № 1 від 11 серпня 2022 р.)*

Свідectво про державну реєстрацію

друкованого засобу масової інформації

серії KB 25123-15063 ПР від 17 лютого 2022 р.

Журнал входить до переліку наукових фахових видань України

Категорія «Б». Галузь наук – юридичні, спеціальності – 081 «Право»,
293 «Міжнародне право»

(наказ Міністерства освіти і науки України від 17 березня 2020 р. № 409)

**Журнал представлено у міжнародних наукометричних базах даних,
репозитаріях та пошукових системах:** Index Copernicus International,

Google Scholar, Academic Resource Index ResearchBib, Національна бібліотека України
імені В. І. Вернадського, MIAR, BASE

Адреса редакції:

Національний університет біоресурсів і природокористування України

вул. Героїв Оборони, 15, м. Київ, Україна, 03041

E-mail: info@environmentalscience.com.ua

www: <https://environmentalscience.com.ua/uk>

Law. Human. Environment

Scientific and practical journal
Volume 13, No. 3



ISSN 2663-1350
E-ISSN 2663-1369

Founder:

National University of Life and Environmental Sciences of Ukraine

Year of foundation: 2010

*Recommended for printing and distribution
via the Internet by the Academic Council
of National University of Life and Environmental Sciences of Ukraine
(Minutes No. 1 of August 11, 2022)*

Certificate of state registration of the print media

Series KV No. 25123-15063 PR of February 17, 2022

The journal is included in the list of Scientific Professional Publications of Ukraine
Category "B". Branch of sciences – legal, specialties – 081 "Law", 293 "International Law"
(order of the Ministry of Education and Science of Ukraine of March 17, 2020, No. 409)

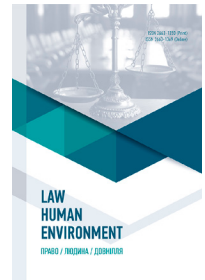
**The journal is presented international scientometric databases, repositories
and scientific systems:** Index Copernicus International,
Google Scholar, Academic Resource Index ResearchBib,
Vernadsky National Library of Ukraine, MIAR, BASE

Editors office address:

National University of Life and Environmental Sciences of Ukraine
03041, 10 Heroiv Oborony, Kyiv, Ukraine
E-mail: info@environmentalscience.com.ua
www: <https://environmentalscience.com.ua/en>

Право. Людина. Довкілля

Науково-практичний журнал
Том 13, № 3



Редакційна колегія

Головний редактор:

Людмила Олександрівна Головка

Заступник головного редактора:

Володимир Михайлович Єрмоленко

Відповідальний секретар:

Марина Андріївна Дейнега

Кандидат юридичних наук, доцент; Національний університет біоресурсів і природокористування України, м. Київ, Україна

Доктор юридичних наук, професор, член-кореспондент НАПрН України; Національний університет біоресурсів і природокористування України, м. Київ, Україна

Доктор юридичних наук, доцент; Національний університет біоресурсів і природокористування України, м. Київ, Україна

Основний склад редакційної колегії

Олена Вікторівна Гафурова

Доктор юридичних наук, професор; Національний університет біоресурсів і природокористування України, м. Київ, Україна

Євген Анатолійович Гетьман

Доктор юридичних наук, професор, член-кореспондент НАПрН України; Національна академія правових наук України, Харків, Україна

Тамара Олексіївна Губанова

Доктор юридичних наук, професор, Заслужений юрист України; Фінансово-правовий коледж, м. Київ, Україна

Володимир Іванович Курило

Доктор юридичних наук, професор; член-кореспондент НААН України; Заслужений юрист України; Національний університет біоресурсів і природокористування України, Київ, Україна

Інна Володимирівна Курило

Доктор юридичних наук, професор; Національний університет біоресурсів і природокористування України, м. Київ, Україна

Віктор Валерійович Ладиченко

Доктор юридичних наук, професор; Національний університет біоресурсів і природокористування України, Київ, Україна

Олена Сергіївна Яра

Доктор юридичних наук, професор; Національний університет біоресурсів і природокористування України, м. Київ, Україна

Ганна Валеріївна Анісімова

Доктор юридичних наук, доцент; Національний юридичний університет імені Ярослава Мудрого, м. Харків, Україна

Юлія Андріївна Краснова

Доктор юридичних наук, доцент; Національний університет біоресурсів і природокористування України, м. Київ, Україна

Олеся Янівна Трагнюк

Кандидат юридичних наук, професор; Національний юридичний університет імені Ярослава Мудрого, м. Харків, Україна

Олена Анатоліївна Улютіна

Кандидат юридичних наук, доцент; Національний університет біоресурсів і природокористування України, м. Київ, Україна

Міжнародні члени редакційної колегії

Петер Мішкольці-Боднар

Професор; Реформаторський університет імені Каролі Гашпара, Будапешт, Угорщина

Габор Кечеш

Кандидат юридичних наук, доцент; Університет Іштвана Сечені, м. Дьйор, Угорщина

Лібор Клімек

Кандидат юридичних наук, доцент; Університет імені Матея Бела, м. Банська Бистриця, Словачка Республіка

Бистрік Шрамел

Кандидат юридичних наук, доцент; Університет святих Кирила та Мефодія у Трнаві, м. Трнава, Словачка Республіка

Іржі Зіха

Кандидат юридичних наук; Університет Томаша Баті, Злін, Чеська Республіка

Ольга Капплова

Кандидат юридичних наук; Університет Томаша Баті, Злін, Чеська Республіка

Стефано Монталдо

Кандидат юридичних наук; Туринський університет, м. Турин, Італійська Республіка

Магдалена Сітек

Кандидат юридичних наук; Університет єврорегіональної економіки імені Альфіде де Гаспері, Юзефів, Республіка Польща

Івона Флорек

Кандидат юридичних наук; Університет єврорегіональної економіки імені Альфіде де Гаспері, м. Юзефів, Республіка Польща

Растіслав Фунта

Кандидат юридичних наук; Університет Данубіус, Сладковічово, Словачка Республіка

Law. Human. Environment

Scientific and practical journal
Volume 13, No. 3



Editorial Board

Editor-in-Chief:

Liudmyla Golovko

Deputy Editor-in-Chief:

Volodymyr Yermolenko

Executive Editor:

Maryna Deineha

PhD in Law, Associate Professor; National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Full Doctor in Law, Professor, Corresponding Member of the National Academy of Legal Sciences of Ukraine; National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Full Doctor in Law, Associate Professor, National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Main Members of the Editorial Board

Olena Hafurova

Full Doctor in Law, Professor; National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Yevhen Hetman

Full Doctor in Law, Professor, Corresponding Member of the National Academy of Legal Sciences of Ukraine; National Academy of Legal Sciences of Ukraine, Kharkiv, Ukraine

Tamara Hubanova

Full Doctor in Law, Professor, Honored Lawyer of Ukraine, College of Finance and Law, Kyiv, Ukraine

Volodymyr Kurylo

Full Doctor in Law, Professor, Corresponding Member of the National Academy of Agrarian Sciences of Ukraine, Honored Lawyer of Ukraine; National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Inna Kurylo

Full Doctor in Law, Professor; National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Viktor Ladychenko

Full Doctor in Law, Professor; National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Olena Yara

Full Doctor in Law, Professor; National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Hanna Anisimova

Full Doctor in Law, Associate Professor; Yaroslav Mudryi National Law University, Kharkiv, Ukraine

Yuliia Krasnova

Full Doctor in Law, Associate Professor; National University of Life and Environmental Sciences of Ukraine, Kyiv, Ukraine

Olesia Trahniuk

PhD Law, Professor; Yaroslav Mudryi National Law University, Kharkiv, Ukraine

Olena Uliutina

PhD in Law, Associate Professor; National University of Life and Environmental Sciences of Ukraine. Kyiv, Ukraine

International Members of the Editorial Board

Péter-Miskolczi Bodnár

Professor; Károli Gáspár University, Budapest, Hungary

Gábor Kecskés

PhD in Law, Associate Professor; Széchenyi István University, Győr, Hungary

Libor Klimek

PhD in Law, Associate Professor; Matej Bel University, Banská Bystrica, Slovak Republic

Bystrík Šramel

PhD in Law, Associate Professor; University of Ss. Cyril and Methodius in Trnava, Trnava, Slovak Republic

Jiří Zicha

PhD in Law; Tomas Bata University, Zlín, Czech Republic

Olga Kapplová

PhD in Law; Tomas Bata University, Zlín, Czech Republic

Stefano Montaldo

PhD in Law; University of Turin, Turin, Italian Republic

Magdalena Sitek

PhD in Law; Alcide De Gasperi University of Euroregional Economy, Jozefow, Republic of Poland

Iwona Florek

PhD in Law; Alcide De Gasperi University of Euroregional Economy, Jozefow, Republic of Poland

Rastislav Funta

PhD in Law; Danubius University, Sladkovicevo, Slovak Republic

ЗМІСТ

Н. І. Аббасов

Критерії оцінки якості судово-експертної діяльності в різних країнах світу7

І. В. Горіславська

Селекційне досягнення у тваринництві як об'єкт права інтелектуальної власності
та об'єкт спадкування в Україні та світі 17

І. І. Дейнега, М. А. Дейнега

Реалізація права на доступ до вищої освіти: політика безбар'єрності та інклюзивної освіти
в міжнародних документах й актах національного законодавства 26

І. В. Лебідь, О. Ю. Піддубний

«Бурштинове питання» в Україні: превенція та наслідки 37

А. С. Микитюк

Поняття та сутність судового захисту екологічних прав людини 44

Т. С. Новак

Організація охорони праці у фермерських господарствах: окремі аспекти правового регулювання 50

О. П. Світличний

Контрафактні та фальсифіковані лікарські засоби: сьогоденні виклики й розумні рішення 59

Ю. В. Суржик

Рішення Конституційного Суду України щодо конституційності статей 81, 82
Кримінального кодексу України в практичному використанні Європейського суду з прав людини 65

О. А. Улютіна

Особливості підтримки суб'єктів господарювання органами державної
та місцевої влади в умовах воєнного стану в Україні 72

О. С. Яра

Особливості системи «блакитних карток» як ефективного механізму
запобігання домашньому насильству в Україні (на основі досвіду Республіки Польща) 78

CONTENTS

N. I. Abbasov

Criteria for Assessing the Quality of Forensic Activities in Different Countries of the World7

I. V. Horislavska

Breeding Achievement in Animal Husbandry as an Object of Intellectual Property Rights
and an Object of Inheritance in Ukraine and the World..... 17

I. I. Deinega, M. A. Deineha

Implementation of the Right of Access to Higher Education: Barrier-Free and Inclusive Education Policy
in International Documents and Acts of National Legislation..... 26

I. V. Lebid, O. Yu. Piddubny

“Amber Issue” in Ukraine: Prevention and Consequence 37

A. S. Mykytyuk

The Concept and Essence of Judicial Protection of Environmental Human Rights..... 44

T. S. Novak

Organisation of Labour Protection in Farms: Certain Aspects of Legal Regulation..... 50

O. P. Svitlichnyy

Counterfeit and Falsified Medicines: Today’s Challenges and Smart Solutions..... 59

Yu. V. Surzik

Decision of the Constitutional Court of Ukraine on the constitutionality of Articles 81, 82
of the Criminal Code of Ukraine in the practical use of the European Court of Human Rights..... 65

O. A. Uliutina

Features of Support of Business Entities by State and Local Authorities under Martial Law in Ukraine 72

O. S. Yara

Features of the “Blue Cards” System as an Effective Mechanism
for Preventing Domestic Violence in Ukraine (Based on the Experience of the Republic of Poland)..... 78



UDC 004.891+347.97

DOI: 10.31548/law2022.03.001

Criteria for Assessing the Quality of Forensic Activities in Different Countries of the World

Nail Ibad Abbasov*

Forensic Science Centre of the Ministry of Justice of the Republic of Azerbaijan
AZ1000, 24 Khagany Str., Baku, Republic of Azerbaijan

Article's History:

Received: 07.05.2022

Revised: 08.07.2022

Accepted: 11.08.2022

Abstract

The globalization of the world community has contributed to qualitative changes in the socio-economic sphere, which has led to the transformation of crime in the Republic of Azerbaijan. Nowadays, forensic expertise has become a key tool in the process of administering justice. Criminal proceedings are no exception. Application of special knowledge in the process of revealing and investigating crimes, providing the right for defense and representing the rights of victims has a special importance in building a legal and democratic society in Azerbaijan. Accreditation of forensic laboratories is a prerequisite for determining the criteria for assessing the quality of forensic activities in the Republic of Azerbaijan. The purpose of the scientific research is to identify the criteria for assessing the quality of forensic activities in the Republic of Azerbaijan, in comparison with other countries of the globe. To achieve this goal, a system of philosophical, general scientific and special scientific methods (comparison, description, analysis and synthesis, induction, deduction and analogy, abstraction, generalization, systematic approach and others) was used. Theoretical, normative-legal and practical problems of formation and application of criteria of forensic activity quality assessment in the Republic of Azerbaijan were examined. The study showed that the problems of determining the criteria for assessing the quality and accreditation of forensic activities were not properly ensured due to the imperfections of the current legislation in the Republic of Azerbaijan. The study resulted in the developing indicators to assess the quality of forensic institutions, such as regulatory, methodological, organizational. The practical value of the research lies in the presentation of a detailed analysis of the experience of implementing new approaches of courts of expertise in countries with different courts of occupation. The study is of practical interest to the judicial system officials involved in the development of the legal framework for conducting court cases

Keywords: accreditation of forensic laboratories, international experience, quality assurance, standards, legislation, criteria expertise

Suggested Citation:

Abbasov, N.I. (2022). Criteria for assessing the quality of forensic activities in different countries of the world. *Law. Human. Environment*, 13(3), 7-16.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

In the objective and accurate assessment of the quality level of performance (resulting activity) in some particular fields, it is important to correctly define the evaluation criteria, taking into account the specific characteristics of a respective area. In such a case, a legitimate question arises of what the criterion is, what it essentially contains, how it should be chosen and accepted, so it allows a full assessment of current reality. Although there are different views and positions on these questions, it is appropriate to draw attention to some provisions that are more complete and have explanations:

- a standard by which decisions, evaluations or classifications are made [1];
- criterion – a condition or fact used as a standard by which something can be judged or considered [2];
- a criterion is a standard or principle by which something is judged, evaluated, and helps make decisions. Criterion is a word of Greek origin, derived from the word “*kriterion*” and used since the 17th century. The literal meaning of the word is “judgment” [3].

As it can be seen, although the history of the use of the word criterion is quite long and there are certain similar positions, there has not been a complete consensus thereon. It is possible to conclude that concrete evidence is needed in every situation in order to be able to comment, evaluate and make a judgment on this or that subject.

The criterion from a philosophical point of view, taking into account the specific characteristics of the field, can be considered a judgment tool for describing objective reality in the evaluation of measurable and non-measurable situations. In the activity of forensic expertise, it is more appropriate to accept the criterion as a judgment. Because many of the events and processes faced by forensic expertise occur outside the current standards and accepted dimensions. Perspectively, ensuring perfection (quality) in the evaluation of the real situation in the field of forensic expertise is considered an objective necessity. Based on the research, it is concluded that for evaluating the quality and assurance of forensic expertise those criteria should be selected taking into account the specific characteristics of individual departments and units operating in the structure of expertise institutions. The criteria chosen should provide a basis for making an objective, accurate and comprehensive judgment on the evaluation of internal and external quality assurance of the expertise institution and its departments as a whole.

External quality assurance is evaluated as “accreditation” in many areas, including forensic institutions. Therefore, it is important to clarify the content and essence of accreditation and study the attitudes of experts on the issue. Although there are many views and opinions in this field, it is appropriate to present some which are more understandable. For example, in the Oxford English dictionary, “accreditation” is defined as “a formal approval by an independent organization that someone or something meets a required standard” [4].

In a document jointly prepared by the World Health Organization, the Organization for Economic Co-operation and Development and the World Bank entitled “Providing quality health services: the global imperative for universal health coverage”, “accreditation”, it is defined as an activity that represents an external evaluation of an organization by an accreditation body and improves public recognition of an organization’s compliance with predetermined standards. Delivering quality health services: a global imperative for universal health coverage [5].

According to the position of the Turkish Accreditation Agency (Türk Akreditasyon Kurumu, TÜRKAK), another reliable source, “accreditation” is a quality subsystem created to support the reliability and validity of the studies conducted by the conformity assessment bodies and the documents (test and inspection reports, calibration certificates, management system documents, product certification documents, personnel certification documents, etc.) certifying the conformity they have created as a result of these studies [6]. Accreditation is the activity of evaluating, approving and subsequently auditing the laboratory’s technical competence by an internationally recognized and authorized institution according to the necessary criteria to ensure the reliability of the tests and analyses [7].

The publication “Accreditation: A Global Tool to Support Public Policy”, prepared by well-known international organizations, the International Laboratory Accreditation Cooperation and the International Accreditation Forum, states that accreditation is used to verify compliance with a standard [8]. Accreditation is an unbiased and objective process carried out by third parties, offering the least repetitive, most transparent and acceptable way to provide reliable conformity assessment results. In another document published in 2015 by the International Laboratory Accreditation Cooperation, “accreditation” is defined as a means of determining the technical competence of testing, calibration and medical laboratories to perform specific types of testing, measurement and calibration [9].

According to D. Montagu [10], a professor at the University of California, “accreditation” is a formal process by which a recognized body, usually a non-governmental organization, evaluates and recognizes that a particular organization meets predetermined and published standards. From the summary of views and positions of research scientists and specialists on this issue, concluded that “accreditation” includes the process of evaluating the independent organization’s product manufacture, work and services performed in accordance with predetermined standards or compliance with relevant norms by international organizations or local accreditation bodies. This position is reflected in the Law of the Republic of Azerbaijan “On accreditation in the field of conformity assessment” dated May 30, 2014. Thus, accreditation is defined as conformity assessment in Article 1.0.1 of the

Law and determined as defining the compliance of the goods (service, work), process, management system and staff with the requirements specified in the relevant standard, technical regulation and other normative-legal acts [11].

The topic of standardizing the process of accreditation of forensic laboratories also attracted the attention of scientists. For example, L. Wilson-Wilde [12] provides an overview of the development of standards in the field of forensics, arguing that the most important initiative at this stage in the development of the industry is the work on the creation of ISO standards. The article describes in detail the bodies that are directly related to the creation and approval of standards for forensic laboratories. A separate vector of the article is a discussion on the topic of navigating the international management of standards development. Standards can be applied through certification, self-regulation, and accreditation. Another study conducted by the Polish scientist M. Sikorski [13] concludes that the results of a forensic medical examination should be questioned. The author believes that the results of the forensic medical examination, which are considered in the trial, and which court decisions rely on when sentencing, are unreliable during the trial. M. Sikorski [13] proposes to increase the efficiency of conducting research similar to large-scale projects in psychology, namely the approach to repetition in psychology.

The experience of involving forensic advisers in the process of solving a criminal case is quite often used in Belgium. Scientists Bitzer et al. [14] note that this approach has led the country's forensic science industry both to positive results and to some problems. However, while advisers were previously only invited to collect and analyze details on particularly complex murder cases, now their presence can be requested for the investigation of lesser crimes. Forensic advisors are the link between the magistrate, investigators, and forensic experts, to whom they provide the results of the processing of traces identified using new technologies. The authors also mention that despite the increased need to attract additional experts, there is no legal basis for regulating their activities in Belgium. C.A. Reid and L.M. Howes [15] examined the effectiveness of issuing brief summary reports with the main charges in a case during a trial in Tasmania. The reports were analyzed according to the criteria of compliance with standardized recommendations, practical studies, and notes. In the course of the analysis of ten especially serious crimes, the scientists came to the conclusion that this practice was quite justified, since, in general, the compiled brief reports had a high level of information content. Scientists believe that subject to additional research, this type of forensic communication can be successfully introduced into the conduct of court cases.

Scientific study of the problems of determining the criteria for assessing the quality of forensic activities Azerbaijan and countries of the world, is the actual task

of the research. The scientific value of the presented study lies in searching for relevant forensic expertise approaches to provide fair disclosure of criminal cases to formulate a democratic system in the country.

Materials and Methods

The study examined the provisions, decisions, and norms of national and international measures of forensic accreditation. The object of scientific research was the problem of formation of criteria for assessing the quality of forensic activities in different countries of the world and in the Republic of Azerbaijan.

The main method of investigating the problems of determining the criteria for assessing the quality of forensic activities in different countries of the world, including the Republic of Azerbaijan is a dialectical method of knowledge. The dialectical method of cognition allowed to formulate recommendations for the development of criteria for assessing the quality of forensic activities in different countries of the world forensic activities on the basis of the Law "On Forensic Activities" [16] and international standards ISO/IEC 17025 [17] and ISO/IEC 17020 [18].

The following philosophical categories were used as an instrument of cognition: quantity and quality, content and form, necessary and accidental, cause and effect, general, special and singular, cause and effect, essence and phenomenon. In considering the topic of the publication the author was guided by a system of specially scientific methods of legal knowledge, which include: analysis, synthesis, formal-logical, system-structural and comparative-legal methods.

In the process of applying the formal-logical method of researching the problems of forming the criteria for assessing the quality of forensic-expert work, the problem of the lack of a body that will carry out internal and external evaluation was identified. In the process of studying the problems of legislative support for assessing the level of quality of forensic the system method was applied. The systematic method involves the consideration of the subject of scientific research as a system, which has a certain structure containing interrelated elements. Comparative-legal method and method of analysis allowed considering the legislative and law enforcement experience of forensic accreditation in foreign countries, on the example of the European Union and the Republic of Azerbaijan.

The method of synthesis allowed generalizing and highlighting features and systematically identifying common and different trends of normative-legal regulation of accreditation in the European Union and the Republic of Azerbaijan. In the process of reasoning and justification of the connection between the concepts, the formal-logical method was applied in the study of the concept of "criterion" and "accreditation". The formal-logical method was applied in the process of describing the indicators for assessing the quality of forensic activities, which resulted in the identification

of normative, methodological and organizational criteria. The system-structural method allowed identifying a number of regulatory and legal measures for the optimal implementation of certain aspects of accreditation in the Republic of Azerbaijan.

Results

The Forensic Expertise Center of the Ministry of Justice of the Republic of Azerbaijan has partially established its work in accordance with the ISO/IEC 17025 International Standard and ISO/IEC 17020 [18] guidelines and accreditation of the Quality Assurance Center is regularly carried out by TURKAK, the accreditation body of the brother Republic of Turkey. There are no standards for forensic expertise in local accreditation bodies of the Republic of Azerbaijan, and these standards have not been developed since this field is a special one. Therefore, it has been deemed appropriate to apply ISO/IEC 17025 standards [17] and ISO/IEC 17020 [18] guidelines, which are considered more honest and objective in this field, to the activities of the expertise center. However, it should be noted that ISO/IEC 17025 [17] and ISO/IEC 17020 [18] standards do not cover all areas of forensic activity. Therefore, it is considered important to perform scientific-research works, including areas not covered by ISO/IEC 17020 [18] standards, prepare and improve new methods and methodologies of expert research, provide scientific-methodical assistance to judicial and law enforcement agencies and develop internal standards for expert preventive activities. Otherwise, the mentioned areas may be completely ignored due to the lack of any normative-legal document on the evaluation of the results of their activities.

Meanwhile, the analysis of the materials on the accreditation assessment conducted in the field of "Conducting forensic expertise and research" covered by ISO/IEC 17025 [17] and ISO/IEC 17020 [18] standards shows that this standard and accreditation assessment included the evaluation of issues related to internal quality assurance in many cases, along with the external quality assurance of the expertise center in the relevant field. In this context, TURKAK, with the status of an international accreditation organization, needs to correct the external and internal quality limits of the evaluation in its activities. Because although external and internal quality assurance complements each other, defining the border between them is considered one of the indicators of quality culture and level. At this time, it should be taken into account that if the assessment of external quality assurance mainly involves measurable factors (for example, evaluation of the conformity of material and technical base, personnel potential, methodical provision with relevant standards and norms), along with the mentioned factors in internal quality assurance, non-measurable factors also affect the quality assessment process.

Quality assurance and determination of evaluation criteria, which are the constituent elements of the

quality management system, are equally important for forensic activity. The international standards applied in the quality management system of forensic expertise require their systematization by indicating the components involved in the preparation of a quality final product. However, no attention is paid to measuring the application level of those components. Carrying out the evaluation of legislation, organizational normative documents of enterprises, methodical tools with measurable and non-measurable criteria in expert activity may allow measure the limit of their application and determine the quality level of the final product.

Upon reviewing the content of the international standard, it was determined that the sources used therein, the subjects and objects involved should be monitored regularly for the quality of expert opinion. The first object that appears in this context is personnel composition. The procedure for determining the professional competence of personnel, that is, their competence, is one of the conditions for conducting appropriate (internal and external) tests. In addition, to keep the knowledge and skills of the personnel at the required level, they should be regularly involved in training and teaching processes. Such procedures also apply methodological tools used as sources, where the validity and reliability of methodological tools are determined through verification and validation.

With regard to technical means, the inspection includes their calibration, adjustment and determination of functional suitability. The listed aspects act as the main parameters. Others include environmental impact, expected management principles, and work area requirements. The aim is to achieve a perfect result and to eliminate or minimize the number of errors in the expert's activity with the mechanisms of international standards. By describing the instructions of the international standard on the mentioned parameters, the difference between the inspection and the evaluation criteria that can be measured during the development of the proposed product is shown.

In general, the requirement of the standard implies the achievement of the objectives of the quality system by ensuring the quality of the components (as a subject – an expert, as an object – technical means, and as a source – methodical means) involved in the development of the product. Within these components, evaluation criteria and parameters for measuring the level of quality assurance can be determined according to the stage of product formation. Here, it is appropriate to highlight a specific aspect. Defining quality assessment criteria also raises the question of which body will assess them. In response, two types of such evaluation can be distinguished – internal evaluation and external evaluation. Therefore, essentially, the criteria should be divided into two groups. One of them exists during product development and is evaluated in a subordinate manner, that is, at the internal level. The other is the evaluation of the final product by the subjects who are

the initiators and authorized to do so, i.e., the customers, and the existing criteria in this direction.

It is important to find a mechanism for the formation of criteria for expert activity and their sorting in the research process when determining indicators of the performance of tasks arising from legislation, methods and solving organizational issues. The necessity such as drawing up an opinion by an authorized expert as a matter arising from the law, that is, a normative document, determining of addressing the questions posed to the research to an expert with appropriate authority and availability of the eligibility criteria may be shown as an example. Violation of this criterion directly affects the quality of the review. From this starting point, the internal and external criteria of the expert research process can be determined [19; 20].

In a staged study, where the quality assurance procedure is carried out by an expert, one of the important conditions for the successful completion of the study and excellent results is compliance with regulatory and methodological guidelines. The general tasks of preparation considered the first stage are listed below. At this stage, the methods of observation, comparison, and determination are used and the following tasks are performed:

1. Resolution of normative issues: (1) the presence of the type of expertise and compliance with the approved list; (2) justification, motive, initiative of appointment of expertise as a procedural measure; (3) the research questions belonging to the expert's specialty; (4) the research object belonging to the type of expertise, specialty; (5) making clarifications with the entity that appoints the expertise (completion of the research object, submission of an additional object, the necessity of on-site inspection of the object); (6) compliance with the form of presentation of the research object, and the procedure for formalization.

2. Resolution of methodological issues: (1) indication of the source, methodology to which the expert method is referred; (2) compliance of the method with the expert's qualification and its use in the expert's qualification.

3. Resolution of organizational issues: (1) compliance with the procedural terms established for expertise; (2) ensuring that all of them join the research when the research includes several types of expertise.

Thus, the criteria of the initial stage can be attributed to feasibility, completeness, compatibility, and authority. The performance quality evaluation indicators and a group of issues (normative, methodical, organizational) covered by the evaluation are reflected in the Table 1.

Table 1. Quality assessment indicators

Criteria, indicators and solving issues for evaluating the quality of the initial stage of expert research		
Criteria	Criterion evaluation indicators	Issues resolved by evaluation
Possibility	The presence of the type of expertise and compliance with the approved list; justification, motive, initiative of appointment of expertise as a procedural measure	Resolution of normative issues
Completeness	Making clarifications with the entity that appoints the expertise (necessity of completing the research object, submitting an additional object, examining the object on-site)	
Compatibility	Compliance with the form of presentation of the research object, the procedure for formalization	
Authority	Whether the research questions belong to the expert's specialty; belonging to the type of expertise and specialty of the research object	
Compliance	Indication of the source and methodology to which the expert method is referred; compliance of the method with the expert's qualification and its use in the expert's qualification	Resolution of methodological issues
Completeness	Compliance with procedural deadlines for expertise; ensuring access to all types when the research refers to several types of expertise	Resolution of organizational issues

Source: compiled by the author

The tasks of the next stages of expert research are closer and the sources cited in their implementation are similar or of the same type, so it is appropriate to express performance criteria and evaluation indicators together. At the same time, the level of solving the tasks of the next stages depends to a large extent on the expert's knowledge and skills. Therefore, this factor needs to be taken into account when formulating the criteria for stages.

In analytical research, which acts as the second stage of expert research, tasks are oriented directly to

the research object. General criminalistic methods of observation, measurement, modeling, description and others are applied here. The purpose of applying those methods is to reveal the characteristics of the research object and to form a position on the questions posed to the expert. Depending on the questions posed to the expert, at this stage, it may be possible to finalize the description of the research and proceed directly to the conclusion. Research conducted in this way in the field of expertise is called diagnostic research, and in this

case, general criminalistic methods are mainly used. In the research process, it is also possible to refer to the requirements of normative documents, existing standards in case investigation, and methods developed in the specific expertise field. The result of the stage shows the state of the research object and can conclude with a positive, negative, or uncertain ending.

The next stage of the research involves the identification of the research object specific to certain group areas of expertise, and special forensic methods are used. The task of this stage is aimed at determining the identity and similarity of the signs detected in the research object in terms of quantity and quality. In the previous stage, the qualitative and quantitative criteria of the research object are important elements, but they are aimed at determining the status of the object. The result of this stage can be concluded as positive, negative, probability. At these stages, compliance with the procedural deadlines (timely implementation, feedback, material return, etc.), preventing confusion in the collection of samples and choosing the right methodology used during the research, and expectation of consistency of the applied methods are considered quality assurance conditions.

Taking into account the credibility and reliability of the research conducted initially, the main criteria at the analyzed stages are highlighted. There are other important criteria to expect for expert research. These include objectivity, completeness, and comprehensiveness.

The sequence of actions that can ensure the performance of tasks during the research phases is as follows:

1. Resolution of normative issues: (1) conducting research in accordance with the Instruction on the organization of expertise; (2) working out the research in accordance with the formal requirements of the legislation; (3) ensuring the objectivity, completeness, and comprehensiveness of the research in the order of subordination (subordination relations arising from the position); establishing a mechanism for monitoring research periods; (4) formalization of obtaining samples; (5) ensuring control of the protection of research boundaries on specialties.

2. Resolution of methodological issues: (1) correct selection of general criminalistic methods and special methods; (2) expected consistency of applied methods; (3) determining the scope and extent of the research; (4) ensuring the quality and reliability of the detected signs, expecting them to be sufficient; (5) ensuring the observation of the progress of the research with images and visuals; (6) being acceptable and legal of the methods used.

3. Resolution of organizational issues: (1) establishment of mechanisms for compliance with research implementation periods; (2) keeping the registration and refund procedures; (3) prevention of confusion in collecting samples for research.

Based on the above, it is possible to distinguish such criteria as completeness, comprehensiveness, reliability, validity, sufficiency and legality by stages (Table 2).

Table 2. Criteria for peer review

Criteria, indicators and solving issues for evaluating the quality of the initial stage of expert research		
Criteria	Criterion evaluation indicators	Issues resolved by evaluation
Legality	Conducting the research according to the instructions, due to the requirement of the procedural type of expertise; working out the research in accordance with the formal requirements of the legislation; controlling the objectivity, completeness, and comprehensiveness of the research in a subordination order; establishment of a mechanism for monitoring the duration of research	Resolution of normative issues
Reliability	Formalization of obtaining samples; control of the protection of research boundaries on specialties	
Reliability	Correct selection of general criminalistic methods and special methods	Resolution of methodological issues
Completeness	Keeping the consistency of the applied methods; determining the limit and scope of the research	
Sufficiency	Ensuring the quality and reliability of the detected signs, expecting them to be sufficient	
Credibility	Providing observation of the research progress with images and visuals	
Legality	Being acceptable and legal of the methods used	Resolution of organizational issues
Completeness	Establishment of mechanisms for compliance with research implementation periods	
Legality	Keeping the registration and default refund procedures	
Reliability	Prevention of confusion in collecting samples for research	

Source: compiled by the author

According to Article 26 of the Law “On Forensic Expertise Activity” [16], it is necessary to evaluate the results of the research in the expert opinion, to justify and fairly express the final results on the questions. Unlike other stages, participation of process participants is not allowed during the finalization of the results obtained. Methodologically, the expert opinion should be based on the research results, and the results obtained via technical means, methodical means, and expert opinion should be expressed in a reasonable, clear and straight manner.

It is necessary to solve one more issue making up the totality of quality assurance in expertise creation, and deemed as a continuation and an integral part of the proposal mentioned above. It is the precise determination of the duties, tasks and targets that should be performed by the structural entities (departments, sections) making up the structure of the expertise institutions and operating within it. Each of the expertise institutions has its own Regulations that determine the directions of activity as a separate institution. Regulations generally reflect the duties and rights of institutions and the direction of their activities. The availability of a document regulating the activities of the structural divisions and departments responsible for the execution of the works, in turn, leads to the uncertainty of the work scope to be performed by each division. The presence of the manual of each department and unit will reflect both general and specific features of its activity. Therefore, in addition to the scope of work and services to be performed by the department, it will be possible to provide the necessary control over its implementation. Simultaneously, it will be possible to react flexibly to the deviations and shortcomings in the expertise activity.

Discussion

The analysis of the publications related to the area under consideration showed that the developments on the evaluation of forensic results by statistical methods, the implementation of quality management system in forensic laboratories, as well as the analysis of the errors of such implementation, were carried out all over the world. These issues have been studied quite extensively, but there is no unified system of standardization procedures implemented in forensic activities in the foreign literature.

A.K.S Alshebel writes that standardization is defined as the process of bringing similar activities to the same qualities [21]. Accreditation is carried out on the basis of international requirements. These requirements include criteria for assessing compliance with the specific requirements of certain activities and internationally recognized requirements in guidance documents. Such documents are developed by regional or international accreditation bodies [22].

Cooperation on International Traceability in Analytical Chemistry (CITAC) provides a procedure for

government agencies to recognize the provision of certain services by competent units. The definition of accreditation for a laboratory involves the technical competence of the laboratory. The laboratory is evaluated and periodically checked for the reliability of tests and analyses performed. This evaluation is carried out by a competent authority in accordance with international standards. Quality assurance is a system for ensuring the quality of the work performed [23].

The International Laboratory Accreditation Cooperation (ILAC) is an organization designed to develop a communication network among accredited laboratories that provides accurate and reliable results [8; 9]. This system brings together many accredited laboratories on a voluntary basis.

International Accreditation Forum (IAF) is an organization that monitors reliability and adequacy of accredited certification bodies [8]. European Co-operation for Accreditation (EA) is a non-profit organization uniting accreditation agencies of European Union and candidate countries [24]. These organizations bring together established agencies around the world to conduct accreditation of activities and conformity assessment in the world. In the Republic of Azerbaijan, Turkish Accreditation Agency (TÜRKAK) provides highly qualified accreditation activities [6].

L. Bayram states that accreditation includes an inventory of processes, personnel, and equipment. For this, the laboratory must make a detailed work plan [25]. The ISO/IEC 17025 standards [17] call for a management system that is continuously improved. This is achieved by keeping track of control system objectives, ensuring control of techniques and documentation to ensure reliable test and calibration results. A.K.S Alshebel writes that ISO/IEC 17025 is a current normative standard defining general requirements for laboratory competence, which can be used for accreditation, e.g., for a digital forensic laboratory [21].

R.W. Byard and D.M. Butzbach argue that there are limitations that pose serious threats to the quality of forensic practice, such as (1) lack of mandatory standardization, certification, and accreditation and their programs; (2) lack of qualified training and continuing education; (3) effectiveness of supervision; (4) strict standards [26].

D.S. Islek, E.H. Yukseloglu admit that standardization is necessary in forensic laboratories for the following reasons: (1) international recognition of forensic laboratory reports (opinions); (2) international forensic competition; (3) improved skills of forensic laboratories; (4) quality of services provided; (5) world forensic globalization processes; (6) increased condensed in forensic laboratories; (7) speed of expert services while ensuring quality [22].

The ISO/17025 laboratory accreditation includes several key sections, namely the personnel and technical requirements. Speaking of quality management requirements, they are similar to ISO 9000 standards [27] for quality management, but in a customized version for

laboratory activities [20]. According to the international standard ISO/IEC 17025 [17] the competence of personnel includes the ability to apply knowledge, skills and personal qualities in activities. ISO/IEC 17025 [17] standards divide laboratory personnel into internal and external. Manageability and work performance in accordance with the laboratory management system are linked as general and particular, form and content: without manageability of personnel, it is difficult to expect that the requirements of international standards will be met. ISO/IEC 17025 [17] states that personnel manageability is determined by the degree to which the instructions of laboratory management are followed. Competence is defined in the international standard ISO/IEC 17025 [17] as the demonstrated ability to apply knowledge and/or skills and personal qualities. This definition brings to the fore the ability to do a certain job, which can also be extended to a specific area of expertise such as craftsmanship [17].

D.S. Islek, E.H. Yukseloglu point out that technical competence indicates the requirements to be met by the laboratory [20]. Many factors determine the accuracy and reliability of tests or calibrations performed by a laboratory. These factors include (1) human factors; (2) the environment and its conditions; (3) test, calibration, and validation methods; (4) equipment; (5) traceability of measurements; (6) sampling; (7) handling of test and calibration materials; (8) quality of test and calibration results; and (9) presentation of results.

Achievement of objectivity in laboratory activities in research or testing is of a purely applied nature and is regulated through documentation of research/testing, validation of research/testing methods, training and clearance of personnel, maintenance of equipment. This includes some additional procedures: calibration of equipment, use of appropriate reference materials, provision of interpretation manuals, verification of results obtained and qualification of personnel, as well as records on equipment or test preparation. The combination of these procedures ensures the objectivity of the study. A study or test carried out in this way can be confirmed by obtaining the same results from different properly trained personnel [28-30].

Modern globalization and integration processes of introducing international norms in the national Republic of Azerbaijan set new goals and objectives for the introduction of international quality standards in forensic science. Experience and practice of forensic

activity regulation in the state opens new prospects for increasing its efficiency and improving the quality and professionalism of forensic investigations. Introduction of international quality standards in forensic science is a guarantee that the the international community at the highest level of recognition of the conclusions of forensic of the Republic of Azerbaijan forensic experts [31].

Therefore, the application of accretionary norms and principles recognized by the international community is a necessary condition for the improvement of expert research in the Republic of Azerbaijan.

Conclusions

Summarizing the conclusions reached as a result of research, it should be noted that one of the issues is the inability to mention the necessity of having normative documents regulating the activity (workflow) of structural units and relevant officials of those institutions for performing the duties specified in the Regulations adjusting the activity of expertise institutions and acting as a guiding basis for them. However, the availability of those normative documents may be an additional guarantee for the implementation and monitoring of the tasks, increasing the efficiency of activity, and the qualitative implementation of the tasks assigned to the expertise institutions by creating conditions for the achievement of excellence.

Last but not least, without an excellent quality assurance system in the field of forensic expertise, it is impossible to achieve the correct application of the established standards for foreign quality assurance. The analysis shows that there is no single, unified internal quality assurance policy of the institutions performing forensic expertise activities. There is a certain fragmentation and lack of system in this field, even in normative regulation. Therefore, it is appropriate to develop a concept of quality assurance that takes into account the specific characteristics of forensic expertise. Along with the relevant basic concepts, provisions on the organization and management of the quality assurance system and the criteria for evaluating quality assurance results should be reflected in the concept. Considering the findings presented in the present study, it is recommended to conduct research on the procedure for the interaction of participants in a forensic examination with further development of the optimization of their communication in order to minimize bias, inaccuracies and, as a result, unfair judgments.

References

- [1] Vandenbos, G.R. (Ed.). (2015). *APA dictionary of psychology* (2nd ed.). Washington, DC: American Psychological Association.
- [2] Criterion. (n.d.). *Cambridge dictionary*. Retrieved from <https://dictionary.cambridge.org/dictionary/english/criterion>.
- [3] Mayor, M. (Ed.). (2009). *Longman dictionary of contemporary English* (5th ed.). Harlow: Pearson Longman.
- [4] Hornby, A.S., & Wehmeier, S. (Eds.). (2020). *Oxford advanced learner's dictionary of current English* (6th ed.). Oxford: Oxford University Press.

- [5] World Health Organization, Organisation for Economic Co-operation and Development, & International Bank for Reconstruction and Development. (2018). *Delivering quality health services: A global imperative for universal health coverage*. Geneva: World Health Organization.
- [6] What is accreditation? (n.d.). *Official website of the Turkish Accreditation Agency*. Retrieved from <https://www.turkak.org.tr/en/accreditation/what-is-accreditation.html>.
- [7] ISO/IEC 17025 forensic accreditation. What sets ANAB apart (n.d.). *ANSI National Accreditation Board*. Retrieved from <https://anab.ansi.org/en/forensic-accreditation/iso-iec-17025-forensic-labs>.
- [8] Accreditation: A global tool to support Public Policy. (2018). *International Accreditation Forum*. Retrieved from https://iaf.nu/wp-content/uploads/2021/05/ILACIAF_Accreditation_17.01.18.pdf.
- [9] International Laboratory Accreditation Cooperation. (2015). *The advantages of being accredited*. Retrieved from <https://akreditacija.hr/wp-content/uploads/agencija/brosure/ILAC/ILAC-The-advantages-of-being-Accredited-2015.pdf>.
- [10] Montagu, D. (2003). *Accreditation and other external quality assessment systems for health care*. London: DFID Health Systems Resource Centre.
- [11] Law of the Republic of Azerbaijan No. 965-IVQ "On Accreditation in the Field of Conformity Assessment". (2014, May). Retrieved from <https://cis-legislation.com/document.fwx?rgn=69635>.
- [12] Wilson-Wilde, L. (2018). The international development of forensic science standards – A review. *Forensic Science International*, 288, 1-9. doi: 10.1016/j.forsciint.2018.04.009.
- [13] Sikorski, M. (2022). Is forensic science in crisis? *Synthese*, 200(3), article number 188. doi: 10.1007/s11229-022-03685-z.
- [14] Bitzer, S., Heudt, L., Barret, A., George, L., Van Dijk, K., Gason, F., & Renard, B. (2018). The introduction of forensic advisors in Belgium and their role in the criminal justice system. *Science and Justice*, 58(3), 177-184. doi: 10.1016/j.scijus.2017.11.002.
- [15] Reid, C.A., & Howes, L.M. (2020). Communicating forensic scientific expertise: An analysis of expert reports and corresponding testimony in tasmanian courts. *Science and Justice*, 60(2), 108-119. doi:10.1016/j.scijus.2019.09.007.
- [16] Law of the Republic of Azerbaijan No. 758-IQ "On Forensic Activities". (1999, November). Retrieved from https://continent-online.com/Document/?doc_id=30602371.
- [17] ISO/IEC 17025:2017 "General Requirements for the Competence of Testing and Calibration Laboratories". Retrieved from <https://www.iso.org/obp/ui#iso:std:iso-iec:17025:ed-3:v1:en>.
- [18] ISO/IEC 17020:2012 "Conformity Assessment – Requirements for the Operation of Various Types of Bodies Performing Inspection". Retrieved from <https://www.iso.org/obp/ui#iso:std:iso-iec:17020:ed-2:v1:en>.
- [19] Yameogo, C.E.W., Omojolaibi, J.A., & Dauda, R.O.S. (2021). Economic globalisation, institutions and environmental quality in Sub-Saharan Africa. *Research in Globalization*, 3, article number 100035. doi: 10.1016/j.resglo.2020.100035.
- [20] Chumak, V.V. (2020). International experience of organization and activities of forensic expert institutions. *Bulletin of Kharkiv National University of Internal Affairs*, 91(4), 235-244. doi: 10.32631/v.2020.4.22.
- [21] Alshebel, A.K.S. (2020). *Standardization requirements for digital forensic laboratories: A document analysis and guideline* (Master's thesis, Auckland University of Technology, Auckland, New Zealand).
- [22] Islek, D.S., & Yukseloglu, E.H. (2018). Accreditation of forensic science laboratories in Turkey in the scope of TS EN ISO/IEC 17025:2017 standard. *International Medical Journal*, 7(4), 962-966. doi: 10.5455/medscience.2018.07.8885.
- [23] Barwick, V. (Ed). (2016). *Eurachem / CITAC guide: Guide to quality in analytical chemistry: An aid to accreditation* (3rd ed.). Retrieved from <https://www.eurachem.org/index.php/publications/guides/qa>.
- [24] EA-01/08 "EA Multi and Bilateral Agreement Signatories". (2009, October). Retrieved from http://164.132.89.215/UploadDocs/379_EA_1_08.pdf.
- [25] Bayram, L. (2012). Technical requirements of TS EN ISO/IEC17025 standard at forensic science laboratories. *Polis Bilimleri Dergisi*, 14(1), 81-99.
- [26] Byard, R.W., & Butzbach, D.M. (2012). Issues in the interpretation of postmortem toxicology. *Forensic Science, Medicine, and Pathology*, 8, 205-207. doi: 10.1007/s12024-011-9278-x.
- [27] ISO 9000:2015 "Quality Management Systems – Fundamentals and Vocabulary". Retrieved from <https://www.iso.org/obp/ui/#iso:std:iso:9000:ed-4:v1:en>.
- [28] Mazroua, M.K., & Mahmoud, N.F. (2022). The need for standards unification in forensic laboratory practices: Protocol for setting up the Arab Forensic Laboratories Accreditation Center. *JMIR Research Protocols*, 11(6), article number e36778. doi: 10.2196/36778.
- [29] Filipenko, N., Spitsyna, H., Shynkarenko, I., & Tsymbalistyi, V. (2021). Implementation of preventive activity; Foreign experience in criminological work of forensic science institutions. *Socrates*, 1, 32-38. doi: 10.25143/socr.19.2020.1.032-038.
- [30] Kipouras, P., & Ovsianynkova, I. (2021). Forensic science activity in globalization context. *Theory and Practice of Forensic Science and Criminalistics*, 25(3), 169-184. doi: 10.32353/khrife.3.2021.12.
- [31] INTERPOL Global guidelines for digital forensics laboratories. (2019). Retrieved from https://www.interpol.int/content/download/13501/file/INTERPOL_DFL_GlobalGuidelinesDigitalForensicsLaboratory.pdf.

Критерії оцінки якості судово-експертної діяльності в різних країнах світу

Наіль Ібад Аббасов

Науково-криміналістичний центр Міністерства юстиції Республіки Азербайджан
AZ1000, вул. Хагани, 24, м. Баку, Азербайджанська Республіка

Анотація

Глобалізація світової спільноти сприяла якісним змінам у соціально-економічній сфері, що призвело до трансформації злочинності в Азербайджанській Республіці. У наш час судово-медична експертиза стала ключовим інструментом у процесі здійснення правосуддя. Кримінальне провадження не є винятком. Застосування спеціальних знань у процесі розкриття та розслідування злочинів, забезпечення права на захист та представництва прав потерпілих має особливе значення в побудові правового та демократичного суспільства в Азербайджані. Акредитація судово-експертних лабораторій є необхідною умовою для визначення критеріїв оцінки якості судово-експертної діяльності в Азербайджанській Республіці. Метою наукового дослідження є визначення критеріїв оцінки якості судово-експертної діяльності в Азербайджанській Республіці в порівнянні з іншими світовими лідерами. Для досягнення мети наукового дослідження використовується система філософських, загальнонаукових і спеціально-наукових методів (порівняння, опис, аналіз і синтез, індукція, дедукція і аналогія, абстрагування, узагальнення, системний підхід та інші). У статті розглянуто теоретичні, нормативно-правові та практичні проблеми формування та застосування критеріїв оцінки якості судово-експертної діяльності в Республіці Азербайджан. Дослідження показало, що проблеми визначення критеріїв оцінки якості та акредитації судово-експертної діяльності не достатньо вирішуються через недосконалість чинного законодавства в Азербайджанській Республіці. Результатом дослідження стала розробка показників оцінки якості діяльності судово-експертних установ, зокрема нормативних, методичних, організаційних. Практична цінність дослідження полягає в представленні детального аналізу досвіду впровадження нових підходів судової експертизи в країнах з різними судовими системами. Дослідження представляє практичний інтерес для діячів судової системи, які займаються розробкою нормативно-правової бази ведення судових справ

Ключові слова: акредитація криміналістичних лабораторій, міжнародний досвід, гарантія якості, стандарти, законодавство, критерії експертизи



UDC 347.1: 347.66

DOI: 10.31548/law2022.03.002

Breeding Achievement in Animal Husbandry as an Object of Intellectual Property Rights and an Object of Inheritance in Ukraine and the World

Inna V. Horislavska*

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Article's History:

Received: 29.04.2022

Revised: 30.06.2022

Accepted: 11.08.2022

Abstract

Global trends are now focused on such challenges as climate change, food security, the development of biotechnology and genetic engineering, and the transition to non-conventional fuels. The problems of promoting each of them in the global world are related to the need for free agricultural potential, the availability of effective and unified legal regulation, first of all, of breeding achievements in animal husbandry regarding the intellectual property rights of breeders, its protection both during life and for heirs, since a patent for an animal breed is an indisputable right of the inventor, which acts as a kind of legal monopoly, the provision of which is guaranteed by the state, and patent protection negates commercial use in the absence of the consent of its owner. The purpose of the study is to analyse certain issues of legal regulation of intellectual property rights to breeding achievements in animal husbandry in Ukraine and proposals for its improvement through the implementation of the global experience. The research methods were chosen considering the goals and objectives. During the research, philosophical (hermeneutical), general scientific (logical, generalisation, praxeological, modelling, predictive, and bibliographic), and special legal (formal-legal, comparative-legal) methods of scientific knowledge were used. The study examines the current state of breeding achievements in animal husbandry and the legal basis for regulating its establishment, protection, and the possibility of inclusion in the breeder's inherited property. Problematic issues in the legal framework for the establishment and implementation of intellectual property rights to breeding achievements in animal husbandry, ways to eliminate relevant conflicts are proposed. The study analyses the international experience in processing law enforcement documents for breeders and the possibility of protecting their rights. The research materials can be useful for lawyers-researchers, business entities engaged in breeding in animal husbandry, teachers, postgraduates, students of law schools, civil servants, and all those who are not indifferent to the issues under study

Keywords: legal relations in the field of intellectual property, results of intellectual activity in the field of animal husbandry, results of intellectual activity as part of the inherited property, protection of intellectual property rights, protection of the rights of the breeder and their heirs

Suggested Citation:

Horislavska, I.V. (2022). Breeding achievement in animal husbandry as an object of intellectual property rights and an object of inheritance in Ukraine and the World. *Law. Human. Environment*, 13(3), 17-25.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

The global biotech market is expected to grow by about 15.5% from 2020 to 2027 and reach a market value of over 850.5 billion USD by 2027. The global biotechnology market is divided into technology and application. By technology, the market is divided into nanobiotechnology, tissue engineering and regeneration, DNA sequencing, cell-based analysis, fermentation, PCR technology, chromatography, etc. By application, the market is divided into healthcare, nutrition and agriculture, natural resources and environment, industrial processing, bioinformatics, etc. In this market structure, agricultural biotechnologies occupy 24% [1].

Even in the Middle Ages, there were communities that conducted control and protection of the intellectual property rights of breeders. However, patent legislation began to form at the end of the 18th – beginning of the 19th century. The first patent law was passed in 1790 in the United States, and a regulatory act directly related to plant protection – in 1930 [2]. In a time, characterised by a high level of instability, the presence of crisis phenomena of climatic, military, economic, and therefore food nature, breeding achievements in the field of animal husbandry as objects of intellectual property rights are gaining special importance. The national policy focuses its efforts on the introduction of new programmes and projects for the development of the agro-industrial sector of the economy, the implementation of which provides, among other things, for the establishment and functioning of the state register of breeding animals, providing breeding entities with new genetic resources and increasing demand for their export. According to the president of the NAAS, the import of genetic resources in certain sectors has reached critical values (for example, in dairy farming – 62%, in poultry farming from industrial meat production – 100%), which should encourage farmers and other market participants to their own breeding studies [3].

A special information system of the National Intellectual Property Authority (hereinafter referred to as NIPA) has been created in Ukraine and intellectual property centres are functioning. These are business entities whose activities are aimed at implementing educational and scientific programmes, respectively, and improving the skills of participants in the field of intellectual property; which could take on the functions of providing legal assistance in the field of implementation and protection of intellectual property rights in the field of biological and food safety. The issue of intellectual property rights to breeding achievements in animal husbandry was investigated by both agricultural researchers and representatives of legal science. In particular, S.L. Voitenko [4] summarised the results of research obtained during the improvement of Myrhorod pigs and their use in crossing, highlighted positions on methods for preserving local Ukrainian pig genotypes, in particular, the patented method for creating a genotype (Myrhorod + wild boar). T.V. Pidpala [5]

determines that the selection of animals of domesticated populations is the main way to improve the genetic potential of cattle and pig breeds, which, accordingly, will contribute to the growth of production of high-quality products and preserve the profitability of livestock industries [2]. R.G. Shchokin justifies the allocation of objects of intellectual property rights in separate groups [6], H. Fedotova and S. Fyl [7] investigate the content of the object of patenting and the conditions of patentability of biotechnological inventions in accordance with the norms of international and national legislation. Ye.F. Bobonych [8] investigated the issues of inheritance as a form of alienation (transfer) of rights to intellectual property objects, in particular, to plant varieties in Ukraine. M.S. Clancy and G. Moschini [9] investigate the relationship between intellectual property rights, market structure, and pricing of patented factors of production in agriculture. J.K. Yu and Y.S. Chung [10] identify the mechanisms for protecting the rights of breeders to plant varieties and the specific features of the activities of The International Union for the Protection of New Varieties of Plants (UPOV).

The purpose of the study is to examine the legal basis for establishing intellectual property rights to breeding achievements in animal husbandry, analyse it as an object of inheritance, and establish the possibility of implementing the experience of individual countries in solving such issues. The originality of the study consists in combining the problems of legal regulation of the establishment and protection of intellectual property rights to breeding achievements in animal husbandry, both for the breeder and their heirs; investigation of the possibility of implementing certain international norms.

Materials and Methods

The main materials of the study are the norms of national legislation: the Constitution of Ukraine [11], the Civil Code of Ukraine [12], the Law of Ukraine “On Breeding Business in Livestock Breeding” [13], the Law of Ukraine “On Protection of Rights to Inventions and Utility Models” [14], the Order “On the Approval of the Regulation on the State Register of Subjects of Breeding Business in Animal Husbandry” [15], “Regulations on the State Register of Breeding Achievements in Animal Husbandry” [16] and other by-laws in the field of breeding livestock and the Practice of the Supreme Court of Ukraine in cases of inheritance [17]. The study was also based on international regulations: Agreement on Trade-Related Aspects of Intellectual Property Rights [18], Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [19] and the European Patent Convention [20]. Information from the State Register of breeding achievements in animal husbandry [21] and the State Statistics Service of Ukraine [22], data from the World Intellectual Property Organisation (WIPO).

The use of the logical method allowed for fully formulating conclusions. The formal legal method has become the basis for a comprehensive analysis of the special legislation of Ukraine on intellectual property rights in the field of animal husbandry and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. Based on the formal legal method, the content of norms and standards defining the concept and procedure for state registration of breeding achievements in animal husbandry is established. The comparative-legal method was used to review and examine the relevant legal literature, basic scientific approaches to determine the tasks that were outlined for research and analysis of national and international patent legislation. The comparative legal method was used to review, study, and compare relevant legal sources, the main scientific approaches that are aimed at solving the tasks of research, analysing national and international legislation on intellectual property rights. The use of the hermeneutical method allowed analysing of the content of the norms of international intellectual property law in the field of animal husbandry, and the norms enshrined in the current legislation that reflect the procedure for establishing the rights of an inventor in the field of animal husbandry, and the content of norms that ensure the proper level of protection of intellectual property rights. The hermeneutical method was useful for establishing the concept of breeding achievement in animal husbandry as an object of inheritance. The praxeological, modelling, and predictive methods are used to determine the prospects for improving the level of protection of inventors and their legal successors (heirs) in Ukraine, considering existing challenges: non-functioning of the Supreme Court of intellectual property and inconsistency of special legislation with the norms of the Civil Code of Ukraine. The method of generalisation is used in the formulation of conclusions and proposals based on the results of the study, determining the range of prospects and vectors of further research. The bibliographic method was useful in identifying and compiling bibliographic characteristics of normative acts of legislation on intellectual property rights in the field of animal husbandry.

Results and Discussion

Updating the patent legislation will give an impetus to the development of a competitive environment with the involvement of national breeders, which will lead to the development of the country's agriculture and its investment attractiveness and export potential. Researchers make a forecast about the further growth of demand for the results of intellectual activity, which determines the need for their effective legal protection [6, p. 152]. The position that intellectual property rights can be crucial for modern agriculture is reasonable. They make agriculture attractive by encouraging investment in new technologies and creating assets suitable for trade. Among

the main intellectual property rights related to agricultural innovation are: patents that protect inventions and rights to plant varieties, the development of new and distinctive plant varieties [24]. Chinese researchers define "agricultural intellectual property" as a driving force for the development of the agricultural sector, and an important part of the national strategy for strengthening the country [25]. Undoubtedly, intellectual property rights are recognised as important for agribusiness, which are only strengthened by the collection and processing of agricultural data and the subsequent ability to package results into improved products, processes, and services through platform providers. This type of relevant intellectual property rights also complements, in particular, conventional plant breeding, and the impact of these innovations on agribusiness is estimated at 7% for agrobiotechnologies [26]. Biological innovations in agriculture have not enjoyed the protection of official intellectual property rights for a long time, but recently there has been a tendency to substantially expand and strengthen these rights [9]. In particular, to motivate continuous innovation in the development of varieties, the system should provide incentives for breeders to create new effective varieties, for example, exclusive ownership of the production and sale of these varieties [10]. In turn, inheritance is multifaceted and demonstrates complexities of various origins from conventional, legislative, and religious sources [27].

The agro-industrial complex, the key component of which is agriculture, forms food, and within certain limits, economic, environmental, and energy security, guarantees the progress of technologically compatible sectors of the Ukrainian economy, and also contributes to the establishment of socio-economic prerequisites for rural development. However, according to the state statistics service of Ukraine [22], the structure of livestock production by main components in 2021 was different for different organisational and legal forms: for enterprises – 57%, for households – 30.9%, and in general in farms of all categories – 41.4%. At the beginning of 2022, the number of cattle decreased by another 6.5%, pigs – by 4.4%, sheep and goats – by 4.3%, and only the number of poultry increased by 0.8% [22]. Therewith, according to the State register of breeding achievements, in particular, in relation to cattle, over the past decade, only one breeding achievement was registered – the factory line of the leader of the 1926780 Ukrainian red-piebald dairy breed of cattle [21].

Ways to solve the accumulated problems in the field of animal husbandry include the implementation of measures for the conservation and reproduction of the diversity of farm animal breeds in accordance with the provisions of the Convention on the Protection of Biological Diversity [28]. The most acute problem remains that the vast majority of relevant participants do not have substantial prerequisites for increasing the number of farm animals and taking action to increase the volume of livestock production. Along with this,

industrial animal husbandry uses specialised, highly productive genotypes of imported breeding, which ultimately leads to the loss of genotypes of domestic breeding and creates the problem of a substantial reduction in genetic diversity, reducing animal resistance, and a substantial dependence on the import of breeding (genetic) resources. Evidently, creating conditions for the conservation of agricultural animal breeds is a multi-component and urgent problem not only for Ukraine but also for the vast majority of states, primarily regarding the choice of forms, varieties of methods, and minimum quantitative indicators of animals for conservation. The UN concept is based on the reproduction of the active component of the population by purebred breeding methods and encouraging the remaining ones to intensify their use in the crossing process. Therewith, the minimum number, for example, of sows for conservation is considered not less than a hundred, and the main boars – ten heads or the corresponding amount of sperm available [4].

The state guarantees national agricultural producers of the latest selection, breeding (genetic) resources a number of preferences: improvement and creation of security conditions for the effective functioning of the state register of farm animals, implementation of measures to introduce a system for assessing and establishing the breeding value of animals, organisation of breeding accounting by creating automated information databases on breeding (genetic) resources and increasing their export potential. However, the Draft Concept of the state program of cattle breeding industry development in Ukraine 2030, presented for review in the relevant ministry, according to the Deputy Minister of the Ministry of Economy of Ukraine [29], establishes only a mechanism for reducing the cost of attracting investment in this industry.

Therewith, actions to implement each programme are directly related to funding, which is conducted in such a way that it requires additional resources to attract even without martial law. At the current stage, the allocation of funds from the budget to finance the “Breeding Programme in Livestock and Poultry Breeding at Enterprises of the Agro-Industrial Complex” is not conducted in the amount that was provided for by the bylaw of the regulatory regulation, and compensation for the cost of acquired corresponding genetic resources is provided at the level of 80% of their price [30]. Limited access to funding is a substantial obstacle to the activities of small organisational forms, and this applies not only to Ukraine. Small and medium-sized enterprises, which are the driving force for innovation, growth, job creation, and social cohesion, are severely limited in their ability to attract credit, both in high-income countries and in emerging economies. According to the World Bank, the volume of trade loans between legal entities in France exceeds 50%, and for Morocco, it is less than 40%. The study shows that the problem of financing can be solved through a system of co-crediting, credit risk insurance,

expanding supply chains, and areas for using factoring services. The World Bank, in turn, offers its own credit programmes in export chains. Such measures should lead to major changes in the financial integration of small businesses and provide them with the necessary financial resources for development [31].

Since now breeding achievements in the field of animal husbandry are formed as a result of purposeful creative activity of groups of breeding animals (breeds, breed types, lines, families, etc.), which are characterised by new genetic traits that are steadily transmitted to offspring, and whose productivity indicators are ahead of the types of animals that were before, then legally they have the status of inventions (Art. 1 and 25 of the Law of Ukraine “On Breeding Business in Livestock Breeding”, hereinafter – the Law) [13].

Breed, along with its bio-zootechnical understanding and legal “nature” (due to patentability), is also an economic category, a means of production. The rate of breed transformation is directly mediated by the growth of public needs for livestock products and the growth of urbanisation processes. Currently, there are challenges to the growth of agricultural livestock production with an increase in its quality indicators, which requires extremely high rates of the breeding process [5, p. 35].

According to Art. 1 of the Law, purebred or obtained in accordance with the approved breed improvement programme animal, that has been registered in the state books of breeding animals is characterised by breeding (genetic) value and is suitable for use in the breeding process in accordance with breeding programmes. Objects of breeding animal husbandry can be: cattle, pigs, sheep, goats, horses, poultry, fish, bees, silkworms, fur-bearing animals, and rabbits, which are reproduced to obtain the products of their vital activity, and participants in breeding in animal husbandry are: owners of breeding (genetic) resources; legal entities of various organisational and legal forms of various forms of ownership and individuals – business entities that take part in the development, storage, use, establishment, mediation of the breeding value of breeding (genetic) resources, the conclusion of contractual structures that determine the transfer of ownership rights to breeding (genetic) resources, and transactions that provide for the services that are directly related to breeding in animal husbandry; owners of non-breeding animals – consumers of breeding (genetic) resources, and customers of breeding services in animal husbandry.

It was previously provided for the signing of a joint order (for example, the establishment of a new breed of chickens was jointly approved by the National Academy of Agrarian Sciences and the relevant ministry [32]) to be able to obtain legal protection and establish a new breed of the animal by breeding achievements. The provisions of the Law of Ukraine “On Protection of Rights to Inventions and Utility Models” [14] recognise the invention of animal breeds without

extending legal protection to such an object (part 2 of Art. 6) and provide for registration actions and entering information in the State Register of breeding achievements in animal husbandry of Ukraine (hereinafter – Register) [16]. As of the end of the first half of 2022, according to the Register, 7 breeding achievements were registered in sheep breeding, 15 in cattle breeding, 5 in fish farming, and in general – 45 breeding achievements in animal husbandry [21].

Even considering the fact that private companies, universities, and individual “bioenterprises” in the United States have issued a total of over 660 patents for animals, including 26 patents from 1997 to 2012 (World Intellectual Property Organization, WIPO [23]), since 1999 the patent law has been changed and provides for the possibility of challenging any recently issued patent in the Federal District Court or the Supreme Court, and such an appeal procedure has been conducted in relation to two patents for animals [33]. Since June 2017, the European Patent Office has introduced amendments to the European Patent Convention (rule 28) [20]. It was decided that patents for conventionally bred plants and animals will no longer be issued and applications will not be accepted accordingly. However, there are still “gaps”, in particular, the European Patent Office did not consider the differences between genetic engineering (which is patentable (rule 27) [20]) and breeding (not technical, which is non-patentable), that is, in the practice of this department, plants obtained as a result of random genetic changes are patentable inventions (for example, patent – EP 3560330) [34, p. 4]. Currently, there is an opinion that patents issued for the use of natural genes, seeds, plants, and their crops are one of the most substantial threats to food security at the global level and may limit regional food sovereignty. Patents create monopolies, that is, provided that patents are issued for conventionally bred plants and animals within geographical boundaries, the patent owner can deprive other breeders of the opportunity to use them for breeding new varieties or breeds, restrict their rights through the existence of license agreements [34].

The Law, unlike Art. 485 and 487 of the Civil Code of Ukraine [12], does not establish opportunities for obtaining such a law enforcement document as a patent for breeding achievements in animal husbandry with the establishment of appropriate rights. Owners of breeding (genetic) resources can take actions to obtain certificates of breeding (genetic) resources that will document the quality and tribal value of breeding (genetic) resources in the context of conducting actions for purchase or sale (Art. 1 and 13 of the Law). Therewith, Art. 485 identifies two types of intellectual property rights to an animal breed according to the criterion “basis of occurrence”, namely: intellectual property rights to an animal breed certified by a patent, which correlate with the provisions of Art. 424 of the Civil Code of Ukraine and cover exclusive and other intellectual property rights; another type of intellectual property

right to distribute an animal breed is confirmed by a certificate of breeding (genetic) resources. This is a document containing information about the breed of the animal, the results of a genetic examination, and the owner of the breeding animal. The study suggested entering information about the insurance contract in the form of the Certificate of breeding (genetic) resources [35].

National legal mechanisms for recognising a selection achievement as an object of intellectual property provide for registration actions of the Ministry of Agrarian Policy and Food of Ukraine and entering relevant data in the State Register of breeding achievements in animal husbandry. There is a procedure for recognising a breeding achievement through the approbation procedure, which ends with the registration of an act of the expert commission, making an entry in the State book of breeding animals and signing a corresponding order on the recognition of a new breeding achievement in animal husbandry. As a result, the order determines the share of the breeder’s involvement in a particular breeding achievement and the name of the subject of breeding, which is assigned the status of the original [16]. Therewith, the Law contains provisions on the recognition of breeding achievements in animal husbandry as an invention, but in accordance with the established procedure, and it provides for the approbation of sectional achievements in animal husbandry.

The legal regulation of the patentability of animal breeds remains partially open both at the national level and at the level of the European Union. It is possible to consider the main provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights [18], so it is necessary to consider the possibility for the inventor to create conditions for the protection of intellectual property rights by appropriate means and methods. Among the issues that arise with the development of biotechnologies and the distinction between natural breeding and genetic engineering, European researchers are increasingly raising the question of the ethics of patenting animals [36]. The theory of “subjectivisation” of animals is gaining scientific and normative justification. The decision of the High Court of the states of Punjab and Haryana of India, adopted in 2019, according to which all animals are recognised as legal entities, and their owners were declared persons in loco parentis (instead of the father), deserves special attention [37]. Among the countries of the European Union, the first on this path was Germany, which in 2002 started guaranteeing animal rights [38].

Among the new areas of examination of the problem is the introduction of transgenic animals into the wild, which can pose a threat to biodiversity, and possible harm to agriculture, which will consist in a substantial increase in the cost of agricultural production [36].

Within the EU, according to The European Patent Convention [20], there is a regional procedure for obtaining a European patent based on a previously issued national patent. A European patent for biotechnologies

can be issued if they are of originality, inventive level, and industrial suitability. A substance that was isolated for the first time and information about its existence was not available is recognised as a new substance. The same procedure is introduced for microorganisms. The DNA sequence, although it is listed in a known gene library, will not be considered new until the special hybridisation zones that are necessary for its isolation and characterisation are considered known [7].

The author expresses support for the position of the national scientific community on the expediency of implementing Directive No. 2004/48/EC of the European Parliament and the EU Council of 29 April 2004 on ensuring intellectual property rights in the relevant procedural codes of Ukraine [39]. For the full implementation of the procedure for ensuring the rights of a breeder, a specialised judicial branch of government should function in the country. The beginning of the work of the IP court (specialised court for consideration of cases on intellectual property rights) will contribute to improving the quality of consideration of relevant cases, encourage the establishment of the same type of judicial practice, and have a positive impact on the terms of consideration of disputes. With the advent of a wide range of methods of proof in the process, there is a real need to improve the quality level in evaluating a substantial amount of evidence coming to court [40].

One of the factors that determine the level of protection of intellectual property rights can be the degree of certainty of the breeder's hereditary rights and the possibility of their protection. According to the provisions of civil legislation, the results of intellectual activity are objects of civil rights and can conduct free circulation, including in the order of inheritance, provided that they are not withdrawn from civil circulation, not restricted in it, or not integral to the author. Objects of inheritance include all the rights and obligations of the testator at the time of opening the inheritance, which are not terminated due to their death (Art. 1218, 1219 of the Civil Code of Ukraine [12]). The corresponding position is taken by the practice of the Supreme Court of Ukraine [17].

It was noted above that there are two types of intellectual property rights to an animal breed that have different grounds for occurrence (patent and registration actions). This raises one of the problems of forming an estate – the inclusion of intellectual property rights to an animal breed. On the one hand, the absence of a legal mechanism for obtaining a patent, but the introduction of an approbation mechanism, on the other – the term of validity of property rights to an animal breed, which is established in Art. 488 of the Civil Code of Ukraine [12]. The intellectual property right to distribute a variety has no validity period and is confirmed by a certificate of breeding (genetic) resources. For heirs whose testator is included in the relevant order on the recognition of a breeding achievement in animal husbandry, there are legal opportunities to consider it a

law enforcement document and issue a certificate of inheritance rights to intellectual property rights to a breeding achievement in animal husbandry, the validity period of which has not ended. In contrast to the provisions of the Law of Ukraine "On the Protection of Rights to Plant Varieties" [41], where there is a norm granting heirs the right to apply for registration of a plant variety (Art. 18), such a position is not provided for breeding achievements in animal husbandry.

The need to improve the legal mechanisms for establishing and protecting intellectual property rights to breeding achievements in animal husbandry also determines the substantial need for IP-specialisation of judges. The full-fledged work of a specialised court is a crucial prerequisite for obtaining a high-quality, properly motivated court decision, and the very existence of a professional court will demonstrate the readiness of the state to work together with both breeders-inventors and investors in breeding.

The Ukrainian state has taken many steps towards the establishment of a legal system for the protection of intellectual property in the field of biotechnology, first of all, the signing of the Convention for the Protection of Biological Diversity, the Paris Convention for the Protection of Industrial Property and the International Convention for the Protection of New Plant Varieties. The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Association Agreement between the European Union and Ukraine, etc. should also be added to this list. [7]. Based on the conducted research, the author of the study expresses the following suggestions.

The positions of the Ukrainian legislative framework on intellectual property rights to breeding achievements in animal husbandry and scientific positions determine the importance not only of the object itself but also its legal recognition and protection at various levels – national and international. The position of Matthew S. Clancy and GianCarlo Moschini [9] that biological innovations in agriculture require official recognition of intellectual property rights and now there is a tendency to expand and strengthen them, which is directly related to the structure and level of market development is considered relevant and justified. It is impossible not to agree with the position of X. Zhang [25] on the importance of intellectual property in agriculture for effective governance of the country. The position of researchers of T.V. Pidpala [5], and S.L. Voitenko [4] on maintaining at the state level its genetic potential in animal husbandry is important. The position of H. Fedotova and S. Fyl [7] regarding the substantial impact on the basic principles of patentability of progress in modern biotechnologies, through the manifestation of a wide range of ethical and moral problems that arise with the formulation of criteria for patentability of all living things, is justified. The position of Ye.F. Bobonych,

M.K. Karpych, and O.M. Myron [8], which consists in the fact that in the absence of a law enforcement document for selection achievement, registration of inheritance cases in an undisputed manner will be possible only with the introduction of appropriate changes to national legislation is one that will ensure the protection of the rights of the breeder's heirs not only in crop production. The analysis of judicial practice on the protection of intellectual property rights in general and in matters of inheritance of intellectual property rights identified an urgent need for an effective specialised judicial mechanism. National statistics of the livestock industry indicate a gradual decrease in the number of all animal species. Analysis of data from the State Register of breeding achievements in animal husbandry gives grounds to assert that the number of breeding achievements over the past decade is minimal. It is promising and effective to involve breeding entities in the issue of harmonisation of national legal regulation with European legislation.

Conclusions

The legal basis of intellectual property rights and breeding achievements in animal husbandry requires unification, and not only at the national level. The position of the Civil Code of Ukraine should be continued in bylaws, which will allow the effective implementation of the intellectual property rights of both breeders and their heirs. In the context of the modern world and global challenges (military, biological, environmental, etc.), this issue is becoming even more important. Based on regulatory sources related to the establishment and functioning of breeding activities in animal husbandry, it is possible to conclude that it is necessary to support national breeding

findings, which will serve the development of the agricultural market not only within the country but also at the international level, guaranteeing food security. The adopted development concepts require the introduction of legal mechanisms for their implementation and proper funding from the state, and the search for ways to attract private investors and international organisations. The national legal doctrine should consider the current practice of European and international approaches to updating patent legislation in relation to animals. Move not only along the path of an anthropometric approach but also consider ecocentric trends and extrapolate them when solving issues related to the protection of breeders' rights. The relevant novelties should also be included in the draft law, which will be adopted to protect breeding achievements in animal husbandry. The decisive factor for the full existence and emergence of breeding achievements in animal husbandry should be the full protection of the intellectual property rights of the breeder and their heirs, the legal mechanisms for the entry of intellectual property rights of the breeder into the inheritance property, and compliance with ethical standards for animals (other living organisms). The main function of protecting the rights of breeders should be implemented through the execution of activities and effective professional decisions of the Supreme Court on intellectual property issues. The subject of further legal investigation should be the development and adoption of norms that will ensure an appropriate level of regulation of the breeder's rights, and the solution of the issues of implementation of coordination and adaptation of the national and international legislation in the field of intellectual property rights to breeding achievements in animal husbandry.

References

- [1] Biotechnology market value forecasted to reach US\$ 850.5 billion by 2027 covering pre and post COVID-19 market analysis: Acumen research and consulting. (2021). Retrieved from <https://www.globenewswire.com/news-release/2021/04/27/2217952/0/en/Biotechnology-Market-Value-Forecasted-To-Reach-US-850-5-Billion-By-2027-Covering-Pre-and-Post-COVID-19-Market-Analysis-Acumen-Research-and-Consulting.html>.
- [2] Rothschild, M.F., Plastow, G., & Newman, S. (2004). Patenting in animal breeding and genetics. In A. Rosati, A. Tewolde, & C. Mosconi (Eds.), *WAAP book of the year 2003: A review on developments and research in livestock systems* (pp. 269-278). The Netherlands: Wageningen Academic Publishers.
- [3] National Academy of Agrarian Sciences of Ukraine: Import of genetic resources of the animal poses a threat to food security in Ukraine. (2022). Retrieved from <https://landlord.ua/news/naan-import-genetichnih-resursiv-tvarinnitstva-zagrozhuye-prodovolchij-bezpetsi-ukrayini/>.
- [4] Voitenko, S.L. (2010). Myrhorod breed of pigs: Current state and efficiency of use. *Livestock Breeding in Ukraine*, 1, 2-5.
- [5] Pidpala, T.V., Voynalovych, S.A., Nazarenko, V.H., Herasymenko, V.V., & Tskhvitava, O.K. (2012). *Breeding dairy cattle and pigs*. Mykolayiv: Mykolayiv National Agrarian University.
- [6] Shchokin, R.G. (2021). Objects of intellectual property in the norms of civil and economic legislation of Ukraine: Comparative legal analysis. *State and Regions. Series: Law*, 3, 152-157. doi: 10.32840/1813-338X-2021.3.27.
- [7] Fedotova, H., & Fyl, S. (2021). Protection of intellectual property rights in the field of biotechnology. *Theory and Practice of Intellectual Property*, 6, 38-48. doi: 10.33731/62021.249001.
- [8] Bobonych, Ye.F., Karpych, M.K., & Myron, O.M. (2021). Inheritance of intellectual property rights to plant varieties in Ukraine. *Juridical Scientific and Electronic Journal*, 2, 54-56. doi: 10.33731/62021.249001.
- [9] Clancy, M.S., & Moschini, G. (2017). Intellectual property rights and the ascent of proprietary innovation in agriculture. *Annual Review of Resource Economics*, 9, 53-74. doi: 10.1146/annurev-resource-100516-053524.

- [10] Yu, J.-K., & Chung, Y.S. (2021). Plant variety protection: Current practices and insights. *Genes*, 12(8), article number 1127. doi: 10.3390/genes12081127.
- [11] Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.
- [12] Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15#Text>.
- [13] Law of Ukraine No. 3691-XII "On Breeding Business in Livestock Breeding". (2016, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/3691-12#Text>.
- [14] Law of Ukraine No. 3687-XII "On Protection of Rights to Inventions and Utility Models". (1993, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/3687-12#Text>.
- [15] Order of the Ministry of Agrarian Policy and Food of Ukraine No. 358 "On the Approval of the Regulation on the State Register of Subjects of Breeding Business in Animal Husbandry". (2021, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/z1118-12#Text>.
- [16] Order of the Ministry of Agrarian Policy and Food of Ukraine No. 385 "Regulations on the State Register of Breeding Achievements in Animal Husbandry". (2012, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/z1218-12#Text>.
- [17] Krat, V. (2022). Inheritance disputes: Practice of the Supreme Court of Ukraine. *Official website of Supreme Court of Ukraine*. Retrieved from https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/2022_prezent/Krat_24_06_2022.pdf.
- [18] Agreement on Trade-Related Aspects of Intellectual Property Rights. (1994, April). Retrieved from https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.
- [19] Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. (2004, June). Retrieved from <http://data.europa.eu/eli/dir/2004/48/corrigendum/2004-06-02/oj>.
- [20] The European Patent Convention (16th ed.). (2020, July). Retrieved from <https://www.epo.org/law-practice/legal-texts/html/epc/2016/e/r28.html>.
- [21] Ministry of Agrarian Policy and Food of Ukraine. (2022). *State register of breeding achievements in animal husbandry*. Retrieved from <https://minagro.gov.ua/file-storage/rejestr-selekcijnih-dosyagnen-u-tvarinnictvi>.
- [22] State Statistics Service of Ukraine. (2022). *Number of agricultural creatures*. Retrieved from https://ukrstat.gov.ua/operativ/operativ2022/sg/ksgr/arh_ksgr2022_u.html.
- [23] Official website of World Intellectual Property Organization. (n.d.). Retrieved from <https://www.wipo.int/portal/en/index.html>.
- [24] Blakeney, M. (2022). Agricultural innovation and sustainable development. *Sustainability*, 14(5), article number 2698. doi: 10.3390/su14052698.
- [25] Zhang, X. (2019). Research on the development of agricultural intellectual property and the strategies of enriching in rural China. *American Journal of Industrial and Business Management*, 9(4), 799-808. doi: 10.4236/ajibm.2019.94053.
- [26] Sanders, A.K. (2022). Intellectual property in digital agriculture. *Law, Innovation and Technology*, 14(1), 113-127. doi: 10.1080/17579961.2022.2047522.
- [27] Abubakari, Z., Richter, C., & Zevenbergen, J. (2019). Plural inheritance laws, practices and emergent types of property – Implications for updating the land register. *Sustainability*, 11(21), article number 6087. doi: 10.3390/su11216087.
- [28] Convention on the Protection of Biological Diversity. (1992, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_030#Text.
- [29] The state program of cattle breeding industry development in Ukraine is planned to be launched at the beginning of 2021. (2020). Retrieved from <https://agro.dn.gov.ua/derzhprogramu-rozvitku-galuzi-skotarstva-v-ukrayini-planuyut-zapustiti-na-pochatku-2021-roku/>.
- [30] Resolution of the Cabinet of Ministers of Ukraine No. 515 "On the Approval of the Procedure for the Use of Funds Provided for in the State Budget for the Implementation of the Breeding Program in Livestock and Poultry Breeding at Enterprises of the Agro-Industrial Complex". (2011, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/515-2011-п#Text>.
- [31] Dornel, A., Ait Ali Slimane, M., & Mohindra, K. (2020). Improving SME access to trade credit and financing in MENA. *MENA Knowledge and Learning Quick Notes Series*, 180. Retrieved from <https://openknowledge.worldbank.org/handle/10986/34898>.
- [32] Order of the Ministry of Agrarian Policy and Food of Ukraine No. 781/111 "On the Approval of the Poltava Clay Breed of Egg and Meat Hens as Part of 6 Genealogical Lines". (2007, November). Retrieved from https://zakon.rada.gov.ua/rada/show/v781_555-07#Text.
- [33] American Anti-Vivisection Society. (n.d.). *Animal patents*. Retrieved from <https://aavs.org/our-work/campaigns/animal-patents/>.
- [34] Tuppe, R., Moy, A.-Ch., Eckhardt, J., Meienberg, F., & Then, Ch. (2022). Patents on genes and genetic variations block access to biological diversity for plant breeding. *No Patents on Seeds!* Retrieved from <https://www.no-patents-on-seeds.org/en>.

- [35] Horislavska, I.V. (2021). Some issues of legal regulation of animal insurance as a compulsory form of insurance. *Law. Human. Environment*, 12(4), 92-98. doi: 10.31548/law2021.04.012.
- [36] Kuklińska, L.A. (2021). A short introduction to patenting of animals and a discussion on the ethicality of such. *Institute of New Europe*. Retrieved from <https://ine.org.pl/en/a-short-introduction-to-patenting-of-animals-and-a-discussion-on-the-legal-morality-of-such-2/>.
- [37] Shad, S. (2019). Indian high court recognizes nonhuman animals as legal entities. *Nonhuman Rights Project*. Retrieved from <https://www.nonhumanrights.org/blog/punjab-haryana-animal-rights/>.
- [38] Ortolani, G. (2018). Citizen ape: The fight for personhood for humans' closest relatives. *Mongabay*. Retrieved from <https://news.mongabay.com/2018/10/citizen-ape-the-fight-for-personhood-for-humans-closest-relatives/>.
- [39] Ukrainian National Bar Association. (2021). *2021 should be the year of the beginning of the Supreme Intellectual Property Court*. Retrieved from <https://unba.org.ua/news/6296-2021-rik-mae-stati-rokom-pochatku-roboti-vishogo-sudu-z-pitan-intelektual-noi-vlasnosti.html>.
- [40] IP-court in the judicial reform matrix. (2019). Retrieved from <https://sk.ua/uk/publications-uk/ip-суд-у-матриці-судової-реформи/>.
- [41] Law of Ukraine No. 3116-XII "On the Protection of Rights to Plant Varieties". (2021, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/3116-12#Text>.

Селекційне досягнення у тваринництві як об'єкт права інтелектуальної власності та об'єкт спадкування в Україні та світі

Інна Вікторівна Горіславська

Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

Світові тенденції нині зосередились на таких викликах, як-от: кліматичні зміни, продовольча безпека, розвиток біотехнологій та генної інженерії, перехід на нетрадиційні види палива. Проблематика просування кожного з них у глобальному світі пов'язана з потребою вільного аграрного потенціалу, наявності ефективного та уніфікованого правового регулювання насамперед селекційних досягнень у тваринництві щодо права інтелектуальної власності селекціонерів, його захисту як за життя, так і для спадкоємців, оскільки патент на породу тварин є беззаперечним правом винахідника, який виступає свого роду юридичною монополією, забезпечення якої гарантується державою, а патентний захист зводить нанівець комерційне використання за відсутності згоди його власника. Метою статті є дослідження окремих питань правового регулювання прав інтелектуальної власності на селекційне досягнення у тваринництві в Україні та пропозиції щодо його удосконалення через імплементацію світового досвіду. Методи дослідження було обрано з урахуванням його мети та завдань. Під час дослідження використовувались філософські (герменевтичний), загальнонаукові (логічний, узагальнення, праксеологічний, моделювання, прогностичний і бібліографічний) та спеціально-юридичні (формально-юридичний, порівняльно-правовий) методи наукового пізнання. Досліджено сучасний стан селекційних досягнень у тваринництві та правові засади регулювання щодо його встановлення, захисту та можливості включення до спадкового майна селекціонера. Встановлено проблемні питання в правовому регулюванні встановлення та реалізації прав інтелектуальної власності на селекційні досягнення у тваринництві та запропоновано способи усунення відповідних колізій. Проаналізовано міжнародний досвід щодо оформлення правоохоронних документів для селекціонерів та можливості захисту їхніх прав. Матеріали дослідження можуть стати у пригоді юристам-науковцям, суб'єктам господарювання, що займаються племінною справою у тваринництві, а також викладачам, аспірантам, студентам юридичних навчальних закладів, державним службовцям та всім небайдужим до порушених питань

Ключові слова: правовідносини у сфері інтелектуальної власності, результати інтелектуальної діяльності у сфері тваринництва, результати інтелектуальної діяльності у складі спадкового майна, захист права інтелектуальної власності, захист прав селекціонера та його спадкоємців



UDC 37.014.1

DOI: 10.31548/law2022.03.003

Implementation of the Right of Access to Higher Education: Barrier-Free and Inclusive Education Policy in International Documents and Acts of National Legislation

Iryna I. Deinega^{1*}, Maryna A. Deineha²

¹National Aviation University
03058, 1 Husar Lubomyr Ave., Kyiv, Ukraine

²National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Article's History:

Received: 3.05.2022
Revised: 05.07.2022
Accepted: 11.08.2022

Abstract

The study deals with one of the most pressing problems of the educational policy of Ukraine – the introduction of Inclusive education – an education system that assimilates the needs of a diverse range of applicants and is aimed at meeting their needs. This subject is extremely relevant, since it is poorly researched within the framework of Ukrainian legal science, and the provisions of the legislation on certain issues require more active practical implementation. In this regard, the educational system of the state should be reformed primarily based on an approved national barrier-free strategy. In the context of the outlined area of educational policy development, the purpose of this study is to analyse the national regulatory framework in the field of barrier-free and inclusive education for compliance with international and European standards, reconsider the already implemented policy and practice of ensuring the educational process for people with special educational needs. The methodological basis of the study was the dialectical method of scientific knowledge, general scientific (formal-logical, analysis, and synthesis), and special-legal (formal-legal) methods. The study analyses international, European, and Ukrainian legislation regulating the introduction of a barrier-free educational environment and inclusive education. According to the results of the study, it is established that barrier-free and inclusivity are values that should become the foundation of modern educational policy. It is discovered that Ukraine is already taking certain organisational and legal steps defined by ratified international and European acts to create a barrier-free educational environment and increase the level of inclusivity in Ukrainian society, but this is not enough. It is proved that the priority task remains to adapt the legislation and practice of Ukraine to the requirements of international and European standards. The study attempts to provide a theoretical justification for the implementation of the barrier-free policy and the concept of inclusive education in the field of higher education in Ukraine. The study offers areas for implementing a national strategy and practice that can prepare the basis for the successful implementation of inclusive education in Ukraine

Keywords: inclusion, education, educational policy, barrier-free environment, persons with disabilities, applicants with special educational needs

Suggested Citation:

Deinega, I.I., & Deineha, M.A. (2022). Implementation of the right of access to higher education: Barrier-free and inclusive education policy in international documents and acts of national legislation. *Law. Human. Environment*, 13(3), 26-36.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

The large-scale war launched by the Russian Federation against Ukraine is a terrible tragedy for the Ukrainian people and a huge challenge for the education sector. Russian armed aggression in 2022 will lead to substantial changes in the higher education system of Ukraine. Its consequences, first of all, will be a reduction in public spending on higher education and budget places in higher education institutions, a substantial increase in “educational migration”, which will lead to a substantial reduction in demand for national higher education with corresponding consequences for the teaching staff, administrations, and network of higher education institutions, and new challenges in ensuring the implementation of the rights of children and youth with disabilities, special educational needs, and internally displaced persons. The war leaves a heavy mark, but it is the educational sector that should neutralise and minimise its negative impact on children and students as much as possible. They should be the focus of attention of the state, society in general, and individual communities. Primarily, school teachers and teachers of higher education institutions will face the task of finding various professional approaches to such applicants.

According to the official data of the Prosecutor General's Office of Ukraine, as of June 30, 2022, 631 children were physically injured as a result of the war in the country [1], and the number of psychologically traumatised children is difficult to even imagine. These are children who have experienced war trauma with irreversible consequences: lost limbs, hearing, vision; children who have experienced psychological trauma with subsequent post-traumatic stress disorders: irritability, attacks of aggression, emotional detachment, apathy, chronic fatigue, etc.; displaced children, many of whom have lost everything they had before the outbreak of hostilities, even relatives. This is exclusive to the category of children. Teachers and institutions of higher education will also deal with adult applicants for education, such as military personnel of the Armed Forces of Ukraine, participants in territorial offence, volunteers who know about the horrors of war first-hand, parents who witnessed children being killed in front of them, and older people who, on the one hand, look for an opportunity to apply the experience for society in modern conditions, and on the other hand, also require a special approach. It is mainly with such categories of applicants that higher education institutions will work in the coming years. Inclusive education, barrier-free spaces, quality services, joint efforts of the state and society should neutralise the negative consequences of war for all these categories of applicants as much as possible and create an educational system in which they will feel protected. The first priority in this process today is to create appropriate conditions for these applicants to have unhindered access to higher education.

The barrier-free policy of the state is aimed at solving these problems, the key task of which is to create

a barrier-free environment in Ukraine, where all citizens will have a full opportunity to exercise their rights and gain access to full involvement in public life. Therewith, the organisation of a barrier-free environment in Ukraine is usually considered within the framework of the policy on persons with disabilities. However, as the experience of foreign countries shows, this approach is methodologically narrowed and atypical for European and international practice. Leading countries consider broader areas of barrier-free policy to be more productive; target groups are not only people with functional disabilities, but also the elderly, mothers with children under 6 years of age, children left without parental care, and young people [2, p. 4]. This provides great opportunities for the inclusion of different groups of the population in social processes.

Now in Ukraine, there are a number of challenges related to the existence of problems for different groups of the population to realise opportunities for full and barrier-free access to higher education. The issues of creating a life without obstacles in the public space and access to infrastructure facilities remain urgent to solve. It is the representatives of such social groups as children and adults with disabilities, the elderly, internally displaced persons as a result of military operations, etc., that are the target audience for which the national policy in the field of education has been implemented in terms of creating a barrier-free educational environment.

One of the promising measures in the field of providing various social groups with full and barrier-free access to higher education is the creation of an inclusive educational environment. It is the presence of an inclusive educational environment in a higher education institution that is the foundation for harmonious professional growth of higher education applicants with different educational needs and their further successful self-realisation in society.

Research on the problems of creating a barrier-free environment and introducing inclusive education is devoted to the investigation of a substantial number of leading researchers-representatives of various branches of science. Thus, John P. Portelli and Patricia Koneeny [3] in their works identify a philosophical approach to understanding the concept of inclusive education. Researchers conduct a critical analysis of all available interpretations of the concept of “inclusive education” and emphasise that not all definitions and justifications for this term have the same benefit. J.P. Portelli and P. Conini argue that “the concept of inclusion needs to be carefully revised, engaging in a critically meaningful dialogue about the democratic benefits of inclusive practice in education” [3, p. 135].

M. Murphy, S. Thompson, D. Doyle, and D. Ferri [4] focuses their research on the mechanism introduced in Ireland for implementing the right to access inclusive education. Researchers use a socio-legal approach to the

study of the outlined phenomenon, relying on sufficient interviews with key stakeholders in education in combination with a legal analysis of relevant primary and secondary sources, analyse current practices related to the education of persons with disabilities. The experience of Ireland in this area is seen as an interesting example for the state due to the history of marginalisation of children with disabilities in this country and their relatively recent involvement in the concept of inclusive education. Budh Singh and Abhishek Kumar Prajapati [5] investigate the challenges of inclusive education in India. According to the researchers, inclusive education should be implemented in an educational institution where applicants with different educational needs are placed in a single educational environment and have equal opportunities for proper education. India's experience in implementing barrier-free and inclusive education policies is also interesting for Ukraine, as this country has a fairly long history of inclusion and has repeatedly taken various initiatives at the international level to ensure fair and inclusive educational opportunities for all people, regardless of their diverse needs. In addition, India has developed an effective legal mechanism for inclusive education policy, which provides a legal basis for its high-quality implementation.

Gaultier de Beco [6; 7] made a practical presentation of the concept of inclusive education within the meaning of the Convention on the Rights of Persons with Disabilities of 2006, considering the discussion on the social model of disability. The researcher denies a narrow approach to the interpretation of the concept of inclusivity, which is now a priority, and draws attention to the expansion of the content of this term. According to Gaultier de Beco, "the system of inclusive education should be designed to provide equal social status to all, eliminating any discrimination" [6, p. 24]. The researcher focuses on the importance of an inclusive educational environment in ending marginalisation. D. Mitchell [8] in his papers emphasises that the scope of inclusive education should go far beyond the education of people with disabilities, covering all applicants, regardless of their characteristics. According to the researcher, "inclusive education is an idea whose time has come for the whole world" [8, p. 26].

The purpose of the study is the analysis of the provisions of international documents and acts of national legislation in the field of determining the legal basis for the establishment of barrier-free education, investigation of scientific approaches to the interpretation of the concept of inclusive education, determination of its content, purpose, and system, and outlining the main areas for improving the policy of barrier-free and inclusive education in Ukraine.

Materials and Methods

The study was conducted using a set of scientific methods and techniques, which allowed for conducting a comprehensive analysis of the research problems – phil-

osophical-ideological, general, and special scientific methods. The use of the dialectics method contributed to the examination of trends in establishing a barrier-free educational environment and implementing the concept of inclusive education and their impact on political, economic, social, and environmental factors of the development of society. The formal-logical method contributed to the characterisation of the content of system-forming concepts and constructions of the subject of the study, such as "barrier-free", "inclusion", "inclusive education", "inclusive educational environment", etc. The method of analysis is used to analyse papers of researchers on the subject of the study and in the characterisation of international, European, and national legislation regulating the policy of barrier-free and inclusive education. Using the synthesis method, the place of legislation regulating relations in the field of forming an inclusive educational environment in the legislation of Ukraine is established. The formal legal method helped to identify the content of the provisions of regulatory regulations and develop proposals for their improvement.

The analysis of international documents regulating the right to education and the rights of persons with special educational needs was the initial stage of the study. The next stage of the study was the examination of national legislation regarding the establishment of barrier-free education and the introduction of the concept of inclusive education. Special attention was paid to the characteristics of the national strategy for creating a barrier-free space in Ukraine. The study required a deeper understanding of the issues of analysing scientific approaches to the interpretation of the concept of inclusive education, determining its content, purpose, and system. The final stage of the study is devoted to identifying the main areas for improving the barrier-free and inclusive education policy in Ukraine.

In the process of achieving this goal of the study, international and European documents regulating the implementation of the right to education and the rights of persons with special educational needs, in particular, the Universal Declaration of Human Rights [9]; the Convention against Discrimination in Education [10]; the Convention on the Rights of the Child [11]; the Convention on the Rights of Persons with Disabilities [12]; the Council Directive (EU) establishing a general framework for equal treatment in employment and professional activities [13]; the Regulation (EU) of the European Parliament and the Council on the European System of Integrated Social Protection Statistics (ESSPROS) [14]; Council of Europe Disability Strategy for 2017-2023 [15], etc., and regulatory regulations of national legislation in this area: the Laws of Ukraine "On Education" [16], "On Higher Education" [17], the Orders of the Cabinet of Ministers of Ukraine No. 366 "On the Approval of the National Strategy for the Creation of a Barrier-Free Space in Ukraine for the Period up to 2030" [18], "On the Approval of the Action Plan for 2021 and 2022 for the Implementation of the National Strategy for the Creation of a

Barrier-Free Space in Ukraine" [19], etc., used statistical data of information and analytical documents in terms of calculating the index of social mobility for the inclusivity of institutions and determining the number of representatives of low-mobility groups.

Results and Discussion

Education is an instrument of comprehensive personal development, so the right to education is enshrined in many international human rights instruments. The Universal Declaration of Human Rights states that "everyone has the right to education" (Art. 26) [9]. The right to education guaranteed by the Universal Declaration of Human Rights is protected by the International Covenant on Economic, Social, and Cultural Rights [20] and the Convention on the Rights of the Child [11]. States that have acceded to these international instruments should ensure accessibility and promote the development of primary, secondary, and higher education. In addition, the right to freedom of choice of education at various levels is also enshrined in the International Covenant on Civil and Political Rights [21].

However, neither the Universal Declaration of Human Rights nor the International Covenants explicitly addressed the right of persons with disabilities to education. Even adopted in 1960, The Convention Against Discrimination in Education [10], which prohibits discrimination in education on certain grounds, does not cover all barriers that may be present in the realisation of the right to education. In particular, the Convention does not regulate the issue of ensuring the right of persons with disabilities to education.

Only the "Standard Rules for Ensuring Equal Opportunities for the Disabilities", adopted by the UN General Assembly in 1993 [22], absorbed all the guiding legislative principles in the humanitarian field and is now the main international document that establishes the basic principles of interaction between society and people with disabilities. "Education for people with disabilities should be an integral part of national education planning, preparation of educational programmes and organisation of educational institutions," declares Rule 6 "Education" [22].

A substantial turning point in declaring the right of persons with disabilities to education was the organisation in 1994 of the UNESCO World Conference on Education for Persons with Special Needs in Salamanca, Spain. The Salamanca statement and framework for action on special needs education urged states to "adopt the principle of inclusive education as a law or policy" [23].

In 2006, the Convention on the Rights of Persons with Disabilities [12] and its Optional Protocol [24] were adopted, which provided for a number of rights that combine the civil, political, economic, social, and cultural rights of persons with disabilities. The countries that have ratified this Convention have undertaken the obligation to ensure and guarantee, within their jurisdiction, the realisation of all rights and fundamental freedoms

for persons with disabilities without discrimination based on disability. Ukraine ratified this Convention on December 16, 2009. In accordance with Art. 24 of the Convention "for the purpose of exercising the right to education ... State Parties shall ensure an inclusive education system at all levels and life long learning." Anyone "cannot be excluded from the general education system because of a disability," and persons with disabilities "can receive ... education on an equal basis with others" [12]. Although the right to education was already rooted in international human rights and enshrined in several international and regional instruments, Art. 24 of the Convention on the Rights of Persons with Disabilities is the first legally binding document that provided for compulsory inclusive education.

In the process of developing international legal support for barrier-free policy and inclusive education, it is worth mentioning the UN Summit on sustainable development, which was held during the session of the UN General Assembly in September 2015. As a result of the Summit, new development guidelines were adopted, which were implemented in the final document "transforming the world: the agenda for sustainable development until 2030", which approved 17 Sustainable Development Goals and 169 tasks [25]. The implementation of the barrier-free and inclusive education policy is correlated with Goal 11 "Ensuring inclusivity, safety, resilience, and environmental sustainability of cities and settlements" and EU policy documents in this area, in particular: the Council Directive (EU) on establishing a general framework for equal treatment in employment and professional activities [13]; the Regulation (EU) of the European Parliament and of the Council on the European System of Integrated Social Protection Statistics (ESSPROS) [14]; Council of Europe Disability Strategy 2017-2023 [15] etc.

Ukraine, as a country that preaches UN values, supported the concept of sustainable development. The adaptation of the Sustainable Development Goals in the field of inclusive education was implemented to enforce the strategic areas of national development of Ukraine for the period up to 2030, based on the principle of "Leave no one aside". The state has ratified the main international documents on the introduction of inclusive education, in accordance with generally accepted socio-economic and educational standards.

A substantial step in the development of inclusive education in Ukraine was the adoption of the Law of Ukraine "On Amendments to the Law of Ukraine 'On Education' Concerning the Specifics of Access of Persons with Special Educational Needs to Educational Services" in 2017 (no longer valid) [26]. In the same year, a new Law of Ukraine "On Education" was adopted [16], which considers inclusive education as "a system of services in education defined by the state, based on the principles of non-discrimination, perception of diversity of people, maximum involvement in the field of education of all participants in the educational process", and the

inclusive educational environment is defined as “a system of prerequisites, techniques, and methods of their implementation for joint training, education and development of participants in the educational process, considering their special needs and opportunities” [16]. Art. 1, 19, and 20 of the Law define the principles of State Educational Policy and educational activities using the principles of inclusion [16].

The Law of Ukraine “On Amendments to Certain Laws of Ukraine Concerning the Improvement of Educational Activities in the Field of Higher Education” in 2019 [27] also introduced corresponding amendments to the Law of Ukraine “On Higher Education” [17], which clearly states that institutions of higher education should not just create conditions for the implementation of the right to education by persons with special educational needs, but provide them with conditions for obtaining high-quality higher education.

A number of bylaws were adopted to fulfil the declared obligations, such as the Decrees of the President of Ukraine “On Improving the Effectiveness of Measures in the Field of Rights of Persons with Disabilities” [28], “On Ensuring the Creation of a Barrier-Free Space in Ukraine” [29], Resolutions of the Cabinet of Ministers of Ukraine “On Approval of the Regulation on the Inclusive Resource Center” [30], “Some Issues of Creating Resource Centers Supporting Inclusive Education and Inclusive Resource Centers” [31], “On approval of the Procedure for Organizing Inclusive Education in Higher Education Institutions” [32], etc.

In 2021, the Cabinet of Ministers of Ukraine approved the National Strategy for the Creation of a Barrier-Free Space in Ukraine for the Period up to 2030 [18]. In compliance with the provisions of the National Strategy, the Order of the Cabinet of Ministers of Ukraine approved the action plan for 2021 and 2022 for the Implementation of the National Strategy for the Creation of a Barrier-Free Space in Ukraine for the period up to 2030 [19].

The National Strategy defines barrier-free as “a generally accepted approach to the implementation and implementation of national policy for the establishment of unhindered opportunities of society in all fields of life”, including in the field of education [18].

The strategy is represented by two main levels: barrier-free framework conditions and barrier-free standards. The barrier-free framework conditions provide for a person’s access to physical (accessibility of objects in the physical environment), informational (availability of various information in any form and technology, including using Braille, sign language, etc.), and digital infrastructure (access to high-speed internet), involvement in public life, the possibility of implementation in the social environment. Barrier-free standards are based on the presence of barrier-free principles in various fields of life, including in the field of education. In the field of barrier-free education, a number of problems are identified, such as: inadequate professional

training of educators and teachers, inappropriate level of competence of employees of specialised services in working with persons with special needs, insufficient availability of experienced specialists in this field; outdated methods and approaches to work that do not coincide with modern realities; lack of consideration of the specifics of the work on the organisation of the educational process; low availability of higher education institutions with special educational and informational materials; inadequate material and technical support with the necessary auxiliary means of communication in the implementation of high-quality and affordable services; unsatisfactory infrastructure of many educational institutions and service structures, etc.

“The ability of adults, young people, and children to implement all types and forms of education; the ability of all participants in the educational process to meet special educational needs; introduction of an inclusive educational environment” [18] have become strategic goals in the field of forming an educational barrier-free environment.

However, despite the fact that international documents and acts of national legislation firmly established the human right to inclusive education, the very concept of inclusion has been and remains a “controversial issue” with uncertainty in meaning. Now the question is repeatedly raised about what is the content and purpose of inclusive education and, accordingly, what the system of inclusive education should look like.

Despite the fact that inclusion is recommended as the best international practice in the field of education and is considered “an essential component of any truly democratic educational environment” [3, p. 134], there is currently no clear definition of inclusive education. UNESCO calls inclusive education “a dynamic approach of positively responding to the diversity of learners and considering individual differences not as a problem, but as an opportunity to enrich learning” [4, p. 4], later “the process of strengthening the capacity of the education system to reach all learners” [4, p. 4].

In 2007, The UN Committee on the Rights of the Child, in its commentary on the issue of education of persons with disabilities, noted that “the purpose of ensuring the implementation of the right of persons with disabilities to education should be the introduction of an inclusive education system” [33]. The creation of an inclusive educational environment should be preceded by a process of systemic reform that involves changes and modifications in the content, teaching methods, approaches, structures, and strategies in education to overcome existing barriers. Therewith, the concept of inclusive education should apply not only to persons with disabilities, but “also to learners from different cultural and linguistic backgrounds or, in general, to any learner who needs additional support to succeed in the education system” [6, p. 12]. In other words, the educational environment should be designed in such a way as to contribute to improving the abilities and capabilities of each applicant.

The committee on the Rights of Persons with Disabilities states that inclusive education needs “a holistic and systematic approach that requires all resources to be invested in the development of inclusive education and in the implementation of necessary changes in institutional culture, policy, and practice” [34]. In addition, the committee draws attention to the fact that the system of inclusive education should also be implemented by ensuring that “all research and teaching staff and other personnel receive the necessary training to acquire the appropriate competencies to create an inclusive educational environment” [34].

Thus, as a conclusion from the general comments of the UN Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, achieving success in implementing inclusive practices in the field of education requires fundamental changes in the educational culture, structure, practices, and educational programmes.

The question of where exactly persons with disabilities should exercise the right to education remains “controversial”: in ordinary educational institutions or special ones. Art. 24 of the Convention on the Rights of Persons with Disabilities does not explicitly prohibit special education or the opening of special institutions. Gaultier de Beco states that the Convention “offers governments some latitude in the practical implementation of inclusive education” [7, p. 402].

However, in its Concluding Observations [35] on state reports, the Committee on the Rights of Persons with Disabilities expressed concern about the ever-increasing number of persons with disabilities in isolated educational institutions or in separate groups in ordinary institutions, which contributes to their stigmatisation and alienation. The committee found that segregation and exclusion of applicants with disabilities from the general education system due to their specific features is a serious violation of the right to inclusive education under the Convention.

In this regard, the Committee defined the right to education as “the right of all people to study in an education system that considers the needs of all people, including those with disabilities, and in which all applicants are perceived by all educational institutions, regardless of their physical, intellectual, social, linguistic, or other abilities. This involves not only providing quality education but also changing discriminatory attitudes and creating inclusive systems in which the differences and dignity of all people are equally respected and valued” [36].

This aspect was drawn back in 1994 in the Salamanca statement, which stated that “ordinary educational institutions with an inclusive orientation are the most effective means of combating discriminatory attitudes, the centre for building an inclusive educational environment and achieving education for all” [23].

Interesting is the theory of N. Fraser, according to whom the core of the concept of inclusive learning is

the principle of “involvement parity”, which entails the construction of such “social arrangements that allow all ... members of society to interact with others to the fullest extent and without any barriers” [37, p. 30]. The concept of inclusion, according to N. Fraser, based on the fact that no one should be assigned a lower social status based on belonging to a certain group of people. This concept should be based on the principle that society can be fair only if it is guided by rules based on the value of all individuals and human diversity [38, p. 113].

Thus, considering the above, inclusive education is a high-quality education without barriers, which emphasises equality in access and involvement to the education of any person, responds positively to the individual educational needs and competencies of all applicants, and assigns responsibility for the adaptation of persons with disabilities to the education system, and not to an individual [39]. Together with other sectors of the economy, education should actively work to ensure that every person, regardless of gender, language, abilities, religion, nationality, or other characteristics, receives the necessary support, and develops in accordance with their potential [5, p. 128].

Inclusive education is a process, and a practice of removing barriers, when opportunities open up for all applicants, regardless of individual characteristics, to learn and actively take part in the educational process. Applicants who study together, learn to live together [39], and therefore inclusion is an important element of human dignity. The scope of inclusive education should go far beyond persons with disabilities and should be expanded to cover all applicants with special educational needs, regardless of their origin [8, p. 17]. Inclusive education: a) improves learning for all applicants – both with and without disabilities, b) promotes understanding, reduces prejudice, and strengthens social integration, and c) ensures that people with disabilities are willing to work and make economic and social contributions to their communities [40]. Therefore, inclusive education involves changing the educational culture with increased attention to the various needs of applicants and individualisation [41, p. 164]. Inclusion is not an experiment that needs to be tested, but a value that needs to be followed [5, p. 128].

This requires a strong and inclusive education policy, changing stakeholder attitudes, a flexible and diversified curriculum, qualified professionals, and sufficient financial assistance. System planning and effective implementation of the declared plan are necessary.

In compliance with the provisions of the laws of Ukraine “On Education”, “On Higher Education”, the Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Procedure for Organizing Inclusive Education in Higher Education Institutions”, the National Strategy for the Creation of a Barrier-Free Space in Ukraine up to 2030 in terms of the establishment of barrier-free education in higher education institutions, all necessary conditions should be created for the exercise

by persons with special educational needs of the right to access higher education. Each higher education institution should give the highest priority to improving its educational systems to enable all future applicants to exercise their right to higher education, regardless of their individual characteristics and differences.

Higher education institutions should become as architecturally accessible as possible, using universal design in improving their educational premises, and equipping suitable places for the work of students with visual, hearing, and musculoskeletal disorders, etc. Requirements for accessibility of educational institutions are formed by State Building Regulations V.2.2-40:2018 "Inclusiveness of Buildings and Structures. Substantive Provisions." [42], State Building Regulations V.2.2.-3:2018 "Buildings and Structures. Educational Institutions" [43], and State Standard of Ukraine B ISO 21542:2013 [44]. These norms apply to the design, construction, and reconstruction, in particular, of higher educational institutions that meet the needs of low-mobility groups of society [42]. The main common features of low-mobility groups of the population are difficulties in movement, the importance of social support, a high risk of discrimination, etc.

It is considered relevant to create an Inclusive Resource Centre based on higher education institutions, the purpose of which would be to support higher education applicants with special educational needs and develop an appropriate mentoring institute. The Inclusive Resource Centre should fully provide social support for such applicants, starting from the stage of admission to higher education institutions and ending with assistance in employment, provide psychological, and often medical-rehabilitation support. In 2017, a resolution of the Cabinet of Ministers of Ukraine approved the regulation on the Inclusive Resource Centre [30], which regulates the procedure for creating and stopping the centre's activities, their main aspects, and its legal status.

Special attention should be paid to improving the skills of participants in the educational process, in particular, research and teaching staff of higher educational institutions. Since the establishment of educational barrier-free regulation manages optimisation in the provision of educational information, the use of modern educational learning technologies, appropriate techniques and methods of communication in the educational process is necessary. The corresponding specialists (psychologists, consultants, social workers, occupational therapists, physiotherapists, speech therapists, speech therapists, etc.) should be involved in helping research and teaching staff. High-quality inclusive education largely depends on the quality of teacher training.

Despite the developed electronic educational environment in higher education institutions of Ukraine, it is necessary to continue developing distance learning in the future, considering the educational characteristics of all participants in the educational process. Therewith, the introduction of exclusively distance learning for

applicants with special educational needs, despite the evident positive aspects, does not solve the problem of their socialisation. On the contrary, this form of training can substantially increase the isolation of such individuals, ignore the development of their motivation and, as a result, is not always productive. Therefore, a mixed form of studying is relevant, which involves distance, individual, and group work with such applicants.

The problem of educational, methodological, and informational support for the training of applicants with special educational needs is urgent to solve. Institutions of higher education need, in particular, to introduce the preparation of video materials of lectures and practical training sessions, which is particularly popular in leading foreign institutions of higher education and is recognised as an effective educational tool. However, it is worth focusing even more attention on creating an appropriate database of specialised literature necessary for people with visual, hearing, and mental disabilities, and an appropriate database of information materials.

Adaptation of the educational programme is another key factor for achieving the goal of inclusive education. According to UNESCO recommendations, an important factor in the implementation of inclusive education is the adoption of more dynamic and diverse teaching strategies and flexible educational programmes that can meet different needs in the provision of educational services [45]. As far as possible, the educational programme should be a single educational programme, that is, accessible to all applicants, in particular, to those with special educational needs [8, p. 25]. The educational programme should not only meet the diverse needs for obtaining educational services but also be aimed at social integration and consider different teaching styles and methods.

Creating a barrier-free environment in education involves including not only people with functional disabilities but also the elderly to the target audience. According to statistical information from the Institute of Demography and Social Research of the National Academy of Sciences of Ukraine, by 2050 the percentage of people over 60 years of age in the country will increase by one and a half times and will amount to 31% of the population. According to UN studies, in the next fifteen years, the percentage of older people on a global scale will increase by 56% [46].

Therefore, the development of adult education, in particular, the creation of third-age universities, also occupies a special place in the implementation of the policy of barrier-free education. The development of appropriate educational programmes aimed at meeting the educational needs of the elderly based on higher educational institutions and popularising such programmes among the relevant category of applicants are considered relevant. This will provide an opportunity for third-age applicants not only to gain relevant knowledge but also to take an active equal part in public life and feel a certain demand in civil society.

It is appropriate and very relevant today to develop educational programmes and create conditions that will provide professional training and retraining for internally displaced persons and contribute to their adaptation to new living conditions and accelerate the process of their socialisation in the new environment. According to the International Organisation for Migration, as of mid-May, over 8 million internally displaced persons were officially registered [47]. Ensuring the implementation of the rights of registered internally displaced persons to education is regulated primarily by the Law of Ukraine "On Ensuring the Rights and Freedoms of Internally Displaced Persons" [48].

An effective policy of the state to overcome obstacles to the full involvement of citizens in the social environment, their social integration not only protects fundamental rights and improves the comfort of life and well-being, but also reduces general stress and accelerates the economic development of the state in general. Conversely, a low level of inclusivity negatively affects the objective indicators of the state and the development of civil society in the country. In 2020, when calculating the Social Mobility Index for the inclusion of institutions, Ukraine ranked only 79th out of 82 countries, 64th in terms of accessibility to the technological environment, and 55th in terms of lifelong education [49]. These are extremely low indicators, which undoubtedly require improvement. The Social Mobility Index reflects the degree of provision of social economic and environmental needs of citizens in the state according to the corresponding indicators. These indicators of the Social Mobility Index in Ukraine demonstrate what the state and, in particular, the government should strive for, so that people, first of all, those with special needs, feel comfortable in their country.

Conclusions

Inclusive education is a new perspective or approach that provides an opportunity to realise the right to education without any barriers, without any discrimination. This is an educational philosophy and practice of human society, which is changing and developing and aims to raise the concept of social justice to a new, higher level.

The 1989 UN Convention on the Rights of the Child and the 1994 Salamanca Declaration urged the governments of all countries to give the highest priority to inclusive education as part of their national education policies. The state is already taking certain steps to create a barrier-free educational environment and increase the level of inclusivity in Ukrainian society. However, the negative impact on the successful implementation of the national policy of inclusive development in Ukraine is now caused by military operations on the territory of the state. Therewith, bringing national legislation and practice in line with the requirements of international law remains a top priority.

It is necessary to create a positive image of an inclusive society and inclusive education and prepare the society itself for a tolerant attitude towards people with special needs to implement the ideas of barrier-free and inclusive education in Ukrainian society. Higher education institutions should be ready to consider the various needs of participants in the educational process, prepare appropriate material and human resources, increase the professional level of specialists who will take part in inclusive educational activities, and create a universal educational environment to implement an effective inclusive educational policy. The prospects for the development of inclusive education in the country will certainly require coordinated and urgent actions on the part of the Ministry of Education and Science of Ukraine, the Ministry of Health of Ukraine, the Ministry of Social Policy of Ukraine, and the Ministry of Youth and Sports of Ukraine. Inclusive education also requires the development and improvement of an appropriate regulatory framework that establishes the legal basis for implementing a barrier-free policy in the educational environment. All these measures will be a substantial practical contribution to the implementation of the principles of inclusive education in Ukraine and the implementation of the right to access higher education for persons with special educational needs.

Implementing a barrier-free and inclusive education policy is a long and lengthy process in which all members of society should take part.

References

- [1] Official website of the Office of the Prosecutor General. (n.d.). Retrieved from <https://www.gp.gov.ua>.
- [2] Zubchenko, S.O., Kaplan, Yu.B., & Tyshchenko, Yu.A. (2020). *Creating a barrier-free environment and social inclusion: World experience for Ukraine*. Kyiv: National Institute for Strategic Studies.
- [3] Portelli, J.P., & Koneeny, P. (2018). Inclusive education: Beyond popular discourses. *International Journal of Emotional Education*, 10(1), 133-144.
- [4] Murphy, M., Thompson, S., Doyle, D., & Ferri, D. (2022). Inclusive education and the law in Ireland. *International Journal of Law in Context*. doi: 10.1017/S1744552322000180.
- [5] Singh, B., & Prajapati, A.K. (2021). Inclusive education in India: What, why and how? *International Journal of Research in Economics and Social Sciences*, 11(03), 111-132.
- [6] De Beco, G. (2022). The right to "inclusive" education. *Modern Law Review*. doi: 10.1111/1468-2230.12742.
- [7] De Beco, G. (2018). The right to inclusive education: Why is there so much opposition to its implementation? *International Journal of Law in Context*, 14(3), 396-415. doi: 10.1017/S1744552317000532.

- [8] Mitchell, D.R. (2015). Inclusive education is a multi-faceted concept. *Center for Educational Policy Studies Journal*, 5(1), 9-28. doi: 10.26529/cepsj.151.
- [9] Universal Declaration of Human Rights. (1948, December). Retrieved from <https://www.coe.int/en/web/compass/the-universal-declaration-of-human-rights-full-version->.
- [10] Convention against Discrimination in Education. (1960, December,). Retrieved from http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html.
- [11] Convention on the Rights of the Child. (1989, November). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.
- [12] Convention on the Rights of Persons with Disabilities. (2006, December). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>.
- [13] Council Directive 2000/78/EU Establishing a General Framework for Equal Treatment in Employment and Professional Activities. (2000, November). Retrieved from <http://data.europa.eu/eli/dir/2000/78/oj>.
- [14] Regulation (EC) of the European Parliament and the Council No. 458/2007 on the European System of Integrated Social Protection Statistics (ESSPROS). (2007, April). Retrieved from <http://data.europa.eu/eli/reg/2007/458/oj>.
- [15] Council of Europe Disability Strategy 2017-2023 "Human rights: A reality for all". (2017, March). Retrieved from <https://rm.coe.int/16806fe7d4>.
- [16] Law of Ukraine No. 2145-VIII "On Education". (2017, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/2145-19#Text>.
- [17] Law of Ukraine No. 1556-VII "On Higher Education". (2014, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1556-18#Text>.
- [18] Order of the Cabinet of Ministers of Ukraine No. 366 "On the Approval of the National Strategy for the Creation of a Barrier-Free Space in Ukraine for the Period up to 2030". (2021, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/366-2021-%D1%80#Text>.
- [19] Order of the Cabinet of Ministers of Ukraine No. 883 "On the Approval of the Action Plan for 2021 and 2022 for the Implementation of the National Strategy for the Creation of a Barrier-Free Space in Ukraine". (2021, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/883-2021-%D1%80#Text>.
- [20] International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.
- [21] International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.
- [22] Resolution of the UN General Assembly No. 48/96 "Standard Rules for Ensuring Equal Opportunities for the Disabilities". (1993, December). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/standard-rules-equalization-opportunities-persons-disabilities>.
- [23] Ministry of Education and Science of Spain. (1994). *The Salamanca statement and framework for action on special needs education*. Salamanca: UNESCO. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000098427>.
- [24] Optional Protocol to the Convention on the Rights of Persons with Disabilities. (2006, December). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-persons-disabilities>.
- [25] Ministry of Education and Science of Ukraine. (n.d.). *Goals of sustainable development*. Retrieved from <https://mon.gov.ua/ua/nauka/innovacijna-diyalnist-ta-transfer-tehnologij/analitichni-materiali/cili-stalogo-rozvitku>.
- [26] Law of Ukraine No. 2053-VIII "On Amendments to the Law of Ukraine 'On Education' Concerning the Specifics of Access of Persons with Special Educational Needs to Educational Services". (2017, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2053-19#Text>.
- [27] Law of Ukraine No. 392-IX "On Amendments to Certain Laws of Ukraine Concerning the Improvement of Educational Activities in the Field of Higher Education". (2019, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/392-20#Text>.
- [28] Decree of the President of Ukraine No. 875/2019 "On Improving the Effectiveness of Measures in the Field of Rights of Persons with Disabilities". (2019, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/875/2019#Text>.
- [29] Decree of the President of Ukraine No. 533/2020 "On Ensuring the Creation of a Barrier-Free Space in Ukraine". (2020, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/533/2020#Text>.
- [30] Resolution of the Cabinet of Ministers of Ukraine No. 545 "On Approval of the Regulation on the Inclusive Resource Center". (2017, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/545-2017-%D0%BF#Text>.
- [31] Resolution of the Cabinet of Ministers of Ukraine No. 617 "Some Issues of Creating Resource Centers Supporting Inclusive Education and Inclusive Resource Centers". (2018, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/617-2018-%D0%BF#Text>.

- [32] Resolution of the Cabinet of Ministers of Ukraine No. 635 "On Approval of the Procedure for Organizing Inclusive Education in Higher Education Institutions". (2019, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/635-2019-%D0%BF#Text>.
- [33] General Comment of the UN Committee on the Rights of the Child (CRC) No. 9 "The Rights of Children with Disabilities". (2007, February). Retrieved from <https://www.refworld.org/docid/461b93f72.html>.
- [34] General Comment of the UN Committee on the Rights of Persons with Disabilities (CRPD) No. 4 "Right to Inclusive Education (Art. 24)". (2016, November). Retrieved from <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-4-article-24-right-inclusive>.
- [35] Concluding Observations on the Initial Report of France of the UN Committee on the Rights of Persons with Disabilities. (2021, October). Retrieved from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fFRA%2fCO%2f1&Lang=en.
- [36] UN Committee on the Rights of Persons with Disabilities Recommendations "Inquiry Concerning Spain Carried Out by the Committee under Article 6 of the Optional Protocol to the Convention". (2018, March). Retrieved from <https://digitallibrary.un.org/record/1483922>.
- [37] Fraser, N. (1998). *Social justice in the age of identity politics: redistribution, recognition and participation: The Tanner lectures on human values*. Salt Lake City: University of Utah Press.
- [38] Fraser, N. (2000). Rethinking Recognition. *New Left Review*, 3, 107-120.
- [39] Save the Children. (2017). *Inclusive education: Children who learn together, learn to live together*. Retrieved from https://resourcecentre.savethechildren.net/node/12351/pdf/project_brief_inclusive_education_final.pdf.
- [40] UNICEF. (2017). *Inclusive education including children with disabilities in quality learning: What needs to be done?* Retrieved from https://www.unicef.org/eca/sites/unicef.org.eca/files/IE_summary_accessible_220917_brief.pdf.
- [41] Onyebuchi, G.C. (2018). Social justice advocacy and inclusive education: Capacity building tools. *Journal of Emerging Trends in Educational Research and Policy Studies*, 9(4), 161-166.
- [42] State Building Regulations V.2.2-40:2018 "Inclusiveness of Buildings and Structures. Substantive Provisions". Retrieved from https://dbn.co.ua/load/normativy/dbn/dbn_v_2_2_40/1-1-0-1832.
- [43] State Building Regulations V.2.2.-3:2018 "Buildings and Structures. Educational Institutions". Retrieved from https://dbn.co.ua/load/normativy/dbn/v_2_2_3/1-1-0-1804.
- [44] State Standard of Ukraine B ISO 21542:2013 "Buildings and Structures. Accessibility and Ease of Use of the Built Living Environment". Retrieved from http://online.budstandart.com/ua/catalog/doc-page?id_doc=56128.
- [45] UNESCO. (2008). *Inclusive education: The way of the future: Conclusions and recommendations of the 48th session of the International Conference on Education*. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000180629>.
- [46] Soroka, N. (2020). Adult education: Cui prodest? *Lex Inform. Legal News of Ukraine*. Retrieved from <https://lexinform.com.ua>.
- [47] The number of internally displaced persons (IDPs) in Ukraine has exceeded 8 million people (2022). *The official website of the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine*. Retrieved from <https://www.minre.gov.ua/news/kilkist-vnutrishno-peremishchenyh-osib-vpo-v-ukrayini-perevyschyla-8-mln-lyudey-zvidky-y-kudy>.
- [48] Law of Ukraine No. 1706-VII "On Ensuring the Rights and Freedoms of Internally Displaced Persons". (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1706-18#Text>.
- [49] World Economic Forum. (2020). Benchmarking social mobility: The global social mobility index. In *The global social mobility report 2020. Equality, opportunity and a new economic imperative* (pp. 14-18). Geneva. Retrieved from http://www3.weforum.org/docs/Global_Social_Mobility_Report.pdf.

Реалізація права на доступ до вищої освіти: політика безбар'єрності та інклюзивної освіти в міжнародних документах й актах національного законодавства

Ірина Іванівна Дейнега¹, Марина Андріївна Дейнега²

¹Національний авіаційний університет
03058, просп. Любомира Гузара, 1, м. Київ, Україна

²Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

У статті порушено одну з найнагальніших проблем освітньої політики України – запровадження інклюзивної освіти – системи освіти, яка асимілює потреби різноманітного кола здобувачів і спрямована на задоволення їхніх потреб. Заявлена тема наукового дослідження має вкрай актуальний характер, оскільки є малодослідженою в рамках національної правової науки, а положення законодавства з визначеної проблематики потребують активнішого практичного впровадження. У зв'язку з цим освітня система нашої держави має бути реформована насамперед на засадах схваленої національної стратегії безбар'єрності. У контексті окресленого напряму розвитку освітньої політики метою представленої статті є аналіз національної нормативно-правової бази у сфері безбар'єрності та інклюзивної освіти на відповідність міжнародним та європейським стандартам, переосмислення вже реалізованої політики та практики забезпечення освітнього процесу для осіб з особливими освітніми потребами. Методологічну основу дослідження склали діалектичний метод наукового пізнання, загальнонаукові (формально-логічний, аналізу та синтезу) та спеціально-юридичний (формально-юридичний) методи. У статті проаналізовано міжнародне, європейське і національне законодавство, що регламентує питання запровадження безбар'єрного освітнього середовища та інклюзивної освіти. За результатами дослідження встановлено, що безбар'єрність та інклюзивність – це цінності, які мають стати фундаментом сучасної освітньої політики. З'ясовано, що Україна вже робить певні організаційно-правові кроки, визначені ратифікованими міжнародними та європейськими актами, задля створення безбар'єрного освітнього середовища й підвищення рівня інклюзивності українського суспільства, однак цього недостатньо. Обґрунтовано, що першочерговим завданням залишається адаптація законодавства та практики України до вимог міжнародних та європейських стандартів. У статті зроблено спробу надати теоретичне обґрунтування впровадження політики безбар'єрності і концепції інклюзивної освіти у сфері вищої освіти в Україні. Стаття пропонує напрями реалізації загальнонаціональної стратегії і практики, які можуть підготувати основу для успішного впровадження інклюзивної освіти в Україні.

Ключові слова: інклюзія, освіта, освітня політика, безбар'єрне середовище, особи з інвалідністю, здобувачі з особливими освітніми потребами



UDC 349.6

DOI: 10.31548/law2022.03.004

“Amber Issue” in Ukraine: Prevention and Consequences

Inna V. Lebid*, Oleksii Yu. Piddubny

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Article's History:

Received: 06.05.2022

Revised: 09.07.2022

Accepted: 11.08.2022

Abstract

The study analyses the current process of amber mining and assesses the legal consequences of illegal activities in the amber mining industry. The relevance of the study is due to the deterioration of the socio-economic aspect of the life of Ukrainian citizens due to the unauthorised extraction of raw materials. The existing fact determines the purpose of the study, namely: the analysis of legal preventive measures and the system of liability norms, in particular, for non-state mining of fossilised resin. The research uses the following methods of searching, processing and presentation of Information: general scientific (formal-logical, analysis and synthesis, concretisation and abstraction, and induction and deduction methods) and special-legal methods (formal-legal, comparative-legal, and method of interpretation of legal provisions). The paper highlights the main gaps in the regulations for amber mining and tort obligations. Based on the results, the main area for changes was established: strengthening responsibility for illegal amber mining, in particular, introducing a state monopoly on its extraction, stopping non-state extraction of valuable resin. The conclusions of the study emphasise that the issue under study also requires the examination of natural aspects of geology, geomorphology, palaeogeography, biology, and the ecology of amber mining sites in general, so only a comprehensive solution to the issues of legalising amber mining at the state level will allow bringing the industry to international standards for mining. The results of the study can be useful for researchers in the field of law, geology, ecology, and biology. Ultimately, the necessary changes in the process of legalising amber mining relate not only to legal aspects. For example, one of the measures aimed at a positive result is the implementation of reclamation processes in the amber mining areas

Keywords: amber, geology, criminal liability, smuggling, economic law

Suggested Citation:

Lebid, I.V., & Piddubny, O.Yu. (2022). “Amber issue” in Ukraine: prevention and consequences. *Law. Human. Environment*, 13(3), 37-43.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

Amber is a petrified wood resin used for jewellery, decoration, medicine, and perfumes. Samples with inclusions of insects and plants are of great scientific importance and are highly valued by collectors. Amber is usually yellow to brown in colour, and individual specimens are reddish-brown-red or reddish-brown in colour [1].

One of the main components of the development of the social area of the economy, namely the level of income of the population and the level of employment of society, is the extraction of minerals on the territory of Ukraine. Thus, in places where amber is mined, mainly in the regions of the economic region of Polissya (Volyn, Zhytomyr, Rivne regions), there is a noticeable unfavourable prospect of economic development [2].

Illegal amber mining adversely affects the economic prosperity of both the state in general and individual regions – places of the main deposit of valuable raw materials. Ultimately, there is not only its illegal extraction and sale but also, as a result, other fields of public life do not function properly: the lack of official employment, decent working conditions and payment for citizens involved in the extraction, the growth of a criminogenic atmosphere among the population. It is also impossible to avoid the negative impact of such mining on the ecological situation of these regions which leads to their devastation and irrevocable destruction.

Considering the above, the purpose of the study is to provide a comprehensive review of the amber mining regulations, the subsequent processing of mining territories, the algorithm for the occurrence of tort obligations of offenders and identify possible measures that will work as a prevention of future natural resource crimes.

While writing the study, the papers of Ukrainian researchers were used, for example, the paper by V.E. Filipovich [3], which proposed a methodology that can be used in the process of monitoring compliance with environmental legal provisions in the territories of open-pit mining, which is necessary against the background of present-day Ukraine. A study conducted by O.V. Gulak and R.A. Grab [4] on the state of organisational and legal support for the amber mining process in Ukraine also played a substantial role and proposed ways to optimise this problem. Most of the sources used are the papers of national lawyers, which are contained in the Scopus and Web of Science databases, for example, the study by R.O. Movchan, A.A. Voznyuk, D.V. Kamensky, O.O. Dudorov, and A.V. Andrushko, which highlights the problems of forming criminal legislation regarding liability for illegal amber mining [5].

1. Existing Problems of Amber Mining

Interest in the issue of the legality of amber mining began to increase steadily only in recent years since the average market price of amber reached over 10 thousand dollars per kilogram. The need to adopt appropriate legislation in Ukraine, which would become one of

the components of legalising amber mining, has existed for many years [6].

Citizens involved in the amber industry support the government's position that legalising the field will help streamline mining and promote soil reclamation, preserve the natural environment – hotbeds where direct work takes place. Notably, not everyone agrees with this approach to solving the problematic issue. Namely, most of the local smugglers are trying by all sorts of methods to prevent the state from being able to freely dispose of amber deposits. They attract corrupt officials and representatives of law enforcement agencies, who, having their own interests, are ready to promote their illegal activities and cover them up to do this.

State officials note: "Only six companies have mining permits: two private ones, and four state-owned enterprises that have recently been closed due to bankruptcy or bureaucratic problems. The main amber reserves of Ukraine are concentrated primarily in forests in the Rivne, Zhytomyr and Volyn Regions" [6].

Such a situation with state-owned enterprises and licensed amber producers does not improve the situation in the industry, but only creates the appearance of a state presence and conditional control of this issue.

Environmentalists note the egregious situation that has developed on the ground, since there is already a place of existence of such territories that are no longer suitable for mining, even if this refers to legal extraction, due to the fact that forests need at least a hundred years to restore their bioresources, the reason for the absence of which is the wrong extraction procedure. Animals also encounter serious difficulties, because they fall into pits and are not able to get out on their own [6].

Notably, smugglers do not adhere to basic mining technologies, extracting rock with motor pumps, which damages the drainage channels of underground water. It will take many dozens of years to restore damaged woodlands and fields to proper condition. Therefore, even at this stage, the state authorities should approve proper legal regulation and save the industry from uncontrolled barbaric amber mining.

In fact, it is appropriate to say that the state does not conduct geological exploration for amber deposits. Therewith, there is also no control over chaotic places where raw materials are extracted by illegal diggers who search for them at random.

Ukrainian mass media, activists, and environmentalists are making substantial efforts to increase attention to this problem. At one time, there was information that law enforcement officers conducted raids on amber digs, where amber is illegally extracted, seized goods, and opened criminal proceedings against offenders. As it was noted: "The amber mafia operates in these regions, and mostly unemployed local residents are involved in mining. This is a social problem. It is complex" [7].

2. Legal Aspect of Problem Solving

It should be emphasised that it is not enough just to adopt a legal framework that will regulate the legal extraction of amber and the corresponding procedure. It is necessary to provide local residents with the opportunity to officially find a job and receive wages while having proper and safe working conditions. As for the corrupt state authorities and law enforcement agencies that contribute to the shadowing of amber mining, it is necessary to legislate such a measure of responsibility that they simply do not have such desires. There was an attempt to resist illegal amber mining through the law. Thus, the Verkhovna Rada in the first reading adopted a bill on the extraction and sale of amber, but it was never finally adopted [8].

It should be emphasised that the problem of illegal amber mining is dealt with not only by lawmakers but also by the public. Round tables were held on this subject, and the mass media sharply cover the problem and expose disclosure and criticism of those illegal facts that are covered up by dishonest officials and law enforcement agencies.

"The local population illegally extracts amber using water pumps and the technology of leaching rock from the soil column (up to 10 meters deep). The next stage is the sale of such illegally extracted amber to unregistered intermediary structures, after which it is exported for further processing outside the country" [9]. The nature of such mining is illegal, so those responsible for such acts should be held accountable in accordance with the current legislation.

Another factor that incites offenders is that public authorities do not have information about the factual extent of violations and damage caused to the environment. The State Ecological Inspectorate of Ukraine [10], the State Inspectorate of Agriculture [11] and the State Forest Protection [12] do not have data on the area of disturbed land (forest fund), so it is expected that they do not respond to violations [13]. Therefore, it is extremely important to adopt an appropriate regulatory framework that would help to analyse all these points and unify not only the process of amber mining but also issues related to the application of liability to offenders and other possible nuances.

"The proceedings of this category are difficult from the standpoint of organising and conducting a pre-trial investigation. This is due to the nature of the way they are committed. The difficulty lies in the fact that the extraction of amber, as a rule, is detected by employees of the forest guard and employees of the State Inspectorate of Agriculture, that is, from the moment of committing a crime to the moment of its detection, a certain period of time passes, which negatively affects the fixation of traces of the crime and the use of forensic means by which it is possible to identify the persons who committed them" [14].

Experts emphasise that it is not so easy to bring to justice those responsible for illegal amber mining in

modern realities. Because the fact of such mining is not immediately noticeable and it is problematic to create an evidence base. It should be added that often cases are not initiated and amber mining continues to be conducted by smugglers since law enforcement agencies are also interested in this.

The initial stage of the investigation of the described type of criminal illegal actions has certain features, which primarily relate to the following aspects: initiation, direct conduct, and documentary recording of the inspection of the place of commission of criminal illegal actions; establishment of the circle of persons involved in a criminal offence, and specific circumstances that are subject to proof [15]. That is, the investigation of such types of offences is of a special nature. This is due to the territory of their implementation and the need to attract individual specialists who must establish the relevant facts concerning amber mining activities.

The operational duty officer must take all measures to stop the criminal offence immediately after receiving a message about illegal amber mining, namely: ensure the organisation of the process of detaining violators of the law, eliminating the negative consequences of the offence, using the algorithm specified in the instructions for organising the activities of the duty service of bodies (divisions) of the National Police of Ukraine [16].

The procedural order that exists when a new offence is detected is general in most cases [17]. However, the pre-trial investigation of illegal amber mining provides for a number of features. There are certain features of conducting an investigative inspection of the scene of such crimes. First of all, this procedure requires the use of special knowledge. Therefore, during the investigation of such types of offences, the investigator should involve specialists who will provide the investigation with industry conclusions, for example, determine the boundaries of the territory of illegal mining, types of minerals, analyse samples of illegally extracted minerals for further preparation of the report [14].

Depending on the situation and the scale of the offence committed regarding illegal amber mining, an operational investigator can involve specialists in the field of geology, mining, chemists, employees of the State Ecological Inspectorate, the Ministry of Environmental Protection and Natural Resources, etc [11].

It is worth emphasising that, as a rule, the state forest guard informs the public about detected violations and works closely with law enforcement and environmental authorities within its competence.

Such crimes not only harm the economy of the country but also negatively affect the ecological state of territories that are rich in mineral deposits [18]. In Ukraine, mineral resources are a unique and important economic and strategic natural resource, which is defined by the Constitution of Ukraine as an object of property rights of the Ukrainian people, which is why special attention is paid to the illegal mining of minerals of national significance among the list of environmental crimes.

The number of crimes in the environmental field related to violation of the rules for the protection or use of mineral resources is constantly growing [19]. Experts on such issues note that crimes in the field of subsurface use can be committed both in the form of action and inaction. However, as for the extraction of amber by illegal means, these are always active measures. The legislation distinguishes: methods of violating the established rules for the protection of mineral resources, methods of violating the rules for the use of mineral resources, and methods of illegal extraction of minerals of national significance [19].

In the case of amber smuggling, there are always active actions, this refers to the preparation, direct extraction process, and hiding traces of the committed offence. "The development of amber ores from Ukrainian deposits can be conducted in an open way by excavator and transport method. Ore processing is performed by washing on metal sieves (screens). Sand and clay are washed off with water, and pieces of amber are selected and sent for sorting and further use. In addition, illegal extraction of raw amber is conducted by the local population of the Rivne region and Zhytomyr region using water pumps by leaching rock from the soil column (up to 10 meters deep). A compressor and motor pump are adjusted to the likely location. The latter consists of an engine and a fire pump. Under high water pressure, water is poured into this place. A pit is formed through which amber, lighter than water, is pushed up" [18, p. 35].

In general, experts divide the methods of illegal amber mining into those that are conducted by open and those that are conducted by underground methods. It is worth emphasising that each of them equally adversely leads to the destruction of ecosystems – places of illegal mining of mineral resources. According to experts, the legal extraction of amber from sand deposits, according to the established production standards, is generally conducted mainly in two ways: mechanical and hydraulic.

The mechanical method involves the mechanical development of an array of soil in an open pit or underground. However, this method of extraction is defined as economically unprofitable due to low profitability: first of all, it not only has high operational and economic costs but also negative consequences for the environment.

The second method, hydraulic, is conducted by eroding the productive soil layer with high-pressure jets and raising amber on the deposit surface using hydraulic flows [20].

It should be emphasised that the legal technology of amber mining should ideally provide the highest level of amber extraction from the deposit with minimal human costs. A high level of productivity should be ensured through the use of the latest technologies to reduce electrical capacity and negative technogenic and environmental impact on the environment. The present forests and roads of some regions of Polissya have the appearance of deep sinkholes since no one pays due attention to the reclamation of excavated areas.

Therefore, every year, due to illegal amber mining, substantial forest areas are deliberately destroyed. Insufficient punishability and regulation by laws has led to the fact that unique minerals are stolen [18, p. 37].

There are scientific approaches to solving this problem by the prospect of strengthening the penalty provided for by the current legislation to a more severe one for offences in the field of subsurface use. Such a step would be more justified because the damage caused by amber smuggling activities poses a threat not only to the country's economy, but also to its ecology, environment, and local legal order.

Notably, there were legislative attempts to resolve the issue of legalising amber mining, in particular, through amendments and additions to the Draft Law of Ukraine "On the Extraction and Sale of Amber" [8].

3. Prevention of Natural and Financial Problems

Unauthorised extraction of raw amber requires a comprehensive approach in many areas that are combined to solve a common problem, in particular, legislative, environmental, scientific, public etc. Only after the legislative settlement of this problem, it is necessary together with researchers to create and process a mechanism for the reclamation of damaged land, which will have maximum efficiency, since one of the main problems is ensuring the creation of new forests [6].

The environmental crisis, which has engulfed the whole world due to the thoughtless economic activity of humans and their indifferent attitude to the environment, threatens the world with a catastrophe. Global warming, the lack of drinking water, and the natural disasters that are present today are just harbingers of it. It should be emphasised that the illegal extraction of amber by destructive, artisanal methods is also part of this harmful activity for nature that occurs in our country.

As for the current ecological situation, there are changes in substantial areas of landscapes. It is worth paying attention to the north-western regions of Polissya, as they are most destroyed by incessant mining. Unauthorised extraction of wood resin negatively affects not only the economic sector of the regions but also disrupts harmony in landscapes and relief structures, in particular, causing disturbances in soils and groundwater, which in the future leads to the destruction of forests [21].

The destruction of forests conducted by smugglers in mines and damaging the soils and surface waters during amber mining directly destroy the local ecological environment.

Representatives of the leading Ministry of Environmental Protection and Natural Resources of Ukraine in this area called for strengthening administrative and criminal liability for the illegal extraction of amber since the country does not have proper effective legislation regulating legal relations in this area [6].

Clear legal regulation of amber mining and its implementation will help to stabilise the situation in

the industry and bring it to state standards. Ultimately, not only the extraction itself requires regulation by the state, but also the process of legal sale of amber and products made from it.

The progression of these problems has led to serious consequences concerning many fields of public life: "This is the violation of the ecosystem of the Ukrainian Polissya that has developed over the centuries, the complete decline of state mining of a unique stone, the predominance of opaque mining schemes and criminal skirmishes, the lack of a legal market, its replacement with shadow market and smuggling" [21].

Experts determine the following reasons for the illegal extraction, purchase, storage, processing, and sale of amber:

- "shallow occurrence of productive amber horizons from the daytime surface, distance from densely populated centres, forest cover, and high swampiness of the territory;
- absence or incapacity of laws on the protection of mineral resources and regulatory support for labour activity in the field of extraction, production, and use of amber;
- unemployment and plight of the population, geo-ecological ignorance of the authorities and local residents, including the younger generation;
- ineffective counteraction to illegal amber mining and trafficking in Ukraine by the Parliament, the Cabinet of Ministers, officials of regional, district and rural administrations" [21].

Only if decisions that will have a positive lasting effect are made at the state level, then it will be possible to talk about solving the amber problem. It is also necessary to approve the concept of activities of economic entities for the development of amber deposits. The main criteria for its creation should be the factors that underlie the success of the amber mining industry: economic, financial, and social.

The financial issue is what funds the entities will receive from the activities of such an enterprise. Basically, rent is fully deducted to the state budget. It would be acceptable if part of the fee remained at the places of its payment, that is, in local budgets – this would certainly have positive consequences [6]. The course of decentralisation of power, which has been promoted in our country in recent years, should provide for this. Since taxes and fees from the amber industry do not work for the benefit of the relevant region but go to the general budget, this does not contribute to the rapid development of the relevant territories and is economically unfair.

As for social factors, the introduction of an enterprise specialising in amber mining will create a certain social tension within society. Therefore, for the comprehensively successful functioning of such enterprises, it is necessary to conduct explanatory work with the population and determine the benefits for society, for example, from solving the problem of employment [6].

Therefore, transparent activities in the amber industry, the confidence of the local population in the

processes in it, and the understanding that legal mining is for the benefit of the whole society, and not just corrupt managers who create an illusive picture at state-owned enterprises, while satisfying their own interests, will allow legalising business and contribute to the elimination of unauthorised amber mining and smuggling.

However, it will not be easy to implement such a process, since today the smuggling business includes not only its organisers and direct performers, but also provides for a more complex structure. Therefore, the decisive methods of the authorities are necessary at all levels of the state apparatus to prevent and counteract crime, which was the result of amber smuggling in Ukraine.

Therewith, it is necessary to remember that ineffective legislation and unauthorised extraction of the fossil for a considerable time caused substantial damage to Ukrainian forests. Thus, the authors consider it necessary to introduce simple and transparent explanations to consider the interests of local residents, the regional community, and the state that will make a profit.

Dialogue and close cooperation of all stakeholders can move any complex task forward. The same applies to the regulation and establishment of regulations on the amber mining and sales market in Ukraine.

As L. Khmurovska notes: "The experts include the following main ways to prevent illegal amber mining:

- strengthening administrative and criminal liability for illegal amber mining;
- introduction of a state monopoly on the extraction of amber to overcome the illegal extraction of this material;
- establishment of appropriate export quotas, creation of conditions for internal processing of amber;
- operation of 24-hours hotlines for reporting cases of illegal amber mining;
- strengthening the work of law enforcement agencies" [22].

First of all, to stop the process of illegal mining and further solve it, it is necessary to have more control in this industry. It is also a good idea to use the finances received from fines in the interests of the territories that are used in the extraction of amber, for example, to conduct land reclamation. Using information resources, it is possible to implement measures to prevent and minimise the negative environmental and economic consequences of amber mining, and offences in this area [23].

However, it is still an open question of how to implement all this in practice and defend it in the realities of the national legislation of Ukraine. It is important not only to consolidate the theory in legal provisions but also to create conditions for the successful implementation of the measures in practice.

Conclusions

The authors consider it necessary to recognise that the issue of illegal amber mining has only worsened in recent years, although it has existed for several years. Ultimately, amber attracted the human imagination from

the very beginning of written history and, according to archaeological data, this wonderful product of the earth of mysterious origin and unusual properties was known to our ancestors.

There is a need to address the current critical state of the amber industry through comprehensive changes that should address many aspects of the country's socio-economic, educational, cultural, and political activities. It is necessary to raise the issue of adopting a number of fundamental legislative changes that would help preserve the country's national wealth – amber and protect it from illegal mining and smuggling abroad.

The necessary changes should relate to the issue of complete termination of non-state amber mining in its places of deposits; introduction of sufficient penalties in case of violation of the norms of regulatory legislation in the industry; ensuring real reclamation of all disrupted land; providing monetary support for geological exploration and studies on amber by state research institutes; solving the issue of employment of the local population, including the development of the infrastructure of local communities; ensuring civilised forms of legal relations between territorial communities

on whose lands amber is mined, prospecting associations, and state mining companies businesses.

Notably, amber mining is only one of the problems of natural resource law, which has become the most substantial due to the exceptional price of the resource itself, its relatively easy method of extraction, combined with the low level of well-being of residents of the territories where this natural resource lies, with their own insufficiently high level of legal culture.

In view of the above, it can be concluded that illegal amber mining appears as a socio-economic catastrophe of our time, the consequences of which will be felt for a considerable time until the principles of natural resource law really serve as guiding ideas, and nature, like human life, becomes the highest social value.

As prospects for the development of the amber industry and legal aspects related to it, it is advisable to implement the proper development of a complex approach to solving the current situation of this industry. Because only if the damaged land is restored, and changes in the legislation regarding the regulation of the resin mining process and tort obligations are implemented, it will be possible to achieve the desired results.

References

- [1] Liu, Y., Shi, G., & Wang, S. (2014). Colored phenomena of blue amber. *Gems and Gemology*, 50(2), 134-140. doi: 10.5741/GEMS.50.2.134.
- [2] Kovalevskiy, S.S. (2019). Identification of foci of amber mining in the forests of Ukraine. *Scientific Bulletin of NLTU*, 29(6), 40-44.
- [3] Filipovich, V.E. (2015). Operational control of the spread of illegal amber mining and assessment of damage caused by states, based on multi-zone space survey. *Ecological Safety and Nature Management*, 4, 91-97.
- [4] Gulak, O.V., & Grab, R.A. (2015). Problematic issues of organizational and legal regulation of amber mining in Ukraine: Current challenges. *Scientific Bulletin of the National University of Life and Environmental Sciences of Ukraine*, 218, 183-188.
- [5] Movchan, R.O., Voznyuk, A.A., Kamensky, D.V., Dudorov, O.O., & Andrushko, A.V. (2021). Problems of criminal liability for illegal amber mining in Ukraine. *Naukovyi Visnyk Natsionalnoho Hirnychoho Universytetu*, 6, 113-117. doi: 10.33271/nvngu/2021-6/113.
- [6] Potikha, A. (2016). The problem of amber mining: Current status and prospects. *Ukraine: Events, Facts, Comments*, 5, 36-44.
- [7] "Amber fever" threatens Ukraine with an ecological catastrophe. (2016). Retrieved from <https://www.mvk.if.ua/energef/37693>.
- [8] Draft Law of Ukraine No. 1351-1 "On the Extraction and Sale of Amber". (2014, December). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53194.
- [9] Alekseyeva-Protsyuk, D.O., & Bryskovska, O.M. (2015). Features of the pre-trial investigation of illegal extraction of minerals (raw amber). *Customs Business*, 1(Part 2, book 1), 74-80.
- [10] Resolution of the Cabinet of Ministers of Ukraine No. 275 "On Approval of the Regulation on the State Ecological Inspectorate of Ukraine". (2017, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/275-2017-p#Text>.
- [11] Order of the Ministry of Agrarian Policy of Ukraine No. 770 "Regulations on the State Inspectorate for Agriculture in the Autonomous Republic of Crimea, Regions, Cities of Kyiv and Sevastopol". (2011, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0034-12#Text>.
- [12] Resolution of the Cabinet of Ministers of Ukraine No. 976 "On Approval of the Regulation on State Protection". (2009, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/976-2009-p#Text>.
- [13] Gnatushenko, V.V., Mozgovyi, D.K., Vasyliov, V.V., & Kavats, O.O. (2017). Satellite monitoring of the consequences of illegal amber mining in Ukraine. *Naukovyi Visnyk Natsionalnoho Hirnychoho Universytetu*, 2, 99-105.
- [14] Order of the General Prosecutor's Office of Ukraine No. 298 "On Approval of the Regulations on the Unified Register of Pre-trial Investigations, its Procedure and Maintenance". (2020, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0298905-20>.

- [15] Code of Criminal Procedure of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.
- [16] Order of the Ministry of Internal Affairs No. 440 "On Approval of the Instruction on the Organization of the Duty Service (Units) of the National Police of Ukraine". (2017, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0750-17#Text>.
- [17] Vasilinchuk, V.I., & Kupranets, I.M. (2015). Ways to teach illegal amber mining. In *Problems of legalization of amber mining by local residents: collection of materials of the All-Ukrainian scientific and practical conference* (pp. 34-35). Kyiv: Scientific Institute of Public Law.
- [18] Vyazmikin, S.A. (2015). Ways to teach illegal extraction of raw amber. *Operative-search prevention of corruption and corruption-related offenses: Materials of the round table* (pp. 34-39). Kyiv: FOP Kandyba T.P.
- [19] Malanchuk, Z., Korniyenko, V., Malanchuk, Ye., & Khrystyuk, A. (2016). Results of experimental studies of amber extraction by hydromechanical method in Ukraine. *Eastern-European Journal of Enterprise Technologies*, 3(10), 24-28. doi: 10.15587/1729-4061.2016.72404.
- [20] Zhovneruk, A. (2017). Illegal amber mining as a prerequisite for environmental disaster. *Entrepreneurship, Economy and Law*, 11, 104-107.
- [21] Matsuy, V.M. (2017). Amber Polissya – "stupid lands", "drunk forest" and "lunar landscape". Forever? *Mirror Weekly*, 11, article number 8. Retrieved from https://zn.ua/ukr/energy_market/burshtinove-polissya-durni-zemli-p-yaniy-lis-i-misyachniy-landshaft-nazavzhdi-.html.
- [22] Khmurovska, L.S. (2018). Illegal amber mining: Current status and main areas of prevention. In *Criminological theory and practice: Experience, current problems and ways to solve them: Materials of the interuniversity scientific and practical round table* (pp. 92-95). Derevach: National Academy of Internal Affairs.
- [23] Krasovsky, G.Ya., Shumeiko, V.O., Klochko, T.O., & Sementsova, N.I. (2018). Information technologies for monitoring the environmental consequences of amber mining in Ukraine. *Environmental Security and Balanced Resource Use*, 2, 106-116. doi: 10.31471/2415-3184-2018-2(18)-106-116.

«Бурштинове питання» в Україні: превенція та наслідки

Інна Володимирівна Лебідь, Олексій Юрійович Піддубний

Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

У статті проведено аналіз сьогоденного процесу видобутку бурштину та оцінено правові наслідки нелегальної діяльності в бурштиновидобувній галузі. Актуальність роботи зумовлено погіршенням соціально-економічного аспекту життя громадян України у зв'язку з несанкціонованим видобуванням сировини. Наявний факт зумовлює мету дослідження, а саме: аналіз правових превентивних заходів та системи норм відповідальності, зокрема за недержавний видобуток скам'янілої смоли. У дослідженні використано такі методи пошуку, обробки та викладення інформації: загальнонаукові (формально-логічний, методи аналізу та синтезу, конкретизації та абстрагування, а також методи індукції та дедукції) і спеціально-юридичні методи (формально-юридичний, порівняльно-правовий та метод тлумачення правових норм). У роботі висвітлені основні прогалини у регламенті видобутку бурштину та деліктних зобов'язаннях. За результатами роботи встановлено основний напрям для змін: посилення відповідальності за нелегальний видобуток бурштину, зокрема введення державної монополії на його видобування, припинення недержавного видобутку цінної смоли. У висновках статті наголошено, що досліджуване питання потребує також вивчення природничих аспектів геології, геоморфології, палеогеографії і біології та загалом екології місць розробки бурштину, тому лише комплексне вирішення питань легалізації видобутку бурштину на державному рівні дасть змогу привести галузь до міжнародних стандартів видобування корисних копалин. Результати дослідження можуть стати в пригоді науковцям у сфері права, геології, екології, біології. Адже необхідні зміни у процесі легалізації видобутку бурштину стосуються не лише правових аспектів. Наприклад, один із заходів, спрямований на позитивний результат, – реалізація рекультиваційних процесів на територіях видобутку бурштину.

Ключові слова: бурштин, геологія, кримінальна відповідальність, контрабанда, економічне право



UDC 349.6

DOI: 10.31548/law2022.03.005

The Concept and Essence of Judicial Protection of Environmental Human Rights

Anton S. Mykytyuk*

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Article's History:

Received: 28.04.2022

Revised: 10.07.2022

Accepted: 11.08.2022

Abstract

The study is devoted to the examination of the essence of judicial protection of environmental human rights and the definition of the concept of "judicial protection of human rights". The relevance of the study is due to the importance of the subject of judicial protection of environmental rights in war conditions. In the context of the implementation of the purpose of the study, the issues of judicial protection of environmental human rights in general and in war conditions, the study of legal doctrine and legislation in the relevant field, considering the judicial practice of resolving relevant disputes, are identified. During the study of the issue of judicial protection of environmental human rights, a comparative legal method was used, which helped to analyse and compare scientific views, theories, and approaches and consider problematic issues for their further solution. Due to the generalisation method, forecasting or proposing statements for improving the legal regulation of the protection of environmental human rights is applied, and due to the analysis method, the features of the principles of legal regulation of the protection of environmental rights are determined. In addition, the study is accompanied by quoting normative regulations, in particular, international treaties, which regulate all events that are currently taking place between Ukraine, the Russian Federation, and Belarus, but notes the non-fulfilment of such international treaties by Belarus and the Russian Federation. The study analyses the opinions of researchers in the field of environmental rights protection, which generally characterise the judicial practice of considering environmental disputes and emphasises the need to increase public activity in the protection of violated environmental rights. The study considers the practice of judicial protection of environmental human rights and describes the problems that exist in the context of the protection of environmental human rights. The specific features of judicial protection of environmental human rights are identified and the main examples of substantial violations of environmental human rights during the war with the Russian Federation are indicated, it is indicated what actions of the Russian Federation and Belarus caused damage to Ukraine in the field of environmental safety, with direct indication of specific objects that were hit by military equipment, as a result of which there is still a risk of environmental disasters not only in Ukraine but also in neighbouring countries. The proposals for improving the judicial protection of environmental rights outlined in this study are unique and effective for compiling scientific texts and conducting classes in the relevant field of law

Keywords: judicial practice, legal regime of martial law, environmental disputes, environmental disaster, legal proceedings in the field of environmental law

Suggested Citation:

Mykytyuk, A.S. (2022). The concept and essence of judicial protection of environmental human rights. *Law. Human. Environment*, 13(3), 44-49.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

The issue of judicial protection of environmental human rights is important because it is the result of the greatest value – human life according to the Constitution of Ukraine. Judicial protection of environmental human rights allows a person to apply for protection of a violated right and protect it.

Researchers V. Ladychenko, A. Melnychuk, L. Golovko, A. Burmak devoted considerable attention to the study of the issue of protecting environmental human rights because in a joint scientific work on the subject “Waste management at the local level in the EU and Ukraine” they raised an issue that is one of the most important in the field of environmental safety [1]. In addition, M.V. Krasnova and Yu.A. Krasnova also considered the above, because in their study titled “Realisation and protection of ecological rights of citizens: Theoretical and legal aspects” they investigated all components of Environmental Rights Protection, cited existing problems and suggested ways to eliminate them and further prevent them [2].

Also researchers V.V. Ladychenko and L.O. Golovko in their scientific work “Organisational and legal principles of environmental management” identified the issues of judicial protection of environmental human rights, in particular [3]. In the paper on the subject “Legal regulation of waste management in Ukraine on the way to European integration”, researchers S. Kidalov, V. Vitiv, L. Golovko, V. Ladychenko analysed the legal regulation of the implementation of environmental rights of citizens through the prism of international regulatory regulations, investigated the compliance of national environmental norms with international standards [4].

The issue of judicial protection of environmental human rights, in particular, during the war, is extremely important, because it implies a direct need for victims to apply to international courts for the protection of their rights.

Human life, which is the highest value, constantly needs proper environmental conditions, which must always be observed to ensure the normal existence of people in the world. Environmental rights are often violated and constantly need to be protected. The obligations of states, regarding access to justice in environmental matters, are defined by the UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (hereinafter referred to as the Convention) [5].

According to the provisions of the Convention, the right to access environmental information, take part in the process of making environmentally important decisions, and challenge violations of such rights are guaranteed. States are required to ensure that the public has access to procedures to appeal against actions that violate the requirements of national environmental legislation.

The practice of applying the convention by Ukrainian courts, given the twenty-year period from

the moment of its ratification in Ukraine, is low. In the Unified State Register of court decisions, there is almost no information about quoting the convention in court decisions, which indicates a low level of use of environmental legislation in Ukraine.

Notably, court decisions issued by Ukrainian courts sometimes trace attempts to apply Convention provisions on the rights of the public to appeal to the courts of decisions, actions, or inactions that were accordingly committed in violation of environmental legislation, given that the appealed decisions do not concern the rights and interests of plaintiffs.

In general, the protection of environmental rights, together with ensuring environmental stability on the territory of Ukraine, is the responsibility of the state, so the subject under study is relevant. According to Art. 50 of the Constitution of Ukraine, public authorities and their officials must ensure that citizens exercise the right to a safe environment for life and health [6].

In addition, Art. 11 of the Law of Ukraine “On Environmental Protection”, the rights of citizens in the field of Environmental Protection, which were accordingly violated, should be restored and protected in court [7].

The purpose of the study is to examine the issue of judicial protection of environmental human rights in general and in war conditions, in particular, a study of legal doctrine and legislation in the relevant field, considering the judicial practice of resolving relevant disputes.

1. Theoretical and Regulatory Features of Judicial Protection of Environmental Rights

The researcher S.V. Storozhenko emphasises the importance of ensuring the strict implementation of environmental human rights by the state, the introduction of an effective system for their protection, the legislative consolidation of responsibility for violation of such rights and the algorithm for restoring violated environmental rights. The protection of environmental human rights, according to the researcher, is a system of legal means to ensure the exercise of environmental rights by a person in the relevant field [8, p. 12].

The field of environmental safety and environmental protection as a function of the state is of particular importance because the implementation of the relevant state task is aimed at preserving human life, the gene pool of Ukraine, so it is to ensure the rights of citizens.

According to V.M. Lagovsky, in the protection of environmental human rights, it is the court that plays an outstanding role, because the issue of violation of environmental law can be fully investigated during the work of judicial bodies involved in the relevant legal mechanism [9, p. 27-28].

There is no specialised court for consideration of cases in the field of environmental law, so the consideration of relevant cases is conducted in administrative proceedings since more often the other party is a state body and in civil, economic, and criminal proceedings.

Thus, courts of general jurisdiction consider cases in the field of environmental law, although they do not meet the needs of society, despite the comments of Ukrainians on judicial forums. For the protection of their environmental rights, there is an opportunity and the right to apply to international courts, because according to Art. 9 of the Convention, citizens have the right to apply to the court to appeal against the actions or inactions of authorised bodies or persons, in case of violation of the legislation on the natural environment.

The corresponding right of citizens to apply to international courts for the protection of their environmental rights is confirmed by the Law of Ukraine "On Ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" [10].

After analysing the practice of cases against Ukraine and not only, most often people apply to the ECHR for the protection of environmental rights. In particular, the Convention for the Protection of Human Rights and Fundamental Freedoms provides for the possibility for the International Court to accept complaints from individuals, groups of individuals, or organisations, if the latter consider themselves to be those whose right has been violated [11].

2. Features of Judicial Practice

Paying attention to the well-known cases of the ECHR against Ukraine for the protection of environmental rights, it is necessary to consider the decision in the case "Dubetska and others v. Ukraine", where an initiative group of people appealed to the court for violation of their environmental rights, namely, for detecting water pollution along with subsidence of soils, flooding of the territorial community in which they live, etc. The issue was the impossibility of resolving the dispute between the administration and the residents of the territorial community, no balance was found in the interests of these parties, so the International Court decided that state bodies, during their industrial policy, should establish a fair balance between interested persons whose rights were substantially violated and society in general. The court's decision indicates the well-being of the population of the whole of Ukraine, in particular, in the context of resolving a dispute over industrial pollution, which has a negative impact on people's health, which allows using the appropriate decision when considering the future similar cases [12].

Therewith, it is necessary to emphasise that this does not mean English case law, which does not apply on the territory of Ukraine, this refers to familiarising with such cases before making decisions by national courts in Ukraine.

Some researchers consider the most important issue in the context of violating the environmental rights of citizens – waste management. This refers to the deterioration of the environmental situation due to the lack of organised monitoring, prevention of environmental

hazards caused by the management of household waste, etc. Unfortunately, the attention paid by researchers to the legal doctrine in general does not affect the reform of the state monitoring system or environmental safety in waste management, and the national judicial system has had almost no practice over the past few years regarding the successful consideration of cases on the issue of illegal waste management [13].

Researcher Yu.A. Krasnova believes that the national judicial system should be changed to ensure rapid and effective consideration of environmental disputes because now the ineffective practice of environmental protection requires a change in the judicial protection of environmental human and civil rights. The researcher suggests summarising judicial practice on the consideration of environmental disputes and conducting information work to increase public activity on the protection of violated environmental rights. The researcher pays special attention to the problem of mandatory examinations to confirm the connection, which this study agrees with [14, p. 56].

Today in Ukraine, there is a problem with the practice of non-compliance by public authorities and courts (judges) with environmental legislation.

It is worth giving an example of the violation of the environmental rights of citizens due to the lack of organisation of regulation of the issue of waste in Ukraine because this problem existed before the war and also exists during the war. Spontaneous landfills and violations of the rules for recycling garbage pose a risk to the environment and human life. According to V. Ladychenko, in the field of household waste management, the main goal should be to prevent the formation of waste at the production stage and to ensure the maximum involvement of waste in civil circulation as secondary raw materials to minimise their disposal. The main task is to introduce an efficient system of separate waste collection, which allows attracting a substantial amount of resources to economic turnover with maximum economic effect [15, p. 329-338].

The above is the basis for citizens' appeals to international courts, and in case of preventing the above-mentioned problems, courts and state bodies should understand their duty to ensure the implementation of environmental rights of citizens and do everything possible to ensure the implementation of the relevant duty.

In addition to the typical characteristics of judicial protection of environmental human rights, today Ukraine is under the legal regime of martial law, and the environmental safety of citizens is violated and cannot yet be restored.

In connection with the military aggression of the Russian Federation against Ukraine, martial law has been imposed in Ukraine since 05:30 on February 24, 2022, which makes it necessary to take appropriate measures regarding the organisational and legal features of the state's life.

During the legal regime of martial law, the rights of legal entities and individuals may be violated. Considering the number of attacks on the territory of Ukraine by the Russian Federation and Belarus, and the number of hits in bases for processing petroleum products, institutions engaged in servicing or processing chemical products, and considering the conduct of military operations in the Chornobyl disaster zone, an important question arises regarding the violation of environmental rights of citizens, which can now be neither protected nor restored.

The actions of the aggressor during the war are a direct threat not only to the environmental security of Ukraine and its citizens but also to the environmental safety of the whole world. This study notes the urgent need to develop a mechanism for protecting the environmental rights of citizens in such cases and create an algorithm to prevent their violation.

It is proposed to consider examples of violations of the environmental rights of citizens during the war, in particular:

- February 24-25, 2022 capture of the Chornobyl zone, as a result of which the radiation background was exceeded by 7.6 times;
- February 26, 2022, the shelling of the Dergachevskiy District of the Kharkiv region caused damage to the transformer, which led to the risk of leakage of radioactive waste and failure of the radiation monitoring system;
- March 6 – rocket artillery attack on the Kharkiv Institute of Physics and Technology – location of a nuclear reactor with 37 nuclear fuel assemblies;
- March 10 – seizure of Zaporizhia NPP, mining of the Kakhovskiy reservoir (coast) on the border with the station [16]. Zaporizhia NPP is still captured and mined.

Regarding the damage caused by Russian troops in the Chornobyl zone and the shelling of other energy facilities in Ukraine, it is necessary to emphasise that the corresponding results of the actions of the Russian military carry the risk of energy danger. Researchers in the field of environmental safety, having analysed the consequences of improper handling of energy facilities and their impact on the environmental rights of citizens, concluded that it is the energy danger that can substantially affect the environment, with which this study fully agrees [16].

Despite the war, Ukraine must ensure that Ukrainian legislation, in particular, in the field of environmental law, is brought to international requirements and European standards, as researchers emphasise in their works [17; 18].

An important issue in terms of the environmental rights of citizens is access to information about the environmental situation because it is this right that is violated in the absence of factual data on environmental safety or the impact of events that occur on the territory of Ukraine or another foreign country on human environmental law, researchers note in their works [19, p. 68-73; 20, p. 172-176].

In case of failure to provide access to environmental information or violation of the above-mentioned right of access, violators may be subject to liability, in particular, disciplinary or administrative. Notably, during the COVID-19 pandemic or the armed aggression of the Russian Federation against Ukraine, there is often a violation of the right of access to environmental information, because there is no information, in particular, the consequences of the presence of Russian troops on the territory of the Chornobyl nuclear power plant or Zaporizhia NPP, etc. [23, p.72-75; 24].

In addition, in the context of judicial protection of citizens' environmental rights, the availability of information as a citizens' right should be ensured by law, implemented in practice and protected in court to bring the protection of citizens' environmental rights to international, in particular, European, standards.

Conclusions

Today, in the conditions of the legal regime of martial law, the issue of judicial protection of environmental human rights is relevant, important, and requires attention from international courts.

In addition, today in Ukraine there is a problem regarding the guarantee of citizens' rights to a safe environment, and the problem of non-compliance by officials of public authorities and courts (judges) with environmental legislation.

The relevant military actions are a direct threat not only to the environmental security of Ukraine and its citizens but also to the environmental security of the whole world, and therefore there is an urgent need to develop a mechanism for protecting the environmental rights of citizens in such cases and create an algorithm to prevent their violation.

Ukraine should strive to improve and improve the regulatory support and implementation of environmental rights of citizens, to European integration in the field of environmental legislation, and the availability of information as a right of citizens should be ensured by law, implemented in practice and protected in court.

Only an effective information policy regarding the ability of individuals to protect their environmental rights and protect the right of citizens to information at the international level by applying to international courts is mandatory, and can become the only way to prevent critical consequences of violations of environmental safety within the country and abroad; the public should apply to international courts to protect their own environmental rights.

The issue of protecting environmental rights in court is relevant and remains insufficiently investigated from the review of the fleeting process of the relevant field, the need for constant monitoring of appeals of individuals for the protection of their environmental rights, monitoring the practice of the ECHR, etc.

References

- [1] Ladychenko, V., Melnychuk, O., Golovko, L., & Burmak, O. (2020). Waste management at the local level in the EU and Ukraine. *European Journal of Sustainable Development*, 9(1), 329-338.
- [2] Krasnova, M.V., & Krasnova, Yu.A. (2021). *Realization and protection of ecological rights of citizens: Theoretical and legal aspects*. Kyiv: Private individual Yamchynsky O.V.
- [3] Ladychenko, V.V., Golovko, L.O., Shulga, E.V., & Feshchenko, I.S. (2013). *Organizational and legal principles of environmental management*. Kyiv: Comprint.
- [4] Kidalov, S., Vitiv, V., Golovko, L., & Ladychenko, V. (2020). Legal regulation of waste management in Ukraine on the way to European integration. *European Journal of Sustainable Development*, 9(2), 422-430.
- [5] Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention). (1998, June). Retrieved from http://zakon.rada.gov.ua/laws/show/994_015.
- [6] Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.
- [7] Law of Ukraine No. 1264-XII "On Environmental Protection". (1991, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1264-12#Text>.
- [8] Storozhenko, S.V. (2011). *Administrative and legal support of environmental rights of citizens* (PhD thesis, National Academy of Internal Affairs, Kyiv, Ukraine).
- [9] Lagovsky, V.M. (2015). Characteristics of the mechanism of the state and the place of the judiciary in it. *Prykarpattia Legal Bulletin*, 2, 26-28.
- [10] Law of Ukraine No. 832-XIV "On Ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" (1999, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/832-14>.
- [11] Convention for the protection of human rights and fundamental freedoms. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.
- [12] Judgment of the European Court of Human Rights in the Case of Dubetska and others v. Ukraine (application No. 30499/03). (2011, February). Retrieved from https://zakon.rada.gov.ua/laws/show/974_689#Text.
- [13] Yara, O., Uliutina, O., Golovko, L., & Andrushchenko, L. (2018). The EU Water Framework Directive: Challenges and Prospects for Implementation in Ukraine. *European Journal of Sustainable development*, 7(2), 175-182.
- [14] Krasnova, Yu. (2019). Problems of ensuring the right to environmental safety in the national courts of Ukraine and ways to solve them. In *International judicial forum "Judicial protection of the natural environment and environmental rights": Collection of materials* (pp. 55-61). Kyiv: Administrative Cassation Court within the Supreme Court.
- [15] Ladychenko, V., Melnychuk, O., Golovko, L., & Burmak, O. (2020). Waste management at the local level in the EU and Ukraine. *European Journal of Sustainable Development*, 9(1), 329-338.
- [16] Ministry of Environmental Protection and Natural Resources of Ukraine. (2022). *Information on the environmental consequences of Russian aggression in Ukraine from February 24 to March 14, 2022*. Retrieved from <https://mepr.gov.ua/news/39034.html>.
- [17] Shulga, I., Kurylo, V., Gyrenko, I., & Savych, S. (2019). Legal regulation of energy safety in Ukraine and the European Union: Problems and perspective. *European Journal of Sustainable Development*, 8(3), 439-447.
- [18] Golovko, L., Yara, O., Kutsevych, M., & Hubanova, T. (2019). Environmental policy integration in Ukraine and the EU. *European Journal of Sustainable Development*, 8(3), 221-227.
- [19] Gulac, O., Dubchak, L., Iarmolenko, I., & Yanchuk, J. (2019). Cooperation of Ukraine and the European Union in the ecological sector: Directions and prospects. *European Journal of Sustainable Development*, 8(1), 22-30.
- [20] Demchuk, T.I. (2020). Access to environmental information in the context of a coronavirus pandemic. In *The system of branches of law in the context of global environmental challenges: Materials of the All-Ukrainian scientific-practical conference* (pp. 68-73). Kyiv: V.M. Koretsky Institute of State and Law of National Academy of Sciences of Ukraine.
- [21] Demchuk, T.I. (2021). Stages of transformation of the concept of "environmental information" at the international level. In *Ecological legislation of Ukraine through the prism of its historical development: materials of the All-Ukrainian scientific-practical conference* (pp. 172-176). Kyiv: V.M. Koretsky Institute of State and Law of National Academy of Sciences of Ukraine.
- [22] Demchuk, T.I. (2019). Administrative liability for refusal or untimely provision of environmental information. *Environmental Law of Ukraine*, 3, 22-25.
- [23] Demchuk, T.I. (2020). Disciplinary liability for violation of the right of access to environmental information. In *Legal system of Ukraine: Current status and current issues: Materials of the International scientific-practical conference* (pp. 72-75). Ivano-Frankivsk.
- [24] Legeza, Y. (2019). Providing access to environmental information. In *International judicial forum "Judicial protection of the natural environment and environmental rights": Collection of materials* (pp. 67-71). Kyiv: Administrative Cassation Court within the Supreme Court.

Поняття та сутність судового захисту екологічних прав людини

Антон Сергійович Микитюк

Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

Наукова стаття присвячена дослідженню сутності судового захисту екологічних прав людини та визначенню поняття «судовий захист прав людини». Актуальність статті зумовлено важливістю теми судового захисту екологічних прав в умовах війни. У контексті реалізації мети наукової статті розкрито питання судового захисту екологічних прав людини загалом та в умовах війни, дослідження правової доктрини та законодавства у відповідній сфері з урахуванням судової практики вирішення відповідних спорів. Під час дослідження питання судового захисту екологічних прав людини використано порівняльно-правовий метод, що допоміг проаналізувати та порівняти наукові погляди, теорії, підходи та розглянути проблемні питання задля подальшого їх вирішення. Завдяки методу узагальнення застосовано прогнозування чи пропонування тверджень щодо вдосконалення правового регулювання захисту екологічних прав людини, а завдяки методу аналізу визначено ознаки принципів правового регулювання захисту екологічних прав. Крім того, наукова стаття супроводжується цитуванням нормативно-правових актів, зокрема міжнародних договорів, якими врегульовано всі події, що наразі відбуваються між Україною, рф та білоруссю, однак наголошується на невиконанні таких міжнародних договорів з боку білорусі і рф. У статті здійснено аналіз думок науковців у сфері захисту екологічних прав, які загалом характеризують судову практику з розгляду екологічних спорів, наголошують на необхідності підвищення активності громадськості до питань захисту порушених екологічних прав. Розглянуто практику судового захисту екологічних прав людини та зазначено характеристики проблем, які існують у контексті захисту екологічних прав людини. Визначено особливості судового захисту екологічних прав людини та зазначено основні приклади значного порушення екологічних прав людини під час війни з рф, зазначено якими саме діями рф та білорусі Україні нанесено шкоди у сфері екологічної безпеки, з безпосереднім зазначенням конкретних об'єктів, яким було нанесено удар військовою технікою, у результаті чого й зараз існує ризик екологічних катастроф не лише в Україні, а й у сусідніх країнах. Пропозиції до удосконалення судового захисту екологічних прав, викладені у цій статті, є унікальними та ефективними для складання наукових текстів та проведення занять у відповідній галузі права

Ключові слова: судова практика, правовий режим воєнного стану, екологічні спори, екологічна катастрофа, судочинство у сфері екологічного права



UDC 349.2

DOI: 10.31548/law2022.03.006

Organisation of Labour Protection in Farms: Certain Aspects of Legal Regulation

Tamara S. Novak*

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Article's History:

Abstract

Received: 11.05.2022

Revised: 12.07.2022

Accepted: 11.08.2022

The study is devoted to the investigation of the state of legal regulation of the organisation of labour protection in farms of Ukraine. The relevance of the work is due to the need to increase the level of protection of persons engaged in the activities of farms from the influence of harmful and dangerous industrial factors, to reduce the level of industrial injuries in this area. The purpose of the study is to examine the achievements of legal science and analyse the current state of regulatory regulation of relations in the field of labour protection organisation in farms to identify key problematic issues and develop proposals for their solution. The following methods of scientific knowledge are used to achieve this goal: dialectical, analysis, formal legal, and comparative legal methods. As a result of the study, it was concluded that the organisation of labour protection in farms is unsatisfactory. A number of changes are proposed to the legislation regarding the method of organising labour protection on small farms and those where hired labour is not used to improve the situation, in particular, regarding the possibility of assigning the duties of the labour protection service to a member (members) of a farm. The procedure for granting such powers is defined. The necessity to expand the range of issues that are included in the training programmes on labour protection for managers of enterprises, in particular, heads of farms, is justified. Namely, to introduce a mandatory investigation of: systems and standards of health management and ensuring the safety of employees; features of introducing a risk-oriented approach to the organisation of labour protection. Proposals for the implementation of information and advisory projects (using internet technologies) for labour protection specialists are formulated. Further work in the field of reforming the legislation on the organisation of labour protection in farms (both in theoretical and practical terms) should be focused on the preparation of normative acts that would define a clear simple algorithm of actions for the heads of farms to ensure law enforcement work, considering the specific features of this form of business activity of citizens. The conclusions obtained in the study will be useful for lawmakers when developing regulations on labour protection in agriculture, and for researchers when investigating the problems of labour protection relations in this area

Keywords: agriculture, labour safety, farm member, employee, labour protection service, industrial injuries

Suggested Citation:

Novak, T.S. (2022). Organisation of labour protection in farms: Certain aspects of legal regulation. *Law. Human. Environment*, 13(3), 50-58.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

Ukraine is traditionally recognised as a state where the agricultural sector is one of the leading in the economy. This industry is providing the population with food, the industry with raw materials, and plays an extremely important role in society. Being one of the largest industries, agriculture provides employment for a substantial number of people, primarily the rural population, which has an absolutely positive social significance.

Therewith, agriculture is one of the most dangerous industries, where work imposes substantial risks to the life and health of the employee.

Despite the national policy aimed at reducing the level of occupational injuries and improving the level of labour protection both in Ukraine in general and in the context of individual sectors of the economy, statistics show a disappointing picture. Figure 1 illustrates the dynamics of occupational injuries for the period 2018-2021.

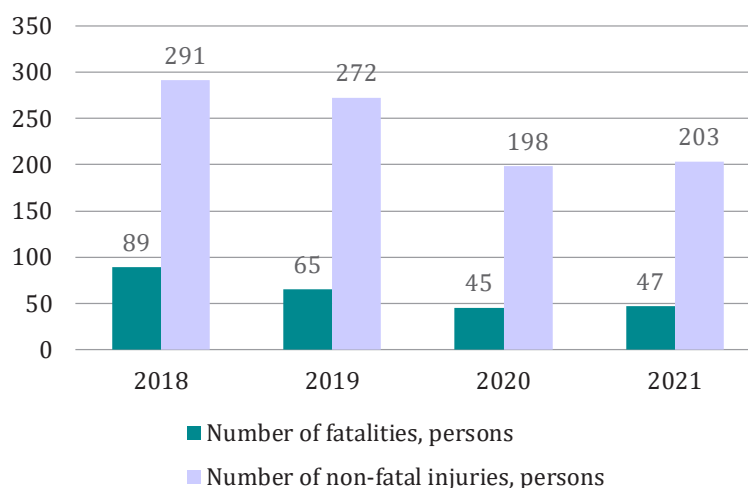


Figure 1. Industrial injuries in agriculture, fishery, and forestry of Ukraine

Source: the histogram is based on the latest published official data of the State Statistics Service of Ukraine, which allow tracing this indicator collectively in agriculture, forestry, and fishery [1]

According to the State Labor Service of Ukraine [2], agriculture ranks third among the types of economic

activity in terms of the number of deaths due to accidents as of 06/28/2022 (Fig. 2).

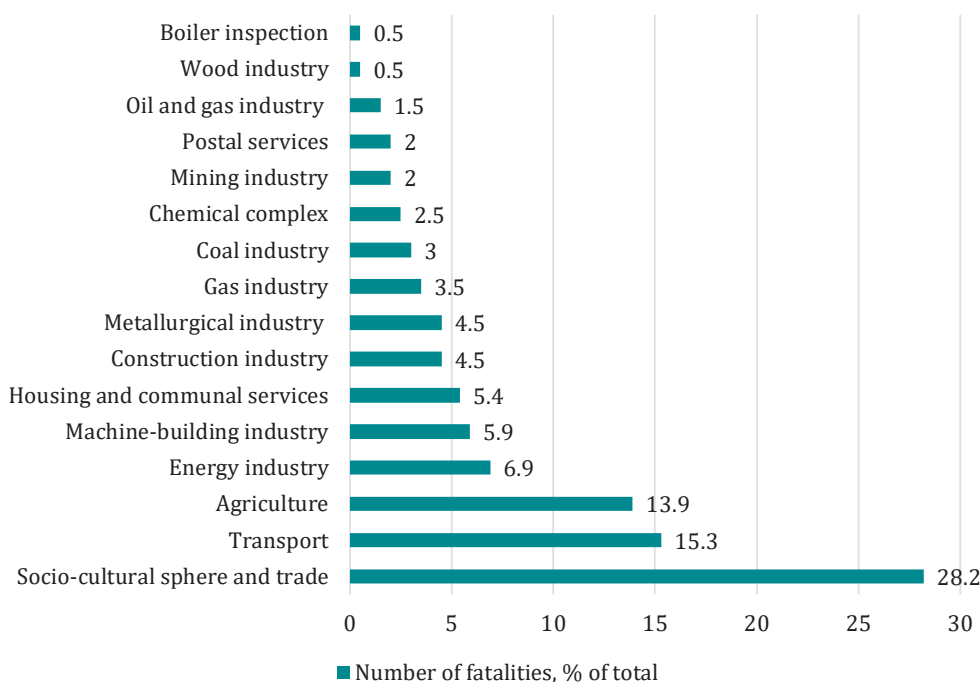


Figure 2. Number of victims of fatal accidents related to production, by type of activity

Source: [2]

There are a number of reasons for this state of affairs. First of all, these are objective reasons that follow from the specific features of technological processes: a high degree of chemicalisation of agricultural production, the use of technologically complex equipment and devices, direct contact with animals and plants, work in adverse weather conditions, in closed ground conditions, the presence of peak periods (sowing, harvesting, etc.). Due to the inability to completely eliminate these causes, persons engaged in agriculture may be exposed to the full range of harmful and dangerous production factors: physical (noise, temperature, humidity, electromagnetic fields, vibration, dust, and aerosols, working equipment elements, etc.); chemical (pesticides, agrochemicals, etc.); biological (viruses, bacteria); psychophysiological (contact with animals, overexertion, etc.). However, there are also subjective reasons, primarily organisational ones. As practice

shows, they dominate among the causes of occupational injuries. According to the generalisations of the State Labor Service of Ukraine, in 2021, among all causes of fatal accidents, organisational accounted for 73.6%, technical – 13.2%, psychophysiological, technogenic, natural, environmental, and social – 13.2% [3]. As inherent in all branches of economic activity, for agriculture, the organisational causes of production-related accidents are combined (and amplified) by the specific features of the organisation of business entities and the regulation of labour protection relations in them. This refers to agricultural cooperatives and farms that use the labour of their members.

Given the limited amount of work, the study emphasises the problems of legal support for the organisation of labour protection in farms. According to the latest officially published data [4], they now prevail in structure of the agricultural enterprises (Fig. 3).

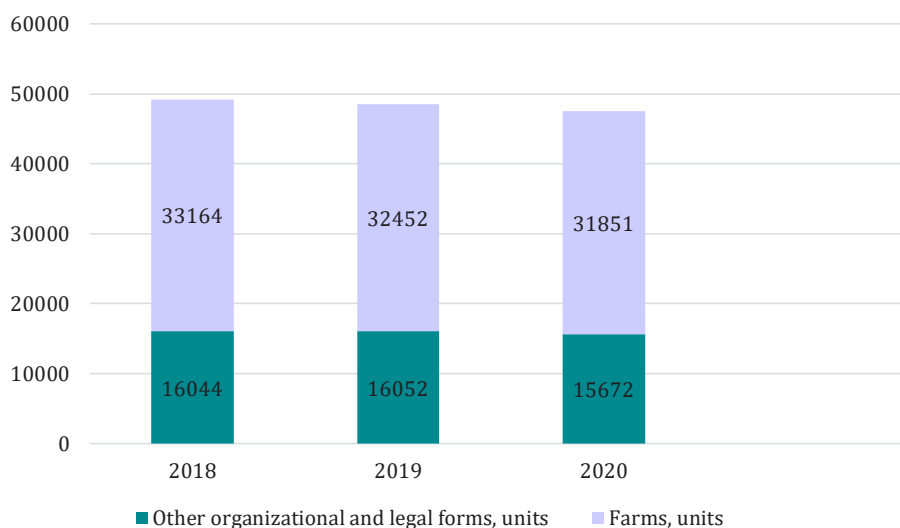


Figure 3. Number of agricultural enterprises in Ukraine

Source: [4]

Considering the importance of labour protection for preserving human life and health in the course of work, the issue of its organisation is constantly in the field of view of researchers – specialists in various fields. Recently, more and more attention has been paid to determining the impact of the level of labour protection on the effectiveness of investments in the organisation of work of enterprises [5], analysing the relationship between labour protection and financial results of socially responsible companies [6], evaluation of the enterprise labour protection management system efficiency [7], and the impact of the competence of labour protection specialists on the occupational risk management state [8]. Researchers are also interested in questions about new (for Ukraine) aspects of labour protection activities. For example, a risk-oriented approach to the organisation of labour protection [9], etc. As for research on the legal aspects of the organisation

of labour protection in such a narrow area as farms, so far there are no up-to-date findings. This issue was indirectly addressed in the works of V.Yu. Urkevich [10], O.A. Miroshnychenko [11], K.E. Danshina [12], and others. The author of this study also considered the problems of labour protection in agriculture [13]. However, these findings have largely lost their relevance due to changes in the legal field. Therefore, it is safe to say that today there is no separate study of the problems of organising labour protection in farms under the legislation of Ukraine and the development of proposals for their solution. Filling in this gap is the purpose of the study.

Materials and Methods

The methodological basis of the research were such methods of scientific knowledge as: dialectical; analysis; formal-legal and comparative-legal methods. The dialectical method was used as the basis for clarifying the

state of ensuring labour protection in agriculture. The use of the analysis method allowed examining the positions of researchers regarding the legal nature of relations on the use of labour of persons in farms, including relations on labour protection. The analysis method was also used to identify legal conflicts and gaps in the legislation regulating the methods of creating a labour protection service depending on the number of employees on the enterprise. The comparative-legal method was used to develop proposals for considering the positive international experience of legal regulation of relations on the organisation of labour protection in small enterprises (including farms). Clarification of the content of legal provisions regulating relations in the field of labour protection in farms and development of the author's proposals for improving their legal support was conducted through the use of the formal-legal method.

The study has as a regulatory basis on the current legal regulations of Ukraine and acts of international legislation. First, these are the basic normative acts of labour legislation and legislation on labour protection: the Labour Code of Ukraine [14] and the Law of Ukraine "On Labor Protection" [15]. The Law of Ukraine "On Farming" [16] as a normative basis for determining the principles of formation and implementation of activities of farms as a form of activity of citizens for the purpose of making a profit in the field of agriculture – in terms of regulating labour relations (including relations on labour protection) in such business entities. The bylaw level of legal regulation of labour protection organisation was analysed to identify problems and determine prospects for improving the mechanism of labour protection organisation in farms – the content of the Standard Regulation on the Labor Protection Service [17] and the Standard Regulation on the Procedure for Conducting Training and Testing Knowledge on Occupational Health and Safety Issues [18]. Considering the European integration course of Ukraine and the important role of international standards in the field of labour protection, the study processed the provisions of such international regulatory documents as Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [19] and ISO 45001:2018 "Occupational Health and Safety Management Systems – Requirements with Guidance for Use" [20]. The study also considered the provisions of programme documents – the Concept of Reforming the Labor Protection Management System in Ukraine [21] and the EU Strategic Framework on Health and Safety at Work 2021-2027 [22].

The generalisation of the level of industrial injuries in agriculture, distribution of the number of victims of fatal accidents related to production, by type of activity and by the number of farms in the structure of agricultural enterprises is based on the official data of the State Statistics Service of Ukraine [1; 4] and the State Labor Service of Ukraine [2; 3].

Results and Discussion

Farming, being a form of entrepreneurial activity of citizens, is specific from the standpoint of relations on the use of the labour of persons, since it provides for both the labour involvement of its members in the activities of the economy and the labour activity of employees. The problem of labour relations in farms has repeatedly become the subject of study [23-25], and for now, it is not necessary to dwell on this aspect. The only thing that is notable is that today the regulation of labour relations in farms for members of such entities is conducted based on the norms of the Law of Ukraine "On Farming" [16] and acts of local rulemaking (charters and agreements (declarations) on the creation of family farms). Therewith, the degree of detail of regulation is very low, which does not contribute to the proper level of guaranteeing the rights of farm members in the use of their labour. In contrast, labour relations between a farm and employees are regulated by labour legislation.

As for relations in the field of labour protection, according to part 3 of Art. 3 of the Labour Code of Ukraine [14], they are regulated both for members of farms and employees in compliance with the guarantees established by labour legislation.

According to Art. 153 of the Labour Code of Ukraine [14] and Art. 13 of the Law of Ukraine "On Labor Protection" [15], the employer is obliged to guarantee safe and harmless working conditions/organisation of labour protection. The Law of Ukraine "On Farming" [16] in part 5 of Art. 27, imposes this duty on the head of the farm. Its practical implementation occurs, first of all, through the creation of a labour protection service at the enterprise. According to Art. 15 of the Law of Ukraine "On Labor Protection" [15] and the Standard Regulation on the Labor Protection Service [17], the labour protection service as a separate structural division is created at enterprises with a number of employees fifty or more people. This provision can be implemented without complications in farms with such a substantial number of employees for this organisational and legal form. Moreover, with a high (full) probability, it can be assumed that employees are necessarily present in such farms since it is very difficult to provide over 50 members of a farm exclusively with relatives/members of the same family.

If the number of employees at the enterprise is less than fifty people, it is allowed to assign the functions of the labour protection service to persons with appropriate training, having registered such relations as part-time work. In designing this regulatory requirement for farms, certain difficulties are present due to the possibility of two scenarios.

The first option. If a farm uses hired labour, then the issue is solved simply: a person/persons from among employees are determined, they receive appropriate training on labour protection issues, and a part-time employment contract is concluded with them. Since neither the Law of Ukraine "On Labor Protection" [15] nor the

Standard Regulation on the Labor Protection Service [17] contain clarification regarding the type of part-time work (external or internal), it is allowed to assign the duties of the labour protection service to persons who are external part-timers in farms.

The second option. The farm has less than fifty employees and does not use the labour of employees, limiting itself to the labour involvement of its members. Then it is impossible to implement the considered option of organising labour protection based on the following. Part-time work, according to the theory of labour law, is the performance by an employee under the terms of an employment contract, in addition to the main job, of other regular, paid work. This work is performed in the free time from the main work. In other words, part-time work is possible only within the framework of an employment relationship and is excluded in a membership relationship. As L.Yu. Velychko rightly proves, persons who are relatives or family members of the head of a farm can be employees of such a farm, but simultaneously should not be its members [26, p. 117]. In turn, erroneous is the statement of V.V. Yeryomenko about the possibility of labour relations with members of the farm through the legal composition (the act of joining the farm as a member and concluding an employment contract with such a person) [24, p. 48-49].

Considering all the above, it is impossible to assign the duties of the labour protection service to a member/members of a farm on a part-time basis. However, remains the option of applying for a job as an external part-time specialist. Then it is necessary to consider restrictions on the use of the labour of employees in family farms: according to part 5 of Art. 1 of the Law of Ukraine "On Farming" [16], under an employment contract, only seasonal workers can work in a family farm, and individuals can be involved in performing certain works that require special knowledge/skills and are directly related to the activities of a family farm. On the one hand, work in the field of labour protection falls under these criteria, which allows hiring a specialist under an employment contract to perform them. However, on the other hand, the presence of at least one employee excludes a family farm from the circle of subjects entitled to additional financial support under Art. 13-1 of the Law of Ukraine "On State Support of Agriculture of Ukraine" [27].

Finally, if an enterprise (in this case, a farm) has less than twenty people, it is allowed to involve third-party specialists with appropriate training in performing the functions of the labour protection service through the conclusion of a contract with them. The legal nature of such a contract is not specified, but based on the fact that the regulation of labour relations is mediated either through an employment contract or through a civil contract, part 3 of Art. 15 of the Law of Ukraine "On Labour Protection" [15] and paragraph 1.4 of the Standard Regulation on the Labor Protection Service [17] refers specifically to a civil contract for the

provision of services. Then the question arises: Can a person with whom such a contract has been concluded fully perform the functions of the labour protection service? It is advisable to turn to the distinction between labour and civil law relations to answer this question. Notably, the discussions on this issue were completed by the Supreme Court of Ukraine, which in its decision in case No. 640/1099/19 of 14.05.2020 [28] clearly defined their features. For an employment contract: legal independence of labour, execution of instructions and orders of the employer in the course of work, the guarantee of remuneration, determination of labour function, perpetuity (as a rule), defined rules and conditions of material and disciplinary responsibility, provision of social guarantees. For a civil contract: focus on a certain result, non-interference of the customer in the process of performing work/providing services, urgency, and freedom of the parties in resolving issues of payment of remuneration for work. Hence, under a civil contract, it is permissible to perform non-systematic, periodic tasks related to labour protection on a farm. This may include consultations, explanations on the organisation of labour protection, assistance in preparing draft documentation on labour protection, local regulations in this area, assistance in formulating reports on labour protection, conducting information and educational activities with employees, etc. Therewith, systematic, constant work on labour protection, which should be conducted on a farm, meeting all the signs of labour relations, cannot be conducted under a civil contract, because then there will already be a concealment of labour relations with corresponding negative legal consequences in the form of legal liability. Thus, according to the current legislation, in farms with less than twenty employees, the duties of the labour protection service can only be assigned to an employee/employees, in particular, part-timers.

To resolve the issue of the method of Organisation of the labour protection service in farms where there are no employees, the author of the study proposes to supplement Art. 15 of the Law of Ukraine "On Labour Protection" [15] and paragraph 1.4 of the Standard Regulation on the Labor Protection Service [17] with the following content: "In farms that do not use the work of employees, with the number of members of fifty or fewer persons, the functions of the labour protection service can be performed by members of such farms that have received appropriate training. The decision on the appointment of such persons is made by the head of the farm in coordination with the members of the farm."

In studies, the opinion is expressed about the possibility of transferring safety and labour protection techniques on small farms to self-organisation. In particular, V.O. Ivanchenko considers it correct, within the framework of self-organisation, to assign all responsibilities for ensuring safety, organising training, obtaining permits provided for by law, etc. to the owner (head of the farm) [29, p.50]. The author of the study

categorically does not support this view based on the following. The current legislation does not directly prohibit the combination of an employer and a labour protection service in one person, from which it would be possible to conclude that the head of a farm can perform these duties. However, a deeper analysis of regulations in the field of labour protection organisation shows the fallacy of this approach. According to part 4 of Art. 15 of the Law of Ukraine "On Labour Protection" [15] and paragraph 1.3 of the Standard Regulation on the Labor Protection Service [17], the labour protection service is directly subordinate to the employer (in a specific case, to the head of the farm). The above version of "self-organisation" creates a situation when the head of a farm independently performs the functions of the labour protection service and controls their implementation, reports, and approves documents on labour protection, which were developed by the head themselves, etc. In the course of such activities, there may be a contradiction between the private interest of the head of the farm and their powers as a manager, which may result in subjective and biased decision-making, performing certain actions or refraining from performing them during the execution of the powers of the head of the farm. That is, a conflict of interest under part 1 of Art. 1 of the Law of Ukraine "On Prevention of Corruption" [30], which is a negative phenomenon with corresponding legal consequences.

The above does not exclude the involvement of the head of the farm in the organisation of labour protection. On the contrary, a wide range of his duties regarding the management of labour protection is enshrined in Art. 13 of the Law of Ukraine "On Labour Protection" [15].

Notably, in international, primarily European labour protection legislation, the head of an enterprise or employer is assigned an important role in ensuring safe and healthy working conditions. Thus, Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [19], applying, in particular, to private agricultural enterprises, defines the principles by which an employer introduces measures for labour protection. These are the principles: avoiding risks; assessing those risks that cannot be eliminated; overcoming risks directly at the source of their occurrence; adapting production processes to the needs and capabilities of employees; adapting production to technological progress; giving preference to safe and less dangerous substances used in production through the replacement of hazardous substances; prioritising collective means of protection over individual ones; proper training of employees. In Ukraine, work has begun on developing a legal framework for the implementation of these principles. The concept of reforming the "On the Approval of the Concept of Reforming the Labor Protection Management System in Ukraine" was adopted [21] and the action plan for its implementation was approved. However, this process is very slow and far from complete [31, p. 93].

A number of other tools have been developed to improve the level of labour protection. In particular, the ISO 45001:2018 Standard "Occupational Health and Safety Management Systems – Requirements with Guidance for Use" was developed and put into effect [20]. It offers a unified, simple approach to improving the level of industrial safety, reducing the level of industrial injuries, and developing the reputation of an enterprise or organisation as a "safe place to work". Additional advantages of using the standard in the activities of the country are reducing the duration of days of temporary disability of employees, reducing the cost of paying fines for violating labour protection legislation, improving the image of the company as socially oriented, etc.

For the effective implementation of such progressive practices at the level of farms, it is necessary to inform their heads as much as possible about the advantages of this system, ways of organising labour protection measures, and algorithms of actions in a particular situation. According to the author of the study, for this purpose it is necessary to supplement the standard thematic plan and training programme on labour protection of officials, given in the standard regulation on the procedure for conducting training and testing knowledge on labour protection issues [18] with the following subjects: a) introduction of a risk-oriented approach in the organisation of labour protection; b) health management systems and ensuring the safety of employees.

In addition, the methodology of so-called benchmarking has recently been gaining popularity. In the field of labour protection, a process of "monitoring" of industrial injuries is implemented to assess and compare the effectiveness of the functioning of the occupational health and safety management system among different subjects, investigating their experience in this area, considering other people's mistakes to improve the level of safety and labour protection at the enterprise, organisation. This is not just copying the actions of other enterprises, but a continuous process of learning and improvement [32, p. 40]. The main obstacle to the widespread use of benchmarking in farms is the lack of relevant knowledge among the heads of farms. It also complicates or even makes impossible benchmarking the lack of free access to the necessary amount of information about industrial injuries in agriculture, the causes of accidents and occupational diseases, and measures introduced by specific business entities to eliminate them in the field under study. In fact, only limited quantitative indicators of industrial injuries in the agricultural sector are published free of charge to the general public.

Raising awareness of the risks associated with accidents at work is currently recognised as one of the priorities for implementing the EU Strategic Framework on Health and Safety at Work 2021-2027 [22]. As part of this strategy, it is planned to implement the "Zero mortality" approach, that is, to minimise the number of industrial accidents with fatal consequences. The prerequisites for

its implementation are recognised as: 1) raising awareness of employers and employees about the risks associated with industrial accidents, occupational diseases; 2) training and education of employers to increase their ability to ensure an appropriate level of labour protection; 3) responsible strict implementation of labour protection rules and the inevitability of legal liability in case of their violation [22].

Considering the European integration course of Ukraine and the need to develop an effective strategy for reducing the level of occupational injuries, our state should focus on the mentioned EU Strategic Framework on Health and Safety at Work for 2021-2027 [22]. All the outlined areas of implementation of the "Zero mortality" approach can (and should) be implemented in Ukraine.

Conclusions

As a result of the study, the following generalisations can be made.

It was established that the state of labour protection in farms of Ukraine at the present stage is unsatisfactory, which is confirmed by high indicators of occupational injuries. The reasons for this are both objective features of agricultural production with its inherent risks, and subjective reasons, primarily organisational ones.

A number of proposals have been formulated to improve the level of organisation of labour protection in farms. Firstly, it is proposed to clarify the provisions of the legislation regulating the procedure for creating a labour protection service, indicating the possibility of assigning the functions of the labour protection service to members of a farm. It is a mandatory requirement for such persons to determine the presence of appropriate training in occupational health and safety. Secondly, the expediency of expanding the range of issues that are covered during the training of heads of enterprises, in

particular, heads of farms, in the field of labour protection through the inclusion in the training programmes of subjects on health management systems, ensuring the safety of employees, and on the specific features of implementing a risk-oriented approach to the organisation of labour protection was justified. Thirdly, it is proposed to conduct work on raising the level of awareness of employers in the field of agriculture about the risks associated with industrial accidents, occupational diseases, and mastering progressive methods of organising labour protection measures, such as benchmarking. For this purpose, it is proposed to: 1) restore the sector of labour protection and fire safety in the structure of the Ministry of Agrarian Policy and Food of Ukraine; 2) provide free access to data on accidents, occupational diseases that occurred at enterprises, institutions and organisations of the agricultural sector, to analytical materials on the causes and consequences of such events; 3) start systematic work with managers and persons responsible for labour protection in agricultural enterprises, including farms (for example, in the form of information and advisory projects, trainings, webinars, etc.) in an online format using internet resources of state authorities.

The results obtained can be considered when improving the content of legal provisions in the field of labour protection in agriculture, and used in works devoted to theoretical problems of legal regulation of relations in this area. It is considered appropriate to focus the attention of researchers on the problematic aspects of monitoring the state of occupational injuries in agriculture, the specific features of labour protection measures for agricultural sub-sectors and the most dangerous types of work (for example, work with chemicals, mechanised work), opportunities to consider the best international experience in organising labour protection in agricultural production.

References

- [1] State Statistics Service of Ukraine. (2021). *Traumatism at work in Ukraine*. Retrieved from https://ukrstat.gov.ua/operativ/operativ2007/oz_rik/oz_u/arch_travm_na_vyrob.htm.
- [2] State Labor Service of Ukraine. (2022). *Operational information. Number of victims of production-related fatal accidents by type of activity*. Retrieved from <https://dsp.gov.ua/operativna-informatsiia/>.
- [3] State Labor Service of Ukraine. (2022). *State of industrial injury*. Retrieved from <https://dsp.gov.ua/stanyvyrobnychoho-travmatyzmu/>.
- [4] State Statistics Service of Ukraine. (2021). *Statistical collection "Agriculture of Ukraine" for 2020*. Kyiv. Retrieved from https://ukrstat.gov.ua/druk/publicat/kat_u/2021/zb/09/zb_sg_20.pdf.
- [5] Guo, J., Tang, Q., & Jin, G. (2021). Labor protection and the efficiency of human capital investment. *Economic Analysis and Policy*, 69, 195-207. doi: 10.1016/j.eap.2020.12.006.
- [6] Dura, C., Păun, A.-P., & Moraru, R.I. (2018). Empirical analysis on the relationship between corporate health and safety performance and the financial outcome within socially responsible companies. *Quality – Access to Success*, 19(162), 155-160.
- [7] Olyanyshen, T.V., Storozhuk, V.M., Yatsiuk, R.A., Korzh, H.I., Ratushniak, Yu.V., & Melnikov, A.V. (2021). Multicriteria problem of evaluation of the enterprise labor protection management system efficiency. *Mathematical Modeling and Computing*, 8(2), 330-337.
- [8] Bakiko, E., Serdyuk, V., Yanchij, S., Ignatovich, I., & Bardina, E. (2020). The labor protection specialist competence influence on the professional risk management state. *E3S Web of Conferences*, 178, article number 01087. doi: 10.1051/e3sconf/202017801087.

- [9] Bordakovskaja, A.P., Rumyantseva, N.V., Kamenskaya, S.O., & Hlebnikov, N.G. (2021). Development of proposals of improving the risk-oriented approach in control and supervision activities on labor protection. *IOP Conference Series Materials Science and Engineering*, 1100, article number 012020. doi: 10.1088/1757-899X/1100/1/012020.
- [10] Urkevich, V.Yu. (2007). *Problems of the theory of agrarian legal relations*. Kharkiv: Kharkiv yurydychnyy.
- [11] Miroshnychenko, O.A. (2008). *Legal regulation of labor relations in the field of agriculture* (PhD thesis, Yaroslav Mudryi National Law University, Kharkiv, Ukraine).
- [12] Danshina, K.E. (2016). *Legal regulation of labor relations in farms of Ukraine* (PhD thesis, H.S. Skovoroda Kharkiv National Pedagogical University, Kharkiv, Ukraine).
- [13] Novak, T.S. (2013). *Legal regulation of labor protection in agriculture of Ukraine: Current state and directions for improvement*. Kyiv: CPU "Comprint".
- [14] Labor Code of Ukraine. (1971, Desember). Retrieved from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.
- [15] Law of Ukraine No. 2694-XII "On Labor Protection". (1992, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/2694-12#Text>.
- [16] Law of Ukraine No. 973-IV "On Farming". (2003, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/973-15#Text>.
- [17] Order of the State Committee of Ukraine for the Supervision of Labor Protection No. 255 "On the Approval of the Standard Regulation on the Labor Protection Service". (2004, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/z1526-04#Text>.
- [18] Order of the State Committee of Ukraine on Labor Protection Supervision No. 15 "On the Approval of the Standard Regulation on the Procedure for Conducting Training and Testing Knowledge on Occupational Health and Safety Issues and the List of High-Risk Jobs". (2005, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0231-05#n186>.
- [19] Council Directive 89/391/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work. (1989, June). Retrieved from <http://data.europa.eu/eli/dir/1989/391/oj>.
- [20] ISO 45001:2018 "Occupational Health and Safety Management Systems – Requirements with Guidance for Use". Retrieved from <https://www.iso.org/obp/ui/#iso:std:iso:45001:ed-1:v1:en>.
- [21] Order of the Cabinet of Ministers of Ukraine No. 989-r "On the Approval of the Concept of Reforming the Labor Protection Management System in Ukraine and the Approval of the Plan of Measures for its Implementation". (2018, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/989-2018-%D1%80#Text>.
- [22] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "EU Strategic Framework on Health and Safety at Work 2021-2027. Occupational Safety and Health in a Changing World of Work". (2021, June). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0323&qid=1626089672913#PP1Contents>.
- [23] Chabanenko, M.M. (2017). Some problems of current and prospective legal regulation of labor relations in farms of Ukraine. *Actual Problems of Domestic Jurisprudence*, Special issue (Part 1), 92-95.
- [24] Yeryomenko, V.V. (2017). Grounds for the emergence of individual labor relations with members of farms and other agricultural enterprises and cooperatives. *Law and Innovation*, 2, 46-54.
- [25] Novak, T.S. (2020). Labor relations in family farms: Certain aspects of legal regulation. *Law. Human. Environment*, 11(4), 95-104. doi: 10.31548/law2020.04.012.
- [26] Velychko, L.Yu. (2018). The scope of labor law on the legal regulation of labor in farms. *Law and Society*, 1, 114-117.
- [27] Law of Ukraine No. 1877-IV "On State Support of Agriculture of Ukraine". (2004, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1877-15#Text>.
- [28] Resolution of the Supreme Court of Ukraine in the case No. 640/1099/19. (2020, May). Retrieved from <https://reyestr.court.gov.ua/Review/89251691?fbclid=IwAR0KH8DK9oM0LUoicH4goxx1am4hp3v5uy1Leb1U7gxtlbE4fZHAX62-Tcg>.
- [29] Ivanchenko, V.O. (2014). Labor protection in small farms. *Scientific Works of the Kirovohrad National Technical University. Economic Sciences*, 25, 47-51.
- [30] Law of Ukraine No. 1700-VII "On Prevention of Corruption". (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1700-18#Text>.
- [31] Novak, T.S. (2021). To the issue of introducing a risk-oriented approach in the field of labor protection in the legislation of Ukraine. *Law. Human. Environment*, 12(1), 85-94. doi: 10.31548/law2021.01.009.
- [32] Levchenko, O., Ilchuk, O., & Pulka, Ch. (2021). Implementation of labor protection benchmarking at the enterprises of the Ministry of Infrastructure of Ukraine. *Problems of Labor Protection in Ukraine*, 37(2), 38-43. doi: 10.36804/nndipbop.37-2.2021.38-43.

Організація охорони праці у фермерських господарствах: окремі аспекти правового регулювання

Тамара Сергіївна Новак

Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

Стаття присвячена дослідженню стану правового регулювання організації охорони праці у фермерських господарствах України. Актуальність роботи зумовлено потребою підвищити рівень захищеності осіб, зайнятих у діяльності фермерських господарств, від впливу шкідливих та небезпечних виробничих факторів, знизити рівень виробничого травматизму в цій сфері. Метою дослідження є вивчення надбань юридичної науки та аналіз сучасного стану нормативно-правового регулювання відносин у сфері організації охорони праці у фермерських господарствах задля визначення ключових проблемних питань та вироблення пропозицій щодо їх вирішення. Для досягнення поставленої мети використано такі методи наукового пізнання: діалектичний метод, метод аналізу, формально-юридичний метод та порівняльно-правовий метод. У результаті проведеного дослідження зроблено висновок про незадовільний стан організації охорони праці у фермерських господарствах. Для покращення ситуації запропоновано низку змін до законодавства в частині способу організації охорони праці на малих фермерських господарствах та таких, де не використовується наймана праця, зокрема щодо можливості покладання обов'язків служби охорони праці на члена (членів) фермерського господарства. Визначено порядок надання таких повноважень. Обґрунтовано необхідність розширити коло питань, які входять до програм навчання з охорони праці керівників підприємств, зокрема голів фермерських господарств. А саме запровадити обов'язкове вивчення: систем та стандартів менеджменту охорони здоров'я і гарантування безпеки працівників; особливостей запровадження ризикоорієнтованого підходу до організації охорони праці. Сформульовано пропозиції з реалізації інформаційно-консультативних проєктів (з використанням інтернет-технологій) для спеціалістів з охорони праці. Подальшу роботу у сфері реформування законодавства про організацію охорони праці в фермерських господарствах (як у теоретичній, так і в практичній площині) варто зосереджувати на підготовці нормативних актів, що визначали б чіткий простий алгоритм дій для голів фермерських господарств щодо забезпечення правоохоронної роботи з урахуванням специфіки цієї форми підприємницької діяльності громадян. Отримані в дослідженні висновки стануть в пригоді законотворцям під час розробки нормативних актів з охорони праці в сільському господарстві, науковцям під час вивчення проблематики працезахоронних відносин у цій галузі.

Ключові слова: сільське господарство, безпека праці, член фермерського господарства, найманий працівник, служба охорони праці, виробничий травматизм



UDC 342.9: 614:347

DOI: 10.31548/law2022.03.007

Counterfeit and Falsified Medicines: Today's Challenges and Smart Solutions

Oleksandr P. Svitlichnyy*

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Article's History:

Received: 01.05.2022

Revised: 30.06.2022

Accepted: 11.08.2022

Abstract

In any democratic country, special attention is paid to health protection, as a result of which, through organisational, financial, economic, and legal institutions, the state ensures and maintains the health protection of the population at the sufficient level. The purpose of the study is to examine the existing problems in the field of providing the population of Ukraine with high-quality medical drugs. The research methodology is a set of cognitive tools and methods, the use of which allowed for obtaining the most objective information about the existing problem processes and phenomena in the field of providing the population of Ukraine with high-quality medicines. Considering the critical state of the health care sector of the population of Ukraine, the study analyses legal regulations that focus on problematic issues in the health care sector of Ukraine. Attention is drawn to the need to provide the population of Ukraine with affordable and high-quality medicines that must meet the best European and international standards. Statistical data on the facts of the detection of counterfeit medicines are presented, and actors on this issue are analysed. It is noted that counterfeit and falsified medicines cause irreparable harm to the health of people all over the world, such illegal actions threaten the economy and security of the state, cause economic and financial damage to manufacturers of medical medicines, undermine their image, and harm the owners of intellectual property rights. It is noted that public relations in the field under study concern legal mechanisms related to unfair competition, which negatively affects the image of the state, and the activities of both Ukrainian and foreign business entities. It is noted that since intellectual property in its nature and content is closely linked to the growth of the economy, there is a need for more effective steps by the state to prevent violations of intellectual property rights. The results of the study, and parts of it, can be useful for both lawyers and government agencies that struggle with unfair competition in the field of medicines

Keywords: protection, unfair competition, state, economy, security

Suggested Citation:

Svitlichnyy, O.P. (2022). Counterfeit and falsified medicines: Today's challenges and smart solutions. *Law. Human. Environment*, 13(3), 59-64.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

In the modern world, scientific views on public health are investigated from a variety of perspectives, which is manifested in economic, legal, political, social, and other approaches. In the leading countries of the world, the issue of providing citizens with high-quality medicines is given priority attention, since the economic growth of the state depends on the health of citizens. Australia, the Netherlands, the United States, Switzerland, and Japan have a highly effective system of medical standards. These countries have an effective system of bodies designed to ensure the proper state of health of the population. This means that in these and other countries of the world, the efforts of the government are aimed at creating an effective regulatory framework that guarantees the production, release, storage, transportation, and sale of medicines and effective mechanisms for protecting the rights holders of intellectual property objects, the importance of which in the creation of medicines is the primary basis. The issue of protection is explained by the fact that in the context of global development, the process of intellectualisation of the economy is taking place. In the end, this phenomenon affects the economic security of a particular country [1, p. 20].

Notably, some important issues of the studied problem were considered by a number of Ukrainian researchers. In particular, A. Hertz paid attention to contractual obligations in the field of providing medical services [2]. B. Logvynenko conducted a theoretical and practical study of the public administration of the health care sector in Ukraine [3]. O. Strelchenko analysed the activities of public bodies [4]. S. Knysh identified the impact of legal provisions on the state of health care in Ukraine [5; 6]. H. Muliar conducted a study of the essence of the implementation of the right of a person to health care [7] and legal prospects for the implementation of medical reform in Ukraine [8].

In the monographic study, the author of the study in collaboration with N. Volk described the state of legal regulation of pharmaceutical activities and identified ways to improve it [9].

S. Sismondo draws attention to problematic issues of formation and drugs that are insufficiently tested [10], other foreign researchers focus on the consequences of falsified medicines for human health [11].

In these works, researchers mainly focus on the specific features of civil and contractual legal relations, patenting inventions in the field of medicine and biotechnology, providing medical services, protecting consumer rights on the Internet, reforming the health care system, medical relations, guarantees of medical care, administrative responsibility, etc. Therewith, today counterfeit medicines are a threat to the national security of the state. Therefore, the existing problematic issues in the field of medicines should concern not only their owners and consumers, but also the state, its authorised officials, and scientific views on solving the existing problem.

The purpose of the study is to determine the ways of effective legal regulation of providing the population of Ukraine with high-quality medicines based on the conducted investigation.

The researcher had to perform the following main tasks to achieve this goal: identify the legislative principles of health care in Ukraine; characterise the state of activity of public authorities in the field of combating counterfeit and falsified medicines; provide statistics related to counterfeiting, falsification of medicines and their negative impact on the state of health of citizens; determine ways to improve the legal regulation of the field of public relations under study.

Materials and Methods

The methodological basis for the study of counterfeit and falsified medicines is a set of techniques and methods that allowed examining and identifying the current state of providing the population with high-quality medicines. The dialectical method is used to analyse the current state of the regulatory framework and determine ways to improve Ukrainian legislation in the field under study. The historical-legal method is used for a retrospective analysis of today's challenges in the fight against counterfeit medicines. The statistical method helped to summarise empirical data for writing the study. Deduction and induction methods are used to identify legislative access and implementation of the right to health care. The method of doctrinal analysis allowed for analysing the problematic issues related to the counterfeiting and falsification of medicines. Formal legal and forecasting methods allowed for determining ways to overcome counterfeiting and falsification of medicines. The application of the method of legal modelling allowed for identifying ways aimed at improving legislation in the field of health care.

The normative basis for writing the study consists of Ukrainian legislative acts, in particular, the Constitution of Ukraine, the norms of the Customs Economic Procedure and Criminal Codes, and numerous Ukrainian and international regulations.

The study used statistical data, judicial practice and economic and legal journalism, analytical materials and internet resources.

Results and Discussion

Among many problematic issues, public health issues in Ukraine are the cornerstone that is inextricably linked with human life. It is no coincidence that Art. 3 of the Constitution of Ukraine declares that "a person, their life, and health are recognised as the highest social value in Ukraine", and Art. 49 of the Constitution guarantees everyone the right to health protection [12].

This duty of the state also follows under the application, in particular, of the norms of Art. 6, 7, and 8. Fundamentals of the legislation of Ukraine on health care, which provide a list of guarantees of the right to health protection and state protection of these rights [13].

The consolidation of these relations in the Constitution of Ukraine is a direct duty of the state to ensure the human right to life and health through the approval of effective legal provisions aimed at protecting health. However, despite the mandatory consolidation of this norm in the Basic Law of the state, Ukraine still cannot guarantee its citizens the proper state of health care [5, p. 1].

Thus, despite the imperative consolidation in the Constitution of Ukraine and other normative regulations to ensure the realisation of citizens' right to health protection, some researchers and specialists draw attention to the shortcomings of legislation (in particular, in the Constitution of Ukraine), which do not fully ensure citizens' access to high-quality and safe medicines, and the medical reform initiated in 2017 has not yet yielded the desired results, which negatively affects the implementation by citizens of their rights guaranteed by the Constitution and other legislative acts of Ukraine [14, p. 141].

Therewith, recently there have been numerous cases of detection of counterfeit medicines, both at the customs border and pharmacy chains, where law enforcement agencies are increasingly detecting counterfeit and falsified medicines. As a result, the state, owners of medicines, and owners of intellectual property rights suffer financial and image losses. Despite the criminalisation of certain articles of the Criminal Code of Ukraine (Part 2 of Art. 305, part 2 of Art. 321-1, part 2 of Art. 229), they are not yet able to ensure proper health care in the country [15]. Therefore, it is advisable to agree with M. Quet's opinion, that pharmacy employees are actively involved in the illegal sale of counterfeit medicines [16]. As a result, the counterfeiting of medicines and their sale through a network of unscrupulous pharmacy employees negatively affects the health of citizens not only in Ukraine but also in other countries of the world [17].

S. Hodges and E. Garnett also argues that "Over the past few decades, global health research and policy have raised concerns about the growing threat of counterfeit and low-quality medicines" and draws attention to the need for evidence when identifying counterfeit, low-quality, or falsified medicines [18].

Investigating the principles of the actual presence on the Ukrainian pharmaceutical market of counterfeit and counterfeit goods, "white" counterfeit goods and medicines that are a consequence of an imperfect system of turnover control and protection, Yu. Vishar draws attention to the problems of intellectual property law and comes to the conclusion that a negligent attitude to the clarity of the definition of concepts and objects of intellectual property in specialised and special legislation creates opportunities for manipulative regulations, pushing such urgent socio-economic problems as "evergreen patents", availability of medicines, reimbursement of medicines, patent trolling, parallel "grey" import of medicines, preclinical and clinical studies of medicines, etc., into the category of secondary [19, p.256-257].

Today, counterfeit and falsified medicines have flooded the national market. In particular, in 2022 alone, counterfeit medicines will reach 991 billion USD, which threatens the health of consumers [17].

In this context, there is also a demand for urgent state measures to protect the economic interests of the state. "This is also due to changes in the principles of functioning of the economy of the country and the movement of financial flows, the issue of creating and functioning an effective system of economic protection of Ukraine in the state has become extremely important" [19 p. 160]. The same opinion is shared by other Ukrainian researchers that draw attention to the need to implement economic reforms in the state [20].

In the context of the problem under study, to determine what should be understood by "falsified medicine" and "counterfeit goods", specialists, officials of customs and law enforcement agencies, etc., should refer to the norms of the Law of Ukraine "On Medicines" of 04/04/1996 No. 123/96-BP [21] and the Customs Code of Ukraine of 13.03.2012 No. 4495-VI [22]. For the accurate identification of counterfeit medicines that have the packaging, a label, or are marked with a certain logo, the factual establishment of a violation of the rights of copyright holders of intellectual property rights, which can be designated counterfeit and falsified medicines.

The Verkhovna Rada of Ukraine on 10/03/2017 amended the economic procedural code of Ukraine on the establishment and operation of a specialised Supreme Court on intellectual property issues of Ukraine to ensure the rapid and effective protection of intellectual property rights [23]. However, due to the existing problems of the High Qualification Commission of judges, the selection for the positions of judges has not yet been completed.

Ukraine ratified the Council of Europe Convention on counterfeiting medical products and similar crimes that threaten health of 06/07/2012 [24], which entered into force on 01/01/2016 to prevent the threats to health [25].

The Convention, among other things, emphasises the need to protect patented medical products as an object of intellectual property rights.

Following the provisions of the Convention, the Order of the Cabinet of Ministers of Ukraine approved the concept, which should be implemented during 2019-2023 in three stages, each of which provides for the gradual and mandatory introduction of necessary measures related to ensuring the protection of medicines and intellectual property rights [26].

The introduced pilot project, the implementation of which was to be conducted from 09/01/2019 – 12/31/2020 [27], had a substantial number of ambiguous comments both from authorised officials of executive authorities and specialists of the pharmaceutical market, who paid attention to the problems of the unified state system for monitoring the turnover of medicines, as a software product that was to be created by the Ministry of Economic Development and Trade.

By order of the Ministry of economic development and trade "Some Issues of Implementation of the Pilot Project on Labeling with Control (Identification) Signs and Monitoring of Drug Circulation" dated 11/26/2019 No. 433, the state enterprise "State Information Analytics" was designated as responsible for the implementation of this Order [28]. However, not agreeing with the Order of the Ministry of Economic Development and Trade No. 433, SE SIA appealed the order of the Ministry of Economy to the District Administrative Court of Kyiv on 03/16/2021 [29].

Despite the adoption of a number of legislative acts, in particular, through amendments to the Criminal Code of Ukraine, as a result of which the guilty person can receive the maximum criminal penalty in case of falsification of medicines [30], the Law of Ukraine "On the Joint Transit Regime and the Introduction of a National Electronic Transit System" [31], which to some extent should have improved the state of affairs at customs, but it did not fully solve the problematic issues of counterfeiting and falsification of medicines, and the Draft Law No. 5547 "On Medicines" [32], which, according to its authors, should somewhat improve the state of affairs in the field of public relations under study, however, a substantial number of comments to this draft law from the perspective of a number of ministries and departments, and experts doubt that this bill will become law in the near future.

Despite the above-mentioned and other measures taken, the scale of the problem of counterfeiting and falsification of medicines has not been resolved. This is indicated by the statistical data on a substantial number of offences in this area and the financial losses that the state suffers due to the illegal manufacture and distribution of counterfeit medicines [33].

Thus, the existing problematic issues of counterfeiting and falsification of medicines that negatively affect the state of Health and life of citizens, along with the failure of the state in the person of authorized bodies of public power, their officials, "question the entire health care system, methods of activity, and legal influence of the state in this area" [34, p. 5].

In addition, the issue of the improper legal protection of both medical and pharmaceutical inventions remains problematic [35, p. 421]. The above applies to

an invention, as an object of intellectual property rights that can be granted legal protection, such an invention must be suitable for industrial use in the medical or pharmaceutical industries and meet the conditions of legal protection in accordance with the law. This may apply to: methods of treatment and diagnosis (except for the substances/compositions that are used in this case [36].

The above should be considered when creating new ways to treat and diagnose people.

Conclusions

Thus, considering the above, it can be concluded that today the state of providing the population of Ukraine with high-quality medicines requires the state, public administration bodies, and their officials to take the necessary measures aimed to ensure the right of a person guaranteed by the Constitution and other legislative acts of Ukraine to proper health care and to high-quality and safe medical care at the national level. High-quality and sufficient medicines should contribute to the health care system, but the existing problems of counterfeiting and falsification of medicines does not only prevent citizens from exercising their constitutional right to health protection. The lack of effective mechanisms and ways to solve counterfeiting and falsification of medicines threatens the national security of the state.

To overcome the existing problem, the Parliament needs to respond more effectively and adequately to the state of legislative support for such an important field of public relations. Considering the challenges facing society, it is necessary to improve the work of health management bodies. The state needs to take a more comprehensive approach to the mechanism of introducing a moratorium on advertising medicines and medical devices on TV, radio programmes, and mass media, especially when such advertising concerns the elderly, who are the largest consumers of medicines.

For the purpose of early detection of counterfeit medicines at the customs border of Ukraine, it is necessary to introduce the "Raman spectroscopy" method, which can be used to prevent offences related to medicines.

In the fight against counterfeiting and falsification of medicines, it is necessary to pay attention to the European system of 2D coding of medicines, the use of which should be initiated in Ukraine.

References

- [1] Baranov, A., Kucher, V., Ustymenko, O., Utkina, M., & Hrybachova, I. (2020). Mechanism of state economic security management in the direction of intellectual property rights protection: Cases of selected industries. *Journal of Security and Sustainability Issues*, 10(1), 19-34.
- [2] Hertz, A.A. (2016). *Contractual obligations in the field of providing medical services* (Doctoral thesis, Ivan Franko National University of Lviv, Lviv, Ukraine).
- [3] Logvynenko, B.O. (2018). *Public administration in the field of health care in Ukraine: Theory and practice* (Doctoral thesis, Interregional Academy of Personnel Management, Kyiv, Ukraine).
- [4] Strelchenko, O.H. (2019). *Public administration of authorities in the field of drug circulation* (Doctoral thesis, Dnipropetrovsk State University of Internal Affairs, Dnipro, Ukraine).
- [5] Knysh, S.V. (2019). *Administrative and legal advice in the field of health care in Ukraine* (Doctoral thesis, Ternopil National Economic University, Ternopil, Ukraine).

- [6] Knysh, S.V., Oderii, A.V., Sarana, S.V., Airapetyan, A.S., & Bova, E.Yu. (2018). The ratio of individual and general interest in medical legal relations. *Georgian Medical News*, 7-8, 134-139.
- [7] Muliar, H.V. (2021). *Administrative and legal support for the implementation of the right to health care* (Doctoral thesis, National Aviation University, Kyiv, Ukraine).
- [8] Muliar, H.V., Solonenko, O.N., Pokalchuk, M.Yu., Pletneva, A.E., & Dombrovan, N.V. (2020). Legal justification and prospects for the implementation of the program of state guarantees of medical care for the population in Ukraine. *Georgian Medical News*, 7-8, 195-199.
- [9] Volk, N.V. (2018). *Administrative and legal regulation of pharmaceutical activity: Ways of improvement*. Kyiv: Publishing Center of National University of Life and Environmental Sciences of Ukraine.
- [10] Sismondo, S. (2018). *Ghost-managed medicine: Big pharma's invisible hands*. Manchester: Mattering Press. doi: 10.28938/9780995527775.
- [11] Rahman, M.S., Yoshida, N., Tsuboi, H., Tomizu, N., Endo, J., Miyu, O., Akimoto, Yo., & Kimura, K. (2018). The health consequences of falsified medicines – A study of the published literature. *Tropical Medicine and International Health*, 23(12), 1294-1303. doi: 10.1111/tmi.13161.
- [12] Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.
- [13] Law of Ukraine No. 2801-XII "Fundamentals of Ukrainian Legislation on Health Protection". (1992, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/2801-12#Text>.
- [14] Shevchenko, A.E., Kudin, S.V., Korotun, E.N., Zagumennaya, Yu.A., & Svetlichny, A.P. (2020). Constitutional foundations for ensuring the human right to health: A comparative legal aspect. *Georgian Medical News*, 3(300), 140-146.
- [15] Smuggling worth millions: Pharmacies sold fake medicines from the Russian Federation. (2021). Retrieved from <https://www.ukrinform.ua/rubric-society/3290908-kontrabanda-na-miljoni-v-aptekah-prodavali-falsivi-liki-zavezeni-z-rf.html>.
- [16] Quet, M. (2018). *Impostures pharmaceutiques: Médicaments illicites et luttes pour l'accès à la santé*. Paris: Éditions La Découverte.
- [17] Ortynska, M. (2020). Dangerous twins. *Economic truth*. Retrieved from <https://www.epravda.com.ua/columns/2020/07/20/663027/>.
- [18] Hodges, S., & Garnett, E. (2020). The ghost in the data: Evidence gaps and the problem of fake drugs in global health research. *Global Public Health*, 15(8), 1103-1118. doi: 10.1080/17441692.2020.1744678.
- [19] Vishar, Yu.Yu. (2020). Legal blockchain of qualitative patenting of the objects of intellectual power in the medicines. *Journal of Kyiv University of Law*, 3, 253-259.
- [20] Cherniavskiy, S., Dzhuzha, O., Babanina, V., & Harust, Yu. (2021). System of ensuring the economic security of the state: World experience and ways of its reform in Ukraine. *Journal of the National Academy of Legal Sciences of Ukraine*, 28(4), 157-168.
- [21] Law of Ukraine No. 123/96-VR "On Medicines". (1996, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/123/96-вр#Text>.
- [22] Customs Code of Ukraine. (2012, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/4495-17#Text>.
- [23] Law of Ukraine No. 1678-VII "On Ratification of the Association Agreement between Ukraine, of the One Part, and the European Union, the European Atomic Energy Community and Their Member States, of the Other Part". (2014, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/1678-18#Text>.
- [24] Law of Ukraine No. 2147-VIII "On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts". (2017, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/2147-19#Text>.
- [25] Law of Ukraine No. 4908-VI "On Ratification of the Council of Europe Convention on Counterfeiting of Medical Products and Similar Crimes Threatening Health". (2012, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/4908-17#Text>.
- [26] Order of the Cabinet of Ministers of Ukraine No. 301-r "On Approval of the Concept of Implementation of the State Policy on Prevention of Falsification of Medicines and Approval of the Plan of Measures for its Implementation". (2019, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/301-2019-р#Text>.
- [27] Resolution of the Cabinet of Ministers of Ukraine No. 653 "On the Introduction of a Pilot Project on Labeling with Control (Identification) Signs and Monitoring the Circulation of Medicines". (2019, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/653-2019-р#Text>.
- [28] Order of the Ministry of Economic Development and Trade of Ukraine No. 433 "Some Issues of Implementation of the Pilot Project on Labeling with Control (Identification) Signs and Monitoring of Drug Circulation". (2019, November). Retrieved from <https://zakon.rada.gov.ua/rada/show/v0433915-19#Text>.
- [29] Decision of the District Administrative Court of Kyiv No. 95609851. (2021, March). Retrieved from <https://youcontrol.com.ua/ru/catalog/court-document/95609851/>.

- [30] Law of Ukraine No. 284-IX "On Amendments to Article 321-1 of the Criminal Code of Ukraine on Strengthening Liability for Falsification of Medicinal Products or Circulation of Counterfeit Medicinal Products". (2019, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/284-20#Text>.
- [31] Law of Ukraine No. 78-IX "On the Joint Transit Regime and the Introduction of a National Electronic Transit System". (2019, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/78-IX>.
- [32] Draft Law of Ukraine No. 5547 "On Medicines". (2021, May). Retrieved from <https://itd.rada.gov.ua/billInfo/Bills/Card/26695>.
- [33] Kostin, I. (2022). *In Ukraine, it is extremely difficult to prove the facts of falsification of medicines – a lawyer*. Retrieved from <https://interfax.com.ua/news/interview/792354.html>.
- [34] Kovalenko, I.A. (2018). *Falsification and circulation of falsified drugs: Criminal law research*. Odesa: Helvetica Publishing House.
- [35] Teremetskyi, V.I., Matviichuk, A.V., Muzychuk, O.M., Shcherbakovskyi, M.H., & Oderii, O.V. (2019). Features of legal protection of medical inventions: present and future. *Pathologia*, 16(3), 417-423. doi: 10.14739/2310-1237. 2019.3.188972.
- [36] Law of Ukraine No. 3687-XII "On the Protection of Rights to Inventions and Utility Models". (1993, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/3687-12#Text>.

Контрафактні та фальсифіковані лікарські засоби: сьогоднішні виклики й розумні рішення

Олександр Петрович Світличний

Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

У будь-якій демократичній країні охороні здоров'ю приділяється питома увага, унаслідок чого шляхом організаційних, фінансових, економічних та правових інститутів держава забезпечує і підтримує на належному рівні стан охорони здоров'я населення. Метою дослідження є вивчення наявних проблем у сфері забезпечення населення України якісними медичними лікарськими засобами. Методологія дослідження – сукупність пізнавальних засобів та методів, використання яких дало змогу отримати максимально об'єктивну інформацію про наявні проблемні процеси і явища у сфері забезпечення населення України якісними лікарськими засобами. Зважаючи на критичний стан у сфері охорони здоров'я населення України, у статті проаналізовано нормативно правові акти, в яких акцентована увага на проблемних питаннях у сфері охорони здоров'я України. Звернено увагу на необхідність забезпечити населення України доступними та якісними лікарськими засобами, які повинні відповідати кращим європейським і світовим стандартам. Наведено статистичні дані про факти виявленням контрафактних лікарських засобів, а також проаналізовано акторські щодо вказаної проблематики. Наголошено, що контрафактні та фальсифіковані лікарські засоби завдають непоправної шкоди здоров'ю людей у всьому світі, такі незаконні дії загрожують економіці й безпеці держави, завдають економічних та фінансових збитків виробникам медичних лікарських засобів, підривають їхній імідж, наносять шкоду власникам об'єктів права інтелектуальної власності. Звернено увагу, що суспільні відносини у дослідженій сфері торкаються правових механізмів пов'язаних із недобросовісною конкуренцією, що негативно впливає на імідж держави, діяльність як українських, так і зарубіжних суб'єктів підприємницької діяльності. Зауважено, що, оскільки інтелектуальна власність за своїм характером і змістом тісно пов'язана зі зростанням економіки, існує потреба в більш дієвих кроках держави щодо запобігання порушень прав інтелектуальної власності. Результати роботи, а також її частини можуть бути корисними як для юристів, так і для державних органів, що борються з проявами недобросовісної конкуренції у сфері лікарських засобів

Ключові слова: захист, недобросовісна конкуренція, держава, економіка, безпека



UDC 342.565.2

DOI: 10.31548/law2022.03.008

Decision of the Constitutional Court of Ukraine on the Constitutionality of Articles 81, 82 of the Criminal Code of Ukraine in the Practical Use of the European Court of Human Rights

Yuriy V. Surzik*

Taras Shevchenko National University of Kyiv
01033, 60 Volodymyrska Str., Kyiv, Ukraine

Article's History:

Received: 08.05.2022

Revised: 01.07.2022

Accepted: 11.08.2022

Abstract

The relevance of the study lies in the assessment and analysis of the decision of the Constitutional Court of Ukraine on the application of the provisions of Articles 81, 82 of the Criminal Code of Ukraine, which are unconstitutional because they violate the personal rights of those sentenced to life imprisonment because they cannot be applied. The decision on unconstitutionality is commensurate with the convention requirements due to the practice of the European Court. The purpose of the study is to examine the specific features of the decision of the Constitutional Court of Ukraine regarding the compliance of articles of criminal legislation with the Constitution of Ukraine, to analyse the functioning of the institution of clemency in international experience, to examine the practice of the European Court of Human Rights regarding the parole of persons sentenced to life imprisonment. The methods used to examine the subject are: comparative, legal recognition, logical and legal, hermeneutical, analysis methods. Among the results of the study are the determination of the fact of violation of the constitutional rights of convicts due to the lack of prospects for release from punishment; characteristics of the court's decision on the admissibility of the provisions of criminal legislation, considering convention requirements; disclosure of human rights violations by comparing life imprisonment with the end of a person's life cycle; analysis of the practice of the European Court regarding the Prohibition of the use of life imprisonment. The paper also suggests ways to solve these problems. It is proved that the decision of the Constitutional Court of Ukraine satisfies the Convention requirements. The provisions disclosed in the study will be useful for analysing court decisions and creating recommendations for overcoming gaps in criminal legislation to harmonise it with the Constitution of Ukraine and comply with its obligations to protect human rights and dignity

Keywords: international experience, parole, institution of clemency, correction of convicts, convention

Suggested Citation:

Surzik, Yu.V. (2022). Decision of the Constitutional Court of Ukraine on the constitutionality of Articles 81, 82 of the Criminal Code of Ukraine in the practical use of the European Court of Human Rights. *Law. Human. Environment*, 13(3), 65-71.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

Recently, the decisions of the Constitutional Court of Ukraine on the unconstitutionality of the norms of criminal legislation have aroused great scientific and practical interest [1], where the court gives conclusions on the compliance of the norms of legislation with the requirements of the European Court of Human Rights (further – ECHR) due to the fact that the Constitution of Ukraine provides for the same rights as the Convention [2]. Ukraine recognised the authority of the European Commission on Human Rights in accepting applications addressed to the Secretary General of the Council of Europe on violations of the provisions of the convention by adopting the Law of Ukraine “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950”. This step made the Convention one of the components of national legislation, so its provisions should be applied in the activities of courts, criminal and civil, in particular [3].

Ukrainian regulatory documents clearly indicate the procedure for serving sentences by convicts. Depending on the degree of Correction, the convict moves from one stage of the system to another. According to the provisions of Article 82 of the Criminal Code of Ukraine, if a convicted person changes their behaviour in a positive way, the unserved part of the sentence may be replaced with a more lenient one. In turn, Article 81 of the Criminal Code of Ukraine declares the application of parole from serving a sentence to a convicted person in case of their conscientious behaviour and involvement in work. However, the first parts of both articles were declared unconstitutional due to the impossibility of their application to persons sentenced to life imprisonment. The study analyses the issues of legal regulation of cases of life imprisonment in Ukrainian and international judicial practice.

The system of decisions of the criminal legal aspect is formed by the practice of the European Court on non-mitigation of life imprisonment. The decision in the case of *Vinter and others v. the United Kingdom* [4] was found to be exemplary in relation to the problem under consideration. The court has repeatedly supported the positions formed in this decision. This is the nature of the decision of the ECHR “*Petukhov v. Ukraine*” [5] on stating a systemic problem regarding non-mitigated life imprisonment. This decision was, so to speak, an impetus for individuals to appeal to the Constitutional Court of Ukraine through the newly created institution of constitutional complaint that the application of such punishment contradicts constitutional rights. The decision of the Second Senate of the Constitutional Court of September 16, 2021, after a long trial, was the final one in this issue [6].

O. Nastasyak [7] believes that in practice, the application of the provisions of the criminal legislation on parole occurs more often. This is a manifestation of the convicted person’s unsuccessful motivation to change the colony to a correctional centre with employment.

The essence of parole concerns serving a long-term sentence, where the application of Article 81 of the Criminal Code of Ukraine [1] is possible only when serving part of the sentence imposed by the court. This rule can be applied to convicts who have fully shown their changes and corrections [7].

D.V. Kaznacheyeva [8] identifies the correction of the convicted person in the positive dynamics of their psyche. There are three degrees of positive evaluation of the correction:

- proof of correction by convicted persons;
- the path of correction that convicts have taken;
- the path of correction on which the condemned stand firm.

A negative assessment is given when convicts violated the rules of serving their sentences and did not take the path of correction.

O.P. Horokh [9] highlighted the position of easy access to understanding the provisions of Articles 81 and 82 of the Criminal Code of Ukraine: it is necessary to introduce rules of subordination of the court regarding the application of a penalty, which make it impossible to voluntarily choose the type and measure of a more lenient penalty.

Researchers in the field of law I.S. Yakovets, and K.A. Autukhov [10] have the opinion that prisoners who have served twenty years of a sentence with the possibility of applying the institution of clemency have the right to early release.

The legislation of Ukraine does not contain the function of reviewing a court decision against those sentenced to life imprisonment. Therefore, the way to resolve this issue is the adoption by the Verkhovna Rada of draft laws that allow releasing a convicted person ahead of schedule, in accordance with the practice of the ECHR [11].

In addition, the constitutional procedure in many countries contains provisions for pardons when considering criminal cases. The issue of clemency was also analysed in the framework of papers on the law. For example, A. Novak [12] compared the powers of pardon and commutation procedures in the United Kingdom, the United States, and the Commonwealth of Nations. The researcher’s paper raises issues of bureaucratisation of the powers of these procedures, issues of the impact of innovations in the field of legislative activity, judicial review, and executive consultations on the procedure. It contains a discussion on the future vectors of the development of regulation of pardons and commutation of sentences, considering the abolition of the death penalty in the Commonwealth of Nations and the development of the institution of parole in modern legal realities.

Researcher M. Minow [13] investigated the relevance of the presence of alternative justice mechanisms on the scale of global law. The study presents material on the correlation between serious crimes against humanity

and the introduction of procedures for mitigating the serving of sentences by convicts. The researcher considers criminal trials and judicial ones, analyses truth and reconciliation commissions as an alternative institution of punishment. In addition, the existence of corruption and compromise to mitigate the sentence is not ignored. Amnesty is seen as a way of political pressure by sacrificing transparent justice. The study discusses alternatives to judicial proceedings to achieve complementarity and suggests recognition of individual national restorative justice processes.

The collective of Ukrainian authors D. Kryklyvets *et al.* [14] investigated the acquisition of liberality by the judicial system by pardoning those sentenced to life imprisonment. Researchers see the reason for liberality in the establishment and development of democracy in Ukraine, which has formed the need for the introduction of European liberal values. Humane approaches to convicts, according to researchers, is priority area for the development of criminal law legislation.

The purpose of the study consists in the investigation of the specific features of the decision made by the Constitutional Court of Ukraine regarding the compliance of articles of criminal legislation with the Constitution of Ukraine, investigation of the principles of functioning of the institution of clemency in international experience, investigation of the practice of the ECHR on the issue of parole of persons sentenced to life imprisonment. The scientific originality of the work lies in the consideration of the functioning of unconstitutional articles in the experience of the ECHR. The author identifies a list of tasks that need to be solved as part of the study:

- analysis of the decision of the Constitutional Court of Ukraine concerning paragraphs 81, 82 of the Criminal Code of Ukraine;
- identification of the possibility of applying Articles 81 and 82 of the Criminal Code of Ukraine in the case of those sentenced to life imprisonment;
- analysis of decisions of the European Court and The European Convention on Human Rights [3] in the practice of the institution of clemency;
- research of international experience and practice of the ECHR.

Materials and Methods

During the study, methods of scientific knowledge were used. Using the comparative method, the paper compares the application of parole and the institution of clemency in Ukraine, France, Albania, Monaco, and other countries. The methods of punishment are compared to the example of Norway and Croatia, where there is a complete ban on punishment in the form of life imprisonment [15].

The legal recognition method consisted in using methods and techniques of cognition, ideas to achieve a scientific result. Based on the method, the features of the norms of the criminal law are highlighted in comparison

with the correction of a convicted person, serving a certain term, which will allow applying a reduced method of punishment. In Ukraine, the institution of clemency can be applied in the case of serving a twenty-five-year term.

The logical-legal method contributed to the characterisation of the court's conclusion on the unconstitutionality of Articles 81 and 82 of the Criminal Code of Ukraine. This method helped to provide a recommendation to eliminate gaps in criminal legislation [16].

The hermeneutical method helped to interpret the provisions of papers, the Criminal Code of Ukraine [1], the decision of the Constitutional Court [6], The European Convention [2], the provisions of the Council of Europe Ministerial recommendation [17], the ECHR case "Vinter and others v. the United Kingdom" [4] and "Petukhov v. Ukraine" [5].

A rather important role in the study of the material was played by the synthesis method, which consisted in an investigation of the practice of ways to ensure compliance with constitutional human rights and rights provided for by the European Convention on Human Rights [3], which are violated due to the impossibility of applying Articles 81 and 82 of the Criminal Code of Ukraine to life imprisonment [7].

The method of analysis consisted in analysing the material of researchers regarding the unconstitutionality of Articles 81 and 82 of the Criminal Code of Ukraine, the possibility of applying such norms and the decision of the Constitutional Court of Ukraine, which included a violation of the constitutional rights of those sentenced to life imprisonment. The author processed the decision of the ECHR to deprive the purpose of correction due to the impossibility of parole, so the Supreme Chamber of the ECHR recognised such measures as illegal and such that they cannot exist. These measures indicate a violation of the Convention, according to which there must necessarily be ways to mitigate the sentence, release from life imprisonment by replacing it with a more lenient sentence.

The study is divided into three stages. In the first stage, the specific features of the decision of the Constitutional Court of Ukraine regarding the unconstitutionality of Articles 81, 82 of the Criminal Code of Ukraine and the result of the activities of the European Court in the case "Vinter and others v. the United Kingdom" were considered [4]. The second stage was to clarify the specific features of the Convention on life imprisonment and the institution of clemency. The study also describes the attitude of the ECHR toward the legislation that makes parole from life imprisonment impossible. The third stage is determining the grounds for parole from life imprisonment and providing recommendations for making changes to the criminal legislation.

Results and Discussion

The Constitutional Court of Ukraine in its decision recognised the non-compliance of the Constitution of Ukraine with Articles 81 (parole) and 82 (replacement

of the unserved part of the sentence with a more lenient one) of the Criminal Code of Ukraine in terms of the fact that they cannot be applied to imprisoned persons [7]. It is necessary to consider European standards to assess whether such a decision will satisfy the convention requirements for life imprisonment.

The problem of life prisoners' hope for a release in Council of Europe countries has long been the subject of consideration for the Strasbourg Court. For the first time, this problem is raised in the Recommendation of the Committee of Ministers of the Council of Europe [17] on the definition of human rights, according to which a situation where persons who have been sentenced to life imprisonment do not have the hope of being released through certain judicial or administrative measures, pardon, or commutation of punishment cannot co-exist with Article 3 of the European Convention on Human Rights [3]. This conclusion of the Commission became fundamental for the consideration of such cases by the court in the future [8].

An important decision regarding the understanding of the problem of non-mitigated imprisonment is the decision of the Grand Chamber of the ECHR in the case "Vinter and others v. the United Kingdom" [4]. First, the court is guided by the fact that states are obliged under the Convention to take measures to protect the population from violent crimes. When it comes to the most serious crimes against the person (such as murder), the state can apply an indefinite term of imprisonment, thus allowing continuous isolation of the offender. The Court distinguishes a reduced and non-reduced life sentence [9]. Compliance with the requirements of the Convention can occur if the gaps in the Criminal Code of Ukraine regarding life imprisonment are eliminated [3]. The requirements will also be met if a person has been denied the right to parole in accordance with national legislation, for example, because they continue to pose a danger to society. The European punitive policy focuses on the correction of convicts, so it is assumed that any deprivation of liberty should contribute to the correction of convicts and encourage internal changes for the possibility of release from punishment.

As the Court noted, the reasons why a person is chosen for life imprisonment exist at the time of the national court's decision, but after a certain period of time they may disappear, and therefore it makes no sense to keep a person in prison. However, the review of punishment must be justified by changes in the convicted person and a clear vision of the right path. It is necessary to consider the practice of applying a reduced sentence for the court to review the punishment. In addition, persons who have received life imprisonment should be informed about rehabilitation and under what conditions parole is possible. This will encourage the individual to change.

If a prisoner is isolated without any prospect of release and without the possibility of a review of the sentence, there is a risk that they will never be able to

redeem themselves for their crime. Even if there is exceptional progress towards correction, their penalty remains fixed and not reviewed. On the contrary, the punishment becomes greater over time: the longer the prisoner lives, the longer their punishment is [9].

Thus, analysing the decisions that were taken by the Commission and the Court, the main requirements of the Convention are the legislation of the state, which provide for measures to replace, mitigate, or end life imprisonment through certain judicial or administrative measures, pardon, or commutation of punishment. As a consequence, there are states in the Council of Europe with different systems for reviewing life imprisonment sentences that have the right to exist. Most council of Europe countries have a special review of the life sentence after serving a certain minimum sentence, as a result of which a person can be released on parole [18].

There are five states, including Ukraine, which have introduced a specific pardon procedure, the purpose of which is to replace the sentence in favour of the convicted person. There are also states where there is no life imprisonment at all, for example, Norway or Croatia [8]. Therefore, the existence of the institution of Presidential clemency does not contradict the Convention and the state can use it, as well as the judicial form. Considering the above and the fact that Ukrainian legislation cannot be considered mitigated, the ECHR identified a violation by Ukraine of the provisions of the European Convention on Human Rights [3] (namely, the prohibition of the use of non-mitigated life imprisonment). The decision in "Petukhov v. Ukraine" No. 2 [5] became a key one, as it identified a systemic problem of the impossibility of applying Article 82 of the Criminal Code of Ukraine [10].

Notably, the court in its decision focuses on reforming the institution of clemency, since reporting on the decision taken to pardon a person is not the responsibility of the President of Ukraine [19]. Filing an application for clemency is possible only in case of mandatory imprisonment for a term of 20 years. It also considers the analysis of all the circumstances of the criminal case, the harm caused to the victim, internal changes of the convicted person, sincere remorse, etc. The pardon process should be open with the disclosure of information about their condition and considering the opinion of the victim party and involving them in the consideration of the procedure. However, the openness of the pardon procedure process is ensured by considering the international practice and experience of the ECHR in this category of cases. Such a procedure contributes to the observance of human rights and will comply with constitutional norms [10].

However, the author notes that the ECHR has always proceeded from the principle of respect for the sovereignty of the state. Therefore, the state itself can choose measures of a general and individual nature to implement the decision. The main measures are to eliminate gaps in legislation and review the practical

use of norms [11]. It is the prerogative of the legislator to implement this provision, but the Constitutional Court can initiate the application of such measures [20]. The Constitutional Court of Ukraine is an independent body that can interpret the constitutional rights of a person. However, given that the Constitution of Ukraine provides for the same content of rights as the European Convention [3], the interpretation of identical rights by the Constitutional Court of Ukraine and the ECHR cannot differ too much [21].

Consequently, the court focused on the institution of clemency and proposed specific solutions to the problem raised. The Constitutional Court, by its decision, factually introduced the institutions of mitigation of punishment. However, to apply a pardon to a convicted person, it is necessary to consider the qualification of the crime committed and the degree of damage caused, consider the opinion of the head of the institution serving the sentence. Pardoning a person will provide for the application of the principle of the rule of law and humane treatment of the person [18]. The difference in the vision of this problem by the two courts, on the one hand, may create a certain barrier to understanding human rights standards, but, on the other hand, it is the introduction of the above-mentioned institutions to the punishment of life imprisonment that can bring Ukraine closer to European human rights standards regarding the problem under study. Given the current state of the legislation on parole [22] and the replacement of the part of the sentence not served with a more lenient one, life imprisonment will become mitigated from the standpoint of the Convention.

However, there are still some questions about how the result was achieved. The recognition by the Constitutional Court of Ukraine of Articles 81 and 82 of the Criminal Code of Ukraine in the part that they do not allow their application to the penalty of life imprisonment raises certain questions [7]. Articles 81 and 82 of the Criminal Code of Ukraine provide for a different procedural form of review of a court verdict, they also apply to fixed-term sentences, after which a person can be released from punishment or replaced with a more lenient one, determined through the part of the sentence that the person has already served, and this depends on the severity of the offence and the period to which a particular representative is convicted. A different logic applies to life imprisonment. As the legislation of states that have a system of parole (Monaco, Albania, France, etc.) shows [23], a tariff period should be applied, that is, the minimum period that a person must serve [24]. Therefore, this term will apply to all cases, regardless of the term assigned to a particular person.

That is why to bring the legislation in line with the decision of the Constitutional Court of Ukraine, it is necessary to include in the Criminal Code of Ukraine new articles "Parole from serving life imprisonment" and "Replacement of life imprisonment with imprisonment for a certain term" [25].

Conclusions

The provisions of Articles 81 and 82 of the Criminal Code of Ukraine, due to violations of the constitutional rights of those sentenced to life imprisonment, were declared unconstitutional by the decision of the Constitutional Court of Ukraine. It is necessary to amend specific legislative acts that will provide for a reduction in the sentence of life imprisonment to address the gap in the legislation. The judicial system notes that such norms are not a motivational moment for convicts, that is, they will not contribute to correction. In the future, a person will never be able to atone for a crime without the possibility of reviewing the court verdict, and the greatest punishment will be the length of their life.

The European Convention on Human Rights provides for measures to apply Articles 81 and 82 of the Criminal Code of Ukraine as a mandatory factor in the correctional field. Council of Europe countries have a special legal procedure that allows life imprisonment after serving a certain term to be replaced with parole.

In Ukraine, there is a specific pardon procedure that is applied to convicts to reduce the sentence to 25 years or completely release them from imprisonment. This institution provides an opportunity to bring Ukraine closer to European standards and correct the situation of violation of the rights of convicts provided for in the convention. However, to mitigate the sentence of convicted persons regarding the application of Articles 81 and 82 of the Criminal Code of Ukraine, it is necessary to consider the severity of the crime, the behavioural nature of serving the sentence, and other factors that indicate the correction of the person. Life imprisonment has a different specificity, which is provided for by a certain minimum term of punishment, after which it is possible to review and commute the sentence. Consequently, it is recommended to introduce amendments to the criminal legislation that will provide for the possibility of applying for parole or replacing the sentence in a more favourable way with those sentenced to life imprisonment, without violating constitutional rights and the provisions of the Convention. In the future, the subject raised can be investigated by analysing the provision of the act on the clemency of the Criminal Code of Ukraine on the possibility of reducing the sentence of life imprisonment to at least 25 years in prison.

References

- [1] Criminal Code of Ukraine. (2002, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.
- [2] European Convention on Human Rights. (1950, November). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.
- [3] Buniak, V.S. (2020). *European convention on human rights and criminal law*. Kyiv: Jurinkom Inter.

- [4] Judgment of the European Court of Human Rights in Case of Vinter and others v. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10). (2013, July). Retrieved from <https://hudoc.echr.coe.int/rus?i=001-122664>.
- [5] Judgment of the European Court of Human Rights in Case of Petukhov v. Ukraine (No. 2) (Application No. 41216/13). (2019, March). Retrieved from <https://hudoc.echr.coe.int/rus?i=001-191703>.
- [6] Decision of the Second Senate of the Constitutional Court of Ukraine in the case of the constitutional complaints of Dmytro Volodymyrovych Krupka regarding the conformity of the first part of Article 81, the first part of Article 82 of the Criminal Code of Ukraine, of Volodymyr Volodymyrovych Kostin, Oleksandr Stepanovych Melnychenko regarding the conformity of the first part of the Constitution of Ukraine (constitutionality) Article 82 of the Criminal Code of Ukraine and on the constitutional complaint of Viktor Ivanovych Hugin regarding the conformity of the first part of Article 81 of the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality) (the case of reviewing the sentence of a person sentenced to life imprisonment) No. 6-p(II)/2021. (2021, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/v006p710-21#Text>.
- [7] Nastasyak, O. (2015). Issues relating to the application of articles 81 and 82 of the Ukrainian Criminal Code to persons serving punishment in the form of liberty restraint. *Scientific Journal of the National Academy of the Prosecutor's Office of Ukraine*, 4, 105-113.
- [8] Kaznacheieva, D.V. (2021). Some controversial issues of parole from serving a sentence. *Bulletin of the Criminological Association of Ukraine*, 1, 187-194.
- [9] Horokh, O.P. (2019). *Release from punishment and from the service of sentence under the Criminal Code of Ukraine* (Doctoral thesis, National Academy of Sciences of Ukraine Institute of the State and Law named after V. M. Koretsky, Kyiv, Ukraine).
- [10] Yakovets, I.S., & Avtukhov, K.A. (2016). Scientific position. *Kharkiv Human Rights Group*. Retrieved from <https://khpg.org/1456258046>.
- [11] Law of Ukraine, No. 3477-IV "On the Implementation of Decisions and Application of the Case Law of the European Court of Human Rights". (2006, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/3477-15#Text>.
- [12] Novak, A. (2017). *Comparative executive clemency: The constitutional pardon power and the prerogative of mercy in global perspective*. Verlag: Taylor & Francis Inc.
- [13] Minow, M. (2019). Do alternative justice mechanisms deserve recognition in international criminal law?: Truth commissions, amnesties, and complementarity at the international criminal court. *Harvard International Law Journal*, 60(1), 1-46.
- [14] Kryklyvets, D.Ye., Kerniakevych-Tanasiichuk, Yu.V., Fidria, Yu.O., Muzychuk, K.S., & Sasko, O.I. (2021). The process of pardoning those sentenced to life sentences and long terms of imprisonment as a criterion for increasing the liberality of the judicial system. *Journal of the National Academy of Legal Sciences of Ukraine*, 28(2), 277-287. doi: 10.37635/jnalsu.28(2).2021.277-287.
- [15] Tournier, P.V. (2004). Systems of conditional release (parole) in the member states of the Council of Europe. *Champ Pénal*, 1. Retrieved from <https://journals.openedition.org/champpenal/378>.
- [16] The Constitutional Court of Ukraine obliged the Verkhovna Rada to amend the Criminal Code. (2021). Retrieved from https://galinfo.com.ua/news/ksu_zobovyazav_radu_vnesty_zminy_do_kryminalnogo_kodeksu_372184.html.
- [17] Recommendation Rec(2003)22 of the Committee of Ministers to Member States on Conditional Release (Parole). (2003, September). Retrieved from <https://rm.coe.int/16800ccb5d>.
- [18] Bello Hutt, D. (2022). Rule of law and political representation. *Hague Journal on the Rule of Law*, 14(1), 1-25. doi: 10.1007/s40803-021-00163-5.
- [19] Draft Law of Ukraine No. 11392 "On the Procedure for Granting Pardons by the President of Ukraine". (2012, November). Retrieved from <https://ips.ligazakon.net/document/JF8SG00A?an=3>.
- [20] Togochynskyi, O.M. (Ed.). (2021). *Current issues of theory and practice in the field of law, education, social and behavioral sciences – 2020: Materials of the international scientific and practical conference* (Vol. 2). Chernihiv: Academy of the State Penitentiary Service.
- [21] Puzyriov, M.S. (2018). Foreign experience of applying release from serving a punishment in the form of deprivation of liberty for a fixed term and perspectives for its implementation in Ukraine. *Actual Problems of National Jurisprudence*, 6(Vol. 1), 162-165.
- [22] Wiggins, B., Rhine, E.E., Crye, B., Tu, R., & Mitchell, K.L. (2022). Parole rules in the United States: Conditions of parole in historical perspective, 1956-2020. *Criminal Justice Review*, 47(2), 185-207. doi: 10.1177/07340168211020811.
- [23] Getting out early: Conditional and early release. (2017). In M. Sanders (Ed.), *A jailhouse lawyer's manual* (pp. 1076-1122). Sheridan: Columbia Human Rights Law Review.
- [24] Beckman, L., & Wang, X. (2022). Revisiting the minority threat perspective: Examining the main and interactive effects of segregation on sentencing severity. *Justice Quarterly*, 39(4), 745-771. doi: 10.1080/07418825.2020.1854832.
- [25] The Constitutional Court of Ukraine recognized unconstitutional impossibility of release for those sentenced to life imprisonment. (2021). Retrieved from <https://pravo.ua/ksu-vyznav-nekonstytutsiynym-nemozhlyvist-zviltennia-dlia-zasudzhennykh-do-dovichnoho-pozbavlennia-voli/>.

**Рішення Конституційного Суду України
щодо конституційності статей 81, 82 Кримінального кодексу України
в практичному використанні Європейського суду з прав людини**

Юрій Валерійович Суржик

Київський національний університет імені Тараса Шевченка
01033, вул. Володимирська, 60, м. Київ, Україна

Анотація

Актуальність дослідження полягає в оцінці та аналізі рішення Конституційного Суду України щодо застосування положень статей 81, 82 Кримінального кодексу України, які є неконституційними, оскільки порушують особисті права засуджених на довічне ув'язнення через неможливість їхнього застосування. Ухвалені рішення про неконституційність співмірні з конвенційними вимогами, зумовленими практикою Європейського суду. Мета статті – вивчити особливості рішення Конституційного Суду України щодо відповідності Конституції України статей кримінального законодавства, проаналізувати функціонування інституту помилування в міжнародному досвіді, дослідити практику Європейського суду з прав людини щодо умовно-дострокового звільнення засуджених до довічного позбавлення волі. Методами, за допомогою яких здійснюється дослідження теми, є: порівняльний метод, правопізнавальний метод, логіко-юридичний метод, герменевтичний метод, метод аналізу та інші. Серед результатів статті – визначення факту порушення конституційних прав засуджених через відсутність перспектив звільнення від покарання; характеристика рішення суду щодо допустимості положень кримінального законодавства з огляду на конвенційні вимоги; розкриття порушень прав людини через зіставлення довічного ув'язнення із завершенням життєвого циклу людини; аналіз практики Європейського суду щодо заборони застосування довічного ув'язнення. У роботі також запропоновано шляхи вирішення порушених проблем. Доведено, що рішення Конституційного Суду України задовольняє конвенційні вимоги. Положення, які розкрито в статті, будуть корисними для аналізу судових рішень та створення рекомендацій щодо подолання прогалин кримінального законодавства з метою його узгодження з Конституцією України та дотримання в ньому зобов'язань захищати людські права та гідність.

Ключові слова: міжнародний досвід, умовно-дострокове звільнення, інститут помилування, виправлення засуджених, конвенція



UDC 352: 658.1:341.31(477)

DOI: 10.31548/law2022.03.009

Features of Support of Business Entities by State and Local Authorities under Martial Law in Ukraine

Olena A. Uliutina*

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Article's History:

Abstract

Received: 11.05.2022

Revised: 02.07.2022

Accepted: 11.08.2022

The relevance of the chosen subject is due to the full-scale invasion of Ukraine by the Russian Federation on February 24, 2022, and the introduction of martial law, which has already been extended several times. In this regard, business entities require certain support measures to preserve the economic potential of the state. The purpose of the study is to review the capabilities of local self-government bodies to support small, medium, and large businesses under martial law in Ukraine. The research methods were: comparative, system-structural, and formal-legal. The results of the study determined that the state and local government bodies from the first days of the war took and continue to take organisational and legal measures to support all business entities in conducting their business on the territory of Ukraine under martial law. It was identified that the legislative and executive authorities have adopted a number of legal regulations and bylaws aimed at introducing tax benefits and compensations for the maintenance of internally displaced persons, developing mechanisms for the relocation of those business entities that do not have the physical ability to continue operating in the temporarily occupied territories or in the territories where active military operations were conducted or are being conducted. The substantial involvement of local self-government bodies (on the example of the Kyiv City Council) in the development of measures to support business entities that conduct their commercial activities in the relevant administrative-territorial unit is argued. Thus, the decisions of the Kyiv City Council introduced a number of benefits aimed at: exemption from the payment of rent of communal property by such entities, partial exemption from payment for parking, exemption from land tax and rent for land by those entities (with the list fixed by the decision of the Kyiv council) that use land plots to accommodate their premises, which are used for the needs of national resistance, protection, public order, food security. The materials of this study can be useful in the investigation of the disciplines of "Economic Law", "Municipal Law", "Administrative Law"

Keywords: war, local self-government bodies, taxes, benefits, compensation, business

Suggested Citation:

Uliutina, O.A. (2022). Features of support of business entities by state and local authorities under martial law in Ukraine. *Law. Human. Environment*, 13(3), 72-77.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

Recently, business entities are increasingly suffering from emergency situations that occur in Ukraine. At first, it was the COVID-19 pandemic, which lasted almost three years, and since 2022, there are still military operations on the territory of Ukraine.

On February 24, 2022, the Russian Federation launched a full-scale invasion and launched the first missile strikes on the territory of Ukraine. On the same day, the president of Ukraine issued and submitted for approval by the Verkhovna Rada of Ukraine a Decree on the imposition of martial law in Ukraine for a period of thirty days [1], which was twice extended for the same period and by the latest Decree of the president of Ukraine the term of martial law until August 23, 2022. Due to the introduction of a legal regime of martial law, an exhaustive list of constitutional rights may be limited. In particular, this list includes Art. 42-44 of the Constitution of Ukraine, which guarantee certain labour guarantees for state protection of business activities, the right to work, and guarantees for timely payment of wages for their activities [2].

Considering such factors, there is an objective need for the support of business entities by state authorities and local self-government bodies within the limits of their powers.

The purpose of the study is to conduct a comprehensive analysis of the impact of martial law in Ukraine on business activities and examine the implemented measures to support business by state and local authorities.

The analysis of recent papers and studies confirms the relevance of the chosen subject because comprehensive investigations of the mechanism of support for business entities by state and local authorities have not yet been performed. However, the papers that analysed certain issues of support for business entities by state and local authorities are notable. In particular, the study of Hiromi Masuda, Shun Kawakubo, Mahesti Okitasari, Kanako Morita examines how local authorities have promoted partnerships to achieve Sustainable Development Goals, especially partnerships with the private sector. The study analyses the activities of mediation entities between businesses and local authorities. It is stated that intermediaries have increased the percentage of trust of business entities in local self-government bodies [3]. Closer to the chosen subject is the work of Chia-Chien Chang [4], in which the researcher investigated the impact of war and war financing on the state's tax system. The author conducted a comparative analysis of United States military funding during the Korean and Vietnam wars. Ultimately, claiming that public authorities can successfully introduce progressive taxation and reduce non-military spending to pay for the war. Quite a large number of studies consider the support of business entities in the context of the COVID-19 pandemic because like the war, in this case, the pandemic has become a driving force that has dealt a blow to the activities of business entities. Thus, H. Jia,

S. Zhang, R. Xu, Q. Zhang, and B. Guo investigated the impact of the pandemic on small and medium-sized businesses and argued for the need to introduce substantial tax benefits for such businesses. They determined that small and medium-sized businesses play an important role in the economic development of the state. Small and medium-sized businesses have the typical characteristics of "five, six, seven, eight, nine", that is, they account for over 50% of national tax revenues, over 60% of GDP, over 70% of technological innovation achievements, over 80% of employed, and over 90% of the number of enterprises [5]. The work of Anna Kosieradzka and Justyna Smagowicz [6], also examines the impact of the pandemic on the possibility of doing business in the state and the direct dependence of support for state authorities and local self-government on the further activities of business entities in difficult times.

The scientific significance of this study lies in the fact that for the first time a comprehensive analysis of the main measures of support for business entities by state and local authorities has been conducted since the introduction of martial law on the territory of Ukraine.

Materials and Methods

The study can be divided into two consecutive stages.

Thus, in the first stage, the general impact of the introduction of martial law on the territory of Ukraine on the activities of business entities was investigated. The main regulations of state authorities on supporting business entities in war conditions are analysed.

In the second stage, an analysis of the support of business entities by local self-government bodies (on the example of the capital of Ukraine – Kyiv) in war conditions is conducted. The study analyses the decisions of the Kyiv City Council regarding the support of businesses operating in the city.

In the third stage, conclusions are drawn on the means of supporting the business by state and local government bodies under martial law in Ukraine.

In the process of investigating the main means of supporting the business by state and local authorities in the context of a full-scale invasion of the Russian Federation and military aggression, a set of general scientific and special legal methods was used. In particular, using the comparative method, the impact of martial law on the implementation of commercial activities by business entities was analysed. Using the system-structural method, the main regulatory and bylaws on supporting business entities under martial law by state and local authorities were analysed. The formal legal method was used in the development of legal provisions concerning the introduction of martial law on the territory of Ukraine.

During the analysis of business support tools under martial law, a number of legal regulations and by laws of Ukraine were used. In particular: the Constitution of Ukraine [2], Presidential Decree No. 64/2022 [1], Law

of Ukraine No. 2118-IX [7], Law of Ukraine No. 2115-IX [8], Law of Ukraine No. 2120-IX [9], Resolution of the Cabinet of Ministers of Ukraine No. 331[10], Decision of the Kyiv City Council No. 4551/4592 [11].

Results and Discussion

From the first days of the war, being in a state of shock, most business entities are forced to temporarily stop their activities, to preserve their own business and the lives and health of their employees.

The economic front of the state during the war is one of the important aspects, ensuring the activities of which allows filling the national and local budgets.

The war caused damage to almost every operating business in Ukraine, thereby causing additional losses of hundreds of billions of dollars. Increasing the level of business development capacity in Ukraine is a key factor in strengthening the economic stability and independence of the state, which can support the economic rear of Ukraine and resist the aggressor.

As the Chairman of the Budget Committee of the Verkhovna Rada rightly notes, it is the restart of the economic space in wartime that should become one of the main goals of the state, because this will contribute to the restoration of the domestic market, increase the financial support of state and local budgets, create new or preserve existing jobs, and encourage citizens who have left to return to Ukraine [12].

In connection with the understanding of the difficult situation in which business entities find themselves, and to ensure their activities, the legislative body of Ukraine adopted a number of necessary legislative acts that provide for the support of business in war conditions.

In particular, one of the first legislative acts that was adopted in the first days of the war was the Law of Ukraine "On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine Concerning the Peculiarities of Taxation and Reporting During Martial Law" [7], which provides for the suspension of reporting deadlines and tax audits. In particular, the key features of this regulation are the following provisions: persons may be exempt from liability (financial, administrative) if during the period of martial law they do not have the physical ability to pay mandatory payments (taxes and fees) without delay; activities related to the provision of charitable assistance for the Armed Forces of Ukraine, Territorial Defense Forces, civil protection forces, or medical institutions are not taxed; socially substantial food, medical and medicinal products, and means determined by the Cabinet of Ministers of Ukraine are exempt from import duties; business entities that do not have the ability to use registrars for settlement operations are also exempt from liability [7].

According to the Law of Ukraine "On the Protection of the Interests of the Subjects of Reporting and Other Documents During Martial Law or State of War" [8], it is stipulated that during the period of martial law and within three months after the end or cancellation of

martial law, business entities cannot be subject to criminal or administrative liability for failure to submit all types of reports. Such reporting documents must be submitted within six months after the end or lifting of martial law on the territory of Ukraine [8].

The so-called tax incentives for business during the war are provided for by the Law of Ukraine "On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine Concerning the Effect of Norms for the Period of Martial Law" [9] (hereinafter – the Law of Ukraine No. 2120).

According to the Law of Ukraine No. 2120, the following changes were introduced: for the period of martial law, not only sole proprietors who were on simplified tax systems but also large enterprises can pay a single tax. The Law of Ukraine No. 2120 increased the income limits for the use of a single tax from 10 million to 10 billion. Such concessions gave more enterprises the opportunity to reduce the tax burden during martial law in Ukraine and maintain their activities in general. In addition, in accordance with this law, such business entities got lifted restrictions on the number of employees and types of activities (with the exception of economic activities related to gambling business or the sale of excise goods). Some features of calculating certain mandatory payments (taxes and fees) under martial law were also identified. This applies to the single social contribution, land payments, environmental tax, etc. In addition, the value-added tax rate was reduced to 7% and the fuel excise tax was exempted. The latest innovation, which is also aimed at reducing the tax burden, was the release of the consumer from liability to the lender in case of late fulfilment of obligations under the concluded consumer lending agreement, the restriction of monthly remuneration to civil servants in the amount of ten wages, and exemption from taxation of personal income tax assistance to persons affected by military operations on the territory of Ukraine [9].

Despite the fact that part of the Ukrainian business in the near future cannot resume its activities in certain territories of Ukraine that are temporarily occupied and where active military operations were conducted or are being conducted, the Cabinet of Ministers of Ukraine has put into effect the "programme on temporary relocation of enterprises from the affected regions". In accordance with the provisions of this programme, enterprises that have the opportunity and plan to move to safer regions of Ukraine will be provided with assistance in finding places to establish their production facilities, and transporting their personnel, or finding new employees. Thus, the programme is focused on preserving the entire labour and production potential of Ukraine to move the activities of business entities from the more dangerous, temporarily occupied territories of Ukraine to safer ones. Such enterprises applying for the nearest relocation should be provided with conditions for free relocation to a certain place of relocation [13].

In addition, within the framework of this study, it is necessary to mention the compensation to employers for salary costs for employed displaced persons (hereinafter referred to as IDPs), which is provided for by the resolution of the Cabinet of Ministers of Ukraine of 03/20/2022 No. 331 "On Approval of the Procedure for Providing the Employer with Compensation for Labor Costs for Employment of Internally Displaced Persons as a Result of Hostilities During Martial Law in Ukraine" [10]. Thus, in accordance with the provisions of this resolution, a certain stable amount of money was determined, which is provided every month to an employer who has employed an internally displaced person. Therewith, it is a mandatory requirement that such an employer pays the SSC (single social contribution) during the period of martial law, and within 30 days after its cancellation or termination. However, such payments for the employer may not exceed 2 months from the date of official employment of an internally displaced person [10]. The employer can submit an application through the portal "Diia" or personally visit the employment centre to submit an application to receive such assistance. Therewith, compensation is provided to the employer if the relevant conditions are met, namely: the employer submitted reports for the 4th quarter of 2021; the employer is a payer of the SSC (single social contribution) for social insurance [10].

The above-mentioned normative legal regulations and bylaws indicate substantial support by state authorities for business entities during martial law to preserve the economy in general and fill the state budget of Ukraine.

In addition to state authorities, local self-government bodies took an active part in supporting the activities of business entities in war conditions.

Thus, the Kyiv City Council is a local self-government body in the capital of Ukraine. In particular, according to the decision of the Kyiv City Council No. 2102-IX [11], a number of benefits are provided for the activities of business entities of the city of Kyiv. Business entities that remain and continue their activities in the capital during the period of martial law are exempt from paying rent for the communal property that they rent. In addition, it is determined that if the tenant does not have the opportunity to use communal property, due to objective reasons (for example, its damage as a result of military operations on the territory of Kyiv), the fee for such property is one hryvnia, and the amount of share involvement for such entities is 50% of the previously established amount. In addition, public catering establishments that have summer terraces also have the opportunity to pay a symbolic one hryvnia for such an attachment. As for business entities that provide advertising services, they are exempt from paying for the right to temporarily use places where outdoor advertising tools are placed. The latest innovation was that owners/users of automobiles or other vehicles were exempt from paying for the placement of

their vehicles on sites provided by the municipal enterprise "Kyivtransparkservice" [11].

On May 14, 2022, the decision of the Kyiv City Council No. 4579/4620 was adopted, which expanded the list of business entities that will enjoy benefits. In particular, a number of business entities that occupy and use land plots to accommodate their premises, which are used for the needs of national resistance, protection, ensuring public order, ensuring food security, etc., were temporarily exempt from paying land tax and rent [14].

Thus, it is possible to summarise that local self-government bodies, feeling responsible for preserving the business that operates on their administrative territory, try to support Ukrainian business by all possible and necessary legal and organisational means, providing them with tax benefits at the local level, and exempting it from paying certain local fees.

The martial law imposed in Ukraine has a substantial negative impact on the economic potential of the state. Analysing the experience of Israel, which constantly suffers from military conflicts and exists in conditions of a constant military threat, it is possible to examine the positive experience of this state in supporting businesses, which from time to time also suffer from the consequences of war. Thus, Israeli state authorities primarily support companies, both small and medium-sized, engaged in the production of the country's defence support, including those focused on export production. Thus, the state provides two fronts at once: the military, because it is always ready for any military conflicts, and the economic – medium and large businesses for the production of weapons and military equipment constantly increase Israel's GDP [15]. Although, the losses for businesses in Israel are much less than the losses caused to businesses in Ukraine for the period from 2014 to 2022. Therefore, during the post-war reconstruction period, Ukrainian state authorities need to consider the possibility of developing mechanisms to support enterprises engaged in the production of weapons and military equipment. Also to increase the level of interaction between the business and the state and local self-government bodies need to introduce the institution of intermediaries between business entities and state authorities, local self-government bodies, this will also increase the economic potential of Ukraine.

Conclusions

The conduct of full-scale military operations on the territory of Ukraine has made it necessary to support business entities by the state and local self-government bodies. Since the first days of the war, state and local authorities have adopted legal regulations and bylaws aimed at supporting business entities of all types and forms of ownership to ensure the economic potential of the state. Such measures can be divided into: those aimed at reducing the tax burden; compensating and reimbursing expenses for the maintenance of IDPs;

relocating businesses. In the conditions of war, a number of small and medium-sized businesses as of mid-2022 effectively moved from the territories of Kherson, Mykolaiv, Donetsk, and Luhansk regions to the western regions of Ukraine and continue to replenish local and national budgets of Ukraine, thus ensuring the economic front of confrontation with the military aggression of a neighbouring state.

In addition to state authorities, active measures to support business entities are organised by local self-government bodies within the limits of their powers. Thus,

analysing the Kyiv City Council as a local self-government body, it is possible to note many counter-steps for business entities that conduct their commercial activities on the territory of the city of Kyiv. This applies to the exemption from rent for communal property, free parking, exemption from land rent for some enterprises, etc.

In the post-war period, it is advisable to consider the possibility of creating an institution of intermediaries between business entities and state and local authorities, focus on supporting businesses engaged in the production of weapons and military equipment.

References

- [1] Decree of the President of Ukraine No. 64/2022 "On the Imposition of Martial Law in Ukraine". (2022, February). Retrieved from <https://www.president.gov.ua/documents/642022-41397>.
- [2] Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.
- [3] Masuda, H., Kawakubo, Sh., Okitasari, M., & Morita, K. (2022). Exploring the role of local governments as intermediaries to facilitate partnerships for the sustainable development goals. *Sustainable Cities and Society*, 82, 103883. doi: 10.1016/j.scs.2022.103883.
- [4] Chang, C.-C. (2020). Economic inequality, war finance and the pursuit of tax fairness. *Journal of Human Values*, 26(2), 114-132. doi: 10.1177/0971685820916713.
- [5] Jia, H., Zhang, S., Xu, R., Zhang, Q., & Guo, B. (2022). A literature study of the impact of COVID-19 pandemic on the financing of SMEs in China. *Journal of Financial Risk Management*, 11(2), 311-322. doi: 10.4236/jfrm.2022.112016.
- [6] Kosieradzka, A., Smagowicz, Ju., & Szwed, C. (2022). Ensuring the business continuity of production companies in the conditions of COVID-19 pandemic in Poland – Applied measures analysis. *International Journal of Disaster Risk Reduction*, 72. doi: 10.1016/j.ijdrr.2022.102863.
- [7] Law of Ukraine No. 2118-IX "On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine Concerning the Peculiarities of Taxation and Reporting During Martial Law". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2118-20#Text>.
- [8] Law of Ukraine No. 2115-IX "On the Protection of the Interests of the Subjects of Reporting and Other Documents During Martial Law or State of War". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2115-20#Text>.
- [9] Law of Ukraine No. 2120-IX "On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine Concerning the Effect of Norms for the Period of Martial Law". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2120-20#Text>.
- [10] Resolution of the Cabinet of Ministers of Ukraine No. 331 "On Approval of the Procedure for Providing the Employer with Compensation for Labor Costs for Employment of Internally Displaced Persons as a Result of Hostilities During Martial Law in Ukraine". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/331-2022-н#Text>.
- [11] Decision of the Kyiv City Council No. 4551/4592 "On Some Issues of Comprehensive Support of Economic Entities of the City of Kyiv During Martial Law, Introduced by the Decree of the President of Ukraine of February 24, 2022 No. 64/2022 "On Martial Law in Ukraine", Approved by the Law of Ukraine "On Approval of the Decree of the President of Ukraine" Imposition of Martial Law in Ukraine" of February 24, 2022 No. 2102-IX". (2022, March). Retrieved from <https://kmr.gov.ua/sites/default/files/4551-4592.pdf>.
- [12] Verkhovna Rada of Ukraine. (2022). *The business relocation program is an effective tool for creating a reliable economic rear, – said the Chairman of the Budget Committee Yuri Aristov*. Retrieved from <https://www.rada.gov.ua/news/razom/223016.html>.
- [13] Ministry of Economy of Ukraine. (2022). *The program on temporary relocation of enterprises from the affected regions is underway*. Retrieved from <https://www.kmu.gov.ua/news/trivaye-programa-shchodotimchasovogo-peremishchennya-pidpriyemstv-z-postrazhdalih-regioniv>.
- [14] Decision of the Kyiv City Council No. 4579/4620 "On Amendments to the Decision of the Kyiv City Council of March 30, 2022 No. 4551/4592 'On Some Issues of Comprehensive Support of Business Entities of the City of Kyiv During Martial Law, Introduced by the Decree of the President of Ukraine of February 24, 2022 No. 64/2022 'On Imposition of Martial Law in Ukraine', Approved by the Law of Ukraine 'On Approval of the Decree of the President of Ukraine 'On Martial Law in Ukraine' of February 24, 2022 No. 2102-IX". (2022, May). Retrieved from https://kmr.gov.ua/sites/default/files/4579-4620_0.pdf.
- [15] Becker, M. (2014). Israel's war business. *Der Spiegel*. Retrieved from <https://www.spiegel.de/international/world/defense-industry-the-business-of-war-in-israel-a-988245.html>.

Особливості підтримки суб'єктів господарювання органами державної та місцевої влади в умовах воєнного стану в Україні

Олена Анатоліївна Улютіна

Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

Актуальність обраної тематики зумовлено повномасштабним вторгненням 24 лютого 2022 р. російської федерації на територію України та запровадженням воєнного стану, що вже був продовжений кілька разів. У зв'язку з цим суб'єкти господарювання потребують певних заходів підтримки задля збереження економічного потенціалу нашої держави. Метою дослідження виступає огляд можливостей органів місцевого самоврядування щодо підтримки малого, середнього та великого бізнесу в умовах воєнного стану в Україні. Методами дослідження стали: компаративний, системно-структурний та формально-юридичний. Результатами дослідження було встановлено, що органи державної влади та місцевого самоврядування з перших днів війни вживали та продовжують вживати організаційно-правових заходів щодо підтримки всіх суб'єктів господарювання у веденні їхнього бізнесу на території України в умовах воєнного стану. З'ясовано, що органами законодавчої та виконавчої влади ухвалено низку нормативно-правових та підзаконних нормативно-правових актів, що спрямовані на впровадження податкових пільг, компенсацій та відшкодувань на утримання внутрішньо-переміщених осіб, напрацювання механізмів для релокації тих суб'єктів господарювання, що не мають фізичної можливості продовжувати здійснювати свою діяльність на тимчасово окупованих територіях чи на територіях, де велися або ведуться активні бойові дії. Аргументовано значну участь органів місцевого самоврядування (на прикладі Київської міської ради) у розробленні заходів з підтримки суб'єктів господарювання, що здійснюють свою комерційну діяльність на відповідній адміністративно-територіальній одиниці. Так, рішеннями Київської міської ради було запроваджено ряд пільг, що спрямовані на: звільнення від сплати оренди комунального майна такими суб'єктами, часткове звільнення від сплати за паркування, звільнення від земельного податку та орендної плати за землю тими суб'єктами (із закріпленим Рішенням Київської ради переліком), що використовують земельні ділянки для розміщення своїх приміщень, які використовуються для потреб національного спротиву, охорони, забезпечення громадського порядку, забезпечення продовольчої безпеки. Матеріали цього дослідження можуть бути корисними під час вивчення дисциплін «Господарське право», «Муніципальне право», «Адміністративне право»

Ключові слова: війна, органи місцевого самоврядування, податки, пільги, компенсація, бізнес



UDC 343.6:343.85(477)

DOI: 10.31548/law2022.03.010

Features of the “Blue Cards” System as an Effective Mechanism for Preventing Domestic Violence in Ukraine (Based on the Experience of the Republic of Poland)

Olena S. Yara*

National University of Life and Environmental Sciences of Ukraine
03041, 15 Heroiv Oborony Str., Kyiv, Ukraine

Article's History:

Received: 29.04.022
Revised: 12.07.2022
Accepted: 11.08.2022

Abstract

The relevance of the subject is due to the Draft Law of Ukraine “On Amendments to the Law of Ukraine ‘On Prevention and Counteraction to Domestic Violence’ on Improving the Mechanism of Prevention and Counteraction to Domestic Violence” submitted to the Verkhovna Rada of Ukraine in September 2021, which provides for the introduction of a “blue cards” system in Ukraine similar to that in the Republic of Poland. The purpose of the study is to review promising opportunities for introducing foreign experience in preventing domestic violence into Ukrainian legislation. The research methods were: comparative legal, system, analysis, and synthesis. The results of the study determined that criminal liability for committing domestic violence in Ukraine and the Republic of Poland is characterised by the same degree of punishment, namely, it provides for imprisonment for a certain period of time. It is argued that Ukraine has been actively working in recent years to adopt positive foreign experience in preventing and countering domestic violence. It was identified that the draft Law of Ukraine “On Prevention and Counteraction to Domestic Violence” on improving the mechanism for preventing and countering domestic violence confirms Ukraine’s focus on effectively countering any manifestations of domestic violence. It is concluded that the adoption of the draft law is important and relevant in the current conditions, but simultaneously the need for changes is justified, including regarding the powers of subjects of countering domestic violence – representatives of the National Police of Ukraine. The practical value of the study lies in the fact that its results can serve as recommendations for improving the current legislation in terms of preventing domestic violence

Keywords: domestic violence, gender inequality, preventive measures, crimes against the family

Suggested Citation:

Yara, O.S. (2022). Features of the “blue cards” system as an effective mechanism for preventing domestic violence in Ukraine (based on the experience of the Republic of Poland). *Law. Human. Environment*, 13(3), 78-83.



*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

Introduction

Domestic violence, in any form radically affects the growth of society in general. This problem is global in all societies, regardless of class, culture, economy, geography, religion, ethnic, or social origin, etc. Not only does it make headlines, but it is also deeply rooted in the psyche of both the victims and the perpetrators themselves, and has a serious impact on the health and mental state of the victim and others in the family. Domestic violence is one of the most acute subjects for discussion [1, p. 3].

The issue of domestic violence has recently become even more relevant, especially after the signing in Istanbul of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (hereinafter referred to as the Istanbul Convention) [2], which is open for signature and ratification by other states. Ukraine is also one of the signatories of the Istanbul Convention, although as of mid-2022 it has not yet ratified it.

Until 2017, the Ukrainian Criminal Code of Ukraine (hereinafter referred to as the CC of Ukraine) did not contain norms that provided for criminal liability for committing domestic violence [3]. Only after adoption in 2017, the Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine in Order to Implement the Provisions of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence" [4] domestic violence was criminalised in the new Art. 128-1, which supplemented the CC of Ukraine [3].

Considering such legislative innovations, the issues of preventing and countering domestic violence are becoming more relevant every year and require separate investigations.

Ukraine, as a state seeking to become a full-fledged member of the European Union, should use the positive foreign experience to improve its legislation. Investigation of possible mechanisms for preventing and countering domestic violence is no exception. Therefore, given that in 2021 the Verkhovna Rada of Ukraine registered a draft law [5], which provides for the introduction of a new mechanism for preventing domestic violence based on the experience of the Republic of Poland, there is an objective need for such an analysis.

The purpose of the study is a comprehensive analysis of mechanisms for preventing and countering domestic violence in the Republic of Poland, and prospects for applying the positive experience to Ukrainian legislation.

The analysis of recent studies and papers indicates the relevance of scientific consideration of issues related to mechanisms for preventing domestic violence. In particular, the paper by S. Palit, & I. Sarangi, which analysed individual indicators of domestic violence, and the gender distribution for identified crimes related to domestic violence are notable [1]. The study by A. Zurnetti, & N. Mulyati reviewed, how the usual

criminal law policy of Minangkabau can help prevent and resolve domestic violence through a restorative justice approach [6].

Andi Muhammad Aswin Anas, Andi Suci Wahyuni, Wiwie Heryani, Mutiah Wenda Junior, and Arini Nur Anissa highlight the impact of the COVID-19 pandemic on the increase in cases of domestic violence and also suggested paying attention to other forms of violence in families [7].

Tongrak Jitbantao, Jamaree Prasunin investigated the causal factors of domestic violence against children and youth in the Thai province of Chiang Rai [8]. T. Stoianova, L. Ostrovska, & G. Tripulskyir considered a specific mechanism for preventing domestic violence. They noted that such a mechanism for preventing violence at the level of interaction should be implemented at the level of the state, public organisations, and direct special means, and also proposed solutions, from amendments to legislation to the redistribution of state and public forces to solve the problem of domestic violence [9].

Materials and Methods

The study was conducted in three consecutive stages

In the first stage, an analysis of the generalising understanding of the essence of domestic violence and the violence in families in Ukraine and the Republic of Poland was conducted. It was identified that the degree of criminal liability for committing domestic violence in Ukraine and the Republic of Poland is almost the same and provides for imprisonment for a certain period.

In the second stage, the essence of the "blue cards" system in the Republic of Poland was characterised, and the analysis of the submitted Draft Law "On Amendments to the Law of Ukraine 'On prevention and Counteraction to Domestic Violence' on Improving the Mechanism of Prevention and Counteraction to Domestic Violence" [5] in September 2021 was conducted for its compliance with the main purpose of adoption – prevention and counteraction to domestic violence.

In the third stage, comprehensive conclusions were drawn about the need to adopt the Law of Ukraine "On Prevention and Counteraction to Domestic Violence" to improve the mechanism for preventing and countering domestic violence [5] with the need to amend the Law of Ukraine "On the National Police" [10].

In the process of investigating the mechanism of preventing and countering domestic violence in the analysed states, a set of general scientific and special methods was used. In particular, the concept of domestic violence was analysed using general scientific methods of analysis and synthesis. The comparative legal method established similar and distinctive features of preventing domestic violence in Ukraine and the Republic of Poland. A draft law submitted to the Verkhovna Rada of Ukraine that considers the positive experience of the Republic of Poland was investigated using a special legal method.

In the course of the analysis of mechanisms for preventing and countering domestic violence, a number of normative regulations of Ukrainian and Polish legislation were used, in particular: the CC of Ukraine [3], The Law of Ukraine "On Prevention and Counteraction to Domestic Violence" [11], the Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine in Order to Implement the Provisions of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence" [4], The Law of Ukraine "On the National Police" [10], the Criminal Code of the Republic of Poland [12], Law of the Republic of Poland on countering crimes in the family [13].

Results and Discussion

First, it is necessary to consider the general criminal and legal counteraction to domestic violence in the Republic of Poland and Ukraine.

Criminality of domestic violence in the Republic of Poland was initiated in 1997. Thus, Art. 207 of the Criminal Code of the Republic of Poland provides that a person who causes physical or psychological harm to their close person, or a person with whom they are in a close or related relationship can be punished. The penalty can be in the form of imprisonment for a period of three months to five years. In cases where such a crime is committed with particular cruelty, the offender may be punished by restriction of liberty for up to ten years, and if the victim as a result of such acts tried to commit suicide, the guilty person may be imprisoned for a period of 2 to 12 years [12].

In addition to the Criminal Code in the Republic of Poland, a special Law on Countering Crimes in the Family was adopted in June 2010 [13]. As for the main provisions of this regulatory document, it first introduced a special system of interaction of bodies with a common goal of preventing domestic violence. Thus, in each administrative-territorial unit of the Republic of Poland (gmina), an interdisciplinary group was created to prevent and detect all cases of domestic violence. This group must include representatives of the municipal commission (persons involved in solving problems related to alcohol and narcotic drugs) and representatives of social protection of the population in communities. The importance of such interdisciplinary groups lies in the fact that they take measures to organise joint assistance for two parties to domestic violence. It should also be noted that this law defines special measures aimed at further preventing the continuation of domestic violence. Thus, the main measure is the possibility of eviction of a person who commits violence from the premises in which the victim is located. An important condition here is that the interdisciplinary group must have really good reasons to believe that the perpetrator may commit violence again. Such a decision must be made jointly with law enforcement officers and relevant medical professionals. In addition, this legislative

act defines separate educational programmes for further work both with persons who commit domestic violence and with persons who have suffered from such acts [14, p. 102].

As for Ukrainian legislation and criminal law counteraction to domestic violence, similar to Polish criminal science, Ukraine has also established, although relatively recently, criminal punishment for committing domestic violence. Therewith, the Ukrainian legislator rather broadly interprets domestic violence, which is defined as a criminal offence, according to Art. 126-1 of the CC of Ukraine. In particular, Ukrainian legislation stipulates that cases of economic violence will also fall under domestic violence, which is different from the legislation of the state under study. Therewith, if the Polish legislator has a rather substantial limit on imprisonment – 12 years for the guilty person, then Ukrainian legislation defines the highest limit – as 5 years of imprisonment [3].

Similar to the Polish Law on Countering Crimes in the family in Ukraine, a specialised special legislative act was adopted in 2017 – the Law of Ukraine "On Prevention and Counteraction to Domestic Violence". This legislative act defined new approaches to organising the activities of special bodies to counteract identified cases of domestic violence. In particular, a rather expanded definition of the concept of domestic violence was again given, which is similar to that given in the CC of Ukraine [11].

Thus, it is possible to note a certain similarity in the legislation of Ukraine and the Republic of Poland regarding the regulation of activities to prevent and counteract domestic violence, because they determine the punishability of an act in accordance with their criminal codified acts, and also have special specialised legislative acts that describe in detail the system of preventing and countering domestic violence.

The Ukrainian legislator constantly analyses the positive foreign experience, which can be used to improve the current legislation. One such example is the Draft Law of Ukraine No. 6074 of 09/20/2021 [5]. This legislative act concerns the introduction of a "blue cards" mechanism, which shows positive results in the application of criminal and legal counteraction to domestic violence in the Republic of Poland.

As noted earlier, domestic violence was criminalised in the Republic of Poland in 1997. A year later, the so-called system of preventing and countering domestic violence was introduced – the "blue cards" system. Such a system has identified new mechanisms for the possibility of intervention of individual bodies in family relations, where domestic violence has been identified. According to this procedure, a police officer, in case of detection of domestic violence, begins the "blue cards" procedure by filling out form "A", in which they note the circumstances of the case. In addition, the police officer who conducts the proceedings or another local police officer explains to the victim possible further actions

and provides them with information for victims of domestic violence (the “Blue Card – B” form). There are also “Blue Card – C” and “Blue Card – D” forms. Such cards are filled in by members of the previously mentioned interdisciplinary commission on the victim and abuser. Thus, accordingly, the “Blue Card – C” form is filled out in relation to a potential victim of domestic violence, and also describes a special individual plan to help such a person. The “Blue Card – D” form concerns the suspect and contains information about the situation and relationships in the family that provoke the commission of domestic violence. In addition, it warns about responsibility for a person who has committed domestic violence and justifies the importance of taking part in special training programmes [15, p. 48].

Analysing such a system of preventing domestic violence in the Republic of Poland, it is necessary to highlight several key aspects, namely: first, such a system allows monitoring families in which cases of domestic violence have been detected without a court decision; secondly, there are quite a large number of cases when the blue cards system is a stimulating factor for establishing relations in the family; thirdly, the number of specialists working to resolve the situation in the family allows assessing this situation from different sides [16, p. 302].

It should also be noted that such a procedure is completed in two cases, if the measures provided for in the individual assistance plan have been completely exhausted and this has resulted from reconciliation in the family and the cessation of violence, or if the members of the commission are convinced that it is inappropriate to continue taking such measures. This decision is made by an interdisciplinary team or working group that directly monitors the family with the signs of domestic violence. If domestic violence has not stopped, then “blue cards” are transferred to the prosecutor’s office to bring the offender to criminal responsibility [17].

Analysing the Ukrainian Draft Law on “blue cards”, the National Bar Association of Ukraine after its registration in the Verkhovna Rada of Ukraine considers it appropriate to return the Draft Law for revision. Therewith, the Bar Association generally sees prospects in the need for a more detailed examination of the positive foreign experiences to prevent and counteract cases of domestic violence [18].

Analysing the provisions of the draft Law of Ukraine No. 6074 [5], by making appropriate changes to the Law of Ukraine “On Prevention and Counteraction to Domestic Violence” [11] in the form of a new Art. 28-1, which will concern the procedure of “blue cards”, it is necessary to make changes to the Law of Ukraine “On the National Police” [10]. This is explained by the fact that, according to the proposed wording of the article, *“the ‘blue cards’ procedure is conducted by authorised units of the National Police of Ukraine in the family, where the fact of domestic violence is identified for the purpose of prevention aimed at eliminating violence in a particular*

family and is not related to criminal proceedings”. Therefore, it is necessary to amend the Law of Ukraine “On the National Police” [10], which will contribute to a systematic approach to determining the legal basis for the organisation and activities of police officers, their powers in this area.

T. Narok, analysing this relevant Draft Law of Ukraine, rightly notes that the “blue cards” procedure differs from the one currently in force in Poland. The “blue cards” procedure proposed by the bill is aimed at collecting information about families where domestic violence is committed, and filling out forms with recommendations for helping the abuser (Form “C” is filled out in relation to a person suspected of committing domestic violence, and contains an individual plan of measures to help them). In addition, the adoption of this bill can be regarded as a “step back”, since it actually allows the state to avoid the obligation to bring those responsible for committing domestic violence to justice by conducting so-called work to prevent the violence that has already been committed [17].

In contrast to the thesis mentioned above regarding a step back, it is possible to appeal by the fact that the proposed system in no way allows the state to avoid the obligation to involve the perpetrator because to resolve the further situation that has developed between the offender and the victim, a substantial number of competent authorities are involved, whose powers are an expression of state will. In addition, the end of the blue cards procedure has only two forms: either the measures applied helped to stop domestic violence and prevent such acts in the future, or the measures are ineffective and the person can be prosecuted.

Before directly forming conclusions, it should also be noted that, according to the recommendations of the United Nations, framed in the form of model legislation, there are three main goals that states should focus on when preparing and making appropriate changes to legislation that defines mechanisms for preventing and countering domestic violence, in particular, they should be aimed at: 1) protecting victims of violence; 2) preventing further violence; 3) punishing persons who commit domestic violence [19]. Therefore, each regulatory act concerning amendments to legislation that provides for the prevention and counteraction of domestic violence should primarily concern these three aspects.

Conclusions

Given the recent events in Ukraine, problems related to domestic violence will only spread. Ultimately, the increase in unemployed people, the lack of a sufficient number of jobs, remote and home-based work are the factors that provoke crisis and conflict situations in the family. In this regard, the legislator, state authorities, and other authorised entities should consider the positive foreign experience in the process of implementing reforms in the field of preventing domestic violence in Ukraine.

A positive aspect of the Ukrainian legislator's focus on the international positive experience can be recognised as the submission of the Draft Law of Ukraine "On Prevention and Counteraction to Domestic Violence" to improve the mechanism for preventing and countering domestic violence, which provides for the adoption of the experience of a neighbouring state that pursues an active policy to minimise cases of domestic violence. The blue cards system in the Republic of Poland is the crucial mechanism in preventing domestic violence and the subject of the Draft Law mentioned above.

In general, the Ukrainian legislator defined the basis for the introduction of the blue cards system in the legal regulation similar to the Polish one. As stipulated in Polish legislation, a blue card must contain four forms for a person who commits domestic violence. However, the Ukrainian legislator needs a comprehensive approach

to the adoption of each new draft law. In the course of the study, it was identified that the main subjects that will use the "blue cards" system will be representatives of the National Police of Ukraine. Therefore, when adopting such a bill, the legislator should simultaneously prepare a Draft Law of Ukraine on amendments to the Law of Ukraine "On the National Police", defining additional rights, duties and powers of national police officers in connection to using the blue cards system.

Therefore, it is necessary to emphasise the absolute importance of further investigation of the positive foreign experience in preventing and countering domestic violence. For the Ukrainian legislator, when further finalising the Draft Law of Ukraine No. 6074, it is necessary to consider the experience of the Republic of Poland in terms of the mandatory presence of two more forms.

References

- [1] Palit, S., & Sarangi, I. (2022). A scrutiny of the relation between domestic violence and crime rate among the teenagers. *Journal of Legal, Ethical and Regulatory Issues*, 25(S5). Retrieved from <https://www.abacademies.org/articles/a-scrutiny-of-the-relation-between-family-violence-and-crime-rate-among-the-teenagers-14434.html>.
- [2] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention). (2011, May). Retrieved from <https://rm.coe.int/168008482e>.
- [3] Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/go/2341-14>.
- [4] Law of Ukraine No. 2227-VIII "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine in Order to Implement the Provisions of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence". (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2227-19#Text>.
- [5] Draft Law of Ukraine No. 6074 "On Amendments to the Law of Ukraine 'On prevention and Counteraction to Domestic Violence' on Improving the Mechanism of Prevention and Counteraction to Domestic Violence". (2021, September). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72800.
- [6] Zurnetti, A., & Mulyati, N. (2022). Customary criminal law policy on domestic violence settlement through restorative justice in West Sumatra. *Journal of Legal, Ethical and Regulatory Issues*, 25(S3). Retrieved from <https://www.abacademies.org/articles/customary-criminal-law-policy-on-domestic-violence-settlement-through-restorative-justice-in-west-sumatra-14414.html>.
- [7] Anas, A.M.A., Wahyuni, A.S., Heryani, W., Juniar, M.W., & Annisa, A.N. (2021). Overcoming domestic violence amid the COVID-19 pandemic. *Journal of Legal, Ethical and Regulatory Issues*, 24(6S). Retrieved from <https://www.abacademies.org/articles/overcoming-domestic-violence-amid-the-covid19-pandemic-13728.html>.
- [8] Jitbantao, T., & Prasunin, J. (2021). Causative factors affecting family violence in children and youth. *Journal of Legal, Ethical and Regulatory Issues*, 24(6S). Retrieved from <https://www.abacademies.org/articles/causative-factors-affecting-family-violence-in-children-and-youth-13736.html>.
- [9] Stoianova, T., Ostrovska, L., & Tripulskyir, G. (2020). COVID-19: Pandemic of domestic violence. *Ius Humani. Law Journal*, 9(2), 111-136. doi: 10.31207/ih.v9i2.246.
- [10] Law of Ukraine No. 580-VIII "On the National Police". (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.
- [11] Law of Ukraine No. 2229-VIII "On Prevention and Counteraction to Domestic Violence". (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2229-19#Text>.
- [12] Kodeks karny: Ustawa z dnia 6 czerwca 1997 r. Nr 88 poz. 553. Retrieved from <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf>.
- [13] Ustawa z dnia 10 czerwca 2010 roku o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw. Retrieved from <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20101250842/T/D20100842L.pdf>.
- [14] Halay, A.O. (Ed.). (2014). *International experience in preventing and combating domestic violence*. Kyiv: KNT.
- [15] Zaporozhets, A.V., Labun, A.V., Zabroda, D.G., Bassista, I.V., Drozdova, I.V., Bryzhik, V.O., & Musiyenko, O.M. (Eds.). (2012). *Violence in the family and the activities of internal affairs to overcome it*. Kyiv: OSCE.

- [16] Bondarenko, O.S. (2020). Uniform state register of domestic violence and gender-based violence: Effectiveness evaluation. *Legal Scientific Electronic Journal*, 2, 301-303.
- [17] Association of Women Lawyers of Ukraine "YurFem". (2022). *Possibilities of the "blue cards" procedure in the prevention of domestic violence (overview of bill 6074)*. Retrieved from <http://jurfem.com.ua/mozhlyvosti-procedury-blakytnei-kartky-u-profilaktyci-domashnyoho-nasylstva-ohlyad-zakonoprojektu-6074/>.
- [18] Comments and proposals of the National Association of Advocates of Ukraine to the draft Law of Ukraine "On Amendments to the Law of Ukraine" on Prevention and Counteraction to Domestic Violence "to Improve the mechanism of prevention and counteraction to domestic violence" (Reg. No. 6074 of 20.09.2021). Retrieved from https://unba.org.ua/assets/uploads/d607435157d87c360b70_file.pdf.
- [19] The UN Special Rapporteur on Violence against Women "A Framework for Model legislation on Domestic Violence". (1996, February). Retrieved from <http://hrlibrary.umn.edu/commission/thematic52/53-add2.htm>.

Особливості системи «блакитних карток» як ефективного механізму запобігання домашньому насильству в Україні (на основі досвіду Республіки Польща)

Олена Сергіївна Яра

Національний університет біоресурсів і природокористування України
03041, вул. Героїв Оборони, 15, м. Київ, Україна

Анотація

Актуальність теми зумовлено поданим до Верховної Ради України у вересні 2021 р. проектом Закону України «Про внесення змін до Закону України "Про запобігання та протидію домашньому насильству" щодо вдосконалення механізму запобігання та протидії домашньому насильству», що й передбачає запровадження системи «блакитних карток» в Україні подібно до такої системи в Республіці Польща. Метою дослідження є огляд перспективних можливостей впровадження в українське законодавство зарубіжного досвіду запобігання домашньому насильству. Методами дослідження стали: порівняльно-правовий, системний, аналізу та синтезу. Результатами дослідження встановлено, що кримінальна відповідальність за вчинення домашнього насильства в Україні та Республіці Польща характеризується однаковою мірою покарання, а саме передбачає позбавлення волі на певний строк. Аргументовано, що Україна останніми роками активно працює в напрямі перейняття позитивного зарубіжного досвіду запобігання та протидії домашньому насильству. З'ясовано, що проект Закону України «Про запобігання та протидію домашньому насильству» щодо вдосконалення механізму запобігання та протидії домашньому насильству» підтверджує орієнтованість України на ефективну протидію будь-яким проявам домашнього насильства. Зроблено висновки, що ухвалення законопроекту є важливим та актуальним в умовах сьогодення, водночас обґрунтовано необхідність внесення змін, зокрема й щодо повноважень суб'єктів протидії домашньому насильству – представників Національної поліції України. Практична цінність дослідження полягає в тому, що його результати можуть слугувати рекомендаціями до вдосконалення чинного законодавства в частині запобігання домашньому насильству

Ключові слова: насильство в сім'ї, гендерна нерівність, превентивні заходи, злочини проти сім'ї

ПРАВО. ЛЮДИНА. ДОВКІЛЛЯ

Науково-практичний журнал

Том 13, № 3. 2022

Заснований у 2010 р. Виходить чотири рази на рік

Оригінал-макет видання виготовлено у відділі науково-технічної інформації
Національного університету біоресурсів і природокористування України

Відповідальний редактор:

М. Ковінько

Редагування англomовних текстів:

С. Воровський, К. Касьянов

Комп'ютерна верстка:

К. Сосєдко

Підписано до друку 11 серпня 2022 р. Формат 60*84/8

Умов. друк. арк. 9,9

Наклад 50 прим.

Адреса видавництва:

Національний університет біоресурсів і природокористування України
вул. Героїв Оборони, 10, м. Київ, Україна, 03041

E-mail: info@environmentalscience.com.ua

www: <https://environmentalscience.com.ua/uk>

LAW. HUMAN. ENVIRONMENT

Scientific and Practical Journal

Volume 13, No. 3. 2022

Founded in 2010. Published four times per year

The original layout of the publication is made in the Department of Scientific and Technical Information of National University of Life and Environmental Sciences of Ukraine

Managing Editor:

M. Kovinko

Editing English-Language Texts:

S. Vorovsky, K. Kasianov

Desktop Publishing:

K. Sosiedko

Signed for print of August 11, 2022. Format 60*84/8

Conventional printed pages 9.9

Circulation 50 copies

Editors Office Address:

National University of Life and Environmental Sciences of Ukraine

03041, 15 Heroiv Oborony, Kyiv, Ukraine

E-mail: info@environmentalscience.com.ua

www: <https://environmentalscience.com.ua/en>