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CONTENTS

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Features of Judicial Protection of Environmental Rights of Citizens in the European Court of Human Rights

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Abstract

The research is dedicated to the issue of the opportunity to apply to the European Court of Human Rights for the protection of environmental rights. The relevance of the study is explained by the fact that the global environmental crisis raises the issue of ensuring the human right to a safe environment and its protection. The necessity of conducting a separate study on this issue arose since the Convention for the Protection of Human Rights and Fundamental Freedoms, defining the rights it guarantees, does not separately allocate environmental rights. That is why the question logically emerges: can individuals apply to the European Court of Human Rights to protect a right that is not specifically mentioned in the Convention. The purpose of the study is to explore the legal framework and grounds for applications to the European Court of Human Rights. In the process of the research, legislative acts, international legal acts, and the activities of the European Court of Human Rights, which purpose is to protect, in particular, environmental human rights, were analysed. The methodological foundation of the study was established by the Aristotelian method, methods of analysis and synthesis and comparative legal method. The study explores both general theoretical aspects related to the protection of environmental rights and analyses the practice of courts in protecting environmental rights, particularly at the international level. The study established that the European Court of Human Rights admits applications from individuals for the protection of violated environmental rights, which it considers through the prism of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms – the right to respect for private, family life and the home of individuals. The practical value of the study lies in the fact that the research analyses national and international law and the practice of the European Court of Human Rights and provide conclusions that identify specific problems related to environmental protection activities and proposes specific mechanisms for overcoming them to avoid violations of citizens' environmental rights

Keywords: human rights, environmental pollution, right to respect for private and family life, justice, protection of rights

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Introduction

The imperative, embodied in Article 16 of the Constitution of Ukraine, to guarantee "ecological security and maintenance of ecological equilibrium on the territory of Ukraine, overcoming the consequences of the Chernobyl disaster – the tragedy of planetary scale, preservation of the gene pool of the Ukrainian nation", demonstrates that the issue of ecological rights must be at the centre of the state attention.

Issues connected with the protection of citizens' environmental rights and the protection of the natural environment require significant steps from the Ukrainian authorities to efficiently combat the environmental situation that has developed in Ukraine. The acute environmental crisis in Ukraine is highlighted by the Law of Ukraine "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030" [1].

One of the methods of combating the current situation in the environmental sphere is the appeal of citizens for the protection of their rights in court. However, the judicial system is currently undergoing reform, which results in a shortage of staff and, consequently, lengthy court proceedings, in particular, to protect violated environmental rights. Occasionally, there are cases where no judge is available in court – and citizens are not able to defend their violated rights at all.

However, despite all these problems, the judicial system, in one way or another, copes with the challenges it faces and defends the violated environmental rights of citizens. However, there are cases where citizens turn to the European Court of Human Rights for protection of their rights if they believe that their rights have not been properly protected at the national level.

Considering the relevance of the issue, the scientific community has investigated the environmental protection issues in the practice of the European Court of Human Rights and its impact on the judicial practice in the sphere of environmental rights protection of citizens in Ukraine.

Thus, H. Anisimova and Ie. Kopytsia conducted a study on the role of courts in the protection of environmental rights in the context of the national policy of Ukraine. The study suggests a restructuring of Ukraine's modern judicial system that will ensure the speedy and efficient handling of environmental cases, which should include a reasonable timeframe for consideration of cases and a clear impact of judicial decisions on the further improvement of environmental public policy [2, p. 164-176]. M.V. Krasnova and Yu.A. Krasnova explored the theoretical, legal and practical aspects of the implementation and protection of environmental rights of individuals. Scholars have exposed the foundations that have contributed to the establishment of this institution, identified the mechanisms by which what is outlined in the paper can be implemented and outlined the protection of human legal options in the field of resource use, environmental protection and security in the environmental sphere [3].

The relationship between human rights and environmental protection was established by D. Shelton, who concluded that human rights depend on environmental protection, and environmental protection depends on the exercise of existing human rights [4]. E. Mykhajlova-Stratilati explored the case law of the European Court of Human Rights on environmental issues and access to justice at the level of the mentioned court [5].

The work of Jean-François Brakeland on access to justice in environmental matters at the European Union level cannot be ignored. In his opinion, the European Union law on access to justice in environmental matters would allow the public to better control the implementation of the Union environmental law [6].

K. F. Braig's research on the European Court of Human Rights' jurisprudence on the right to clean water and sanitation is interesting. This study explores the said court's jurisprudence on the right to clean water and sanitation using two methods of interpretation, namely the "living instrument" doctrine and the "practical and efficient" doctrine. The European Court of Human Rights has recognised that a breach of the state's obligation to respect the water right may amount to a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms on inhuman or degrading treatment. In addition, the Court has held that a State may be liable for a violation of Article 8 of the Convention, namely the right to respect for private and family life [7].

B. Peters studied the case law of the European Court of Human Rights on environmental protection. The author analysed the court practice on this issue and, in general, concluded that such protection by the court is efficient [8].

In her work, I. Leijten analysed a particular case and concluded that efforts should be made to ensure that human rights "fit" climate change cases and that courts can provide efficient protection in this regard [9].

As it appears, the issues of environmental rights protection at the level of the European Court of Human Rights were dealt with by both Ukrainian and foreign scientists. Undoubtedly, many contributions have been delivered by scholars, but the authors of this study, through an analysis of the practice of the European Court of Human Rights in cases initiated against Ukraine, demonstrate the problems that exist at the national level and propose specific ways of tackling them.

The purpose of the research is to explore the issue of the possibility for citizens to appeal to the European Court of Human Rights through the prism of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. To obtain the purpose, national and international legislation was analysed, and the case law of the European Court of Human Rights and academic research on the issue were examined.

Materials and Methods

In preparing this research, the authors considered the legal framework of Ukraine (the Constitution of Ukraine, the Law of Ukraine "On the Execution of Judgments and Application of the Practice of the European Court of Human Rights", the Law of Ukraine "On Environmental Protection", the Law of Ukraine "On the Basic Principles (Strategy) of State Environmental Policy of Ukraine until 2030", etc.), international law (the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, etc.), and the case law of the European Court of Human Rights has been analysed.

This work is a theoretical study, connected with practical aspects. Using the method of analysis and synthesis, the legal framework that regulates the relations in the studied issue is examined. The Aristotelian method allowed identifying the content of legislative acts related to the protection of environmental rights in the European Court of Human Rights. Using the comparative legal method is conditioned upon the necessity to compare the regulation of the issue of judicial protection of environmental rights in domestic and international legislation in the investigated area, considering the European integration intentions of Ukraine and implementing its international obligations.

Results and Discussion

Ukraine is at the stage of political, organisational and legal development. This development affects all spheres of life in society, including the activity of the judicial branch of power, designed to protect the rights, freedoms and interests of citizens, the interests of society and the state. However, such development does not always occur within the framework of civil and democratic principles.

The Constitution of Ukraine guarantees the right of every person to protection by the court, which is one of the fundamental human and civil rights. The judicial system and the judiciary in Ukraine encounter specific challenges and problems from time to time. The test for the judicial system and citizens was the armed aggression of the russian federation against Ukraine, when there were conditions under which some judges stopped performing their duties and courts stopped their activities. Currently, it is still difficult to assess the extent to which citizens remain limited in protecting their violated, disputed or unrecognised rights and interests. Before this event, the COVID-19 pandemic was a challenge. According to Article 64 of the Constitution of Ukraine, restriction of the right to go to court for the protection of one's rights is not allowed. During the period when the Government introduced quarantine restrictions and judges and court staff were diagnosed with COVID-19, the courts continued to administer justice. Currently, the judicial system is in a state that leaves much to be desired: there is a large number of vacant positions of judges, a lack of proper funding for the judicial system, and a lack of appropriate technical equipment and expenditures on the information. The imperfection of the system, which is designed to defend the rights of citizens, according to the Ombudsman, is indicated by the number of reports received by the Ukrainian Parliament Commissioner for Human Rights in 2020 – 10,426 [10, p. 91].

The statement that has failed to defend environmental rights and legitimate interests in domestic courts, more and more Ukrainian citizens are applying to the European Court of Human Rights (further – the ECHR, the Court) will not be groundless. This right is guaranteed by Part 4 of Article 55 of the Constitution of Ukraine, according to which every person, after exhausting all national remedies, has the right to apply to the relevant international judicial institutions or organisations if they believe that their rights or freedoms require protection. Such right can be exercised only in those international judicial institutions or organisations of which Ukraine is a member [11]. Thus, it can be concluded that the Basic Law of Ukraine explicitly provides for the right of citizens to apply to the ECHR. But this right is not unconditional, and the possibility of its full implementation is associated with the observance of specific conditions, which will be discussed below.

M.V. Krasnova states that "the courts, as representatives of one of the branches of state power in Ukraine, owe the citizens of this country a proper open, objective, legal, impartial consideration of cases with their participation, especially in terms of protection of their violated environmental rights"[12, p. 51]. Despite this statement of M.V. Krasnova, notably, the analysis of decisions based on the results of consideration of cases in the field of protection of environmental rights of citizens, the courts in the vast majority ensure proper consideration of this category of cases and defend human rights.

The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter – the Convention) was ratified by Ukraine in 1997. By ratifying the Convention, Ukraine has thus agreed to and ensured its application in the territory of Ukraine; without concluding any additional agreement, it has confirmed the Court's jurisdiction in the areas that concern issues of interpretation and application of the Convention [13]. Notably, ratification of the Convention has become a powerful instrument in matters relating to the protection of citizens' environmental rights, in particular.

According to Article 34 of the Convention, the Court accepts applications from all individuals, non-governmental organisations or groups of individuals if they are victims and in case of violation of their rights [14]. It emphasises that the Court does not ignore the issues raised by non-governmental organisations, as they are an efficient lever of influence on the state's activities in case it ignores the requirements of environmental legislation.

Considering that by ratifying the Convention, Ukraine assumed the obligation to implement the Court's judgments in cases against Ukraine and considering the necessity to eliminate the reasons why Ukraine violated the Convention, in 2006, the Ukrainian legislature adopted the Law on Enforcement of Judgments and Application of Practice of the European Court of Human Rights, according to which ECHR judgments are obligatory for our country; Ukrainian courts apply the Convention and the Court's jurisprudence in cases, as they are sources of law [15]. Such step was a breakthrough in the possibility of applying the Court's decisions as a source of law.

Notably, environmental rights and obligations of citizens should be implemented in particular legal forms:

1) the rights of authorised persons should be used "as part of active environmentally oriented behaviour", meaning participation in hearings (in particular public hearings), meetings (including public meetings) when there is a discussion on environmental impact assessment materials for dangerous activities, in the case of "strategic environmental assessment of national programmes, plans", etc;

2) as the authorised persons have duties which are defined at the national level, they have to perform them: to protect the environment, to compensate for damage if it occurs, to pay the appropriate charges if pollution occurs, to be liable if offences are committed, etc;

3) although specific parties are holders of rights, they are obliged to comply with the requirements that exist in the environmental field [12, p. 52].

By ratifying the Aarhus Convention [16] (Law of Ukraine "On Ratification of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", 6 July 1999, No. 832-XIV [17]), Ukraine guaranteed the right of citizens to apply to international courts. Thus, Ukraine is gradually orienting its actions to establish appropriate conditions for its citizens to live in a safe environment.

It is essential that according to Article 35 of the Convention, the Court has the power to examine the case only if all remedies have been exhausted at the national level and the person applies to the Court within 4 months from the date of the final decision in the country against which they apply to the Court [14].

By recognising the Court's case law as a source of law in our country, the legislature has thus established the conditions for the implementation of human rights standards in the Ukrainian legal system, which are based on the European community. Embodying the further development of the rule of law, the legislator enshrined that the decisions of the ECHR, which were made in cases against one of the countries that is a member of the Council of Europe, are binding on the courts in Ukraine, that is, they can be legal precedents [18]. It has significantly expanded the possibility of applying in jurisprudence both the conclusions and legal positions adopted in cases against Ukraine and those adopted in cases against other states. Considering that in the environmental field few judgments have been issued against Ukraine, thus, using the positions expressed in other Court decisions provides an opportunity to be proactive and avoid the mistakes made by authorities in implementing their public policies in the environmental field in other countries.

Sharing the above opinion of H. Vronskaya, however, it cannot be agreed with A. Babich's conclusions that the ECHR conclusions for the authorities in the country are not obligatory but recommendatory. If an efficient legal system is implemented, if controlling bodies are established that are sufficiently independent, and if citizens are allowed to influence specific decisions in the state – the situation may change for the better [19, p. 164-165].

Exercising the right granted by the Constitution of Ukraine and international law, citizens of Ukraine are increasingly applying to the Court.

To ensure the rule of law and the protection of the rights of citizens arising in environmental legal relations, the courts must be accessible and efficient for citizens to protect those rights that occur, in particular in the fields of environmental protection, management of natural resources etc.

International legal acts (in particular, the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights or the Convention) do not contain any references to human rights in the sphere involving environmental legal relations, nor do they provide for the protection of environmental rights but the international community is aware of the extreme significance of environmental issues and the link between environmental conditions and human rights [20, p. 67].

The analysis of the studied ECHR decisions demonstrates that in the issue of environmental rights and environmental protection, applicants focus on Articles 2, 6, 8, 10, 13, 34, 35 of the Convention [14].

The ECHR considered the case "Guerra and Others v. Italy" (application no. 116/1996/735/932, judgment of 19 February 1998), which concerned the danger to the environment and the welfare of the population. By the circumstances of the case, in 1988, the enterprise, which was engaged in the production of mineral and chemical fertilisers, received the status of a "high-risk" enterprise (this meant that the enterprise had a risk of large-scale accidents in specific areas of industry with danger to the environment and the welfare of the population living in a particular area). The persons, who appealed to the court, stated that during its operation, the plant emits a significant amount of gases, which may result in chemical reactions with emissions of explosive hazardous toxic substances (sulfur dioxide, nitrogen oxide, etc.). The government did not deny these circumstances. The applicants considered that there had been a violation of several articles of the Convention and asked for just satisfaction [21, p. 71-72].

Consider this case, analysing the relevant international provisions.

The Convention guarantees everyone "the right to freedom of expression" (Article 10) [14]. However, the court concluded that Article 10 (namely the protection it affords) has a preventive function in respect of possible violations of the Convention where there is substantial damage to the environment, and Article 10 applies even before the individual's right to respect for privacy, and family life or right to life has been violated, thus, Article 10 cannot be applied in this case [21, p. 83].

Article 8 of the Convention guarantees everyone "the right to respect for his private and family life" (Article 8) [14]. The Court concluded that the State, which was the respondent, in this case, had failed to perform its obligations to ensure the right of the applicants to respect their private and family life, thus violating Article 8 of the Convention [21, p. 86].

Accordingly, the Court concluded that it was not required to assess the applicants' arguments on the violation of Article 2 of the Convention ("everyone's right to life should be protected by law"), as the Court had already concluded that there had been a violation of Article 8 of the Convention and that this was sufficient to protect the applicants' rights [21, p. 86].

The ECHR decided that Italy should pay each of the applicants 10,000,000 Italian liras within three months as compensation for non-pecuniary damage suffered, subject to a 5% annual interest rate to be paid in the event of failure to comply with the Court's decision on non-pecuniary damage within the applicable period [21, p. 89].

The activity of the ECHR demonstrates that the court, while considering the case, was guided by Article 8 of the Convention, according to which everyone has the right to respect their private and family life, their home and correspondence. As a general rule, authorities may not interfere with the exercise of this right, but it may occur in exceptional cases, based on law, when it is in the public safety or national interest, or when it is essential to protect the economic welfare of the country, or to prevent criminal offences, to protect the health or morals or rights and freedoms of individuals [14].

In addition, this is confirmed by the case "Lopez Ostra v. Spain" (case No. 41/1993/436/515, judgment of December 9, 1994). In this case, the essence was that in city of Lorca there are many enterprises whose activities are connected with the production of leather. Several workshops had established a water and waste treatment plant on communal land, but it was located 12 metres from the applicant's home. When the plant started operating, gases, specific fumes, and contamination began to be emitted, resulting in a deterioration of public health and causing inconvenience to residents of the mentioned town, including residents of the neighbourhood where the complainant lived. The local authorities resettled the residents of the quarter and provided them with free housing for 3 months in 1988. After this period the applicant and her family returned to their home, where they lived until February 1992 [22].

Having failed before the Town Hall, the Administrative Chamber of Murcia, the Supreme Court of Justice, to which Ms López Ostra appealed, and the Constitutional Court as the court of last resort (to which she had lodged her complaint), the case was referred to the Court by the European Commission of Human Rights on December 8, 1993. Having examined the evidence available in the case, the Court recognised that there had been a violation of Article 8 of the Convention [22].

In exploring the specifics of the application of Article 8 of the Convention when protecting citizens in the environmental sphere, L.A. Kalishuk concludes that neither Article 8 nor other provisions of the Convention at the official level recognise and guarantee both environmental rights of citizens in general and the right to an environment that is safe for the life and health of citizens, which would compromise the possibility of protecting these rights at all before the Court. However, the examples of applications to the Court and the analysis of the decisions issued in the categories of cases under consideration suggest a close connection between the right to a safe environment for life and health, which is guaranteed by national environmental legislation, and the right to respect for private and family life, which is set out in Article 8 of the Convention, in that environmental pollution may affect the welfare of persons in a way that would deprive them of the enjoyment of their home in a way that would harm their livelihood. It confirms the Court's recognition of the right to the environment that will be safe for life and health as a derivative right, which is evident from the provisions of Article 8 of the Convention [23, p. 79].

In such situations, the Court's objective, as stated in the judgment of the Kharkiv Administrative Court of Appeal of July 9, 2018 in case No. 816/117/18, is to assess whether the state has implemented all sufficient measures to ensure the protection of the applicant's rights under Article 8 of the Convention. In the case when there are provisions regulating environmental relations at the level of national legislation, non-compliance with these provisions may be considered as a violation of Article 8 of the Convention. In addition, the approaches in evaluating the State's responsibility under article 8 of the Convention in cases involving the protection of environmental rights are broadly similar, regardless of whether the case is to be judged in terms of the State's positive obligation to introduce measures necessary to guarantee the rights of the applicant under Article 8, paragraph 1, of the Convention, or in terms of the justification under Article 8, paragraph 2, of the Convention for "interference by public authorities". Where public authorities have been obliged by a court decision to act in a specific way, but the decision has been ignored or not implemented for a long period, the ECHR may hold the state responsible, as the guarantees available under Article 8 of the Convention may become inoperative ("Taşkin and Others v. Turkey") [24].

Notably, although Article 8 of the Convention does not explicitly mention the possibility of applying to the Court for the protection of citizens' environmental rights, the grounds for such an application can be identified in both domestic and international legal provisions. Such provisions, in particular, are the following:

- The Constitution of Ukraine, according to which everyone has the right to an environment that is safe for their life and health, the right to compensation for damage caused by the violation of this right (Article 50); everyone has the right to appeal to international judicial institutions or organisations of which Ukraine is a member or participant, to defend their rights and freedoms if they have used all national legal remedies (part 4 of Article 55) [11];
- Law of Ukraine "On Environmental Protection", according to which Ukraine guarantees the implementation of those rights in the field of environmental legal relations, which are provided by the legislator to citizens (part 1 of Art. 11), in the case of the international treaty ratified by Ukraine, provides rules that vary from the legislation of Ukraine on environmental protection, the rules provided by the international treaty are applied (part 2 of Art. 71) [25];
- The Law of Ukraine "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030", according to which one of the main purposes of Ukraine is to ensure the rights and obligations of individuals in the field of environmental legal relations, access to justice in environmental protection and natural resource management [1];
- Universal Declaration of Human Rights, according to Article 8 of which everyone has the right to a remedy, which must be efficient and implemented by national courts [26];
- Convention:

– The European Court of Human Rights should be established to ensure that the signatory countries comply with their obligations under the Convention and its Protocols (Article 19).

– All issues relating to the interpretation and application of the Convention and the Protocols thereto should be under the jurisdiction of the Court (Article 32).

– The Court has jurisdiction to entertain the case when the remedies granted at the national level have been exhausted and within four months from the date of the final decision (Article 35, Protocol No. 11) [14].

Thus, the legislator (both by adopting separate laws and by ratifying the Convention) has established a fairly broad foundation for the possibility of protecting individuals' rights and legitimate interests in the field related to environmental safety.

Thus, justice has a crucial role to perform in addressing environmental human rights issues. In this context, everyone should be provided with free access to justice, including appealing court decisions to higher instances. According to the legal position of the ECHR, the principle of the rule of law and generally accepted conceptions of justice, national courts should presume the existence of positive obligations of the state in the field of environmental human rights protection, even if such obligations are not explicitly stated in the law, as it is the inaction of public authorities and/or lack of proper state regulation that results in violations of environmental human rights [27, p. 176]. The authors of the research support the opinion expressed by D.W. Jiga that it is the inaction of public authorities that frequently results in violations of the environmental rights of citizens. Looking ahead, the Court's case law on cases brought against Ukraine demonstrates this. Hopefully, allowing the legislator to use as a source of law decisions issued in cases initiated against other countries, as discussed above, will allow Ukraine to avoid specific mistakes in the future.

Currently, everyone can apply straight to the Court, which is, admittedly, a strong guarantee of citizens' rights in the environmental field. However, the Court's jurisdiction is related to the interpretation and application of the Convention and its Protocols, and there is no mention of environmental rights at all (and there is no explicit connection between human rights and the state of the environment in which they live). However, following the practice of decision-making by the Court, it can be concluded that such a connection can be observed [28, p. 371].

Based on an analysis of ECHR judgments, in particular in the cases "Dubetska and Others v. Ukraine" and "Fadeeva v. Russia", D.V. Jiga concludes that national courts and other competent authorities repeatedly encounter difficulties exactly in establishing the factual circumstances of the case, proving the fact of interference in the private life of a person and its connection with an environmental "irritant" which has a specific level of danger. Considering this, methods and means of proof in cases involving environmental human rights must be developed and established in Ukrainian law. Such evidence may include, among others, decisions of public authorities and local government on the specific situation of the person whose environmental right has been violated; and reports and studies performed by both public and private institutions. By analogy, this evidence should be evaluated by the court in the aggregate from the standpoint of its admissibility, relevance and reliability [27, p. 177]. The authors of this study agree with the position expressed by D.W. Jiga, as the issue of proving harm caused in environmental legal relations has its specific features, and evidence often disappears over time (considering their specifics), while consequences remain. And for establishing a cause-and-effect relationship, sometimes the evidence is not enough. Thus, while supporting the idea that evidence in such categories of cases could be the decisions of competent authorities in particular situations, in addition, it would be advisable to establish short time limits for such decisions, which would ensure that specific factual circumstances can be fully recorded to ensure that such decisions have the status of appropriate evidence in the future.

Unfortunately, an analysis of the Court's rulings demonstrates that the number of cases related to the protection of environmental rights is increasing. Currently, there is every reason to conclude that in the absence of an efficient mechanism for the protection of environmental rights at the national level, the number of such cases will only increase. In general, the ECHR considers the state as the entity primarily responsible for ensuring the legal regulation of the protection of environmental human rights. Thus, for the adoption of efficient legislation in the field of protection of environmental human rights, states should consider the practice of the ECHR in this field [29, p. 150].

Currently, the ECHR has already considered several cases against Ukraine concerning environmental protection and environmental rights of citizens. Considering their small number, consider them. In particular, in the judgment in the case of "Dubetska and Others v. Ukraine", Application No. 30499/03, concerning the application instituted by the Court against Ukraine on September 4, 2003 under Article 34 of the Convention, 11 Ukrainian nationals stated that the authorities had failed to protect their homes, and, thus, their private and family life, from pollution caused by two industrial plants, which was excessive and therefore the Court held that there had been a violation of Article 8 of the Convention. Following the examination of the case on February 11, 2011, the Court awarded the applicants the amounts they requested: one family – 32,000.00 euros, the other – 33,000.00 euros. In making its decision, the court considered various factors, in particular, the duration of the situation that resulted in the appeal to the court. In addition, in paragraph 142 of the judgment, in this case, the Court draws attention to "the complexity of issues relating to environmental policy, which results in the role of the Court being mainly subsidiary". However, when the issues concern the national policy, the Court first of all ascertains whether "the decision-making process was fair", and occasionally (in some cases) may "review the substantive conclusions of the national authorities" [30].

In the case "Grymkivskaya v. Ukraine" (application No. 38182/03, judgment of October 21, 2011), the ECHR established a violation of Art. 8 of the Convention as there was no balance between the rights of the person applying to the Court for protection and the public interest: the state failed to prove that, before the road was used as a motorway, an environmental impact study was performed that would have been comprehensive and complete in this case; Ms Grimkovskaya was practically deprived of the opportunity to influence in any way key decisions relating to using the road as a motorway (which passed through the street where she lived). Considering the case, the Court held that Article 8 of the Convention had indeed been violated in this case [31].

In the case of "Dzemiuk v. Ukraine" (application No. 42488/02, judgment of February 4, 2014), Dzemiuk referred to a violation of Articles 6 and 8 of the Convention, as a cemetery was established near the house where he lived despite court ban on such location (38 meters from the house). Although Article 8 of the Convention is mainly designed to protect individuals from arbitrary encroachment by the state apparatus, it may provide for the adoption by the competent authorities of measures designed to ensure respect for private life and home. In this case, the Court concluded that there had been a clear violation of Article 8 of the Convention, as the authorities continued to violate the proximity of the cemetery to the applicant's house, although the court had prohibited such actions. Violation of the provisions of environmental legislation existing at the national level is perceived by the Court as a violation of Article 8 of the Convention [32].

Thus, the above list of environmental cases demonstrates that the ECHR, accepting a case concerning the protection of violated environmental rights, considers it by Article 8 of the Convention. And here it is hard to exaggerate the significance of such an approach of the Court to the issue of the possibility of protecting environmental rights in the Court. It can be stated that in the absence of such a so-called "creative" approach to the interpretation of Article 8 of the Convention, there could be no discussion about the protection of environmental rights at the level of the ECHR.

Based on the analysis of the Court's activity, V.V. Kovalenko concludes that the Court can recognise the violation of citizens' rights in environmental legal relations within the framework of Article 8 of the Conventio The court must examine whether the state was actually aware of the problem, whether it failed to act, whether there was a significant impact and substantial damage. As the Court's practice demonstrates, "the dynamic interpretation of the Convention enables the ECHR to constantly define updated approaches to the protection of environmental rights". The Court does not interfere in the national policy explicit but only identifies specific violations, thus, Ukraine should be guided by the conclusions reached by the ECHR in its judgments to develop guarantees of respect, protection and restoration of human rights in the field of environmental security [33, p. 455].

Indeed, an analysis of the Court's judgments in cases against several countries demonstrates that the ECHR has in all these cases established precisely a violation of Article 8 of the Convention and has allowed applications to be examined through the very prism of a possible violation of the right to respect for private, family life and the home of individuals. Notably, the low number of cases and decisions against Ukraine indicates that, at the national level, the state is generally coping with the issues that arise in the area of protecting citizens' environmental rights. However, the analysis of the judgments against Ukraine demonstrates that the issues have a problem that can be divided into two notional areas: 1) improper protection of environmental rights by state authorities at the pre-trial level, i.e. inappropriate implementation of environmental protection activities (where there is a failure to implement specific decisions taken – in the cases “Dubetska and Others v. Ukraine” and “Grimkovskaya v. Ukraine”, the decision concerning the eviction of applicants); 2) rejection of national court decisions by the authorities and abuse of power (the case “Dzemiuk v. Ukraine” – the court decided that a council decision which allocated a specific plot for building a cemetery was illegal, but subsequently the local council decided again under the same conditions to transfer the same plot for building a cemetery).

Admittedly, the existing judgments of the Court in cases against Ukraine establish case law and define the gaps that exist in this area, thereby demonstrating what the state should consider when developing and implementing national policy in the field of environmental legal relations. The authors of the study consider it possible to propose the implementation of various measures that strengthen the legal awareness of decision-makers in the field of ensuring the right to a safe environment (lectures, training, seminars, etc.). In addition, consideration should be given to the necessity of short time limits for the competent authorities to decide on specific situations relating to the protection of citizens’ environmental rights since the analysis suggests that the issues before the Court were sometimes decided over more than a decade ago. The authors of the research proposal to strengthen the liability of officials who abuse their power or official position (which occurred in the circumstances specified in the judgment of the Court in the case “Dzemiuk v. Ukraine”). In the field of environmental rights protection, the establishment and operation of an environmental court are very relevant, in the author’s opinion, whose efficient work will contribute to the protection of individuals’ rights to a safe environment and thus reduce the number of applications to the ECHR, but this is the subject of a separate study.

Conclutions

The analysis of judicial protection of the environmental rights of citizens in the Court demonstrates that the Court serves as a guarantor of the protection of the environmental rights of citizens. Guided by Article 34 of the Convention, the ECHR accepts applications from Ukrainian citizens in case of violation of their rights. However, a person (the applicant) can only apply to the ECHR when all domestic remedies have been exhausted and only within four months from the date of the final decision, which will ensure that the case can be accepted by the Court for examination (Article 35 of the Convention).

In the absence of a provision in the Convention and its Protocols that provides for a violation of environmental law, the ECHR, has accepted the case, and will examine it by Article 8 of the Convention, “Right to respect for private and family life”. The analysis suggests that the Court does not pursue a perfunctory approach in cases involving the protection of environmental rights but delves more deeply into the spirit of the individual’s right to respect for private and family life, thus enabling human rights to be fully protected.

The activity of the ECHR is of great significance for the judicial practice in Ukraine, and its decisions urgently indicate the necessity of changes in the activities of public authorities and domestic courts, to which citizens apply to protect environmental rights.

The results of the study demonstrated gaps and imperfections in the protection of environmental rights at the national level. To overcome this, the authors of the study suggest:

- to introduce various measures that strengthen the legal awareness of decision-makers in the field of ensuring the right to a safe environment (lectures, training, seminars, etc.);
- establish a short time frame for decision-making by the competent authorities in particular situations concerning the protection of citizens’ environmental rights;
- strengthen the responsibility of officials for abuse of power or official position in the environmental field;
- to introduce the activities of the environmental court.

The authors of the study consider the idea of introducing an environmental court to be quite relevant and one that will be further explored and implemented in practice.

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Особливості судового захисту екологічних прав громадян у Європейському суді з прав людини

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Анотація

Статтю присвячено питанню можливості звернення до Європейського суду з прав людини за захистом екологічних прав. Актуальність дослідження зумовлено тим, що з огляду на глобальну екологічну кризу гостро постало питання гарантії права особи на безпечне довкілля та його захист. Необхідність проведення окремого дослідження з окресленого питання виникла в зв'язку з тим, що Конвенція про захист прав людини й основоположних свобод, визначаючи права, які вона гарантує, окремо не виділяє екологічних прав. Саме тому логічно постає питання: чи можуть особи звертатися до Європейського суду з прав людини для захисту права, яке безпосередньо в згаданій Конвенції відсутнє. Мета статті – вивчення правової бази та підстав звернень до Європейського суду з прав людини. У дослідженні проаналізовано законодавчі та міжнародно-правові акти, а також діяльність Європейського суду з прав людини, метою якої є захист прав громадян, зокрема екологічних. Методологічну основу дослідження склали формально-логічний метод, методи аналізу та синтезу й порівняльно-правовий метод. У роботі розкрито загально-теоретичні аспекти, пов'язані із захистом екологічних прав. Проведено аналіз практики захисту судами екологічних прав, зокрема на міжнародному рівні. За результатами проведеного дослідження встановлено, що Європейський суд з прав людини допускає до розгляду заяви осіб з метою захисту порушених екологічних прав, які розглядаються крізь призму ст. 8 Конвенції про захист прав людини і основоположних свобод: право на повагу до приватного, сімейного життя та житла людей. Практична цінність дослідження полягає в тому, що в статті проведено аналіз національного та міжнародного законодавства, а також практики Європейського суду з прав людини, зроблено висновки, які розкривають певні проблеми, пов'язані з природоохоронною діяльністю, та запропоновано певні механізми їх подолання з метою уникнути порушень екологічних прав громадян

Ключові слова: права людини, забруднення довкілля, право на повагу до приватного та сімейного життя, правосуддя, захист прав

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Foreign Experience of State Support of Agricultural Producers

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Abstract

To maintain Ukraine's food security, its production of all the necessary foodstuffs for the country's population, support for small and medium agricultural producers, and the development of rural areas in general, the study of foreign experience of state support for producers of agricultural products, which has proved itself in practice, has become relevant. The purpose of the research is to explore the foreign experience of state support for business entities operating in the agricultural sector in the People's Republic of China, European Union member states and the United States, its analysis, identifying the most efficient mechanisms of such support for possible replication in the Ukrainian legislation. To ensure an efficient analysis of the problems, the method of hermeneutics, dialectical, comparative legal, system-functional, and statistical methods of scientific knowledge were used. The analysis of legal regulation of state support of agricultural producers in foreign countries was performed in the context of the research, and the national-specific features of state support of agricultural producers, which are inherent to individual countries, were identified. The strategic priorities of the new Common Agricultural Policy of the European Union for 2023-2027 were identified. Particular attention is devoted to the analysis of the legal regulation of tax incentives for producers of agricultural products in the European Union Member States, using Poland, the Czech Republic and Austria as examples, identifying the types of tax incentives and the conditions for their application in the above-mentioned countries. The conclusion is drawn about the efficiency of the identified types of tax benefits in the agricultural sector of the economy and the expediency of their introduction into the legislation of Ukraine. The research will be useful for researchers, practitioners, graduate students, doctoral students and anyone interested in the foreign experience of state support of agricultural producers

Keywords: agricultural subsidies, tax benefits, support for farmers, EU common agricultural policy

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Introduction

The state support of agricultural producers is one of the major factors that can contribute to the qualitative development of Ukrainian agricultural production and support the food security of the country. At the present stage, agricultural producers in Ukraine receive the least support from the state among all European countries, which puts them at a disadvantage in the international market and reduces their competitiveness. Thus, it is essential to explore the successful foreign experience of state support for entities engaged in agricultural activities.

One of the efficient methods to support agricultural producers is tax support. Its advantage is efficiency and no necessity of explicit financial support from the state. In Ukraine, tax support requires reforming. Therefore, it is essential to highlight the foreign experience in this area.

State support in the agricultural sector has been explored by several Ukrainian and foreign authors. G. Pavlova proposed a classification of state support for agricultural producers, identifying its main three forms: direct (explicit state payments), conditionally straight (establishment of a special tax regime, debt restructuring), indirect (protection of commodity producers in foreign economic activity, procurement and commodity interventions) [1, p. 20].

H. Grigorieva in her monographic study highlighted the problems of legal support of state support of agriculture of Ukraine [2], arguing the necessity of its separation into a separate sub-branch of agrarian law – agroprotection law.

O. Gulak, V. Ladychenko and M. Kutsevych prove the necessity of state support for the cooperative sector and granting agricultural cooperatives the status of non-profit enterprises [3-6]. Studying the theoretical and practical aspects of state support and regulation of the development of agricultural cooperatives in Ukraine, O. Sakovska and A. Shpykuliak note the necessity of supporting their development and activities at the national level through the adoption of relevant legislation and regulations and programmes, as the establishment of cooperatives for agricultural producers provides an opportunity to specialise and concentrate production, reduce material costs and, as a result, ensure growth in agriculture [7].

The problems of legal regulation of taxation of agricultural enterprises were studied by the following Ukrainian scientists: V. Yermolenko, O. Krasnova and O. Yara [8-10], proving the tax burden as a deterrent to the development of the Ukrainian agricultural sector. O. Artemenko [11] emphasised the necessity of using a differentiated approach to taxation of agricultural production based on the priorities of development of individual types of agricultural production.

O. Kuzmenko, I. Semenchuk and V. Pohromskyi identified the major land management problems in Ukraine, which are: a high degree of ploughing of agricultural land, violation of scientifically sound crop rotation system, low application of organic fertilisers (0.1-1.3 t/ha), which intensifies soil degradation processes, the bulk of investment in the agricultural sector are funds of enterprises and organisations (65.4%) and only 0.7% - funds of foreign investors [12].

S.W. Martinez explored the policy of state support for agricultural producers in the United States, highlighting the positive experience of supporting local producers [13]. V.V. Kurennaya, A.T. Aydinova, A.O. Cherednichenko, Yu.V. Rybasova, A.E. Shevchenko in their research conclude that the support of a large agricultural producer in the United States through the provision of progressive tax benefits [14]. X. Guo notes the necessity to support the industrialisation of modern agricultural production in China [15].

At the same time, despite previous research, the legal regulation of state support for small and medium-sized agricultural producers in foreign countries to borrow best practices, in particular, from the perspective of agricultural subsidies and tax incentives in the agri-food sector, remains relevant and requires detailed scientific analysis.

The purpose of the study is to investigate the issues of state support for agricultural producers in the PRC, EU member states and the USA, to analyse the regulatory legal acts which provide state support for agricultural producers in the above countries, and to identify the main forms of state support for economic entities engaged in business activities in the agricultural sector which have proved themselves in practice and to propose their application in Ukraine. The scientific originality of the research is the analysis of foreign legislation in the field of state support for agricultural producers. A contribution to the study is the identification of positive experiences from the Czech Republic, Austria and Poland in the field of preferential taxation that have proved to be practical.

Materials and Methods

In writing the research, both general scientific and special scientific methods of scientific research were applied. Using the system-functional method, the analysis of the main forms of state support for economic entities engaged in business activities in the agricultural sector, which are used in foreign countries, in particular the People's Republic of China, EU member states and the United States, was performed.

The dialectical method is used to clarify the current regulatory and legal state of state support for agricultural producers in individual EU member states and the prospects for its further development. The method of hermeneutics was used for the analysis of the current legislation of European countries in the example of Poland, the Czech Republic and Austria designed to support small and medium agricultural producers, primarily in the tax sphere, to explore its efficiency and performance at the current stage and to identify regulatory gaps in the domestic legislation to eliminate them (in particular, the Polish Law "On the publication of the uniform text of the law on corporate income tax" [16], the Czech Law "On Income Tax" [17], Czech Law "On Excise Duty" [18], Czech Law "On Road Tax" [19], the Czech Law "On Property Tax" [20]). In addition, the regulatory foundation for the research was provided by scientific works of domestic and foreign authors, reports and statistical data of international organisations, in particular, the Food and Agriculture Organisation of the UN, and policy documents of the European Union (EU Farm to Fork Strategy Strategy [21], EU Biodiversity Strategy [22]) and EU regulations, which are based on the new EU Common Agricultural Policy for 2023-2027 (EU Regulation 2021/2115 establishing rules to support national strategic plans for Common Agricultural Policy and repealing EU Regulations 1305/2013 and 1307/2013 [23], EU Regulation 2021/2116 repealing EU Regulation 1306/2013 on the funding, management and monitoring of Common Agricultural Policy [24], Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 establishing the Common Agricultural Market Organisation [25]).

The comparative legal method allowed identifying the specific features of state support for entities engaged in agricultural activities in individual foreign countries. The statistical method was used for obtaining an empirical base, which became one of the main sources of information on the success of legal regulation of state support for agricultural producers in individual countries.

Results and Discussion

One of the largest agricultural economies in the world is PRC. Currently, the PRC produces 18% of the world's grain crops, 29% of the world's meat and 50% of the world's vegetables [26]. Thus, it is interesting to explore their experience in obtaining such results.

Subsidies are the main way to support China's agricultural industry. The country has established a base policy on agricultural subsidies that complies with WTO requirements but considers local conditions [27]. In China, there are the following types of subsidies: direct subsidies for grain producers, subsidies for better crop varieties, general subsidies for agricultural resources, and subsidies for the purchase of modern tools and equipment. To protect the productivity of agricultural land and ensure the necessary scale of food production, in 2013, the Chinese government published the Financial Management Measures for Agricultural Production and Development, the latest amendments to which entered into force on 24 March 2020 and which will be valid until 2023 State financial support for agriculture in the PRC is centred on: agricultural land protection, subsidies for the purchase of agricultural machinery, mainly the latest models, and for the implementation of recycling and renewal projects and related pilot innovation projects; green agricultural development and technical services, mainly in terms of improving quality and efficiency, dry farming and water conservation in the production of major crops, trials of replacing chemical fertilisers with organic ones for fruits, vegetables and tea, promotion of improved seeds and farming practices, etc. [28]. The above financial support is provided to farmers and new agricultural producers who have recently begun their businesses.

In addition, the PRC funds individual projects. At the same time, the major aspect is based on innovations in agriculture, and the promotion of sustainable growth of agricultural production. The Agricultural Science and Technology Foundation, established by the Ministry of Science and Technology of the People's Republic of China, supports the commercialisation of technology in agriculture, emphasising research projects and using new agricultural technologies. Funding can be obtained by enterprises or research institutions established in the PRC. Most of the capital of the enterprise must belong to Chinese domestic investors, and, in addition, the enterprise must have existed for at least one year before applying for funding, and its authorised capital must be larger than the funds to be received under the project [29].

V. Yermolenko, O. Hafurova, M. Deineha, T. Novak, and Yu. Shovkun [8] emphasise the necessity to ensure the protection of agricultural land. Fully agree with the above mentioned scholars. Financial management measures for agricultural production and development in the PRC are a practical example of how to perform this commitment. Subsidies for the purchase of agricultural machinery for domestic production were implemented in Ukraine. And that is good. However, it would be useful to introduce subsidies for recycling and renewing machinery, reducing the usage of chemical fertilisers, and developing green agriculture. These subsidies would support both agricultural producers and improve the quality of food and the environment.

The United States of America has been supporting American farmers since 1933 when the Agricultural Adjustment Act was approved. State support for agricultural producers is currently regulated by a package of legislative acts named "The Farm Bill", which is updated every five to six years and regulates various types of support for the country's agribusiness, i.e. subsidies to farmers. The above-mentioned legal act regulates various programs such as crop insurance, training of farmers, support for sustainable agricultural practices, and access to healthy food for low-income families. Each farm bill has a unique name and the current bill is called the Agriculture Improvement Act. It was adopted in December 2018 and will be valid until 2023. The Farm Bill allows farmers to choose between agricultural risk coverage and price loss coverage when choosing an insurance program [30].

Over the past decade, farm subsidies in the US have averaged $16 billion a year. The amount of subsidies is not the same for various crops and is mainly concentrated for five crops (corn, soybeans, wheat, cotton and rice). Support for "special crops", which primarily includes fruits, vegetables and nuts, has been relatively minimal in absolute terms and has only been available for the last three decades [31]. With the support of the above subsidies, the US Government is influencing farmers on what crops to grow.

V.V. Kurennaya, A.T. Aydinova, A.O. Cherednichenko, Yu.V. Rybasova and A.E. Shevchenko highlight the support of a large agricultural producer in the United States [14]. The author of the research agrees with the criticism of scientists and considers it essential to prioritise the legislator's attention on supporting small and medium-sized agricultural entities.

The new Common Agricultural Policy envisaged for 2023-2027 is designed to reach the purposes of the European Green Deal and will be one of the crucial instruments that will contribute to biodiversity conservation. The main regulations that are the foundation of the new Common Agricultural Products are as follows: EU Regulation 2021/2115 establishing rules to support national strategic plans for Common Agricultural Policy and repealing EU Regulations 1305/2013 and 1307/2013 [32], EU Regulation 2021/2116 repealing EU Regulation 1306/2013 on the funding, management and monitoring of Common Agricultural Policy [33], Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 establishing a common agricultural market organisation [34]. According to the Common Agricultural Policy 2023-2027, at least 35% of rural development funds will be dedicated to activities supporting climate, biodiversity, environment and animal welfare; programmes in the horticultural sector will include at least 15% of economic entities' environmental expenditure; 40% of the budget of the New Agricultural Policy should be dedicated to climate; 10% of explicit payments should support income redistribution to small and medium-sized farms; at least 3% of explicit payments should be allocated to young farmers [35].

The EU Farm to Fork Strategy strategy recommends, on the one hand, reducing pesticide usage in agriculture and antibiotics in animal husbandry by 50% and synthetic fertilisers by 20% by 2030, and on the other hand, increasing substantially the percentage of agricultural land used for organic agriculture from the current 10% to 25% by 2030. [36]. The biodiversity strategy provides for the withdrawal of 10% of agricultural land from production, which will be designated for enhanced environmental protection [22].

One of the types of state support for agricultural producers in developed countries is tax benefits. As the experience of the European Union member states demonstrates, a well-established tax system in the agricultural sector allows agricultural producers to adapt to the ever-growing competition in the agricultural sector. Admittedly, stimulating the development of the domestic food sector requires tax support that would contribute to a balanced structure of agricultural production. Supporting small and medium-sized socially oriented producers, and increasing their competitiveness is one of the major objectives of the national legislator. A well-designed tax system contributes to increasing the level of employment of the rural population and increasing the budget of rural communities.

Poland has an efficient system of taxation of the agro-industrial complex. This country is a leader in the production of agricultural products in the European Union, and ranks first in the world rankings in rye production [37]. Such successes were achieved due to the quality system of taxation of agricultural producers, which has specific features in comparison with other EU member states.

The tax system of Poland has a low tax burden. Approximately 95% of Polish farmers are not taxed under the general income tax system (they do not pay income tax). A small percentage of farmers who produce specific agricultural products pay income tax, which is based on the calculation of actual costs or average production rates. Personal income tax should be paid by those farmers who are engaged in one of the types of agricultural activities defined in the legislation (e.g. poultry, mushrooms, beekeeping, greenhouse farming, pig farming, silkworm breeding). The above-mentioned food products are produced by only a small percentage of farmers (approximately 2-5%) [38]. Thus, a significant number of farmers do not pay income tax.

In addition, no tax is paid in Poland on subsidies that farmers receive from the European Union budget [16]. The tax on property used in agricultural activities by the farmer is lower than the regular property tax, which reduces the tax burden on the farmer. In addition, the vast majority of farms use the flat tax rate scheme rather than the regular VAT regime. Poland's experience is quite interesting concerning taxes on real estate (buildings) inherited and agricultural land, the ownership of which is acquired based on a gift agreement, and in the case when the ownership of agricultural land is transferred between relatives in the event of a farmer's retirement. These transactions are not taxable [39].

In Poland, farmers and their family members pay reduced contributions under a special social insurance scheme while being entitled to receive similar benefits as in the case of the regular social insurance scheme. Farmers use the agricultural social security fund. The fund was initially established to provide retirement pensions for farmers. The contributions paid by farmers are only a small part of the fund's income. More than 90% of its income comes from the state budget of Poland. All farmers owning agricultural land or forests of more than one hectare are now able to use the social security system of the agricultural welfare fund instead of the regular social security system [40].

In addition, agricultural land in Poland is free from property tax. Land plots larger than 1 hectare are subject to agricultural tax. In calculating the above-mentioned tax, coefficients are used that vary according to soil fertility, distinguishing between arable land, grassland and pasture, there are four zones based on climatic, economic and production conditions, and ten classes of use and fourteen classes of soil types [41]. The mentioned classification of land was approved by the Ministry of Finance. Notably, most of the croplands in Poland are of average quality.

A significant number of benefits for agricultural producers exist in the Czech Republic [42]. Thus, the Law of the Czech Republic "On Income Tax" established benefits for agricultural producers. Czech farmers and entities performing activities in the field of forestry can reduce the tax base by 80% annually. Therewith, the maximal amount of possible deductions in other areas is 40-60 % [17], which undoubtedly indicates significant support from agricultural producers.

The subject of personal income tax is not the income received as a result of the acquisition of ownership of property from a close person who was engaged in entrepreneurial activity in the agro-food sector and early terminated its activities, which is considered to be a tax benefit. A tax privilege for farmers is provided by the Law "On Road Tax", which states that, among other things, agricultural and forestry tractors, trailers, and other specific vehicles used by farmers are not subject to the tax [19].

The Law of the Czech Republic "On Excise Duty" provides the possibility of refunding the tax on so-called green diesel, i.e. mineral oils to persons who use these oils for primary agricultural production [18]. According to the Law "On Property Tax", real estate tax exemptions are available to entities engaged in agricultural production or fish farming [20].

In Austria, the vast majority of economic entities operating in agriculture belong to small and family enterprises (90%). The country has tax incentives applicable to agricultural producers and entities operating in the forestry sector. Austria has developed and implemented simplified methods of income and value added tax assessment for small agricultural and forestry enterprises. Small enterprises in these sectors can choose to calculate their income using a full or partial fixed assessment, which is less than the conventional income calculation in other sectors. Property valuation, which is performed for the purpose of calculating property tax and land alienation tax, is not performed at the market rate either [43].

The regulation of the flat tax rate in Austria simplifies the calculation of profits and reduces the cost of accounting. Most business entities performing their activities in agriculture and forestry calculate their profits based on a fixed rate and, as a result, pay a low-income tax.

Income of individuals from agriculture and forestry is taxed under the simplified scheme (37% if the assessed value of the property does not exceed EUR 15,000, 41% if the assessed value is from EUR 15,000 to 36,500, 45% if the assessed value is from EUR 36,500 to 65,000) [44]. The preferential taxation system helps to increase the income of agricultural producers.

Several tax benefits for agricultural producers, which were introduced in the EU member states, can be introduced in Ukraine. First of all, it concerns income tax rebates, property tax exemptions and reduction of excise tax on fuel.

Conclusions

In the People's Republic of China, there are several subsidies for agricultural producers both for the production of specific crops and for the purchase of agricultural equipment. Another interesting practice is the establishment of an agricultural science and technology fund, which finances the commercialisation of the latest technologies in agriculture.

The new EU Common Agricultural Policy for 2023-2027 is designed to support climate actions and increase biodiversity. In addition, agricultural entities are required to invest in the environment. In addition, the new EU Common Agricultural Policy provides support for small farmers.

Legal regulation of agricultural production and support for small and medium-sized agricultural producers is a crucial objective that is currently on the agenda in all countries, and in Ukraine, in particular. There is a wide application of a preferential taxation system for agricultural producers in the EU member states. An analysis of state support for agricultural producers in the EU Member States, using Poland, the Czech Republic and Austria as examples, demonstrates that the legislation in these countries provides for a significant number of tax incentives for agricultural producers and foresters in particular: reduction in income tax; no taxes on agricultural land or property inherited from agricultural producers; property tax exemptions; reduced excise tax on fuel; reduced social security contributions. Reducing taxes increases the competitiveness of small and medium-sized businesses operating in agriculture and forestry. In addition, tax privileges increase the profits of agricultural producers and promote the development of specific types of agricultural activities. In Ukraine, there is an urgent necessity to reform the taxation system of agricultural production using the experience of the EU member states, which has proven its efficiency, to support domestic agricultural producers and ensure the food security of the country. Thus, the introduction of a preferential taxation system for agricultural producers at the expense of EU member states may be a prospect for further research on the subject.

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Зарубіжний досвід державної підтримки сільськогосподарських товаровиробників

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Анотація

Для підтримки продовольчої безпеки України, власного виробництва усіх необхідних продуктів харчування для населення країни, підтримки дрібних та середніх сільськогосподарських товаровиробників, а також розвитку сільських територій загалом, актуалізується вивчення зарубіжного досвіду державної підтримки виробників сільськогосподарської продукції, який виправдав себе на практиці. Мета наукової роботи полягає в дослідженні зарубіжного досвіду державної підтримки суб'єктів господарювання, що здійснюють свою діяльність в аграрному секторі в Китайській Народній Республіці, країнах-членах Європейського Союзу та США, його аналізі, виявленні найбільш дієвих механізмів такої підтримки для можливого їх запозичення до українського законодавства. Для забезпечення ефективного аналізу проблематики були використані метод герменевтики, діалектичний, порівняльно-правовий, системно-функціональний, статистичний методи наукового пізнання. У розрізі проведеного дослідження проведено аналіз правового регулювання підтримки виробників сільськогосподарської продукції на державному рівні в зарубіжних країнах, виявлено національні особливості державної підтримки сільськогосподарських товаровиробників, які притаманні окремим країнам. З'ясовано стратегічні пріоритети нової Спільної сільськогосподарської політики Європейського Союзу на 2023-2027 рр. Окрему увагу приділено аналізу правового регулювання податкових пільг для виробників сільськогосподарської продукції в країнах-членах Європейського Союзу на прикладі Польщі, Чехії та Австрії, виявлено види податкових пільг і умови їх застосування у вищезазначених країнах. Зроблено висновок про ефективність виявлених видів податкових пільг в аграрному секторі економіки й доцільність їх запровадження до законодавства України. Стаття буде корисною для наукових співробітників, спеціалістів-практиків, аспірантів, докторантів і всіх, кого цікавить зарубіжний досвід державної підтримки виробників сільськогосподарської продукції

Ключові слова: сільськогосподарські субсидії, податкові пільги, підтримка фермерів, спільна сільськогосподарська політика ЄС

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Theoretical and Legal Aspect of Cyberviolence Against Women

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Abstract

The relevance of the study is explained by the fact that in the society of the 21st century, which is constantly developing and changing, the processes of communication and learning have expanded to the online environment, gaining more and more territory. Social networking applications such as Facebook, Instagram, WhatsApp, Skype, Twitter, Tik Tok, Zoom, etc., allow people to stay in touch with others while identifying them as potential victims of online abuse. The European Court of Human Rights notes that cyberviolence is a form of domestic violence. The results of sociological studies and statistics demonstrate that the victims of domestic violence in the vast majority of cases are women, and therefore, the commission of cyberviolence threatens women. An analysis of recent publications demonstrates that cyberviolence as a form of domestic violence against women is an issue that is widely discussed by many professionals in the fields of law, psychology, sociology and education. Ukrainian legislation on the protection of women against domestic violence does not define cyberviolence as a form of domestic violence. At the same time, the analysis of judicial practice demonstrates that judges consider cyberviolence to be a form of domestic violence and prosecute the offender to administrative responsibility. All of this necessitates a theoretical exploration of the term "cyberviolence", which would contribute to the legal definition of the phenomenon, distinguishing it from other concepts and developing efficient ways to prevent and counteract the perpetration of this act. The purpose of the study is the theoretical and legal analysis of the phenomenon of violence in cyberspace and its legal regulation in Ukrainian legislation. The efficient analysis of the research problems was provided by using the methods of interpretation of the law, legal modelling, technical-dogmatic, and comparative methods. In the context of the study, the definitions of cyberbullying and cyberviolence are examined and these concepts are distinguished. The author's definition of cyberviolence is defined. To interpret cyberviolence as a form of domestic violence, the definitions of "psychological violence" and "sexual violence" given in the Law of Ukraine "On Preventing and Combating Domestic Violence" have been proposed to be improved. The foreign experience of cyberviolence regulation is studied, and it is proposed to identify the cyberviolence forms introduced by Romanian legislation among the cyberviolence forms in Ukrainian legislation. The theoretical provisions and conclusions proposed in the study are of significant value for the development of the theory of state and law in the area under study and for the improvement of the current legislation

Keywords: domestic violence, psychological violence, sexual violence, cyberbullying, offender, victim

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Introduction

A survey of women between the ages of fifteen and twenty-five from twenty-two countries conducted by Plan International, a non-governmental organisation that targets violence against women, demonstrated that the vast majority of women surveyed had experienced online harassment, sending them explicit messages and images or being abused online [1].

Considering the global spread of digital violence against women, on 20 October 2021 the Group of Experts on Action on Violence Against Women and Domestic Violence (hereafter, GREVIO), which monitors the implementation of the Istanbul Convention, adopted General Recommendation No. 1 on the digital dimension of violence against women, recognising it as one of the current challenges currently [2]. The international community's increased interest in the phenomenon of cyberviolence has resulted in a demand for a theoretical and legal analysis of the phenomenon and its place among domestic violence forms, given the lack of a comprehensive study of cyberviolence in modern legal studies.

Specific issues concerning domestic violence in general and cyberviolence, in particular, have been the subject of research papers by domestic and international scholars, namely: L. Golovko, O. Uliutina, and others have studied public policies, national legislation and best practices to prevent and respond to domestic violence in Poland, the Czech Republic and Slovakia [3]. Marta Badenes-Sastre and Franziska Exposito conducted a bibliographic study to explore and analyse existing research on the perception and identification of gender-based violence and victim identification [4]. Ronald M. Hernández, Miguel Saavedra-López and others analysed the research on gender violence conducted by Latin American researchers in Scopus-indexed journals for the period 2010-2019 [5]. Ch. Charlton, R. R. Mani, S. Chinnappan, A. K. Balaraman and others conducted a scientific analysis of the results of the study of domestic violence in Australia for the period 1984-2019 [6]. Maria Pentaraki and Janet Speake have identified new issues of domestic violence that have emerged during the COVID-19 pandemic [7]. N. Henry, S. Vasil, and A. Flynn explored domestic violence against immigrant and refugee women using digital technologies [8], Mahfud and Rizanizarli analysed legislation to protect women from domestic violence in Indonesia [9].

The purpose of the research is to determine the place of cyberviolence among other forms of domestic violence, to clarify its manifestations and to develop proposals for improving the current legislation in this area.

The scientific originality of the study is the development of the author's definition of cyberviolence and proposals for adjusting the existing wording of "psychological violence" and "sexual violence" in the legislation.

Materials and Methods

In conducting the research, general scientific methods were used, namely dialectical, which helped to establish the legal nature of cyberviolence and cyberbullying; and historical, which clarified the state of scientific research on the legal regulation of domestic violence against women, and the evolution of the regulation of cyberviolence; analysis, through which the objective side of the administrative offence of domestic violence was established; synthesis, which allowed to illuminate the content of categories and obtain conclusions; deductive and inductive methods allowed making inferences about the determinants of cyberviolence; hermeneutic method allowed analysing the current domestic legislation to determine its efficiency at the current stage and clarify regulatory gaps, shortcomings and conflict of laws aspects (In particular, the Law of Ukraine "On Education" [10], the Law of Ukraine "On Preventing and Combating Domestic Violence" (hereinafter – the Law on Domestic Violence) [11], the Code of Administrative Offences [12]), the comparative legal, which helped to correlate cyberviolence and cyberbullying with each other system-structural, which contributed to a comprehensive vision of the research problems, highlighting its general component ("domestic violence against women") and partial ("cyberbullying in the family against women"); statistical method allowed exploring the Unified State Register of court decisions and decisions of the European Court of Human Rights on cases of cyberbullying. In conducting the research, several specific scientific methods of knowledge were applied, in particular: the method of legal interpretation helped to clarify the content of individual rules of law, including the evaluative concepts enshrined in the law; technical and dogmatic, which helped to establish and substantiate the definitions of the concepts under study; comparative, which allowed for the description of foreign experience in the regulation of cyberviolence, and legal modelling, through which suggestions for improving Ukrainian legislation on preventing and countering cyberviolence were provided.

Results and Discussion

In the scientific literature, when referring to violence using communication, the concepts of "cyberbullying" and "cyberviolence" are used.

Thus, researchers define cyberbullying:

1) online bullying, which denotes the commission of violent acts designed to annoy, harm, or humiliate a person through various information and communication media, such as: mobile phones, e-mail, social networks, forums, blogs, online video games [13, p. 26];

2) bullying performed using electronic communications [14, p. 42];

3) intentional, systematic, against a person's will, psychological influence of one person on the mind of another, performed with the purpose of defaming, humiliating, intimidating, insulting, harassing a person and using information and communication means and transmitted to another persons in the form of messages, videos, photos, video recordings [15].

It is evident from the above that the concept of "cyberbullying" is used as a definition of violence through communication tools. Notably, the Law of Ukraine "On Education" uses the definition of bullying to interpret actions (acts or omissions) of participants in the educational process which involve physical, economic, psychological, and sexual violence, in particular using electronic communication, performed on a child and/or by the child against other participants in the educational process, resulting or potentially resulting in harm to the physical or mental health of the victim [10]. Notably, the legislative definition of "bullying" stresses the possibility of its commission using electronic communication means.

In turn, scientists define cyberviolence as:

1) deliberate systematic actions by one person or group of persons, performed through electronic communication means, against another person(s) and establishing a hostile, humiliating environment to frighten, violate a person's rights to life and health, honour, respect, dignity, property, safe education and limit the free will of the person(s), etc. [16, p. 179];

2) aggressive, intentional actions committed by a group or an individual consisting of humiliation, harassment and intimidation of another person through using the means of information communications [17, p. 71].

According to GREVIO experts, the digital dimension of violence against women includes any behaviour that encompasses any act of gender-based violence against women that results in or may result in physical, sexual, psychological or economic harm or suffering. Such violence may include threats of acts occurring, coercion or arbitrary deprivation of liberty, regardless of whether it occurs in private or public life [2].

In the author's opinion, cyberviolence is a form of domestic violence, which consists of the commission of intentional actions of a psychological and sexual nature against a woman using electronic communications.

Agree with the statement of Jurgita Pečuriene, researcher of gender violence at the European Institute for Gender Equality (EIGE), who has noted that violence online and in real life has a common purpose: controlling the victim in public, physical or digital space [18].

There is no consensus in the scientific community on the types of cyberviolence. The classification of cyberbullying types was first performed by American scientists R. Kowalski, S. Limber, P. Agatston. Though the researchers conducted the study about children, the types of behaviour they proposed may be applied to the types of cyberviolence against women, namely:

– quarrels, or flaming – exchange of short, humiliating, inflammatory messages (in chats, on forums);

– harassment is the systematic sending of offensive messages and phone calls that overload personal communication channels;

– libel, slander is the dissemination of derogatory false information about a person, which is done using text messages, photos and videos that offensively depict the person;

– imposture, impersonation – positioning by the offender of himself as a victim, which is performed by using the password to access the victim's account in social networks, blog, e-mail, instant messaging, etc. and to spread adverse information on his behalf, as a result of which the victim receives malicious responses;

– fraud – obtaining confidential information (documents, photos, videos) and sending it to other persons by post or on the Internet;

– cyberstalking – secret surveillance and harassment of a person through the Internet to commit criminal acts (rape, assault, beating, etc.);

– happy slapping – posting videos on the Internet, where they can be viewed by other users without the consent of the victim or sending videos using mobile phones [19].

GREVIO experts consider that "cyber violence against women and girls" includes the distribution of video or photographic images, coercion and threats, including sexual humiliation and other forms of intimidation, sexual harassment of a person online, threats of rape, online stalking, impersonation, psychological violence and economic harm caused by digital technologies, [2].

Furthermore, V. Rufanova distinguishes among the types of cyberviolence: 1) sending messages and emails to blackmail or intimidate a person; 2) spreading false information about a person; 3) hacking into a social network email or page; 4) using and changing people's profiles using other people's passwords; 5) sending and spreading others' photos to mock and discuss; 6) posting intimate photos to stigmatise or harass a person; 7) extorting personal information through electronic communication to spread this information; 8) copying and using personal information by hacking or illegally entering another person's social media profile; 9) discussing a person in social media or chat rooms to defame or discredit [20].

Online violence against women can manifest itself through the use, manipulation, dissemination or sharing of private data, information and/or content, photographs or videos, including sexual images, audio and/or video recordings or photoshopped images [21].

As it can be seen, cyberviolence can have various manifestations. Thus, the development of the latest digital technologies results in the emergence of new types of cyberviolence.

To recognise cyberviolence as a form of domestic violence against women, the abuser must be a person on the list of those covered by domestic violence legislation, despite the fact of cohabitation with the abused person.

In most cases, the perpetrator commits cyberbullying deliberately and repeatedly to harm the victim, to whom they do not feel empathy. The victim is generally weaker than the offender and defenceless. Exposure of the victim to such aggression can result in lower self-esteem, cancellation of plans for the future, anxiety, depression, substance abuse, sleep disorders, and suicide.

As known, the Law of Ukraine "On Preventing and Combating Domestic Violence" defines the forms of domestic violence against women as physical, psychological, economic and sexual [11]. At the same time, in none of these forms, and in the definition of domestic violence itself, there is no hint of the possibility of committing violence against women through electronic communications or on the Internet. It provides the perpetrator with a perception of legitimacy and impunity, which is unacceptable given recent social trends developing zero tolerance for domestic violence against women in general and all forms of violence in particular.

As evidenced by a review of court practice, Ukrainian courts, despite legislative conflicts, recognise violence committed through electronic communications or the Internet as an objective side of an administrative offence defined in Article 173-2 of the Code of Administrative Offences "Committing domestic violence, gender-based violence, failure to comply with an urgent restraining order or failure to notify a place of temporary residence" [12], for example:

– insulting with obscene words through social networks, sending messages through the mobile application "Viber", which contain threats, insults and humiliation (decision of Ivano-Frankivsk City Court of Ivano-Frankivsk Region of September 13, 2021 in case No. 344/13527/21) [22];

– insulting with obscene language and threatening expressions during communication (correspondence) in social networks (Rivne City Court of Rivne region ruling of August 27, 2021 on case No. 569/17246/21) [23];

– sending SMS messages containing coarse obscene language and threats of physical violence (decision of the Svatove District Court of Luhansk region of February 12, 2021, in case No. 426/399/21) [24].

In all of these cases, the abuser's actions were considered to be psychological violence, by which the law means verbal insults, and threats, including intimidation, harassment, humiliation, and other actions designed to control the reproductive sphere, limitation of the person's will, if such actions or inaction caused the victim to fear for their safety or that of others, resulted in emotional uncertainty, inability to defend themselves or resulted in damage to the person's mental health [11]. At the same time, the above definition of psychological violence does not indicate that these actions can be committed using electronic communication devices.

In addition to widespread psychological violence, cyberviolence can most often manifest itself in sexual violence, such as: imposing specific types of sexual contact on a woman using electronic communication, distributing photographs, and videos of an intimate nature about the victim, courting in a manner unacceptable to the victim, accusing her of sexual unattractiveness or inadequacy etc.

To ensure a uniform interpretation of cyberviolence as a form of domestic violence, the definitions of "psychological violence" and "sexual violence" in the Law of Ukraine "On Preventing and Combating Domestic Violence" [11] should be improved to include the possibility of committing these types of violence using electronic communications.

Evidence of cyberbullying can often be printouts of electronic correspondence, screenshots of messages, pages in social networks, and websites. Notably, the Supreme Court, by its ruling of 13.07.2020 in case No. 753/10840/19, screenshots of messages from the phone and tablet and printouts from Viber were considered proper and admissible evidence [25]. Considering this, the victim should be obliged to preserve proper and admissible evidence of cyberviolence committed against them, and subsequently, submit them to the court.

The necessity to consider the phenomenon of "cyberbullying" as a separate type of violence was emphasised by the European Court of Human Rights (hereinafter – the ECHR) in its decisions. Thus, in the case of "Buturuga vs. Romania" (judgment of February 11, 2020) it was established that the applicant complained to the law enforcement authorities about the misconduct committed by her ex-husband, who inspected her page on the social network Facebook, listened to private conversations, copied documents and photos. The Romanian Themis did not qualify the actions of the offender as a manifestation of domestic violence. However, the ECHR, considering the case of Buturuga, recalled that domestic violence can manifest itself in various forms and should not be perceived by national authorities only as physical. Violence in cyberspace, which is currently one of the most widespread, can have various forms, including forced penetration into the victim's computer, and distribution and manipulation of photos, videos, and private documents. The Court confirmed that such acts as access, illegal monitoring or storage of correspondence of one of the partners should be considered by the authorised bodies when examining cases of domestic violence. Thus, the Court determined that Romania had failed to perform its positive obligations under Articles 3 and 8 of the European Convention and obliged the state to pay Buturuga 10,000 euros in compensation [26].

Another ECHR judgment in the field of combating cyberviolence was adopted on September 14, 2021 in the case of "Volodina vs. Russia". After the complainant divorced her husband, he established fake social media profiles in his ex-wife's name, posted intimate pictures of her, tracked her whereabouts and sent social media messages threatening to kill her. At first, law enforcement agencies refused to consider such a statement. Eventually, criminal proceedings were opened, and the police determined that it was the ex-husband who had published the photos in which the applicant was naked without her consent, but the offender was not punished due to the expiry of the statute of limitations on criminal liability. The facts of surveillance of the applicant with a GPS tracker and sending death threats on social networks were not considered by the police in general. Consequently, the ECHR issued a judgment in which it established that Russia had breached its positive obligations under Article 8 of the European

Convention and ordered the state to pay 12,886.46 euros in compensation to Volodina. The ECHR stressed the obligation of states to ensure the establishment and efficient application of a system of punishment for all forms of domestic violence, regardless of whether they occur online or offline, and the provision of sufficient guarantees for victims [27].

Notably, the ECHR judgment in the case of "Buturuga vs. Romania" had a positive impact on lawmaking in Romania. Thus, on July 9, 2020, amendments to the Law on Domestic Violence of 2003 entered into force, according to which cyber harassment is recognised as a form of domestic violence. According to the amendments, cyberbullying includes online harassment, online hate messages, online harassment, online threats, publishing information and intimate graphic content without a person's consent, illegal interception of messages, and using social media or email services to shame, humiliate, fear the victim [28]. The types of cyberviolence defined in Romanian legislation deserve attention and can be borrowed in Ukrainian legislation to clarify the manifestations of cyberviolence.

Forms of domestic violence committed in real life against women and online are not mutually exclusive and often occur in parallel, causing significant harm to women. Underestimation of the social illegality of physical and sexual violence committed using electronic communication can increase the usual manifestations of domestic violence. Abuse of new information technologies by perpetrators causes the victim to feel fear, anxiety and gradual isolation from friends and family. Therefore, ignoring the broader manifestations of domestic violence risks missing the social reality of violence against women, which stems from the idea of women's inferiority and stereotypes about their role in society in general.

Conclusions

Thus, cyberviolence as a phenomenon is an urgent problem of the present, which requires urgent solutions as soon as possible, as a large number of women victims are subjected to violence through electronic communication. Currently, cyberviolence against women is not defined as a form of domestic violence in the Law on Domestic Violence, the Code of Administrative Offenses, or the Criminal Code of Ukraine. It can cause the offender to feel the absence of any responsibility and result in the recurrence of acts. However, the consequences of cyberviolence are not less, and in some cases even greater, when compared to other forms of domestic violence. It is explained by the fact that domestic violence is usually committed only in the presence of the victim. At the same time, specific forms of cyberviolence against the victim can be observed by a significant audience using electronic communication tools.

Cyberviolence is a form of psychological and sexual violence, and, therefore, the definitions of these concepts require legislative improvement by providing for the possibility of committing such types of violence using electronic communications. It will eliminate the gap that currently exists in the legislation regarding the impossibility of committing domestic violence in social networks, the World Wide Web and other means of electronic communication, and will bring legal clarity to the institute of legal liability for committing cyberviolence. It is encouraging that despite the lack of a legal definition of cyberviolence as a form of domestic violence, the Ukrainian justice system has brought abusers to administrative responsibility for committing such acts. It coincides with the practice of the European Court of Human Rights and contributes to the best protection of women from digital violence committed by current or ex-partners, and other family members.

Cyberviolence can have various manifestations (flaming, harassment, deceit, slander, happy slapping, imposture, cyberstalking, etc.), which victims may not be aware of, and therefore, raising legal awareness among women in this area will be facilitated by holding round tables, seminars, dissemination of information in the media, dissemination of social advertising on the prevention and combating of cyberviolence.

However, further, development is required to strengthen liability for cyberviolence and to supplement the types of evidence used in administrative offence cases with electronic evidence.

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Теоретико-правовий аспект кібернасильства щодо жінок

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Анотація

Актуальність дослідження зумовлено тим, що в суспільстві XXI століття, яке постійно розвивається та змінюється, процеси комунікації та навчання поширилися на онлайн-середовище, завойовуючи все більше й більше території. Додатки соціальних мереж Facebook, Instagram, Whatsapp, Skype, Twitter, Tik Tok, Zoom тощо дають змогу людям залишатися на зв'язку з іншими, але водночас викривають їх як потенційних жертв онлайн-насильства. Європейський суд з прав людини наголошує, що кібернасильство становить одну з форм домашнього насильства. Результати соціологічних досліджень та статистика свідчать, що постраждалими від домашнього насильства в переважній більшості випадків є саме жінки, а отже, учинення кібернасильства несе загрозу також щодо жінок. Аналіз останніх публікацій свідчить, що кібернасильство як форма домашнього насильства щодо жінок є проблемою, яку широко обговорюють багато фахівців у галузях юриспруденції, психології, соціології та освіти. Українське законодавство про захист жінок від домашнього насильства не визначає кібернасильство формою насильства в сім'ї. Водночас аналіз судової практики свідчить про те, що судді відносять кібернасильство до форм домашнього насильства та притягують кривдника до адміністративної відповідальності. Усе це зумовлює необхідність у теоретичному дослідженні терміна "кібернасильство", що сприятиме правовій визначеності цього явища, відмежуванню його від інших понять та розробленню ефективних шляхів попередження та протидії вчинення цього діяння. Мета дослідження полягає в теоретико-правовому аналізі явища насильства в кіберпросторі та його правовому регулюванні в українському законодавстві. Ефективний аналіз проблематики дослідження забезпечило використання методів тлумачення права, правового моделювання, техніко-догматичного, компаративістського. У дослідженні проаналізовано визначення кібербулінгу та кібернасильства й розмежовано ці поняття. Сформульовано авторське визначення кібернасильства. З метою тлумачення кібернасильства як форми домашнього насильства, дефініції "психологічне насильство" та "сексуальне насильство", наведені в Законі України "Про запобігання та протидію домашньому насильству", запропоновано удосконалити. Досліджено зарубіжний досвід регулювання кібернасильства та запропоновано серед форм кібернасильства в українському законодавстві визначити форми кібернасильства, як це зроблено в румунському законодавстві. Запропоновані в статті теоретичні положення та висновки мають істотне значення для розвитку теорії держави і права в досліджуваній сфері та для вдосконалення чинного законодавства

Ключові слова: домашнє насильство, психологічне насильство, сексуальне насильство, кібербулінг, кривдник, постраждала особа

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Contractual Regulation of Employment Relations: Problems and Prospects

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Abstract

The research is devoted to the prospects of the development of labour legislation in the part of contractual regulation of labour relations. The relevance of the study is conditioned upon the necessity to update the regulatory framework governing labour relations, first of all, the relations on the conclusion, amendment, termination of labour contracts, and relations in the field of collective contractual regulation. The purpose of the study is to identify the risks and highlight the shortcomings of draft laws concerning the individual contractual regulation of labour relations, to analyse the prospects for the development of labour legislation on labour and collective agreements, and to develop the authors' proposals to improve the state of legal regulation in this area. To achieve this purpose, the following scientific methods were used: dialectical, Aristotelian, analytical, formal-legal and comparative-legal. As a result of the study, the following priority measures to improve the contractual regulation of labour relations were identified. Ensuring that stakeholders are better informed about collective bargaining as a guarantee of employees' rights (through the development of an information and advisory space, in particular, a virtual one). Intensification of the process of concluding collective agreements for maximum coverage of the employed population and employers, including individual entrepreneurs. Preventing the adoption of the proposed draft law No. 5371 as such, which by its scope may put employees of small and medium-sized enterprises in a worse position in terms of labour relations than employees who will not be subject to the contractual regime of regulation of labour relations. Further work in the area of labour law reform (both on the theoretical and practical levels) should concentrate on exploring options for regulating labour relations that would combine centralised, unified minimum guarantees for all participants in labour relations with special, possibly simplified, rules for particular categories (e.g. micro-enterprises). The generalisations can be used to develop draft regulations for labour law and can also be used to prepare research on the legal regulation of individual and collective labour relations

Keywords: collective contract, employee, collective agreement, employer, employment contract, labour rights, terms and conditions of the employment contract

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Introduction

The reform of labour legislation has been underway in Ukraine for many years. For objective reasons, the main regulatory act – the Labour Code of Ukraine (hereinafter – the Labour Code) [1], which Ukraine "inherited" from the USSR, largely does not correspond to modern economic, social and other realities.

As the analysis of the source base of theoretical and practical nature demonstrates, currently, there are several trends in updating the legislation in the field of labour relations regulation. First of all, since 2003, the Labour Code of Ukraine has been under development. During this time, about ten projects of this regulatory act were developed. However, as of June 2022, they are all still at the level of draft legislation, in fact, due to difficulties in reaching a compromise between the stakeholders (state, employers and employees). The second area of updating the national labour legislation is manifested in the abolition of legislative acts of the ex-USSR and Ukrainian SSR, which were still applied on the territory of Ukraine by the Resolution of the Verkhovna Rada of Ukraine "On the Procedure for Temporary Operation of Certain Legislative Acts of the USSR in Ukraine" of 09/12/1991, No. 1545-XII [2]. Significant steps in this area, notably, among others, the termination of the Ministry of Social Policy of Ukraine Order No. 592 of 04/10/2017 "On Recognition as Not Applicable of Some Regulatory Acts of the USSR on the territory of Ukraine" [3] more than a hundred regulatory acts of the USSR concerning various sectoral aspects of labour protection, and the adoption of the Law of Ukraine "On de-Sovietization of Ukrainian Legislation" of 04/21/2022 No. 2215-IX [4], which amended the Labour Code [1] and terminated the application in Ukraine of the acts of the USSR and Ukrainian SSR state authorities and administration. Finally, the third area is the amendment of some provisions of the current regulations governing labour and related relations. Considering the limited scope of the scientific research, the author would like to highlight the latest legislative originality concerning the improvement of the contractual regime of legal regulation of labour relations.

Notably, the problems of both individual and collective legal regulation of labour relations are actively studied in scientific circles. Among the latest (in time dimension) studies devoted to these issues, one can note the work of N. Hetmantseva and A. Mitrytska, which exposes the legal nature of individual contractual regulation of labour relations, which is based on the employment contract. The authors substantiate the mixed nature of the employment contract through the presence in it of both individual and regulatory legal provisions [5]. S. Gusarov and K. Melnyk emphasise new approaches to the legal regulation and organisation of labour in Ukraine, namely in terms of establishing the content of the prospective Labour Code of Ukraine regarding the labour contract on remote work [6]. The study of prospects and specific features of normative regulation of homework (as the best option in the digital era) in the EU member states was performed by D. Predeţeanu-Dragne, I. Tudor, D. Popescu, V. Nicolae [7] The studies devoted to the improvement of legal regulation of individual components of the content of employment contracts/conditions of work, including by considering international experience, are significant in the context of this research. For example, V. Yarotskiy, Y. Dreval and S. Zaika identified the systemic features of legal regulation of one of the most significant aspects of labour activity – labour protection. The authors performed research on the example of the Republic of Poland as a country that had similar "starting conditions" to Ukraine and is currently demonstrating an intensive process of improving the legal framework in the field of occupational safety and health [8]. Useful proposals to optimise the mandatory condition of the employment contract – wages in the conditions of Europeanisation of the Ukrainian economy through the development of the Unified Wage Scale for all professions in the Classifier of Occupations have been developed by O. Yaroshenko, O. Lutsenko and N. Vapnyarchuk [9]. Noteworthy are works of a more general nature. For example, the study of the conditions for the retention of labour resources based on the sustainable development of production, as a result of which the authors prove the necessity of establishing favourable working conditions, evaluation of special employees as a prerequisite for optimising work processes, increasing their efficiency, and preserving labour resources [10].

At the same time, labour legislation is under active change, in particular, the Law of Ukraine "On Amending Certain Legislative Acts of Ukraine on Enhancing Protection of Employees' Rights" of 05/12/2022, No. 2253-IX [11] became valid, and the Draft Law of Ukraine "Amendments to Certain Legislative Acts Concerning Simplification of Labour Relations in the Sphere of Small and Medium Business and Reduction of Administrative Burdens on Entrepreneurial Activity" was adopted as a foundation [12]. Thus, the authors of this study identify the prospects for contractual regulation of employment relations by identifying the major areas for improvement. To achieve this research purpose, the following objectives are envisaged: to analyse current and prospective legislation, academic writings and international experience regarding the advantages and disadvantages of introducing a special contractual regime for the regulation of labour relations; define the role of collective and contractual regulation of labour relations in modern conditions; highlight the risks of introducing a special contractual regime to regulate labour relations for a limited number of persons; develop proposals for improving the legal regulation of labour relations in Ukraine by contract.

Materials and Methods

The methodological foundation of the study was established by three groups of scientific methods: dialectical, general scientific (Aristotelian method and method of analysis) and special legal methods (formal-legal method and comparative-legal method). The application of the dialectical method allowed identifying trends in the development of legislation in the area of individual and collective contractual regulation of labour relations. The Aristotelian method was used to clarify the essence of the contractual regime of labour relations regulation. The method of analysis was based on the study of scientific approaches to improving the legal regulation of labour relations. The same method was used to identify contentiously conflicting legal provisions in the area in question, in particular proposals to allow the parties to the employment contract to deviate from the rules governing labour relations established by labour legislation in a way that worsens the position of employees. The comparative legal method was used to compare Ukrainian and international legislation, and to compare the experience of its application. Finally, the content of legal provisions in the area of contractual regulation of labour relations and the development of proposals for their improvement was clarified by using the formal-legal method.

The regulatory framework of the study was based on Ukrainian and international legal acts of various industries. First of all, it is: The Labour Code of Ukraine [1] as the fundamental normative act that currently regulates labour and related relations. The Law of Ukraine "On Collective Contracts and Agreements" [13] – the legal foundation for the collective and contractual regulation of labour relations, and the Law of Ukraine "On Amending Certain Legislative Acts of Ukraine on Enhancing Protection of Employees' Rights" [11] were elaborated. Attention is devoted to the acts of economic and financial legislation – the Commercial Code of Ukraine [14] and the Law of Ukraine "On Accounting and Financial Reporting" [15] in terms of determining the criteria for dividing enterprises into small, medium and large. Considering the significance of international labour standards, the study analysed the provisions of documents such as the International Labour Organisation Declaration of Fundamental Principles and Rights at Work [16] and the International Labour Organisation Convention No. 111 of 06/25/1958 on Discrimination in Respect of Employment and Occupation [17], Directive 2013/34/EU of the European Parliament and the Council of 06/26/2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings [18], International Labour Organisation Convention on the promotion of collective bargaining of 06/19/1981 No. 154 [19]. Prospective legislation has been developed: the draft Labour Code of Ukraine [20] and alternative laws – the Labour Code of Ukraine [21], the draft Law of Ukraine "On Labour" [22], the draft Law of Ukraine "Amendments to Certain Legislative Acts Concerning Simplification of Labour Relations in the Sphere of Small and Medium Business and Reduction of Administrative Burdens on Entrepreneurial Activity" [12], etc.

A summary of the number of small, medium and large enterprises in Ukraine, the number and percentage of employees employed in them, and the unemployment rate are based on official data from the State Statistics Service of Ukraine [23] and specialised information and analytical resources [24].

Results and Discussion

Based on the purpose of this work, the analysis of the identified issues will begin with the prospects of individual contractual legal regulation of labour relations. As N. Hetmantseva and A. Mitrytska argue, it is through individual contractual regulation that the sectoral specifics of labour law emerge and that it establishes the foundation for improving the legal regulation of labour relations. In turn, individual legal regulation of labour relations is based on the employment contract [5, p. 116].

For a comprehensive objective study, first of all, consider the experience of other countries (European countries) in the regulation of individual employment contracts. In the European space, there is no unified approach to the content of the employment contract, the procedure for its conclusion, etc. Each European state has its specific legal regulation of these relations. At the same time, due to globalization processes and the existence of common European labour standards, the process of searching for options for the unification of the legal institution of the employment contract continues [25, p. 340]. In addition, it is significant in the context of this study that Western European countries are shifting their emphasis to the fundamentality of the employment contract (rather than the law) when regulating labour relations while maintaining the rule that the employment contract may define the rights and obligations of the parties without worsening their situation as compared to the law. For example, Article 9 of the Polish Labour Code [26] expressly prohibits the establishment of rules in labour and collective agreements, regulations, and statutes that are less favourable than those established by labour law. Generally, in European countries, the main, fundamental aspects of the interaction between the parties to labour relations are established at the level of legislation. For example, regarding the definition of the list of mandatory terms of the employment contract, the form of the employment contract (Article 34 of the Labour Law of the Czech Republic) [27]. As for the content of the terms of a particular employment contract, the parties are provided with wide freedom to consider the specifics of the respective work. But there is adverse international experience in the field of special regimes of regulation of labour relations. An example is the regulation of non-standard forms of employment in Central and Eastern Europe [28]. The introduction of simplified forms of employment (fixed-term employment contracts), designed to promote the employment of young people, women, and low-skilled workers (i.e. the most vulnerable categories), giving them a chance to escape from poverty and employment instability, has resulted in the opposite – the lack of guarantees of labour rights. These factors should be considered when reforming Ukrainian labour legislation.

Until recently, legislators have had a unanimous approach to the concept and content of an employment contract (starting with the draft Labour Code of 08/28/2003, No. 1038-1 (Chapter 1, "Labour relations and employment contract" in Book Two "Occurrence, Change and Termination of Labour Relations") [20] and concluding with the draft Labour Code of 11/08/2019, No. 2410-1 (Chapter 1. "Labour relations and employment contract" Book Two "Occurrence and termination of labour relations") [21] and the draft Labour Law of 01/16/2020, No. 2708-2 (Chapter 1. "Labour relations and employment contract" of Section II "Occurrence and termination of labour relations") [22]). The key in this approach was that the content of any employment contract should be based on the acts of labour legislation, comply with it and cannot contain conditions that worsen the position of the employee compared to the current labour legislation. If such conditions were established, they would be invalidated. This position of the lawmakers was correct, but, as noted above, none of the mentioned draft laws was adopted.

But in May 2022 a draft law "Amendments to Certain Legislative Acts Concerning Simplification of Labour Relations in the Sphere of Small and Medium Business and Reduction of Administrative Burdens on Entrepreneurial Activity" of 04/13/2021 (hereinafter – draft law No. 5371) [12] was accepted for consideration, shortening the preparation period, in which cardinal innovations were proposed.

According to the authors of the draft law No. 5371 [12], currently, in Ukraine, there is heavy regulation of labour relations, excessive bureaucratisation of their implementation, complicated procedures for personnel records, maintenance of personnel documentation, unreasonable pressure on employers from the state in the face of regulatory authorities. And all this is against the background of outdated labour legislation that does not comply with the current requirements of the labour market, the principles of human resources management and the principles of market self-regulation. To overcome these difficulties, it was proposed, among other things, to introduce a "contractual regime of regulation of labour relations". The regime was defined as limited, namely: a) for some categories of employees; b) for small and medium-sized enterprises. The essence of the proposed contractual regime is to allow wide freedom to the parties to the employment contract when negotiating its terms and conditions, the content of which may vary even for the worse from those established by the employment law. If the employee and the employer agree on such conditions, they are valid and this will not be considered a deterioration in the position of employees (subparagraph 2) of paragraph 1 of part 1 of the draft law No. 5371 [12]). Evidently, this position is debatable based on the following.

The principles of equality and non-discrimination and the principle of non-deterioration of the employee's position compared to the level stipulated by the legislation are generally recognised both at the Ukrainian and international levels. These fundamental principles are enshrined in Article 2-1 and Article 9 of the Labour Code [1], the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work [16], and the Convention concerning Discrimination in Respect of Employment and Occupation No. 111 [17]. Although experts argue that the proposed amendments to Article 9 of the Labour Code as proposed by Bill 5371 do not fall within the concept of "discrimination" within the meaning of Convention No. 111 on Discrimination in Employment and Occupation [29], however, workers who would be subject to such a contractual regime governing labour relations may be disadvantaged in comparison to other workers, without any objective foundation to justify such differentiation [30].

Consider in more detail the field of the contractual regime of labour relations regulation. Draft Law No. 5371 [12] provides for supplementing the Labour Code of Ukraine [1] with Chapter III-B "Contractual Regime of Labour Relations", and Part 1 of Article 49-5 of this Chapter provides for the application of this regime only to specific categories of participants in labour relations. The criteria for classification as such are: the first - the amount of employee's salary (more than eight minimum wages) and the second – the number of employees per calendar year (not more than 250). At the same time, such employers are called "small and medium entrepreneurship".

Concerning the first criterion, it is not entirely clear what the authors of the draft law No. 5371 [12] were guided by when determining such a minimum wage and generally being bound to such an unstable parameter (given the level of inflation, currency fluctuations, potential changes in the socio-economic life of the population, etc.) The author considers that this may result in the necessity to introduce permanent amendments to the basic normative act of labour legislation – the Labour Code [1]. This proposal is inconsistent with such a feature of the law as a type of legal action as stability. Thus, the author of the research fully supports the thesis that the law is the most stable source of law, and it is this property that allows for achieving a high level of guarantees for the implementation of its provisions. On the contrary – frequent changes in laws (the so-called "legislative instability") are detrimental to the efficiency of legal regulation of social relations [31, p. 21], in particular, labour relations.

As for the second criterion, it is quite controversial. Firstly, according to the current legislation – Part 2 of Article 2 of the Law of Ukraine "On Accounting and Financial Reporting" [15], enterprises are differentiated into micro, small, medium and large enterprises based on the average number of employees, and the balance value of assets and net income from sales. Thus, to classify an enterprise into a specific category, it must correspond to at least two of the three criteria. This provision of the Ukrainian legislation fully complies with international requirements, reproducing Article 3 of Directive 2013/34/EU of the European Parliament and the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings [18]. Therefore, using the term "small and medium-sized enterprises" by the authors of draft law No. 5371 [12] only based on the number of employees does not comply with the current legislation. Secondly, according to official data of the State Statistics Service of Ukraine [23], in Ukraine over the past decade, there has been a positive trend in the growth of the number of small and medium-sized enterprises. There are many more of them than large businesses (Figures 1-3).

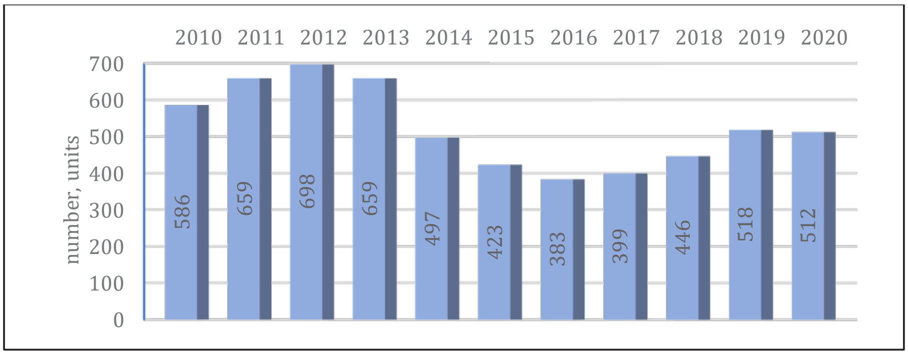

Figure 1. Number of large business entities, units

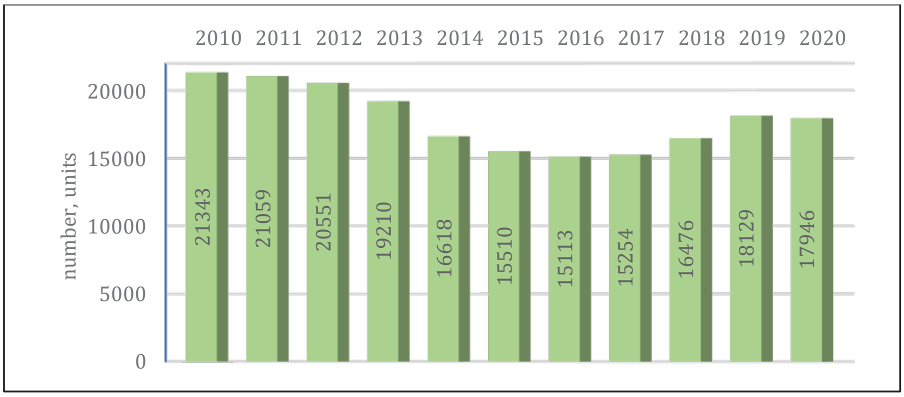

Figure 2. Number of medium-sized enterprises, units

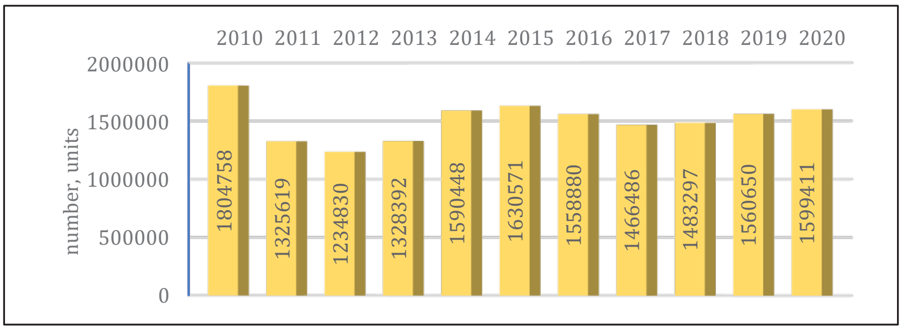

Figure 3. Number of small business entities, units

In addition, the analysis of statistical data on the number of employees in the context of large, medium and small enterprises, from 2010 to 2020 (these are the latest officially published data) demonstrates a steady increase in the number of employees in enterprises belonging to the category of small and medium enterprises. Thus, if as of 2010, 30.6% of employees of the total number worked at large enterprises, in 2020, this figure decreased to 25%. Instead, at medium-sized enterprises, it increased from 43.3% (2010) to 49.1% (2020). The results of generalisations of the dynamics of changes in the number of employees by categories of enterprises are illustrated in Figures 4 and 5.

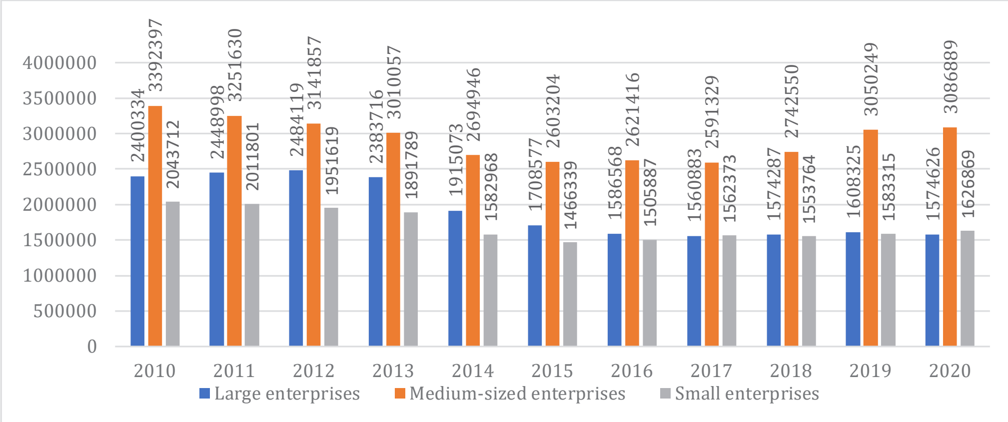

Figure 4. Number of employees at enterprises, persons

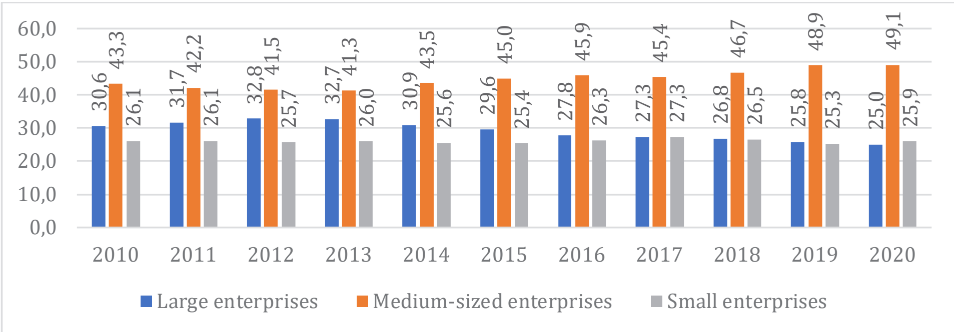

Figure 5. Number of employees at enterprises, in % of the total number of employees

It can be seen that the process of development of small and medium enterprises is underway in Ukraine, it is the right course, based on the positive experience of the European Union. According to the research results, in the European space small and medium-sized enterprises play an essential role in the social and economic development of the European Union countries. These categories of enterprises support the community's economy in times of crisis and ensure competitiveness. The rate of employed workers in small and medium-sized enterprises in the private sector in the European Union is about 67% [32, p. 121]. And the Member States of the European Union, in every possible way, promote the development of small and medium enterprises. In case of considering the proposals for absolute simplification of legal regulation of labour relations between employees and employers – small and medium entrepreneurs, advanced by the authors of the draft law No. 5371 [12], there is a risk of getting the opposite result in Ukraine – to place such employees at a disadvantage compared to those to which the contractual regime of regulation of labour relations will not apply. Such a conclusion follows from the fact that Draft Law No. 5371 [12], firstly, provides the parties to the employment contract with wide freedom to independently resolve all key aspects of the employment relationship, and secondly, explicitly provides worse conditions for the employee (compared to the current labour legislation). For example, it is no longer necessary to obtain permission from the trade union to hire an employee for overtime work, the frequency of wage payments is established at least once a month, the employer has the right to terminate an employment contract at its initiative, in particular, unilaterally (and it is allowed including in the employment contract a condition that no consent of the trade union is required in such termination of the contract even with an employee who is a member of a primary trade union organisation), etc. Finally, the parties may, at their discretion, decide in the employment agreement on the conditions of occurrence and the procedure for resolving conflicts of interest. Thus, it is permitted to "bypass" the regulatory procedures for resolving individual and collective labour disputes (conflicts), which, in the author's opinion, is unacceptable and does not contribute to the efficient and objective protection of the rights and interests of employees.

Despite all the difficulties that may exist for employees if the contractual regime for regulating labour relations as understood in Bill No. 5371 [12] is applied to them, in the current reality, there is a high probability that individuals will agree to the conditions offered by the employer because of the complex situation in the labour market. In the context of military aggression in Ukraine, the unemployment rate is growing rapidly. At the end of 2021, this figure was about 10% [24]. As of May 2022, more than 4.8 million jobs had already been lost in Ukraine due to full-scale Russian aggression, according to the International Labour Organisation.

The International Labour Organisation predicts that Ukraine is capable of restoring 3.4 million jobs if hostilities end quickly. In case of a prolonged war, Ukraine could lose up to 7 million jobs [33].

The potential adverse consequences of changes in the individual-contractual regulation of labour relations can be mitigated by increasing the efficiency of their collective-contractual regulation, i.e. through collective agreements and treaties. As scholars note, the main purpose of collective bargaining is to increase the level of labour rights and guarantees for employees compared to the minimum established by the state centrally in regulations [34, pp. 153-154]. Its purpose is to harmonise the interests of employers and employees by regulating production, labour and socio-economic relations.

Notably, in terms of collective bargaining regulation of labour relations, significant changes have recently occurred due to the adoption of the Law of Ukraine "On Amending Certain Legislative Acts of Ukraine on Enhancing Protection of Employees' Rights" dated 05/12/2022 No. 2253-IX [11]. From then on, collective bargaining agreements can be concluded both with employers who are legal entities and with self-employed individuals. Art. 9 of the Law of Ukraine "On Collective Contracts and Agreements" dated 07/01/1993 No. 3356-XII [13] was changed to introduce the obligation of the employer to provide the employee with the content of the collective bargaining agreement, to ensure free access to the collective bargaining agreement, including the possibility of copying it, before the start of work under the concluded employment agreement. Article 5 of the Law of Ukraine "On Collective Contracts and Agreements" [13] remains unchanged [13], which prohibits the inclusion of conditions that worsen the situation of employees in collective agreements and employment contracts in comparison to the current legislation and invalidates such conditions (if they are still included).

However, the conclusion of a collective agreement is voluntary and initiated by one of the parties. There is no legal liability for the absence of a collective agreement. Moreover, the Law of Ukraine "On Amending Certain Legislative Acts of Ukraine on Enhancing Protection of Employees' Rights" dated 05/12/2022 No. 2253-IX [11] Part 7 of Article 65 of the Commercial Code of Ukraine [14] is presented in a new version to replace the previous one, which contained the phrase "a collective agreement should be concluded". Thus, bringing it into line with International Labour Organisation Convention No. 154 of 06/19/1981 on the Promotion of Collective Bargaining [19].

Conclusions

Considering the above, the authors of this research propose the following measures/areas for improving the contractual regulation of labour relations.

It is essential to intensify the process of concluding collective agreements to achieve the maximum possible coverage of employees by collective agreements. For this purpose, information, education and advisory work among the population should be intensified. Employees should know the concept of the collective agreement, its content, meaning, the procedure of conclusion and other key issues. In addition, the establishment of the simplest possible consultative space is necessary, where all interested parties could receive answers/assistance on the outlined aspects. It, according to the authors of this study, will increase employees' initiative, bring collective bargaining to a new level and prevent employers' abuses in concluding and implementing employment contracts.

It is appropriate to reconsider the legislation that is intended to introduce a specific contractual regime for the regulation of employment relations, primarily concerning its field of application and the possibility of deviations in the content of employment contracts from the prescriptions of the labour law towards the worsening of the situation of employees.

According to the authors of the research, instead of radical changes in terms of introducing a special contractual regime to regulate labour relations for specific categories of employees, further research should be devoted to improving the current labour legislation, establishing an optimal model for the employee, the employer and the state to maintain personnel documentation, expanding opportunities (within specific limits defined by labour legislation) to reflect the specifics of the employment relationship. Ukraine already has positive examples of such improvement. For example, to simplify, streamline and "modernise" the issue of employers determining the necessary personal protective equipment for employees, taking into account the risks in the workplace, the required protective features of personal protective equipment and the employer's choice of protective equipment from the range available on the market. Thus, the relative freedom of choice was ensured without prejudice to the right of employees to labour protection.

The obtained results can become the foundation for the development of the content of normative acts in the field of the contractual regime of labour relations regulation and can be used in theoretical works.

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Договірне регулювання трудових правовідносин: проблеми та перспективи

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Анотація

Статтю присвячено дослідженню перспектив розвитку трудового законодавства в частині договірного регулювання трудових відносин. Актуальність роботи зумовлено потребою в оновленні нормативної бази, що регулює трудові відносини, насамперед відносини щодо укладання, зміни, припинення трудових договорів, а також відносини у сфері колективно-договірного регулювання. Метою дослідження є визначення ризиків та виокремлення недоліків законопроєктів, присвячених питанням індивідуально-договірного регулювання трудових відносин, аналізі перспектив розвитку трудового законодавства про трудові та колективні договори, формулювання авторських пропозицій щодо покращення стану правового регулювання в цій сфері. Досягненню поставленої мети слугувало застосування таких методів науково пізнання, як діалектичний, формально-логічний, метод аналізу, формально-юридичний та порівняльно-правовий. У підсумку проведеного дослідження сформульовано такі першочергові заходи з удосконалення договірного регулювання трудових відносин. Забезпечення підвищення рівня поінформованості зацікавлених осіб у сфері колективно-договірного регулювання трудових відносин як гарантії дотримання прав найманих працівників (через формування інформаційно-консультативного простору, зокрема віртуального). Інтенсифікація процесу укладання колективних договорів для максимального охоплення зайнятого населення та роботодавців, зокрема фізичних осіб-підприємців. Недопущення прийняття законопроєкту № 5371 в запропонованій редакції як такого, що своєю сферою дії може ставити найманих працівників малих та середніх підприємств у гірше становище в частині трудових відносин, ніж працівників, на яких не поширюватиметься договірний режим регулювання трудових відносин. Подальшу роботу в сфері реформування трудового законодавства (як на теоретичному та практичному рівнях) концентрувати на пошуку таких варіантів регулювання трудових відносин, які б поєднували централізовані, уніфіковані для всіх учасників трудових відносин мінімальні гарантії зі спеціальними, можливо спрощеними, правилами для окремих категорій, наприклад мікропідприємств. Отримані узагальнення можуть використовуватися для розробки проєктів нормативно-правових актів трудового законодавства, стануть в пригоді під час роботи над науковими дослідженнями, присвяченими проблематиці правового регулювання індивідуального та колективного регулювання трудових відносин

Ключові слова: колективний договір, найманий працівник, колективна угода, роботодавець, трудовий договір, трудові права, умови трудового договору

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Principles of Patent Protection in the Field of Biotechnology in Eastern Europe: Influence of Western and Eastern Models

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Abstract

The relevance of this research is explained by the necessity of a comprehensive study of the subject of patent protection in the field of biotechnology in Eastern European countries, which is conditioned upon the rapid development of technologies in the field of biology, medicine and pharmacy. The purpose of the research is to provide a legal assessment of the principles of patent protection and to develop approaches to the qualification of biotechnological achievements. While compiling the research, the author used general scientific methods: analysis and synthesis, induction and deduction, abstraction, specification and analogy. Among specific scientific methods, the statistical method is distinguished; notably, specific legal methods, such as comparative legal and method of interpretation of legal provisions. The results of the study highlight the main achievements in the field of biotechnology and promising ways of developing their patent protection. The research describes in detail the fundamental principles of patent protection of biotechnologies. The necessity to consider the possibility of alienation of patents in favour of the state for some inventions, if these inventions are essential at the level of the state and society, to ensure equal and free access to such technologies. It is stated that it is unacceptable to grant patent protection, especially to the results of research in the field of human cloning or the development of artificial intelligence on human cells, as it contradicts ethical and moral standards. The final part of the research is the conclusions of the study, which identify the significance and provides an assessment of the impact of biotechnology on the present and future. The results of the research may be useful for lawyers and scientists in the field of intellectual property law

Keywords: biology, intellectual law, medical law, protection of intellectual rights, intellectual property

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Introduction

Relevant to the research in the context of the protection of human rights and databases containing genetic information is the legislation of leading Western countries, as the rest of the world is only able to perceive the technology, and the archaic philosophical, ideological, and legal foundation for the protection of the rights of patent owners, contrary to the rights and demands of the rest of society. Thus, countries have, for the most part, neglected the development of intellectual property law, recognising that patent owners from other countries will interact in their territory, and expecting international provisions in this area – as demonstrated by a comparison of the types, cultural values and legal protection offered in place of conventional and/or indigenous knowledge in three zones: Brazil, Kenya and Canada [1].

Thus, in Western countries, patent legislation is the foundation of powerful research industries, which involve scientific potential and significant financial resources. Regrettably, such benefits do not benefit the entire society but only large corporations.

In conditions when no ideology can be defined by the state as mandatory (Article 15 of the Constitution of Ukraine [2]), and the church and religious institutions are separated from the state (Article 35 of the Constitution of Ukraine), bioethical principles can be a valuable indicator for the progress of society. It is expected that without the achievements of bioethics and biophilosophy it is difficult to develop bio-law, meanwhile, the volume of bio-law is growing rapidly, sometimes contradictory and unsystematically. Notably, the regulatory definition of "biosafety" as defined in the Law of Ukraine "On the State Biosafety System in Creating, Testing, Transporting, and Using Genetically Modified Organisms" [3], demonstrates a discrepancy between the term and its content (as proper understanding signifies the understanding of biological safety as the safety of biology – the science of living); Article 16 of the Constitution of Ukraine declares the obligation, to preserve the gene pool of the Ukrainian people, while the Concept of Health Protection of Ukraine [4] provides "strengthening the gene pool" etc., from which we conclude that the establishment of bio-law and bio-law requires collaborative work of philosophers, ethicists, ecologists, healthcare professionals, lawyers [5].

Consider that this approach should be supported, since only legal awareness of the phenomena of objective reality as lawful or unlawful, or attribution of such phenomena to different spheres of legal regulation with a varying correlation of public and private components will allow the developing of a model that provides for sustainable development of humanity. In particular, one such phenomenon that requires proper classification is the legal qualification of biotechnological achievements [6, p. 52].

While collecting information, the author used both national literary resources and the foreign latest research. The materials were based both on textbooks of Ukrainian authors and scientific research in foreign journals, for example, the research "Creation of a Bacterial Cell Controlled by a Chemically Synthesized Genome" in the journal "Science" [7], in which scientists designed a cell that will be controlled by a synthetic chromosome. In addition, the author referred to a recent study by Bridget Tenni et al, namely their research, "What is the Impact of Intellectual Property Rules on Access to Medicines? A Systematic Review" [8], in which authors measured the impact of intellectual property regulations on access to medicines. Analysis of the legislation of the European Union and its impact was supported by the research of K. Shahbazyan "Protection of Inventions in the Field of Biotechnology in the EU and Ukraine" [9], which assessed the controversial European provisions on the patentability of biotechnological products and considered the issues of ethics, morality and criteria in patent protection. As India has occupied a leading position among other countries in filing patents in recent years, it is hard to argue that this has not had an impact on patenting in Eurasia, so the author considered the research by Jobin Jose et al "The Benefits and Barriers of Patenting: How Academicians and Researchers Can use their IP to Improve Research Outcomes: An Indian Perspective", which explores the problems and benefits of patenting inventions in the field of medicine [10]. And the position of Ukraine and the establishment of the specific features of harmonisation of national legislation with the EU legislation in the aspect of pharmaceutical patenting was determined by the research of L. Deshko and O. Ivasyn "Patenting of Medicines in Ukraine through the Prism of the Association Agreement with the EU and the TRIPS Agreement: Improvement in Medical and Administrative Regulations" [11].

The purpose of the author's research is an in-depth analysis of the legislation of Eastern European countries, which are not members of the European Union, and determination of the extent of influence of the West and East models on the establishment of the principles of patent protection in the field of biotechnology. Before starting, the author of the research set the following objectives: to comprehensively examine the current legislation of the countries in Eastern Europe in the field of intellectual law and to provide a legal assessment of the vector of development of this field of law.

Modern national legal regulation

However, it can be stated that the legal regulation of biotechnology and its intellectual property rights aspect in Ukraine is rather declarative and vague. Thus, by the Strategy of Economic and Social Policy for the period from 2000 to 2004, the development of the biotechnology industry was noted as one of the priority areas of national policy development.

In addition to the above, the protection of biotechnologies in the national legislation is performed by the Laws of Ukraine "On Legal Protection of Rights to Inventions and Utility Models" [12] of December 15, 2003, "On the Protection of Rights to Plant Varieties" [13] of April 21, 1993, "On Breeding in Livestock" [14] of December 15, 1993, etc.

Thus, there are some foundations of legislative regulation, that can be analysed when trying to determine the legal qualification of biotechnology products and their legal regime, in particular as objects of environmental law or objects of intellectual property rights.

There is a huge divergence of opinion as to the patentability of living organisms, which are largely excluded from patentability. However, the way of thinking is changing rapidly, and much attention is being devoted to intellectual property issues in biotechnology. To reach global markets based on biotechnology, developing countries are amending their patent laws to encourage investment in biotechnology. Recent advances in biotechnological innovations have resulted in remarkable transformations in the field of genetics and molecular biology and have provided new perspectives in healthcare, pharmaceuticals and agriculture [15].

Biotechnology and bioprocesses are two essential tools for economic progress and social welfare. The industrial, academic and government sectors will inevitably encounter technical challenges as they develop competitive biotechnology products and processes using synthetic biology, genetics and molecular biology as alternatives to chemical applications. Therefore, the biological control of microbial consortia based on synthetic biology solutions, and the regulation and optimisation of the transition from batch production to continuous production are ongoing challenges [16].

The closest concept to biotechnology in the field of developing plant and animal breeds by conventional methods is breeding. *Breeding* – is an activity in the field of intellectual property concerned with the development (invention) of completely new, not previously bred seed resources as source material, further used in seed production for the propagation of highly productive varieties of grain crops [17, p. 138].

The modern science of agrarian law of Ukraine considers legal relations that have emerged through the development, protection, use, and alienation of new varieties of plants and new breeds of animals as relations in the field of breeding achievements. In addition, the authors note that the US patent law allows obtaining a patent, the invention of which is a plant. Currently, activities in the field of biotechnology, genetic and cellular engineering, and the establishment of new varieties and hybrids of plants by biotechnological methods are actively developing.

Trendes in the development of patent law protection

The author recommends that the prospective legal institute of patent protection of biotechnologies should be considered as a complex one, which should combine elements of environmental and other fields of law. In the context of this study, the main interest is not the civil law features of the protection of the rights of the inventor etc., but the ability of specific achievements to state registration and recognition in terms of nature management, or rather, using life as a universal biological resource, which causes a detailed environmental and legal regulation of the phenomena under study.

In other words, the ownership of life is a serious ontological problem for society. As pompous as it sounds, when it involves plant varieties, animal breeds, and breeding – activities that have surrounded humans throughout history – intellectual property, as a reward for years of effort, seemed legitimate. Currently, significant capital is actively invested in the development and patenting of nucleotide sequences that have not yet existed in nature and have not yet been fully explored, but they appear, and thus it can be stated that everything that surrounds them is patented. A similar process of "pirate registrations" by individuals who are not involved in the development of substances occurs in pharmaceuticals [18, p. 75].

A similar process, cybersquatting, i.e. registration of unoccupied Internet addresses that have a specific dictionary meaning, has long covered the "verbal space", Internet addresses that contain even the smallest and most absurd semantic load have long been reserved; the names of drugs are patented long before their development and determination of their medical effect, indications and contraindications. And now this process has affected the living world. It is as if someone patented the air they breathe cubic meter by cubic meter.

It is an essential issue concerning the privatisation of public legal space. Under the hegemony of capital, the fact that they still do not charge for the air they breathe or at least do not pay taxes for its use looks like a miracle.

However, it is not excluded that soon they will be forced to pay for their genes, as no biological resource, starting from the molecular level and above, can be in public use for a long time. All genes and biochemicals from various genomes that are of interest and promise income are in the process of patenting and privatisation.

Evidence of this tendency can be the fact of patenting azadirachtin derived from a tree called "neem", which grows in India. This tree has been used since ancient times to treat many diseases (primarily in the fight against infections) and is a natural pesticide. The scientist W.R. Grace identified the most significant component responsible for this effect (azadirachtin) and patented it. Although the process of extracting azadirachtin was known to Indian companies, they did not patent it: the neem tree, with its useful properties and known sphere of application, is considered to be in the public domain in India. In addition, using the neem tree for medical and other purposes has been known for many centuries. In a straightforward act of colonial aggression, which can be defined as eco-piracy, W.R. Grace has captured and maintains relative control over a public resource (it is encouraging to note that some countries refuse to acknowledge this patent) [19].

In this regard, information from the journal "Science" [7] is interesting, according to which a team of scientists first collected DNA sequences from chemical reagents. Based on the existing bacterium of the genus Mycoplasma, the sequence of genes was collected artificially with the addition of marker genes indicating the artificial origin of the collected bacteria. Such an organism is named *Mycoplasma mycoides* JCVI-syn 1.0. Craig Venter, a world-renowned specialist who managed the project, declared in this regard about the industrial revolution [7, p. 1], which would follow this discovery or invention. In the existing terms of law, it is currently difficult to establish what exactly was done by biologists – the discovery of new laws of nature or biotechnological invention. After all, it depends on the level of legal understanding and further legal regulation of legal relations that will necessarily be generated by this fact.

According to Yu.I. Kundiev provides a way to manipulate life on a scale that was previously considered unattainable. It is possible to design living systems with predetermined capabilities, in other words, programming living organisms, developing living organisms from the so-called "bio-bricks", and assembling DNA sequence fragment by fragment. Thus, this is a clear example of when "dangerous knowledge" increases it is potentially much faster than the wisdom that is required to cope with it [20, p. 28].

The requirement of the clearest and most complete description of the invention in the field of biology is one of the main obstacles in ensuring patent protection of the results of technological research [21, p. 362-365].

Conventionally, the essential features of breeding achievements include the presence of a biological object, the presence of genetically determined traits and obtaining as a result of purposeful selection [21, p. 410]. To this is added the predominant use in agricultural production, priority based on the world level of distinctiveness by biological features, is created exclusively in material form and requires organoleptic expertise [22, p. 7].

As noted by researchers of foreign sources, the instructions to the European Patent Commission currently outlining a biotechnological invention, biological material, plant variety and process in the field of microbiology, enshrine the principle of non-limitation to one particular plant variety or animal breed (i.e. if the technical embodiment of the invention is not limited to a particular plant variety or animal breed), and specified inventions deprived of patentability – "processes of cloning of human beings, processes of alteration through the germline of genetic identity of human beings, use of human embryos for industrial or commercial purposes; processes of alteration of genetic identity of animals which may cause them suffering without any significant medical benefit to humans or animals, and animals emerging as a result of such processes". [23, p. 23].

Interesting is the research of K. Shahbazyan, who notes: "Comparison of the provisions of the national legislation of Ukraine and Directive 98/44/EC testifies to the expediency of implementing into our legislation all the fundamental principles specified in the Directive concerning the patentability of biotechnological inventions, the scope of their protection, licensing conditions, conditions of deposit and access to them, etc." [9].

The justification for this position is that even historically in the European Union, several reasons determined the necessity to harmonise the legislation of the Member States on the protection of biotechnological inventions. For example, one such reason is the diversity that exists in the systems of legal protection for inventions in the European Union, which is expected to become an obstacle to commerce and market development in the future; and the progression of these differences in the adoption of updated national legislation and its interpretation by national courts in the European Union; and, admittedly, the realisation that only legal protection adapted to the requirements of the present will encourage increased investment in the biotechnology industry.

Solution of biopatenting problems

However, the author notes the significant role of consolidation in the legislation of specific principles to be applied to the patentability of biological materials, which, in addition, promotes and intensifies the desire for harmony in the legislation. Notably, to comprehensively improve the multilevel system of legal regulation of research and development in the field of biotechnology, the Directive was approved in 1998 [24]. The harmonisation of biotechnology legislation in the European Union has now begun based on the European Parliament and Council Directive 98/44/EC on the legal protection of biotechnology inventions, which is designed to address issues in ethical terms and to encourage research and development.

The Directive states that "the following are the principles for patenting inventions in the field of biotechnology. Technological inventions suitable for industrial use are patentable even if they concern a product containing biological material or a process by which biological material is produced or used. Inventions concerning plants or animals are patentable if the technical embodiment of the invention is not limited to a particular plant variety or animal breed. The human body and its elements may not constitute a patentable invention, but an element separated from the body or produced in another way may constitute a patentable invention" [25].

In addition, biological inventions, which appeared contrary to the generally accepted provisions of ethics and morality in society, are not patentable, in particular: human cloning, using human embryos for industrial purposes and changing the genetic identity of a person.

According to the document, patent protection cannot be granted to inventions if they only compile previously acquired knowledge and are not used for new purposes. That is, there is no possibility to patent a DNA sequence since it is not an invention but only a discovery.

Instead, processes and products that use DNA sequences can become patentable if they comply with ancillary patentability criteria.

As a result, the author proposes to consider as unpatentable some processes, such as cloning of a human being, and changing its genetic identity; to determine that the human body at any stage of ontogenesis should not be an object that can be patented [26, p. 1].

In the author's opinion, without naming specific methods or techniques, it is necessary to consider the possibility of compulsory alienation of patents in favour of the state for those inventions that will be considered to be in the public domain and distributed freely or on predetermined, equal conditions for all with the possibility of access to each interested person.

Conclusions

Considering the above, it is essential to reconsider the essence of the state as a social regulator of radically new social relations arising in connection with the development of biotechnology. Previously, due to a lack of appropriate instruments for penetration and manipulation, human biological beings seemed solely a private sphere, but now the state must regulate in detail all phenomena in the sphere of biological beings, above all human beings, considering those dangers and rights violations, increasing social inequality by biological inequality, which will be reflected in closing the access for most of society to using the achievements of biotechnology by various kinds of patent barriers. Thus, when deciding whether or not to grant patent protection to specific phenomena in biotechnology, the regulator should not be guided by the interests of the researcher, inventor or investor - although it would seem that prioritising such interests would contribute to the more efficient development of biotechnology, as advocated by the author of the research, but on the interests of the general public, on how such legal protection will affect the development of social relations and whether it will violate the fundamental ecological right of the individual to life and the free enjoyment of the environment in which they live. In this case, the author should proceed from the concept of administrative procedures in the field of intellectual property, not only as activities to protect and enforce the rights of intellectual property subjects but as activities to protect the public interest and free development of further research in the field of biotechnology.

The doctrinal determination of the development of biotechnology and its impact on nature and society should be based on the principle that the biological resource is single and indivisible, like atmospheric air, and cannot be an object of individual use. Similarly, the only biological resource – life is even more universal and the results of its use, all derivative life species established from existing ones, and those constructed from chemical compounds by assembling DNA helix segments, evidently cannot be artificially distinguished and become objects of civil rights.

And it is unacceptable to grant patent protection, especially to the results of research in the field of human cloning or the development of artificial intelligence on human cells, which can only encourage those who want to make a profit. The primary principle of legal qualification should be compliance with environmental rights and the legitimate interests of members of society, and only if this preliminary criterion is satisfied, should further ways of disseminating the phenomenon through intellectual property mechanisms, or recognition as a discovery and in the public domain.

To outline the prospects of national development, consideration should be devoted to the rapid development of industries related to medicine and pharmacy. According to the author, these processes are connected proportionally, thus, the significance and necessity of biopatenting will only increase.

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Принципи патентного захисту у сфері біотехнологій у країнах Східної Європи: вплив західної та східної моделей

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Анотація

Актуальність цієї роботи зумовлюється необхідністю всебічного дослідження теми патентного захисту у сфері біотехнологій у східноєвропейських країнах, яка зумовлена стрімким розвитком технологій у галузі біології, медицини та фармації. Мета роботи полягає в наданні юридичної оцінки принципам патентного захисту, а також опрацюванні підходів до кваліфікації біотехнологічних досягнень. Готуючи статтю, автор використовував загальнонаукові методи: аналізу та синтезу, індукції та дедукції, абстрагування, конкретизації та аналогії. Серед спеціальних наукових методів виокремлюється статистичний метод;

також варто наголосити на спеціальних юридичних методах, як-от порівняльно-правовий та метод тлумачення правових норм. Результати дослідження висвітлюють основні досягнення у сфері біотехнологій та перспективні шляхи розвитку їх патентного захисту. У статті детально розглянуто базові принципи патентного захисту біотехнологій. Виявлено необхідність у розгляді можливості відчуження патентів на користь держави на деякі винаходи, якщо ці винаходи мають важливе значення на рівні держави та суспільства, для забезпечення рівного та вільного доступу для таких технологій. Зазначено, що є неприйнятним надання патентного захисту, особливо результатам досліджень у галузі клонування людини чи розробки на людських клітинах штучного інтелекту, оскільки це прямо суперечить етичним та моральним нормам. Заключною частиною роботи слугують висновки з проведеного дослідження, у яких розкривається значення та надання оцінки впливу біотехнологій на сьогодення та майбутнє. Результати роботи можуть стати в пригоді правникам та науковцям у сфері інтелектуального права

Ключові слова: біологія, інтелектуальне право, медичне право, захист інтелектуальних прав, інтелектуальна власність

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Assessment of Occupational (Industrial) Risks: New Approaches, Improvements, Methodology

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Abstract

The relevance of the study presented is conditioned upon the fact that the current national policy of control and supervision, including industrial safety, is designed to detect and prevent violations of the permissible level of danger for people and the environment by entities engaged in economic activities. The purpose of this study is to analyse occupational risks in enterprises and to explore new approaches, methodologies and ways of improving the assessment of occupational risks in production facilities. The methodological foundation of the study is based on a combination of various general scientific methods of scientific knowledge: analysis and synthesis of information, comparative method, and methods of induction and deduction. Improving the state of occupational safety requires improving the principles of occupational safety management. In addition, an assessment of the risk to the life or health of employees from economic activity should be performed and defined as the product of the probability of one accident per year and the probable number of lost working days per employee during the year. The study identified that workplace risk assessment should be re-evaluated whenever changes are expected in the company that may affect safety, such as new processes, new equipment, new materials, or changes in the work organisation or the work environment. The steps of risk assessment are clarified, the means of eliminating or reducing the risk are identified. It was demonstrated that a risk assessment should be developed and used to help employers or managers, and it was emphasised that once risks and dangers have been identified, appropriate action should be implemented with proper legal compliance. The practical significance of the presented research is that it can be used both in practice and for studying the theory of occupational risk assessment at enterprises

Keywords: industrial activity, industrial risk, labour protection, potential threats, safety

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Introduction

Improving the state of occupational safety requires improvement of the principles of occupational safety management. State supervision of labour protection and industrial safety involves various types of inspections depending on the specific features of technological processes, production facilities, and works performed by business entities. The modern national policy of control and supervision, including in the field of labour protection and industrial safety, is designed to identify and prevent violations of safety requirements at these facilities [1].

The main regulatory document in this regard is the Law of Ukraine, “On Basic Principles of State Supervision (Control) in the Sphere of Economic Activity” [2], and the Law of Ukraine, “On Occupational Safety and Health” [3]. As a starting point for the planned organisation of supervision activities, the state supervisory authority determines the criteria by which the risk of business activities is assessed, and supervision activities are designed. Thus, permissible risks for industrial and occupational safety indicators should be determined at the legislative level. Admittedly, one of the main indicators in the field of safety is accidents at work, in particular those with deadly consequences. Improving the state of occupational safety and health requires improvement of the principles of occupational safety and health management. It is conditioned upon modern world trends in the field of labour protection, and requirements of the relevant international law. These include, for example, the International Labour Organisation Convention on the Fundamentals of Occupational Safety and Health [4], and the international standard “Guidelines on Occupational Safety and Health Management, ILO-OSH 2001” [5]. The new principles of occupational safety and health are based on various motivating factors that are determined by analysis, forecasting, personnel management, risk management (industrial, occupational), the process approach, using international practices and, finally, the improvement of occupational safety and health and the management of the industry. The main issues of improving management are the development of a methodology for risk analysis and assessment of their further management [6].

A hazard is defined as a feature or capability of a facility (e.g., production materials, equipment, technology, and procedures) that can result in damage. Risk can be defined as the probability of potential damage and the possible degree of damage. Risk assessment is the process of evaluating the risk to the health and safety of workers in the workplace arising from the circumstances of the danger in the enterprise [7]. The assessment of the risk to the life or health of workers from the economic activity for each type of activity should be determined as the product of the probability of one accident per year and the probable number of lost working days per employee during the year. The following indicators are proposed for evaluation: the average number of occupational accidents (Lost Time Injuries and Deadly Accidents) over the last three years, the average number of employees in that economic activity over the last three years and the average number of working days missed as a result of incapacity for work conditioned upon accidents over the last three years [8].

According to the International Labour Organisation, the correlation between the total number of accidents at work and deadly accidents at work in Western Europe can be estimated at one thousand. Thus, probable harm should be considered as the risk of injury to the life or health of workers in the economic activity for each activity, which is defined proxy for the probable number of working days lost per worker in the enterprise during the year [9].

During the literature review, it was investigated that risk assessment should be developed and used to assist employers or managers. Thus, the study by M. Rodrigues and co-authors considers the impact of activities related to the prevention of occupational risks on occupational health and safety indicators [10]. The results of the study demonstrated that in Portugal’s microenterprises, some enterprises did not have a preventive service, and in some cases, there were no occupational safety and health policies, risk assessments, training and accident reporting mechanisms. Insufficient time was devoted by employers to occupational safety and health issues and support of external consulting services.

The issue of the influence of enterprise management and media attention on occupational health and safety at enterprises was exposed in their study by Q. Zhou and co-authors [11]. The authors have established a model that has proven to be efficient by reducing the costs of managing the main enterprise, increasing the probability of receiving precise messages in the media, and reducing the initial costs of labour protection.

Notably is the study of N. Mashwama and co-authors [12] on the problems of occupational health and safety of small and medium-sized business contractors. The authors emphasise that employee safety and health are non-negotiable, and increase employee productivity, improve the company’s image, and reduce the number of claims and accidents. Instead, managers and employers should have efficient communication skills, technical and business skills, experience and relevant education.

It is essential to identify the dangers in the workplace and assess the risks associated with these to identify what measures should be implemented to protect the health and safety of workers and their subordinates, with proper regard to legal requirements. The study demonstrated that workplace risk assessments should be re-evaluated whenever changes are expected in the company that may change the perception of risk, such as new processes, new equipment, new materials, changes in work organisation, new production, and conditions such as the opening of new stores or other premises.

The purpose of the research is to analyse occupational risks at enterprises and to consider new approaches, methods and ways to improve the assessment of occupational risks at industrial and other production facilities.

Materials and Methods

The methodological foundation of the study is based on a combination of various general scientific methods of scientific knowledge. In this study, the methods of analysis and synthesis of information, comparative method, and the method of induction and deduction were used, and the analysis of scientific literature relevant to the research subject was performed. Through the methods of analysis and synthesis, the approaches used to assess risks in the workplace and their crucial elements were identified. The ways of conducting risk evaluation at the workplace were identified, and the most efficient ones were analysed. Comparison as a logical technique was used in the study of ways to increase production efficiency and improve its quality. The methods of comprehensive risk assessment were analysed, and possible control measures were identified.

The principles of risk assessment planning were analysed. The first principle states that the assessment should be structured to cover all significant hazards and risks (e.g. not forgetting objectives such as off-site cleaning or ancillary units such as waste compaction). The second principle is that, once the risk has been identified, the assessment should start from purely theoretical principles and consider whether the risk can be eliminated: whether the hazard it represents is required (e.g. whether internal traffic problems can be avoided and if this traffic occurs not only on the road that exists at the enterprise but from the very edge of this road) [13].

Results and Discussion

Each employer has a general responsibility to ensure the safety and health of workers in every aspect of their work. The purpose of the risk assessment is to enable the employer to implement the appropriate measures to protect the safety and health of employees. These measures include: the prevention of occupational risks, informing employees, training employees, organisation and resources to implement the required measures [14]. Though risk assessment involves the prevention of occupational risks, and, this should be the purpose at all times, in practice, it is not always possible to solve this problem. If the risks cannot be eliminated, the risks should be mitigated, and the residual risk should be controlled. At a later stage, as part of the review programme, such residual risks will be re-evaluated, and the possibility of eliminating or further reducing the risk may be considered in light of new findings [15].

Risk assessments should be developed and applied to assist employers or managers. It is essential to identify the dangers in the workplace and assess the risks associated with these to identify what measures should be implemented to protect the health and safety of workers and their subordinates, with proper regard to legal requirements. The above risks should be evaluated for the most reasonable choice of production facilities, chemicals and medicines, workplace equipment and work management. In addition, it is essential to verify whether the measures implemented are sufficient. If the assessment results indicate the necessity of additional measures, they should be prioritised. It is essential to demonstrate to oneself, the competent authorities, employees and their representatives that all factors relevant to the work have been considered and that an informed decision has been made regarding the risks and necessary health and safety measures. In addition, it is necessary to ensure that the precautions and work methods and production technologies identified as necessary as a result of the risk assessment include an increased level of protection of workers in terms of safety and health [16].

The workplace risk assessment should be re-evaluated whenever changes are expected in the company that may change the perception of risk, such as new processes, new equipment, new materials, changes in work organisation and new production. conditions such as the opening of new stores or other premises. In any risk assessment and subsequent measures or controls, it should be essential that the risk is not transferred, i.e. that one problem does not result in another. For example, installing double-glazed windows in the office to reduce street noise will be a dubious advantage if proper ventilation is not provided. It is equally essential that the risk is not transferred to another area. For example, exhaust ventilation should not be provided to remove toxic substances in a way that establishes a hazard to other production areas or to people outside the facility (one hospital installed a mortuary room exhaust under the windows of the children's ward, which resulted in a hazard to life and limb) [17].

Risk assessment consists of the following stages: identification of hazards, identification of workers (or other persons) who may be exposed to these hazards, and assessment of the relevant risk, i.e. qualitative or quantitative consideration of the possibility of eliminating the risk. If it cannot be eliminated, the decision to implement further measures to prevent or reduce the risk. Risk assessment should be performed for all workplaces. In a broader sense, they can be classified as: stationary establishments, such as offices, schools, and factories, change of work, such as construction, docks, and shipyards, mobile work, civil service brigade, and duties associated with the performance of work with visits [18].

Several approaches (and their combinations) can be used for risk assessment, provided they contain the essential elements. Approaches used to assess risks in the workplace are usually based on the following elements:

1) monitoring of the production environment (e.g. means of access, floor condition, machine safety, dust and steam, temperature, lighting, noise, etc);

2) identification of objectives to be performed at the

workplace (identify all objectives and include them in the risk assessment);

3) consideration of objectives performed at the workplace (risk assessment of various objectives);

4) performance monitoring (verifying that procedures are performed according to the established procedure or forecast and that there are no other risks);

5) consideration of working models (to assess the impact of hazards);

6) consideration of external factors that may affect the workplace (for example, weather conditions for workers outside the buildings);

7) exploring psychological, social and physical factors that may contribute to stress at work, and their interaction with other factors of work organisation and work environment;

8) consideration of organisational measures to maintain conditions, including protective measures (e.g. risk assessment systems for new equipment, materials, etc. to update risk information) [19].

If you require a risk assessment at your workplace, the fastest and most reliable way to discover the details of what's occurring is to conduct a risk assessment. For example, to survey employees involved in the relevant production activities. They know what technological operations are performed, whether there are any simplified methods or ways to accelerate a complex task, and what preventive measures are implemented. Thus, employers should ensure that the risk assessor, whether an employee or an external consultant, communicates with employees or others, such as contractors, who perform the work [20].

In addition, employees can be warned about specific dangers that are difficult to detect. These are issues that can result from the organisation of work, working hours or the workplace that people sometimes take for granted or suffer at the cost of their comfort. Employees may discover that the way work is presented to them causes difficulties: for example, due to the work, being presented too quickly, leading to stress, or presented in a way that requires the employee to extend their hand or occupy an awkward posture, requires constant movement or acute pain and trauma from constant stress [21].

For a more detailed consideration of the problem of industrial risk assessment, it is essential to consider the works of other researchers. D. Pleban and co-authors note [22] that the increase in production efficiency and quality improvement has contributed to the development of ultrasonic technological applications, in which low-frequency ultrasounds are generated to operate, accelerate and facilitate technological processes. Process ultrasonic devices (i.e. ultrasonic noise sources in the working environment, e.g. ultrasonic gaskets, ultrasonic welding machines) have relatively high power and their nominal frequencies range from 18kHz to 40kHz. In Poland, ultrasonic noise (defined as noise containing high audible and low ultrasonic frequencies from 10 kHz to 40 kHz) is included in the list of harmful factors in the working environment, thus, the permissible values of ultrasonic noise in the workplace are established. The permissible values of ultrasonic noise and the new method of measuring ultrasonic noise allow for an assessment of the occupational risk associated with ultrasonic noise. The measurement range of this method includes the determination of equivalent sound pressure levels in 1/3 octave ranges with intermediate frequencies from 10 kHz to 40 kHz. The research [22] describes both methods of ultrasonic noise measurement and methods of occupational risk assessment related to ultrasonic noise. In addition, examples of the results of occupational risk assessment associated with exposure to ultrasonic noise are discussed.

Uzbekistan is currently in the process of modernising its legislation, especially in the field of occupational safety and health. Modernisation is the transition from a still inefficient remuneration system to a modern system based on preventive approaches, which implies continuous improvement of working conditions. The analysis of legislation in the field of occupational safety and health management, which obliges employers to approach the assessment and management of occupational risks, and the assessment of occupational risks for miners working under the influence of harmful and dangerous factors, is performed in the work [23]. Among such factors, the researchers identified the factors of gold mining in the quarry and the development of measures to reduce hazards. Possible reasons for non-compliance with the stated requirements of the physical factors of the working environment of miners when working in gold mines are considered. Occupational risks for personnel are defined as high and medium, and organisational and technical measures should be implemented to minimise them [23].

M. Palega notes that occupational risk is closely related to the working environment [24]. For the same positions, but in different working conditions, the hazards and levels of risk may be varied. To assess the degree of risk of damage, as many exposures as possible should be applied. However, when assessing the probability of a hazard, it is essential to include, among other things: working conditions, past events or possible behaviour of employees (especially those that may cause an accident at work). The source of the above information can be statistical data or workstation observations. Thus, the research by M. Paleha presents an assessment of occupational risk in the position of laser cutter operator, which was performed by the method of occupational safety analysis. According to this method, the occupational risk is determined based on two parameters, namely: consequences and probability of them, where the probability of consequences is the sum of three factors: the frequency of the hazard, the probability of the event and the limitation of the possibility to avoid damage [24].

Occupational safety issues that occur in the workplace are issues that companies should consider when improving their health and environmental awareness activities [13]. There are many methods in the literature with various justifications for identifying priorities of hazards according to their risk level and for mitigating their consequences. In the study of M. Gül and M.F. Ak, a new model of occupational risk assessment is developed by combining two well-known multicriteria decision-making methods, called the best and worst method (BWM) and multi-attribute ideal real comparative analysis (MAIRCA) in a fuzzy environment. The suggested model is distinguished from other similar models in three aspects. First, it considers the severity of the hazard and the associated risk in terms of risk to humans and the environment. Second, it applies fuzzy BWM (F-BWM) to estimate the comparative significance of three risk factors called "probability, frequency and severity" of the conventional Fine-Kinney method. Thirdly, it applies fuzzy MAIRCA (F-MAIRCA) to rank hazards according to their risk level using the significance values obtained by F-BWM. To demonstrate the applicability of the approach, a case study of a risk assessment in a marble factory was completed. In addition, several validation studies are considered in the research, including a comparative analysis using fuzzy VIKOR and fuzzy TOPSIS methods to highlight the reliability of the proposed approach, and sensitivity analysis is performed according to various weights of the significance of risk factors [13].

The issues of occupational risks and new approaches to their assessment are raised in the study by O. Polukarpov and co-authors [25]. The relevance of this subject is explained by a wide range of situations that occur in modern industries and pose a high degree of risk to employees of the enterprise. The purpose of the study [25] is to identify new approaches to occupational risk assessment and to explore various aspects of improving production activities in the context of using new risk assessment methods. The leading scientific method in the authors' research is a combination of analytical and logical approaches to the complex problems introduced in the subject of this study. The main results of this study are to identify new, efficient methods for assessing the risk of occupational accidents and to estimate the level of occupational accidents in Ukrainian enterprises in 2020 and several previous years. Prospects for further study in this regard introduce a methodology for assessing the real level of occupational risks in the production sphere to reduce the total number of risk situations for employees of modern industrial enterprises occurring in the course of their work. The applied significance of the study by A. Polukarpov and co-authors is the possibility of the further practical application of the results obtained to establish a foundation for the safe performance of professional activities by employees of enterprises and organisations operating respectively in various fields of economy, and industry. production. Identification of various aspects of occupational risk assessment in different fields contributes to the elimination of such risks and prevents their occurrence in the future [25].

The issue of limited access to the method of biological factors assessment is considered by L. Biktasheva and N. Vadulina. Notably, the impact of the biological factor is underestimated in some occupational groups. The assessment of the biological factor is based only on the current methodology for conducting a special assessment of working conditions, which determines the hazard class for microorganisms-producers according to the excess of their maximum permissible concentration in the air of the working area. For pathogenic microorganisms, the hazard class is determined according to the Classification of biological agents by pathogenicity groups. In both cases, the occupational risks of workers in contact with the biological environment are not considered. In the study [26], additional risk factors of biological agents were identified, which, according to the authors, will help to better assess the biological factor, without avoiding various biological risks. Such an assessment of the biological factor will allow more accurately determining the class of working conditions of workers. It is proposed to improve the methodology for assessing biological factors, which considers the occupational risks of sewage treatment plant workers and the calculation of their occupational risk index by the Fine-Kinney method. At the end of the study, it was concluded that it is expedient and necessary to consider occupational risks in the methodology for assessing biological factors. Such accounting will allow more accurately determining the class of working conditions for the underestimated separate professional group of workers of treatment facilities [26].

In general, a risk assessment should, if possible, identify risks that can be reduced. In many cases, this purpose may be unattainable, but it must be established at all times. Fully consider those hazards that do not require additional measures (e.g. ladders or hand tools that are properly designed and controlled). However, the possible exceptional or specific uses should not be ignored. For example, if you have to lift or lower very heavy loads or if hand tools are used to handle stone, a more detailed risk assessment is recommended. It is essential to identify risks that are well known and for which control measures can be implemented quickly. And, in addition, demonstrate where to perform a more comprehensive assessment and, if appropriate, use more sophisticated methods.

Conclusions

Improving the state of occupational safety and health requires improvement of the principles of occupational safety and health management. The assessment of the risk to the life or health of workers from the economic activity for each type of activity should be determined as the product of the probability of one accident per year and the probable number of lost working days per employee during the year. In the process of the study, it was determined that the workplace risk assessment should be updated whenever changes are expected in the company that may change the risk status, for example, new processes, new equipment, new materials, changes in the organisation of work or the working environment.

It is demonstrated that risk assessment consists of the following steps: identification of hazards, identification of workers (or other persons) who may be at risk, and assessment of the relevant risk, i.e. qualitative or quantitative consideration of the possibility of eliminating the risk. If the risk cannot be excluded, measures should be implemented to decrease it. Risk assessment should be performed for all workplaces, which can be classified as follows: stationary establishments such as offices, schools, factories such as construction, docks, shipyards, and mobile work. It was identified that according to the International Labour Organisation, the correlation between the total number of accidents at work and deadly accidents at work in Western Europe can be estimated at one thousand.

The literature review identified that risk assessment should be developed and used to assist employers or managers. It is necessary to identify hazards in the workplace and assess the risks associated with these hazards to determine what measures should be implemented to protect the health and safety of workers, with proper compliance with legal requirements.

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Оцінка професійних (виробничих) ризиків: нові підходи, удосконалення, методологія

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Анотація

Актуальність представленого дослідження зумовлено тим, що сучасна державна політика контролю та нагляду, зокрема промислової безпеки, спрямована на виявлення та запобігання порушень суб'єктами господарської діяльності допустимого рівня небезпеки для людей та довкілля. Метою представленого дослідження є аналіз професійних ризиків на підприємствах, а також вивчення нових підходів, методології та пошук шляхів щодо вдосконалення оцінки професійних ризиків на виробництвах. Методологічна основа дослідження ґрунтується на поєднанні різних загальнонаукових методів наукового пізнання: аналізу та синтезу інформації, порівняльного методу, а також методів індукції та дедукції. Поліпшення стану безпеки праці потребує вдосконалення засад управління охороною праці. Також необхідно проводити оцінку ризику для життя або здоров'я працівників від господарської діяльності та визначати її як добуток ймовірності одного нещасного випадку на рік і ймовірної кількості втрачених робочих днів на одного працівника протягом року. У процесі дослідження визначено, що оцінку ризиків на робочому місці треба переоцінювати щоразу, коли очікуються зміни в компанії, які можуть впливати на рівень безпеки, наприклад нові процеси, нове обладнання, нові матеріали, зміни в організації праці або у виробничому середовищі. З'ясовано кроки проведення оцінки ризику, виявлено засоби усунення чи зниження ризику. Показано, що оцінка ризику повинна бути розроблена та використана для допомоги роботодавцям або керівникам, і підкреслено, що після виявлення ризиків та небезпек необхідно вжити відповідних заходів з належним дотриманням вимог законодавства. Практичне значення представленого дослідження полягає в тому, що воно може бути використане як на практиці, так і для вивчення теорії оцінки професійних ризиків на підприємствах

Ключові слова: промислова діяльність, промисловий ризик, охорона праці, потенційні загрози, безпека

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"Disclosure" of Restricted Information and Related Terms of Criminal Law: Interrelation of Concepts

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Abstract

The relevance of the publication is explained by the fact that one of the main factors of the inefficiency of existing criminal law means of protection of information with limited access is an imperfection of the text of the current Criminal Code of Ukraine, as evidenced by the lack of a systematic approach of the legislator to the legal structure of "disclosure of information". The purpose of the research is to conduct a comparative legal analysis of the normative regulation of disclosure of information with limited access and tangential terms in criminal law for technical and legal improvement of the Criminal Code of Ukraine. To achieve it, the methods of system-structural analysis, semantic, dogmatic, Aristotelian and classification methods were used. The research considers the correlation of the content of all criminal law terms relating to the concept of disclosure, which are roughly divided into several groups: alternative acts (collection, receipt, modification, destruction, etc.), collected acts (violation of secrecy/prohibition, use), synonymous acts (distribution, disclosure, provision of access, transmission). The alternative acts of "collection" and "possession" have been identified as preparatory to "disclosure" if there is a corresponding purpose for the disclosure of the collected information, and, thus, they cannot be included in the criminal law content of the act of "disclosure" itself. It has been established that the existence of two mutually exclusive (related) legal elements of criminal offences – wrongful acquisition of information (a "truncated element" which does not give legal significance to further actions of storage, dissemination or other use of information) and disclosure (by a person who has lawfully acquired the information) – may be promising by addressing the relevant technical and legal deficiencies. The "disclosure" of relevant information has been demonstrated to constitute a "violation of secrecy" and a "violation of the prohibition on using information", but such definitions should not be used in the text of the criminal law due to their lack of specificity. Established that the content of the concepts of "disclosure", "spreading", and "dissemination" of information is identical. The study is recommended for use in improving Ukraine's criminal law and for law enforcement officials in qualifying

Keywords: classified information, dissemination of information, collection of information, modification of information, spreading of information, transfer of information, provision of access to information

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Introduction

The level of functioning of the legal system in any state depends on both the improvement of the mechanism of legal regulation and the mechanism of law enforcement. Accurate translation of normative provisions into specific subjective rights and legal obligations, determining the grounds for criminal prosecution of a person is one of the guarantees of the rule of law. The central place among the means that will contribute to this is the legal technique. In particular, many dispositions of articles of the Special Part of the Criminal Code of Ukraine (hereinafter – the CCU) [1] refer to various infringements of information: "unlawful .... distribution of confidential information about a person" in part 1 of Article 182 of the CCU; "illegal disclosure, transfer or provision of access to insider information" in part 1 of Article 232-1 of the CCU; "illegal destruction", "illegal alteration" (Article 182 of the CCU), "unauthorised blocking, interception or copying of information" (Article 362 of the CCU), "illegal denial of access to information" (Article 171 of the CCU) etc. The legislator does not propose definitions of these definitions at the level of the criminal law, which establishes difficulties in law enforcement – the interpretation of these terms may lead to misclassification of a person's actions due to the wrong definition and resolution of competition, conflict or other relations of criminal law provisions. These are the problems that the study is designed to solve.

Aspects of compliance with legislative technique in terms of the normative establishment of criminal offences of disclosure of information with limited access have been considered in the works of many Ukrainian scholars. Thus, O.H. Semeniuk, in his monograph "Problems of Protection of State Secrets: Criminal Law and Criminological Aspects" (2017), analysed the correlation between the definitions "disclosure" and "transfer" of state secrets [2]. In addition, O.V. Sosnina in her PhD thesis "Criminal Liability for Violation of Privacy" (2017) explored terminological flaws in the dispositions of Article 182 of the CCU [3], and I.V. Yedynak in the PhD thesis "Comparative Characteristics of Criminal Liability for Breach of Secrecy of Correspondence, Telephone Conversations, Telegraph or other Correspondence Transmitted by Means of Communication or Computer, under the Laws of Ukraine and the Republic of Poland" (2021) – similar problems under Article 163 of the CCU [4]. Analysis of individual concepts used in Article 232-1 of the CCU is contained in the collaborative publication of A.A. Dudorov, D.V. Kamensky "Insider Information and Criminal Law: From American Realities to European Perspectives" (2019) [5]. However, these studies concerned the provisions of criminal legislation on specific types of restricted information. A definite level of generalisation of technical and legal shortcomings of the description of the act can be identified in the study by T.Yu. Vyslotska, "Criminal Law Protection of Secrets in Ukraine" (2018) [6], but it lacks detail and specificity.

However, to ensure the consistency of criminal law, a comprehensive study of the relationship between all the terms used in criminal law regarding the "disclosure" of information with limited accessibility is necessary, which the author has conducted for the first time and the results of which are highlighted below.

The purpose of the study is to perform a comparative legal analysis of the normative regulation in the criminal law of the manifestations of disclosure of restricted information and related terms for the technical and legal improvement of the CCU. To achieve the purpose of the study the following objectives were accomplished: the system-structural analysis of tangential transversal and local definitions of the current criminal law and their division into groups was performed, the lexical meaning of the analysed Ukrainian words was determined, the content of correlative terms in the scientific literature was studied, the specific features of liability for disclosure of information with limited access were identified.

The scientific originality of the results is that the research is the first attempt to comprehensively, using modern methods of cognition, considering the latest advances in criminal science to develop conceptual ways of further development of the text of the criminal law of Ukraine in terms of using the term "disclosure" and related concepts.

Results and Discussion

The problem of defining the concept of disclosure [*T.P.* – as a method of committing a crime] is complicated by the inconsistency of terminology, as different definitions are used in scientific sources, such as "spreading", "distribution", "disclosure", "announcement", "communication", "acquaintance", "transfer", "provision" and "leakage" of information, which requires etymological interpretation of the said terminology [7, p. 106]. Thus, scientists appropriately note that such terms as "sale", "transfer", "distribution", and "spread" of specific items or information should be unified [8, p. 150]. Such a problem at the scientific level is caused by technical and legal shortcomings of the criminal law, although the terminology of the Special Part of the CCU should be distinctive, precise, readable, and comprehensive, which is achieved primarily by the correct use of words, according to their specific meaning [9, p. 48].

Instead, in none of the 11 cases (Articles 132, 145, 159, 168, part 2 of Article 209-1, Article 231, Article 232, part 1 of Article 422, Article 328, Article 381, Article 387 of the CCU [1]) the use of the term "disclosure" as a description of an act in the text of the criminal law does not provide its definition and does not provide a list of acts that should be considered disclosure. In addition, this definition is used along with similar terms (distribution, spreading, transferring, providing access, etc.). Consider the correlation of the content of all related terms with "disclosure".

1. ***Alternative actions: collection, acquisition, alteration, destruction***

The legislator, along with the term "disclosure", uses other terms to denote related (sometimes alternative) acts that denote unlawful behaviour in handling restricted information: collection, acquisition, alteration, destruction, etc. In particular, part 1 of Article 132 of the CCU states: "Disclosure ... by an auxiliary employee who has independently *obtained* information ... of information about the medical examination ..." [1]. At the level of this legal composition of the criminal offence, the legislator clearly distinguishes between such acts as **disclosure** and **obtaining** information, and the latter in time precedes the disclosure. According to Article 231 of the CCU, a person who has committed intentional *actions designed to obtain* information constituting a commercial or banking secret, with the purpose of disclosure or other use of this information, although the title of the research indicates "collection", shall be criminally liable. Thus, the legislator uses several different terms to denote the same concept – *an act that may precede disclosure* – collection (an imperfect form of the verb); obtaining (a perfect form of the verb); actions designed to obtain (emphasising the incompleteness of the process designed to achieve a result).

An intermediate conclusion should be drawn that, at present, such actions are inherently preparatory to the "disclosure of information" if there is an appropriate purpose to publish the collected information. Thus, they cannot be included in the criminal law content of the act of "disclosure" but should be assessed as preparation for disclosure of information, and, accordingly, qualified concerning part 1 of Article 14 of the CCU. An exception is the existence of a distinct legal structure of the criminal offence of "collection" (for example, under Article 231 of the CCU), which may be established, in particular, by providing an appropriate alternative act in the relevant provision (the current CCU does not provide such an example). A similar conclusion can be reached regarding the illegal storage of restricted information (Article 182 of the CCU). However, as noted above, it would have been far better to have two mutually exclusive (related) legal elements of criminal offences – misappropriation of information (a "truncated element" which does not provide legal significance to further acts of storing, disseminating, otherwise using information) and disclosure (by the person who lawfully obtained the information).

Other types of unlawful handling of restricted access information include "unlawful destruction", "unlawful alteration" (Article 182 of the CCU), "unauthorised blocking, interception or copying of information" (Article 362 of the CCU), "unlawful denial of access to information" (Article 171 of the CCU), "non-provision of information" (Article 232-2 of the CCU), "provision of deliberately false information" (Articles 222, 351 and 351-1 of the CCU), "deliberate submission of false information or untimely submission of information" (Article 376-1 of the CCU) and others. These actions are not included in the criminal-law content of the concept of "disclosure" either, as they are essentially designed to accomplish quite different unlawful purposes, not related to the violation of the restricted access to information regime.

1. ***Collective acts of "violation of secrecy/prohibition", "usage"***

In addition, at the level of criminal law, there are "generalised" terms that may cover criminal offences of disclosure of information ("violation of secrecy", "unlawful use", "violation of the prohibition of use"). Thus, the disposition of part 1 of article 159 of the CCU states: "Deliberate violation of the secrecy of the vote during an election or referendum, which resulted in the disclosure of the content of the will of a citizen who voted in an election or referendum". Considering the contents of the disposition, one can argue that disclosure is a manifestation (type) of violation of secrets (in the case of Article 159 of the CCU only, but this cannot be extended to all cases of "violation of secrets" under the CCU (Articles 163, 397 of the CCU).

These definitions, due to their lack of specificity, not only give rise to problems in their application in practice but cause lively discussions about their content in the scientific literature. For example, D.Yu Kondratov notes that the act under Article 163 of the CCU consists only of illegal acquaintance with the content of the relevant information. Further actions regarding the storage, disclosure, publication, and use of information obtained as a result of illegal acquaintance are more socially dangerous and therefore go beyond the objective side of Article 163 of the CCU of 2001 [10, p. 125], and the fact of correspondence [10, p.131]. Instead, according to S.Ya. Lykhova, the provision contained in Article 163 of the CCU should be considered special to the provision contained in Article 182 of the CCU [11, p. 34]. A similar opinion is expressed by Yu.I. Demyanenko [12, p. 18], T.Yu. Vyslotska [6, p. 81], and O.P. Horpyniuk [13, p. 127]. In this context, I.V. Yedynak notes humorously that the validity of this decision [*T.P.* – the use of the term "violation"] is questionable, although the decision itself is logical as if the criteria and boundaries of the protected secrets are not clearly outlined in Article 163 of the CCU, it is difficult to expect certainty in socially dangerous actions [14, p. 151].

In the author's opinion, the position of scientists, who believe that according to Article 163 of the CCU of 2001, one of the types of acts (ways of secrecy violation) is the transfer of information, cannot be unequivocally rejected, as in this case the secrecy regime is violated. However, to this extent, Kondratov's opinion is valid, as the author associates the criminal prohibition with the relevant provisions of civil law and therefore concludes that the "violation of secrecy" occurs as soon as the subject of the criminal offence becomes aware of the content of the secret information.

However, the author of the research has a slightly different position. Thus, "violation of secrecy" means that an external party becomes acquainted with its content, i.e. the secret nature of the information is negated. However, this person may be not only the subject of the criminal offence but the recipient (the person to whom the subject of the criminal offence discloses this information), and, therefore, it may consist not only of acquaintance (possession) of this information but its disclosure.

A similar conclusion can be made considering the content of "violation of secrecy" under Article 397 of the CCU. This provision is designed to guarantee the right to secrecy in the provision of legal assistance. The parties to the relevant legal relations are the client and the advocate, and the subject of secrecy may be both information about the client and the content of the advocate's advice, consultations, explanations, documents compiled by the lawyer, etc. The relevant information may become legally known (without violating the regime of attorney-client privilege) to unauthorised persons (for example, employees of the central executive body implementing the state policy in the field of prevention and counteraction to legalisation (laundering) of proceeds of crime, terrorist financing and financing weapons of mass destruction proliferation in case of notification of an attorney about the financial transaction by part 7 Article 22 of the Law of Ukraine "On Advocacy and Lawyering Activity") [15]. However, if the relevant subjects of the criminal offence disclose the information entrusted to them to persons outside the regime of protection of the attorney-client privilege or not for the purposes defined by law, it will be a violation of the attorney-client privilege in the form of disclosure.

Schematically depict the logical scope of "violation of secrecy" and "disclosure" (Fig. 1).

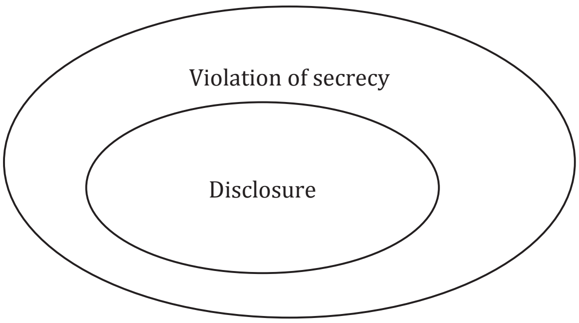

Figure 1. Correlation of the terms "violation of secrecy" and "disclosure" in the criminal law of Ukraine

An additional argument for this position could be the fact that, according to the disposition of part 1 of Article 159 of the CCU, disclosure is the only (criminally punishable) way of violating the secrecy of the vote. Thus, K.P. Zadoya notes that on the objective side of the criminal offence under part 1 of Article 159 of the CCU, is committed by violating the secrecy of the vote during elections, committed in the only *way* defined by law – by disclosing the content of the will of the citizen, which should be understood as bringing the guilty party to the attention of at least one other personal information about the content of the will of the victim, committed against the will of the latter. Not qualified under part 1 of Article 159 of the CCU case when a person against the will of a citizen who took part in the elections, learned about the content of their will but subsequently did not disseminate this information [16, p. 92]. In addition, notably, technically, this behaviour indicates a violation of the secrecy of the vote due to the legislative will it is not criminalised (unlike similar behaviour under Article 163 of CCU).

In general, the construction of the act as a "violation of secrecy" is unsuccessful, as it is not clear which type of encroachment the legislator is referring to – whether it is referring to acquaintance information or its disclosure to third parties etc. In the author's opinion, such wording should be excluded from the titles and dispositions of the relevant articles (Articles 159, 163, 397 of the CCU) as legally unspecific, replacing them with one or more specific types of encroachment on information: collection/acquaintance/possession or disclosure, etc. Therewith, such wording should be excluded from the titles of research if there is only one type of encroachment. However, if there are several of them (for example, collection and disclosure), it is permissible to use such a phrase at the level of the title of the article to save the language in criminal law.

The above conclusion coincides with the position embodied in Section 7.5 "Crimes and misdemeanours against the promotion of justice and law enforcement agencies" of the Draft CCU [17], as the current wording of Article 397 of the CCU in terms of violation of secrecy was replaced by "disclosure of lawyer secrecy": "A party who, being obliged to the secrecy of attorney, exposed it – has committed a misdemeanour." But the current wording of part 1 of Article 159 of the CCU, unfortunately, has not yet undergone similar changes to the draft of the CCU: "A person who violated the secrecy of voting during an election or referendum, which was expressed in the disclosure of the contents of the will of another voter or referendum participant – has committed a misdemeanour" (Article 4.11.14 of the draft CCU), as in Article 163 of the CCU.

Regarding the definition of "violation of the prohibition to use" (part 1 Article 232-1 of the CCU), it is the author's opinion that it includes disclosure of insider information, since the corresponding provision in Article 146 of the Law of Ukraine "On Capital Markets and Organized Commodity Markets" [18] explicitly states the prohibition to transfer insider information or provide access to it to other persons, except for the disclosure of information in the performance of professional, employment or official duties and other cases provided for by law. In addition, it concerns the execution of transactions and providing recommendations on financial instruments in respect of which the person has insider information until the disclosure of such information.

The last two manifestations are not a disclosure of information in the literal sense, furthermore, the first type of behaviour is criminalised under part 2 of Article 232-1 of the CCU). But, again, the construction of "violation of the prohibition on use" is vague, it would be much better to specify two alternative acts "disclosure of insider information" and "providing advice on financial instruments for which it holds insider information".

Thus, in the author's opinion, disclosure of the relevant information is a manifestation of a "violation of secrecy" (Article 159 of the CCU) and a "violation of the prohibition of the use of information" (Article 232-1 of the CCU) but it is not desirable to use such terminology in the text of the criminal law.

From the analysis of the description in the criminal law of the legal composition of the criminal offence under Article 231 of the CCU, it is evident that the legislator defines disclosure as a type of information use. In addition, this approach is supported in the scientific literature. Thus, O.E. Radutny observes no distinctions between using in the form of disclosure (Article 321 of the CCU) and disclosure (Article 232 of the CCU) at the level of objective signs of a crime [19, p. 133], their distinction is made considering the legality of the grounds for the subject's awareness of secret information under Article 232 of the CCU [20, p. 10]. The opinion on recognition of disclosure as a type of use is supported by S.O. Kharlamova in her dissertation research [21, p. 12].

Instead, at the level of Article 182 of the CCU, the legislator has already used two alternative concepts of "usage" and "spreading", which results in the opposite conclusion of the relevant scholars – the dissemination of information is not a manifestation of its use but refers to its distribution. Thus, O.V. Sosnina argues that in the disposition of Article 182 of the CCU all alternative ways of committing actions that constitute the objective side are indicated exhaustively, and the lexical interpretation of the term "dissemination" coincides with the interpretation of the term dissemination and disclosure [3, p. 104].

This distinction in the researchers' conclusions is again due to deficiencies in the legislative technique of the criminal law, in which various terms are used to describe acts, the content of which is not specified and harmonised, and which in various situations are used with different meanings (have different contents at the level of different legal elements of criminal offences).

Interestingly, regardless of the context (disposition of part 1 of Article 182 of the CCU), O.V. Sosnina states a different opinion – using is not possible without disclosure. As an example, the researcher cites the situation when the content of information is brought to its legal holder. She considers these actions illegal and obviously pursue an illegal purpose (for example, blackmail) [3, p. 104-105].

Particularly interesting in this context are the constructions of "transactions involving the use of information" (part 2 of Article 232-3 of the CCU) and "provision of recommendations based on information" (part 1 of Article 232-2 of the CCU).

While supporting the opinion that disclosure is a type of use, and, thus, rejecting the assertion that any use is inherent in the disclosure of information (along with the latter, it could be the provision of advice in secrecy, without disclosure of the content, the performance of transactions with acquired knowledge, which does not involve the disclosure of information to outsiders), the author still considers "usage" a rather vague terminology for criminal law use.

3. *Synonymous acts of "disclosure", "distribution", "spreading", "providing access", "transfer"*

O.M. Musychenko emphasises the prohibition in criminal law to use synonyms to denote a similar concept, phenomena that have various shades of meaning (so-called ideographic synonyms). Among them, in her opinion, should be chosen the one that has the most common meaning in the language and conveys the most precise meaning [22, p. 137].

Thus, at the level of criminal law, there is no clear distinction between the definitions of "disclosure" and "transfer" (Article 114, part 1, and Article 330 of the CCU), "distribution" (Article 114-2, part 1, Article 182 of the CCU), "spreading" and "providing access" (Article 232-3 of the CCU), "provision" (Article 256, part 1, of the CCU) and "dissemination" (Article 361-2 of the CCU). However, the issue must be answered as to whether this distinction is reasonable and required for criminal law since, in essence, all these acts involve the transfer (or potential transfer) of information from the subject of the criminal offence to an unauthorised person.

Consider the lexical meaning of the relevant words, the specifics of using the relevant terminology in the regulatory legislation, and their criminal law content about the relevant legal offences. According to the Great Dictionary of the Modern Ukrainian Language "to provide" – to allow using something [23, p.709], "to announce" – <u>to expose</u>, to make known, <u>to disclose</u> something [23, p. 826], "to transfer" – to give, to hand something, to inform, to inform [23, p. 906], "*to distribute*" – to distribute to many, *to spread* [23, p. 1098], "disclose" – to make public, to make known [23, p. 1238], "disclose" – to make available, to make known [23, p. 1247], "distribute" – to spread, *to transfer* [23, p. 1257-1258]. Thus, the authors of the dictionary use the verbs disclose and disclose as synonyms, and spread, distribute and transfer. In addition, note that the verb to disclose is explained through the noun "access". According to the Practical Dictionary of Synonyms of the Ukrainian Language, synonyms are to disclose and disseminate, publish, distribute, transfer [24, p. 388, 394].

Therewith, it is impossible not to notice the specific feature of the verb "to disclose" – it is used exclusively for particular data (information). Instead, the words "transfer", "provide", "disclose", and "disseminate" can refer to actions about objects or intangible objects (e.g., to disclose cards, pass a baton, give significance, spread a smell, etc.) If the last words are used in the information context, then all these concepts will mean the transfer of particular information to another person(s).

Earlier, the author of this research performed a terminology analysis of the provisions of regulatory law in the field of information protection, and here are its results. There is no absolute uniformity of terminology – a total of seven distinct words and phrases are used in the regulatory legislation to denote relevant unlawful behaviour in the relevant field (disclosure, transmission, violation of secrecy, distribution, communication, unauthorised acts), of which the terminology of disclosure is used most frequently (66.67%). As for the designation of legitimate cases of disclosure of information with restricted access, nine different words are used (violation of secrecy, publication, edition, provision, transfer, distribution, disclosure, dissemination, promulgation), of which the most common are provision and edition (23.81% in total) [25, p. 170]. The term "disclosure" is used to refer to lawful conduct in only three cases. Therewith, in appropriate cases, this term is used to identify unlawful conduct (secret of pre-trial investigation, commercial secret, secret of private life) [25, p. 170]. It indicates the absence of terminological distinction between lawful and unlawful behaviour, as it is implemented for other types of information with restricted access – in 75% of cases [25, p. 170].

As for the criminal law content of the relevant terms, in general, all these terms denote the transfer of information with limited access from the subject of the crime to the addressee (specific or unspecified). A single law enforcement benchmark is provided in the Resolution of the Supreme Court in the panel of judges of the Second Trial Chamber of the Cassation Criminal Court of 17 July 2019 in Case No. 725/4771/17 (proceedings No. 51-9459km18) [26] regarding the distinction between "sale" and "disclosure" as forms of the act under Article 361-2 of the CCU. The Supreme Court notes that the unauthorised **sale** of restricted information should be understood as a paid or *free* transfer to at least one person who does not have access to this information, and distribution - as placement in an AS or computer network with *free access* to it or other actions that establish free access to it to an indefinite number of persons. Such conclusions are at least inconsistent with the content of parts 5 and 6 of Article 212-6 of the Code of Administrative Offenses [27], where the adjective free of charge is used for distribution and not for sale (it is precisely about the distinguishing feature, as all other signs of administrative offences under part 5 of Article 212-6 and part 6 of Article 212-6 of the Code of Administrative Offenses are identical).

A slightly different distinction is made by D.S. Azarov: "Dissemination covers paid and gratuitous transmission of this information, while sale covers only paid transmission; dissemination consists of the transmission of information to an indefinite, unlimited number of persons, while sale covers both one person and a significant number of them" [8, p. 149].

Both definitions are not flawless, as sale, as a general rule, does not mean gratuitous behaviour in criminal law, nor can it refer to an indefinite circle of persons, as it is a criminal transaction in which the parties are more or less identified with each other. Thus, even if a person has posted the obtained information on a specific Internet platform, which provides paid access to it for third parties, such users can be identified at least based on their authorisation on the platform, or even in case of non-cash transfer of funds (if the payment comes to the subject of the criminal offence personally from them, and not from the platform itself). Theoretically, there may be a case when authorisation is not required, and payment is not made explicitly – in this case, the identification of the addressee is difficult, but at least the subject of the crime is aware of their number, given the correlation between the price for information and the amount of money received. The crucial thing that both definitions agree on, however, is that dissemination is only possible to an indefinite, unlimited number of people. In the author's opinion, such meaning is given to the concept of "distribution" considering the necessity to distinguish these actions from "sale". If the legislator had used only one term, it would have referred to both a specific addressee and an indefinite circle, that is, the definition would be identical to disclosure.

The same conclusion applies to the correlation of "disclosure" with "dissemination". O.P. Horpyniuk's statement that disclosure is a narrower concept is incorrect, as it implies that the receiver is aware of the content of the information that is disclosed to them ("dissemination" is an action as a result of which information becomes known to an *indefinite* number of persons). As noted above, the definition of "dissemination" stated in paragraph 15 of the Resolution of the Plenum of the Supreme Court of Ukraine of 02/27/2009 No. 1 "On Judicial Practice in Cases of Protection of Dignity and Honour of an Individual, and Business Reputation of an Individual and Legal Entity" [28] is based on the coincidence of its content with disclosure (both to a specific addressee and an indefinite circle).

Thus, the real correlation of the identity of the content of the definitions "disclosure", "dissemination", and "distribution" can be depicted graphically as follows (Fig. 2). Once again, emphasise the artificial nature of the distinction between "distribution" and "sale" under Article 361-2 of the CCU, which is not solved by giving synonymous definitions various meanings. In addition, in the author's opinion, the term "sale" should not be used at the level of dispositions of the criminal law provisions of the Special Part of the CCU, which denote the disclosure of restricted information, since it is impossible to offer an alternative to it, which would denote a free transfer (except for such literal wording). Better to use a mercenary motive as a qualifying feature. In such conditions, proving the criminal offence would be simplified – the court would not additionally have to establish the transfer of funds but would only have to prove a self-serving motive.

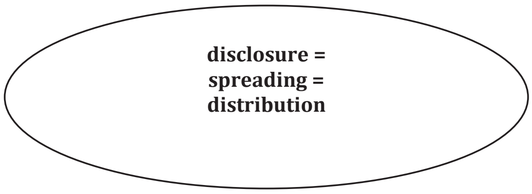

Figure 2. Correlation of the definitions "disclosure", "spreading" and "distribution" in the criminal law of Ukraine

When analysing the terms "disclosure" and "transfer" O.H. Semeniuk notes that if the term "transfer" can be attributed to the communication of any information [*T.P.* – and not only information], then "disclosure" is more suitable for the announcement of classified information. That is, the definition of "transfer" is broader in its content and includes actions to "disclose" information [2, p. 161]. Thus, in the text of the CCU "disclosure" is used only concerning information, while "transfer" refers to encroachment on human freedom (for example, Article 149 of the CCU), property (for example, Article 189 of the CCU), items withdrawn from civil circulation (for example, Article 263 of the CCU), etc. and "provision" (Article 159 of the CCU – election ballot; Article 210 of the CCU – budget loans; Article 256 of the CCU – premises, storage facilities, vehicles, etc.) This feature again should be relevant when deciding on one of these terms.

However, comparing these terms in the context of the dispositions of Articles 111, 114, 328 of the CCU, O.H. Semeniuk notes that this discrepancy in the content of these concepts does not matter, since in the commission of all these acts is performed "notification", "disclosure" of information of the same category – constituting a state secret [2, p. 161]. In addition, the author believes that the concept of "disclosure" more accurately reflects the nature of the event, which is associated with the leakage of information, and therefore proposes to abandon the simultaneous use of the two terms, leaving only disclosure [2, p. 162].

In the author's opinion, in the context of the dispositions of Articles 111, 114, and 328 of the CCU, the transfer of information necessarily involves a specific addressee identified by the subject of the criminal offence (for example, a foreign state), disclosure, therefore, may be targeted at an indefinite number of persons (the public, humanity, etc.), but it may involve a specific third party, as mentioned above. Considering the above, the real correlation of "transfer" and "disclosure" can be graphically depicted as follows (Fig. 3):

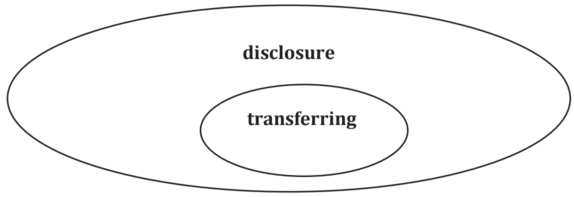

Figure 3. Correlation of the terms "disclosure" and "transfer" in the criminal law of Ukraine

However, the considerations of O.H. Semeniuk are consistent with each other, as the author, along with replacing the term "transfer" with "disclosure", proposes to abandon the criminality of acts under Articles 111 and 114 of the CCU related to the acquisition and transmission of classified information only to a special addressee – a foreign state, foreign organisation or their representatives, and to protect information from any outside influence, regardless of who is the customer of such information or its final addressee [2, p. 155]. The researcher explains this by the fact that even at the current initial stages of the development of information society, when the emergence of the Internet and the development of modern technologies do not exclude the possibility of obtaining state secrets remotely, and information technology allows going beyond conventional structures and forms of communication within one state, it becomes obvious that conventional standpoint on the necessity of protecting classified information only from foreign states, organisations and their representatives is outdated. Under the conditions of an information society, state secrets outside the state-controlled sphere of classified activities provide an opportunity for an unlimited number of users of information and communication technologies, regardless of their nationality and state of residence, to get acquainted with its contents [2, p. 153-154]. As an example, the author provides situations of countering international terrorism, drug trafficking, cross-border and other organised crime, which require states to expand information exchange, including information constituting a state secret [2, p. 154]. According to O.H. Semeniuk, in the period from 2005 to 2016, the Security Service of Ukraine issued 225 permits for the transfer of information constituting a state secret to foreign countries and their authorised representatives. In particular, in 2014, 27 such permits were issued, in 2015 – 3, in 2016 – 9 permits [2, p. 155]. The author of the research can neither support nor refute the above considerations of O.H. Semeniuk, as they go beyond the purposes of the study – to determine the general features of all criminal offences – disclosure of restricted information. However, they outline an interesting area for further promising scientific developments.

Conclusions

Notably, the willingness of the subject of a criminal offence to convey specific information only to individuals or to the entire humanity cannot in itself indicate a different degree of public danger of the relevant act. That is why all the above actions should be referred to by the single term “disclosure”. Such terminology (technical and legal) improvement of the texts of the CCU, and regulatory legislation, in particular the Criminal Procedure Code of Ukraine, the Civil Code of Ukraine and the Commercial Code of Ukraine, will contribute to the implementation of legal clarity as a component of the rule of law.

The practical significance of the research results is that they contain clear recommendations for the legislator to improve the text of the criminal law. In addition, the conclusions stated in the research on the correlation of the terms “disclosure” of restricted information with tangential ones may be useful in criminal legal qualification. At the same time, a promising area for further research is the study of subjective features of the legal elements of the criminal offence of disclosure of information with limited access, which will contribute to the development of a comprehensive vision of the problem under study – the typical legal elements of this criminal offence.

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"Розголошення" інформації з обмеженим доступом та дотичні терміни кримінального закону: взаємозв'язок понять

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Анотація

Актуальність публікації зумовлено тим, що одним з основних чинників неефективності наявних кримінально-правових засобів охорони інформації з обмеженим доступом є недосконалість тексту чинного Кримінального кодексу України, про що свідчить відсутність системного підходу законодавця до використання юридичної конструкції "розголошення інформації". Мета дослідження – здійснити порівняльно-правовий аналіз нормативної регламентації в кримінальному законі проявів розголошення інформації з обмеженим доступом та дотичних термінів задля техніко-юридичного вдосконалення Кримінального кодексу України. Задля її досягнення використано методи системно-структурного аналізу, семантичний, догматичний, формально-логічний, а також метод класифікації. У статті розглянуто співвідношення змісту всіх термінів кримінального закону, дотичних до поняття "розголошення", які умовно поділено на кілька груп: альтернативні діяння (збирання, здобування, зміна, знищення та ін.), збірні діяння (порушення таємниці/заборони, використання), синонімічні діяння (поширення, розповсюдження, розкриття, надання доступу, передача). Визначено, що альтернативні діяння "збирання", "зберігання" є підготовчими для "розголошення інформації" в разі наявності відповідної мети оприлюднити зібрані відомості, а отже, вони не можуть включатися в кримінально-правовий зміст самого діяння "розголошення". Обґрунтовано, що існування двох взаємовиключних (суміжних) юридичних складів кримінальних правопорушень: протиправного заволодіння інформацією ("усічений склад", який не надає юридичного значення подальшим діям щодо зберігання, поширення, іншого використання інформації) та розголошення (особою, яка правомірно заволоділа інформацією) – може бути перспективним шляхом усунення відповідних техніко-юридичних недоліків. Доведено, що "розголошення" відповідної інформації є проявом "порушення таємниці", а також "порушення заборони використання інформації", однак такі терміни використовувати в тексті кримінального закону не варто з огляду на їхню неконкретність. Установлено, що зміст понять "розголошення", "поширення" та "розповсюдження" інформації – тотожний. Дослідження рекомендовано до використання під час вдосконалення кримінального закону України, а також для правозастосувачів під час кваліфікації

Ключові слова: таємна інформація, розповсюдження інформації, збирання інформації, зміна інформації, поширення інформації, передача інформації, надання доступу до інформації

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Main Criminalistic Features of a Person Committing Domestic Violence in Ukraine

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Abstract

The relevance of the research subject is conditioned upon changes in social relations, modification of the criminological nature of perpetrators of domestic violence in Ukraine, in particular, foreign policy and socio-economic changes in Ukraine and the world. The purpose of the research is to identify the main socio-demographic and moral, and psychological features of a person who committed domestic violence. The main methods used in the research are the structural and systemic method, which allowed identifying the typical properties of a person committing domestic violence, and the statistical method, which allowed for studying the empirical base, which provided one of the main sources of information about such a person. The research analyses the criminal and legal properties of a person committing domestic violence. Noted that although a part of offences does not receive proper legal assessment in Ukraine there is a positive tendency to increase the realism of statistics on the commission of these crimes. The proposal on the necessity to modify the system of punishment is substantiated, in particular, the establishment of stricter sanctions for repeat offenders. In the research, it is suggested to use more often as a preventive measure conversations with a psychologist. The socio-demographic properties of a person who commits domestic violence in Ukraine are analysed. Based on statistical data, it was concluded that the number of women committing domestic violence is increasing; in particular, this is explained by the complicated economic and political situation in the country and social processes. Notably, offenders inherit the criminal behaviour of their parents (or one of them), and partly come from disadvantaged families, with low educational and cultural levels and difficult financial situations. The moral and psychological properties of a person who commits domestic violence in Ukraine are analysed. Notably, the behaviour of a person is influenced by both moral provisions and values and legal consciousness, in particular, if it is deformed, it can be an additional incentive to commit a crime. The practical significance of this research is that its provisions will help in further scientific research on the forensic and legal features of domestic violence in Ukraine in particular, its scientific originality may provide a foundation for new areas of research in the field of jurisprudence and research in other fields of social sciences

Keywords: violence, crime, socio-demographic properties, moral and psychological properties

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Introduction

The subject of domestic violence is not new. Many scientists at one time or another have studied various aspects of this phenomenon. Time changes – social relations change, including the object, subject and purpose of the study. Thus, the subject of domestic violence remains relevant. In addition, the proportion of scientific research in this area is increasing, which seems to be mainly explained by the introduction of amendments to legal acts, and the change in the consciousness of victims of these offences – previously, speaking about domestic violence was shameful and scary for victims, this subject remained in the shadows, was not sufficiently covered.

The relevance of this study is conditioned upon the modification of the criminological nature of perpetrators of domestic violence, which causes foreign policy and socio-economic changes in Ukraine and specifically in the world. The legal literature rightly notes that the measures to prevent and combat domestic violence are based on the person who committed it, this is a specific "starting point" in the study in general.

The issue is especially relevant due to "COVID-19 quarantine restrictions" [1-3]. Thus, even though social isolation is not the cause of domestic violence, its role as an additional factor in the growth of domestic violence is undeniable [4-6].

The issue of the perpetrator of domestic violence has been studied by several authors. Thus, the study analysed the Ukrainian dissertations of O. Bespal [7], M. Kuznetsov [8], N. Lishchuk [9], U. Mytnyk [10] and others) and scientific research of recent years.

Exploring the issue of socio-demographic features of the perpetrators of domestic violence, O. Bespal notes that such violence is mainly committed by men, middle-aged (the age group is mainly men from 30 to 49 years), living in rural areas, and the so-called "civil" (unregistered) marriage and have a complete secondary education. The study performed by O. Bespal allowed for exploring the determinants of domestic violence, which together allows the development of the main "measures to prevent domestic violence against life and health of children" [11, p. 163]. In addition, the author of another publication analysed the specific features of the criminological characteristics of the perpetrators of such violence. It notes that such persons are described by the following criminal and legal features: recidivism of the person's behaviour (most of them have committed administrative offences before committing domestic violence), in 96.7% of cases they are committed alone, often committed in a state of intoxication (every third crime) [12].

U. Mytnyk, in his research, summarising the features of such a person, lists similar to the above and indicates that he "has a distorted social consciousness, low level of social skills, emotional intelligence, mostly was a victim or witness of domestic violence in childhood" [13, p. 143].

However, despite the thorough research of the analysed issues, considering the current conditions, its socio-demographic and moral-psychological properties appear to be insufficiently studied.

For a more thorough and precise study, statistics have been analysed on the main features of perpetrators of domestic violence, the number and "quality" of which have changed in recent years, which again highlights the relevance of the subject of the study.

The purpose of the study is to clarify the main criminological features of a person who committed domestic violence.

General features of the subject of domestic violence: Normative and doctrinal approaches

The activation of the legislator to improve the legal regulation of domestic violence indicates, on the one hand, the imperfection of legal acts and, on the other – the significance and relevance of this issue.

The system of legal regulation of this issue includes the Law of Ukraine "On Preventing and Combating Domestic Violence", adopted on 7 December 2017 [14], in the same year the Criminal Code of Ukraine (hereinafter – the CCU) was supplemented by Article 126-1 "Domestic Violence" [15], and in 2020 the Presidential Decree "On Urgent Measures to Prevent and Combat Domestic Violence, Gender-Based Violence, Protection of the Rights of Victims of Such Violence" was adopted [16]. Such an offence is provided for in Article 173-2 of the Code of Ukraine on Administrative Offenses (hereinafter – CAO) [17; 18, p. 127].

Thus, according to Article 126-1 of the CC of Ukraine "the subject of the crime is a specific one (a spouse or ex-spouse or another person, who is in family or close relations). The family consists of persons who live together, are connected by common life, have mutual rights and obligations ... . Close persons – persons who live together, are connected by common life and have mutual rights and obligations ..., including persons who live together but are not married". In addition, this list includes some persons ("husband, wife, father, mother, stepfather, stepmother, son, daughter...", etc.), regardless of the conditions mentioned above [19].

Thus, one of the features that define a person who commits domestic violence is the intentional commission of socially dangerous unlawful acts against a specific subject, as provided for by the CCU.

The so-called "criminal-legal" block of signs of a person who committed domestic violence includes data on the person's previous convictions, time spent in penitentiary institutions, crimes for which the person was previously convicted, punishments received by a court sentence, the purpose of committing domestic violence and the motivational field [20, p. 249]; "the composition of the crime, the degree of severity, the motivation of criminal behaviour" [21, p. 35], etc. Consider some of them.

In several studies conducted by criminologists, it was identified that in a significant number of cases there is a recurrence of the perpetrator's behaviour, as, by the time the crime (domestic violence) was committed, administrative offences were committed concerning such violence [22, p. 46]. Thus, Article 173-2 of the CAO provides for liability for committing domestic violence, the subject of this offence is "a person who has reached the age of 16 and who has committed violence against a member of their family" [17].

B. Holovkin rightly notes, "that a part of the offences does not find an appropriate legal assessment". The reasons for this are: defective legal acts, the reluctance of victims of domestic violence to bring offenders to justice, lack of active actions (passivity) of some law enforcement officers to investigate offences, etc." [22, p. 46]. It, in the author's opinion, explains the biased statistics of domestic violence, the number of such crimes is much higher. Currently, however, the situation with the realism of statistics on domestic violence is improving, in particular, due to the amendments and additions to legal acts. The number of appeals for domestic violence in 2021 increased by 45% compared to last year [23].

Regarding the recurrence of the crime in question, in 2020, 34% of people were previously convicted of various types of crimes [20, p. 249]. After analysing the data of the Prosecutor General's Office of Ukraine for 2021-2022, it can be stated that approximately 28% of "perpetrators of domestic violence have previously committed crimes" [24]. It indicates both unlawful, and disrespectful to the family behaviour of the subject, and the inefficiency of the system of punishment for domestic violence, it seems that it should be modified. In this case, preventive conversations (increasing their number and improving their quality), in particular with a psychologist, to overcome anger and aggression will help. Notably, stricter sanctions for criminals should be considered, especially if this person has a history of medium and serious crimes.

Another feature is that such crimes are mostly committed by one person [12, p. 26; 24], and often under the influence of alcohol or drugs [24].

The legal literature states that "in its content, the motivation of a crime is a specific synthesis of the interaction of internal (person) and external (social environment) factors, which results in the establishment, development and implementation of the motive of the crime". Yu. Lymarenko notes that there are no pure motives in committing domestic violence. The first place among such motives is revenge (44.6%), combined with hooliganism. Revenge, in the case of domestic violence and, for example, in the case of intentional murder or bodily harm, manifests itself in different ways. "Most of the convicts who avenged their relatives for the 'insult' acted almost immediately after the 'offensive' actions of the victims." The next motive by the number of cases (29.1%) is contempt. The reasons for disrespectful attitudes towards close persons include: "the wife's long-term stay on vacation (for example, maternity leave) and her minimal socialisation; the offender's confidence that he is at a higher social level than the victim; the helpless state of the victim due to physical disabilities; hostility after divorce, etc." [20, p. 250].

Therefore, the criminal and legal features of the perpetrators of domestic violence are only one of its features, as the analysed phenomenon is complex and intersectoral. Thus, the criminological study of a person committing domestic violence will be incomplete without clarifying its psychological, and sociological features and disclosing the nature of this phenomenon.

Thus, V. Romanov notes that legal psychology studies a broader set of features of the personality (person) of an offender than the system of "socio-demographic, socio-role, socio-psychological traits" that are somehow related to criminal offences), namely: it analyses both psychological aspects and the physical essence of the individual and age features, "mental attitude ability", defined properties of functional-role nature, for example, the position occupied by the person, exclusive duties or specific attitude towards the victim, besides, a complex psychological characteristic of the subject of crime is performed, including their intellectual, emotional-volitional and other qualities [9, p. 83-84]. Therefore, the author shares the opinion of the majority of Ukrainian scientists on the identification of socio-demographic and moral and psychological properties of a person who committed domestic violence [9, p. 86, 246; 1, p. 97].

Socio-demographic features of the perpetrator of domestic violence

Socio-demographic features are specific to each individual, that is, they are common, and, therefore, – do not have criminogenic properties. They allow identifying particular individuals. These features of an individual subject include: "gender (preference for committing domestic violence by a particular gender), age (special attention is paid to the correlation of various age categories to the mass of crime, juvenile delinquency), level of education (secondary, higher), occupation (profession, place of work), length of service, marital status (married or not, presence of children), place of residence" [17, p. 33-38; 1, p. 100].

The number of men (by gender) prevails in the proportion of perpetrators of domestic violence. Thus, from 2013 to 2017, 91.2% of men were registered for domestic violence, while the proportion of women is only 8.8% (according to official statistics). Instead, in 2020, the proportion of men committing domestic violence was 79.7%, while only 20.3% were women [20, p. 248]. In 2021, 80% and 20% respectively [25]. A conclusion can be drawn about the increase in the number of women committing domestic violence, which can primarily be explained on the one hand by the increase in criminal behaviour among women due to the difficult socio-economic and political situation in the state (economic crisis, war, coronavirus), lack of necessary earnings and as a result, the disruption of family members, and on the other hand by emancipation processes (in its adverse meaning). B. Holovkin notes in this regard that "in the current time, female immorality is progressing, which is manifested in sexual debauchery, drunkenness, and domestic untidiness. Some women become rude, cruel and aggressive" [22, p. 40].

In terms of age, the highest rate of perpetrators of domestic violence in Ukraine falls in the middle age – 35-39 years (22.3%) and 40-44 years (21.3%). In the literature, such statistics are explained by the fact that this age is the maximum in the development of a person in all spheres of life. A person under 35 actively develops a career, starts a family, makes plans and tries to achieve them. Such a period can become a crisis as a person evaluates their previous achievements [20, p. 246-247]. This tendency continues today.

Similar conclusions about the dependence of domestic violence rates on age can be found in the works of foreign scientists. In addition, the age of men who most often commit domestic violence is relatively lower (up to 30 years) [26, p. 1270].

Notably, offenders adopt the model of behaviour in the family that they observed in childhood. Most perpetrators of domestic violence suffered from it as a child. Thus, according to an Amnesty International survey, 65% of men in Ukraine suffered from domestic violence as children [27]. Similar conclusions were reached by some foreign scientists studying domestic violence in other countries [6].

In addition, the level of education affects the development of a person, in particular, according to sociological studies cited in the legal literature, 44.7% of criminals who committed this crime had a complete secondary education, 29.5% of them had special education, 19% had incomplete secondary education, 5% of offenders had higher education, the rest (1.8%) had primary education or no education [7, p. 100]. Similar indicators are given by Yu. Lymarenko and A. Blaha [20, p. 248].

The fact that the level of education affects the indicators of domestic violence is noted by foreign scientists. However, the dynamics are somewhat different. For example, a study conducted in Indonesia found that women whose husbands/partners had primary/secondary education were more frequently experiencing violence than those whose husbands/partners had no education [26].

The socio-demographic characteristics of the offender include: their place of residence, and the environment of the offender, which has a significant impact on the development of their personality, and the acquisition of skills that the individual uses in everyday and family life. In addition, clarification of the course of a person's behaviour in a conflict situation is implemented by identifying the features inherent in rural and urban areas. According to the results of the study of Y. Lymarenko, 74.7% of perpetrators of domestic violence are residents of cities, and 25.3% – are persons living in rural areas. She explains this distribution by the fact that in a big city, in which a significant proportion of apartment buildings are located, residents are partly unfamiliar with each other, thus, perpetrators of domestic violence expect that neighbours will not call the police, considering family quarrels and fights as someone else's business that does not concern them. In rural areas, as a rule, everyone knows each other, which is a constraint for domestic violence, or residents carefully hide it [20, p. 248].

As for the marital status of perpetrators of domestic violence, about 40% of them are in an unregistered marriage. In addition, Yu. Lymarenko identified that "only 28% of offenders grew up in a full family, 3% were raised in an orphanage, and others were raised by their mother or grandparents only. 17.4% were raised in a worker's family, 2.9% in an employee's family, and the other 79.7% were supported by temporary part-time jobs and did not have a permanent job. 20% of those convicted were from families where alcohol abuse and using violence to settle family matters were standard practices in everyday life. 16.5% were the only children in the family, 7.7% were families with many children (families with three or more children)" [20, p. 247].

Thus, it can be stated that, for the most part, a person who has committed domestic violence can be defined as follows: coming from a dysfunctional family, with an unstable financial situation and a low level of culture and education, and bad habits.

Moral and phychological characteristics of the person who committed domestic violence

Psychological features are among the major and most significant factors that influence the commission of acts of a socially dangerous nature by a person, as the choice of the way of committing it is in correlation with the specific features of the psychological nature and mental originality of the offender. The above is manifested in the "character traits, volitional and emotional qualities, value and regulatory features of consciousness, the motivational sphere of criminal behaviour, the state of the offender at the time of the crime and the mechanism of subsequent criminal actions". In other words, the foundation of such forecasting is the personality of the individual and their previous behaviour [9, p. 83].

Thus, another block of the description of a person who committed domestic violence is moral and psychological properties.

A person's behaviour is influenced by: their mental state and attitude to reality, demands, interests, worldview and level of spiritual development, and motivational aspects, at the same time, the above determines the commission of domestic violence. Thus, the lack of material and spiritual requirements affects the offender's dissatisfaction. The commission of domestic violence in connection with unsatisfied demands may arise from the lack of their satisfaction, and this provokes aggression and discontent in the perpetrator, as a result – the commission of domestic violence. Another case of domestic violence is the offender's failure to provide the victim with the opportunity to address the demands of the victim (for example, the offender deprives the child of food and uses it as a cruel punishment) [28]. Regarding the mental state, such conditions as "psychopathy, psychopathic state, alcoholism, drug addiction", and others can have an impact on the commission of domestic violence.

The behaviour of a person is influenced by legal consciousness and moral provisions and values. As known, legal nihilism and other deformations of legal consciousness can cause the commission of crimes. Moral provisions are interrelated with legal ones, as in most cases, a person may be held legally liable for the violation of the first. However, even if moral provisions violated by a person are not criminalised, it is the first step to a criminal future. At first, criminals level moral provisions, consider themselves higher than the requirements of social relations, and later immoral habits transform into conflicting, unlawful ones.

When describing the moral and psychological properties of violent criminals, scientists note that these are people without strong beliefs and with situational behaviour. Such people desire to satisfy their aspirations immediately, regardless of others and social provisions of communication. They are characterised by "social alienation, low tolerance, anger, egocentrism, etc." [29, p. 89].

The issue of psychological health is interesting, considering the issue under study. Thus, if a person has significant mental disorders, it is no longer possible to consider the person a criminal, as such a person may be declared insane by the court. For example, according to a study by O. Bespal, "86% of perpetrators had no data on mental disorders; 6.2% were registered for mental disorders (including as a result of substance use); 5.9% had mental disorders (were not registered) and only 1% had previously been in a mental health care facility" [7, p. 107].

The propensity of persons with mental disorders to commit violence against family members is noted by foreign scientists. However, the general picture is different from that illustrated in the works of Ukrainian scientists. Thus, T. Labrum and P. Solomon note that almost half (47%) of all respondents reported that they were victims of violence committed by their relatives with mental disorders from the beginning of the disease [30, p. 2955]. Therewith, studies by other foreign scientists note that the risk of domestic violence by persons with mental disorders may be exacerbated during the pandemic since such people experience interruptions in treatment as a result of social distancing and additional stress factors [31, p. 1057].

In addition, people who are in emotional tension and stress, and consume drugs, alcohol are more exposed to domestic violence. For example, the literature indicates that the chances of experiencing such violence where one or both partners had alcohol problems are higher compared to relationships where neither partner had alcohol problems [6]. Other factors that cause domestic violence, in addition to alcohol, include problems with drug use [2], economic uncertainty and stress associated with sudden poverty [32; 33].

Conclutions

Thus, domestic violence in Ukraine is mainly committed by middle-aged men, repeat offenders, largely uneducated or with a complete secondary education, with a low level of emotional intelligence. Such persons often use the family model they observed in their childhood. Currently, the main triggers for domestic violence are legal nihilism, economic and political reasons (low level of material security, war, coronavirus).

To prevent and counteract domestic violence, several measures should be implemented. The priority in this matter is to study the forensic properties (characteristics) of the persons committing this crime. This set of features is developed by several factors, which is why the work supports the opinion of those scientists who distinguish between criminal-legal, socio-demographic and moral-psychological features. After all, it is by knowing them that the essence of such a person can be identified, and a "portrait" of the criminal can be established.

In addition, currently, considering the war in Ukraine, it seems appropriate to investigate the impact of participation in hostilities on the propensity to commit domestic violence, using the experience of other countries to develop methods of prevention in this area. After all, full-scale military actions will have an adverse impact on Ukrainian society.

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Основні криміналістичні властивості особи, яка вчиняє домашнє насильство в Україні

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Анотація

Актуальність теми дослідження зумовлено змінами в суспільних відносинах, модифікацією кримінологічної природи осіб, що вчинили домашнє насильство в Україні, зокрема накладають відбиток зовнішньополітичні та соціально-економічні зміни в Україні та світі. Метою дослідження є з'ясування основних соціально-демографічних та морально-психологічних властивостей особи, яка вчинила домашнє насильство. Основні методи, що використовувалися в статті, – структурно-системний, який дав можливість визначити типові властивості особи, що вчиняє домашнє насильство, та статистичний метод, який дав змогу вивчити емпіричну базу, що стало одним з основних джерел інформації про таку особу. У статті проаналізовано кримінально-правові властивості особи, що здійснює домашнє насильство. Зауважено, що хоча й певна частина правопорушень не отримує належної правової оцінки, проте в Україні спостерігається і позитивна тенденція до збільшення реалістичності статистики щодо вчинення цих злочинів. Обґрунтовано пропозицію щодо необхідності модифікації системи покарань, зокрема йдеться про встановлення суворіших санкцій для злочинців-рецидивістів. У статті запропоновано частіше застосовувати як профілактичні заходи бесіди з психологом. Проаналізовано соціально-демографічні властивості особи, яка вчиняє домашнє насильство в Україні. На основі статистичних даних зроблено висновок про збільшення кількості жінок, які здійснюють домашнє насильство; зокрема, це пояснюється складною економіко-політичною ситуацією в країні та соціальними процесами. Зауважено, що кривдники успадковують кримінальну поведінку своїх батьків (або одного з них), почасти є вихідцями з неблагополучних сімей, з низьким освітньо-культурним рівнем та складним матеріальним становищем. Проаналізовано морально-психологічні властивості особи, яка вчиняє домашнє насильство в Україні. Зауважено, що на поведінку особи впливають як моральні норми та цінності, так і правосвідомість, зокрема, якщо вона деформована, то це може бути додатковим стимулом для вчинення злочину. Практичне значення цієї статті полягає в тому, що її положення допоможуть у подальших наукових дослідженнях щодо криміналістично-правової характеристики домашнього насильства в Україні, зокрема її наукова новизна може стати підґрунтям для нових напрямів дослідження не лише у сфері юриспруденції, але й для розвідок в інших галузях суспільних наук

Ключові слова: насильство, злочин, соціально-демографічні властивості, морально-психологічні властивості

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Features of Criminal Liability for Disclosure of Information Constituting a State Secret in Ukraine and Foreign Countries

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Abstract

The relevance of the subject is largely conditioned upon the full-scale invasion of the Russian Federation, which, regretfully, does not exclude cases of criminal offences regarding the disclosure of information constituting a state secret. The purpose of the study is to analyse some aspects of criminal liability for disclosure of state secrets in Ukraine and to identify, based on positive foreign experience, proposals for improving this institution in Ukraine. The research methods were: analysis and synthesis, dialectical, comparative legal, Aristotelian and formal-dogmatic. In the process of analysis, it was identified that at the legislative level in Ukraine, the protection of state secrets is regulated in detail, lists of information that may contain state secrets, and cases when information cannot be a state secret, no matter what. In addition, the Criminal Code of Ukraine defines adverse consequences in the form of criminal sanctions that may occur for persons who disclose information constituting a state secret. It is determined that the analysis of the provisions of the Criminal Code of Ukraine, and its correlation with the legal provisions of other regulations, including the study of international legislation, allows concluding that the criminal law provisions defining liability for violation of the state secret protection regime should be transferred to another section. The materials of this study can be used in consideration of the problems of criminal law, in law-making activities in the development of provisions for improving criminal liability for disclosure of information constituting a state secret in Ukraine

Keywords: information space, the information constituting a state secret, secrecy, human rights, criminal offence

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Introduction

Preservation of state secrets is always one of the most significant guarantees of independence of each state in the world, its inviolability and security. In this regard, the key objective of the state will be the protection of data or information constituting a state secret. To ensure proper protection of the state's interests, it is essential to establish an efficient system of protection and defence of state secrets, based on legislative acts and appropriate law enforcement measures.

Notably, the legislation of Ukraine is defined by a rather extensive system of regulations related to the protection and defence of state secrets, including appropriate criminal sanctions for criminal offences committed for violation of state secrets. Thus, the state protects the type of information under study by criminalising the relevant criminal acts in Section XIV of the Special Part of the Criminal Code of Ukraine "Crimes in the field of protection of state secrets, inviolability of state borders, conscription and mobilisation" [1].

An efficient system for the protection of state secrets is one of the guarantees for the preservation of the inviolability and integrity of any state, regardless of its location on the world map and the economic potential of the country. This subject is especially relevant considering the recent events of the armed aggression of the neighbouring state and therefore requires detailed analysis and research at the level of scientific developments and proper legislative regulation.

Considering that Ukraine uses positive international experience, therefore, one of the most efficient ways to perform the research is to analyse the system of criminal law protection of state secrets in foreign countries to identify the experience to be borrowed.

The analysis of recent studies and publications demonstrates the interest of scholars in the specific features of criminal law protection of state secrets both in Ukraine and abroad. Therewith, notably, publications and research: Yu. Kostyanaya [2] studied freedom of access to information and considered it one of the basic human rights. This law is enshrined both at the international level and in the national legislation of all countries. This law is defined as an opportunity for everyone to demand the provision of state information and to receive it from state bodies or officials. Relevant information on the actions and decisions of civil officers becomes publicly available. In addition, he noted that access to information has two levels, namely information with restricted access and information with free access. A. Basuchoudhary & N. Searle [3] explored, in their publication, the individual states for the existence of criminal liability for disclosure of top secret, secret and classified information. In addition, they proposed a mechanism to reduce the number of offences related to state secrets. In the work of Yu.A. Ponomarenko [4], it is determined that political battles and military conflicts are accompanied by active offences, which are expressed in the dissemination of information that may constitute a state secret. In general, the scientist comprehensively examined the offences that may arise during martial law. M. Jurgielewicz and O. Jurgielewicz [5] analysed the information on regulatory and legal support for the protection of state secrets by the provisions of criminal law in the example of the Republic of Poland. The scientists provided statistical data on the number of offences committed in the studied area and reflected the dynamics of the constant increase in such offences.

The purpose of the study is to perform a comprehensive comparative analysis of cases of disclosure of information constituting a state secret and the specific features of criminal liability for committing such criminal offences in Ukraine and foreign countries.

Materials and Methods

In the process of analysis of the chosen subject, three interrelated and successive stages were identified.

In the first stage, the system of regulations of Ukrainian legislation governing the protection of state secrets in Ukraine was examined. It was established that the legislation of Ukraine defines the lists of data (information) that may contain state secrets and cases when the code of information under no circumstances can not be a state secret, and identified adverse criminal sanctions that may be applied to offenders who disclose such information.

In the second stage, a comprehensive analysis of foreign legislation in terms of ensuring the protection of information that may constitute a state secret was performed. In particular, four countries were identified for analysis: Germany, the United States of America, the United Kingdom and France. Thus, it was established that all the studied states mandatorily determine the levels of confidentiality (secrecy) of disclosure of the information using regulations, and measures for the protection and protection of such information are determined based on this. In addition, notably, the level of protection of information that is "top secret" is much higher than that of information that is secret or classified. In this regard, it is proposed to divide classified information into three blocks (levels), namely top secret, secret and confidential, following the example of France, based on positive foreign experience.

In the third stage, conclusions and proposals were developed for the current criminal legislation in the field under study. In particular, it is necessary to strengthen the punishment by raising its upper limit to thirty years. In addition, the necessity of transferring Article 328 of the Criminal Code of Ukraine "Disclosure of State Secrets" [1] and Article 329 of the Criminal Code of Ukraine "Loss of Documents Containing State Secrets" [1], which are placed in Section XIV "Crimes in the field of protection of state secrets, inviolability of state borders, conscription and mobilisation" [1], to Section I "Crimes against the national security of Ukraine" [1], is argued.

To perform a comprehensive analysis of the selected research subject, a complex of general scientific and special legal methods was used. Thus, the dialectical method provides the foundation for the study, as it is a general scientific method of cognition of legal phenomena in their development and interconnection; the systematic method was used to define varieties of state secrets in Ukraine and foreign countries; the comparative legal method in studying foreign legislation on criminal liability for state secrets offences; formal-dogmatic – when analysing the provisions of the Criminal Code of Ukraine [1] that contain a reference to secrecy; Aristotelian – served to identify deficiencies in the provisions of the Criminal Code of Ukraine [1] that contain a reference to secrecy. Notably, such methods of scientific research were used in conjunction with each other.

The following regulations were used to analyse the selected subject: the Criminal Code of Ukraine [1], the Law of Ukraine "On State Secrets" [6], the Law of Ukraine "On Information" [7], the Order of the Security Service of Ukraine "Report of Information Constituting a State Secret" [8].

Results and Discussion

O. Reznik rightly notes the ratification by the Verkhovna Rada of Ukraine on June 27, 2014. The Association Agreement between Ukraine and the European Union [9] marked the state's agreement to implement the obligations stated in this document. By the Agreement, one of the fundamental principles of cooperation is the rule of law and respect for human rights and fundamental freedoms, which should be ensured, in particular, by strengthening the judiciary, increasing its efficiency, and guaranteeing its independence and impartiality [10, p. 3].

In any legal democratic state, the primary objective is to protect the fundamental rights, freedoms and legitimate interests of a person and citizen, including from offences of public authorities or local self-government, including their officials [11, p. 3].

Analysis of the current situation will be simply impossible without determining its past, and the previous one without comparing it. It can be emphasised that it is necessary to refer to the information on the first mentions of the protection of state secrets. Thus, Americans are considered to be one of the first in the world who began to talk about the system of information protection at the level of legislation. D.P. Vasylenko noted that the current principles of the US state security policy demonstrate that this country defines state secrets as an essential component of national security and makes significant efforts to protect them and ensure their legal regulation. The US legislative system on information security is one of the most reliable in the world, which makes it almost flawless and the one that everyone should be equal to [12, p. 129].

Considering the strategic course of Ukraine towards full membership of Ukraine in NATO and the European Union, it is essential to enhance measures to protect and defend state secrets. Among all types of information of specific interest are data on the activities of the authorities according to the criterion of high social significance and demand. It is explained by the very specific features of the functions entrusted to these institutions. The state apparatus processes and disseminates a significant amount of information to perform its rule-making, management and control functions. This information is the foundation for the preparation, adoption and implementation of government decisions [2].

Notably, the protection of information constituting a state secret is regulated by the Constitution of Ukraine [13], the Law of Ukraine "On State Secrets" [6], the Report of Information Constituting a State Secrets [8], international treaties ratified by the Verkhovna Rada of Ukraine and other regulations.

The Law of Ukraine "On Information" [7] in part 1 of Article 20 defines that "according to the order of access, information is divided into open information and information with limited access". Part 1 of Article 21 of the same Law states that "information with restricted access is confidential, secret and official information" [7].

Regarding the legislative definition of "state secrets", Article 1 of the Law of Ukraine "On State Secrets" [6] defines that "state secret (hereinafter – secret information) is a type of secret information, covering information in the field of defence, economy, science and technology, foreign relations, state security and law enforcement, the disclosure of which may harm the national security of Ukraine and which are considered in the order established by this Law, as a state secret and subject to protection by the state" [6].

In addition, no less significant is the "List of information constituting state secrets, which is developed by the Security Service of Ukraine based on decisions of state experts on secrets, which defines specific groups of information that may fall under the definition of state secrets" [8].

In addition, notably, the Law of Ukraine "On State Secrets" [6] defines the list of information that cannot be classified as a state secret, including:

"– on the state of the environment, quality of food and household items;

– on accidents, disasters, dangerous natural phenomena and other emergencies that have occurred or may occur that threaten the safety of citizens;

– on the state of health of the population, its standard of living, including food, clothing, housing, medical care and social security, and on socio-demographic indicators, the state of law and order, education and culture of the population;

– on violations of human and civil rights and freedoms;

– on illegal actions of state bodies, local authorities and their officials" [6].

O. Shamsutdinov, exploring the signs of state secrets, highlights:

– material criterion (significance, as disclosure of such information, may harm the national security of Ukraine);

– formal criterion (provision of detailed information included in the concept of "state secret" using the definition in a specific regulation – the Code);

– restrictions on access to classified information and restrictions on their dissemination and material carriers;

– protection of such classified information by the state, that is, the establishment of a unified procedure for ensuring the protection of this information by state legal means based on the current legislation;

– the clear and precise definition of areas in which state secrets may exist (which may include: science and technology, foreign relations, defence and economy) [14, p. 23].

Concerning criminal liability for the disclosure of information constituting a state secret, notably, Article 329 of the Ukrainian Criminal Code [1], which establishes "liability for the loss of documents containing state secrets, provides for the loss of documents or other material carriers of secret information containing state secrets, and items concerning which information constitutes a State secret, by the person to whom they were entrusted, if the loss resulted from a violation of the statutory procedure for handling these documents and other material carriers of secret information or items".

Thus, it can be concluded that at the legislative level in Ukraine the protection and defence of state secrets are regulated in detail, lists of information that may contain state secrets and cases when information cannot be a state secret are defined. In addition, the Criminal Code of Ukraine [1] defines adverse consequences in the form of criminal sanctions that may occur for persons who disclose information constituting a state secret.

In general, having outlined the key aspects of state secrets in Ukraine, the author of the research proposes to consider the legislation of individual states belonging to various legal families. Among them can be identified Germany and France, as the states of the Romano-Germanic legal family and the Anglo-American – the United States and Great Britain.

Germany. Thus, in the Federal Republic of Germany, hereinafter referred to as Germany, the key source of criminal law is the Criminal Code of Germany (dated 05/15/1871, as amended on 11/13/1998) [15]. It is in the second section of the Special Part of the Criminal Code of Germany entitled "Treason and Endangering External Security" [15] that there are legal provisions relating to criminal liability for "betrayal of illegal secrets" (Section 97a), "betrayal based on mistaken assumption that secret is illegal" (Section 97b), "revealing state secrets" (Section 95), etc. Thus, Section 95 of the Criminal Code defines that the disclosure of a state secret is granting an unauthorised person access to or public announcement of a protected state secret, which establishes a threat of causing serious damage to the external security of the Federal Republic [15].

In addition, Section 94 of the FRG Criminal Code [15] defines that any person who by the nature of service or work does not have the right to possess this information is considered unlawful. Such a person can be considered a foreign citizen, if they do not correspond to the features of a special addressee, thus not a member of a foreign government or foreign intelligence [15].

Notably, to bring a person to criminal liability, it is imperative that the information that is disclosed and is a state secret was known to the guilty person. In the absence of such a requirement, the person will not be held criminally liable. In addition, the requirement that the suspect understands that the information is being transferred to an unauthorised person is quite essential. All this corresponds to the German doctrine, and the essence of intent defined by the Supreme Court of Germany: "Intent is the will to commit a crime with awareness of all its circumstances" [16, p. 212].

USA. As for the American system of protection of state secrets and criminal liability for its disclosure, notably, it is regulated by the US Presidential Order "Classified Information in the Field of National Security" [17]. According to this Order, there are three degrees of secrecy. Notably, US legislation in the field of information is a definite basis (benchmark) on which foreign states should be equal to build a decent basis for their information legislation. Thus, the legislative system of information security in the United States is considered one of the most efficient in the world and is almost perfect [12, p. 129].

According to the law, classified information in the US is divided into two types: defence (information about national security) and official (restricted information, for example, information about the scientific and technical potential of the US in the field of intelligence, communications, cryptographic system, information about operational activities of law enforcement agencies, human resources policy of a government agency etc.) [18, p. 449].

The US legislation defines a large number of criminal law provisions that provide for differentiated liability for violation of state secrets. Where such a criterion of differentiation can be, for example, the subject or object of the crime, the content of subjective factors [19, p. 92]. Thus, each category of official information is subject to a separate provision of federal criminal law. In particular, the US federal legislation provides for liability for intentional and negligent disclosure of state secrets in various provisions. The defining feature for distinguishing between the disclosure of state secrets and related crimes is the subject of the crime. In addition, there is a detailed description of concepts and terms related to state secrets. [12, p. 130].

Notably, the protection of state secrets is not restricted by criminal law and occurs in criminal proceedings. In particular, the current Criminal Procedure Code of Ukraine [20] provides for the implementation of procedural powers of its participants in criminal proceedings that require compliance with the procedure for ensuring the protection of state secrets. The administration of justice, which contains information constituting a state secret, is generally regulated by the fortieth chapter of this regulation. However, notably, the procedural forms of protection of state secrets remain unregulated in cases where, during the pre-trial investigation, the information constituting a state secret becomes known to unauthorised persons (without access). During the period of profound developments in Ukraine, the issues of protection of state secrets are of particular relevance. After all, on the one hand, new threats to the security of the state may appear, and on the other hand, the protection of state secrets in Ukraine is not always performed properly [21, p. 180].

Great Britain. According to the current legislation of the United Kingdom [22], there are four degrees of secrecy of information with restricted access, namely "Restricted" (for official use), "Confidential", "Secret", "Top Secret" [23, p. 207].

Thus, restricted information "Restricted" can be defined as "information whose unauthorised disclosure would damage international relations, hinder the efficiency or security of British or allied forces; prejudice investigations or facilitate the commission of a crime; cause financial loss to individuals or entities, or complicate public sector management". Secret information can be defined as "information whose unauthorised disclosure would raise international tensions; seriously damage relations with friendly governments; directly threaten life or cause significant harm to public order or individual security and freedoms; cause significant damage to the efficiency or security of British or allied forces, or intelligence operations; or cause substantial material damage to national finances or economies and commercial interests". And "Top Secret" restricted information can be defined as "information whose unauthorised disclosure could threaten the internal stability of the United Kingdom or its friendly countries; result in significant loss of life; or cause significant damage to the effectiveness or security of British or allied forces or intelligence operations [19, p. 118].

Concerning criminal liability for the disclosure, Section 10 of the UK Criminal Liability Act [24], the main penalties are imprisonment with a potential term of up to 2 years, or a fine of up to £2,000, and, in addition, allow having both penalties applied simultaneously. In case of committing actions that facilitate the disclosure of information constituting a state secret, the types of punishment are similar to those mentioned above, only lesser, thus, the term of imprisonment can be up to 3 months, and the fine up to 2 thousand sterling. Notably, the Cabinet of Ministers of the United Kingdom is actively developing measures to prevent the leakage of classified information using the media, while applying the provisions of the law on state secrets, or the law on confidentiality, which is administrative. According to the law on confidentiality [24], the Cabinet of Ministers can request through the court (of the first degree) to prohibit the publication of specific information or materials, without specifying the persons in respect of whom such a ban is imposed [19, p. 118].

France. Considering the features of the French legislation in the field under study, notably, the legal framework for the protection and defence of state secrets in France was defined in 1960, at the time when the state became a member of the "nuclear club" – a group of nuclear powers [23, p. 207].

In the current French situation, restricted information is generally divided into three levels, as follows: "defence secret – information the disclosure of which would cause substantial harm to national defence and which may not be disseminated without authorisation from the relevant authorities, except in exceptional situations; extremely sensitive defence secret – information the disclosure of which is considered extremely dangerous to national defence, no organisation may hold, transmit, display or destroy information at this level of a secret without authorisation from the French Prime Minister or Secretary of National Defence; sensitive defence information – information the disclosure of which is deemed to be potentially dangerous to national defence or which could result in the disclosure of information classified at a higher security level. Notably, in France, information is divided into appropriate levels in ascending order, namely: confidential, for employees; confidential, for junior employees; dissemination limited, dissemination limited by the administration [25].

V.V. Serhiichuk [26, p. 164], analysing foreign experience, identified the positive aspects of the French experience. Thus, consideration should be given to amending the Law of Ukraine "On State Secrets" [6] and establishing a list of classified information at the level of the Law, in particular, to include the terms of protection and classification according to the degree of secrecy of each type of information that constitutes a state secret. In addition, it is advisable to amend the Criminal Code of Ukraine [1], in particular: to strengthen (according to the French experience) the punishment for crimes in the field of protection of state secrets, for which punishment in the form of imprisonment for up to thirty years may be applied, to harmonise the general part of the Criminal Code of Ukraine [1]. In addition, considering the necessity of Ukraine's development in the field of defence, the author of the research considers it essential to systematise, following the example of France, the list of classified information in the field of defence, dividing it into three levels: confidential defence, secret defence, top secret defence [27, p. 164].

Conclusions

Exploring the provisions of the Law of Ukraine on Criminal Liability of Ukraine, and its correlation with the provisions of other regulations, including foreign legislation, notably, legal provisions, which define responsibility for violation of the regime of protection of state secrets should be excluded from Section XIV "Offences in the sphere of protection of state secrets, inviolability of state borders, securing conscription and mobilisation" of the Criminal Code of Ukraine and be incorporated into Section I "Offences against the foundations of national security", since they are of particular relevance to national security.

Without considering the difference in the legal regulation of the protection of information constituting a state secret, it allows concluding that the US and UK regulations describe and distinguish between the categories of information that may contain a state secret in a rather detailed way. It is explained by the fact that the case law system is specific to the Anglo-Saxon system. Thus, the legislative protection of information constituting a state secret in the United States is quite close to the British one, namely in terms of differentiation of liability based on the category of information disclosure. Analysing the legislation of France and Germany, notably, "disclosure of state secrets" belongs to the category of "crimes against the state". Thus, it can be stated that the identified specific features of international legislation should be considered by the legislator when developing amendments. In addition, it is advisable to strengthen the responsibility for the disclosure of state secrets by amending the current criminal legislation. The Ukrainian legislator should amend the Criminal Code of Ukraine, namely: Article 328 "Disclosure of State Secrets" and Article 329 "Loss of Documents Containing State Secrets" to be placed in Chapter 1 of the Criminal Code of Ukraine "Crimes against National Security of Ukraine".

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Особливості кримінальної відповідальності за розголошення інформації, що становить державну таємницю в Україні та зарубіжних країнах

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Анотація

Актуальність теми значною мірою зумовлено повномасштабним вторгненням Російської Федерації, що не виключає випадків вчинення кримінальних правопорушень щодо розголошення інформації, яка становить державну таємницю. Мета дослідження – здійснити аналіз окремих аспектів кримінальної відповідальності за розголошення державної таємниці в Україні та виокремити на основі позитивного зарубіжного досвіду пропозиції щодо удосконалення такого інституту в Україні. Методами дослідження стали: аналіз та синтез, діалектичний, порівняльно-правовий, формально-логічний та формально-догматичний. З'ясовано, що на законодавчому рівні в Україні досить детально регламентовано охорону та захист державної таємниці, визначено переліки інформації, що можуть містити державну таємницю, випадки, коли інформація не може бути державною таємницею, незважаючи ні на що. Також Кримінальний кодекс України визначає негативні наслідки у вигляді кримінально-правових санкцій, що можуть наступити для осіб, які розголошують відомості, що становлять державну таємницю. Визначено, що аналіз норм Кримінального кодексу України, а також його співвідношення з правовими нормами інших нормативно-правових актів, зокрема дослідження міжнародного законодавства, дає змогу зробити висновки, що кримінально-правові норми, що визначають відповідальність за порушення режиму охорони державної таємниці повинні бути перенесені до іншого розділу. Матеріали цього дослідження можуть бути використані під час розгляду проблем кримінального права, у законотворчій діяльності для напрацювання положень щодо удосконалення кримінальної відповідальності за розголошення відомостей, що становлять державну таємницю в Україні

Ключові слова: інформаційний простір, відомості, що становлять державну таємницю, секретність, права людини, кримінальне правопорушення

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Access to Justice During Martial Law

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Abstract

The relevance of the study stems from the necessity to assess the efficiency of access to justice as a compulsory and integral element of human rights in the context of a full-scale military invasion of Ukraine. The purpose of the study is to analyse the main measures undertaken by the Government of Ukraine and the judiciary to restore access to justice during martial law, identify the problematic issues of its implementation, and find efficient mechanisms to overcome them. The research methodology covered general scientific and specific methods of scientific knowledge: comparative legal method, cybernetic method and method of analysis and synthesis. Based on the study of the work of the courts of Ukraine, a conditional division of courts was performed based on the mode of their work and the respective location, namely: territories where active hostilities are underway; territories under occupation (blockade); de-occupied territories, and territories remote from hostilities. It is stated that active hostilities, occupation and constant rocket attacks have established several new problems in access to justice, namely the physical impossibility of judges in the occupied territories and areas of active hostilities to administer justice; the catastrophic shortage of court officials; problems related to the transfer of jurisdiction from one court to another (overloading of judges, physical impossibility to transfer case files, actual destruction of cases, longer delays in court cases). It is concluded that under martial law, using electronic justice is an efficient solution that can ensure the right to access justice. It was noted that the current model of electronic justice in Ukraine still requires improvement through the adoption of a clear regulatory framework governing the full use of electronic justice (including the introduction of appropriate amendments to the procedural codes and the development of detailed instructions for judges and parties to the proceedings); improvement of the software to expand its functionality while providing technical equipment to all judges. The practical significance of the conducted research is of scientific value both for practitioners and scholars studying the theoretical and legal issues of access to justice and can be used to ensure the observance and implementation of the right to access to justice in the face of future challenges of extraordinary or global scale, such as war or pandemic

Keywords: court proceedings, russian military aggression, judicial system, e-justice, consideration of court cases

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Introduction

The fact that in the 21st century, in any part of the world, one country will encroach on the territorial integrity of another country through military aggression still appears as a utopia. However, on February 24, 2022, the Russian Federation conducted a full-scale military invasion of the territory of sovereign and independent Ukraine.

By the Decree of the President of Ukraine [1] of 02/24/2022, martial law was introduced throughout the territory of Ukraine, which was extended until August 2022 [2; 3] and is expected to be extended in the future. The Law of Ukraine "On the Legal Regime of Martial Law" explicitly states that during the period of martial law, justice shall be administered exclusively by the courts, and the reduction or acceleration of any form of legal proceedings is prohibited [4].

The introduction of martial law or any other measures within the framework of countering military aggression must be implemented within the framework of respect for fundamental human rights and the rule of law itself. Therewith, martial law should not be used as a reason for unjustified and illegal restrictions of international human rights standards.

By ratifying the European Convention on Human Rights , Ukraine has assumed international obligations to comply with the principles of a fair trial, an element of which is access to justice. Even though the European Convention on Human Rights provides for the possibility of limiting a country's compliance with international human rights standards, such derogations are justified only in exceptional and urgent situations that threaten the life of the nation.

Theoretical and legal aspects and problems of ensuring access to justice in criminal, civil, economic and administrative cases have previously been the subject of scientific research by such scientists as O. Kozakevych, T. Lukash, N. Sakara, R. Moskal, O. Balatska etc.

Thus, O. Kozakevych explores the establishment and development of the concept of the right to access through the analysis of theoretical approaches to the study of the concept of access to justice. The scientist concluded that the right to access justice cannot be attributed to a purely classical concept of human rights, as this right is universally accepted and is beyond the conventional approach [6].

In turn, T. Lukash, considering access to justice as a component of the right to a fair trial, develops his author's definition of the right to a fair trial as "the possibility of a person (individual and/or collective entity), which is legally enshrined in the protection in specific state institutions (judicial system and bodies in the justice system) of violated rights and freedoms, which results in the actions of special state institutions to restore the violated right and/or the possibility of an individual to hold a position in the judicial system and bodies in the justice system" [7].

N. Sakara, based on the practice of the European Court of Human Rights and analysis of national legislation, notes that the right to access to justice in civil cases should be considered in two reference meanings: "firstly, as the right to access to justice, which follows from paragraph 1 of Article 6 of the Convention and exists on a par with others explicitly enshrined in the above provision and developed by the ECHR; secondly, as access to justice, i.e. a specific international standard for fair and efficient judicial protection" [8].

Exploring the issues of access to justice, R. Moskal draws a clear distinction between the concepts of "access to justice", "accessibility of justice", and "the right to access to court". Therewith, the scientist concludes that "access to justice as one of the elements of the rule of law cannot be equated with 'access to a court' as an element of the right to a fair trial guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms" [9].

Considering the essence of access to justice in criminal proceedings, O. Balatska notes the necessity to replace the term "access to justice" with the "principle of access to court", which covers both the possibility of appealing to the court and a set of institutional and functional elements [10].

With all the thoroughness and completeness of the research of the above scholars, most of them explored the problem of access to justice as one of the aspects of ensuring the right to a fair trial in the general theoretical context without considering the possibility of full implementation of this right in the conditions of Ukraine's being in a state of full-scale war. Notably, ensuring access to justice under martial law has been partially covered in the media and the comments of the judges of the Supreme Court and the Council of Judges of Ukraine, but this issue has not been fully explored in a scientific study.

That is why *the purpose of the study* is to conduct a thorough analysis of the work of the courts of Ukraine during the period of large-scale military aggression and to identify the most efficient measures to ensure full and continuous access to justice in the conditions of active hostilities, occupation of territories, and the risk to the life and health of court employees and participants in the process.

Materials and Methods

The study was conducted by using the following general scientific and specific methods of scientific cognition: comparative legal method, through which the author performed a comparative analysis of the legislative measures necessary to prevent restrictions in the field of access to justice during martial law; cybernetic method, which allowed considering the most appropriate alternative methods of administration of justice in the conditions of military aggression on the territory of Ukraine; methods of analysis and synthesis allowed developing scientific and practical conclusions and proposals for further improvement of guarantees of access to justice.

This study analysed the legislation, regulations and recommendations that specifically regulate the activities of the courts and ensure access to justice under martial law (both those in force before the military aggression and those adopted under martial law, in particular, draft laws No. 7315 [11] and No. 7316 [12], which are currently under consideration).

Results and Discussion

Despite some experience gained and adapted to the realities of the judicial system in conditions of threat to human life (meaning the coronavirus pandemic), a full-scale military invasion has become such a powerful challenge that Ukrainian justice could not even imagine. Admittedly, martial law, active hostilities, occupation of territories, destruction of court premises and constant threat to human life forced the judiciary to immediately implement unprecedented measures to restore courts to proper operation and fully implement guarantees of access to justice.

Based on the particular situation on the territory of the regions where they are located, the author divides all courts of Ukraine into four types, namely: 1) *courts located in the territory where active hostilities are ongoing* (part of the courts of Donetsk, Luhansk, Zaporizhzhia, and Kharkiv regions); 2) *courts in the occupied territories* (23 courts of Kherson region, some courts of Donetsk, Luhansk and Zaporizhzhia regions); 3) *courts located in the de-occupied regions* (26 courts of Chernihiv region, Irpin city court of Kyiv region, Makariv district court of Kyiv region, Brusyliv, Malyn and Ovruch district courts of Zhytomyr region); 4) *courts whose administrative-territorial location is remote from any hostilities* (for example, courts of Ternopil, Ivano-Frankivsk, Lviv, Kirovograd, and Dnipropetrovsk regions).

Thus, courts located in the territory of active hostilities or occupation were forced to suspend their activities. However, courts located outside the hostilities zone and in the de-occupied territories continue to operate regularly but with some specific features.

Notably, the mode of operation of courts, according to the territory of their location and the approach of active hostilities, could constantly change (from suspension to resumption and back). For example, on March 6, 2022, the number of non-working courts was 48, already on April 6, 2022, this number increased to 128, and on May 25, 2022, it decreased to 99 (more details on Figure 1).

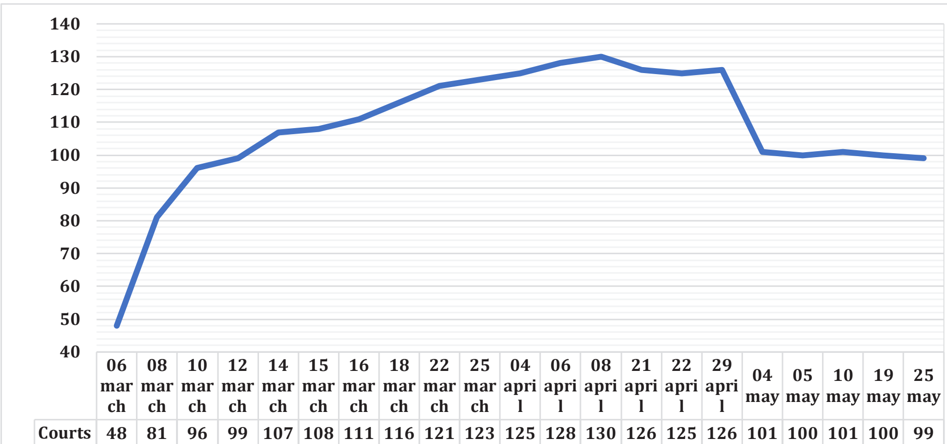

Figure 1. Dynamics of the number of courts that suspended (stopped) their activities under martial law for the period from March 6, 2022, to May 25, 2022

Source: compiled based on official orders of the Supreme Court [13]

As of June 14, 2022, 47 court buildings in the administrative-territorial units of the following regions have suffered significant damage since the military invasion: Luhansk, Donetsk, Kyiv, Chernihiv and Kherson regions. Therewith, the Borodianskyi District Court of Kyiv region, Izium City Court of Kharkiv region, Kharkiv Court of Appeal, and Economic Court of Mykolaiv region were destroyed and are not suitable for use at all.

To restore the possibility of administering justice in courts that have suspended their activities due to the urgent threat to life and health in the conditions of active hostilities and occupation, the Law of Ukraine "On Amendments to Part Seven of Article 147 of the Law of Ukraine 'On the Judicial System and Status of Judges' regarding the determination of territorial jurisdiction of court cases" was adopted [14]. This law provides for the possibility of changing the territorial jurisdiction of cases, which cannot administer justice due to military operations, by transferring such jurisdiction to the court most geographically close to this court. The decision to change the jurisdiction of a particular court is made by the High Council of Justice upon the proposal of the Chief Justice. In the absence of the powers of the High Council of Justice, the change of jurisdiction of the court is based on the order of the Chairman of the Supreme Court.

Thus, in the period from March 6, 2022, to June 14, 2022, the Chairman of the Supreme Court issued

22 orders on the territorial jurisdiction of cases, of which 16 orders concerned the change of territorial jurisdiction, and 6, on the contrary, its restoration. Thus, as of June 14, 2022, the number of courts that do not administer justice is 99, and the number of courts that have resumed their activities is 33.

In turn, to ensure the proper functioning of courts under martial law, the Council of Judges of Ukraine, as the highest body of judicial self-government, has adopted several important decisions and recommendations for all courts of Ukraine. Thus, the decision of the Council of Judges of Ukraine No. 9 of February 24, 2022 [15] contains recommendations for streamlining the work of courts while ensuring the safety of judges, and judicial staff, and a list of required measures in case of escalation of hostilities to preserve court cases and documents. Among the main (key) functional measures should be noted:

1) the possibility for court chairpersons, in case of a threat to the life and health of judges, parties to the proceedings and court staff, to decide on the temporary suspension of the court's activities until the threat is eliminated;

2) the heads and chiefs of staff of the courts were instructed to ensure the safety of seals and stamps of the courts, and to identify and provide court cases and documents to be preserved and evacuated in case of aggravation of the situation;

3) establishment of an operational headquarters at the Council of Judges of Ukraine, which will constantly coordinate the work of courts in Ukraine.

In addition, on March 2, 2022, the Council of Judges of Ukraine developed recommendations for all courts of Ukraine on the immediate regulation of the administration of justice and the procedure for considering cases [16]. Thus, the Council of Judges of Ukraine recommended judges consider the current situation in the respective region:

– to independently make decisions on the mode of operation of the court (including the possibility of suspending its work) based on the real threat to the life and health of judges, court staff, participants in the process and visitors to the court;

– restrict access to the court premises for all visitors (except participants of the trial);

– limit the number of court employees and judges physically present on the court premises by introducing appropriate duties. All other court employees are recommended to switch to remote work;

– if possible, to delay the consideration of court cases (except for urgent and urgent cases: detention, an extension of detention). Therewith, consideration of other cases is possible only with the written consent of all parties to the case;

– to provide daily accounting of all court staff and judges (including information on their whereabouts and safety).

On March 13, 2022, the order of the Chairman of the Supreme Court [17] proposed an algorithm of actions for courts and judges in case of occupation of a settlement (or court) or threat of its occupation. According to these recommendations, judges should respond to the situation with the highest priority – the preservation of human life and health. The algorithm of actions provides for: mandatory evacuation of judges and staff from the occupied territories (through evacuation corridors or independently); the possibility to ensure the transportation of court cases (or at least the most significant and high-profile cases); the procedure for the removal of court seals, robes, breastplates, servers, devices with electronic digital signatures of judges and court staff from the court premises. In case of impossibility of their transportation – everything is destroyed compulsorily.

Although the judiciary has undertaken all possible measures designed to ensure uninterrupted access to justice and the full functioning of the courts, there are still several problems of the judicial system and the activities of the courts that still require urgent solutions and regulation:

1. The problem of physical transfer of court case files from courts that have suspended their activities, and the consideration of cases of this court was transferred to another court under jurisdiction. Currently, if it is necessary to move court cases to a new court, they are moved. Cases that have been relocated are transferred to the clerk's office in the new court and reassigned and heard from the beginning. Cases that cannot be physically removed remain in the court premises (if possible in the safes of the court premises). Therewith, if the proceedings have been initiated, but no judgment has been rendered, the party to the case has the right to file a lawsuit again in the court to which the jurisdiction of the case has been transferred. However, what to do with the materials of proceedings that have not been evacuated, and consideration of court cases without case files is simply impossible?

2. Overload of courts and judges to whom the consideration of cases were transferred from courts located in the occupied territories or in the territories where active hostilities are conducted. For example, court cases from the courts of the Kherson region (21 courts), Donetsk region (12 courts), Luhansk region (16 courts), Zaporizhzhya region (14 courts) and Kharkiv region (6 courts) were transferred to the courts of Dnipropetrovsk region by the order of the Chairman of the Supreme Court. That is, the workload of the courts of the Dnipropetrovsk region has additionally increased by the number of cases that were under the jurisdiction of 69 courts, which increased the workload of judges three times.

3. Problems of the secondment of judges from the territories where active hostilities are conducted to the courts where jurisdiction over cases is transferred. In particular, the possibility of sending courts from the territories of occupation remains a problem, as judges are now physically unable to leave these regions (exit is prohibited), and the possibility of remote work is not

allowed, as there is no mobile communication and Internet in these regions (for example, Kherson and Zaporizhzhia regions).

4. Catastrophic shortage of court staff, starting from secretaries, assistants, court staff and up to judges. It is primarily explained by the fact that as a result of the military aggression, women judicial employees were obliged to leave their homes and evacuate to safer regions (in particular, they went abroad) for their safety and the safety of their children. Thus, almost all courts of Ukraine (which are currently exercising their powers) publish on their official pages' information about a large number of vacant positions in this court, and information about the lack of courts that have the authority to work.

Notably, the problem of preserving life and health under martial law while ensuring access to justice should be considered in parallel with the problem of protecting personal data and data constituting judicial secrecy. That is why the judicial authorities of Ukraine temporarily (during the period of martial law) suspended access to the Unified State Register of Court Decisions, the services "Status of consideration of cases" and "List of cases scheduled for consideration". Therewith, information on the case (including decisions and court summonses) can be obtained by each participant in the process in the personal account of the Electronic Court, which is now constantly updated with information on the status and progress of the relevant case.

It is appropriate to note that the prerequisite and driving force for the widespread implementation and the beginning of the full use of electronic justice was the large-scale spread of the coronavirus disease COVID-19 [18; 19]. The COVID-19 pandemic has accelerated the use of digital tools for court cases, and access to remote justice with the active use of audio and video both in Ukraine and in all European countries [20; 21]. During martial law, Ukraine has an e-Court system with a wide range of tools (possibility of filing lawsuits, statements and motions immediately in court, receiving current and timely information on the date and status of the case, familiarisation with the case file, holding court hearings via video conferencing, receiving court decisions in the electronic cabinet, etc.), in addition, it allowed for court cases to be heard by both judges and litigants from a safe location.

The increase in the use of e-court subsystems under martial law is confirmed by official statistics. Thus, from February 24, 2022, to May 31, 2022, 30,438 court hearings were conducted via videoconference, and 85,659 applications and petitions were filed with the court through the personal account of the electronic court. And the number of newly registered users in the e-court system reached almost 6,000 people [22].

Realising that e-justice is the most efficient mechanism for access to justice in a pandemic [23], and in the conditions of active hostilities, occupation and the threat of missile attacks, the judiciary continues to actively improve technological processes aimed at refining, improving and expanding a wide range of e-court functionality.

Thus, on June 6, 2022, the Order of the State Judicial Administration of Ukraine No. 156 approved the Instruction on working with technical means of recording court hearings [24], which introduced a new procedure for recording court hearings and using new functionality that allows avoiding the recording of court hearings on a CD and fully integrating with the subsystem of the Electronic Court.

Now, the court session will be recorded through the videoconferencing subsystem, and the records of the court session will be stored in the appropriate data storage. Therewith, the court session is recorded through this subsystem both for the sessions held via videoconferencing and for the court sessions held in the courtroom. The instruction provides for the procedure for access to the recording of the court session. Thus, the records of the court session are available at the web link in the court. Participants of the trial have the opportunity to access the link to the recording of the relevant court session after paying the established court fee. In addition, the instruction introduces the technical possibility for the secretary of the court session to work outside the court premises (completely remotely).

In addition, in April 2022, several draft laws were registered that specifically address the issue of the administration of justice, namely draft Law No. 7315 on Amendments to the Law of Ukraine on the Judiciary and the Status of Judges regarding the administration of justice in conditions of martial law or state of emergency [11], and draft Law No. 7316 on Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine and the Economic Procedure Code of Ukraine (concerning the conduct of court proceedings under martial law) [12].

These draft laws proposed to enable the courts to summon or notify the parties about the place, time and date of the court hearing by any possible means, in particular by all known means of communication: e-mail, telephone, SMS or messenger and even through announcements on the official web portal of the judiciary. After receiving a notification from the court, the participant in the case must immediately send a confirmation of receipt or acquaintance with such a call or message by SMS, phone, messenger or e-mail. The text of such confirmation is printed out, and the telephone confirmation is recorded by the relevant employee of the court staff, attached by the secretary of the court session to the case and is considered to be a proper notification of the participant in the trial. Such notifications can be used only if it is not possible to ensure the notification of participants in the general order. Currently, the possibility of notification by e-mail, telephone or other means (except messengers) exists only if the participant has previously sent a corresponding application.

The draft law proposes to allow the parties to access the electronic version of the court decision and enforcement documents through the mobile application of the portal "Diya" and the Unified State Web Portal of Electronic Services. If a participant of the trial does not have an official e-mail address, the court will be able to notify them of the court decision by posting information on the official web portal of the judiciary with a link to the web address of such court decision in the Unified State Register of Court Decisions. In addition, there is an opportunity for a participant in the proceedings to get acquainted with the court decision in conditions when it is not physically possible to deliver it in person or send it by mail.

Draft Law No. 7316 expands the possibility of remote participation of a secretary, interpreter, and witness by introducing appropriate amendments to all procedural codes (except for criminal cases). Thus, in the courts located in the occupied territories or in the territories where active hostilities are underway and where the secretary of the court session is physically unable to be in the courtroom or such an employee is absent at all, during the martial law or state of emergency, by order of the chairman of the court, any employee of the court staff with higher legal education may be appointed to exercise the powers of the secretary of the court session. The Secretary will be able to perform their duties via videoconferencing. In case it is impossible to record the court session by technical means, the secretary of the court session will be able to record the course of the court session in the protocol of the court session remotely.

Considering using e-justice as the most efficient solution for the full administration of justice, the experience of the European Union countries, which have been fully using e-justice systems for a long time, should be considered. Thus, the countries with the highest level of integration of information technology in the judiciary include Austria, Italy, Norway, Estonia and Hungary.

For example, the most developed electronic communication court systems are the electronic system Processo Civile Telematico or TOL in Italy and the electronic case e-File and the electronic court system KIS in Estonia [20]. Based on a thorough analysis of the data of electronic court systems, the author has identified their functionality, the implementation of which in the electronic court system of Ukraine will allow providing full access to justice in the conditions of martial law or challenges of extraordinary and global scale, namely:

1) availability of a unified information court system that unites courts of all instances and is used for all proceedings without exception (it is in this system that court cases are registered, and all materials of proceedings and court rulings and decisions are contained). Therewith, the systems provide for the possibility of both filing lawsuits in court and appealing against decisions already passed by any instance;

2) fully electronic document management (from submission, storage and the possibility to get acquainted with the procedural materials of the case at any time). Notably, in Estonia, digital court files are used along with paper court files (and, if the court file is available in digital form, its duplication in paper form is not required);

3) provides for the possibility for the parties to receive court summonses and any information on the progress of the case in electronic form;

4) a full-fledged opportunity to pay court fees immediately in the electronic office;

5) the electronic systems have explicit software restrictions to protect against the dissemination of confidential and personal information: only the judge in charge of the case and only those court employees who are related to the case have access to confidential and personal information;

6) full possibility of holding court hearings remotely (via videoconferencing) using the electronic court system;

7) a precise and legally regulated algorithm of identification and access of the parties to their accounts in electronic court systems.

Conclusions

The study allows concluding that most of the measures introduced to ensure the full functioning of the judicial system were immediate, exceptional and necessary in the current circumstances. However, the military invasion, occupation and active hostilities in large parts of Ukraine have highlighted several pressing problems in providing justice, namely overburdening of judges due to the transfer of court cases from courts in the occupied territories and areas of active hostilities; the physical inability of judges and parties to hear court cases in court premises due to the threat to life; shortage of court staff and judges themselves due to their departure to a safer location; the physical impossibility of transferring court cases from the occupied territories (destroyed court buildings) to a new court, effectively stopping any consideration of these cases until they are restored.

Notably, one of the most efficient solutions to solve the above-mentioned problems and restore access to justice during war and martial law is the transfer of judicial proceedings (electronic communication between the court and the parties to the proceedings: from filing, registration and management of cases, exchange of electronic documents, sending of subpoenas) to the remote mode through electronic courts.

Analysing the experience of Ukraine and the experience of the European Union countries that have been fully using e-court systems for a long time, it is undoubtedly a fact that for the possibility of full and successful functioning of e-justice in Ukraine it is necessary to further regulate its legislative regulation, technical refinement (improvement) and provision. However, it can be confidently stated that Ukraine has chosen the right vector of judicial development towards the establishment of a full-fledged electronic and communicative judicial system, which will ensure continuous access to justice as a fundamental principle of human rights by international standards.

The experience of measures, work of the judicial system and legislative changes under martial law will become a new vector of world scientific research in the field of access to justice and will provide an opportunity for further improvement of the current legislation towards the improvement and full use of electronic justice.

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Доступ до правосуддя в умовах воєнного стану

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Анотація

Актуальність дослідження зумовлено необхідністю провести оцінку ефективності забезпечення доступу до правосуддя як обов'язкового та невід'ємного елементу прав людини в умовах повномасштабного воєнного вторгнення в Україну. Мета статті – аналіз основних заходів, що вжили уряд України та судова влада для відновлення доступу до правосуддя під час воєнного стану для виявлення проблемних питань його реалізації, а також пошук ефективних механізмів їх подолання. Методологія дослідження охопила загальнонаукові та спеціальні методи наукового пізнання: порівняльно-правовий метод, кібернетичний метод та метод аналізу і синтезу. На підставі дослідження роботи судів України здійснено умовний поділ судів залежно від режиму їхньої роботи й відповідного розташування, а саме: території, де ведуться активні бойові дії; території, що перебувають в окупації (блокаді); деокуповані території, а також території, віддалені від військових дій. Констатовано, що активні бойові дії, окупація та постійні ракетні обстріли створили низку нових проблем у доступі до правосуддя, як-от: фізична неможливість здійснення правосуддя суддями на окупованих територіях та територіях активних бойових дій; катастрофічний брак працівників судів; проблеми, пов'язані з передачею підсудності з одного суду до іншого (перенавантаження суддів, фізична неможливість передачі матеріалів судових справ, фактичне знищення справ, збільшення строків розгляду судових справ). Зроблено висновок, що в умовах воєнного стану застосування електронного судочинства є саме тим ефективним рішенням, що може забезпечити право на доступ до правосуддя. Звернено увагу, що чинна модель електронного судочинства в Україні ще потребує доопрацювання шляхом ухвалення чіткої нормативно-правової бази, що регламентує повноцінне використання електронного судочинства (включно зі внесенням відповідних змін до процесуальних кодексів та розробкою детальних інструкцій для суддів і сторін процесу); доопрацювання програмного забезпечення для розширення його функціональних можливостей з одночасним забезпеченням технічним обладнанням всіх суддів. Практична значимість проведених досліджень має наукову цінність не тільки для практиків і науковців, що вивчають теоретико-правову проблематику доступності правосуддя, а й можуть бути використані для забезпечення дотримання та реалізації права на доступ до правосуддя в умовах майбутніх викликів надзвичайного чи світового масштабу, як-от війна чи пандемія

Ключові слова: судовий розгляд, російська військова агресія, судова система, електронне правосуддя, розгляд судових справ

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