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On Some Issues Concerning Section 4.5. “Crimes Against Human Will and Dignity” of the Draft Criminal Code of Ukraine

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Abstract

The socio-political and economic situation in the state determines the improvement of the national legal system, considering modern challenges and needs of a democratic society. The Criminal Code of Ukraine, the draft of which is currently under development, is no exception. The purpose of this study is to analyse approaches to the proposed wording of articles of the draft Criminal Code of Ukraine concerning liability for crimes against human will and dignity, identify shortcomings and determine ways to eliminate the latter. To fulfill this purpose, the authors employed the following methods: logical-semantic, comparative, hermeneutical, dogmatic (Aristotelian) and system analysis. The study uses current Ukrainian and foreign legislation, works of researchers from Canada, United Kingdom, Switzerland, Uganda, Ukraine, and the USA, as well as materials of judicial practice. The study proves that Section 4.5. “Crimes Against Human Will and Dignity” of the draft Criminal Code of Ukraine protects the right to freedom and personal integrity. The authors establish that the term “freedom” better corresponds to the object of encroachment and thus is more appropriate. This study offers original definitions of the terms “right to freedom” and “right to personal integrity”. It is argued that the term “representative of a foreign state” in Article 4.5.1. “Meaning of the terms used in this Section” is worded inaccurately. Comments are made on the wording of Article 4.5.4. “Illegal deprivation of person's liberty” concerning the debatable nature of combining acts differing in terms of the primary direct object in one norm – illegal detention, compulsory attendance, house arrest or detention, illegal placement in a psychiatric care institution, kidnapping and illegal deprivation of liberty; the study provides an author's version of Paragraph “b”, Article 4.5.4. The practical value of this study is to highlight scientific opinions on some matters concerning the regulation of crimes against the person's will and dignity in the draft Criminal Code of Ukraine and formulate proposals in this regard, which can be considered by the developer of this project – the Working Group on criminal law development

Keywords: right to liberty, right to personal integrity, crimes against human will and dignity, placement in a psychiatric care facility, unlawful deprivation of liberty, kidnapping

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Introduction

For more than two decades after the adoption of the Criminal Code of Ukraine on April 5, 2001, it has undergone essential changes, the adoption of which was conditioned upon the processes taking place in society, the state, and the world. As noted by V.V. Cherniei and A.A. Vozniuk, some of these changes have substantially complicated the application of criminal law norms, namely leading to the emergence of duplicate norms, unjustified competition, and the loss of certain criminal law instruments of influence on persons who commit socially dangerous acts. Ever since the Criminal Code of Ukraine has been enforced, its certain provisions remained "dead" norms. Law enforcement activities have clearly demonstrated other critical shortcomings, the elimination of which is now possible only under the condition of a comprehensive reform of criminal legislation [1, p. 7].

Decree of the President of Ukraine No. 584/2019 of August 7, 2019, "Matters of the Commission on Legal Reform"¹ approved the Regulations on the Commission on Legal Reform and its personnel; a Working Group on the development of criminal law has been formed within the Commission. Leading forensic scientists who have been involved in this Working Group took an active part in the development of the draft Criminal Code of Ukraine (hereinafter referred to as the "CCU"); as of July 25, 2021, the result of their work was published at the official website of the New Criminal Code [2].

Section 4.5. "Crimes Against Human Will and Dignity" of Book 4 "Crimes and Misdemeanors against a Person and Citizen" of the special part of the draft CCU contains the following norms:

- Article 4.5.1. "Definition of the Terms used in this Section";
- Article 4.5.2. "Essential Elements of Offence that Reduce the Gravity of Offence Provisioned in this Section by Two Degrees";
- Article 4.5.3. "Essential Elements of Offence that Reduce the Gravity of Offence Provisioned in this Section by One Degree";
- Article 4.5.4. "Illegal Deprivation of Liberty";
- Article 4.5.5. "Enforced Disappearance";
- Article 4.5.6. "Connivance of Enforced Disappearance";
- Article 4.5.7. "Human Trafficking";
- Article 4.5.8. "Coercion";
- Article 4.5.9. "Forced Marriage";
- Article 4.5.10. "Coercion as a Condition for the Release of a Hostage".

The given structure of Section 4.5. "Crimes Against Human Will and Dignity" of the draft CCU is controversial, since the norms in question, in their structure and content, contradict certain provisions of international regulations ratified by Ukraine.

Crimes against human will and dignity have been the subject of studies for many researchers. Thus, a comprehensive study of the problems of criminal liability for these encroachments at the level of dissertation theses was conducted by A.S. Politova [3], O.S. Naumova [4], V.A. Bortnyk [5], O.S. Subbotenko [6], A.V. Andrushko [7].

Other dissertations addressed the specific features of criminal liability for certain socially dangerous encroachments against the human will and dignity, namely criminal liability for kidnapping (O.O. Volodina [8], V.G. Kundeus [9], L.V. Kabanets [10]), hostage-taking (M.O. Akimov [11]), child exploitation (I.M. Dolyanovska [12] and D.O. Kalmykov [13]), exploitation of a minor for beggary (I. V. Dehtiarova [14]). Experts in criminal law paid special attention to the issues of responsibility for human trafficking, among the dissertations covering this subject, the authors of the present study highlight the works of such researchers as V.O. Ivashchenko [15], V.A. Kozak [16], Ya.G. Lyzohub [17], A.M. Orlean [18; 19], V.M. Pidhorodynskyi [20]. Therewith, as A.V. Andrushko notes, as of today, not a single dissertation has been defended on the specific features of criminal liability for enforced disappearance (Article 146-1), illegal placement in a psychiatric care institution (Article 151), and forced marriage (Article 151-2) [7, p. 46-47].

The originality of the present paper is that the above-mentioned studies concern the liability for criminal offences against the will, honour, and dignity of a person under the CCU of 2001, and the norms proposed in the draft CCU essentially differ from them. This indicates the relevance of this study.

The purpose of this study is to investigate the opinions of criminologists (researchers and practitioners) regarding the wording of articles on responsibility for crimes against human will and dignity formulated by the developers of the draft CCU, identifying the shortcomings of the latter and justifying promising areas for their elimination.

Materials and Methods

The paper analyses the current Ukrainian and foreign criminal legislation, studies by researchers from the USA, Great Britain, Canada, Switzerland, Uganda, Ukraine on the problems of criminal liability in general and crimes against human will and dignity in particular; analytical materials, judicial practice to determine gaps in the current criminal legislation, and shortcomings in the draft CCU.

The study employed logical-semantic, comparative, hermeneutical, dogmatic (Aristotelian) methods, and the method of system analysis. The logical-semantic method was used to analyse terms that reveal the essence of such concepts as "right to freedom", "right

¹Decree of the President of Ukraine No. 584/2019 "Matters of the Commission on Legal Reform". (2019, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/584/2019#Text>.

to personal integrity”, “freedom”, “will”, “representative of a foreign state”. The comparative method is used to examine foreign practices regarding criminal liability for illegal placement in a psychiatric care institution, as well as kidnapping and illegal deprivation of liberty. Hermeneutical method – for analysing the understanding of the grounds for placement in a psychiatric care institution. Dogmatic (Aristotelian) method – for the analysis and interpretation of the provisions of criminal law and legislation on criminal liability upon the characterisation of certain types of criminal offences against human will, honor, and dignity, and also allowed developing proposals for improving the draft CCU on liability for crimes against human will and dignity. The method of system analysis was used to cover the elements and features of Articles 4.5.1, 4.5.4 of Section 4.5. of the draft CCU.

Results and Discussion

The right to liberty and security of person as an object of crimes against human will and dignity

Crimes against human will and dignity pose a great public danger since they encroach on freedom and personal integrity, as well as on the life and health of the victim, cause considerable material damage to the state, legal entities, and individuals, are committed mainly in complicity (in particular by organised groups whose activities are transnational in nature), and have a high level of latency.

Article 29 of the Constitution of Ukraine establishes the right of every person to freedom and personal integrity. Internationally, the right to liberty is provisioned together with the right to life and personal integrity. Thus, Universal Declaration of Human Rights¹ proclaims that all people are born free and equal in dignity and rights (Article 1) and every human has the right to life, liberty, and personal integrity (Article 3). These provisions are embodied and further developed in other international regulations. For example, in Paragraph 1, Article 9 of The International Covenant on Public and Political Rights².

Article 5, Paragraph 1 of the European Convention on Human Rights³ provides that everyone has the right to liberty and personal integrity. No one may be deprived of their liberty except the following cases and according to the legally established procedure:

(a) lawful imprisonment of a person after conviction by a competent court;

(b) lawful arrest or detention of a person for failure to comply with a lawful order of a court or to ensure the fulfillment of any legally established duty;

(c) lawful arrest or detention of a person carried out for the purpose of bringing them to the competent judicial authority in the presence of a reasonable suspicion that they have committed an offence, or if it is reasonably considered necessary to prevent them from committing an offence or absconding after such offence has been committed;

(d) detention of a minor based on a lawful decision for the purpose of applying surveillance measures of an educational nature or lawful detention of a minor for the purpose of bringing them to the competent authority;

f) lawful detention of persons to prevent the spread of infectious diseases, lawful detention of the mentally ill, alcoholics, or drug addicts, or vagrants;

(f) lawful arrest or detention of a person to prevent their unauthorised entry into the country or of the person being deported or extradited.

As for mentally ill people, S.D. Guillot notes that pursuant to Article 14 of the UN Convention on the Rights of Persons with disabilities⁴, Member States should repeal the legislative provisions on the application of a preventive measure in the form of detention based on a mental disorder (both in itself and in combination with other factors such as possible danger or need for treatment), which effectively means the annulment of the legislation on psychiatric care. At the same time, certain UN Human Rights Institutions (including the Human Rights Committee) continue to claim that deprivation of liberty according to the legislatively established procedure on psychiatric care shall be considered lawful under certain circumstances [21].

Despite some controversial issues of detaining certain categories of people, the authors believe that the right to freedom is a natural right of everyone to exercise their freedom of expression and activity without any restrictions. The only thing that is laid down in it is the restriction of other people's freedom, especially of officials who can use coercion. Proceeding from this, the right to freedom is defined as the natural ability of a person guaranteed by the state to choose their place of residence at their own request, move freely on the territory of the state and beyond, and perform any actions regardless of the internal beliefs (will) of others.

As for the right to personal integrity, it should be defined as the main personal incorporeal right, which

¹Universal Declaration of Human Rights. Adopted and proclaimed by UN General Assembly resolution 217 A (III). (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

²International Covenant on Civil and Political Rights; Adopted by the UN General Assembly. (1966, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_043#Text.

³European Convention on Human Rights as amended by Protocols Nos. 11, 14, and 15. (2021). Retrieved from https://www.echr.coe.int/Documents/Convention_UKR.pdf.

⁴UN Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly. (2006, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_g71#Text.

defines the personal integrity of a person, a human person as such (as a living physical being). Personal integrity should include physical, mental, and moral integrity. However, correlation of the right to personal integrity with crimes against human will and dignity reveals that not all articles of Section 4.5. "Crimes Against Human Will and Dignity" of the draft CCU refer to violations of physical, sexual, or mental integrity. Such approach to the interpretation of the right to personal integrity suggests that the right to personal integrity is a natural possibility of a person's free existence guaranteed by the state without any interference or influence on their freedom and dignity.

Summarising the above, the generic object of crimes against human will and dignity is social relations that ensure the right to freedom and personal integrity. Consequently the use of the term "will" in the title of Section 4.5. is unjustified, since the concept of will is clarified through recognition of freedom, while freedom is a recognised vital necessity. The will allows a person to act within a certain social space, which gives grounds to consider the concept of freedom broader than the concept of will [22, p. 177]. Therefore, it is correct to state that the categorisation of offences entails a critical loss of information, since offences are committed through a complex combination of behavioral and situational motives, most of which do not fit into simple classification categories [23]. That is why the term "freedom" (not "will") should be used in the title of Section 4.5. of the draft CCU, and it will correspond to the object of encroachment.

State representatives and foreign state representatives as subjects of crimes against human will and dignity

Article 4.5.1. "Definition of the Terms used in this Section" of the draft CCU¹ contains explanations of the terms used, including "state representative" and "foreign state representative". A state representative is an official or a person acting with the permission, support, or consent of the state, while a foreign state representative is a person who:

- a) acts as a civil servant of a foreign state;
- b) performs military service in the armed forces, police bodies, state security bodies, intelligence agencies;
- c) holds a position in the specified or any other state bodies or local self-government bodies of a foreign state formed in accordance with its legislation;
- d) acts on the order of the persons specified in paragraphs (a) to (b) of this paragraph of the note;
- e) is a representative of irregular illegal armed groups, armed gangs or groups of mercenaries created, subordinate, managed, or financed by the Russian Federation,

f) is a representative of the occupation administration of the Russian Federation, which constitute its state bodies or other structures functionally responsible for the management of the temporarily occupied territories, or

g) is a representative of the self-proclaimed bodies controlled by the Russian Federation, which usurped the power functions in the temporarily occupied territories of Ukraine.

Undoubtedly, in the current conditions of implementation of national policy regarding national security, solving the issue of restoring the territorial integrity of Ukraine remains one of the strategic vectors, as well as measures aimed at de-occupation and integration of certain areas of Donetska and Luhanska Oblasts where state authorities do not exercise their powers. After all, armed conflict is always associated with violence, internal migration of people, causes harm to health and life and, unfortunately, is a common phenomenon in the world [24; 25].

However, firstly, is there a need to indicate representatives of a particular foreign state, namely the Russian Federation, in the CCU? Theoretically, it is impossible to exclude the possibility that Poland, Romania, Slovakia, or Hungary may also hold an illegal referendum and declare the annexation of a certain territory or contribute to the creation of self-proclaimed republics on the territory of Ukraine. Secondly, is the definition of the term "foreign state representative" proposed in the draft appropriate? It is common knowledge that this term is not included in the legislation of Ukraine, but it is used in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons², namely diplomatic agents (ratified by the Supreme Soviet of the USSR on December 26, 1975; entered into force on February 20, 1977). Pursuant to Part 1, Article 1 of the said Convention³ a person enjoying international protection is:

a) the head of state, including every member of a collegial body performing the functions of the head of state according to the Constitution of the state concerned, the head of government or the minister of foreign affairs who is in a foreign state, as well as accompanying members of his/her family;

b) any representative or official of a state, or any official or other agent of an intergovernmental international organisation, when an offence has been committed against them, their official premises, their living quarters or their vehicles, is entitled under international law to special protection against any attack on their rights, freedoms, and dignity, as well as family members residing with them.

¹Draft Criminal Code of Ukraine. (2021, July). Retrieved from <https://newcriminalcode.org.ua/upload/media/2021/07/28/1-kontrolnyj-tekst-proektu-kk-25-07-2021.pdf>.

²Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. (1973, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_389#Text.

³*Ibidem*, 1973.

In the current CCU, Article 443¹ makes provision for liability for an attack on the life of a foreign state representative, consisting in the murder or attempted murder of a foreign state representative or other person with international protection, with the purpose of influencing the nature of their activities or the activities of states or organisations they represent, or with the purpose of provoking war or international complications.

The analysis of scientific developments on this subject allows identifying the features that describe the concept of a foreign state representative in the CCU:

a) a foreign state representative should be considered a representative of any foreign state, regardless of the social and state system and ideology;

b) a foreign state representative is a person of foreign citizenship. They cannot be a citizen of Ukraine;

c) it is a person who is on an official visit to Ukraine;

d) a foreign state representative is a person who enjoys the right to represent and protect the interests of their state, the right to negotiate with the highest state authorities in Ukraine, as well as other persons with international protection [26, p. 578].

Given the above and considering the provisions, Article 1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, namely diplomatic agents², foreign state representatives include heads of state and representative offices, heads and members of government delegations, ministers, diplomatic representatives – that is, persons who can act on behalf of a foreign state or in its service.

As for Article 4.5.1. of the draft, these categories of persons do not meet the characteristics of foreign state representatives, given at least that they are located in the occupied territory of Donetsk and Luhansk Oblasts, without having the status of persons specified in Article 1 of the specified Convention³. Furthermore, the list of persons and their actions resemble “collaboration” in the sense of voluntary or forced cooperation of citizens of the country with the occupation administration, as well as resemble “mercenaries”⁴, that is, persons who:

a) were specially recruited in Ukraine or abroad to take part in armed conflict, military, or violent actions aimed at forcibly changing or overthrowing the constitutional order, seizing state power, obstructing the activities of state authorities or violating territorial integrity;

b) take part in military or violent actions for the purpose of obtaining any personal gain;

c) are neither citizens (subjects) of a party in conflict, nor persons who permanently legally reside in the territory controlled by the party in conflict;

d) are not part of the personnel of the armed forces of the state on the territory of which such actions are performed;

e) are not sent by a state that is not a party to the conflict to perform official duties as persons who are part of its armed forces.

These arguments indicate inaccuracy in the wording and interpretation of the terms specified in Article 4.5.1. “Definition of the Terms Used in this Section” of the draft CCU. Furthermore, Part 1, Article 1.2.8. “Conscientious Performance of International Obligations” of Section 1.2. “Principles of the Criminal Code” of the draft CCU states that the Code must comply with current international treaties, the consent to be bound by which was granted by the Verkhovna Rada of Ukraine.

Controversial issues of illegal deprivation of human liberty

Article 4.5.4. “Illegal Deprivation of Human Liberty” of the draft CCU is also of interest⁷, according to which a person who unlawfully deprived another person(s) of liberty shall be liable for the following actions:

a) detention or arrest of a person without legally established grounds;

b) illegal placement of an evidently mentally healthy person, or a person who does not require appropriate hospitalisation, in a psychiatric care institution;

c) kidnapped a person or

d) unlawfully deprived a person of liberty in any other form.

Analysis of this article in comparison with the current CCU in 2001⁸ allows identifying several elements of criminal offences included in Article 4.5.4. of the draft CCU, namely: Article 371. “Knowingly Illegal Detentions, Compulsory Attendance, House Arrest, or Detention”, Article 151 “Illegal Placement in a Psychiatric Care Facility”, Article 146. “Illegal Deprivation of Liberty or Kidnapping”. Undoubtedly, the main direct (Articles 146, 151 of the CCU) or additional direct (Article 371 of the CCU) object is public relations in the sphere of ensuring the constitutional human right to freedom and personal integrity.

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

²Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. (1973, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_389#Text.

³*Ibidem*, 1973.

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

⁵Draft Criminal Code of Ukraine. (2021, July). Retrieved from <https://newcriminalcode.org.ua/upload/media/2021/07/28/1-kontrolnyj-tekst-proektu-kk-25-07-2021.pdf>.

⁶Criminal Code of Ukraine, 2001.

⁷Draft Criminal Code of Ukraine. (2021, July). Retrieved from <https://newcriminalcode.org.ua/upload/media/2021/07/28/1-kontrolnyj-tekst-proektu-kk-25-07-2021.pdf>.

⁸Criminal Code of Ukraine, 2001.

But is it appropriate to combine such unlawful acts in Article 4.5.4 of the draft CCU that are not directly related to the object? The authors of the present study do not support this argument because, for example, illegal deprivation of liberty, as exemplified by the Criminal Code of Sweden¹, lies in the fact that a person who captures or deprives a child or other person of their freedom with the intention of causing bodily harm or harm to their health, or forcing them to work, or for the purpose of extortion, must be convicted of kidnapping for ransom (Article 1 of Chapter 4. Crimes Against Freedom and Public Peace²). Article 2 of the same chapter establishes liability when a person who, in cases other than those provided for in Article 1, kidnaps, holds in captivity or deprives them of their liberty. This approach, proposed by the Swedish legislator, allows distinguishing the following forms of illegal deprivation of liberty: kidnapping and illegal deprivation of liberty.

As for para. b) (a person who illegally placed a deliberately mentally healthy person in a psychiatric care institution, or one that does not require hospitalisation in such an institution), Article 4.5.4. of the draft, the theory of criminal law lacks a unified approach to the qualification of such offences, since placement in a psychiatric care institution is governed by the Law of Ukraine of February 22, 2000 No. 1489-III "On Psychiatric Care"³. This is explained by the fact that, firstly, the issue of the term "placement in a psychiatric institution" is debatable. Thus, I.M. Tyazhkova believes that placement in a psychiatric institution is factually hospitalisation, which is performed from the moment of completion of registration of documents in the emergency room [27, p. 52]. The second such aspect is precisely the unlawfulness of such placement. The Law of Ukraine No. 1489-III of February 22, 2000 "On Psychiatric Care"⁴ Part 1, Article 13 states that a person who has reached the age of 14 can be hospitalised in a psychiatric care facility at their personal request or with their informed written consent. A person under the age of 14 (a minor) can be hospitalised in a psychiatric care facility at the request or with the written consent of their parents or other legal representative. In case of disagreement of one of the parents or in the absence of parents, a person under the age of 14 (a minor) is hospitalised in a psychiatric care institution by decision (consent) of the guardianship and custodianship authority, which is taken no later than 24 hours from the moment of application of another legal representative of the

specified person to this body and can be appealed in accordance with the law, including in court. A person who is recognised as legally incompetent is hospitalised in a psychiatric care facility voluntarily – at their request or with their informed written consent. The legal representative of a person recognised as legally incompetent notifies the guardianship and custodianship authority at the place of residence of the person under care of the consent of such person to hospitalisation in a psychiatric care institution no later than the day following the day of granting such consent. A person recognised as incapable according to the legally established procedure, who, due to their health condition, is unable to express a request or provide informed written consent, shall be hospitalised in a psychiatric care institution by a decision (consent) of the guardianship and custodianship authority, which is taken no later than 24 hours from the moment the legal representative of the specified person applies to the said authority and can be appealed in accordance with the law, including in court. Consent to hospitalisation is recorded in the medical documentation signed by the person or their legal representative and a psychiatrist. Furthermore, pursuant to Article 14. "Grounds for Hospitalisation of a Person in a Compulsory Psychiatric Care Institution" of this Law, *a person suffering from a mental disorder* (highlighted by the authors), may be hospitalised in a psychiatric care facility without their informed written consent or without the written consent of their legal representative, provided that their examination or treatment is possible only in an inpatient setting, and if a person has a severe mental disorder, as a result of which they commit or express real intentions to commit actions that pose an immediate danger to them or others, or is incapable of unassisted meeting its basic life needs at the level that ensures their vital activity⁵.

Researchers also comment on the qualification of actions of a perpetrator that keeps a person in a psychiatric institution, which was placed in such psychiatric care institution legally, but has been cured of a mental disorder or is subject to transfer to outpatient treatment. Such actions, in the opinion of some researchers, are covered by the concept of placement in a psychiatric institution. According to others, such detention of a person in a psychiatric institution should be qualified as illegal deprivation of liberty or abuse of official position [28, p. 201].

To resolve this debatable issue regarding the qualification of the actions of the guilty person, it is

¹Criminal Code of Sweden. (1962, December). Retrieved from [https://www.lotin.se/Fallor/Pdf/Brottsbalken_\(1962_700\).pdf](https://www.lotin.se/Fallor/Pdf/Brottsbalken_(1962_700).pdf).

²*Ibidem*, 1962.

³Law of Ukraine No. 1489-III "On Psychiatric Care". (2000, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/1489-14#Text>.

⁴*Ibidem*, 2000.

⁵*Ibidem*, 2000.

necessary to conduct a comparative analysis of the words “placement” and “detention”. Thus, “placement” is an action, a location, etc., where someone or something is placed [29, p. 857]. The word “detention” can be interpreted as follows: “1. Hold someone something without letting them fall; 2. Hinder someone's movement, slow down, decelerate the progress of someone, something, or stop it altogether; 3. Ask or force someone to stay somewhere without letting them out; 4. Do not give the enemy any position, any line, military facility, etc.; 5. Keep something the same, unchanged; 6. Deducting a certain part of any amount, not giving it away for any reason” [29, p. 1309].

Thus, based on the meaning of the words “placement” and “detention”, it can be concluded that they have different meanings and do not complement or exclude each other. Therefore, the opinion of those researchers who believe that placement in a psychiatric care institution is also covered by detention in it is erroneous.

Summarising the above, paragraph b), Article 4.5.4. of the draft CCU should be set out in the following wording: “placement in a psychiatric care institution of a deliberately mentally healthy person or illegal detention in such an institution”. It is in the similar wording that the norms in the Criminal Code of Georgia are set out¹ (Part 1, Article 149), Criminal Code of the Republic of Tajikistan² (Part 1, Article 133), Criminal Code of the Republic of Kazakhstan³ (Part 1, Article 127), Criminal

Code of the Republic of Armenia⁴ (Part 1, Article 134).

Conclusions

Ultimately, the criminalisation of socially dangerous acts that take place in society undoubtedly plays a leading role among the means of influencing crime. The practice of developing the legislation of Ukraine on criminal responsibility knows many cases when previously non-criminally punishable acts were then recognised by the legislator as an offence. Therewith, the analysis of Section 4.5. “Crimes Against Human Will and Dignity” of the draft CCU suggests that it is necessary to draw the attention of members of the Working Group on the development of criminal law to the inconsistency of certain provisions with international regulations. In particular, according to the results of this study, it is proposed to change wording of para. b), Article 4.5.4. “Illegal Deprivation of Human Liberty” of the draft CCU as follows: “Placement in a psychiatric care institution of a deliberately mentally healthy person or illegal detention in such an institution”, as well as to correct the title of Section 4.5. of the draft by replacing the word “will” with the word “freedom”, which would correspond to the natural right to freedom and personal integrity of a person as an object of encroachment. The authors consider it appropriate to conduct further research of Section 4.5. “Crimes Against Human Will and Dignity” of the draft CCU and pay attention to other articles of this Section.

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¹Criminal Code of Georgia. (1999, July). Retrieved from <https://matsne.gov.ge/ru/document/view/16426?publication=229>.

²Criminal Code of the Republic of Tajikistan. (1998, May). Retrieved from http://continent-online.com/Document/?doc_id=30397325&doc_id2=30397325#activate_doc=2&pos=56;-88.39999389648438&pos2=1252;-112.39999389648438.

³Criminal Code of the Republic of Kazakhstan. (2014, July). Retrieved from https://online.zakon.kz/Document/?doc_id=31575252#pos=2007;-56.

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Деякі дискусійні питання Розділу 4.5. «Злочини проти волі і гідності людини» проєкту Кримінального кодексу України

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Анотація

Суспільно-політична та економічна ситуація в державі обумовлює вдосконалення національної правової системи з урахуванням сучасних викликів і потреб демократичного суспільства. Не є виключенням і КК України, проєкт якого наразі розробляється. Мета дослідження полягає в аналізі підходів до запропонованої редакції статей проєкту КК України щодо відповідальності за злочини проти волі та гідності людини, виявлення недоліків і визначення шляхів їх усунення. Для реалізації поставленої мети авторами застосовувалися такі методи: логіко-семантичний, компаративістський, герменевтичний, догматичний (формально-логічний) та системного аналізу. У дослідженні використані чинне вітчизняне та зарубіжне законодавство, праці вчених із Канади, Великобританії, Швейцарії, Уганди, України та США, матеріали судової практики. Обґрунтовано, що Розділом 4.5. «Злочини проти волі і гідності людини» проєкту КК України охороняється право на свободу та особисту недоторканність. Встановлено, що термін «свобода» краще відповідає об'єкту посягання і є більш прийнятним для використання. Запропоновано авторські визначення понять «право на свободу» та «право на особисту недоторканність». Аргументовано, що поняття «представник іноземної держави» у ст. 4.5.1. «Значення термінів, вжитих у цьому Розділі» містить неточності у формулюванні. Висловлено зауваження щодо редакції ст. 4.5.4. «Протиправне позбавлення волі людини» стосовно дискусійності поєднання у одній нормі різних за основним безпосереднім об'єктом діянь – незаконне затримання, привід, домашній арешт або тримання під вартою, незаконне поміщення в заклад з надання психіатричної допомоги, викрадення людини та незаконного позбавлення волі; запропоновано авторську редакцію п. «б» ст. 4.5.4. Практична цінність проведеного дослідження полягає у висвітленні наукових поглядів на деякі питання регламентації злочинів проти волі і гідності людини у проєкті КК України та формулюванні власних пропозицій із зазначеної проблематики, що можуть бути взяті до уваги розробником даного проєкту – робочою групою з питань розвитку кримінального права

Ключові слова: право на свободу, право на особисту недоторканність, злочини проти свободи і гідності людини, поміщення в заклад з надання психіатричної допомоги, протиправне позбавлення волі, викрадення людини



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Business Ombudsman as an Institution for Improving Compliance with the Rule of Law Principles

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Abstract

The relevance of the chosen subject is conditioned upon the fact that law enforcement officers, upon exercising their powers, abuse the rights and obligations granted to them, violating the legal rights of business representatives. In other words, this refers to the arbitrariness of law enforcement agencies regarding business entities, which is incompatible with the rule of law principles. The purpose of this study is to summarise the current state of activity of the institution of business ombudsman and areas for its improvement, which will contribute to improving compliance with the rule of law principles. The system-structural method, systemic and dialectical methods, the method of critical analysis, analytical, formal-legal methods, as well as the method of documentary analysis and the Aristotelian method allowed achieving this purpose. The paper addresses the issue of violation of the rights of business representatives by law enforcement officers, which poses a threat to the rule of law principles. The authors identified the reasons for the introduction of rule of law. Conventional tools for protecting businesses from the arbitrariness of law enforcement agencies are highlighted. The study also noted the role of the Business Ombudsman Council as an effective tool in ensuring and implementing the rule of law regarding the business environment representatives. Attention is focused on the prospects for the development of ombudsmen who contribute to the protection of entrepreneurs' rights. It is concluded that it is necessary to expand the powers of the business ombudsman due to the recognition of the latter as a participant in criminal proceedings. The practical value of this study is that the proposals set out herein are aimed at improving the activities of the institution of business ombudsman in Ukraine, which would contribute to improving compliance with the rule of law principles

Keywords: human rights, business representatives, Business Ombudsman Council, arbitrariness of law enforcement agencies

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Introduction

Ensuring the rule of law is the basis of law and order in Ukraine, and its real existence is determined by the state of respect for human rights and freedoms in the exercise of power by law enforcement and judicial bodies. However, the analysis of statistical information and reports on the activities of law enforcement agencies, namely the report of the Business Ombudsman Council [1], indicates that it is law enforcement officers who, in the exercise of their powers, most abuse the rights and obligations granted to them, violating the legal rights of business entities and thereby undermining the authority of law enforcement agencies and effectively negating the results of the law enforcement and judicial system reforms. In particular, this refers to the arbitrariness of law enforcement officers regarding small, medium-sized, and large businesses, which is incompatible with the concept of the rule of law. For example, in 2018, out of 1,688 registered criminal offences under Article 212 of the Criminal Code of Ukraine¹, which covers tax evasion, only 39 cases were submitted to the court with an indictment, which in percentage terms does not exceed 2.4%, and in the first half of 2019, out of 653 registered criminal offences, only 71 criminal proceedings were filed to the court [2]. Evidently, most cases are openly groundless and constitute an attempt of law enforcement agencies to pressure businesses. Another example that indicates the arbitrariness of law enforcement officers concerns searches of business representatives with subsequent confiscation of property and consequential blocking of the entrepreneurs' work. Thus, in 2017, almost 120,000 searches were conducted, which is 1.3 times more than in 2016 [3]. At the same time, such searches could be performed either by the decision of the investigating judge, or without it. Despite the fact that these statistics are taken over the past years, the situation has hardly changed and indicates the arbitrariness of law enforcement officers regarding business, and, most importantly, the violation of the business representatives' rights, which jeopardises the rule of law.

After all, it is business representatives who provide employment and are among the largest taxpayers. At the same time, pressure on businesses forces the latter to engage in their activities in the shadows and look for ways to evade taxes. In turn, this generates an increase in the level of the shadow economy, which compromises the economic security of the state and affects all spheres of economic activity. In addition, the arbitrary actions of law enforcement officers lead to a decrease in the investment attractiveness of Ukraine and an increase in the level of corruption. Thus, according to BDO International Business Compass (IBC) for 2018, Ukraine ranks 131st in the investment attractiveness rating and 82nd in the Resource Utilisation Index

rating [4], and according to Transparency International in 2020, Ukraine ranked 117th out of 180 in terms of Corruption Perception [5]. Evidently, as long as the country does not reduce administrative pressure on business and corruption exists, the rule of law does not prevail, Ukraine will remain a country not only with a negative business image and an unfavourable investment climate in particular, but also with a low level of the economy in general.

Thus, at present, both in Ukraine and around the world, there is a problem of violation of the business representatives' rights and, accordingly, non-compliance with the principles of the rule of law. This indicates the need to find new ways to solve this problem, because the existence of arbitrariness on the part of law enforcement officers regarding business representatives poses a threat to the stability of public relations and acts as a gross violation of human rights. Hence, *the purpose of this paper* is to summarise the current state of activity of the institution of Business Ombudsman and areas for its improvement, which will contribute to improving compliance with the rule of law principles. To achieve this purpose, the following *tasks* must be solved: to establish the importance of introducing the rule of law; to identify conventional and alternative tools for protecting businesses from the arbitrariness of law enforcement agencies; to summarise foreign practices of the business ombudsman; to analyse the current state of the Business Ombudsman Council; to suggest ways to improve the institution of the Business Ombudsman.

Literature Review

Familiarisation with the content of recent publications and research demonstrates that the issue of the Business Ombudsman's activity as an institution for improving compliance with the principles of the rule of law is scientifically covered. In particular, I. Vyakina, based on the analysis of the survey results of managers of small, medium-sized, and large enterprises in 2016-2018, including business entities of various types of economic activity and legal forms, notes that business representatives do not feel safe in the current business conditions [6]. In the subjective perception of entrepreneurs, there is no reduction in the administrative burden on business. At the same time, inspectors remain focused on collecting fines, while inspections remain fiscal [6]. J. Saloranta emphasises that the creation of provisions on access to remedies, the definition of responsibility and the adoption of enforcement measures at the national level should be key features of any regulatory initiative to strengthen responsibility for the observance of human rights [7]. According to other researchers, from the

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

standpoint of modern constitutional doctrine and trends in the development of constitutional law, as well as internal and external challenges in the field of human rights in Ukraine, the relevance and importance of the development and effective operation of specialised services for the protection of human rights, including specialised ombudsmen, and even business ombudsmen, is undoubted, and the legislative regulation of corresponding public relations and processes is a requirement of the time [8].

O. Batanov and T. Goloyadova note that in Ukraine, in connection with the reform of various spheres of life and the development of civil society institutions, the issue of modernising the constitutional legal mechanism for the protection of human rights is being updated [9]. Evidently, the introduction of the institution of the Ombudsman – the Verkhovna Rada Commissioner for Human Rights, is a significant way to ensure human rights [9]. M. Olenov notes that the creation of the institution of the Ombudsman as a state body is one of the momentous achievements of democratic transformation [10]. This is an essential mechanism for protecting human rights and strengthening the rule of law in the activities of state bodies and their officials [10]. Furthermore, the work of the Ombudsman is one of the ways to ensure human rights and an additional legal guarantee. A special feature of the Ombudsman is the almost complete absence of any “power” functions and compulsory powers, and their activities do not cancel or entail a review of the competence of state bodies [11]. I. Chistyakova and I. Krivdina note that the institution of a business ombudsman is a fairly new phenomenon in the system of protecting the rights of entrepreneurs in Ukraine, an additional mechanism for resolving disputes out of court [12]. At the same time, the analysis of the world practice of establishment of the institution of Business Ombudsman indicates the existence of various models that have the following common features: 1) lack of power in such institutions; 2) exercise of powers on the grounds of mediation based on the norms of Ukrainian administrative law. At the same time, the Business Ombudsman does not duplicate the powers of the judicial branch of government, anti-corruption and antimonopoly institutions, etc. [12].

Proceeding from the above, it can be concluded that the problem of human rights violations, and, for our part, non-compliance with the principles of the rule of law, is not new, and the latest scientific developments generally focus on the violation of the rights of entrepreneurs and the need to create and operate institutions to protect the rights of business representatives.

Materials and Methods

In the course of studying the activities of the business ombudsman as an institution for improving compliance with the rule of law principles, both general scientific and special methods of cognition were used. Thus, the

system-structural method was used to consider the recent publications covering the activities of the Business Ombudsman as an institution for improving compliance with the rule of law principles, and the results of the study were systematically presented. The systematic approach as a general scientific method allowed determining the reasons for the introduction of the rule of law in general. The dialectical method is used to determine the essence of the establishment and operation of the institution of business ombudsman. One of the main methods that allowed covering the role of the business ombudsman institution in protecting the rights of entrepreneurs from the arbitrariness of law enforcement agencies is the critical analysis method. The analytical method allowed considering the prospects for the development of ombudsmen who contribute to the protection of entrepreneurs' rights. The formal legal method allowed analysing the legal grounds of the Business Ombudsman Council's activities. At the same time, the method of documentary analysis was used to develop proposals and recommendations for improving the activities of the institution of business ombudsman in Ukraine. The Aristotelian method allowed formulating proposals for improving the activities of the institution of business ombudsman in Ukraine. In particular, it is proposed to expand the powers of the Business Ombudsman, recognising the latter as a participant in criminal proceedings, which would help meet the needs of representatives of small, medium-sized, and large businesses. The regulatory framework of this study included both Ukrainian and international regulations, as well as reports on the activities of corresponding institutions. Thus, the provisions of the Constitution of Ukraine were used to highlight the main aspects of the introduction of the rule of law.

The provisions of the Criminal Code of Ukraine were used to determine the nature of abuses by law enforcement agencies regarding small, medium-sized, and large businesses. In particular, it was found that most frequently law enforcement officers put pressure on entrepreneurs under the article concerning tax evasion. Familiarisation with attempts to introduce the institution of a business ombudsman legislatively served as the basis for referring to the relevant draft laws concerning the institution of a business ombudsman. The provisions of international regulations suggests that it is necessary to expand the capabilities of the Business Ombudsman Council. Analysis of the report of the Business Ombudsman Council allowed identifying the bodies whose actions are most often complained about by the business environment representatives. Furthermore, the authors of the study managed to identify key problems that Ukrainian enterprises face most frequently.

Results and Discussion

The introduction of the rule of law is conditioned by several aspects. Firstly, by expansion of the principle

of legality established for Ukrainian legal science by adapting fundamental legal factors – constitutional norms and principles of the Fundamental Law¹ and international standards of human rights and freedoms to its content. Secondly, the recognition, along with the definition of the law as the main form of law, of the need to use the potential of other sources of law. Thirdly, the special status of the judiciary as a professional and collegial arbitrator on legal issues, authorised to make final legal decisions primarily on the protection of human rights and freedoms [13]. At the same time, the violation of this principle by law enforcement officers regarding business entities forces the latter to look for various ways to solve this problem. At the same time, for most entrepreneurs in Ukraine, protecting interests and restoring violated rights is a rather inefficient process, because most complaints were refused based on illegal decisions of state bodies. After that, entrepreneurs had to resolve disputes in court, which is an incredibly expensive process due to the cost of such resources as money, time, mental strength, business downtime or losses caused by the trial [14].

Evidently, conventional tools for protecting businesses from the arbitrariness of law enforcement agencies are not always effective, so in Ukraine various institutions have been created and are currently working to support and protect the interests of business, including business associations and other public organisations, which mainly contribute to establishing communication with the heads of law enforcement agencies and drawing public attention to the situation with pressure on businesses. However, since 2014, the Business Ombudsman Council, established in accordance with Resolution of the Cabinet of Ministers No. 691², has become an essential and effective tool in ensuring and implementing the rule of law regarding the business environment representatives, whose activities are aimed at creating transparent working conditions for businesses, as well as combating corruption and illegal actions primarily on the part of state bodies. In general, this authority has been established as a permanent advisory body under

the Cabinet of Ministers of Ukraine, which considers complaints of entrepreneurs regarding violation of their legitimate interests through corruption actions, including local self-government [15]. Notably, ensuring personal security, human and civil rights and freedoms is a sophisticated legal complex that combines national and international means. At present, the institution of an Ombudsman is actively used in state systems for protecting the rights and freedoms of citizens from the arbitrariness of state government bodies and from abuse of power by officials. In Ukraine, the institution of the Ombudsman is at the stage of development and improvement, especially now, in the period of changes and reform of the current legal system [16].

When introducing the institution of a business ombudsman, Ukraine relied on the practices of foreign countries, where this institution has been functioning and developing in a certain form for quite a long time. The end of the 20th century saw isolated cases of creating the institutions of business ombudsman. In particular, the United States of America, Australia, Georgia, etc. have this experience. At the same time, the activities of such institutions are based on mediation, when applicants apply to them to solve problems out of court. Each country has the right to independently choose the form of the business ombudsman institution in accordance with generally accepted models, and, accordingly, the functions and powers of these institutions. However, the main functions of the Ombudsman relate to the protection of human rights (less often – private legal entities), expressed in the form of recommendations and mediation [12].

At the same time, the prospects for the development of ombudsmen, which contribute to the protection of entrepreneurs' rights, include the following ones (Fig. 1). Notably, the expansion of the application of the Ombudsman concept in private legal relations should take place to provide alternative dispute resolution and support by states for ombudsman schemes in the private sector by recognising them as alternative methods of dispute resolution to unload the state dispute resolution system [17].

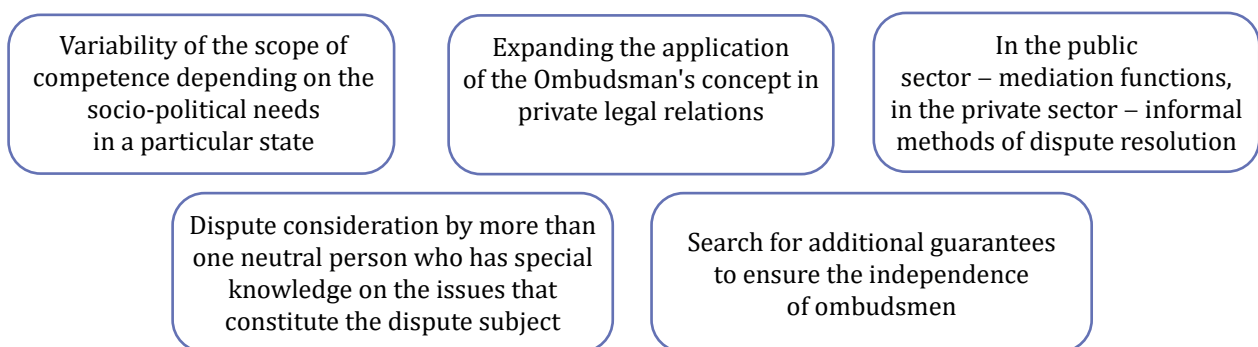


Figure 1. Development prospects for ombudsmen

Source: compiled by the author based on [17]

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

²Resolution of the Cabinet of Ministers of Ukraine No. 691 "On the Establishment of the Business Ombudsman Council". (2014, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/691-2014-%D0%BF#Text>.

Returning to the Business Ombudsman Council in Ukraine, it should be noted that in 2020, this body received the most complaints from business representatives regarding the actions of the State Fiscal Service of Ukraine (1,193 complaints), the National Police of Ukraine (122 complaints) and the Office of the Prosecutor General (53 complaints) [1]. Analysis of complaints demonstrates that Ukrainian enterprises most often face such key problems as tax audits, procedural abuses, criminal proceedings against businesses, and corruption charges. At the same time, over six years of its operation, the Business Ombudsman Council, having considered complaints, helped return UAH 18.8 billion to Ukrainian enterprises [1]. However, due to the fact that the consideration of many complaints is outside the competence of the Business Ombudsman Council, and its legal status is not legislatively consolidated, business representatives are forced to overcome problems unassisted. To resolve this situation in Ukraine, there have already been attempts to introduce the institution of a business ombudsman at the legislative level (draft Law of Ukraine No. 4591 "On the Institution of the Business Ombudsman" of May 5, 2016¹ and draft Law of Ukraine No. 3607 "On the Establishment of the Business Ombudsman in Ukraine" of June 5, 2020²). However, due to legislative uncertainty and substantial shortcomings, these draft laws were never adopted.

Thus, based on the researchers' analysis of the aforementioned draft laws, to improve them, it was proposed to define the business ombudsman not as an individual, but as an official, because power is exercised in connection with the occupation of the corresponding position. Therewith, recognition of the Business Ombudsman as an official would help strengthen their status and human rights commissioner role [9]. In addition, legislative regulation requires the definition and establishment of measures in case of failure to provide information or documents on the part of state bodies or failure of bodies to comply with the recommendations provided. For this, it is necessary to officially determine the status of the Council and its powers by a special law, which will allow or limit certain actions or influence of the Council on state bodies [14].

Given all of the above, one of the priority tasks in terms of protecting businesses from the arbitrariness of law enforcement agencies and violations of rights should be not only to improve the current legislation governing the activities of law enforcement agencies, but also to expand the capabilities of the Business Ombudsman Council, considering the shortcomings of previous draft laws in accordance with the present-day realities,

as well as to strengthen public control in terms of monitoring violations of the rights of business entities by law enforcement agencies. In particular, the expansion of the capabilities of this body should take place by recognising the latter as a participant in criminal proceedings on certain types of crimes in the economic sphere. Only under such conditions would it be possible to achieve a higher level of law enforcement on the part of law enforcement agencies, guided by the principles of the rule of law, and to promote sustainable reforms in the field of justice and law enforcement agencies. This, for its part, would allow achieving economic growth indicators, help bring legal businesses out of the shadows and protect their rights to do business, increase the level of budget revenue, reduce corruption, increase the level of investment attractiveness of Ukraine, as well as create a favourable business climate.

Due to expansion of the capabilities of the Business Ombudsman Council, the approach to the role of this institution, proposed in this paper, is new, because it allows considerably strengthening the protection of business rights from arbitrary actions of law enforcement agencies and reduce corruption, which guarantees the rule of law in Ukraine. Moreover, further signing of memoranda of partnership and cooperation between the business ombudsman institution and law enforcement agencies will prevent unfair behaviour of law enforcement officers, work on solving systemic business problems and formalise permanent cooperation at the level of expert groups, as well as contribute to the implementation of systemic recommendations by the Business Ombudsman institution and the implementation of reforms in the law enforcement sector.

Furthermore, expansion of the capabilities of the Business Ombudsman Council is consistent with the signed Memorandum of Understanding on Support for the Anti-Corruption Initiative of Ukraine³, the parties to which recognise the importance of responsibility, transparency, and the rule of law for the proper functioning and effective regulation of the Ukrainian economy, as well as resolving the issue of corruption and unfair treatment of business entities in Ukraine. In addition, the proposed changes correspond to the course taken by Ukraine towards European integration, namely the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part in terms of establishing the rule of law and strengthening institutions at all levels in the field of governance in general and law enforcement and judicial bodies in particular.

¹Draft Law of Ukraine No. 4591 "On the Institution of Business Ombudsman". (2016, June). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58980.

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Conclusions

Consequently, the main need of business entities is the need to ensure an appropriate level of protection of their rights to conduct economic activities from the arbitrariness of law enforcement officers. Restoring business confidence in law enforcement agencies and creating conditions for protecting businesses will help entrepreneurs be interested in paying taxes to the budget, which will obviously reduce the level of the shadow economy, a quarter of which is in the shadow of Ukraine's official GDP. Despite the fact that foreign investors call repressive actions of law enforcement agencies one of the obstacles affecting capital attraction in

Ukraine, this requires the creation of such conditions under which these investors will rest assured that Ukraine has transparent business conditions, and law enforcement agencies are guided by the principles of the rule of law in their activities, which is the key to a favourable business climate. Accordingly, expanding the powers of the business ombudsman by recognising the latter as a participant in criminal proceedings will allow meeting the needs of business entities, because its activities would be aimed precisely at protecting the rights of entrepreneurs, which is essential for the observance of the rule of law principles.

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Бізнес-омбудсмен як інститут підвищення дотримання принципів верховенства права

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Анотація

Актуальність обраної проблематики обумовлена тим, що співробітники правоохоронних органів, здійснюючи свої повноваження, зловживають наданими їм правами й обов'язками, порушуючи законні права представників бізнесу. Інакше кажучи, мова йде про свавілля правоохоронних структур по відношенню до суб'єктів господарювання, яке є несумісним із принципами верховенства права. Мета статті полягає в узагальненні сучасного стану діяльності інституту бізнес-омбудсмена та напрямів його удосконалення, що сприятиме підвищенню дотримання принципів верховенства права. Досягнення поставленої мети уможливили системно-структурний метод, системний і діалектичний методи, метод критичного аналізу, аналітичний, формально-юридичний методи, а також метод документального аналізу та формально-логічний метод. У статті описана проблема порушення прав представників бізнесу з боку правоохоронців, що становить загрозу принципам верховенства права. Визначено причини запровадження принципу верховенства права. Виокремлено традиційні інструменти захисту бізнесу від свавілля правоохоронних органів. Наголошено на ролі Ради бізнес-омбудсмена як ефективного інструмента в забезпеченні та реалізації принципу верховенства права по відношенню до представників бізнес-середовища. Акцентовано увагу на перспективі розвитку омбудсменів, що сприяють захисту прав підприємців. Зроблено висновок про необхідність розширення повноважень бізнес-омбудсмена завдяки визнанню останнього учасником кримінального провадження. Практична цінність даної роботи полягає в тому, що викладені в статті пропозиції спрямовані на удосконалення діяльності інституту бізнес-омбудсмена в Україні, що сприятиме підвищенню дотримання принципів верховенства права

Ключові слова: права людини, представники бізнесу, Рада бізнес-омбудсмена, свавілля правоохоронних органів

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International Legal Standards of Prosecutorial Activity and Status of Prosecutors: Implementation in Ukraine and in Individual Member States of the European Union

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Abstract

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The relevance of the subject under study lies in the fact that today Ukraine is striving for integration with the European community. Since the adaptation of Ukrainian legislation to European regulations is an integral part of this accession, it is necessary to improve international cooperation, improve the regulatory framework that will comply with European principles and standards, and introduce new methods based on the positive practices of foreign countries. Such measures will help increase the effectiveness of prosecutors' implementation of procedural guidance during pre-trial investigation and judicial review of criminal proceedings, ensure the effectiveness of punishments, and reduce the crime rate. In this regard, this paper is aimed at determining the current state of implementation of international standards of prosecutorial activity in the national legislation of Ukraine. The leading methods of research of the chosen problem are theoretical, namely analysis, synthesis, generalisation, modelling; empirical – observation, study, and generalisation of the state of implementation of international standards in Ukrainian legislation. The paper analyses compliance with the international principles of prosecutorial activity by such countries as France, Germany, Spain, defines the specific features of their guarantee, and considers national practice. Based on the identified data, particular recommendations have been developed aimed at improving the role of international standards in prosecutorial activities, since the prosecutor is a key figure in criminal prosecution. The results of this study are the coverage of the importance of international standards of prosecutor's activity and the status of prosecutors, highlighting examples of their positive implementation in the legal systems of Ukraine and foreign countries, identifying the state of bringing Ukrainian legislation to the legislation of the European Union, as well as the development of recommendations that will help improve the current situation with the introduction of international standards and reduce the overall crime rate in Ukraine, thereby ensuring the protection of constitutional rights, freedoms, legitimate interests of the population. Having analysed the specific features of implementing international standards of prosecutor's activity and the status of prosecutors, their role, and importance, it can be concluded that the current situation in Ukraine requires considerable improvement of the legislative framework that governs the activities of the prosecutor's office. To improve the efficiency and effectiveness of the prosecutors' work, it is necessary to modernise the specialised legislation, incorporating the best foreign practices

Keywords: international principles, independence of prosecutors, functions of the prosecutor's office, International Association of Prosecutors, Standards of the International Association of Prosecutors

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Introduction

Despite the key role that prosecutors play in resolving legal cases, especially when it comes to criminal proceedings, very little is mentioned in international documents about prosecutors, compared with references to judges and advocates [1]. Thus, neither the International Covenant on Civil and Political Rights¹ nor the United Nations (UN) case law considers or regulates the status and activities of employees of the prosecutor's office. Despite the lack of sufficient attention in international regulations, prosecutors are important figures in implementing many of the principles consolidated in international instruments, such as the right to a fair trial, the right to be heard by a court, the principle of equality before the law and before the court, and the prohibition of torture². The importance of the functioning of the prosecutor's office is also prescribed in several UN conventions on crime³, the purpose of which is to improve the effectiveness of investigations and prosecutions of serious crimes such as drug trafficking, organised crime, and corruption. These international legal instruments require member states to ensure that any legal powers that may be exercised to prosecute the above-mentioned offences are "used to maximise the effectiveness of law enforcement measures" [2]. International standards developed by the European community help achieve a unified approach to determining the prosecutor's activity, the quality of prosecutor's activity, and the status of prosecutors [3]. They contribute to improving the effectiveness of the investigation of criminal offences, an integral figure of which is the prosecution – the prosecutor. International standards are aimed at strengthening European integration, creating a unified system for investigating and preventing crimes, which positively affects the overall crime rate and ensures the sustainable development of countries [4].

The theoretical significance of this study is confirmed by the analysis of the most relevant available practices regarding the implementation of international standards of prosecutor's activity and the status of prosecutors in Ukraine and other foreign European countries, which have a developed legislative framework that offers effective methods for fast, high-quality, and effective investigation of crimes. Thus, this study considered and analysed the international regulations that establish key international standards and principles of prosecutor's activity and the status of prosecutors, as well as foreign practices. The practical significance of this study lies in the possibility of determining the current state of implementation of international standards in the national legislation of Ukraine, developing recommendations

for increasing the impact of international standards to improve the statutory framework governing prosecutor's activities and improving the functions of the prosecutor's office.

Thus, *the purpose of this study* is a full, comprehensive, and in-depth study of the role of international standards in the process of carrying out prosecutorial activities, which is aimed at procedural management of pre-trial investigation of criminal offences, protection of constitutional rights and freedoms of citizens. Furthermore, the implementation of international standards in national regulations accelerates European integration, establishes international legal cooperation, and adapts national legislation to the legislation of the European Union (EU). *The objectives of this study* are as follows:

- 1) definition of the concept and role of international standards of prosecutorial activity and the status of prosecutors;
- 2) analysis of international legal documents, research of historical development of international standards and their design;
- 3) consideration of the current state of implementation of international standards of prosecutorial activity in the national legislative framework of such countries as France, Germany, and Spain;
- 4) identification of the current situation with the implementation of international standards in the national practice of Ukraine;
- 5) development of recommendations that help accelerate the implementation of international standards in Ukrainian legislation and accelerate European integration.

Literature Review

At present, international standards of prosecutorial activity and the status of prosecutors are relevant because most countries of the world strive for international cooperation, especially in the legislative sphere. International standards regarding the status, role, and activities of the prosecutor's office have received a lot of attention from researchers. Thus, S. Oleksiiev considers the implementation of international legal norms in the legal system of Ukraine [5]. He notes that the process of adapting the national legislation of Ukraine to the EU legislation is currently underway, namely in the field of prosecutor's activity [5]. K. Ambos considers the institution of the European prosecutor's office, the guidelines that guide prosecutors when carrying out their activities as a party to the prosecution [6]. K. Birzhu analyses

¹International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_043/ed19661216#Text.

²*Ibidem*, 1966.

³United Nations Convention Against Transnational Organised Crime. (2000, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_789/ed20001115#Text.

the impact of international standards on the International Criminal Court, where one of the key figures is precisely the prosecutor [7]. S. Edgett defines the role of principles in the constitutional procedure, examines how the implementation of international principles affects the state of the national legislative framework, recognises that international cooperation can solve problems related to gaps in regulatory provisions [1]. R. Etinski and B. Tubik analyse the role of international law, the impact on the national legal systems of various countries [8]. G. Michelini and M. Cadelli consider the principle of independence as a key principle of prosecutor's activity, its most important components and implementation in practice [9]. J. Hodson investigated the role and status of the prosecutor in criminal proceedings, considered the principles that guide the prosecutor's office in its professional legal activities [3]. D. Lopez-Medina defines international standards that increase the effectiveness of the investigation of criminal offences in the context of the international judicial system [10]. A. Mammadov also focuses on the principles of law governing the organisation of legal proceedings in international law, including the rule of law, independence, reasonable terms of consideration of cases [11]. V. Michel analyses the key role of prosecutor's independence and prosecutorial impartiality and objectivity in criminal proceedings [12]. E. Michut, K. Dzhigay, V. Mitsilegas, F. Giuffrida determine that the European government plays an essential role in ensuring the internal security of the European community both through security policy and through the effectiveness of EU institutions [13; 14]. The European prosecutor's office is a newly created institution that, with its form of organisation and its attributes, aims at ensuring the internal security of the EU [13; 14].

Materials and Methods

At various stages of this study, a wide interrelated set of research methods was used, which helped extensively determine the development features of international standards governing the status and activities of prosecutor's offices, identify the current issues and suggest solutions for them to improve the mechanism for adapting Ukrainian legislation to EU legislation, improving the effectiveness of criminal action by the prosecution. Thus, the main methods used to conduct this study are as follows:

- theoretical methods – the study of scientific literature, regulatory documents, both Ukrainian and international, to clarify the state of the subject under study, the essence of standards, their role, and functions in the institution of prosecutor's office. Analysis, synthesis, generalisation, and modelling were employed, which allowed characterising the terminology and identifying key features of international standards;
- empirical methods – observation, study, and generalisation of the mechanism of implementation of

international standards in the Ukrainian legislative system. Special attention was paid to the implementation of international standards in the legislative provisions of Ukraine concerning the prosecutor's activity and the status of the key figure criminal action – the prosecutor.

The first stage of the study involved a theoretical analysis of regulatory documents, which consolidated the fundamental international legal standards governing the status and activities of prosecutor's offices. The author of this study also analysed scientific studies, dissertations of foreign and Ukrainian researchers who focused on investigating the development of international standards, examined the historical development of key principles that govern the activities and status of prosecutors. The paper also analyses the role and functions of the prosecutor's office, which must comply with the fundamental guidelines. The author considers the issues that arose in the process of developing international standards. Considerable attention is paid to the analysis of Ukrainian regulations regarding the status and activities of prosecutor's offices, the author also considers the implementation of international standards in the national legislation of Ukraine to improve the effectiveness of the prosecution's activities. The paper highlights the fundamental tasks, purpose, and methods of the present study.

The second stage included the analysis of the state of implementation of international legal standards of prosecutor's activity and the status of prosecutors in Ukraine and in individual EU Member States. This stage also involved the identification of the main issues, advantages, and disadvantages of applying international standards in Ukrainian prosecutorial practices. Furthermore, the study established how the implementation of the principles affected the prosecutor's activity. In the course of the study, the conclusions were verified and specified.

The third stage saw the completion of the theoretical analysis of regulatory documents establishing international standards and principles governing the activities of the prosecutor's office and the status of prosecutors. The author clarifies their theoretical and practical conclusions, summarises the results, and proposes his solutions to modern issues concerning the implementation of international regulations.

Theoretical analysis of international legal documents, namely criminal procedural legislation, recommendations of Council of Europe bodies, UN commissions, helps improve the modern procedure for implementing international legal norms in Ukrainian legislation, increase the significance and effectiveness of the prosecutorial activities. The methodology and techniques used in this study provided the necessary reliability and trustworthiness of the results.

Results and Discussion

The United Nations is essential in developing standards and principles that establish the status and activities

of the prosecuting authorities. International standards of prosecutorial activity are certain rules of conduct governed by the international community of prosecutor's offices, which they are obliged to comply with to guarantee the rule and primacy of law in the state, protect the rights and freedoms of citizens, and form a high level of respect of citizens for the prosecutor's office. The adoption of standards and principles of activity of prosecutor's offices has passed a long historical path of development. Thus, the sixth UN Congress on Crime Prevention and Treatment of Offenders, held in 1980, noted that there is a need to define international standards for the prosecutor's office [6]. The Congress indicated that the effective implementation of Article 14 of the International Covenant on civil and political rights¹ is related to the proper selection and training of prosecutor's office employees: "UN Member States must ensure that employees of the prosecutor's office must be properly qualified to perform their tasks and perform them in a way that does not depend on personal or group interests". The importance of establishing standards governing the status and activities of prosecutors was also confirmed at the seventh UN Congress, which was held in 1985. Representatives of the UN Member States who attended the Congress noted that the developed standards can guarantee the objectivity and impartiality of prosecutors during criminal prosecution, as well as help avoid discrimination in the selection and appointment of prosecutors. The Seventh Congress also called for consideration of the development of draft guidelines on the selection, training, and status of prosecutors, their expected tasks and behaviour, immunity, means to increase and improve their contribution to the smooth performance of the criminal justice system and their cooperation with the police [1]. Based on the results of previous Congresses and developed recommendations, the eighth UN Congress (1990) on Crime Prevention and Treatment of Offenders established fundamental principles concerning the role of prosecutors, their status, and functions. Their goal is formulated as follows: "The fundamental principles of the activities and status of prosecutors have been defined and consolidated to help Member States guarantee the

effectiveness, impartiality, and fairness of prosecutors in criminal proceedings. They should be respected and taken into account by the governments of Member States in national legislation and practice. Furthermore, they should be brought to the attention of prosecutors, as well as other judicial bodies, executive and legislative branches of government and citizens"².

To ensure the implementation of these principles, the International Association of Prosecutors (IAP) was established in June 1995 at the United Nations in Vienna. Moreover, the world has become witness to the need for expanding international cooperation between prosecutors and increasing the speed and efficiency of mutual assistance, asset tracking and other international cooperation activities. One of the key objectives of IAP is to enhance the role and importance of internationally recognised standards and principles as necessary mechanisms for the proper and independent prosecution of offences. This objective contributed to the development of Professional Responsibility Standards in 1999³ and the consolidation of the main duties and rights of prosecutors (hereinafter – the "IAP Standards"), which established the fundamental place of the prosecutor's office in the administration of justice. The IAP Standards⁴ supplement and expand the Guidelines⁵. They constitute an international standard for the behaviour of prosecutors and prosecutor's offices. Furthermore, the IAP Standards⁶ promote international cooperation, emphasising the need for independence, objectivity, and impartiality of prosecutors [10]. One of the main issues in creating internationally recognised rules of conduct for prosecutors, which the latter should follow in their activities, was the differences in substantive law, evidence, and procedures due to the different legal traditions and legal systems existing around the world. Although this problem currently exists, it is less influential, as different legal traditions and systems begin to unite and acquire features of each other. The IAP Standards⁷ are particularly important since they are not the result of an agreement between states or governments, but were written and adopted by prosecutors themselves from all over the world and various legal traditions. In 2008, through Resolution 17/2 of the Commission on Crime

¹International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_043/ed19661216#Text.

²Fundamental Principles Concerning the Role of Lawyers. (1990, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_313#Text.

³Standards of Professional Responsibility and Fundamental Duties and Rights of Prosecutors adopted by the International Association of Prosecutors. (1999, April). Retrieved from [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/Ukrainian.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/Ukrainian.pdf.aspx).

⁴*Ibidem*, 1999.

⁵Guidelines on the Role of Prosecutors. (1990, August). Retrieved from <https://www.ohchr.org/Documents/ProfessionalInterest/prosecutors.pdf>.

⁶Standards of Professional Responsibility and Fundamental Duties and Rights of Prosecutors adopted by the International Association of Prosecutors, 1999.

⁷*Ibidem*, 1999.

Prevention and Criminal Justice¹, the IAP Standards² have been recognised by the United Nations as additional provisions to the Guidelines on the status and activities of prosecuting authorities³. Member States were invited to encourage prosecuting authorities to comply with the IAP Standards⁴ to improve the system of criminal prosecution and prevent the commission of crimes [8].

At present, in many states, the prosecutor's office is a constitutional body and a key institution in the justice system, especially in the criminal prosecution procedure, which helps maintain the effectiveness of criminal prosecution and the independence of the judicial system [11]. Prosecutors of all European states, including Ukraine, can make decisions on initiating, conducting, and continuing criminal prosecution, as well as on appealing certain decisions of judicial authorities. There are also general tasks of the prosecutor's office, such as implementing national criminal policies, deciding on alternatives to prosecution, etc. Furthermore, the prosecutor has the right to take part in other types of trials, for example, civil [3]. Considering the most general functions of the prosecutor's office, it is difficult to imagine that their proper implementation depends on the legislative and executive branches of government. Therefore, it is necessary to consider the content of such an international standard as the independence of the prosecutor's office. The independence standard helps ensure that principles such as legality, impartiality, and hierarchy are respected. There are different types of independence. Thus, it can be addressed to the work of an individual prosecutor who solves a particular case – such independence is called functional, since certain powers are performed by a clearly defined person [9]. Researchers also distinguish institutional or structural independence, when a certain case is sent either to the prosecutor's office as an institution, or to the Prosecutor General as the head of the service [12]. The importance of the prosecutors' independence is also confirmed by the report of the European Commission for Democracy Through Law (Venice Commission) on the European Standards as Regards the Independence of the Judiciary,

which noted that the prosecutor's office should acquire an autonomous status, and prosecutors should become independent of the executive and legislative branches of government⁵. This is also emphasised by the UN Special Rapporteur, who considered the independence of judges and lawyers within the UN. He focuses his attention on the importance of autonomy and functional independence of the prosecutor's office, as this will increase the authority of the prosecutor's office and increase public confidence in justice⁶.

As for the definition and content of the prosecutors' independence, there are many opinions of researchers that have certain differences from each other. For example, a non-governmental organisation such as the International Commission of Jurists refers to making the justice system fully independent, which includes a set of judges, advocates, and prosecutors⁷. However, there is also an opinion that the content of the independence of the prosecutorial authorities differs from the independence of the judiciary, since they are usually hierarchical institutions subordinate to higher bodies. It should be emphasised that these features of structural independence should be compatible with the functional independence of prosecutors in the application of the law, and this makes it more similar to the functional independence of the judicial system [15]. Some authors also argue that if independence is interpreted as the subordination of a judge exclusively to the law during the criminal trial, the prosecutor can never be independent in criminal procedure, since they act as a party to the prosecution in defence of the rule of law [16]. However, to protect the rule of law, the activities of the prosecutor's office must be lawful, that is, within the limits established by law, and without interference from any other branches of government. Some researchers note that the principle of independence of prosecutors should be considered in a broad sense and closer to the content of independence of the judicial system, which means a guarantee that the prosecutor's office will not be influenced by other branches of government – neither executive nor legislative [17].

One of the best ways to see the development of

¹The Commission on Crime Prevention and Criminal Justice Resolution No. 17/2, "Strengthening the Rule of Law through Improved Integrity and Capacity of Prosecution Services". (2008, April). Retrieved from https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2008/CCPCJ/Resolution_17-2.pdf.

²Standards of Professional Responsibility and Fundamental Duties and Rights of Prosecutors adopted by the International Association of Prosecutors. (1999, April). Retrieved from [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/Ukrainian.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/Ukrainian.pdf.aspx).

³Guidelines on the Role of Prosecutors. (1990, August). Retrieved from <https://www.ohchr.org/Documents/ProfessionalInterest/prosecutors.pdf>.

⁴Standards of Professional Responsibility and Fundamental Duties and Rights of Prosecutors adopted by the International Association of Prosecutors. (1999, April). Retrieved from [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/Ukrainian.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/Ukrainian.pdf.aspx).

⁵Report of the European Commission for Democracy Through Law (Venice Commission) on European Standards as Regards the Independence of the Judiciary. (2011, January). Retrieved from <https://rm.coe.int/1680700a60>.

⁶Report of the Special Rapporteur on the independence of judges and lawyers. (2017, June). Retrieved from <https://undocs.org/en/A/HRC/35/31>.

⁷Report of the European Network of Councils for the Judiciary for 2014-2016. (2016). Retrieved from https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_prosecution_2014_2016.pdf.

the principle of independence of the prosecutor's office is to analyse certain provisions adopted by the Council of Europe bodies. Chronologically, the regulatory documents developed within this organisation over the past two decades demonstrate a certain tendency to increase the importance of the prosecutors' independence. Back in Recommendation of the Committee of Ministers of the Council of Europe No. Rec (2000) 19 to Member States on the role of the prosecutor's office in the criminal justice system¹, the possibility of subordination of the prosecutor's office to the government was not excluded, subject to certain safeguards, such as the legality of government powers regarding prosecutors, as well as the publicity and written general instructions. It also stated that in case of the possibility provided for by national legislation, the government can instruct the prosecutor in individual cases. As for internal functioning, this recommendation² makes provision for the application of the principles of impartiality and independence in the distribution of cases. The independence of the prosecutor's office is considered as a consequence of the independence of the judiciary, which should perform its functions without interference, guided by the principles of separation of powers. Therefore, the independence of prosecutors is similar to that of judges [9]. Some authors distinguish between external and internal independence and state that prosecutors should enjoy external independence, which means that it is impossible for other state or non-state authorities to interfere illegally or unlawfully [18]. Furthermore, the prosecutor's office should have internal independence and be capable of freely performing its functions and making decisions, even if the ways of action vary from one legal system to another [18].

Analysing the case law of the Court of Justice of the European Union (also the European Court of Justice), a stronger position on the independence of the prosecutor's office from the executive branch can be noted. Thus, some cases establish the autonomy of the German prosecutor's office. Under the Law of Germany "On the Judiciary", the prosecutor's office is accountable to the Minister of Justice, who can supervise and manage it³. The European Court of Justice calls these ministerial powers external, which may affect the decision of the prosecutor's office. The court notes that the instructions issued by the Minister of Justice cannot go beyond the

law because this would violate the principle of independence, which would adversely affect the effectiveness of prosecutor's activities [13]. It is also worth mentioning the prosecutor's office of France. Thus, in France, the prosecutor's office is a hierarchical institution that obeys the instructions of senior managers. The Minister of Justice has the right only to issue general instructions on the development of criminal policy, which is accompanied by a clear prohibition to instruct on individual cases [9]. The court emphasises that independence requires adequate legislative or organisational rules to ensure that this body is not vulnerable to receiving individual instructions from the executive government. In Spain, the prosecutor's office can be considered as a constitutional institution. The prosecutor's office acts to protect the rule of law, the rights of citizens and the public interest, as well as to protect the independence of the judiciary and the satisfaction of public interests. These functions are performed based on four principles: legality, impartiality, unity of action, and hierarchical dependence. Although there is no hierarchical dependence of prosecutors on the government, the state Prosecutor General is appointed and dismissed by the King on the recommendation of the government and after approval by the General Council of the Judiciary. Notably, Spain belongs to the minority of countries where the pre-trial investigation is headed by a pre-trial (investigative) judge, not a prosecutor. However, the task of bringing an indictment and taking part in the prosecution part of the procedure belongs to the prosecutor's office [19]. Law 50/1981 of 30 December 1981 on the Public Prosecution Service Status and Organisation⁴ notes on the autonomous functioning of the prosecutor's office. The Law⁵ also specifies that according to the principle of impartiality, the prosecutor's office shall act objectively and independently to protect its legitimate interests. In Spain, according to legislative acts, it is strictly forbidden to influence the independence of the judiciary, and violation of this rule can entail the initiation of legal proceedings. This prohibition applies both to external organisations and individuals, as well as to relations between judges. However, as for the individual actions of judges or prosecutors, they must act autonomously and have the right and duty to refrain from a case where their impartiality could be jeopardised [19].

¹Recommendation of the Committee of Ministers of the Council of Europe No. Rec (2000)19 on the Role of Public Prosecution in the Criminal Justice System. (2000, October). Retrieved from <https://www.legislationline.org/documents/id/7987>.

²Recommendation of the Committee of Ministers of the Council of Europe No. Rec (2000)19 on the Role of Public Prosecution in the Criminal Justice System. (2000, October). Retrieved from <https://www.legislationline.org/documents/id/7987>.

³The Law of Germany "On the Judiciary". (1972, April). Retrieved from https://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html.

⁴Law of the Kingdom of Spain No. 50/1981 "On the Regulation of the Charter of the State Representation Service". (1981, December). Retrieved from https://old.pravo.org.ua/files/zarub_zakon/Isp_1981.pdf.

⁵*Ibidem*, 1981.

The international standard of independence is also contained in Council Regulation (EU) 2017/1939 of 12 October 2017¹, which introduces enhanced cooperation on the establishment of the European prosecutor's office. Article 6 of the above-mentioned rules² defines the independence of the European prosecutor's office as a European body, as well as the independence of the European chief prosecutor, their deputies, European prosecutors, and European delegated prosecutors. The Regulations³ also note that the above-mentioned prosecutors are prohibited from requesting or accepting any external instructions, and the EU Member States and the bodies, offices, and institutions of the EU do not have the right to influence them. Summarising the analysis of European trends, it can be said that despite the content of the independence of the prosecutor's office may differ from the independence of the judiciary, it is an indispensable element of the rule of law.

The Prosecutor's Office of Ukraine constitutes a single system that is endowed with functions established by the Constitution of Ukraine⁴ and aimed at protecting human rights and freedoms, the common interests of society and the state. At the same time, the functions of the Prosecutor's Office are also prescribed by the Law of Ukraine "On the Prosecutor's Office" of 14 October 2014⁵, namely: 1) maintaining public prosecution in court; 2) representing the interests of a citizen or the state in court in cases defined by this law⁶ and Chapter 12 Section III of the Civil Procedural Code of Ukraine⁷; 3) supervision of compliance with laws by bodies engaged in intelligence, inquiry, and pre-trial investigation activities; 4) supervision of compliance with laws in the execution of court decisions in criminal cases, as well as in the application of other coercive measures relating to the restriction of personal freedom of citizens. Notably, to perform its functions, the Prosecutor's Office engages in international cooperation and adheres to the developed international legal standards [5]. Thus, the special legislation stipulates that the Prosecutor's Office adheres to certain key principles in its activities, including the rule of law, recognition of a person, their life and health, honour and dignity, inviolability and security

as the highest social value, legality, justice, impartiality and objectivity, independence of prosecutors⁸. Special attention should be paid to the consolidation of such a foundation of the prosecutor's office's activities as the prosecutors' independence, which constitutes a key international legal standard. The content of this guideline makes provision for the existence of guarantees against illegal political, material, or other influence on the prosecutor to make decisions in the performance of official duties. Ukrainian legislation also states that the Prosecutor's Office is described by a lack of political influence. Thus, the legislative, executive, and judicial branches of government have no right to interfere in its activities.

The principle of transparency of the prosecutor's office's activities is also widely covered in the legislation of Ukraine. Thus, transparency ensures honest prosecutorial activities aimed at respecting the rights and interests of victims, witnesses, as well as the fundamental rights of suspects and accused persons, and other procedure participants pursuant to high standards of human rights protection. Transparency is ensured by open and competitive employment of the prosecutors, free access to reference information, and the provision of information on demand, if the law does not establish restrictions on such provision⁹.

One should also pay attention to compliance with such standards as professional ethics and behaviour of prosecutors. The prosecutor must know and follow the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may cause conflict issues [20]. If a conflict requiring recusal exists and is not subject to refusal, or informed consent has not been obtained, the prosecutor must refuse to continue their involvement in the case. In addition, the prosecutor should not allow their professional activities to be influenced by personal, political, financial, professional, commercial, ownership, or other interests and relations. Such an international standard as equanimity is described by the fact that all citizens are equal before the law and the court; the prosecutor must not conduct cases concerning their close persons, relatives, acquaintances¹⁰.

¹Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. (2017, October). Retrieved from <https://eur-lex.europa.eu/eli/reg/2017/1939/oj>.

²*Ibidem*, 2017.

³*Ibidem*, 2017.

⁴Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed19960628#Text>.

⁵Law of Ukraine No. 1697-VII "On the Prosecutor's Office". (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1697-18/ed20141014#Text>.

⁶*Ibidem*, 2014.

⁷Civil Procedural Code of Ukraine. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15/ed20040318#Text>.

⁸Law of Ukraine No. 1697-VII "On the Prosecutor's Office". (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1697-18/ed20141014#Text>.

⁹*Ibidem*, 2014.

¹⁰Fundamental Principles Concerning the Role of Lawyers. (1990, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995_313#Text.

The prosecutor must not identify or display prejudice based on race, gender, religion, national origin, disability, age, sexual orientation, gender identity, or socio-economic status in words or behaviour. The prosecutor should not use other inappropriate considerations, such as extraneous, political or personal, when exercising the prosecutor's discretion [21].

Having analysed the Ukrainian legislation, it can be concluded that the regulatory provisions governing the status of prosecutors and prosecutor's activities currently implement the principles of efficiency, professionalism, independence, and responsibility. It is necessary to assess the compliance of prosecutors with the criteria of professional competence, integrity, professional ethics, as well as to provide an opportunity for all candidates who have the necessary theoretical knowledge and practical skills to take the position of prosecutor in the prosecutor's office on a competitive basis. The main task of the prosecutor's office is to ensure respect for constitutional human rights and freedoms during the investigation of criminal offences, coordinate the development of appropriate criminal law policies to approach European standards, ensure openness and transparency in its activities, and strengthen public confidence. It is impossible to complete these tasks without establishing and maintaining a professional culture of prosecutor's office employees aimed at regularly improving the quality of their activities, continuous training, and encouraging the use of innovations. According to the author of this study, a comprehensive and unbiased system for assessing the quality of the prosecutor's work should be developed, which would include such criteria as direct performance of powers, innovation, desire for development, self-improvement, attitude towards colleagues, leadership, etc. Furthermore, to strengthen the skills of prosecutors and, accordingly, the quality of their activities, it is necessary to systematically conduct trainings and other forms of education, where employees can learn about international legal standards of prosecutors' activities, the practice of their application, innovations, and trends. One should not forget about the motivation of prosecutors to encourage and retain the best employees.

To increase public confidence in the prosecutor's office, it is necessary to introduce effective methods of monitoring compliance with the norms of prosecutor's ethics and integrity: conducting trainings on professional ethics and integrity, avoiding conflicts of interest and preventing corruption cases. Moreover, one should regularly inspect knowledge of ethics and integrity. To prevent corruption, it is necessary to introduce appropriate control methods and ensure the protection of corruption whistle-blowers so that they can safely and confidentially report cases of corruption without prejudice to their rights.

It is also worth mentioning the independence of the prosecutor's office. Thus, as previously mentioned,

prosecutors are independent of the executive and legislative branches of government. They also cannot be subjected to groundless inspections by the highest-level prosecutor's office. Furthermore, prosecutors have the right to appeal against illegal actions, instructions, pressure from their managers or other colleagues.

All these recommendations are aimed at better realisation of the mission of the prosecutor's office, aimed at such fundamental guidelines as respect for human rights and freedoms, protection of human life and health, honour and dignity, inviolability, and security to achieve a high level of trust in the work of prosecutors and the prosecutor's office in general.

Conclusions

In summary, the context of the aspirations of Ukraine for European integration reveals that such international legal standards of the status of prosecutors and prosecutor's activities as the rule of law, recognition of a person, their life and health, honour and dignity, inviolability and security as the highest social value, legality, justice, impartiality and objectivity, independence of prosecutors, transparency of activities, compliance with professional ethics and behaviour have a massive impact on the organisation and activities of the prosecutor's office in Ukraine. They "direct" the actions of the prosecutor, establish prohibitions, restrictions, and obligations that must be strictly observed upon exercising their powers. One of the main international legal standards is the independence of prosecutors primarily from the executive and legislative branches of government, autonomy in decision-making, the absence of interference by state and local authorities, and any unlawful influence. This principle is analysed according to international regulations, and the study identified its implementation in certain countries of the world, namely in France, Germany, and Spain, and its enormous role in ensuring high-quality and effective prosecutor's activities. The independence of the prosecutor's office serves as a guarantee of impartiality, which, for its part, leads to the creation of a transparent prosecutor's office. This independence should also be maintained in the face of inappropriate pressure that may arise from the media and individuals or interest groups in the community, or even the public in general. The IAP Standards also emphasise that decisions of the prosecutor's office should be made without outside influence in situations where prosecutors can exercise discretion regarding the decision on criminal prosecution.

The author of this paper concluded that Ukraine embodies such international standards as the rule of law, legality, justice, impartiality and objectivity, the independence of prosecutors, the inadmissibility of unlawful interference of the prosecutor's office in the activities of executive, legislative, and judicial authorities, respect for the independence of judges, transparency of the prosecutor's office, strict compliance with

the requirements of professional ethics and behaviour, equanimity, objectivity. At present, there is a need to improve the guarantees of ensuring their implementation. For high-quality implementation of prosecutor's activities, it is necessary to harmonise the legislation of Ukraine with the EU legislation, establish international cooperation with international institutions that have introduced international legal standards for the activities of prosecutors, namely with the International Association of Prosecutors.

Furthermore, the author has developed particular recommendations aimed at ensuring that prosecutors effectively exercise their powers pursuant to high European standards for the protection of human rights.

In particular, the most critical among them are the introduction of a system and criteria for assessing the quality of work of prosecutors, strengthening their skills and, accordingly, the quality of the latter's activities through systematic training and other forms of education in the main areas of activity, providing material and non-material incentives to stimulate the work of prosecutors, applying methods of monitoring compliance with the norms of prosecutorial ethics and integrity, regular testing of knowledge on ethics and integrity, protecting corruption whistle-blowers, establishing an effective mechanism for prosecutors to appeal against unlawful actions, instructions, pressure from their managers or other colleagues.

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Міжнародно-правові стандарти прокурорської діяльності та статусу прокурорів: втілення в Україні та в окремих країнах-членах Європейського Союзу

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Анотація

Актуальність обраної теми дослідження полягає в тому, що на сьогодні Україна прагне до інтеграції з європейською спільнотою. Оскільки адаптація національного законодавства до європейських положень є невід'ємною складовою інтеграції, необхідно удосконалювати міжнародне співробітництво, покращувати нормативно-правову базу, яка буде відповідати європейським принципам і стандартам, впроваджувати нові методики, ґрунтуючись на позитивному досвіді зарубіжних країн. Такі заходи допоможуть підвищити ефективність здійснення прокурорами процесуального керівництва під час досудового розслідування та судового розгляду кримінальних проваджень, забезпечити ефективність покарань, знизити рівень злочинності. У зв'язку з цим наукова стаття спрямована на визначення сучасного стану втілення міжнародних стандартів прокурорської діяльності в національне законодавство України. Провідними методами дослідження обраної проблеми є теоретичні, а саме: аналіз, синтез, узагальнення, моделювання; емпіричні – спостереження, вивчення і узагальнення стану втілення міжнародних стандартів в національне законодавство. У роботі проведено аналіз дотримання міжнародних засад прокурорської діяльності такими країнами, як Франція, Німеччина, Іспанія, визначено особливості їхнього гарантування, розглянуто національну практику. На основі виявлених даних розроблені конкретні рекомендації, спрямовані на підвищення ролі міжнародних стандартів у прокурорській діяльності, оскільки прокурор є ключовою фігурою кримінального переслідування. Результатом наукової роботи є розкриття значущості міжнародних стандартів прокурорської діяльності та статусу прокурорів, виокремлення прикладів їхнього позитивного втілення в правові системи України та зарубіжних країн, виявлення стану приведення українського законодавства до законодавства Європейського Союзу, а також розробка рекомендацій, які допоможуть удосконалити сучасну ситуацію із запровадженням міжнародних стандартів і знизити загальний рівень злочинності в Україні, тим самим забезпечуючи захист конституційних прав, свобод, законних інтересів населення. Проаналізувавши особливості втілення міжнародних стандартів прокурорської діяльності та статусу прокурорів, їхню роль та значущість, можна зробити висновок, що сучасна ситуація в Україні потребує значного удосконалення законодавчої бази, якою регулюється діяльність прокуратури. Для підвищення ефективності та результативності роботи прокурорів необхідно модернізувати профільне законодавство з урахуванням передового іноземного досвіду.

Ключові слова: міжнародні принципи, незалежність прокурорів, функції прокуратури, Міжнародна асоціація прокурорів, Стандарти Міжнародної асоціації прокурорів

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Legal Regulation of Land Relations in the Context of Canadian Legislation

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Abstract

The relevance of the study is conditioned by the need to analyse international practices of legal regulation of land matters, in particular on the example of the Canadian experience, to update and further implement Ukrainian legislation. The purpose of the study is to identify the features of the legislative regulation of land relations in Canada, Ukraine, and other countries. The methods used to investigate the selected topic include: dialectical, formalisation, legal, formal and legal, hermeneutic, logical-legal, systemic, structural and functional, axiomatic, induction and deduction, analysis and synthesis. The study identified the basic concepts, terms and phenomena used in the field of land regulation in Canada and other countries; the concept of "land relations" is characterised, the objects and subjects of land relations are defined; an analysis of the legal framework governing land relations in Canada and the peculiarities of such regulation; features of regulation and implementation of land relations in Ukraine and such countries as Great Britain, Germany, France, Australia, and New Zealand are described; the list of regulations is compiled based on which regulation of land relations is carried out. The provisions highlighted in the paper are of practical value primarily for entities whose activities are aimed at regulating and controlling land relations, persons whose rights are directly or indirectly covered by the land sphere and fall under the regulation in this area

Keywords: ownership, land use, foreign experience, inventory checking; land plot

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Introduction

The evolutionary development of society was characterised by the establishment of land as the main means of production. The establishment of land as the main means of production in the world has made it one of the main wealth in society, possession and use of which determined the social and property status of various segments of the population. Therefore, during the long development of society there were various socio-economic relations regarding the use, distribution, lease, and utilisation of land, which became the basis for the establishment of modern land relations in different countries [1]. The land is the greatest wealth of mankind, due to which there is life on the planet and the needs of people are met. The term “land” should be understood as a system that includes land plots, environment, land resources, conditions under which the rational use of land in the world and agro-climatic conditions of production [2].

William Petty, one of the leading experts in political economy, noted: “Labour is the father of wealth, and the land is the mother” [3]. The establishment of land relations and their proper regulation is considered one of the powers of public authorities in each country. Land is a special and important resource that ensures the normal economic and social functioning of the population. At the same time, land is the basis, the factor that determines certain features of the development of each country. The land policy of each country, and, consequently, the legal framework governing this area, is aimed at increasing production and social potential, creating conditions for investment, which in turn leads to the transformation of land policy into a powerful, efficient and high-quality growth factor for the world economy. In recent years, land relations in Ukraine, and the land sphere and land law in general are characterised by active development, but still there are a number of shortcomings in the regulation of this area, primarily due to legislation aimed at resolving land issues [4]. The analysis of foreign experience of regulation of land relations in different countries, in particular within the framework of scientific research, the most part of attention is given to experience of regulation of land relations in Canada, allows defining advantages and the lacks arising at regulation of land relations and development of the basic areas of improvement of the land sphere.

Land and the regulation of land relations in different countries differ. This is conditioned by the fact that the object of regulation of land relations, namely land, there are different regulations and a separate procedure for regulating its use. In Ukraine, the state of regulation of land relations, compared with developed countries, is at an early stage of development. Regulation of land relations and implementation of land policy in particular are aimed primarily at improving the efficiency of land use, creating appropriate conditions for

increasing production and investment potential of land in each country and turning land into a powerful factor in economic growth [5].

The purpose of the study is to determine the features of the legislative regulation of land relations on the example of the Canadian experience and other countries. *The main objectives of the study* are:

- definition of the concept of “land relations”, characterisation of its essence and content, and analysis of views on the interpretation of the concepts of “object of land relations” and “subject of land relations”;
- analysis of the legal regulation of land relations in Canada and investigation of the peculiarities that arise during land use, the study and separation of powers of public authorities in the land sphere;
- characterisation implementation of the characteristics of the legal framework and the main features of land regulation in other countries of the world, and in Ukraine in particular;
- study and development of recommendations for improving the sphere of land relations in Ukraine.

Materials and Methods

Methodological support of the study is conditioned upon its purpose and objectives and is based on the use of a set of general and special methods of cognition. In accordance with the defined goals and objectives, the study used a set of research methods of modern epistemology. Using the methods of synthesis and theoretical analysis, research was conducted in the field of land regulation in Canada, Ukraine, and the world, features of land regulation in Canada and the world were identified, and the development of regulatory regulation of land was analysed. The dialectical method is the basis of the study, because it is used to learn all the processes of research on the chosen topic. The use of this method in the study of legal issues leads to theoretical and practical investigation of the improvement of land relations. Using the formal and legal method of research, the analysis of features that occur during the regulation of land relations in the world and in Canada, in particular, highlights the features that arise during the regulation of this area and identified the legal framework for land regulation; using the system method, the range of researched problems was determined and proposals for their solution were made. Comparative method and synthesis – during the analysis of foreign experience in the functioning of land relations and the possibility of its use in Ukraine.

For a more complete and effective investigation of the chosen topic, the study used: hermeneutic method, which helped to reveal the essence of the concept of “land relations” and its key characteristics; analysis allowed dividing the object of study into its component parts for the purpose of their independent consideration, and also helped connecting the individual legal phenomena

that were the subject of analysis, in a logically structured legal reality; analogies through the establishment of similarities in some features of legal phenomena and in legal relations, and through this method, knowledge of objects and phenomena is achieved on the basis that they are similar to others.

Axiomatic method should also be considered one of effective methods of research in the field of land relations in Canada, the world, and in Ukraine in particular. Axiomatic method aims to build a scientific theory in which some statements (axioms) are accepted without evidence and then used to obtain other knowledge according to certain logical rules; with the help of the system and structural method – the general legislative base of regulation of the legal sphere is formed and the peculiarities that arise during the regulation of land relations in the countries of the world are established, and the procedure of improving the land sphere in Ukraine is considered; method of formalisation, which reflects the meaningful knowledge in the known sign-symbolic content. The methods of system analysis, theoretical generalisation, induction and deduction were used to generalise research related to land relations in Canada, Ukraine, and other countries. Philosophical approaches were also used, in particular the methodological and complex one, which led to the involvement in the methodological arsenal of various worldviews, philosophical theories, methodological principles, and methods.

Results and Discussion

Land relations should be understood as public relations of land ownership, disposal, and use. Land and land relations during the long development of mankind have been the main causes of controversy between people and there is still a debate among researchers regarding their legal regulation [6]. Land relations have always occupied a special place in the history of mankind, as they contain unique features of land resources and ensure the proper activity of people and the satisfaction of their interests. A. Honore gave an interpretation of “land relations”, which is based on eleven elements, including: the right to use land; the right to manage land resources; land ownership; the right to income derived from the use of land resources; the right to inherit land and related rights; the right to “capital value” of property; indefiniteness; the right to safe use of land resources;

ban on the use of land, in case of misuse; responsibility for the use of land resources; residual nature [6].

The objects of land relations are lands and the rights to land, which are in the possession, use and disposal of the subjects of land relations. The subjects of land relations include citizens, legal entities, and public authorities. The state policy of each country and the legal framework governing land relations are important factors and elements in improving and developing the land sector, because in most countries the successful regulation of land relations depends on the effective application of regulations governing land relations and the exercise by public authorities of their powers in accordance with the laws of each country and considering the interests of the population.

Thus, referring to international examples of practices of legal regulation of land relations, the study will focus on Canada, which is a constitutional monarchy and is considered one of the developed countries in the world. First of all, notably, land in Canada is classified into the following types: agricultural land use, recreational land use, forestry land use, land used to reproduce wild ungulate animals and waterfowl [7]. The planning and use of land resources are close and have common features with English law. The drafting of legislation, i.e., the implementation of legislative activity in Canada, is mostly done by the provincial government, which in turn establishes the peculiarities of the regulation of land relations. Canada's legal system consists of seventeen branches of law. The area of law that governs land relations in Canada is property rights. Thus, property rights in Canada are an industry whose laws govern the rights of people to land and other property. This area covers the issue of ownership of movable and immovable property, and intellectual property rights. The regulations governing land relations in Canada include: the Constitution of Canada¹, Agricultural and Rural Development Act², Canadian Environmental Protection Act³, First Nations Land Management Act⁴, international acts to which Canada is a party and which regulate that or to some extent land relations, as well as other acts in the field of regulation of land relations. One of the international acts that indirectly regulates land relations, namely the right to property, is the Universal Declaration of Human Rights of 1948⁵. The Universal Declaration of Human Rights of 1948⁶ is a fundamental

¹Constitution of Canada. (1982, April). Retrieved from <https://laws-lois.justice.gc.ca/eng/const/index.html>.

²Law of Canada No.RSC 1985 A-3 “Agricultural and Rural Development Act”. (1985, January). Retrieved from <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-a-3/latest/rsc-1985-c-a-3.html>.

³Law of Canada No.SC 1999 33 “Canadian Environmental Protection Act”. (1999, September). Retrieved from <https://www.canlii.org/en/ca/laws/stat/sc-1999-c-33/latest/sc-1999-c-33.html>.

⁴Law of Canada No. SC 1999 24 “First Nations Land Management Act”. (1999, June). Retrieved from <https://laws.justice.gc.ca/eng/acts/F-11.8/FullText.html>.

⁵Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

⁶*Ibidem*, 1948.

international act that establishes, consolidates, and regulates fundamental human rights in the world. The Declaration¹ does not directly regulate land relations, however, Article 17 establishes a provision according to which every person has the right to own property and no one may unreasonably deprive such person of property belonging to them. Thus, the right to property is recognised and protected at the international level, and land as property and property is also recognised and protected, but the protection of land ownership is carried out in accordance with the national law of each country.

The current state of research and regulation of land relations in Canada is characterised by the existence of the Agricultural and Rural Development Act², adopted in 1985, which is one of the most important documents in the land sector. This Act³ facilitated and provided the basis for a land inventory service, the main purpose of which is to survey land in accordance with a defined programme in the country to provide federal and provincial authorities with accurate and reliable information about the state of land and potential productivity of Canada [8]. For its part, the federal government is committed to coordinating research and the development of common land classification criteria in Canada and funding these surveys and surveys of national interest. One type of land relationship in Canada is land ownership. However, in Canada, private land ownership accounts for about 10% of all available land, and the rest is state-owned. An example is the provision that 90% of all forests in Canada are state-owned [9].

At the same time, Canada has undergone a reform that has consolidated in the Constitution of Canada⁴ the right of provinces to own their lands and the right to address issues arising from land use. In Canada, the purchase and sale of public land takes place through open auctions, primarily to prevent abuse during such operations. The state is obliged to supervise the legality of land use and ownership, regardless of the purpose of these lands [10]. The law also establishes liability for violation of the conditions for the use of land resources and the use of agricultural land for purposes other than its intended use.

In some provinces of Canada, namely Alberta and Manitoba, restrictions on the ownership and use of land by foreigners are consolidated in law, as exemplified by the provision that they may purchase land that

corresponds to a small farm and no more. Another area of land relations is land cadastre. The land cadastre in Canada is maintained by the Canada Land Inventory service under the Agricultural and Rural Development Act⁵. The Canada Land Inventory involves not only the Land Inventory service, but also agencies and ministries whose activities are aimed at regulating land use. The peculiarities of land cadastre planning and implementation in Canada were influenced by the following factors:

- result of the presence of the French order in some provinces of Canada and the organisation of land relations in accordance with the Western European type;
- observance of English traditions in the organisation of land use;
- social, political, and economic ties with the United States of America, which in turn has led to convergence in land planning and use;
- Canada's administrative and territorial organisation, various economic and natural conditions that to some extent affect the implementation of the land cadastre and the regulation of land relations [11].

In Canada, at the federal level, there is a Department of the Environment, which under the Canadian Environmental Protection Act⁶, has been empowered to control the level of land pollution in the country, formulate regulations on land use, and conduct scientific research on land use [12]. Many Canadian provinces have been mandated by the Department of the Environment to establish responsibility for land pollution. An example is the province of Saskatchewan, where the Environmental Protection Act⁷ allows the Ministry of the Environment to impose a fine of CAD 1 million or imprisonment for three years on a violator who pollutes the land. There is no special legislation in Canada that establishes liability for improper use of land, land degradation due to over-use, or other violations. Instead, liability is established by related regulations, and special programmes adopted by the government, which, in turn, allows creating incentives for efficient management. One such programme is the provincial Agreement on the Protection of Soil Resources, which provides subsidies to farmers who cultivate degraded land for agricultural turnover, and funds are allocated to responsible organisations for research and mapping of soil cover [13].

Another point in the regulation of land relations in Canada is the payment of land tax, which is one of the sources of state and local budgets. In Canada, there

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

²Law of Canada No.RSC 1985 A-3 "Agricultural and Rural Development Act". (1985, January). Retrieved from <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-a-3/latest/rsc-1985-c-a-3.html>.

³*Ibidem*, 1985.

⁴Law of Canada. (1982, April). Retrieved from <https://laws-lois.justice.gc.ca/eng/const/index.html>.

⁵Law of Canada No. RSC 1985 A-3 "Agricultural and Rural Development Act", 1985.

⁶Law of Canada No.SC 1999 33 "Canadian Environmental Protection Act". (1999, September). Retrieved from <https://www.canlii.org/en/ca/laws/stat/sc-1999-c-33/latest/sc-1999-c-33.html>.

⁷*Ibidem*, 1999.

is a practice of tax incentives that apply to farmers, in particular in tax breaks and certain features when estimating the land value. Canadian tax law excludes equipment and machinery used in agricultural production from the tax base and discounts for low-income farmers. The Constitution of Ukraine¹ stipulates that land in Ukraine is recognised as a national treasure, which in turn is separate from other immovable property and is under special protection by the state, as land resources located in Ukraine are one of the most important areas of the economic development.

In general, researchers interpret the concept of “land relations” differently. Thus, I.A. Kolesnyk construes land relations as social relations that arise during the possession and management of land resources, relations that arise as a result of the distribution of income from land use [9]. O.S. Miroshnychenko, for his part, interprets “land relations” as relations based on land ownership, relations that arise during the possession, disposal, and use of land [10]. Thus, in Ukraine the main regulations concerning land relations are the Constitution of Ukraine², the Land Code of Ukraine³, the Law of Ukraine “On Environmental Protection”⁴, the Law of Ukraine “On Land Management”⁵, international acts ratified by the Verkhovna Rada of Ukraine, and other regulations. The definition of “land relations” is consolidated in the Land Code of Ukraine⁶. According to the Land Code of Ukraine⁷, land relations should be understood as public relations that arise in connection with the possession, disposal, and use of land. However, despite the normative consolidation of the concept of land relations in the legislation of Ukraine, the content of land relations is not fully disclosed at the legislative level. A separate classification of land relations is proposed in the scientific and legal literature:

- relations that arise during land management;
- relations that arise during land use, land ownership relations;
- relations on rational use and protection of land [11; 12].

To better understand land relations in Ukraine, it is necessary to outline the types of land relations that exist in Ukraine. Land ownership is a set of norms that regulate the right of persons to land in the possession, use, and disposal, and determine the ways of exercising the rights of subjects of land relations. All lands located on the territory of Ukraine are in the land fund

of Ukraine, hence another type of land relations – land management. Activities aimed at land management include: implementation of land use planning in Ukraine; control over the legality of land use in Ukraine and their monitoring; transfer of land into possession and use; settlement of disputes arising during land use; maintenance of land cadastre, etc. The Law of Ukraine “On Land Management”⁸ consolidates the organisation and planning of rational use of land and their protection, which includes the following provisions: the implementation of natural and agricultural zoning of land; development of regulations on rational land use; identification of lands that can be included in the special land fund, and within which citizens and legal entities are provided with land plots.

The study also included an analysis of regulations of land relations in different countries. Thus, in the UK, the regulation of land relations is characterised by a fairly long historical period. The historical development of land relations in the UK includes restrictions on land use, a description of land to identify the owners of such land and planning for the rational use of land in the country. Land in the UK is formally owned by the royal family, but the right to own land is freely sold, which in turn allows it to be effectively disposed of. Buying land does not mean that the person who bought it will use it forever. In addition, in the UK, it is very difficult to change the purpose of the land. It is forbidden for owners to sell land to foreigners [14]. In modern England, the legislation distinguishes three categories of land use regulation: regulation of the impact of land use on the environment; regulation, which is carried out to achieve planning goals; regulation of issues that arise during land use [15].

In different countries there are government agencies whose powers include land management and protection. In Germany, for example, there is the Land Management Society, which is responsible for managing land resources as state property and gradually privatising land. In France, such a body is the Department of Land Management, which, in accordance with all the powers provided for in the French Agricultural Code, also issues an opinion on the privatisation of uncultivated land. In Australia, there is a so-called “free choice of land”, which was adopted in the 19th century. According to this statutory principle, every citizen had the right to receive a land plot in the range of 200 to 800 hectares, the size of such a plot depended on soil fertility. In addition, in Australia

¹Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed19960628#Text>.

²*Ibidem*, 1996.

³Land Code of Ukraine. (2001, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/2768-14/ed20011025#Text>.

⁴Law of Ukraine No. 1264-XII “On Environmental Protection”. (1991, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1264-12/ed19910625#Text>.

⁵Law of Ukraine No. 858-IV “On Land Management”. (2003, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/858-15/ed20030522#Text>.

⁶Land Code of Ukraine, 2001.

⁷*Ibidem*, 2001.

⁸Law of Ukraine No. 858-IV “On Land Management”, 2003.

in 1892 a law was passed that allowed the lease of land for a period of 99 years with the payment of rent, which is 4% of the value of the leased land. With the adoption of such a law, Australia has ensured an increase in revenues to the country's economy without losing state land. In 1894, a law was passed aimed at limiting the concentration of large amounts of land among individuals and allowing public authorities, in the public interest, to expropriate too large holdings [16]. The largest amount of land in Australia belongs to the state, it owns the land on which highways and railways are built and lands on which factories and ports are located.

In some parts of the world there is coercion to use land. In France, there is a practice whereby if someone discovers a plot of land that has not been cultivated for more than three years, they can apply to the prefect, who in turn will apply to the French Department of Land Management for the status of a disused plot. After granting such a plot of land the status of unused, any person may apply for the use of such land. After such a request, the prefect informs the owner of the unused land plot of two actions to be taken by them within two months: 1) to prepare the relevant land plot for use or 2) to lease it. In case of non-fulfilment of the above requirements by the owner of the land plot, the prefect has the right to transfer such land plot for use to the person who has applied for the use of such land plot. Italian law stipulates that if the land is not cultivated for two years or the yield on such land is less than 40%, then special committee records information that such land is inefficiently used or not used at all. If the specified land plot is suitable for cultivation, in particular for use in agriculture, then the special committee informs the owner of the land plot who is willing to receive such land plot for use [17].

There are countries in which the acquisition of land by law requires a special permit. For example, in Germany and New Zealand, land can only be purchased with a permit. However, obtaining such a permit is, in some cases, quite difficult. Thus, if it is established that

the agrarian structure is deteriorating, the issuance of such a permit to a person wishing to purchase land will be denied. The experience of land regulation in Canada and other countries allows comparing it with the experience of land regulation in Ukraine to identify common features and characteristics that arise during the regulation of land use in each country.

Conclusions

Thus, the study analysed the legislative regulation of land relations in Canada, Ukraine, and also Great Britain, Germany, Australia, France, and New Zealand, based on which the peculiarities of land regulation were established. The main approaches to the definition of "land relations" are considered, according to which a single interpretation of land relations is established: public relations of land ownership, disposal, and use. It has been confirmed that land relations have always been a specific phenomenon and sphere of human relations, as they arose in connection with the possession, disposal, and use of land, from ancient times to the present day. At the same time, the study singles out the main legal acts regulating land relations in Canada, which establish the specifics of land use in Canada, determine the state bodies authorised to regulate land use activities and control the legality of use by entities in their possession, disposal, and use land plots. The powers of the Ministry of Environment and the Canada Land Inventory service have been determined. The reform carried out in Canada was described, according to which the provinces were given the right to own their lands and the right to solve all problems and issues that arise during the use of land resources. A list of the main characteristics of the legal regulation of land relations in the above countries, such as Ukraine, Great Britain, Germany, Australia, France, and New Zealand.

Therefore, the study of the chosen topic showed the features arising in the regulation of land relations in the world, particularly in Canada, which in turn, serves as a guide and a certain example for Ukraine in the development and improvement of land relations regulation.

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Правове регулювання земельних відносин у контексті канадського законодавства

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Анотація

Актуальність наукової статті визначається потребою в аналізі міжнародних практик правового регулювання земельних відносин, зокрема на прикладі досвіду Канади, задля оновлення та подальшої імплементації в українське законодавство. Метою статті є виявлення особливостей законодавчого регулювання земельних відносин в Канаді, Україні, а також в інших країнах світу. Серед методів, за допомогою яких здійснювалось дослідження обраної теми, можна виділити: діалектичний метод, метод формалізації, правопізнавальний метод, формально-юридичний метод, герменевтичний метод, логіко-юридичний метод, системний, структурно-функціональний метод, аксіоматичний метод, метод індукції та дедукції, метод аналізу та синтезу. У процесі дослідження було визначено основні поняття, терміни та явища, які застосовуються у сфері регулювання земельних відносин в Канаді та в інших країнах світу; охарактеризовано поняття «земельні відносини», визначено об'єктів і суб'єктів земельних відносин; проведено аналіз законодавчої бази, яка регулює земельні відносини в Канаді, а також досліджено особливості такого регулювання; охарактеризовано особливості регулювання та здійснення земельних відносин в Україні та таких країнах, як Великобританія, Німеччина, Франція, Австралія та Нова Зеландія; закріплено перелік нормативно-правових актів, на основі яких здійснюється регулювання земельних відносин. Положення, які висвітлені в науковій статті, становлять практичну цінність насамперед для суб'єктів, діяльність яких спрямована на регулювання та контролювання земельних відносин, а також осіб, чиї права прямо чи опосередковано охоплюються земельною сферою та підпадають під регулювання правових актів у цій сфері

Ключові слова: право власності, землекористування, зарубіжний досвід, інвентаризація, земельна ділянка

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Constitutional Status of the Head of State and Its Regulation in National Legislation

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Abstract

This study established that the head of the Ukrainian state is the key guarantor of the stability of social relations and internal political and international processes. He exerts influence directly by drafting various regulations, sending messages and orders for the implementation of various constitutional provisions in real management practice. The author pointed out certain problems and imperfections of the legislative regulation of activities of the current President of Ukraine. Separate legal constructions regarding the characteristics and features of the activities of the President of Ukraine and the reform of various state institutions were also investigated. The practice of the Constitutional Court of Ukraine was involved in the study, related to the consideration of issues of changing the constitutional, legislative foundations of the country's development and the status of the head of state. Therefore, the purpose of this study is a comprehensive study of the institution of the head of state of independent Ukraine and other countries to obtain comparative legal experience for the Ukrainian legislative system. The main results of the study were obtained through theoretical and methodological analysis of literary scientific sources, as well as by methods of formal legal, comparative legal, comparative political, system-structural analysis, value-normative and institutional methods, content analysis of statistical data and official documents. The study of modern practice and achievements of the President of Ukraine allowed determining the practical significance and originality of certain issues of the implementation of constitutional norms in the activities of the head of state. The subjects considered in this paper related to the regulation of the legal status of the President in the current legislation of Ukraine are promising for further in-depth study and detailing, resolving various controversial issues, including for additional analysis concerning modern legal reforms of the state

Keywords: head of state, President of Ukraine, constitutional status of the President, consolidation of powers, legislation of Ukraine, Fundamental Law, Verkhovna Rada

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Introduction

The construction of a truly social, legal, and democratic state in Ukraine should be ensured by the development of various institutions of public power that influence the general national policy and the development of national legislation, such as the head of state and representative bodies of central government. The relevance of this study is predetermined by the specific constitutional status of the President of Ukraine in the system of state public power. In particular, the President is the guarantor of human and civil rights and freedoms, the Constitution (Fundamental Law) of the state, the independence of Ukraine and the integrity of its territory (including Crimea, Donetsk, Luhansk, and Sevastopol). It is the President who acts as the main driving unit that sets the general vector of activity of the entire public mechanism of central and regional authorities. Because of this, the legal consolidation of the status of the President of Ukraine should be particularly meaningful, thoughtful, balanced, and detailed.

The purpose of this paper was a comprehensive study of the specific features of the legal status of the head of state in Ukraine in comparative characteristics with foreign countries. These specific features of the consolidation of the constitutional status of the President in the national legislation, and the scope of their activities are investigated by analysing the content of various publications, statistical data, the regulatory framework of Ukraine in terms of ensuring the implementation of the rights and duties, powers of the head of state at the present stage of building a civil society and a new information policy.

The object of this study was the processes and relations describing the constitutional status of the President of Ukraine in terms of its functional efficiency.

The constitutional and, in part, political and socio-normative research carried out in this study allowed identifying and concretising the problematic patterns present in certain legislative acts and decisions of the head of state from a practical standpoint.

For a greater expansion of scientific topics, publications and monographic works of foreign researchers were employed regarding the study of the influence of the authority of the head of state on the development of legislative mechanism of functioning of the highest legislative, judicial, and executive authorities in Europe [1]; the specific features of the exercise of powers of the President of the country in the sphere of limiting the possibilities of exercising constitutional rights and freedoms of the population under the dictatorial regime in the Philippines [2]; the constitutional and legislative justification of decisions of American presidents on external and internal interference in political processes and the propensity of the modern US president to initiate various international conflicts [3]; the relationship between the US Congress and the President of the country regarding the legitimisation of military actions in Korea,

in the presence of special conciliation procedures between the legislative and executive authorities specified in Article II of the Constitution [4]; the influence of the constitutional powers of the Presidents of India and the United Republic of East Africa, – Tanzania on the process of promoting information and digital technologies at the national level in developing countries [5]; etc.

The practical issues of this study are determined by the empirical area of work and law enforcement analysis of statistical data concerning the activities of the President of Ukraine; the use of content analysis of legal documents; etc.

The scientific originality of this study is determined by the identification of a complex and systemic interrelation between the norms of the Constitution of Ukraine and the laws and the actual modern-day practice of the functioning of the institution of the President. Furthermore, the issues raised in this study received practically no coverage regarding the national peculiarities of the organisation and functioning of the constitutional institution of the President of Ukraine with the modernisation of the regulatory framework of its activities using international legal principles and guidelines, the practices of legal regulation of foreign states.

Materials and Methods

Any constitutional or branch legal research is based on special and general methodological tools and means, including both methods of general analysis and synthesis of scientific, research-to-practice phenomena of reality and scientific legal literature, and special methods inherent exclusively in legal concepts and research. Furthermore, the development of legal topics of state-legal orientation may include accompanying elements of socio-political research to substantiate the relevance and importance of the problem under study for social development and its role in social processes. Since the President of the country is also a guarantor of the stability of public relations and processes in society, influences directly through the development of various regulations (including draft laws using the right of legislative initiative), sending messages and orders to public authorities regarding the adoption of immediate or planned decisions in socio-economic, cultural, environmental and other spheres of human activity, the state, and organisations, the use of socio-political research methods in the study is a justified necessity.

In substantiating the theoretical aspects of the study of problematic issues, methods of theoretical research and comparison of scientific and journalistic works related to the content of the materials published by the author were used, i.e., analysis (detailing, separation) of the material and synthesis, generalisation of the investigated information data; concretisation of socio-political, general legal, constitutional, etc. concepts and terms. The method of concretisation of legal phenomena

also allowed highlighting the regulatory aspects of securing the powers of the President in the current legislation of Ukraine.

The study employed the formal legal method of in-depth research of legal categories and objects for a detailed study of legal phenomena, the institution of the presidency and legislative acts of independent Ukraine containing the norms of constitutional and administrative law governing the powers and limits of competence of the head of state, the mechanism for the implementation of these powers. This method was taken as the most universal, comprehensive, based on the current system of legislative documents of Ukraine, and is aimed at the investigation of legal structures regarding the characteristics and features of the activities of the President of Ukraine and the reform of various state institutions. The norms of the Fundamental Law and other regulations were analysed using mandatory rules and tools of formal logic, considering the specific features of legal regulations, legislation, and legal understanding of problematic aspects of securing the powers of the President of Ukraine. The use of the comparative legal method allowed establishing the specific features of the status of the head of the Ukrainian state in comparison with other countries, and this method was also employed in the analysis of the correlation of the norms of the Constitution with other legislation of Ukraine.

The method of comparative political science used in the development of the materials of this study allowed investigating the achievements of the current President of Ukraine, V.O. Zelenskyy, relative to his predecessors and the previous government policy.

Content analysis as a special method of studying the content of the thesis sayings of the President of the country, certain norms of the legislation of Ukraine, various excerpts from the speeches of the head of state published in the press, provided a better insight into the current policy vectors of V.O. Zelenskyy. Having correlated the political views of the head of state, the vectors of the implementation of his powers with the real measures taken by the President of Ukraine, the author highlighted shortcomings and problems in the implementation of the constitutional foundations and principles of building a democratic independent state by the presidential power.

Elements of system-structural analysis, value-normative and institutional methods also contributed to a more extensive coverage of the subject within the framework of studying the exercise of constitutional powers by the President of the country and his Office (auxiliary and advisory body).

Statistical analysis was used to investigate voting in the elections to the central Parliament (Verkhovna Rada) of Ukraine in 2019.

Results

From the standpoint of his constitutional appointment, the institution of the President of Ukraine is determined by the importance of the powers exercised and the effectiveness of functioning in the main areas of ensuring constitutional guarantees: to create conditions for ensuring the security of the country, the inviolability of the sovereignty and integrity of the state (Articles 1, 2; Articles 17, 18, Article 102 of the Constitution); to achieve stability of the legal status of state institutions of power (Articles 6, 106 of the Constitution); to create tools for the unhindered enjoyment of human rights and freedoms specified in Section 2 of the Fundamental Law of Ukraine, etc¹.

The majority of measures to ensure the implementation of constitutional provisions regarding the vital aspects of internal and external public policy are adopted and implemented by the President of Ukraine through the issuance of special orders and decrees.

The consolidation of the powers of the head of state and the foundations of his constitutional status takes place by regulating the essential elements of the President's competence in the Fundamental Law of the state. However, the specification of certain provisions of the Constitution of Ukraine, admittedly, should occur by detailing the norms of the Fundamental Law in other legal acts.

Therefore, in 2017, the Verkhovna Rada (Parliament of Ukraine) proposed a draft law "On the President of Ukraine and the Impeachment Procedure", which was never implemented. In the draft, representatives of the Verkhovna Rada noted shortcomings in the construction of the norms of the Constitution of the country regarding the consolidation of the powers of the head of state due to their poor detail, which allowed individual Presidents at different stages of the history of independence of Ukraine to make attempts to expand their power towards absolutism. Therewith, the creators of the draft law "On the President of Ukraine and the Impeachment Procedure" emphasised the need for legislative regulation of the President's activities, since "presidential practice leads to the destruction of the legal system of Ukraine"².

This practice of expanding presidential power and the struggle of the two vital structures of Ukraine: the Verkhovna Rada and the head of state, led to an unconstructive dialogue and disrupted the natural functioning of the state mechanism. From the standpoint of science and practice of real public constitutionalism, the form of the republic was constantly changing: from a parliamentary-presidential to a presidential-parliamentary regime of government (even a presidential republic) and vice versa. On October 1, 2010, by its decision, the Constitutional Court of Ukraine declared the

¹Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/card/>.

²Explanatory note to the draft Law of Ukraine No. 7248 "About the President of Ukraine and the Procedure for Termination of His Powers". (2017, October). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/GH5LC00A.html.

Law of Ukraine “On Amendments to the Constitution of Ukraine” dated December 8, 2004 No. 2222-IV contrary to the fundamentals of the constitutional structure of the country and a return to the wording of the Fundamental Law of 1996, according to which Ukraine became a presidential republic. Consequently, the supreme body of constitutional control over compliance with the norms on the state structure of Ukraine also attempted to strengthen the presidential power. According to the special opinion of individual judges of the Constitutional Court of Ukraine, set out in the decision of 30.09.2010 No. 20-rp/2010, this decision was very contradictory, since the body of constitutional control and justice does not have the right to adhere to a universal legal position regarding the “automatic renewal of the previous version of the provisions of the Constitution of Ukraine”¹.

Moreover, according to the author of the study, the Constitutional Court of Ukraine in its decision No. 20-rp/2010 of September 30, 2010 factually contributed to changing the form of government in the country, since the powers of the head of state were substantially expanded².

The adoption of the Law of Ukraine “On the Status of the President of Ukraine” by the Verkhovna Rada in 2017 was absolutely necessary, which is also explained by the fact that almost any of the last Presidents of independent modern Ukraine for more than 20 years expanded their powers contrary to the norms of the Fundamental Law by adopting and legitimising presidential acts (decrees, orders), replacing the parliament and its laws. Individual heads of state, acting in their personal interests through “allies” in the Verkhovna Rada of Ukraine, in an emergency promoted the unconstitutional parliamentary acts they saw fit, which sometimes granted absolutely unlawful powers in various spheres of internal and external national policy. Thereby strengthening the legitimacy of presidential pressure in the field of making new political decisions without the consent of the legislative authority.

Notably, in 2019, in the decision No. 5-r/2019 of June 13, 2019 on the case “On the National Commission Implementing State Regulation in the fields of Energy and Utilities”³, the Constitutional Court of Ukraine nevertheless took a clear and unconditional position regarding compliance with the norms of the Constitution of the country, indicating that the presidential

powers to form and manage individual strategic central authorities cannot be expanded by the adoption of special laws. The body of constitutional jurisdiction, which ensures the supremacy of the Fundamental Law of the state and its norms [6], unconditionally concluded that the powers of the President of Ukraine are determined exclusively by the normative provisions of the Constitution of Ukraine and cannot be legislatively expanded⁴.

However, the detailing of these presidential powers remains necessary by the adoption of the aforementioned legitimate legislative act by the Verkhovna Rada to avoid the unlawful expansion of the competence of the head of state via orders and decrees.

Moreover, the norms of the Constitution of the country practically do not prescribe the impeachment procedure against the head of state (only the general aspects of such removal of the President are specified and consolidated in Part 3, Article 108, Article 111 of the Fundamental Law), while this procedure is rather cumbersome. And the involvement of numerous judicial instances and central authorities in the procedure initiated by the Verkhovna Rada of Ukraine to impeach acting heads of state, who can be directly pressured by the President of the country, generally turns the entire procedure into a legal fiction, unrealistic in practical execution.

For example, the Republic of Kazakhstan has adopted a law on the status of the President of the country at the highest constitutional level⁵. A great danger at this stage of the country’s development is the fusion of executive, presidential, and legislative power by establishing absolute pressure of the political elite.

In 2019, the powers specified in the Constitution of Ukraine (Section 8, Article 106 of the Fundamental Law) allowed V.O. Zelenskyy to dissolve the Verkhovna Rada during the inauguration, call new elections and call on the government to voluntarily resign, violating the procedural terms for the dissolution of parliament.

The new parliamentary elections allowed the party of the President of Ukraine “Servant of the People” to gain 43.16% of the votes (Fig. 1), the political organisation “Opposition Platform – for Life” gained 13.05%, the “Fatherland” party – 8.18%, the political organisation of the former head of state “European Solidarity” gained 8.10%, and the “Voice” party – 5.82%, other parties that nominated candidates retained 21.69% of the votes in aggregate [7].

¹Constitutional Court Decision No. 20-rp/2010 in the case of the constitutional submission of 252 People’s Deputies of Ukraine regarding compliance with the Constitution of Ukraine (constitutionality) Law of Ukraine “On Amendments to the Constitution of Ukraine” dated December 8, 2004 No. 2222-IV (case on compliance with the procedure for Amending the Constitution of Ukraine). (2010, September). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KS10094.html.

²*Ibidem*, 2010.

³Constitutional Court Decision No. 5-r/2019 in the case of the constitutional submission of 46 People’s Deputies of Ukraine regarding compliance with the Constitution of Ukraine (constitutionality). (2019, June). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KS19014.html.

⁴*Ibidem*, 2019.

⁵Constitutional Law of the Republic of Kazakhstan No. 2733 “About the President of the Republic of Kazakhstan”. (1995, December). Retrieved from https://adilet.zan.kz/rus/docs/Z950002733_.

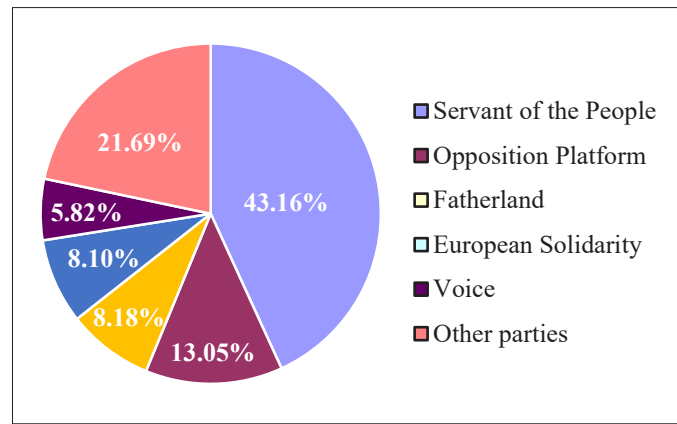


Figure 1. The percentage of voting in the elections to the Verkhovna Rada of 2019

The results of the elections allowed the presidential party to take 254 places in the parliament out of 450 possible (56%), having received an absolute majority for the first time in the history of independent Ukraine. Therefore, there is a real danger of concentrating all power in the hands of the President and his political elite.

Another important issue needs to be addressed. With the aspirations stated at the inauguration to fight for the independence and indivisibility of Ukraine, the President of Ukraine has factually done very little in this area. The President of Russia and the federal authorities of the Russian Federation, in turn, have taken considerable steps in this area: the norms of the country's Constitution have been changed, and top-level legislative acts have been adopted establishing the independence of Crimea and Sevastopol from Ukrainian jurisdiction; amendments have been made to tax and budget legislation, schemes have been developed for further expansion of influence in Ukraine. Considering the significant powers within the framework of the implementation of legislative initiatives by the President of Ukraine (Article 93 of the Constitution), including the right to consider the critical draft laws expeditiously, the competence to make major decisions on military and emergency measures, as well as the fact that the head of state is the guarantor of the sovereignty of the country, V.O. Zelenskyy needs to take more active steps to protect the territories of Ukraine. Otherwise, a paradoxical situation arises that is new for the country, when the Constitution of the DPR (the self-proclaimed Donetsk People's Republic) and other laws of Donetsk, Luhanska Oblasts (also the self-proclaimed republic) consolidate norms that directly violate the integrity of the territory of Ukraine and the foundations of the constitutional system, and the key official of the state is practically idle.

There also remains a problem relevant to the entire world, – the fight against coronavirus disease, – where timely, prompt actions and decisions of the President, including through the introduction of various restrictions and the implementation of financial and informational support, should contribute to the normalisation of economic and social activities. Therewith, the necessary measures of influence should not violate the natural

rights of citizens of Ukraine. Even Mexican researchers point out the importance of applying government and presidential response measures during the spread of coronavirus infection to restrict certain rights and freedoms of citizens of developing countries, freedom of business and their relationship with the guarantee of these constitutional powers even during a state of emergency [8].

Positive results of the current President's activity can be considered the development of institutions for the protection of human rights and freedoms by appointing various advisers authorised by the head of state for citizens, including children, disabled people and victims of military operations, the reform of the office of the President of the country, the nomination and appointment of various professionals to important posts, as well as attempts to establish a dialogue with the heads of other states.

In summary, it can be noted that only if all constitutional principles and norms are observed in the activities of the President, considering the increase in his activity in various areas of national policy development, it is possible to achieve unconditional prosperity of Ukraine.

Discussion

Thus, according to the results of the study of statistical, regulatory, scientific sources, other literary and analytical data, it can be argued that the essential aspects of the further development of the constitutional institution of the President of Ukraine is the understanding of the contradictory practices of the head of state and borrowing the developments of various countries in this area of legal regulation.

Of interest, first of all, are the academic dissertation research aimed at investigating the constitutional and public features of the legal regulation of the activities of the head of state in presidential, semi-presidential, mixed, and parliamentary republics. In his monographic author's work, Ho Chi-jung makes an independent modern assessment of the semi-presidency of Taiwan and the People's Republic of China (PRC) through a comparative characteristic of the state potential of constitutional regulation and the exercise of powers by the head of state. In this scientific study, the twenty-year experience of the State of Taiwan and the People's Republic of China

in the implementation of social policy by various heads of the country is studied to establish the interrelation and verify the effectiveness of the exercise of supreme power in the system of industry-wide management under conditions of coordination of actions between the parliamentary representative power and the president. Therewith, there is a great opportunity to coordinate common interests in the field of law-making, the implementation of regulatory requirements of the Fundamental Law of the People's Republic of China. This became possible after the introduction of relevant amendments to the Constitution of China, which proclaimed the PRC as a democratic republic with a semi-presidential form and a system of supreme central government. The author of the monograph notes the problematic nature of the functioning of the modern constitutional structure of the supreme administration due to the ongoing creation of a strong but irresponsible institution of the presidency in the implementation of coordination and the existence of a "close connection" between the president and the parliament, causing limited equal interaction between the executive and legislative branches of government. The problem of the lack of a capable and independent government, the limitation of its competence by the decisions of the head of state, who is in full solidarity with the legislature, is also highlighted [9].

Ho Chi-jung also analyses popular opinion regarding the policy of the heads of state at various stages and in different historical periods (for 30 years) to establish the attitude of the population towards the supreme power and the effectiveness of its activities. Researcher has identified the following areas and criteria for studying the opinions of Chinese and Taiwanese citizens and experts in the field of public administration: fiscal, budgetary, and tax internal potential of the country under various forms of legitimate central government; administrative changes and the effectiveness of the activities of representatives of the highest authorities; legislative productivity within the framework of balance (full coherence) of the interests of legislative and presidential authorities; military potential and territorial sovereignty of the country [9].

C.M. Koch also devotes her studies to the investigation of the development of the constitutional and legislative foundations for the consolidation and implementation of the powers of US Presidents from the standpoint of historical retrospect through the use of comparative-historical and comparative-legal methods. This specialist emphasises that the establishment and expansion of the constitutional foundations of presidential power is associated with the first attempts to combat slavery, to guarantee the inalienable rights and freedoms of American citizens regardless of origin, social status, and nationality (especially regarding African Americans and Latin Americans). In the publication of C.M. Koch, considerable work has been done to analyse the activities of 44 US presidents, including the functioning of presidential power during the office of Barack Obama. The issues of the organisation of national security as the basis of independent external activity of

heads of state in various historical periods are also being studied [10].

In his thesis, R. Nelson raises questions of the constitutionality or unconstitutionality of the autocratic regime of the presidency in South Vietnam during the Civil War, when national security was guaranteed by the priority of public pressure on political processes in the country, but the citizens of the state enjoyed personal freedoms and rights with considerable reservations and restrictions. During this period, there was practically no system for ensuring civil independence. The overthrow of the unconstitutional government and the presidential power led to a deterioration in the conditions for ensuring internal security, but the individual freedom of citizens expanded, tools and means of constitutional guarantee of rights and freedoms in modern Vietnam began to be introduced (human rights and freedoms are consolidated in Chapter 2 of the Fundamental Law of the Socialist Republic of Vietnam) [11].

The Harvard Law Journal has published an interesting and practically significant work on the study of the constitutional foundations and the problem of the implementation of the highest state power, the role of the institution of the presidency in coordinating the interests of various public bodies. From the standpoint of their guarantee by executive management structures based on compliance with the most important principles of interaction between the authorities and the population, the study considered the features of the implementation of constitutional rights and freedoms: tolerance, consistency, democracy, responsiveness, efficiency. K.M. Taney, referring to the opinion of another expert Rodriguez, justifies the "presidential primacy" in the modern world as the key constitutional and state institution in conditions of declining importance of other structures of public administration and democracy. It reveals and analyses the effectiveness of the activities of the US President as a necessary condition for achieving the goals of the democratic policy of each state. Therewith, this specialist emphasises that "the president represents the only branch of government with the necessary flexibility and national support" [12].

In addition, K.M. Tani, developing the content of the constitutional principle of democracy in the state, points out that a considerable part of the institutions of representation from the people and the instruments of direct democracy are usually ineffective, especially during crises in the country. Therewith, according to the expert, an effective government and presidential power are essential factors of social development that use all means and tools to achieve desired public goals, even by limiting the personal and property rights of citizens. Since the energetic leadership of the country by the President will allow for the best results in the development of political and socio-economic relations than providing absolute freedom to choose the vectors of internal and external policy by other public administration bodies [12].

In this regard, it is possible to point to a relatively new position in personnel matters of the President of

Ukraine, V. Zelenskyy, who is currently engaging into various shake-ups and appointing specialists to the highest positions of the state, which, according to the head of state, should serve to solve numerous issues as soon as possible and further develop the country [13]. In particular, upon carrying out these measures regarding personnel changes, a new Commissioner for Children's Rights was appointed¹.

In her review work "Presidential norms and Article II", D. Renan actualises the problems of applying the norms of the Constitution regarding the legality and legitimacy of the US President's actions. This author notes the impossibility of knowing the constitutional nature of the powers of the head of state and the institution of the presidency without referring to particular norms of the US Constitution. However, the legal understanding of the President's position and his interaction with other public authorities, especially legislative structures at the federal level, is often supplemented by the real practice of using illegitimate instruments and levers of political pressure, thanks to which the current head of state sets "their own rules". These "unwritten" rules of behaviour, according to the competent opinion of D. Renan, associate professor at the Harvard Law Faculty, and the non-normative foundations of the organisation of interaction simultaneously strengthen and limit the power of the head of state. This scientist previously held the high post of adviser to the Deputy Prosecutor General in the Ministry of Justice, which allowed her to consider the practical aspect of using the President's leverage on the executive authorities of the federation. D. Renan uses real examples to demonstrate the role of presidential norms in the development of the current government and raises topical issues for the science of constitutional law. Therewith, the main issue remains the problematic aspect, when the extra-legal system of interaction between the executive body of the federal government and the head of state ceases to ensure national interests, whether it is possible to raise the question of the illegality of the President's actions within the framework of constitutional norms. D. Renan's article concludes with a summary of the results of the study of judicial and non-judicial legal, organisational, and institutional instruments and conditions that provide a legitimate institution of the presidency based on constitutional norms [14].

Given the current situation in Ukraine, as well as the decline in the public authority of President Volodymyr Zelenskyy due to individual mistakes in positioning his own political figure in international and internal relations, this study is also of essential scientific and practical interest from the standpoint of investigating illegitimate organisational instruments of presidential

influence. The President of modern Ukraine, by studying public opinion on various regulatory guidelines, establishing contacts with representatives of foreign states, increasing the legitimacy of his activities, reorganising his Administration into the Office of the President of Ukraine and reducing the number of employees, is trying to improve the procedures for the exercise of presidential power.

Conclusions

The study touched upon the main issues of ensuring the legitimacy of the activities and status of the President of the country by changing the norms of the Constitution and the adoption of a special law. The author analysed the reality of the danger of the power of one political elite, which exists not only in Ukraine, but also in Belarus, Russia. Currently, the problem of revising fictitious and non-viable legislative structures, the problem of convergence of political reality and constitutional, statutory regulation of the institution of the President is extremely urgent in Ukraine. The activity of the Constitutional Court of Ukraine, whose main duty is to check and balance the activities and decisions, acts of various central authorities for compliance with the norms of the Constitution of the country, can also help in this regard.

Contrary to the constitutional consolidation of the principle of separation of powers, in practice in Ukraine the qualities of unity, solidity, non-separateness of presidential and parliamentary power are preserved (due to the majority of representatives of the Servant of the People party); presidential power and the institution of the presidency in the perception of society are personified only by the figure of the current head of state; to maintain his authority, the modern head of state practically does not need to legitimise his power; the head of state, from constitutional positions, is factually the only person responsible for the exercise and control of public power in the country, but this responsibility is more moral, it is insufficiently regulated and detailed in regulations; organisationally, the President remains subordinate to no one and retains high independence and absolute managerial autonomy; the functioning of the entire state administration apparatus is closed to the head of Ukraine, the presidential power acts as an instrument of pressure, interpreting in its favour insufficiently detailed and clearly elaborated and blurred regulatory provisions of the Fundamental Law.

This study is of undoubted scientific interest, practical significance and constitutional, legal, socio-political purpose, and therefore, may be useful for further study of issues and areas of improvement of the institution of the presidency in Ukraine.

¹Presidential Decree No. 245/2021 "On the Appointment of D. Gerasimchuk as Adviser – Commissioner of the President of Ukraine for the Rights of the Child and Child Rehabilitation". (2021, June). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/U245_21.html.

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Конституційно-правовий статус глави держави та її регулювання у національному законодавстві

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Анотація

У процесі написання статті було встановлено, що глава української держави є найважливішим гарантом стабільності соціальних відносин та внутрішньополітичних і міжнародних процесів. Він впливає безпосередньо шляхом розробки проєктів різних нормативних актів, напрямом послань і розпоряджень на реалізацію різних конституційних положень у реальній управлінській практиці. Автором були показані окремі проблеми та недосконалість законодавчої регламентації діяльності чинного Президента України. Також було досліджено окремі правові конструкції щодо характеристики та особливостей діяльності Президента України та реформування різних державних інститутів. До роботи було залучено практику Конституційного Суду України, пов'язану з розглядом питань зміни конституційних, законодавчих засад розвитку країни та статусу глави держави. Тому метою цієї публікації є комплексне дослідження інституту глави держави незалежної України та інших країн з метою отримання порівняльного та правового досвіду для української системи законодавства. Основні результати дослідження були отримані засобами теоретико-методологічного аналізу літературних наукових джерел, а також методами формально-юридичного, порівняльно-правового, порівняльно-політичного, системно-структурного аналізу, ціннісно-нормативного та інституційного методів, контент-аналізу статистичних даних та офіційних документів. Вивчення сучасної практики та здобутків Президента України дозволило визначити практичну значущість, новизну окремих питань реалізації конституційних норм у діяльності глави держави. Розглянута у роботі тематика, пов'язана з регулюванням юридичного становища Президента у сучасному законодавстві України, є перспективною для подальшого наукового поглиблення та деталізації, вирішення різноманітних суперечливих питань, зокрема, з метою додаткового аналізу щодо сучасних правових реформ держави

Ключові слова: лава держави, Президент України, конституційно-правовий статус Президента, закріплення повноважень, законодавство України, Основний Закон, Верховна Рада

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Teleological Statism in State Building: Doctrinal, Constitutional, and Historical Analysis

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Abstract

Ensuring state interests as the leading area of the state's activity is a rather urgent problem of modern Ukraine. For that reason, the purpose of the study is the examination of teleological statism in state-building in its doctrinal, constitutional, and historical dimensions. The methodological basis of the study is synergetic and analytical approaches, general scientific (praxeological, historical, and dialectical) and special (formal-legal, comparative-legal) methods of scientific cognition. The study clarifies that at the conceptual level the doctrinal aspect of teleological statism in state-building appears in the "Age of Revolutions" of the 16th-18th centuries in the form of the theory of the regulatory state. Therewith, it is proved that in 20th century it is manifested in the theories of totalitarian and corporate state. The co-authors substantiate that the embodiment of teleological statism in state-building is mostly fixed at the level of individual laws, which have the character of constitutional. It is proved that Italy of the fascist dictatorship, which considered totalitarianism as a fundamental principle of its statehood, did not actually acquire a statist character. It is also established that Spain during the actual regency of F. Franco Bahamonde and Portugal during the dictatorships of A. Salazar and M. Caetano were openly statist, despite the fact that the world community did not formally recognise them as totalitarian. The study discovers that the ideas of the "corporate state" were most effectively implemented in Italy under Mussolini, Spain during the reign of Franco, Portugal during the dictatorship of A. Salazar and, to some extent, the Third Reich by A. Hitler. The co-authors substantiate that the origins of the ideals of autocracy, which are characteristic of modern Russia, were the situation in the Vladimir-Suzdal principality. As a result of the analysis of historical features of implementation of teleological statism in state-building of Russia, it is confirmed that there are two approaches to it – personalism and statism. It is identified that the embodiment of the personalist approach was the rule of the Moscow Rurik dynasty from Ivan III to Fyodor Ivanovich. Therewith, it is substantiated that the era of statism in Russia lasted from the reign of Peter I to the reign of his niece – Anna Ioannovna. The practical value of this study is that it can be used both in further research and in the teaching of legal disciplines of the political science cycle

Keywords: the goal of the state, totalitarian state, corporate state, monarch, constitutional regulation, prosecutor's office, reforms of Peter I

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Introduction

As is known, the functioning of the state begins with the establishment of a goal, that is, the desired result that it seeks to achieve [1, p. 198]. Therewith, the state-building teleology can have a very diverse character, because, as Polish constitutionalists quite rightly noted: “Any human community is guided by the law, but the law does not necessarily affect similar phenomena” [2, p. 350]. In particular, the goal of the Soviet state was formally the construction of communism, while the socio-legal state focuses on the maximum satisfaction of the needs of citizens and the fulfilment of their socio-economic interests [3, p. 92] through the development of “a public apparatus that, with deep integration and coordination of all its components, could ensure the social and economic equality of all citizens” [4, p. 677]. During his meeting with representatives of the Office of the President, parliament, and government, President Zelensky stressed that the main goal is a wealthy Ukrainian, for which the state “should provide support for young entrepreneurs and freedom of competition as the basis of Ukraine’s market economy” [5]. Moreover, in European constitutional practice, the teleological aspect of statehood is outstanding, particularly “the ideas that the state should not go further in restricting competing rights and interests than necessary to achieve a certain goal, and that the means should not be out of proportion to the aims to be achieved, seem to be fundamental elements of justice” [6, p. 317]. Considering the above, the problems of the goal of the state or the teleology of state-building are quite relevant.

Therewith, it should not be assumed that the teleology of state-building was not the subject of legal research. In particular, the goal of the state was actively studied by representatives of Russian pre-revolutionary jurisprudence – F. Kokoshkin [7, p. 81-85], B. Chicherin [8]. For example, P. Lodi considered the state precisely in the context of the goal: “the state is an unequal community of free people united under one supreme power to achieve common security and well-being” [9, p. 93]. Therewith, by “common well-being” he meant such a “condition of the state, under which it can become more perfect, that is, keep up with achieving its goal without obstacles” [9, p. 93]. F. Kokoshkin also defines the interests of society as the goal of the state [7, p. 84]. As for B. Chicherin, he saw the goal of the state “in the harmonious arrangement of public life” [8]. Evidently, according to P. Lodi, F. Kokoshkin, and B. Chicherin, the goal of the state is to benefit society. A slightly different opinion was expressed by M. Rennenkampf, who noted in “Legal Encyclopedia” that: “in states, life is based on the existence of individuals who carry the principle of movement in themselves, are the main goal for themselves” [10, p. 163]. In fact, the researcher states that the goal of the state is to ensure the interests of the citizen. Therefore, representatives of the Russian pre-revolutionary law school mostly considered the state goal

not as an end in itself, and therefore most of them had nothing to do with teleological statism.

Among modern researchers, the studies of V. Tymoshenko [11], S. Kocherov [12] can be noted, who studied the goal of the state from the standpoint of the history of the teachings on the state and law, focusing their attention on thinkers of the past: Plato, Aristotle, B. Spinoza, etc. Evidently, the research on the goal of the state can be conditionally reduced to two groups. The first group is focused on its own definition of the state’s goal [7; 8]. Another group of researchers examined the studies of the previous group, including teleological reflections of thinkers of the past [11; 12]. Without detracting from the previous achievements, it should be noted that “theoretical developments focused on the conceptualisation of the doctrine” [13, p. 29] of teleological statism remain insufficient and mostly focused on the functions and mechanism of the state.

The purpose of this study is to examine the goal of the state in the context of ensuring the interests of the latter. In other words, the teleology of the state should focus on statism. The implementation of this purpose has necessitated the solution of *numerous research objectives*. Firstly, to characterise in general the doctrinal aspect of teleological statism in state-building. Secondly, to study the implementation of teleological statism in state-building in constitutional legislation. Thirdly, to analyse the historical features of the implementation of teleological statism in the state-building of Russia as the most consistent country that implemented the ideals of autocracy.

Materials and Methods

The study of the chosen problem of teleological statism in state-building took place in two stages. At the first stage, the main attention is paid to the doctrinal and constitutional dimensions of teleological statism, in particular, it was noted that each state has the interests of one of the three subjects as a goal: the state itself, society in its classes and other social strata, or a citizen of this state. Considering the interests of the state, a synergistic approach was used, which allows considering various social or natural phenomena through the prism of three levels: macro-level (highest level), meso-level (middle level), and micro-level (lowest level). In this case, the macro-level was characterised only in the most general form, focusing on the meso-level (teleological statism) and micro-level (a type of teleological statism). Therewith, these varieties were identified using a formal legal method, which, as is known, is used to classify any state-legal phenomena.

During the characterisation of the constitutional dimension of teleological statism, the constitutional acts of states that chose totalitarianism and corporatism as the principles of their existence were analysed. In particular, the constitutional legislation of such countries

fascist Italy, Spain during the reign of F. Franco Bahamonde, and Portugal during the dictatorships of A. Salazar and M. Caetano was used. The analysis of the constitutional legislation of fascist Italy was focused on the deviations initiated by B. Mussolini as prime minister, attempting to consolidate the dictatorship of his party. Firstly, it is related to the “Law on the Structure and Powers of the Grand Council of Fascism” of December 9, 1928¹, which consolidated the dominant position of the fascist party in the Kingdom of Italy. The analysis of the constitutional acts of the Spanish state under F. Franco Bahamonde was mostly devoted to the “Charter of Labour”² and the relevant Decree that approved it. As for the Constitutional Legislation of Portugal, the “Political Constitution of the Portuguese Republic” of March 19, 1933³, was analysed, which appeared during the dictatorship of A. Salazar. Indirectly, the first stage of the study described the situation in Eastern European countries – Hungary during the regency of M. Horthy, Poland during the reign of J. Pilsudski, Greece during the dictatorship of the “Regime of the Colonels”. In fact, the main method here was the analysis and method of comparative law.

The next stage of research was the combination of the theory of totalitarian and corporate state with

the constitutional principles of totalitarianism and corporatism in the practical plane using the praxeological method. The isolation as a separate object of teleological statism in Russia is explained by the fact that almost the entire history of this country, in one way or another, was built around the phenomenon of the state. In view of this, it was necessary to use the historical method, which allowed identifying individual stages in the development of Russian statehood, considering the awareness of this phenomenon. Due to the fact that teleological statism in Russia developed and changed, the dialectical method was applied.

Results and Discussion

Teleological statism: Doctrinal and constitutional dimensions

When analysing the goals and objectives of the state, it is worth noting that the philosophy of the state, as part of the general state studies, examines the meaning of the state, its essence, concept, foundations and place in the world, its value and importance, and its role in the life of man and society, in the fate of peoples and humanity [14, p. 75], identifies three groups of teleological theories: statist, social, and civil (Fig. 1).

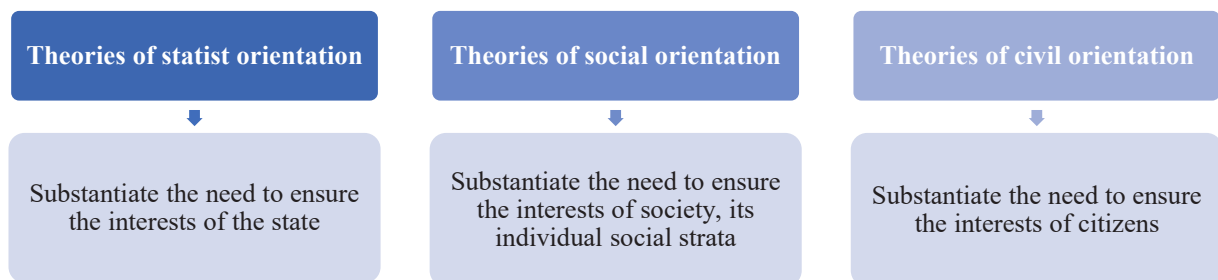


Figure 1. Block diagram of teleological theories

Statist theories (from *French* état – state) provide for the provision of state interests as the main criterion for its success. In general, such theories of statism can be outlined: the theory of the totalitarian state, the theory of the corporate state, and the theory of the regulatory state. The idea of the latter was created by prominent philosophers of the 17th-18th centuries, such as G.W. Leibniz or H. Wolf, according to whom for a good life it would be enough to introduce “good” government agencies [15; 16]. G.W. Leibniz wrote on this matter: “Experience has shown enough that the state can be flourished only by establishing good collegia because as in a clock one wheel gives movement to another, so in a large state machine one collegium must give movement to another, and if everything is arranged with the exact dimension

and harmony, the arrow of life will show the country happy hours” [15, p. 365]. This opinion was almost completely shared by H. Wolf: “The government should have the right and duty to force everyone to work, set wages and prices for goods, take care of the arrangement of beautiful streets, strong and beautiful houses, delight the eyes of the people with pictures that please the eye and ears with music, birds singing, and the murmur of water, promote social entertainment with theatrical performances and other spectacles, encourage poetry, take care of children’s upbringing, ensure that adult citizens attempt to be honest and pious” [16, p. 399]. The subjects “... should be willing to do what the government considers necessary for the common good” [16, p. 399]. Such ideas of a “regulatory state” were largely

¹Law on the structure and powers of the Grand Council of Fascism. (1933, December). Retrieved from <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1928-12-11&atto.codiceRedazionale=028U2693&tipoDettaglio=originario&qId=&tabID=0.19890030577053053&title=Atto%20originario&bloccoAggiornamentoBreadCrumb=true>.

²Decree approving Labor Jurisdiction. (1938, March). Retrieved from <http://www.luisbelenes.es/FueroDelTrabajo.htm>.

³Political Constitution of the Portuguese Republic. (1933, March). Retrieved from <https://www.parlamento.pt/Parlamento/Documents/CRP-1933.pdf>.

implemented by the Russian Emperor Peter I. Later, the world constitutional doctrine began to focus on the interests of citizens. However, due to the fact that “no political system will ever be able to function smoothly without unpredictable events” [17, p. 235], in the 20th century, statist theories were “revived” within the theories of totalitarian and corporate states. Although, according to K. Ingerflom, the term “totalitarianism” was originally used in a negative sense (in particular, the researcher cites as an example the views of opposition figures J. Amendola and P. Gobetti) [18, p. 372-373], in the mid-1920s it began to be used by politicians and philosophers who professed other views. Thus, in 1925 the Italian philosopher J. Gentile substantiated the need to build a strong state in Italy, because “the maximum of freedom always coincides with the maximum strength of the state” [19, p. 31]. The leader of the Italian fascists, B. Mussolini, defined totalitarianism as a society in which the main state ideology exerts a decisive influence on citizens, since “there are no human or spiritual values outside the state” [20, p. 237]. Therewith, due to the fact that “ideology plays a role in a complex set of different options for interaction between politics, social experience, public opinion” [21, p. 287], the very idea of totalitarianism begins to see a public ideal in the state, because “the fascist concept of life emphasises the importance of the state and accepts the individual only as much as its interests coincide with the interests of the state, which represents the conscience and universal will of man as a historical entity” [20, p. 237]. Therewith, J. Gentile and B. Mussolini were of opinion that the development of communication technologies leads to the continuous improvement of propaganda, resulting in the inevitable evolution of society towards totalitarianism [22, p. 120].

Nevertheless, it should be borne in mind that fascist Italy, which declared totalitarianism as a fundamental constant of its statehood, in fact, has not reached the statist level, a kind of which is a totalitarian state. In particular, based on Art. 1 and Art. 2 of the “Law on the Structure and Powers of the Grand Council of Fascism” of December 9, 1928, “The Grand Council of Fascism is the supreme body that coordinates and concentrates all the activities of the regime..., performs a legislative function in cases established by law and must...provide conclusions on all other issues – political, economic, or social, state importance, by order of the head of government”, who, in turn, “holds the post of chairman of the Grand Council of Fascism”¹. Such nationalisation of the fascist party actually resulted in its fusion with the state. However, in this chain, domination belonged to the fascist party, not the state. The state only served the interests of the fascists, in particular, deputies legitimised

the fascist decrees by their vote [23, p. 399], which were abolished by the Constitutional Court of Italy only in 1956 [24, p. 12].

In another state that declared totalitarianism as its basic characteristic, Spain, the situation was somewhat different. In particular, the dominant political force in the country – the Spanish phalanx of traditionalists and the junta of the national-syndicalist offensive, despite having a certain influence, could not become a force that could subordinate the state to its will since it lacked its own ideology and was actually the association of all anti-republican forces – the military, monarchists [25, p. 78]. In neighbouring Portugal, the ruling party “National Union” was established by the government to fight opponents of the regime of A. Salazar [26, p. 483]. However, similarly to “Spanish phalanx”, the “Union” was only part of the state, not its ruler. Based on this, Spain in the time of F. Franco and Portugal in the period of A. Salazar had a frankly statist character. The experience of Eastern European countries before World War II also testifies to certain statist features in the teleology of the statehood of Poland and Hungary. In particular, the latter during 1920-1944 existed under the Regency – the de facto dictatorship of Regent M. Horthy, who ruled the country on behalf of King Charles IV [27, p. 437]. The situation was similar in the Second Polish-Lithuanian Commonwealth, where J. Pilsudski in May 1926, having organised a coup d’etat, arranged a dictatorial regime “Sanation” [27, p. 438].

In contrast to totalitarianism, the idea of a corporate state was the result of the development of the theory of “solidarism” by L. Duguit, who considered the state as a “working corporation”, which is a set of public services that serve the whole society, “the whole nation” [28]. Duguit was of the opinion that the corporate state would replace the state as a “public power” since its creation is aimed at overcoming class antagonisms and eliminating classes altogether [28]. Instead of classes, proponents of this theory introduced the concept of “corporations”, which initiate the cooperation between “labour and capital”: each corporation performs its own social function, while the entrepreneur in the “corporation” is not an “exploiter”, but an “industry leader”. The ideas of the “corporate state” were most fully embodied within fascist Italy, Franco’s Spain, Salazar’s Portugal, and partly in Nazi Germany. Thus, in particular, the Political Constitution of the Portuguese Republic of March 19, 1933, in Article 5 stipulated that Portugal is a “unitary and corporate Republic”².

As for Spain, Art. XIII of the Spanish “Charter of Labour”³, approved by a special decree of March 9, 1938, enshrined the following aspects:

1. The state system of national syndicalism will be

¹Law on the Structure and Powers of the Grand Council of Fascism. (1933, December). Retrieved from <https://cutt.ly/1IQKbhx>.

²Political Constitution of the Portuguese Republic. (1933, March). Retrieved from <https://www.parlamento.pt/Parlamento/Documents/CRP-1933.pdf>.

³Decree approving Labor Jurisdiction. (1938, March). Retrieved from <http://www.luisbelenes.es/FueroDelTrabajo.htm>.

inspired by the principles of Unity, Totalitarianism, and Hierarchy.

2. All elements of the economy will be covered by production or service industries – vertical syndicates. Persons of liberal professions and technical specialities will be organised in a similar way in accordance with the established laws.

3. A vertical syndicate is a public law corporation that is constituted as a single organism that combines all the elements involved in the economic process within a certain branch of production or service and is built hierarchically under the leadership of the state.

4. Leading positions in the syndicate will necessarily be held by members of the “Spanish phalanx of traditionalists and the junta of the national-syndicalist offensive”.

5. The vertical syndicate is a tool in the service of the state; the economic policy of the state is implemented primarily through syndicates. Syndicates should consider production problems and make proposals to solve them, subordinating these proposals to national interests. The vertical syndicate has the right to intervene through special bodies in matters of regulation, protection, and compliance with working conditions.

6. The vertical syndicate may establish, maintain, or finance research institutions, moral, physical, and vocational education, self-sufficiency and care, and social institutions that may arouse interest in various elements of production.

7. Syndicates establish hiring bureaus to provide workers with jobs according to their abilities and merits.

8. The functions of syndicates include providing the state with the information necessary for concluding production statistics.

9. The law on syndicates will determine the form of inclusion in this new system of existing economic and professional associations.

Admittedly, constitutional law “reveals the symbolic social power of those who determine the meaning of the law” [29, p. 220], therefore, in the conditions of Franco’s Spain, the interests of society and ordinary citizens united in syndicates were completely subordinated to the interests of the state.

In the second half of the 20th century, the so-called “Regime of the Colonels” was openly statist, the Constitution of which actually established a puppet Constitutional Court responsible for “constant supervision” of political parties and could outlaw them, even if their actions were nonviolent and formally legal [30, p. 182].

Teleological statism in Russia: The dichotomy of personalism and statism

Therewith, there are at least two approaches to the implementation of teleological statism in state-building, which best illustrates the experience of developing Russian statehood. The fact is that, unlike the Kingdom of Galicia-Volhynia, which is now considered the basis of modern Ukrainian statehood, in Russia there were

two similar foundations: Novgorod and Pskov feudal republics and Vladimir-Suzdal principality in the north-eastern lands of the ancient Russian Empire [31, p. 52]. However, due to the historical development, the influence of the Novgorod-Pskov lands was practically nullified due to the entire policy of the Russian state. The ideals of liberties that both Novgorod and Pskov were famous for now practically do not affect its activities in any way. As for the ideals of autocracy, they were mostly characteristic of the Vladimir-Suzdal principality, rather than the Novgorod Republic. Therewith, it should not be assumed that autocracy is the result only of the Horde’s rule because it has been inherent in the northeast of the ancient Russian Empire since the time of Andrey Bogolyubsky [32, p. 7]. In fact, it is from the time of the latter that the history of Russia begins, because it was this prince who first decided to build his own state with its own capital, rejecting even the spectre of formal power in Kyiv [33, p. 278].

At first, autocracy was developed due to the personality of Andrey Bogolyubsky, who conducted the centralisation of power through the devaluation of the interests of both his princes-relatives and the local boyars, which led to conflict situations and, in the end, turned into the fragmentation of the Vladimir-Suzdal principality into new allotments headed by princely descendants. This became especially relevant when the descendants of Vsevolod the Big Nest extended their power to all the cities of North-Eastern Russia [34, p. 303-304]. When analysing the social basis of state power in the Vladimir-Suzdal principality, it is worth noting that the leading role in it was played not by local boyars, but by the so-called “senior princely druzhina” – professional soldiers whose interests were closely related to the interests of the prince. There was also “younger druzhina”, whose representatives held various types of judicial and administrative positions, for which they received land with peasants from the prince. Boyars who did not belong to the “druzhina”, were called “free servants”. And although they owned land plots, they were obliged to perform military service to the prince. Later, impoverished families stood out among them, which became known as “boyar children”. Therewith, the nobility was born. At first, they held grassroots positions in the prince’s court, and later began to be involved in military service, for which they also received land with peasants [31, p. 53-54].

This is how such a feature of Orthodox-Russian subcivilisation as statehood, which included military service to the state and readiness to protect it, gradually begins to develop [35, p. 191]. The need for service to the prince as a way of life was emphasised in the Praying of Daniel the Immured: “my Lord! Don’t look at my appearance but look at how I am inside. I, the Lord, although thin in clothes, am nevertheless endowed with intelligence; young in age, but old in thought” [36, p. 65]. According to B. Rybakov, Danylo Zatochnyk, who came from among serfs-slaves, in fact, was an expression of

the interests of that stratum of service people who grew up during the 12th century, who usually went to the army, to the “younger druzhina”, and sometimes, as an exception, asked for service that required a certain “wisdom” [25, p. 308-309].

As for the social lower classes, unlike in Kievan Rus, there the communal peasants were called “orphans” rather than “smerds”. Therewith, there was no self-government in the cities, although for the first time veche traditions were preserved [31, p. 54]. This, in particular, is evidenced by the situation when the citizens of Vladimir-on-Klyazma, its “new smaller people”,

decided to support one of the sons of Yuri Dolgorukiy – Mikhail, and later his brother – Vsevolod the Big Nest [34, p. 306-307].

The authoritarian tendencies that were developed in Russia under Andrey Bogolyubsky became vividly expressed during the Mongol-Tatar Yoke, when, on the one hand, the Khan was at an unattainable height, and the subjects had to declare their worthlessness and slavish obedience. Since Mongol times, all residents had been considered servants of the state. Therewith, the entire population was divided into two numerically unequal categories (Fig. 2):

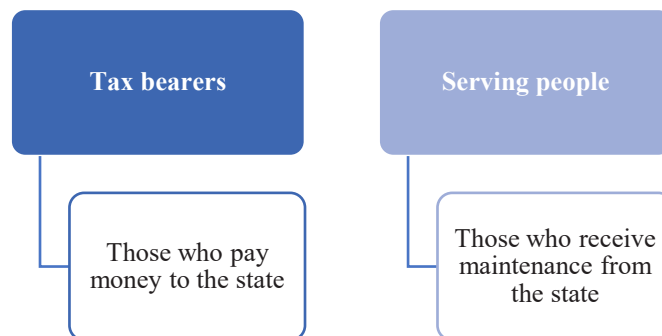


Figure 2. Structure of numerically unequal categories of the population in Mongolian times

According to Figure 2, it should be noted that service people will be – and still are – in a privileged position, but in return, they are required to be loyal and executive. Therewith, since the privileged class had no rights before the ruler, he did not recognise any rights for the lower ones either. That is why there was so much cruelty, tyranny, and inhumanity in Russian serfdom. In the worst years of serfdom, landlords treated their peasants like slaves – they could mock them as they pleased, sell them wholesale and retail, separate their families, or even torture them to death [37, p. 381-383].

Notably, the Horde model of the state existed by unspoken agreement: the monarch has the right to do anything because of the almost divine status of his power, and the people (including the leading strata of society) take it for granted. As an example, the oprichnina – the territory of full sovereignty of the tsar, which included the central and northern lands of the Tsardom of Russia with all the cities belonging to it [38, p. 69]. In this territory, “the terrible habit of not respecting the life, honor, and property of one’s neighbour reigned” [39, p. 377-378]. The results of such an oprichnina have not yet been overcome in the minds of Russians. As the Ukrainian historian M. Kostomarov quite rightly noted: “Having created an oprichnina, Ivan turned the Russians against each other, showed them the way to seek mercy or salvation in the death of their neighbours, accustomed them to false denunciations through executions for clearly fabricated crimes and, committing inhumane crimes solely for fun, cultivated callousness and cruelty in his environment. Respect for truth and

morality disappeared after the tsar, who, according to the popular ideal, should be the guardian of both, staged such spectacles in front of his subjects as baiting innocent people with bears or publicly torturing naked girls, while adhering to the strictest rules of monastic piety. In moments of one’s own danger, each person naturally thinks only of oneself; but when such moments for Russians lasted for decades, it is clear that a generation of self-serving and hard-hearted egoists was to be raised, in whom all thoughts, all aspirations were inclined only to their own protection, a generation for which, with the external observance of the usual forms of piety, legality, and morality, there was no inner truth left. Those who were smarter than others had to become a model of deceit; this was an era when the mind, confined exclusively to the narrow limits of self-serving reasoning inherent in all modern life, could only manifest itself in art, through deception, and achieve personal goals. Serious diseases of human societies, similarly to physical diseases, are not cured in a short time, especially when further living conditions contribute to the continuation of the ill state; only this explains those terrible phenomena of the time of troubles, which were accumulated in the terrible era of Ivan’s torture” [40, p. 274]. Thus, the entire system of the last Moscow Rurik dynasty was based on the almost divine status of all-powerful tsars, who were “free to reward their serfs, free to punish” [41, p. 34]. On the other hand, this system was characterised by absolute obedience to the dominant part of the subjects. Admittedly, as B. Akunin wrote, the power “of such a system was minor, because it was too

dependent on an intangible element: the population's faith in the divine right of an autocrat. When this factor stopped working under Godunov, the state had nothing to replace it with. And it collapsed" [42, p. 375]. In this regard, it is worth explaining that B. Akunin in his research analysed the state as a system of institutions, and not as a country [33, p. 3]. Therefore, its collapse really took place after the coming to power of Boris Godunov and False Dmitry I, the first Russian ruler, from whom "impotence became a chronic disease of the state" [43, p. 26].

Thus, since the reign of Grand Duchy of Moscow Ivan III, who actually considered the state as his fiefdom [42, p. 374], all strata of society have served the state interests. According to the apt expression of V. Klyuchevskiy, from the very beginning "...inside Ivan III, his eldest son and grandson, the patrimonial and ruler, the autocratic master and bearer of supreme state power, began to fight. This fluctuation between two principles or orders was manifested in the solution of the most important questions raised by this assembly itself – about the order of succession of power, about its scope and form. The course of the political life of united Great Russia was ruined for more than a century by this fluctuation, which led to deep shocks for the state and the dynasty of gatherers to death" [44, p. 121]. This is largely due to the fact that it is impossible to manage a large state like an estate. If, like Ivan the Terrible, "excessive zeal is detected in the commitment to direct and manual control, the mechanism of self-destruction is launched" [42, p. 375]. Thus, the stage of the rule of the Moscow Rurik dynasty (from Ivan III to Fyodor Ivanovich) is characterised by an openly statist state, the specificity of which lies in its personalist character.

The statist system develops somewhat differently after 1694, when, with the death of Natalya Kirillovna Naryshkina [15, p. 367], her son Peter received real power in the Tsardom of Russia. During the time of Peter I, the country's social elite underwent a major transformation. It became not much freer than the serfs because it had more responsibilities than privileges. The tsar considered all nobles to be his servants, and servants had to serve. Moreover, Peter elevated even the very position of a landowner to the rank of state service. They were now responsible before the law for collecting the per capita tax from their serfs. Therewith, if in Europe the aristocracy had a choice – to serve, take spiritual orders, or do nothing, the Russian tsar did not give his szlachta such a will. Everyone was supposed to enter the service, not where one wanted, but where one was assigned. The service actually began from childhood, because compulsory education became a duty as Peter did not need uneducated servants. In 1710, with the introduction of the Table of Ranks, belonging to the szlachta was directly related to public service. A new nobility appeared – not by

birthright, but by the usefulness to which Peter attached more importance than the pedigree [45, p. 255-258]. According to B. Akunin, "the empire needed officers and officials, not degenerate heirs of the ancestral estates" [45, p. 258]. As an example, the situation with the fleet can be noted, which Peter I paid considerable attention to. As is known, at first, he could not provide the Navy with the appropriate number of officers. The only way to change the situation was studying abroad. For that reason, Peter I in the 1690s began to send young nobles to Holland, Venice, England, and France. Returning, they had to undergo a test before the tsar on the level of their knowledge [45, p. 242]. Therefore, as B. Akunin wrote, "the main slogan of Petrine Russia could be formulated as: "the highest good is the benefit to the state. But also, most likely, the only one" [45, p. 371]. For this purpose, Peter I begins the development of a number of supervisory authorities. In particular, on March 2, 1711, he introduced the Fiscal Service, whose purpose was to "secretly monitor all cases and spy out the wrong court". In 1715, to oversee the execution of the will of the Senate, the post of auditor general was introduced [46, p. 22]. Finally, in 1722, the institution of the prosecutor's office was introduced. According to V. Klyuchevskiy, Peter I thought for quite a long time about the need to introduce such a body, because "the arrangement of supervision of the highest institution, which itself supervised the entire department, was a difficult task; it had to be coordinated with the forms of responsibility" [47, p. 161].

The institution of the prosecutor's office in the Russian Empire began to develop after the corresponding decrees of Peter I of January 12 and January 18, 1722 [48] and ended with his decree of April 27, 1722. "On the post of Prosecutor General"¹. According to the said decrees, subsequently, the main powers of the prosecutor's office were: supervision of officials; supervision of elders; transfer of the voivode to a court; control over persons engaged in trade; control by zemstvo burgomasters over the timeliness of customs and drinking fees; supervision of public expenditures; punishment of governors for late performance of tasks; ordering the vice-governor to supervise; severe penalties for inaccurate execution of orders in accordance with Senate decrees; punishment of persons whose activities harm the state interests; consideration of cases in accordance with the Code; warning governors, vice-governors, and the voivode about the inadmissibility of violations during tax collection; supervision by senior officials of collegia [46, p. 24]. On May 16, 1722, by the personal decree of the emperor "On the Establishment of Collegium of Little Russia in Hlukhiv and the Appointment of Brigadier Velyaminov to it, the Institute of the Prosecutor's Office First Appeared in Ukraine" [46, p. 25]. In this way, the prosecutor's office, like the "state eye", became the embodiment of the supervision that allowed the state to take care exclusively of its own interests.

¹Decree of Peter I "On the Post of Prosecutor General". (1722, April). Retrieved from <http://www.hist.msu.ru/ER/Etext/genprok.htm>.

Thus, despite the personality of Peter I, the teleological statism of state-building during his autocracy acquired not so much a personalist character as the features of statism, which was based on the concept according to which the meaning of the country's existence "is the state as a super-idea and the highest value" [49, p. 199]. The Russian Empire has ceased to be a statist empire since the reign of Anna Ioannovna when the national policy was based solely on the interests of the nobility [50, p. 247-258]. From this period, the state finally began to serve society in the face of the privileged nobility.

Conclusions

Thus, considering teleological statism in state-building, the authors concluded that it is only one of the options of state teleology, which aims to ensure the interests of the state. The above is disclosed within the framework of the doctrinal, constitutional, and historical analysis of the designated option. Therewith, when describing the doctrinal aspect of teleological statism, it should be borne in mind that at the conceptual level it emerges in the form of the idea of a "regulatory state" during the period of revolutionary transformations that marked

the transition from an agrarian to an industrial society. However, it was established that the doctrine of teleological statism was most developed in the 20th century, being implemented in the theories of totalitarian and corporate states.

Constitutional analysis of teleological statism shows that for the most part it was fixed at the level of individual laws that were recognised as constitutional. Therewith, it should be noted that the constitutions of totalitarian states of the statist area remained at the level of declarations and were not changed by the ruling regimes. Historical analysis of teleological statism in state-building indicates that not all states that established totalitarianism as a fundamental principle actually acquired a statist character. In particular, this is evidenced by the historical experience of Italy during the premiership of B. Mussolini, which put the state at the service of the ruling fascist party. In Russia, which has made the state its fundamental phenomenon, two approaches to the implementation of teleological statism were identified – personalism and statism. Therewith, the latter is largely intertwined with the social teleology of state-building in the country, which, in fact, is a matter of further research.

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Телеологічний етатизм у державному будівництві: доктринальний, конституційний та історичний аналіз

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Анотація

Забезпечення державних інтересів як провідний напрям діяльності держави є достатньо актуальною проблемою сучасної України. Саме тому, метою статті є дослідження телеологічного етатизму в державному будівництві в його доктринальному, конституційному й історичному вимірах. Методологічну основу статті становлять синергетичний та аналітичний підходи, загальнонаукові (праксеологічний, історичний та діалектичний) та спеціальні (формально-юридичний, порівняльно-правовий) методи наукового пізнання. У статті з'ясовано, що на концептуальному рівні доктринальний аспект телеологічного етатизму в державному будівництві виникає ще в «Епоху Революцій» XVI–XVIII ст. у формі теорії регуляторної держави. Водночас доведено, що у XX ст. він реалізується в теоріях тоталітарної та корпоративної держави. Співавторами обґрунтовано, що процеси втілення телеологічного етатизму в державному будівництві здебільшого закріплюються на рівні окремих законів, котрі мають характер конституційних. Доведено, що Італія доби фашистської диктатури, яка розглядала тоталітаризм як засадничий принцип своєї державності, фактично не набула етатистського характеру. Також встановлено, що Іспанія під час фактичного регентства Ф. Франко Баамонде та Португалія доби диктатур А. Салазара та М. Каетану мали відверто етатистський характер, незважаючи на те, що світова спільнота формально їх тоталітарними не визнала. У статті з'ясовано, що ідеї «корпоративної держави» найбільш ефективно були реалізовані в Італії доби Б. Муссоліні, Іспанії періоду правління Ф. Франко, Португалії під час диктатури А. Салазара та, до певної міри, III Рейху А. Гітлера. Співавторами обґрунтовано, що у витоків ідеалів самовладдя, які характерні для сучасної Росії, була ситуація, що склалася у Володимиро-Суздальському князівстві. Завдяки аналізу історичних особливостей реалізації телеологічного етатизму у державному будівництві Росії доведено, що існує два підходи щодо його реалізації – персоналізм та стейтизм. Заразом з'ясовано, що втіленням персоналістського підходу було правління московських Рюриковичів від Івана III до Федора Івановича. Обґрунтовано, що доба стейтизму в Росії тривала з часів правління Петра I до початку правління його племінниці – Анни Іоанівни. Практична цінність цієї статті полягає у тому, що вона може бути використана як у подальшій науковій роботі, так і в процесі викладання юридичних дисциплін державознавчого циклу

Ключові слова: мета держави, тоталітарна держава, корпоративна держава, монарх, конституційне регулювання, прокуратура, реформи Петра I

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Legal Means of Combating Corruption in Europe and Ukraine

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Abstract

This study investigates the complex issue of manifestations of corruption in power as the critical national factor of a negative, destructive, nationwide nature. The paper provides a comparative analysis of the practices of other European states in combating corruption, describes the significance of this experience for Ukraine. The study also touched upon the issues of searching for various forms of anti-corruption, including legal means. All of the above allowed the author to highlight the main purpose of writing this paper – a comprehensive, systematic examination of the implementation of the fight against corruption as a general social issue using evidence from Ukraine and Western Europe. The main and practically significant results were obtained by theoretical and methodological research of scientific publications covering the issues of corruption both at the international and international levels, tools of comparative legal analysis, system-structural analysis, value-normative and institutional methods, content analysis results of sociological surveys, statistical data and official documents, etc. The study presents information data from surveys conducted by various social independent institutions: The O. Razumkov Ukrainian Centre for Economic and Political Studies; the Kyiv International Sociology Institute, etc. This article is a problem study of an academic, advisory socio-political, and legal nature, which has an unconditional practical significance, as well as the originality of clarifying some issues. The materials of the publication study are aimed at attempts to thoroughly investigate the key aspects of the development of anti-corruption legislation and other measures to counter corruption in Ukraine. Furthermore, the subjects brought up in this paper are, admittedly, promising for further extensive research and refinement of individual points superficially touched upon herein

Keywords: moral foundations, rules of conduct, manifestations of corruption, public survey, oligarchs, Ukraine, anti-corruption legislation

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Introduction

The conditions and the main factors of the emergence and development of manifestations of corruption in various European countries vary depending on the national specifics and the developed system of management of public processes, the level of development of economic leverage on the authorities. In this regard, attempts to develop common universal legal means of preventing and suppressing the receipt of illegal income, bribery of government officials, and other manifestations of corruption seem practically unrealistic and virtually impossible. Modern corruption phenomena usually have a considerable public resonance and damage the interests of the state and society, violate the foundations of the constitutional order of European states and interfere with the direct action of the democratic principles of Ukraine's development, hinder the development of an efficient management system in the field of economic and financial relations between the state and civil institutions, commercial organisations, effective protection of private property, pursuit of the entrepreneurs' interests. In some European countries, legislation contains numerous administrative provisions included in certain disparate legal acts and aimed at combating corruption in public administration and government. In other European countries, there are even special laws containing moral legal norms of behaviour of civil servants in the performance of their public duties.

All legal means of combating corruption should be based on the recognition and protection of the rights, interests, and freedoms of the individual with a clear performance of duties by officials within their mission. Therewith, complex legal norms concerning ethical principles, restrictions, and behaviour of civil servants should be developed considering the creation of conditions for the real implementation of anti-corruption measures in the state apparatus.

The purpose of this study is to investigate the processes of spreading corruption manifestations in Ukraine, which reduce public confidence in the authorities and legal measures aimed at solving the issues of the proliferation of corruption in public authorities.

This paper touches upon various issues related to the purpose of the study: the authors cover the basics of legislative regulation of public service in European countries; identify the causes and factors of the spread of corruption and measures to combat it; demonstrate modern legal means of countering manifestations of corruption in public power structures.

The problem of corruption has been the subject of study by various researchers and specialists: the specific features of the investigation of corruption crimes in Brazil and their scale, the social aspect of their manifestation are touched upon in the studies of E. Carvalho [1], R. Ivory [2]; the issues of corruption of rural officials are touched upon in the publication of D. Jeong and A. Shenoy [3]; some experts focus on the international nature

of corruption and its proliferation in unstable societies and transitional states [4; 5].

The practical significance and results of this study lie in the fact that the formed material and the conducted research allow pointing out practical shortcomings within the framework of anti-corruption policy in Ukraine. Therewith, the author formulated recommendations for improving the legal means of combating corruption.

The originality of this study is associated with the analysis of certain topical issues on improving the anti-corruption struggle, considering the use of modern means and tools of constitutional and sectoral legislation, as well as various organisational measures. Latest articles of various researchers (2020-2021) were also involved in this paper for an in-depth analysis of the problems under study.

Materials and Methods

Theoretical and empirical research of the subject under study was performed in several stages:

1. The first stage of the study formulates and identifies urgent issues requiring an in-depth investigation of using the tools and means to combat corruption in modern Europe, considering the socio-economic, legal policies of Ukraine, Germany, Great Britain, Spain, and other countries. Methodological research tools were also formulated and defined, using which the results were analysed and generalised within the framework of the subject matter.

2. At the second stage of the theoretical and methodological research, a content analysis of the results obtained, the study of generalised data from scientific sources, normative literature, and the results of sociological and political science surveys were carried out. Selected aspects related to the statutory regulation and improvement of certain measures to combat corruption in Ukraine were also covered in detail.

3. At the final stage, the results of this study were summarised to formulate the authors' opinion on the identified problematic elements. The results of investigating the legal regulation of anti-corruption activities using evidence from a particular state (Ukraine) were also summarised with the study of particular results and generalisation of all conclusions at the final stage.

The processing of information data involved the use of general logical and general scientific methods of cognition of legal and political processes and phenomena: analysis of the studies of other researchers and analytical information (to identify particular vectors and measures of the national anti-corruption policy); synthesis of various results obtained during this study and summary of research results. The instruments of specification of legal categories and processes allowed identifying the features of legal regulation and consolidation of the main anti-corruption tools in the modern national legislation of Ukraine.

The formal legal method was used to investigate specific legal processes, national legislation governing and consolidating the fight against corruption, restricting the rights of oligarchs to political interference in the state affairs, the creation of a special anti-corruption bureau, etc.

The method of comparative political science and comparative legal science were employed to identify the conceptual provisions of legislative acts, other government documents and measures in the field of combating corruption by comparing the practices of various Western European countries: Germany, England, etc. The European practices of combating corrupt manifestations in Western states has a considerable history, and its importance for Ukraine is undoubted.

As a special research method, content analysis involved the study of the internal content of individual regulatory documents and the results of surveys of the population of Ukraine. Quantitative characterisation and generalisation of the data of sociological surveys conducted by independent structures and social institutions allowed demonstrating the public opinion of modern citizens of Ukraine regarding the corruption components of national policy on individual examples.

The methodological tools used in this study allowed forming the research-to-practice results, which have unconditional social and political importance for the further development of Ukrainian statehood.

Results

The legislative regulation of the civil service and public discipline in different European countries formally differs; however, in terms of the content of constitutional and administrative principles and anti-corruption legislation, modern states tend to converge.

Germany, as a prominent representative of the Romano-German legal family, has a fairly extensive anti-corruption legislation, which includes the norms of the German Constitution, the General Law on the Legal Regulation of Public Service and a special act on Public Service. There is also a regulatory framework that consolidates the issues of the powers of federal employees, monetary and material support of the official apparatus. To ensure discipline and consolidate the rules of conduct, the moral foundations for exercising the powers and duties of state officials, a Disciplinary Legislative Act has been federally developed and introduced, which consolidates various types of punishments within the framework of bringing to disciplinary responsibility.

According to German legislation, civil servants have considerable restrictions in engaging in business activities, have no right to put personal interests over public ones, must not harm national interests, etc. [6]. The available legislative restrictions on the public service and the specific features of disciplinary responsibility are aimed at consolidating the status of government

officials as “servants of the people” who lead a highly moral lifestyle, are always reserved and honest, support the constitutional system of the Federal Republic of Germany, carry out only activities related to the administrative and political reform of the country.

In the United Kingdom, the modernisation of the legal framework governing the civil service and the introduction of new anti-corruption measures have led to the creation and development of a special-purpose ethical infrastructure – the Committee on Standards in the Public Sphere¹. Currently, this body is developing reports and recommendations on improving disciplinary norms, rules of conduct, and moral foundations of public service at the level of regions and municipalities.

Based on these reports, the UK Government is building a policy for the further development of anti-corruption legislation. The achievements of the Committee can be considered the development of recommendations in the following areas: the introduction of high standards in the behaviour of officials, the expansion of the structure of the legal rules of business appointment, provided through legal agreements, transparency of the institution of lobbying the interests of commercial structures in government, the reform of the rights and duties of the Commissioner for Public appointments, etc. Furthermore, the Committee performs a territorial audit and investigates corruption among local and regional authorities, the results of which allowed developing numerous recommendations and identifying “best practices for improving ethical standards in local authorities”².

The practices of Spain are unusual, where the civil service is represented by two types of bureaucracy at once: officials of the royal court and “people’s” civil servants. Most recently, the Royal Court of Spain published a Code of Conduct for its Employees (2016). This document, originally intended for internal use, has been widely distributed among public authorities. Many of its norms were well-perceived by other employees who do not belong to the category of the “royal court”: to comply with the laws of Spain, to improve professionalism and qualifications, not to disclose secret information, to communicate politely with representatives of the population, to refrain from using official position for lucrative purposes³.

Through the adoption of the Law of Ukraine No. 1698-VII “On the National Anti-Corruption Bureau of Ukraine”⁴ of October 14, 2014, Ukraine established a special structure handling the issues of corruption of officials in the country. However, unlike the UK Committee on Standards in the Public Sphere (CSPS), the Anti-Corruption Bureau investigates corruption-related offences in the criminal and public sphere, i.e., it has a special narrow competence. It seems necessary to introduce legislative amendments to the Law of Ukraine No. 1698-VII “On the National Anti-Corruption Bureau

¹Independent reports of the Committee on Standards in Public Life. (2021). Retrieved from <https://cutt.ly/HOVrt4A>.

²*Ibidem*, 2021.

³Code of Conduct for Spanish Civil Servants. (2021). Retrieved from <https://cutt.ly/oOVrczu>

⁴Law of Ukraine No. 1698-VII “About the National Anti-Corruption Bureau of Ukraine”. (2014, October). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T141698.html.

of Ukraine”¹ of October 14, 2014 to expand the functions of the specified special body for the preparation of reports and recommendations on combating other manifestations of corruption in the state (following the example of the UK CSPA), to assign to the National Anti-Corruption Bureau of Ukraine the right of legislative initiative in the field of its activities (corresponding amendments can be introduced to the Constitution of Ukraine). In general, the situation with the corruption of Ukrainian officials has recently been described as dangerous, affecting the overall economic crisis in the country.

According to the latest data (end of October 2021), based on the results of a three-day political and sociological study conducted by specialists of the O. Razumkov Ukrainian Centre for Economic and Political Research by personally interviewing 1,200 adult respondents, it can be indicated that currently over half of the country's population (55.9%) believe that their financial standing has worsened compared to 2019-2020. Only a third of respondents (35.3%) admitted that it remained the same, and only 7.5% recognised some improvements in material status and stabilisation of monetary income (Fig. 1) [7].

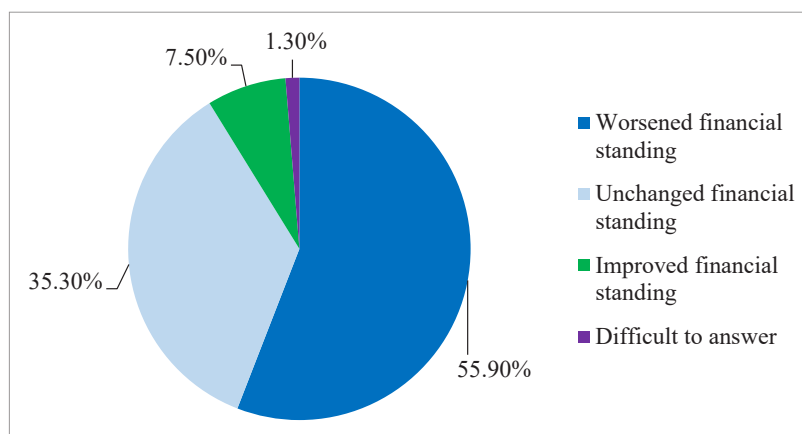


Figure 1. Public opinion regarding their financial standing (October 2021, %)

Therewith, as the main factors (Fig. 2) affecting household income and personal earnings of the population, as well as the source of all financial issues of the country, respondents name the incompetence of public authorities headed by the central government and the President (39.1%), a high degree of corruption and embezzlement of state and municipal budget funds (35.4%). Approximately 10.2% of respondents also point to the complexity of the economic situation

during the pandemic. This, in their opinion, affects the restriction of entrepreneurial activity, the inefficiency of all structures of the service sector, service and entertainment, forced unpaid absenteeism, increased mortality of the population. 10.0% of respondents consider the current national crisis to be a consequence of military actions and the presence of instability in the eastern territories of Ukraine [7].

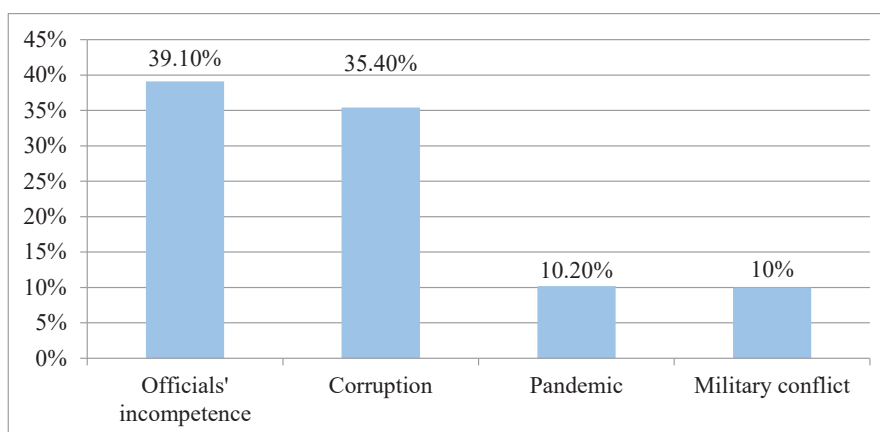


Figure 2. The main factors and causes affecting the instability of the situation in Ukraine (2021, %)

On certain topical issues related to the study of corruption manifestations, even nationwide surveys of the population are conducted to identify attitudes

towards certain problems of internal and external policy. In 2020, at the initiative of President Volodymyr Zelenskyy, an all-Ukrainian population survey was carried out for

¹Law of Ukraine No. 1698-VII “About the National Anti-Corruption Bureau of Ukraine”. (2014, October). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T141698.html.

the first time in the history of Ukraine, the key questions of which concerned the national sovereignty of the country, territorial issues, corruption of public officials.

The creation and successful launch of the public services platform “Diia” can be called one of the essential contemporary anti-corruption measures undertaken and implemented in Ukraine [8]. This digital resource will avoid administrative barriers in obtaining the necessary services, reduce the personal and financial interest of individual management entities and affect the overall state of corruption in the state.

Furthermore, at the initiative of the President of Ukraine, the Law of Ukraine No. 1780-IX “On the Prevention of Threats to National Security Associated with Excessive Influence of Persons with Considerable Economic and Political Weight in Public Life (Oligarchs)” of September 23, 2021¹ was developed and adopted.

According to the public opinion, studied by a survey of the population of the state by representatives of the Kyiv International Sociology Institute (KISI), the aforementioned law is necessary in Ukraine to limit the influence of oligarchs on political processes in the country.

In particular, according to Table 1, in the summer of 2021 (within a week), KISI specialists conducted an all-Ukrainian survey of the population (a sample of 2,031 respondents living in 107 municipalities of the country), which demonstrated the following quantitative results: 56.4% of respondents fully approved the adoption of a regulation on de-oligarchisation, which, in their opinion, will help fight corruption in the highest “echelons” of power, and only 20.4% of Ukrainians consider this regulation a threat to large businessmen of the country [9].

Table 1. *Opinion of the population of certain regions of Ukraine regarding the adoption of the Law on Oligarchs*

Answers	Nationwide result	Central part of Ukraine	South of Ukraine	East of Ukraine	Donbas Region
Approved the adoption of the law as necessary	20.4	20.5	21.3	19.1	18.1
The law is a threat to oligarchs	56.4	57.6	57.1	52.9	61.8
Have not decided	22.9	21.7	20.8	27.7	18.8
Refused to answer the question	0.3	0.1	0.8	0.3	1.4

According to the results obtained in 2013, 2016, 2020, 2021 by the Rating Group Ukraine, which is an independent research organisation conducting research in compliance with the international standards of the ESOMAR and WAPOR codes, from 18% to 51% of the population in various regions of the country consider corruption and bribery to be a serious issue [10-13].

In 2016, over 90% of respondents, i.e., the overwhelming majority of 2,000 Ukrainians surveyed from different regions of the country, practically did not recognise the achievements of public authorities in the following areas: economic and social policy, combating bribery, laundering illegal income, corruption, limiting the influence of oligarchs on political and legal processes in the state [10].

In 2020, according to public opinion, in the Chernihivska Oblast, a fifth of the population (out of 1,200 people surveyed) recognised bribery and corruption as a nationwide issue (18%), as well as 1/7 (157%) of Ukrainians faced it personally [11]. In the Lvivska Oblast, according to a survey of 2,000 respondents conducted in 2020, the problems of substandard medicine and corruption concern every fifth respondent (about 20%) [12].

All these data and indicators demonstrate the seriousness of the issue of corruption in the government in Ukraine, which should be resolved, including by legal methods.

Discussion

According to the studies of various researchers and specialists regarding the legal, political, and social elements of modern manifestations of corruption in the activities of central, regional, and local authorities, the large-scale level of national corruption exacerbates the problems of the crisis and transition period of socio-economic development of the country, preventing their constructive resolution.

This process was expressly illustrated by researchers using evidence from India, where the heads of rural settlements are engaged in the distribution of vacant positions and jobs in rural areas. Chon Dahan and Shenoy Ajay emphasise that the public central authorities and administrations of India, informal government organisations, non-profit structures and various legal organisations use a variety of funds and financial instruments aimed at manifestations of corruption at the local level of government. Recently, together with the public, the central government of India and regional authorities have been developing and implementing policy documents to combat poverty in rural areas, which should also ensure maximum transparency and accountability of the activities of municipal governments. The studied analytical materials presented on the official websites of government agencies allow researchers to establish the level and scope of corruption in certain

¹Law of Ukraine No. 1780-IX “On the Prevention of Threats to National Security Related to the Excessive Influence of Persons with Significant Economic and Political Weight in Public Life (Oligarchs)”. (2021, September). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T211780.html.

territories, where various frauds are committed among the heads of rural settlements aimed at creating an unequal distribution of vacant jobs among the population and facilitating the receipt of local service positions. Therewith, as the authors of this paper note, corruption manifestations also persist due to the gap between the legal regulation of the struggle for morality in the public service system and the real transparency of the activities of individual officials in practice. Timely access to information about the activities of local government representatives will allow Indian citizens to timely respond to violations of their rights by officials [3].

In addition, Chong Dahan and Shenoy Ajay note that many residents of rural areas, having full awareness of the corruption of local officials, prefer not to apply for protection of their rights to specialised human rights bodies and institutions, but to pay a certain amount to obtain employment privileges. Sometimes honest and highly moral local politicians in India (for instance, in the state of Uttarakhand) independently undertake the factual implementation of anti-corruption laws, comprehensively protecting violated human rights and interests and supporting initiatives of citizens and public organisations in this area [3].

Recent events in Brazil have allowed the world community to explore various manifestations of hidden corruption using evidence from this country. Many experts have addressed the issues of corruption and crimes as a negative experience of democratic Brazil. Brazil was represented in the international community as a model of a new democracy among all developing countries, which “absorbed” the socio-political realities of the development of civilised countries of Western Europe. However, modern processes indicate that the political culture of Brazil retains a tendency to corruption, the development of unlawful ties between big business and government agencies, which led to abuse of official powers among high-ranking officials.

According to the criminal investigation conducted in the cases of “Lava Jato” and “Odebrecht” in Brazil, well-known political personalities, parliamentarians, large entrepreneurs, party functionaries, former representatives of executive authorities, as well as the management of the Petrobras oil company were brought to justice. These subjects were accused of various criminal offences of money laundering, bribery, and unlawful construction of facilities not provided for in the state budget [1].

E. Carvalho Nepomuceno Alencar investigates the trust of the Brazilian population in the new government after the above negative events. In his thesis research, the researcher establishes and studies the correlation between the practices of establishing manifestations of criminally punishable corruption and the decline in trust in local public structures in Brazil and other countries (the anti-corruption investigation affected subjects from 12 Latin American and African countries, for

example, Peru). Carvalho offers a diverse set of tools to prevent the expansion of corruption processes in developing countries [1].

R. Ivory, using the data from the investigation of cases in Brazil, offers his tools for countering corruption in Australia: increasing the level of audit of the financial activities of state bodies and management institutions; introducing necessary and rational changes to the Australian federal anti-corruption legislation; improving the reputation of public officials and their moral ideals; achieving transparency in the use of budget funds; developing the principles of establishing criminal liability of corporations, etc. [2].

Researchers from the University of California identify the following measures to combat national and transnational corruption: unscheduled supervisory and control state inspections, achieving decent wages and material incentives for local public officials, extending the term of office of the most honest and professional employees [14].

M. Gehrke Ryff Moreira reveals the consequences of a decrease in the effectiveness of anti-corruption policy in various countries, manifested in the imperfection and untimely imposition of judicial sanctions, low quality of investigation of money laundering crimes, weak accountability and control during legitimate elections, insufficient supervision of the legislature over the implementation of adopted regulations and the activities of officials [15].

An in-depth study by Baragvanat Vogel covers the issues of manifestations of corruption in the oil and gas field. This researcher draws parallels between tax evasion and the officials’ lucrative interests [16]. T. Mackey investigates the introduction of digital technologies that can prevent corruption in the healthcare and pharmaceutical industries. They are also used to eliminate administrative barriers to access to special medicines, to combat the leakage of expensive medicines and the penetration of substandard or falsified medicinal products [17].

This researcher emphasises the importance of including additional digital anti-corruption technologies in the regulation and control of public procurement of certain medicines from manufacturers (pharmaceutical companies in various countries) and achieving the global goal of developing quality healthcare in all countries of the world [17]. A separate group of researchers and practitioners covers the use of corrupt ties in the government when large companies evade taxes and other financial and fiscal fees [18].

O’Brien and two of his Chinese colleagues conducted a comprehensive study of unlawful regional processes in China, when for a certain fee, local officials of public authorities assist the socio-economic elite in conducting illegal and unauthorised political popular actions to overthrow the “objectionable” local government. In turn, individual officials, by organising collective actions of citizens, seek to support civil society initiatives

and use them as tools in the struggle for power against arrogant, despotic, or corrupt bosses [19]. Some experts emphasise the international nature of corruption and its proliferation in unstable societies and transitional states [4; 5].

The conducted research allowed concluding on the possibility of reducing or limiting corruption manifestations in power only by simultaneously eradicating the conditions and factors that cause them; therewith, legal means of combating corruption should be used in all diversity, with all determination and in various vectors and levels of public governance structures. National corruption exists in Ukraine insofar as the state constantly, massively, and often unreasonably interferes in the personal, public, socio-economic, cultural life of the population of the country. The problem is also that public administration bodies and power structures, exercising the legislatively regulated powers within their competence and their social purpose, are obliged to intervene, but such intervention should be as correct as possible, objectively necessary and effective. And the corruption existing in the world and in national states acts a certain indicator that points to the inefficiency, irresponsibility of the actions of the state apparatus of the state in question.

Conclusions

The issues raised in this paper bring insight into the nationwide constitutional and general legal issues of the spread and growth of corruption in Ukraine, as well as individual measures to counteract its manifestations in society and public structures by legal means. The materials of this study do not apply an analysis of the criminal sphere of combating corruption-related crimes, since this subject under study is most frequently investigated

by researchers who miss essential details of improving the legislative regulation of tools and measures to combat corruption as a universal social issue. It was the combination of general social, general legal, and political methods of investigating corruption in the Ukraine that substantiated the originality of the subject matter, allowing to touch on new aspects upon the research of legal means of combating corruption in Ukraine and in European countries.

The investigation of the problematics allowed formulating the following recommendations:

- harmonise the content of legislative and sub-legislative acts with the norms of the Law of Ukraine No. 1780-IX “On the Prevention of Threats to National Security Associated with Excessive Influence of Persons with Considerable Economic and Political Weight in Public Life (Oligarchs)” dated September 23, 2021 and ensure the implementation the norms of the said law;

- amend the Law of Ukraine No. 1698-VII “On the National Anti-Corruption Bureau of Ukraine” of October 14, 2014 to expand the functions of the specified special body for the preparation of reports and recommendations on combating other manifestations of corruption in the state;

- expand the administrative legal means of preventing and suppressing corruption, specifying certain rules of conduct and the moral foundations of the activities of a public servant in the public service system of Ukraine, it is advisable for the Verkhovna Rada to adopt laws on the prevention of abuse of power or official powers, as well as on fundamentals of anti-corruption policy as soon as possible. The latest law may introduce anti-corruption standards in various spheres of public administration, becoming a fundamental act for the interpretation of industry norms.

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Правові засоби боротьби з корупцією в Європі та Україні

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Анотація

Стаття присвячена складній проблемі існування проявів корупції у владі як найважливішого національного чинника негативного, деструктивного, загальнодержавного характеру. У роботі проведено порівняльний аналіз досвіду різних держав Європи щодо боротьби з корупційними проявами, охарактеризовано значущість цього досвіду для України. Також було порушено питання пошуку різних форм протидії корупції, зокрема, правовими засобами. Все вищезгадане дозволило автору виділити основну мету написання статті – комплексне системне вивчення питань здійснення боротьби з корупцією як загальносоціальної проблеми на прикладі України та Західної Європи. Основні та практично значущі результати були отримані засобами теоретико-методологічного дослідження наукових публікацій, присвячених проблемам і питанням корупції як на внутрішньодержавному, так і міжнародному рівні, інструментами порівняльно-правового аналізу, системно-структурного аналізу, ціннісно-нормативного та інституційного методів, контент-результатів соціологічних опитувань, статистичних даних та офіційних документів тощо. У статті наведено інформаційні дані опитувань, проведених різними соціальними незалежними інститутами суспільства: Українським Центром економічних та політичних досліджень ім. О. Разумкова; Київським міжнародним інститутом соціології та ін. Ця стаття є проблемним дослідженням науково-рекомендаційного соціально-політичного, правового характеру, що має безумовну практичну значущість, новизну уточнення деяких проблем. Матеріали публікаційного дослідження спрямовані на спроби детального вивчення найважливіших аспектів розвитку антикорупційного законодавства та інших заходів протидії проявам корупції в Україні. При цьому розглянута в роботі тематика, безумовно, є перспективною для подальшого наукового поглиблення та деталізації окремих моментів, поверхово порушених у публікації

Ключові слова: моральні засади, правила поведінки, прояви корупції, опитування населення, олігархи, Україна, антикорупційне законодавство

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