

CUESTIONES POLÍTICAS

Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche"
de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela



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Entre sus objetivos figuran: contribuir con el progreso científico de las Ciencias Humanas y Sociales, a través de la divulgación de los resultados logrados por sus investigadores; estimular la investigación en estas áreas del saber; y propiciar la presentación, discusión y confrontación de las ideas y avances científicos con compromiso social.

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Contenido

16	Presentación
	Derecho Público
21	Política y gestión institucional del turismo argentino: logros, desafíos y propuestas Policy and institutional management of Argentine tourism: achievements, challenges, and proposals <i>Nahuel Malaspina, M. Victoria Sanagustín-Fons y Carlos Gómez Bahillo</i>
44	Justicia desde la óptica de John Rawls y Robert Nozick: una perspectiva comparada Justice from the perspective of John Rawls and Robert Nozick: a comparative perspective <i>Pedro Luis Bracho Fuenmayor</i>
66	Perspectives of electronic judicial proceedings' development: international experience and possibilities of its application in Ukraine Perspectivas del desarrollo de los procedimientos judiciales electrónicos: experiencia internacional y posibilidades de su aplicación en Ucrania <i>Oleksandr Mykolaiovych Holovko, Irina V. Aristova, Volodymyr Viktorovych Shulhin y Andrii Oleksiovych Sobakar</i>
80	State policy of the potential-forming space transformation in the context of the regional development intensification Política de Estado de transformación espacial formadora de potencial en el contexto de la intensificación del desarrollo regional <i>Marta Derhaliuk, Olha Popelo, Svitlana Tulchynska, Kostyantyn Mashnenkov y Danylo Berezovskyi</i>
94	The factor of justice in the consolidation of urban communities El factor de justicia en la consolidación de las comunidades urbanas <i>Valentin P. Babintsev y Dianna V. Khripkova</i>
105	Justice: between law and Conscience Justicia: entre la ley y la conciencia <i>Andrey I. Vinogradov, Maiia E. Pankratova, Anatoly N. Yashin, Natalya Yu. Rasheva, Anton V. Emelyanov y Oksana P. Chernykh</i>
119	Legal Aspects of Dividend Payment in a Limited Liability Company Aspectos Legales del Pago de Dividendos en Una Sociedad de Responsabilidad Limitada <i>Oleksandra S. Yavorska, Pylyp D. Pylypenko, Svitlana M. Synchuk, Iryna I. Shpuhanych y Yustuna Y. Samagalska</i>



- 139 The role of the Prosecutor of the International Criminal Court in strengthening the international legal order**
El papel del Fiscal de la Corte Penal Internacional en el fortalecimiento del orden jurídico internacional
Vitalii Gutnyk, Yaroslav Yavorskyi y Roksolana Klymkevych
- 153 Legal aspects of cryptocurrency's circulation: international experience and possibilities of its application in Ukraine**
Aspectos legales de la circulación de criptomonedas: experiencia internacional y posibilidades de su aplicación en Ucrania
Mykola Karchevskiy, Artem Kovalenko, Anatolii Matviichuk y Mykhailo Volodymyrovych Zavalnyi
- 165 World experience of legal regulation of road safety**
Experiencia mundial en regulación legal de la seguridad vial
Igor Pastukh, Iryna Bukhtiarova, Nataliia Kapitonova y Bohdan Ahanin
- 179 Prospects of Ukraine's foreign economic policy concerning Latin America**
Perspectivas de la política económica exterior de Ucrania con respecto a América Latina
Poklonskyi Andrii, Poklonska Olena, Klymchuk Mykhailo, Slobodianiuk Borys y Torlo Olena
- 195 Activities of the court to investigate the circumstances of criminal proceedings and their assessment under the laws of Ukraine**
Actividades del tribunal para investigar las circunstancias de los procesos penales y su evaluación con arreglo a las leyes de Ucrania
Hanna Teteriatnyk, Oleksii Ryzhiiy, Anna Fedorova, Yurii Vykhodets y Vitalii Marko
- 211 Status and directions of perspective of the development of legal education: analysis of international experience**
Situación y direcciones de perspectiva del desarrollo de la educación jurídica: análisis de la experiencia internacional
Svitlana Hryhorivna Serohina, Serhii Boldyriev, Tatyana Steshenko y Svitlana Fomina
- 222 Tactical and procedural features of the search in the investigation of crimes against public security**
Características tácticas y procesales de la realización de un registro en la investigación de delitos contra la seguridad pública
Zaika Serhii, Soroka Andrii, Ratniuk Viktor, Bekh Oleg y Somyk Oleksandr
- 238 Principles of mediation as an alternative way to protect human and citizen rights**
Principios de la mediación como forma alternativa de proteger los derechos humanos y ciudadanos
Nadiya Bortnyk, Olha Tylchik, Galina Lukyanova, Olha Skochyliias-Pavliv y Olesia Remeniak



- 250 | The stability of State information in the face of terrorist threats**
La estabilidad de la información del Estado frente a las amenazas terroristas
Yuriy M. Bidzilya, Yevhen O. Solomin, Halyna V. Shapovalova, Viktoriia V. Georgiievuska y Nataliya M. Poplavska
- 270 | Hypernomie as a Phenomenon of Modern Society**
Hipernomía como fenómeno de la sociedad moderna
Vladimir Kuzmenkov, Konstantin Starostenko, Iryna Soina y Alexander Chekulaev
- 282 | Legal regulation of prevention of domestic violence in Ukraine**
Regulación legal de la prevención de la violencia doméstica en Ucrania
Oleksii Humin, Valentyna Merkulova, Oksana Hrytenko, Svitlana Yuldasheva y Serhii Bratkov
- 303 | Había una vez un Estado... notas para problematizar el Estado a partir de interpretaciones complementarias**
Once upon a time there was a State... Notes on problematizing the State on the basis of complementary interpretations
María Elena Nogueira Joaquín
- 320 | Implementation of the International Convention on the Rights of the Child in the South Urals in the 1990s**
Implementación de la Convención Internacional sobre los Derechos del Niño en los Urales del Sur en la década de 1990
Alexander L. Khudoborodov, Anna V. Samokhina y Nadezhda V. Korshunova
- 337 | ¿Educar o evitar el pensamiento? Un análisis sobre el lenguaje y el poder**
Educate or avoid thinking? An analysis of language and power
Marcela Karina Imaicela-Reyes
- 352 | Biopoder y ciudadanía en América latina. Una lectura desde Foucault**
Biopower and citizenship in Latin America. A reading from Foucault
Perla Eloisa Crespín-Quimí, Shirley Margarita Ordóñez-Barcia, Ricardo Geovanni Lalangui-Sarango y Olena Nesterenko
- 368 | Obtaining the testimony of a minor during the pre-trial investigation under the laws of Ukraine**
Obtención del testimonio de un menor durante la investigación previa al juicio bajo las leyes de Ucrania
Viktoriia Zarubei, Yuliia Komarynska, Andrii Babenko, Yuliia Sukhomlyn y Nataliia Kononenko
- 385 | Protection of Human Health: Medical and Legal Aspects**
Protección de la salud humana: aspectos médicos y jurídicos
Kateryna Katerynychuk, Ihor Diorditsa, Inna Kovalenko, Sergij Kyrenko y Nina Trotsiuk



- 407 | **The interests of state and civil society as a determinant of the democratic political development of Central and Eastern Europe countries**
Los intereses del Estado y la sociedad civil como determinante del desarrollo político democrático de los países de Europa Central y Oriental
Bohdan Hrebeniuk, Viktoriia Hrytsun, Valerii Bortniak, Kateryna Bortniak y Alina Liasota
- 426 | **The restrictions of the freedom of information during the Covid-19 pandemic**
Restricciones a la libertad de información durante la pandemia COVID-19
Oksana Kalitenko, Galyna Anikinar, Ekaterina Spasova y Oleksandra Shahaka
- 446 | **Administrative Liability for Environmental Offences: A Comparative Study**
Responsabilidad administrativa por delitos ambientales: un estudio comparativo
Olga M. Merdova, Demian V. Smernytskyi, Kostiantyn V. Zaichko, Valerii M. Podonitsyn y Serhii M. Onyshchenko
- 465 | **The Role of a Lawyer's Request as a Means of Legal Communication in the Field of Human Rights Advocacy**
El papel de la solicitud de un abogado como medio de comunicación jurídica en el ámbito de la defensa de los derechos humanos
Marharyta A. Pohosian, Maryna S. Horodetska, Mykola Y. Veselov, Dmytro O. Pylypenko y Olena V. Banchuk-Petrosova
- 485 | **Features of Interrogation of Minor Victims in the Pre-Trial Investigation**
Características del Interrogatorio de Víctimas Menores en la Investigación Previa al Juicio
Olga Y. Guseva, Myroslav V. Popovych, Lyubov M. Hryndey, Oksana V. Melnyk y Mykhailo V. Huzela
- 504 | **Political Extremism in Modern Democratic Transformations**
El Extremismo Político en las Transformaciones Democráticas Modernas
Ivo Svoboda, Olena V. Novakova, Olena B. Balatska, Olena V. Karchevska y Valentyn S. Tulinov
- 524 | **Comparative analysis of the legislative support for law enforcement agencies in the post-soviet space and Europe**
Análisis comparativo del apoyo legislativo a los organismos encargados de hacer cumplir la ley en el espacio postsoviético y Europa
Demian Smernytskyi, Kostiantyn Zaichko, Yurii Zhvanko, Malvina Bakal y Tetiana Shapochka
- 548 | **Administrative-legal framework for the implementation of gender equality in the activities of the National police of Ukraine**
Marco administrativo-legal para la implementación de la igualdad de género en las actividades de la Policía Nacional de Ucrania
Viktoriia Bass, Sergiy Bratel, Iryna Bulyk y Nelia Liakh



- 570 | **Shares as an object of civil law regulation**
Acciones como objeto de regulación de derecho civil
Yury Alexandrovich Svirin, Eduard Eduardovich Artyukhov, Igor Mikhaylovich Divin, Badma Vladimirovich Sangadzhiev y Vladislav Petrovich Sorokin
- 586 | **Modern Criminal-Legal Problems of the Fight Against Corruption in Russia**
Problemas jurídicos penales modernos de la lucha contra la corrupción en Rusia
Melnikov Victor Yuryevich, Seregin Andrei Victorovich, Akopov Leonid Vladimirovich, Skorik Elena Nikolaevna y K.A. Dolgopolov
- 598 | **The concept of crime detection in Russian law**
El concepto de detección de delitos en la legislación rusa
Ivan Alexandrovich Zavyalov, Taulan Osmanovich Boziev, Nikolay Nikolaevich Bukharov, Alexandr Vladimirovich Shakhmatov y Nikolay Kazimirovich Pcholovsky
- 607 | **Problem of lawyer protection: comparative legal analysis**
Problema de la protección de los abogados: análisis jurídico comparado
Vladislav Yu. Turanin, Alexandra Vl. Gridchina, Vera P. Kufina, Amala A. Umarova y Stanislav F. Dolgov
- 617 | **Prevention of crimes against the environment: the experience of Ukraine**
Prevención de delitos contra el medio ambiente: la experiencia de Ucrania
Viktoria Babanina, Oleksandr Mykytychuk, Olena Matiushenko y Viktoria Ladniuk
- 640 | **Comparative analysis of the essence of abuse of power in international legal sciences and Ukraine**
Análisis comparativo de la esencia del abuso de poder en ciencias jurídicas internacionales y Ucrania
Anna Nesterenko, Nataliia Maryniak, Marta Trush, Serhii Yesimov, Yaryna Bohiv y Vita Pervii
- 649 | **Gestión del riesgo de desastres en la conciencia ambiental de estudiantes policiales**
Disaster Risk Management in the Environmental Awareness of Police Students
Renzo Grocio Saavedra Ugaz, Abel Rodríguez Taboada, Jacinto Joaquín Vértiz Osore, Jorge Luis Flores Escalante y Jessica Paola Palacios Garay
- 674 | **Detection and Extraction of Electronic Information During Investigative (Search) Actions Under Ukrainian Legislation**
Detección y extracción de información electrónica durante las acciones de investigación (búsqueda) bajo la legislación ucraniana
Oksana Khablo, Dmytro Pysmennyi, Oleksandr Halahan, Mykhailo Nykonenko y Olha Kubareva



- 696 Combating corruption in the educational sphere: Ukrainian experience**
Lucha contra la corrupción en el ámbito educativo: experiencia ucraniana
Tetyana Kolomoiets, Oleh Reznik, Olha Bondarenko, Maryna Utkina y Alina Goncharova
- 716 Psicopolítica y Gobernanza en el Perú**
Psychopolitics and Governance in Peru
Sonia Lidia Romero Vela, Héctor Raúl Santa María Relaiza, Gloria Luz Cueva Vergara y Ana Maritza Boy Barreto
- 733 Supporting System of the National Security System of Ukraine: Legal Regulation**
Sistema de apoyo del sistema nacional de seguridad de Ucrania: Reglamento legal
Oleksiy Titarenko, Tetiana Chekhovych, Andrii Minchenko, Tetiana Morhunova y Mykhailo Striuk
- 742 Legal regulation of illegal influence on the results of official sports competitions: criminal aspect and international experience**
Regulación legal de la influencia ilegal en los resultados de las competiciones deportivas oficiales: aspecto penal y experiencia internacional
Mykola Yefimov, Inna Yefimova, Viacheslav Harkusha, Nataliia Cherniak y Nina Holenko
- 757 Judicial reforms in Ukraine: polishing procedures and their systemic role**
Reformas judiciales en Ucrania: procedimientos de lustración y su papel sistémico
Oksana Kaplina, Maxim Zhushman y Iryna Cherevatenko
- 768 Transformations of the organizational and legal mechanism of the Ukrainian state policy in tourism and hospitality**
Transformaciones del mecanismo organizacional y jurídico de la política estatal de Ucrania en el ámbito del turismo y la hospitalidad
Roman Oleksenko, Yevhenii Bortnykov, Stanislav Bilohur, Nina Rybalchenko y Makovetska Natalia
- 784 Stratagems of political and legal development of Ukraine: problems of actualization and scientific comprehension**
Estrategias de desarrollo político y jurídico de Ucrania: problemas de actualización y comprensión científica
Volodymyr Tarasyuk, Elina Morhunova, Dmytro Drobotun, Olena Stoyko y Olena Chyzhova
- 800 Smuggling or violation of customs rules: actual questions of application of administrative and criminal liability**
Contrabando o violación de las normas aduaneras: temas de actualidad de responsabilidad administrativa y penal
Vadym Pidgorodynskyi, Dmitriy Kamensky, Inna Bolokan, Tamara Makarenko y Hanna Samilo



- 815 | Linguistic approaches and modern communication technologies in political discourses in Europe and the USA (contrastive aspect)**
Enfoques lingüísticos y tecnologías modernas de la comunicación en los discursos políticos en Europa y EE. UU (Aspecto comparativo)
Nataliia Shkvorchenko, Irina Cherniaieva y Nataliya Petlyuchenko
- 832 | Portrait descriptions in poetry and prose of England of the XVI-XIX centuries: from Shakespeare to Byron (the influence of trends of the past on the present)**
Descripciones de retratos en poesía y prosa de Inglaterra de los siglos XVI-XIX: de Shakespeare a Byron (influencia de las tendencias del pasado en el presente)
Vira Mizetska, Snizhana Korkishko, Hanna Savchuk, Anastasiia Musatova y Albina Ladynenko
- 844 | Smart contracts in the context of digitalization: the legal realities of world experience**
Contratos inteligentes en el contexto de la digitalización: las realidades legales de la experiencia mundial
Olga Klepikova, Oleksandr Harahonych y Iryna Antoshyna
- 862 | Application of Innovative Technologies for Detection and Investigation of Evidence in Criminal Proceedings**
Uso de técnicas innovadoras para la revelación e investigación de pruebas en un procedimiento criminal
Iryna Hora, Valeriy Kolesnyk y Oleg Batiuk
- 875 | Political Communications of the UK Government as an Institutional System**
Comunicaciones políticas del Gobierno del Reino Unido como sistema institucional
Oksana Mikhailovna Ivanova, Mikhail Evgenievich Guryev, Zilya Raisovna Sadykova, Nailya Rifkatovna Mingazova y Ksenia Vyacheslavovna Khramova
- 884 | The Attitude of Iran's Criminal Policy Towards the Observance of the Culprit's Right to Silence in the Trials**
La actitud de la política criminal de Irán hacia la observancia del derecho de los culpables al silencio en los juicios
Sayed Alireza Mousavi, Massoud Ghasemi y Mohammad Javad Jafari
- 902 | Seizure of property: development of legislation and improvement of law enforcement practice**
Incautación de bienes: desarrollo de legislación y mejora de la práctica de aplicación de la ley
Dmitriy Aleksandrovich Ivanov, Igor Alekseevich Antonov, Elena Nikolaevna Kleshchina, Lenar Vazyhovich Satdinov y Elena Vladimirovna Blinova
- 915 | Influence of legal principles on justice**
Influencia de los principios legales en la justicia
Yury Alexandrovich Svirin, Aleksey Vladimirovich Minbaleev, Eduard Eduardovich Artyukhov, Sergej Nikolaevich Shestov y Aleksey Anatolyevich Davydov



Cuestiones Políticas

Vol. 39 N° 70 (2021)

- 933 | **Counter-majoritarian mechanisms in local self-government: a view from Russia**
Mecanismos contramayoritarios en el autogobierno local: una mirada desde Rusia
Sergey Solovev, Olga Pastukhova y Elena Sumina
- 942 | **The Comparison of Examples of Deviation from Jurisdiction in the Criminal Procedures of Iran and France**
Comparación de ejemplos de desviación de la jurisdicción en los procedimientos penales de Irán y Francia
Abbas Ali Ghorbanian, Ali Mazidi Sharafabadi y Seyed Mehdi Mansouri
- 966 | **Normas para los autores**
970 | **Notas sobre arbitraje de artículos**

Derecho penal y Derechos humanas: una relación compleja

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Resumen

En el mundo de hoy la relación derecho penal y Derechos Humanos sigue siendo compleja, tanto en la doctrina como en la práctica, tal como lo demuestran las diversas realidades y teorías en torno a esta materia, por lo que conviene reflexionar sobre las formas y métodos más viables para humanizar al derecho penal y procesal penal en aras de preservar la dignidad humana. El propósito del texto radica en presentar la editorial de la edición especial del Vol. 39, No, 70 de Cuestiones políticas. Los argumentos esbozados permiten concluir que, sería ilusoria suponer como piensan algunos juristas que el derecho por sí misma es suficiente para construir un muro de contención por ante el accionar de los poderes arbitrarios que se constituyen en óbice de los derechos fundamentales, hace falta además la voluntad política de los actores de poder para cumplir y hacer cumplir la ley de forma humana y racional y, muy especialmente, el accionar organizado de una ciudadanía dispuesta a luchar por el ejercicio de sus derechos humanos en el marco de toda acción punitiva.

Palabras clave: derecho penal; derechos humanos; derecho penal mínimo; contraloría social; teoría criminológica contemporánea.

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Criminal Law and Human Rights: A Complex Relationship

Abstract

In today's world the relationship between criminal law and human rights remains complex, both in doctrine and in practice, as evidenced by the various realities and theories around this matter, so it is convenient to reflect on the most viable ways and methods to humanize criminal law and criminal procedure to preserve human dignity. The purpose of the text lies in presenting the editorial of the special edition of Vol. 39, No. 70 of Political Issues. The arguments outlined allow us to conclude that, it would be illusory to suppose, as some jurists think, that the law by itself is sufficient to build a wall of contention in the face of the actions of the arbitrary powers that constitute an obstacle to fundamental rights, it is also necessary the political will of the actors of power to comply with and enforce the law in a human and rational way and, especially, the organized action of a citizenry willing to fight for the exercise of their human rights within the framework of any punitive action.

Keyword: criminal law; human rights; minimum criminal law; social comptroller; contemporary criminological theory.

En el mundo de hoy la relación derecho penal y Derechos Humanos sigue siendo compleja, tanto en la doctrina como en la práctica, esto por distintas y diferenciadas razones. En principio, el infractor de la ley es considerado por la teoría criminológica clásica y la opinión pública como un sujeto desviado apuesto a la convivencia civilizada, en consecuencia, es percibe como un peligro para el orden social y debe ser apartado del resto de la sociedad para prevenir daños mayores. Esta argumentación justifica la reproducción de centros penitenciarios en todo el mundo, no obstante, sabemos que algunas sociedades humanas como los pueblos ancestrales de América prescinden de la privación de la libertad cuando se trata de imponer un merecido castigo a una persona ¿es posible un modelo penal post carcelario?

En este orden de ideas Foucault (2008), explica que los castigos aberrantes del medioevo que destruían públicamente el cuerpo de los reos, en un espectáculo entre grotesco y sádico tenían al menos un doble propósito, por un lado, sembrar el terror colectivo sobre lo que acarrearía ofender al soberano al transgredir sus leyes y, por el otro, mostrar su capacidad destructiva en todo su esplendor para disuadir a la comisión de otros crímenes. Ya en la modernidad, el derecho penal experimenta avances significativos en sus tecnologías de castigo que lo convierten en un

dispositivo mucho más eficientes para el control social, formal e informal, aunque aparentemente lusca menos despiadado.

Existen distintas lecturas sobre la persona criminal, sin embargo, en ninguna doctrina jurídica contemporánea se postula que un sujeto transgresor de la ley es, per se, un ser deshumanizado que pierde su dignidad humana y que, por tanto, puede ser privado del goce y disfrute de sus derechos fundamentales. Todo lo contrario, la doctrina de los derechos humanos busca garantizar que los imputados y reos no vean menoscabados sus derechos fundamentales en ninguna etapa o momento del proceso penal. Pero, a pesar de estas consideraciones, en la práctica muchas personas se ven privadas de sus derechos más elementales y son sometidas a tratos crueles y degradantes por parte de las autoridades competentes del estado.

En esta discusión sobre las realidades penales, conviene recordar que muchas personas no tienen siquiera derecho a un juicio justo y que, además, en sistemas políticos autoritarios o en democracias de baja calidad el dispositivo penal es empleado sistemáticamente como herramienta de castigo para silenciar a las personas y grupos que legítimamente se ponen al orden establecido y alzan su voz de protesta ante situaciones objetivamente injustas. Por estas razones y por otras que no viene al caso mencionar algunos autores como Ferrajoli (S/F) proponen el derecho penal mínimo, con base a la idea de que:

La seguridad y la libertad de los ciudadanos no son en efecto amenazadas únicamente por los delitos, sino también, y habitualmente en mayor medida, por las penas excesivas y despóticas, por los arrestos y los procesos sumarios, por los controles de policía arbitrarios e invasores; en una palabra, por aquel conjunto de intervenciones que se definen con el noble nombre de «justicia penal» la que quizás, en la historia de la humanidad, ha costado más dolores e injusticias que el total de los delitos cometidos (S/F: 22).

Otra propuesta que vendría a fortalecer al estado constitucional de derecho sería la constitucionalización del derecho procesal penal para sumar garantías adicionales a la tutela judicial efectiva y al debido proceso, tal como propone Pernalet (2021). A pesar de la consistencia teórica de estas propuestas ganadas a minimizar los sistemas punitivos en las sociedades contemporáneas, no hay todavía conclusiones definitivas sobre cual es el mejor camino para reducir, no solo el uso arbitrario del poder judicial vinculante en la vida de personas y comunidades enteras, sino, para minimizar la comisión de actos punibles en una comunidad determinada, todo lo cual desemboca en la pregunta: ¿más castigo o menos castigo? Como condición de posibilidad para garantizar la convivencia pacífica. Todo indica, solo las investigaciones científicas de base empírica en los diferentes contextos sociales pueden aportar luces a la resolución del dilema plantado.

Por último, sería ilusoria suponer como piensan algunos juristas que el derecho por sí misma es suficiente para construir un muro de contención

por ante el accionar de los poderes arbitrarios que se constituyen en óbice de los derechos fundamentales, hace falta además la voluntad política de los actores de poder para cumplir y hacer cumplir la ley de forma humana y racional y, muy especialmente, el accionar organizado de una ciudadanía dispuesta a luchar por el ejercicio de sus derechos humanos.

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Derecho Público

Política y gestión institucional del turismo argentino: logros, desafíos y propuestas *

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Resumen

Esta investigación analiza los efectos que han provocado las políticas públicas y programas implementados por el Estado nacional argentino entre los años 2003 y 2019, para fortalecer la gestión institucional del turismo. El objetivo es generar pensamiento crítico y ofrecer, desde una perspectiva teórica de la sociología de las políticas públicas, un conjunto de directrices que ayuden a atenuar los conflictos, mejorando la efectividad de los programas y la calidad del gerenciamiento. Se utiliza como abordaje, el análisis de políticas públicas y el método secuencial operativo. Los resultados del trabajo aportan un diagnóstico situacional con los avances del período y las problemáticas que siguen vigentes. Sobre ellos define un conjunto de propuestas para la mejora. Como conclusión, se puede afirmar que el sector turístico argentino avanzó hacia una cierta consolidación institucional, que tuvo como principal perceptor la ley 25.997/05. Sin embargo, siguen sin resolver problemas estructurales, vinculados a (i) la escasez de información, control interno y rendición de cuentas; (ii) la incorporación de tecnologías y nuevos paradigmas de gobierno, (iii) y el logro de un federalismo que permita un desarrollo territorial más equilibrado e inclusivo.

Palabras clave: Argentina; turismo; políticas públicas; gestión de gobierno; desafíos y propuestas.

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Policy and institutional management of Argentine tourism: achievements, challenges, and proposals

Abstract

This research analyzes the effects of public policies and programs implemented by the Argentinian government between 2003 and 2019, to strengthen the institutional management of tourism. The main objective is to generate critical thinking and offer -from a theoretical perspective of the sociology of public policies- a set of guidelines that help mitigate conflicts, improving the effectiveness of programs and the quality of management. The analysis of public policies and the operational sequential method are used as an approach. The results provide a situational diagnosis that details the institutional advances of the period and pending problems. Regarding them, a set of proposals for improvement is defined. As a conclusion, it may be said that the Argentinian tourism sector has advanced towards a certain institutional consolidation, motivated by the Law 25,997/05. However, there are still unsolved structural problems, such as (i) the lack of information, internal control, and accountability; (ii) the incorporation of technologies and new government paradigms, (iii) and the achievement of a federalism that allows a more balanced and inclusive territorial development.

Keywords: Argentina; tourism; public policies; governance; challenges and proposals.

Introducción

El período comprendido entre los años 2003 y 2019, representa una de las etapas más dinámicas de la historia argentina; una época cargada de grandes contrastes, con omisiones y avances que ayudaron al posicionamiento del turismo en la agenda pública. La perspectiva teórica de esta investigación es la sociología de las políticas públicas, y utiliza como herramienta el análisis de políticas y el método secuencial operativo.

El trabajo tiene como objetivos (i) analizar los resultados de las políticas ejecutadas para fortalecer la gestión institucional y (ii) desarrollar un conjunto de propuestas de mejora. Para ello estudia los instrumentos normativos, de planificación estratégica y coordinación, observando sus alcances y limitaciones. A partir de allí define directrices que buscan avanzar hacia una gobernanza que aporte información, transparencia y mayor equidad al modelo.

De esa forma, la investigación contribuye a reconocer las problemáticas y desafíos que deben afrontarse para mejorar la calidad institucional del turismo argentino. Además, aporta herramientas conceptuales para

fortalecer su gestión y el armado de políticas públicas. Por último, la originalidad del planteamiento se basa en la adopción del análisis de política pública como perspectiva metodológica. Con ello logra conciliar enfoques provenientes de la sociología política y la administración pública, aportando nuevas líneas de análisis que ayudan a la problematización del turismo en Argentina como política pública.

1. Metodología

La investigación utiliza el enfoque de análisis de políticas públicas y el método secuencial (Lasswell, 1951), a partir del modelo operativo de Subirats *et al.*, (2008) y Knopfel *et al.*, (2007). Se trata de una propuesta heurística que divide el proceso político en tres etapas: --diseño, implementación y evaluación-- permitiendo un abordaje diferenciado de cada una.

Las técnicas del método se basan en datos secundarios de tipo cuantitativo. Se ha realizado un análisis de fuentes secundarias de varios organismos públicos y privados del país⁵. El material analizado permitió conocer la historicidad de los fenómenos, identificar tendencias y analizar causas y consecuencias de los problemas. Todo ello se presenta de forma sinóptica en el diagnóstico. Por otro lado, la tipología del trabajo es “analítica” ya que busca interpretar, explicar y demostrar las relaciones causales entre las políticas y el sistema de gobierno, y también es “perspectiva” al proponer directrices para la mejora (Hernández Samperi, 1991).

2. Diagnóstico situacional

2.1 Principales avances y logros del período

La sanción de la ley argentina de turismo --25.997/05-- representó el principal logro institucional del período. Lo destacable de la norma es que generó instrumentos concretos de política turística. En esa línea, reconstituyó el “Fondo de turismo” y su impuesto DNT (1958), creó el Instituto Nacional de promoción turística- INPROTUR (art.13-23), el plan Nacional de infraestructura turística - PNIT (art. 34-36), el Comité interministerial de facilitación (art. 3-5), y reivindicó el rol de las provincias fortaleciendo el Consejo federal de turismo, en adelante, CFT (art. 9-12).

La ley también incorporó la planificación dentro de la agenda, al establecer en su artículo No. 7 la necesidad de crear un plan Nacional que

5 Como el Instituto nacional de estadística y censos, Ministerio de turismo y deporte, Sindicatura general de la Nación, Auditoría general de la Nación, Presidencia de la Nación, Jefatura de gabinete, archivo general de la Nación, memorias detalladas del Estado, Ministerio de economía, biblioteca del congreso, entre otras

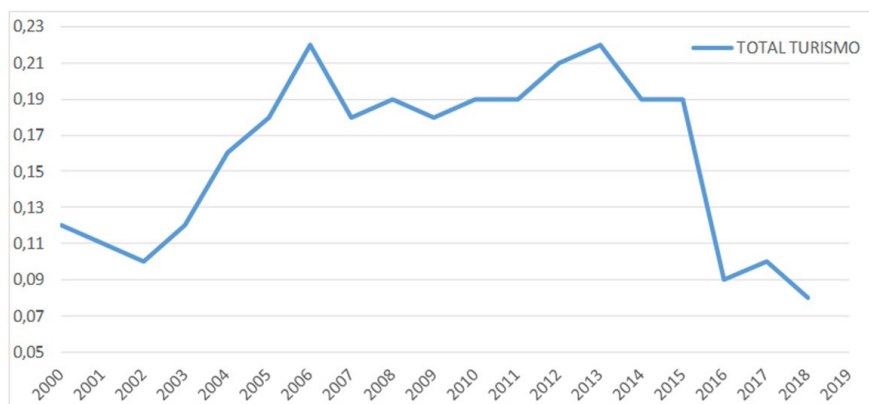
ordene el desarrollo del sector. Ese antecedente promovió la elaboración del Plan federal estratégico de turismo sustentable-PFETS, un instrumento que permitió ordenar, clarificar, consensuar y acercar la política turística a las agendas locales. Además, el plan ayudó a comunicar la direccionalidad que tomarían las políticas públicas del sector. Ordenó al universo de actores, alineando agentes e instituciones, ya sea por convicción, interés o comodidad. Asimismo, su metodología implicó un trabajo horizontal y participativo que tuvo una continuidad inédita (2005-2015), logrando dos actualizaciones (2011, 2015). En ello la continuidad del mismo gobierno fue determinante.

A nivel territorial el Plan federal estratégico de turismo sostenible, en adelante solo PFETS, permitió planificar cada porción del país. Para ello creó el mapa federal de oportunidades de inversión turística (MFOIT). El mapa fue la contraparte territorial del plan y sirvió para delimitar jerarquías, establecer prioridades y definir los plazos de intervención. Esto permitió ordenar las inversiones de los principales programas Nacionales de financiamiento, como el PNIT o los créditos internacionales (BID). Sin embargo, los avances del PFETS fueron discontinuados con el cambio de gobierno de 2015. El nuevo “Plan integral de gestión 2016-2019” no supo aprovechar los 10 años de experiencia y aprendizaje acumulados.

Otro aporte de la ley de turismo fue la formalización del CFT, un organismo que integra a todas las provincias y funciona de nexo con la Nación. Si bien el consejo tiene más de 45 años, la norma le dio mayor respaldo institucional y logístico, otorgándole una figura legal acorde y mayores recursos técnicos para funcionar. Además, estableció claramente cuál sería su objeto, composición y atribuciones (art. 9 al 12).

La nueva ley de turismo también ayudó a posicionar a la Secretaría de turismo, en adelante SECTUR, como el principal instrumento ejecutor de las políticas turísticas, estableciendo sus facultades y deberes (art. 6, 7 y 8), y definiéndola como autoridad de aplicación. De esa forma, se posicionó como la encargada de originar, coordinar y presidir todos los vínculos que se urden alrededor de las políticas turísticas Nacionales (Schenkel y Ercolani, 2015). Todo ello se vio potenciado, cinco años más tarde, con la jerarquización de la SECTUR al rango de ministerio (2010-2018). Además, hasta 2015 ese respaldo fue acompañado con una mejora de la estructura --nuevas áreas--, y con una ampliación de los recursos técnicos y humanos. El personal aumentó un 65% (2003-2015), pasando de 440 a 727 (Sindicatura general de la Nación, 2015). De igual modo, durante ese período, el porcentaje del presupuesto destinado al turismo aumentó un 90% (MECON, ejecución presupuestaria 2003-2015). Esto permitió robustecer las capacidades del Estado en materia turística.

Gráfico n°1- Variación porcentual del presupuesto Nacional destinado a turismo (2000-2019)



Fuente: Elaboración propia a partir de Oficina Nacional de presupuesto (2019).

Pese a ello, durante los últimos 4 años (2016-2019) se redujeron los recursos, principalmente, por el traslado de las áreas naturales al nuevo ministerio de ambiente (ver gráfico No.1). Todo ello se vio potenciado por la preminencia del INPROTUR, organismo encargado de la promoción extranjera. En 2019, su presupuesto alcanzó un pico histórico: 47% del total de la cartera (Oficina nacional de presupuesto, 2019). Esto refleja la prioridad dada a la captación de divisas extranjeras.

Finalmente, se produjeron grandes avances en materia de información y estadísticas, con la creación de instrumentos como la encuesta de ocupación hotelera (2008-2021), la encuesta de viajes y turismo en hogares (2011-2021), los anuarios estadísticos (2006-2015), el observatorio de turismo de reuniones, y plataformas digitales como el SIET (2011-2015) e YVERA (2017-2021). Hasta el año 2008, la encuesta de turismo internacional era la única fuente estadística Nacional continua. Esto refleja el predominio de una visión economicista que asociaba al turismo como un mero factor de captación de divisas.

2.2 Limitaciones y conflictos pendientes

A pesar de los avances existen problemáticas que disminuyen la calidad institucional del modelo argentino. La primera de ellas refiere a la escasez de información pública y la falta de herramientas de monitoreo, control y rendición de cuentas. No existen instrumentos de gestión que aporten datos sobre las acciones, desviaciones o niveles de avances de los programas ejecutados. Además, la imprecisión de las metas en los proyectos y líneas

de acción impide medir avances y grados de eficacia y eficiencia (Auditoría general de la Nación, 2008). Lejos han quedado los objetivos primigenios del gobierno de afianzar un modelo de gestión por resultados que sea fácilmente evaluable para la ciudadanía (Memoria detallada del Estado, 2003).

Como complemento, los mecanismos de control que usa el Estado Nacional son muy escasos⁶. Además, los únicos indicadores que tiene la SECTUR devienen de la ejecución presupuestaria. Según cada programa se contemplan variables como: cantidad de personas capacitadas, ferias y encuentros de comercialización, servicios de turismo social (pernoctas y turistas en las unidades), turistas extranjeros, acciones promocionales, porcentaje de ANP con planes de manejo, entre otros (Oficina Nacional de presupuesto, 2019). Los indicadores abordan aspectos muy superficiales que no reflejan el desempeño real del gobierno.

La falta de control se extendió también sobre el PFETS. No existió ningún mecanismo de monitoreo para detectar desviaciones o avances a pesar de que en su primera versión (2005), establece la necesidad de crearlos (ver cuadro No.1). Del mismo modo, sostuvo que, para evaluar los efectos del plan, se definiría una línea de base con indicadores al inicio del proceso a través del Programa de monitoreo y evaluación continua. Sin embargo, lo único que se observa son tres escasos indicadores: llegadas de turistas extranjeros, ingreso de divisas turísticas por turismo receptor, y pernoctas en hoteles y para hoteles de turistas argentinos y extranjeros (PFETS, 2005).

Cuadro No.1- Propuestas vinculadas al monitoreo del PFETS (2005)

Programa 2.1.3- Monitoreo y evaluación del PFETS	
Tablero de comando informático: Desarrollar un proceso de evaluación participativa para detectar desviaciones y realizar correcciones, generando información sobre la experiencia para implementar acciones de mejora.	Acciones principales: Diseño de indicadores y realización de informes de avance. Confección del manual de procedimientos, difusión, capacitación a responsables locales. Puesta en funcionamiento del sistema web de la SECTUR.

Fuente: Elaboración propia a partir de PFETS (2005).

6 Memorias detalladas del Estado de la Nación, informes de auditoría -Unidad de auditoría interna, Sindicatura general de la Nación y la Auditoría general de la Nación-, presupuestos de la administración pública y datos de ejecución presupuestaria.

La segunda deuda institucional del período fue afianzar un mayor federalismo y un modelo que sea capaz de revertir los desequilibrios territoriales. Argentina posee una configuración inequitativa y desigual, con regiones que tienen disímiles niveles de desarrollo. El mapa Nacional conjuga centros maduros con zonas marginales que, a pesar de su potencial, están fuera del sistema, acarreando déficits de infraestructuras (conectividad, transporte, sanidad, seguridad), servicios básicos (agua, energía, gas, cloacas, comunicación), prestaciones (alojamiento, restauración, agencias, excursiones), promoción y comercialización.

La preminencia de ese modelo favoreció la consolidación de regiones maduras, en detrimento de espacios emergentes que continúan sin alcanzar un desarrollo adecuado. Ejemplos de ello se aprecian en provincias emergentes como: Chaco, Formosa, La Pampa, o bien en destinos del interior de Buenos Aires, Cuyo o la Patagonia. Estas condiciones representan problemas históricos, cuyos orígenes se remontan hacia fines de siglo XIX, durante el proceso de consolidación del Estado Nacional (1880-1930) y del modelo agroexportador⁷.

Las problemáticas mencionadas contienen otras que resultan subsidiarias, como la inequitativa reasignación de los fondos públicos, una débil articulación entre productos y regiones, escasez de inversiones, entre otras. Bajo esa lógica territorial, las ventajas comparativas del país (amplitud y heterogeneidad de paisajes), conviven con grandes debilidades estructurales.

Los desequilibrios del modelo Nacional se ven potenciados por la existencia de un débil federalismo. El sistema turístico argentino funciona sobre un marco institucional republicano y federal. Sin embargo, en la práctica prevalece una concentración de las competencias y los recursos en el Estado Nacional. La ley argentina de turismo tiene aquí un gran margen de mejora. Durante el debate parlamentario se rechazó la posibilidad de coparticipar el fondo Nacional, y de darle a las disposiciones del consejo un rol vinculante. El fondo es administrado por la autoridad de aplicación (art.29), y se reparte entre la SECTUR (40%) y el INPROTUR (60%). Por otra parte, la ley le asignó al CFT un carácter consultivo por el cual puede ser convocado cuando el ejecutivo considere oportuno. Con ello: “El órgano que genuinamente representa a las provincias siempre quedará librado a la buena voluntad del órgano de aplicación” (Chironi, 2004: 62).

Con todo, la nueva ley de turismo: “Establece una pirámide de concentración, en donde las definiciones de políticas se hacen desde la SECTUR” (Jaroslavsky, 2004: 26). De esta forma sigue: “Profundizando el

7 Este último produjo la inserción exclusiva de zonas funcionales a ese esquema productivo, generando una distribución desequilibrada de la infraestructura y de los servicios, dejando afuera a grandes regiones del país. Esa situación tuvo un impacto irreversible en la configuración del turismo ya que su desarrollo depende de la base territorial y de los sistemas económicos en que se sustenta.

centralismo en las decisiones y, por ende, fomentando la discrecionalidad y arbitrariedades políticas” (Poggi, 2005: 33). Por ello, si bien la ley es un activo, también significó la pérdida de una oportunidad histórica para darle mayor equidad al modelo. Por falta de voluntad política, se desaprovechó un momento inmejorable para refundar el sistema bajo nuevas lógicas que empoderen a las competencias locales. El planteamiento de la norma debería comenzar por fortalecer a los actores del territorio, más precisamente a los municipios, ya que representan el espacio donde sucede el turismo, donde se enfrentan las urgencias y exigencias contemporáneas.

La descentralización equitativa --de los recursos y el poder-- en pos de los gobiernos locales es un tema que se mantiene pendiente, un requerimiento histórico que invoca cambios inéditos y de gran envergadura, un proceso de transición complejo e incierto que interpela intereses muy arraigados. Debido a eso, por acción y omisión ningún gobierno quiso abordar este tema, principalmente, para evitar las concesiones de poder que implica. Proceso que resulta similar al resto de democracias latinoamericanas en el sentido de ser capaces de asumir el reto de un cambio político y la mejora de la calidad democrática (López Leyva *et al.*, 2012).

3. Propuestas, acciones y experiencias

A partir del diagnóstico realizado, se propone un conjunto de directrices que buscan atenuar los conflictos y potenciar las fortalezas detectadas, considerando los recursos existentes. Además, se presentan instrumentos que fueron aplicados con éxito sobre los destinos.

3.1 Descentralización: hacia un nuevo modelo de distribución turística

Lograr una descentralización Nacional en favor de las provincias y municipios implica un cambio muy complejo, por la heterogeneidad del mapa Nacional, y por los espacios de poder que se deben alterar. Significa zanjar muchos interrogantes, que van desde el abordaje de las asimetrías regionales y la nueva forma de distribución de recursos, hasta el rol que cumpliría el organismo central en ese renovado escenario. En cada caso se deberá contemplar: el contexto socio económico de la región, las prioridades locales, el grado de madurez y los recursos disponibles (financieros, organizativos, humanos, legales).

Con esta propuesta no se busca concebir el desarrollo local en términos asistencialistas, es decir, en función de lo que el Estado Nacional hace o deja de hacer. Sería injusto y reduccionista admitirlo en esos términos. De hecho, el crecimiento de los destinos de interior no forma parte de las funciones principales de la SECTUR. Pero más importante aún es reconocer

que la mayoría de los destinos argentinos prosperaron de forma autónoma y endógena en el sentido que tuvieron que enfrentar el crecimiento del centro frente a la periferia (Sandrea y Boscán, 2009). No hay que subestimar los resultados logrados a fuerza de voluntades y capacidades locales. Hay muchos casos destacables, como el termalismo en Entre Ríos, el avistamiento de fauna marina en la península Valdez, el enoturismo en Cuyo, o de naturaleza en la cordillera neuquina. Sin embargo, existen regiones que necesitan de un fortalecimiento inicial para desenvolverse; en esas zonas la descentralización puede resultar muy virtuosa.

Desde el punto de vista operativo, el primer paso hacia un nuevo modelo es fortalecer las unidades de gestión para que los destinos puedan capitalizar su autonomía. Como sostuvo Cals en los orígenes de la experiencia española: “La concepción del turismo como competencia exclusiva de las comunidades autónomas puede producir espejismos sobre las posibilidades reales de que sus gobiernos puedan instrumentar políticas propias” (1983:18). La falta de capital técnico, organizativo, experiencia, equipamiento, infraestructura y marcos legales en el interior, han sido argumentos recurrentes de quienes defienden el actual *statu quo*.

Además, el cambio hacia un modelo deberá encauzarse dentro de la ley Nacional y a partir de un plan vinculante. En el cuadro No. 2 se presentan algunas actuaciones para avanzar de forma secuencial y por etapas. El criterio de equidad debe ser el *leitmotiv* de todo el proceso, lo que implica descentralizar recursos a favor de las áreas menos favorecidas y replegar esfuerzos sobre espacios maduros.

Cuadro No. 2- Actuaciones para avanzar hacia un nuevo federalismo

Actualización del marco normativo Nacional. Determinar por ley los términos de referencia del nuevo modelo.
Definición del turismo como un sector prioritario en las agendas locales (compromiso de los gobernadores).
Construcción participativa de una agenda que oriente la transición bajo criterios de gradualidad, inclusión y equidad (plan quinquenal operativo).
Descentralización secuencial y paulatina, priorizando la adaptación en destinos emergentes.
Fortalecimiento institucional de las provincias. Otorgar al CFT un rol vinculante y auditor.
Determinación de mecanismos de control local que aseguren el destino de los fondos.

Descentralización de funciones y recursos de la SECTUR a las provincias.
Coparticipación del fondo Nacional.

Reingeniería de la estructura del organismo Nacional (compactación).

Equilibrio de los directorios de INPROTUR y CFT.

Fuente: Elaboración propia.

Mención aparte merece el rol que ocuparía la cartera Nacional de turismo. El desequilibrio actual no justifica relegarla a un rol accesorio. El desafío será fortalecer la autonomía local, sin que ello implique: un desguace del Estado central, una pérdida de su identidad, o una relación de hostilidad con las regiones. El liderazgo Nacional es clave para darle cohesión, coherencia y armonía al conjunto, siendo irremplazable en sus tareas de coordinación, colaboración e integración.

En suma, a pesar de la descentralización que introdujo la reforma constitucional de 1994, el federalismo argentino opera de forma limitada. Para revertir esta situación se deben ceder recursos --técnicos, organizativos y financieros-- que materialicen esas facultades delegadas. Sin ellos no existirá una verdadera autonomía. Si la mayoría de los gobiernos locales tienen que apelar a niveles superiores para diseñar o financiar sus proyectos, siempre permanecerán sujetos a voluntades foráneas. Es imprescindible diseñar un esquema que invierta la pirámide de distribución actual. El desarrollo del turismo debe concebirse en los municipios, fortalecerse desde las provincias y coordinarse por la Nación.

3.2 De la desinformación a la transparencia: un nuevo modelo de gobernanza

La gestión Nacional carece de un sistema adecuado de indicadores y metas, como también de planes operativos que detallen los programas, subprogramas, proyectos y líneas de acción. Para atenuar esta situación, existen modelos empresariales que fueron adaptados por las administraciones públicas. Uno de los más antiguos y difundidos es el método PHVA (Deming, 1989), que propone un sencillo ciclo de mejora en cuatro pasos: “planificar-hacer-verificar-actuar” (ver cuadro No. 3). Si bien el método fue ampliamente utilizado en el sector empresarial, arrojando buenos resultados, en materia de turismo, y en especial en lo que refiere a la gestión de destinos, la evidencia empírica es escasa (Monteiro Rodrigues, 2011; Rodrigues y Miguel-Dávila, 2013). Por ello su aplicación sobre el organismo Nacional representaría una propuesta innovadora.

El sencillo esquema PHVA se puede complementar y fortalecer con otros más complejos como el cuadro de mando integral (Norton y Kaplan, 2000).

Este tablero permite obtener una visión global y fundada en evidencia, sobre los programas en ejecución. “Recoge un conjunto coherente de indicadores que proporcionan a la alta dirección y a las funciones responsables una visión comprensible de su área de responsabilidad” (Asociación Española de normalización y certificación, 2018: 245).

Cuadro No.3- Etapas del ciclo PHVA

Planificar	Definición de indicadores, objetivos, metas y programas de acción.
Hacer	Ejecución de los lineamientos anteriores sobre el territorio.
Verificar	Seguimiento continuo de los procesos y resultados.
Actuar	Acciones de mejora y corrección para aumentar el desempeño.

Fuente: Elaboración propia a partir de Asociación Española de Normalización y Certificación (2018).

El cuadro de mandos es un instrumento de pilotaje que aporta información en tiempo real sobre las actuaciones, analizando su evolución, y ayudando a identificar tendencias y desviaciones. A nivel operativo sintetiza un conjunto de indicadores por campos de actuación en una única matriz (ver cuadro No. 4). Como complemento, usa planillas anexas que contienen información de cada indicador (ver cuadro No. 5).

Cuadro No. 4- Modelo de cuadro de mando integral campo “Gobernanza”

Campo	Fecha	Indicador	Fuente	Meta	Cumplimiento	Objetivo
Gobernanza	31/12/2021	Control de actuaciones	Cantidad de programas bajo seguimiento	Seguimiento del 80% de los programas.	40%	Afianzar un proceso de gestión que garantice el análisis y medición de recursos y resultados.

Fuente: elaboración a partir de Asociación española de normalización y certificación (2018).

Cuadro No.5- Detalle de indicadores para el campo “Gobernanza”

CAMPO: GOBERNANZA			
INDICADOR 1: CONTROL DE LAS ACTUACIONES			
Detalle: Existencia de unidades <i>ad hoc</i> a cargo del seguimiento operativo			
Objetivo: Lograr una gestión que garantice el análisis y medición de los recursos y resultados.	Fuente: Cantidad de unidades creadas y operativas. Cantidad de programas bajo seguimiento respecto del total.	Meta: Generar 3 unidades a cargo del seguimiento diario de los programas. Controlar un 80% de los programas.	Periodicidad: Semestral
Dificultades detectadas;	Conflictos detectados (reticencia de las áreas al control, bajo compromiso del personal, falta de conciencia sobre la importancia de la herramienta, escepticismo, burocracia, entre otros).		
INDICADOR 2: EFECTIVIDAD DE LA GESTIÓN			
Detalle: Porcentaje de objetivos alcanzados/parcialmente alcanzados			
Objetivo: Medir el cumplimiento de los objetivos.	Fuente: Cantidad de objetivos alcanzados y concretados parcialmente, respecto del total.	Meta: Alcanzar un alcance total del 60% y parcial del 40%.	Periodicidad: Anual
Dificultades detectadas;	Conflictos detectados durante la implementación (subjetividad en la medición, falta de seguimiento, parcialidad de los indicadores, entre otras).		
INDICADOR 3: NIVEL DE COORDINACIÓN Y TRABAJO CONJUNTO			
Detalle: Existencia y actividad de los espacios de coordinación interna y externa de las políticas turísticas.			
Objetivo: Promover una gestión integral y mancomunada entre los agentes.	Fuente: Cantidad de unidades de coordinación, reuniones, programas ejecutados en conjunto.	Meta: 1 mesa de coordinación interna por secretaría. 1 unidad de coordinación por región. 1 reunión de trabajo mensual.	Periodicidad: trimestral
Dificultades detectadas;	Conflictos detectados durante la implementación (reticencia del personal a compartir información, falta de sinergia entre los equipos, procedimientos endogámicos, otros).		
INDICADOR 4: INNOVACIÓN DE LA GESTIÓN			
Detalle: Implementación de nuevos programas o ideas que aporten valor a los ya existentes.			
Objetivo: Promover una oferta renovada de experiencias turísticas	Fuente: Cantidad de nuevos programas o ideas ejecutadas respecto del total.	Meta: Generar 6 nuevos programas y 12 incorporaciones que mejoren la oferta Nacional.	Periodicidad: Anual

Fuente: elaboración propia a partir de Asociación española de normalización y certificación (2018).

3.3-Hacia un gobierno “inteligente” del turismo argentino

A) Nuevas tecnologías con vocación de servicio

Uno de los conceptos que más creció durante los últimos años fue el llamado internet de las cosas y el *big data*. Con ellos los destinos se transformaron en productores de una enorme cantidad de datos que son fundamentales para guiar las decisiones y el gerenciamiento turístico (Celdrán Bernabéu, 2018). Las administraciones tienen a su alcance información estratégica sobre el comportamiento del turista mediante soportes digitales como aplicaciones, herramientas de geolocalización, redes sociales, tarjetas bancarias, reservas, pagos vía móvil, recomendaciones en portales, uso de buscadores, entre otros. A ello se suman nuevos términos como la “sensorización” de destinos, que consisten en la distribución de sensores (*beacons*) que recopilan información variada sobre el tráfico, circulación de personas, valores ambientales, generación de residuos, consumo energético, entre otros.

Todos esos nuevos instrumentos generan un flujo ingente de datos de alto valor, tanto para el sector público, como privado y académico. Ese material permite adaptar o desarrollar nuevos productos, controlar el aprovechamiento del entorno, optimizar recursos, definir perspectivas, adelantar tendencias, testear experiencias, entre muchos otros. Con esas herramientas los gestores tienen la posibilidad de obtener datos en tiempo real y tomar decisiones más certeras. Su influencia ha redefinido las funciones de los entes de gestión, afectando desde el diseño, la promoción y comercialización de experiencias, hasta la atención de visitantes, la accesibilidad o el manejo de crisis. Además, surge una nueva lógica de colaboración, en la que el turista se ubica en el centro de los esfuerzos, como consumidor y productor de las experiencias del destino. Emerge así una gobernanza pública colaborativa que debe albergar a un grupo cada vez más amplio y heterogéneo.

En Argentina estos instrumentos todavía no se utilizan a nivel Nacional, aunque existen algunas experiencias destacables. Una de las más recientes es la ciudad de Buenos Aires, quien junto a SEGITTUR, elaboró su propio “Sistema de inteligencia turística”. Según fuentes de la ciudad (Esper, 2019), el sistema ayuda en la gestión al aportar información precisa para: (i) diseñar proyectos de ley (como el de incentivo fiscal para la inversión hotelera), (ii) anticipar el comportamiento de la demanda, (iii) delinear la conectividad aérea, (iv) redefinir y segmentar estrategias de comunicación, (v) mejorar la experiencia por barrios y épocas del año, (vi) potenciar la gobernanza (con otras áreas del gobierno como seguridad, transporte, espacio público), entre otras. Además, la plataforma es de acceso libre para que todos los actores cuenten con más y mejor información que ayude a definir estrategias comerciales e identificar oportunidades de negocios.

Ilustración No.1- Sistema de inteligencia turística-ciudad de Bs. As

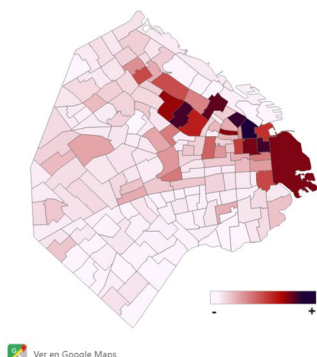
Viajeros internacionales - Gasto turístico con tarjeta según zona, rubro y rango horario

Datos a Diciembre 2019 // Dirección General de Inteligencia de Mercado y Observatorio - ENTUR

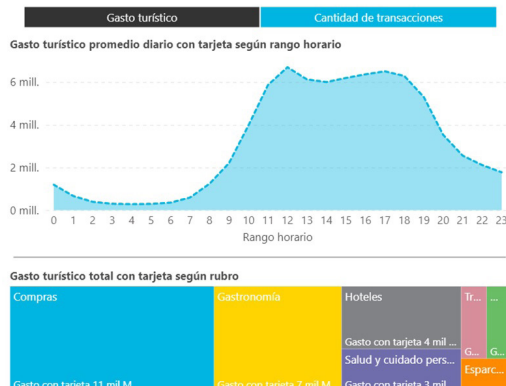
Año: 2019 Mes: Todas Día de la semana: Todas Rango horario: Todas Origen: Todas Rubro: Todas



Gasto turístico total con tarjeta en CABA



Ver en Google Maps



Fuente: Consumos turísticos con tarjetas bancarias – Ente de turismo CABA.

En definitiva, las soluciones digitales están aportando los *inputs* necesarios para que la gestión turística evolucione sobre una planificación más ajustada, ágil, flexible y respaldada por datos (Li *et al.*, 2017). Esto representa un aporte categórico que tendrá mayores ramificaciones. Sin lugar a duda, su incorporación será determinante para mejorar la calidad de la gobernanza turística Nacional y el armado de políticas públicas.

B) El gobierno “inteligente” más allá de la tecnología

El paradigma de los DTI excede el uso de las nuevas tecnologías ya que contempla dimensiones vinculadas a la sostenibilidad, conectividad, accesibilidad, innovación, información, marketing y gobernanza. Sobre esta última, Ivars-Baidal *et al.*, (2017) definen una serie de requisitos para alcanzarla, como: (i) contar con un plan estratégico, un plan específico de DTI y planes operativos anuales, (ii) establecer indicadores y medios de seguimiento, (iii) realizar análisis del retorno, (iv) lograr una difusión periódica de memorias sobre la gestión, (v) generar estructuras de colaboración público-privadas, (vi) afianzar procedimientos de coordinación interdepartamental, (vii) incentivar la administración electrónica, (viii) instalar sistemas de calidad, (ix) efectuar campañas de sensibilización social, entre otras. En suma, el gobierno inteligente comprende una recopilación de herramientas de larga data, enriquecidas por el uso de nuevas tecnologías y fuentes de información.

A nivel operativo muchos destinos implementaron interesantes iniciativas que podrían enriquecer la experiencia argentina. En esa línea se ubica Copenhague con su plataforma de inteligencia turística 2030 (10xcopenhague). Con ella, la capital danesa ofrece información sobre el comportamiento de los turistas, los competidores, la percepción del residente, entre otros. Otro caso destacable es la Comunidad Valenciana con la creación del *Social Analytics* de destinos, un soporte que permite monitorizar la presencia en twitter e instagram de las localidades, analizar su reputación e imagen online en tiempo real, y generar información para ajustar su estrategia de marketing. De igual modo, la ciudad de Lyon creó una base de datos turísticos --*ONLYLYON Experience*-- que integra información de diferentes asociaciones del destino como hoteles, museos, proveedores de servicios. El proyecto involucra a competidores para que trabajen juntos, generando datos abiertos que ayuden a optimizar la experiencia del visitante y ajustar los servicios públicos y privados.

Por otra parte, Niza elaboró un sistema de monitoreo ambiental urbano, una plataforma que recopila datos ambientales como calidad del aire, niveles de ruido, pérdidas de la red de agua, densidad del tráfico, consumo de energía o gestión de residuos. Para ello se vale de una red de 3.000 sensores distribuidos en diferentes puntos (recogida de residuos, redes de distribución de agua, edificios públicos, viviendas sociales, entre otros). El ayuntamiento de Valencia también es otro caso interesante con la creación de un sistema de información que utiliza un sistema de cuadros de mandos online. Este instrumento de uso interno municipal se basa en un conjunto de 750 indicadores de rendimiento que permite medir el funcionamiento de los servicios que presta el ayuntamiento.

Finalmente, a modo de síntesis en el cuadro No. 6 se presentan un conjunto de acciones que ayudarían a encauzar la gestión Nacional bajo el nuevo paradigma de los destinos inteligentes.

Cuadro No. 6- Acciones para avanzar hacia un gobierno inteligente

Acciones/Descripción
Afianzar una planificación estratégica interna y externa: Diseñar e implementar un plan director que contemple: (i) un diagnóstico integral, (ii) objetivos aspiracionales con metas, y (iii) un detalle de los programas con sus respectivas acciones. El plan debe ser capaz de clarificar la direccionalidad de las políticas y los valores que perseguirá el gobierno. El plan director (10 años) debe plasmarse al interior del organismo mediante un plan de gestión (4 años) que desarrolle los lineamientos operativos. Ese documento tiene que detallar: (i) como deben ejecutarse los programas (pasos a seguir), (ii) los recursos afectados (técnicos, financieros, humanos), (iii) responsables, (iv) plazos de cumplimiento, y (v) medios de evaluación y seguimiento. A su vez es recomendable delinear esquemas anuales operativos (1 año) que acompañen el proceso. Para ello es fundamental contar con un área técnica específica a cargo de la planificación.

Creación de un sistema de inteligencia turística Nacional (SIT): Diseñar una plataforma de <i>business intelligence</i> que integre la información de todos los destinos del país que usen herramientas de <i>big data</i>, open data o minería de datos. Esto permitiría crear una plataforma Nacional de datos públicos del sector.
Diseñar e implementar un sistema de gestión: Elaboración de documentos técnicos que detallen los términos de referencia sobre la forma en que deben ejecutarse los procedimientos y procesos internos. Se incluyen aquí actividades y servicios rutinarios, procesos de apoyo o soporte, y acciones de seguimiento, medición, análisis, y mejora. Este sistema ayudaría a que cada agente y área sepan: que hacer, cómo, cuándo y porqué.
Promover observatorios por productos y centros de pensamiento para la acción: Generar espacios de investigación y seguimiento de los principales productos del país y sus mercados. Esto permitiría definir un conjunto de indicadores para monitorear la dinámica Nacional, establecer escenarios futuros y perspectivas, generar informes de coyuntura y del contexto. Los observatorios o centros de pensamiento deberían incorporar a profesionales del sector público (Nacional y Provincial), privado y las universidades. Funcionarían como un puente entre el Estado, las empresas y la academia.
Espacios de diálogo e intercambio de información: Crear y mantener canales de comunicación ágiles entre el organismo Nacional y los principales actores del sector: empresarios, turistas, ciudadanos, organizaciones intermedias y académicas. Para ello se deben generar espacios institucionales que aprovechen la inteligencia colectiva, estimulando la implicación de los actores. Existen múltiples herramientas como: sitios web interactivos, plataformas de colaboración ciudadana, redes sociales oficiales (participación y escucha activa), tableros públicos para mostrar el rendimiento de los programas y los recursos públicos empleados, foros de debate, mecanismos de diálogo en línea (<i>chatbox</i>), encuestas online, entre otros.
Monitorización, control y rendición de cuentas: Establecer un cuadro de mando integral online que permita un seguimiento de todos los programas y líneas de acción sobre los que trabaja la SECTUR.
Comunicación y transparencia: Afianzar canales de información con un lenguaje accesible. Para ello se pueden utilizar portales de open data, RRSS, webs 3.0, apps, publicaciones, informes parciales de gestión, gacetillas de prensa, foros, disertaciones, ruedas de prensa, entre otros.
Espacios institucionales colaborativos: Generar alianzas para promover sinergias y transferencia de conocimiento, experiencias y buenas prácticas entre los DTI. Se puede mencionar aquí a la red de DTI de España, un organismo que promueve el trabajo colaborativo, el desarrollo de tecnologías ofrece asistencia técnica, subvenciones, formación, catálogos de proveedores digitales, asistencia a encuentros, entre otros. Actualmente la red cuenta con 251 miembros, entre destinos (154), instituciones (40) y empresas (57).
Ayudas especiales para emprendimientos smart: Delinear programas de fomento para motivar la adhesión de los destinos a este nuevo paradigma. Las mismas pueden contemplar asistencias y acompañamiento técnico, subsidios o créditos blandos para la adquisición de tecnología, exenciones impositivas, entre otras.
Legislación, normas y directrices: Elaboración de normas y recomendaciones que definan los pasos y requisitos para alcanzar un gobierno inteligente de los destinos. Existen múltiples iniciativas a tomar en cuenta, como los libros blancos de DTI (SEGITTUR, 2015; Blanco, 2015) o las normas de la Asociación Española de Normalización y Certificación (Sistema de Gestión de un DTI, Indicadores y herramientas del DTI, Semántica aplicada a los DTI).

Fuente: Elaboración propia.

3.4- Recuperar la jerarquía ministerial

Hacia mediados de 2018 Argentina vivió una fuerte escalada de la crisis económica. En ese marco el gobierno Nacional decidió aplicar una reducción de su estructura para “achicar gastos”. De esa forma, 10 ministerios fueron absorbidos por otras dependencias, entre ellos, el de turismo. Así, tras 8 años de ocupar la máxima categoría, pasó a formar nuevamente una secretaría de Estado.

La transversalidad del sector implica que el éxito de sus programas dependa de la participación de otras áreas del Estado. Para lograr esa sinergia turismo debe ocupar la máxima categoría de gobierno. Por otro lado, una mayor imbricación del turismo en la matriz económica aportaría soluciones sostenibles y de raíz a los problemas que precarizan la realidad argentina. El efecto multiplicador, su naturaleza expansiva e intensiva de mano de obra, y su capacidad de llegar a rincones donde otro sector no podría, son solo algunas de las razones. Para lograr ese objetivo es necesario que otras áreas del Estado --economía, producción, trabajo-- tengan mayor protagonismo, dándole prioridad al sector de los viajes. Para avanzar en esa dirección será necesario recuperar el rango de ministerio. Todo ello potenciaría el “liderazgo político” que necesita la SECTUR, ya que ayudaría a consolidar aquellos procesos y condiciones necesarias para edificar su voluntad de poder y materializar sus proyectos políticos (Villasmil Espinoza *et al.*, 2021).

3.5-Repensar el comité interministerial de facilitación turística

Desde su creación en 2005, ningún gobierno quiso, supo o pudo aprovechar el comité de facilitación. Esta situación alimentó el personalismo de la gestión y la falta de coordinación interna. Para darle mayor operatividad y jerarquía se debe modificar su estructura de modo tal que quede a cargo del “número uno”. Así funcionaría como una mesa de enlace para abordar temas estratégicos, siendo moderada por el responsable de la cartera, y en donde cada ministro desarrolle su estado de situación. Significaría una instancia de descentralización, coordinación y seguimiento para interpelar a los responsables de área. Para ello se necesita inexorablemente del respaldo político que solo puede ejercer el primer mandatario.

La crisis por la pandemia actual ha trastocado todas las esferas políticas, económicas y sociales. Ese punto de inflexión traerá reformas substanciales que marcarán un antes y un después en las relaciones entre los actores y factores de poder (Arbeláez-Campillo y Villasmil, 2020). En ese nuevo escenario, los Estados necesitarán más que nunca de instrumentos efectivos de coordinación interna que potencien sus capacidades para responder a demandas cada vez más complejas. En ello los aportes del comité interministerial serían muy importantes.

3.6-Fortalecimiento del trabajo territorial (municipal)

Para fortalecer la articulación del Estado Nacional con las provincias y municipios, es necesario sumar a nuevos actores dentro la gestión. Esto implica institucionalizar el vínculo con espacios locales, como la “Red Argentina de municipios turísticos”. A partir de ahí se podría realizar un relevamiento y un sello de distinción para las localidades que tienen un marcado perfil turístico. Esto incentivaría la adhesión de espacios, sobre los cuales se podrían aplicar programas que mejoren su autonomía. Esas líneas podrían contemplar acciones de sensibilización y capacitaciones, créditos, subsidios y mentorías privadas, elaboración de estrategias de desarrollo, información y conocimiento, financiamiento para la puesta en valor de recursos, estudios de impacto ambiental, desarrollo de soportes digitales, entre otras. Del mismo modo, esos espacios permitirían abordar problemas comunes como el crecimiento desordenado, la degradación de recursos, saturación de espacios, contaminación visual, inseguridad, tratamiento de efluentes, acceso a la tierra, aculturización, entre otras.

3.7-Nuevas herramientas estadísticas a replicar

La creación del Observatorio económico de turismo de reuniones representa un ejemplo que debe ser replicado y extendido al resto de los productos nacionales (sol y playa, naturaleza, cultural histórico, religioso, deportivo, gastronómico, entre muchos otros). Actualmente se dispone de muy poca información sobre áreas y temas que son estratégicos. Esa situación se puede revertir extendiendo el uso de este tipo de herramientas. De igual modo, es necesario concretar otros proyectos pendientes como la cuenta satélite.

3.8-Actualización de la normativa Nacional

En 2021 se cumplieron 16 años de la sanción de la ley argentina de turismo. El tiempo transcurrido y la celeridad de los cambios ameritan una actualización oportuna. Esto permitiría evaluar el desempeño de los espacios que fueron creados. Además, serviría para incorporar temas pendientes, como la ampliación del federalismo, o sumar innovaciones de rigurosa actualidad, como la creación de centros de investigación para abordar la competitividad de los destinos, el desarrollo e implantación de herramientas digitales (*big data*-minería de datos), el estudio de las pautas de consumo en los viajeros, o la creación de un consejo Nacional para el abordaje integral de las políticas turísticas (integrado por autoridades Nacionales, Provincias, sector privado y académico, entre otros).

Conclusiones

La investigación permitió identificar los resultados de las políticas implementadas y definir propuestas para avanzar hacia una gobernanza que aporte información, transparencia y mayor equidad al modelo argentino. Dentro de ello se especificaron los conflictos y desafíos que deberán afrontarse para mejorar la calidad institucional del turismo.

Durante el período analizado, el turismo Nacional avanzó hacia una cierta consolidación mediante instrumentos que lo fortalecieron a nivel declarativo, organizacional, financiero, jurídico, de gestión y planificación. Sin embargo, el paso de los gobiernos no logró resolver problemas estructurales. El primero relacionado a la disponibilidad de datos públicos. La escasez de información sobre la performance de los gobiernos es una debilidad histórica del sistema argentino. La naturalización de esas penumbras dificulta el análisis de las políticas públicas. Además, precariza el proceso de gestión ya que muchas decisiones, lejos de basarse en evidencia empírica, quedan sujetas a percepciones personales o arbitrariedades. En ese contexto, todavía no fueron incorporados los instrumentos y valores que aportan las nuevas tecnologías y paradigmas de gobierno.

La segunda deuda institucional es alcanzar un federalismo que logre una descentralización genuina y un desarrollo más equilibrado e inclusivo. Todavía prexisten viejas lógicas centralistas que perjudican la autonomía de los destinos del interior, acrecientan los contrastes y la exclusión de zonas con potencialidad. Por ello es necesaria una reingeniería que permita una distribución en favor de las administraciones locales.

La crisis por la pandemia actual ha trastocado todas las esferas políticas, económicas y sociales. El turismo y su gestión deberán acompañar y saber adaptarse a esas transformaciones. Todo ello obliga a los gobiernos a mejorar sus intervenciones y a abordar problemas cada vez más complejos. Para ello será imprescindible disponer de información y de nuevas herramientas que potencien la calidad de la gestión. Sobre esas premisas contribuyen las propuestas de este trabajo.

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Justicia desde la óptica de John Rawls y Robert Nozick: una perspectiva comparada

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Resumen

En esta investigación el objetivo fue analizar la justicia considerando la óptica de John Rawls y Robert Nozick, desde una perspectiva comparada. Se realizó una revisión documental del material bibliográfico acerca de la *Teoría de la Justicia* (1975) de Rawls y *Anarquía, estado y utopía* de Nozick (1988), considerando además el conocimiento de distintos expertos en la temática. Es una investigación cualitativa de tipo descriptiva, con un diseño metodológico de corte teórico, documental y diacrónico. En relación con la técnica de recolección de datos, se empleó el fichaje o registro de referencias de autor, documentales y de contenido. Como resultados, se pudo establecer una comparación analítica referida a algunos criterios resaltantes sobre la noción de justicia, muy especialmente en relación a como se asume la propiedad y la distribución de las riquezas, según ambos filósofos, la actuación del Estado, para Rawls de gran inherencia y para Nozick de mínima participación. Puede concluirse de este análisis que existen antagonismos entre estos dos filósofos por cuanto para Rawls la justicia se enmarca en un igualitarismo social, donde la sociedad es algo ideal, abstracta, mientras que Nozick la asume dentro del pensamiento de liberalismo conservador, tomando en cuenta una sociedad real y concreta.

Palabras clave: Justicia; comparación teórica; teoría de la justicia; John Rawls; Robert Nozick.

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Justicia from the perspective of John Rawls and Robert Nozick: a comparative perspective

Abstract

In this research the objective was to analyze justice considering the optics of John Rawls and Robert Nozick, from a comparative perspective. A documentary review of the bibliographic material on Rawls' *Theory of Justice* (1975) and Nozick's *Anarchy, State and Utopia* (1988) was carried out, also considering the knowledge of different experts on the subject. It is qualitative research of descriptive type, with a methodological design of theoretical, documentary, and diachronic cut. In relation to the data collection technique, the registration or registration of author, documentary and content references was used. As a result, it was possible to establish an analytical comparison referring to some outstanding criteria on the notion of justice, especially in relation to how the ownership and distribution of wealth is assumed, according to both philosophers, the action of the State, for Rawls of great inherence and for Nozick of minimal participation. It can be concluded from this analysis that there are antagonisms between these two philosophers because for Rawls justice is framed in a social egalitarianism, where society is something ideal, abstract, while Nozick assumes it within the thought of conservative liberalism, considering a real and concrete society.

Keywords: Justice; theoretical comparison; theory of justice; John Rawls; Robert Nozick.

Introducción

La justicia ha sido abordada desde tiempos remotos, considerada una virtud, un valor universal por cuanto se aspira que, en cualquier lugar, con cualquier persona o sociedad, ésta sea respetada. Se define como un principio moral con el cual se busca obrar y juzgar respetando la verdad y dando a cada uno lo que le corresponde. Es un bien común para la sociedad.

Ahora bien, ¿qué se entiende por justicia? Se diría que es la posibilidad de ser atendido y entendido de manera similar a los otros, mirándose como igualdad, de permitir que se tengan derechos, especialmente la libertad pero que, a la vez, se cumpla con lo que se debe, de manera que se actúe en la sociedad con un comportamiento acorde a lo que en ella se establece.

No obstante, la justicia se considera en ocasiones según son las circunstancias, de manera relativa a los hechos, y no como un principio de igualdad que implica una conducta similar en todos los ciudadanos, de allí que mientras unos opinan que algo es justo, para otros, la situación

es injusta, entonces se llega a pensar que la justicia se modifica a la luz de la visión de quien la debe asumir. Tal es el caso de los utilitaristas, los liberales, los pragmáticos, o desde el punto de vista filosófico político, por ello, ha sido una temática conflictiva, entender la justicia y tener que aceptar las distintas posiciones.

Verdaderamente, la justicia debe reposar en varios conceptos o principios básicos, el de la equidad, imparcialidad y libertad, por cuanto se parte del hecho que todos los seres humanos son iguales, no se admiten diferencias por sexo, edad, clase social, cargos, puesto que el trato para las personas debe estar concentrado en el respeto, la empatía. Es cierto que en la medida que más se conoce a un individuo, más posibilidad hay de ser justo con él, de aceptarlo y entenderlo y esto, a la vez, se convierte en un parámetro de posibles diferencias de atención.

Por ello, la justicia debe ser imparcial, en cuanto todos tienen los mismos derechos y, por ende, los deberes deben ser cumplidos con la misma exactitud según esta establecido, lo cual implica que quien se encarga de generar justicia, debe ver a los individuos de manera similar, para no caer en mayores oportunidades para unos o consentir más a uno que a otros. Aquí vuelve a plantearse la misma inquietud, posiblemente si se conoce a una persona en conflicto, más que a la otra, la balanza se incline favoreciendo a uno sobre el otro, entonces, no se logra ser justo.

El parámetro de la libertad es otro elemento importante de la justicia, porque determina la posibilidad de los individuos de desenvolverse con amplitud en su medio, sabiendo esa persona que es lo que debe hacer y no puede, conociendo sus fortalezas ante el medio y sus limitaciones, esto va a permitir su comportamiento natural y espontáneo ante los hechos, con la seguridad de saber escoger lo correcto y no lo incorrecto, para estar del lado del bien.

Destacan estos tres principios de manera sencilla y clara, estableciendo que la equidad, la imparcialidad y la libertad prevalecen cuando se habla de justicia. Sin embargo, podría decirse que hablar sobre este tema es interesante, sobre todo cuando está cargado de la filosofía, de lo teórico, de las posiciones de personajes filosóficos de trayectoria, políticos de alto renombre. Pero cuando se trata de entender la justicia en el plano de la realidad, de lo pragmático, de lo cotidiano, es posible caer en grandes incertidumbres, se llega a pensar si realmente la justicia existe, para quien existe, porque se inclina más en unos que en otros, y se llega a la premisa que si hubiera justicia en el mundo no existirían problemas, conflictos de tipo políticos, sociales, económicos, porque cada persona con su comportamiento, haría lo que debe hacer y esto permitiría el respeto a los demás, y por ende, la fraternidad, solidaridad, apoyo, cooperación. Pero no es así, esto no siempre se observa en el día a día, ni en la casa, el lugar de trabajo o la sociedad en general.

De igual manera, existen autores que hablan de la justicia según las necesidades de las personas, haciendo entonces, diferencias entre quienes tienen dificultades y quienes no, lo cual suena poco congruente cuando se desea la igualdad, y aquí se estaría dando mayor relevancia al necesitado con respecto al otro. Destaca que estas divergencias se producen porque hay diferencias en el pensar, en el sentir y en el actuar de las personas y de las instituciones sociales, y de no ser así, Marx, Lenin, Hegel, Kant no habrían perdido tiempo en divagar al respecto, y más actualmente, los filósofos y los políticos entenderían la justicia bajo la misma línea, por tanto, todo sería más fácil y aceptable, posiblemente se daría la equidad, la imparcialidad y la libertad.

El liberalismo es: “La postura filosófico-política más adecuada para fundamentar los derechos humanos” (Fernández, 1998:187), donde coexisten múltiples doctrinas y autores con puntos de vista diversos, e incluso divergentes. El liberalismo libertario, como lo plantea Quispe (2015:7) “Constituye el presupuesto irrenunciable en sus teorías de la justicia, se asienta en la consideración de los seres humanos como agentes morales”, pese a esta coincidencia central, la discrepancia será manifiesta en el planteamiento de la relación entre el individuo y el Estado.

De acuerdo a la explicación de la autora antes mencionada, la propuesta del liberalismo igualitario se compromete con políticas de redistribución social y económica que demandan la intervención de los poderes públicos. El marco institucional requerido, por ende, es el de un Estado social y democrático de Derecho que se adhiere a los valores libertad e igualdad sin absolutizar ninguno, aunque dicha adhesión, no es pacífica, sino conflictual.

En ese orden de ideas, surgen diversas teorías acerca de la Justicia con pensamiento liberal, partiendo de John Rawls quien desde 1951 comienza a interpretar ésta como virtud, valor, generando una serie de modificaciones en cada una de sus publicaciones hasta que en 1971 presenta *A Theory of Justice*, traducida al español en 1975 como *Una Teoría de la Justicia*. A partir de estas presentaciones otros filósofos, comienzan a disertar sobre el tema, siguiendo la línea o en contraposición, uno de ellos Robert Nozick.

En ese orden de ideas, el liberalismo “Acoge en su seno una tradición tan extensa que sostiene posiciones políticas más antagónicas de las que pueden encontrarse entre algunos comentaristas y algunos liberales, por ello, Rawls elimina de su argumentación la verdad absoluta” (Rodríguez, 2010:206), distinguiéndose por los procedimientos democráticos frente a la filosofía, de allí que en este estudio se plantea si sus posiciones son antagónicas o se complementan.

Por lo tanto, en función de aclarar ciertos aspectos se plantea la interrogante que direcciona este ensayo es: ¿puede el pensamiento liberal de estos dos autores John Rawls y Robert Nozick, presentar antagonismo

o si, por el contrario, se complementan en cuanto a lo que para ellos es la justicia con relación a los derechos civiles y derechos sociales? Esto lleva a formular como objetivo analizar la justicia considerando la óptica de John Rawls y Robert Nozick, desde una perspectiva comparada.

1. John Rawls. Liberalismo igualitario o social

John Rawls, según lo manifiesta Quispe (2015:06) inaugura: “La vertiente del liberalismo, para establecer la importancia que tienen para él estos derechos y cómo los configura en el marco abstracto, pensado para la praxis, de su producción filosófico-política”. Una obra que ha despertado el interés de otros pensadores que, desde planteamientos críticos, no dejan de apuntarse en la estela de las inquietudes del filósofo contribuyendo con su propósito amplio de dar fundamento a una convivencia política en las sociedades democráticas que se base en un loable marco de justicia y a su vez, haga posible que los sectores menos afortunados de las sociedades de todo el orbe aseguren su existencia y puedan desarrollar libremente sus planes de vida.

Este filósofo norteamericano presenta su enfoque y los criterios formativos como alternativa frente a las teorías sobre justicia, reinantes hasta entonces: el utilitarismo y el intuicionismo; y lo hace con posiciones interdisciplinarias, considerando el Derecho, la Filosofía del Derecho, así como aspectos referidos a la psicología, economía, Ciencia Política además de la moral, por cuanto cada una de estas áreas plantean posturas al respecto. Restituye la idea del contrato social como recurso argumentativo y diseño metodológico, para establecer unos parámetros o principios consensuados que guiarán el establecimiento de instituciones públicas justas. Al respecto, Calvano manifiesta que:

En el caso de Rawls, quien fuera sin duda una de los pensadores más lúcidos del derecho y la política en el siglo XX, la justicia misma como valor fundamental emana de su situación contractual que define en el derecho positivo lo que una colectividad entiende como bueno, útil y necesario para la vida en comunidad, para la *polis* o la *ciudad* al decir de los antiguos griegos y romanos (Calvano, 2019: 19).

La posición de Rawls con respecto al contrato social, se centra en la idea de una sociedad justa y ordenada, donde de manera democrática se da poder a la gente para que actúen de manera libre, racional y equitativa, que favorezca la convivencia donde cada individuo cumple con lo que le corresponde en beneficio de sí mismo y de la colectividad. Por esto, plantea que “una sociedad justa es aquella con la que estaríamos de acuerdo aunque no supiéramos las circunstancias en las que vamos a vivir” (Rawls, 1997:12).

Para Rawls “el más importante de los valores jurídicos es precisamente el de la justicia, dada su trascendencia e impacto en la vida social” (Núñez,

2021:28), por cuanto todo procesos se inicia con acciones justas de la sociedad planteando, “con la elección de los primeros principios de una concepción de justicia que regule todas las críticas posteriores y la reforma de las instituciones.” (Rawls, 1999:12), de esa forma se piensa de manera colectiva, cuál será el beneficio para todos, de allí su posición con respecto al contrato social.

Al respecto de las diferencias y desigualdades, cada persona elige lo que le gustaría y no lo que debería ser, y trae como consecuencia, que los comportamientos de unos sean correctos para quien desde el punto de vista político, establece que debe hacerse, mientras otras personas, escogen conductas fuera de la aceptación de lo moral. Como lo enfatiza Rawls:

Una sociedad justa otorga a sus integrantes el más extenso catálogo de libertades posibles, en términos de equidad, y organiza los asuntos económicos de tal forma que las desigualdades son permitidas únicamente cuando sirven el propósito de mejorar la situación de los más débiles (Nussbaum, 2014:8).

Por su parte, Quintero (2008:2) manifiesta que para para Rawls una sociedad justa “requiere de una fuerte actividad por parte del Estado, con el propósito de igualar las circunstancias básicas de las personas”; esta posición es posible desde el punto de vista teórico, pero en la praxis, la realidad es otra, el hombre muchas veces no vive en la mejor sociedad, por más que lo desee, y las circunstancias que le toca experimentar, hacen que muchas situaciones no sean justas, a pesar de su preparación, de su esfuerzo, aunado a que todos desearían ser remunerados por las capacidades que posee. Tal como explica Rawls, esa sociedad justa, implica lo que él denomina posición original y velo de la ignorancia.

Por otro lado, la inclusión de la justicia desde una perspectiva moral en la cuestión jurídica despertó el debate positivista que pretendía escindir la moral al derecho. Para John Rawls, la justicia es lo que prevalece en una sociedad justa, más, sin embargo, ¿qué se podría considerar justa?, ¿para quién es justa? Asume que en la sociedad las personas viven juntas, y existe cooperación y ayuda mutua. No obstante, cuando se produce un conflicto, se detecta que no siempre puede estarse de acuerdo en lo que debe hacerse, y es allí cuando surgen las diferencias, donde cada individuo podría reclamar sus derechos, debe ocuparse de sus deberes y esperar que se distribuyan los beneficios según sean las cargas, cuestión que es totalmente factible en cualquier sociedad.

Su teoría se refiere a aquello que la gente acordaría si pudiera escoger, y se estaría de acuerdo, aunque las personas desconocieran las circunstancias en las que le toca vivir, de allí que menciona dos premisas, la posición original y el velo de la ignorancia partiendo del hecho que las personas desconocen todo aquello que los llevaría a tomar una elección racional que fuera distinta de los demás, suponiendo que debe ignorar muchos aspectos acerca de lo

que son sus intereses, prejuicios, preferencias, porque su elección debe ser igual para todos sin considerar sus inquietudes y oportunidades propias y particulares.

En su libro *Teoría de la Justicia*, editado en 1971, traducido al español en 1975, después de 12 años reelaborando sus escritos, hace una recopilación de los cursos desarrollados en la Universidad de Harvard en los años 80. Para comprender lo que algunos llaman el giro pragmático de Rawls y su cercanía a un republicanismo kantiano, es decir, su enriquecimiento crítico con Jürgen Habermas propone una teoría pública de la justicia en una sociedad pluralista.

La constatación de este hecho lleva al autor a postular la idea de que para llegar a lo justo se requiere de un procedimiento formal. Así como lo explica Castaño (2013:75) “Esta sería la manera para cumplir con la pretensión de garantizar la razonabilidad de esos principios a través de un consenso entrecruzado”, tomando en cuenta que en la filosofía contemporánea es posible identificar los: “Puntos de tensión teórica entre los distintos modelos relacionados con la filosofía del derecho” (Castaño, 2013:75), por lo tanto, en el escenario del debate sobre las teorías de la justicia no se debe olvidar que los razonamientos teóricos se encuentran estructurados con base en supuestos implícitos. En el caso del constructivismo de John Rawls se encuentra una concepción de la razón que implica:

El rechazo de una versión fuerte de cognitivismo en moral y política, indispensable para abordar el tema de la pluralidad y, en segundo lugar, su cualidad negativa primordialmente, propia de la noción del juicio kantiano, y que en Rawls tiene que ver con el modo como las cuestiones deben ser decididas, sin decir nada acerca de cuáles son las buenas razones o las decisiones correctas (Rawls, 1996: 619).

Ahora bien, Rawls en su teoría explica, además, que en la elección racional existen dos posibles situaciones basadas en la incertidumbre, según sea la garantía o el riesgo que corre con su elección y, por esto, se explica su punto en función de la incertidumbre, de la escasez moderada versus la abundancia. El *maximin* en dos versiones: a) todo va bien o; b) pueden presentarse problemas o crisis económica en la cual la persona puede ser optimista y seleccionar la situación donde todo va bien o ser pesimista y en función de los problemas que puedan presentarse y elegir el mejor resultado suponiendo que sucede lo peor.

En esta primera situación, las personas deben partir de su posición original considerando las libertades básicas, y el velo de ignorancia sobre la vida, cuestión muy difícil de asumir porque todas las personas aun cuando no quieran tienen una historia, una experiencia que los induce a elegir para su bien, aunque este no sea el bien común o del colectivo. Se busca maximizar la utilidad esperada o placer, de allí que las personas generalmente escogen lo que les da garantía y no es muy riesgoso para ellas.

En la segunda situación basada en el principio de iguales oportunidades, el *Maximax*, se busca maximizar el valor tomando en cuenta ser optimista de manera que en la sociedad se le brinde mejores opciones para obtener riquezas y poder, considerando que todas las acciones van en pro de la sociedad y del hombre como tal.

Estas explicaciones del filósofo Rawls parecieran ser incongruentes en cuanto a lo expresado de la Justicia, por ello, en su teoría muestra poca solidez al respecto, cuestión que en la medida del tiempo fue modificando hasta llevar al plano de la legitimidad, además de ser motivo de contradicciones con otros expertos que han analizado en profundidad esta virtud, don, derecho del ser humano dentro de una sociedad.

2. Robert Nozick. Liberalismo libertario o individual

El libertarismo es una corriente que proclama estar especialmente preocupada por el tema de la libertad. Para Robert Nozick la sociedad justa es aquella en la que los derechos de los individuos han sido acordados por el respeto que se les debe. Resalta los derechos de las personas tomando en cuenta que el individuo como ser humano está separado y es distinto de los demás, por lo cual pueden actuar como les conviene sin tener consideración por otras personas.

En su obra *Anarquía, Estado y Utopía*, Nozick expresa, que se requiere de un Estado mucho menos ambicioso en cuanto a sus pretensiones: un Estado mínimo, dedicado exclusivamente a “proteger a las personas contra el robo, el fraude y el uso ilegítimo de la fuerza, y a respaldar el cumplimiento de los contratos celebrados entre los individuos” (Zúñiga, 2011:194), tomando en cuenta la necesidad de responsabilizarse los ciudadanos agrupándose en asociaciones de manera que entre todos puedan defender sus derechos y seguridad sin esperar que sea el Estado quien lo garantice, y aunque tengan modelos liberales, conservadoras, comunistas, socialistas, podrán hacerlo, en tanto sepan respetar los derechos de los demás. Los derechos naturales en los que piensa Nozick, se fundan en una intuición básica La propiedad de cada uno sobre sí mismo y cada uno es el legítimo propietario de su cuerpo.

En ese orden de ideas, se considera el principio de rectificación que para Nozick parte de dar reconociendo la posibilidad que algunas transferencias o apropiaciones se hayan realizado de modo inadecuado y admite que tales situaciones requieren de reparación, si es que se trata de presentar una teoría de la justicia coherente. Reconoce la posibilidad que algunas transferencias o apropiaciones se hayan realizado de modo inadecuado, y admite que tales situaciones requieren de reparación, si es que se trata de presentar una teoría de la justicia coherente, por ello, plantea el principio de la rectificación con el cual se exige reparaciones en cuanto a posibles

injusticias cometidas a través de previas adquisiciones y transferencias. Saavedra Silva (2007) considera que:

Para Robert Nozick una justicia tiene que respetar los títulos de pertenencia y sólo redistribuir aquellas propiedades que carezcan de títulos. Someter la libertad de unos individuos a través de la intervención estatal sobre sus propiedades, para beneficiar a otros, es tomar a los primeros como medios para el logro de los fines de los otros, lo cual es contrario al imperativo categórico Kantiano que ordena no tomar al hombre como medio, sino siempre como fin (Saavedra Silva, 2007:4).

La posición de Nozick era impugnar la teoría que Rawls plantea sobre la justicia, porque contradice la normativa moral de respetar la propiedad y los derechos de los demás, que son divergentes con la teoría kantiana, de allí que expresa que Rawls no es leal con su maestro acerca del deber ser al suponer que deben distribuirse las riquezas entre los demás, sin considerar que quien se esforzó por tenerlas, merece ser respetado, planteando que la justicia de una distribución puede residir en su surgimiento de un proceso justo de intercambio voluntario de propiedad y servicios justamente adquiridos. Cualquier resultado que sea producido por este proceso será justo, pero no hay algún patrón particular al que el resultado se deba ajustar, para hacer una distribución de acuerdo al valor que se tiene, a las capacidades de cada ser.

El principio de la rectificación es el que exige reparaciones en cuanto a posibles injusticias cometidas a través de previas adquisiciones y transferencias. La idea es que este principio permita justificar el desarrollo del resto de la teoría. Este principio exige volver atrás y reparar el daño cometido, para impedir que la sociedad se erija a partir de una serie de actos de apropiación injustificados, borrando aquellos rastros de posibles injusticias.

En ese sentido, Nozick, asume los derechos a gozar de la vida, de la salud, de la libertad y de las posesiones sin que haya interferencias por parte de otros en forma de violencia, robo, fraude, o rotura del contrato. En cuanto al contrato social, Nozick, de acuerdo al planteamiento de Rodilla (1984: 12) “recurrir a la tradición contractualista, no precisamente a la noción de contrato social, en el marco de una teoría del Estado fuertemente iusnaturalista e individualista, lo cual representa un intento de radicalizar esa nueva versión del liberalismo de *laissez-faire*”, para el que en Norteamérica se reserva el rótulo de libertarismo, representando dos formas de adaptación de la tradición liberal a las tendencias neoconservadoras; y, aunque sus marcos teóricos sean diferentes, cumplen funciones complementarias. En concreto, plantea la anarquía como el orden sociopolítico más adecuado al goce y disfrute de la libertad, la cual se da en varias etapas:

1. Constitución de grupos pequeños que se unen en búsqueda de la autoprotección.
2. Designación de algunas personas a quienes se les encomienda la defensa de los componentes de la asociación, usando el término de agencia de

protección. 3. Si se dan más conflictos entre las asociaciones, una sobresaldrá como dominante. 4. Asume el control la agencia de protección de la asociación sobre todos los individuos dentro de su área y cuando los antiguos independientes son compensados por la pérdida de su autonomía dándoles protección que ofrece la agencia, entonces el Estado inicia su existencia (Riddall, 1991: 207- 211).

Para Nozick este proceso que llama de la mano invisible es la fuerza del autointerés racional que determina en cada momento lo que ha de seguir, es una manera de regular y controlar. El autor también habla de justicia en la posesión que debe cumplirse cuando la propiedad fue adquirida sin que fuera propiedad de otro o si la propiedad ha sido transferida al actual poseedor por medios válidos como un regalo o venta y no por fraude o robo.

Nozick considera las agencias protectoras importantes para darle solución a los problemas de sus asociados. Pero estas nunca llegan a tener el monopolio de nada, ni siquiera el monopolio del uso legítimo de la fuerza. Sólo tienen el derecho que les confieren los individuos que voluntariamente deciden ponerse bajo su protección. Por su parte, la autoridad de la agencia que pasa a dominar las demás, toma en cuenta Estado ultra-mínimo carece de todo título jurídico que no provenga de la libre aceptación de quienes están sometidos a ella. Su legitimidad no tiene más respaldo que la razón que los individuos presentan para someterse a la voluntad de la agencia de protección escogida.

La contratación no implica en ningún momento la atribución de un monopolio de derechos hacia la o las agencias contratadas, por ello Nozick plantea que: “Todas las obligaciones que los individuos puedan tener provienen de la libre contratación que hacen éstos de determinados servicios” (Saavedra Silva, 2007:57), donde el Estado por su mínimo poder de intervención, no posee acción jurídica de allí que la legitimidad no tiene más apoyo que la razón que las personas de manera voluntaria le otorguen.

En tal sentido, el Estado cumple la función de vigilante y la intromisión es mínima, pero garantiza la indemnización para la persona cuyos derechos han sido vulnerados por parte de la persona que ha causado el daño con el fin de impedir en el futuro se vuelva a cometer estas infracciones, prohibiendo conductas peligrosas. El Estado surge “De forma tan gradual e imperceptible, sin ningún rompimiento grande o fundamental de la continuidad, que estaría tentado a afirmar que el estado de naturaleza y la sociedad civil son una y la misma cosa” (Nozick, 1988: 136).

Explica que cualquier intento para justificar la redistribución de la propiedad por motivos sociales o de reducir el grado de desigualdad de la distribución de la propiedad, dentro de un Estado, está fundado en bases erróneas, tomando en cuenta que debe respetarse a la persona, tomando en cuenta que cada individuo de manera particular, se ha esforzado y trabajado para tener lo que necesita, y no le parece justo que deba repartirlo de manera equitativa con otros, porque cada individuo tiene derecho a disfrutar de lo suyo, sin sentirse obligado a darlo a los demás.

Al tomar en cuenta los aspectos antes expuestos sobre Rawls y Nozick, se presenta a continuación un cuadro comparativo referido a distintos criterios en los que se basan las teorías sobre Justicia por parte de ambos filósofos del pensamiento libertario, considerando entre los mismos las ideas de su teoría, el origen de las mismas, su fundamento, como es la percepción de la persona y de la sociedad según ellos, los principios que caracterizan sus argumentos, como detectan las desigualdades, la posición social los derechos, la distribución de las riquezas, la retribución, el papel del Estado, entre otros elementos que permiten definir similitudes o diferencias desde la perspectiva de los derechos sociales.

Cuadro No. 1

Perspectiva Comparada Sobre Justicia

Criterios comparativos	John Rawls	Robert Nozick
Ideas en su teoría	Libertad, igualdad y recompensa por servicios.	Libertad individual, recompensa por su trabajo.
Origen de sus ideas	Emanan del contrato social, como si la gente acordara escoger algo.	Toma muy en cuenta la posición de Rawls y a partir de estas, genera su posición siendo más individualista.
Fundamento	Imparcialidad: Teoría universalista aplicable a cada individuo.	Existencia de cada ser humano como individuo, separado y distinto de los demás sin obviar su papel en la sociedad.
Percepción de la persona	La interpreta en su teoría de manera diferente según sea la circunstancia, plantea más sus ideas sobre las instituciones sociales.	Plantea al individualismo radical, la voluntad propia. Los derechos individuales son de carácter absoluto.

Sociedad	Asume la cooperación y ayuda mutua. Habla de una sociedad justa y, por lo tanto, de la naturaleza de la justicia. Aquella con la que se estaría de acuerdo, aunque no se supiera las circunstancias en las que se va a vivir institucionalmente bien organizada	La toma como un espacio donde los individuos se socializan, pero sobre la base de que cuentan con una serie de derechos que son anteriores a cualquier acuerdo entre los sujetos que componen dicha sociedad. Habla de una sociedad justa donde los derechos de los individuos han sido acordados por el respeto que se les debe.
Principios de justicia	Plantea superar el modelo utilitarista y las posiciones restrictivas de liberalismo libertario. Todos tienen derechos. Cada persona que participa en una práctica, o se ve afectada por ella, tiene igual derecho a la más amplia libertad. Las desigualdades son arbitrarias.	Libertad individual: Participación mínima del Estado Derecho en la propiedad. Para el autor, son posibles las desigualdades, depende del individuo como tal quien hace defender sus derechos.
Desigualdades	Considera las arbitrariedades moralmente. Las desigualdades producidas tanto por las contingencias sociales como por las contingencias naturales, trata entonces de corregirlas a través del principio de la justa igualdad de oportunidades y el principio de diferencia.	Considera que las desigualdades en lugar de perjudicar ayudan porque incentiva al hombre a trabajar más, a generar los insumos para satisfacer sus necesidades en función de los derechos que tiene para actuar dentro de la sociedad.
Posición social	Asume la posición social de las personas en situación de desventaja sin distinguir entre aquellas que se encuentran en tal situación por circunstancias fortuitas o por causas atribuibles a su responsabilidad.	El derecho natural impone que a nadie le es permitido actuar de forma que dañe la vida, la salud, la libertad o las posesiones de los demás.

Derechos	Aplicación de valores universales. Elección racional porque los individuos deciden de lo que experimentan en su sociedad	Plantea los derechos naturales conferidos en gozar de la vida, la salud, la libertad y de las posesiones sin que haya interferencia del Estado y de otros. Libertad de expresión.
Propiedad privada	Sustenta sus planteamientos en las instituciones sociales donde los individuos se desenvuelven.	Defiende la propiedad privada, como un derecho del hombre.
Distribución de las riquezas	Plantea la distribución de las riquezas, quien tiene más debe aportar a los desventajados socialmente.	No promueve una justicia distributiva porque cualquier medida que tenga como objetivo la redistribución de la riqueza infringiría el derecho natural de aquellos que consideran la propiedad como algo que debe conservarse.
Retribución	Habla de la recompensa por servicio, pero no la explica como tal por cuanto promueve la distribución.	Considera que la riqueza se distribuye en función de lo que hace la persona para obtenerla.
Responsabilidad individual	Rawls no hace referencia explícita a la responsabilidad individual, asume el papel de los individuos como parte de la sociedad.	En todo momento plantea al hombre como un ser con voluntad propia para elegir lo que más le conviene y quiere siendo responsable de sus actos.
Fundamentos	Sus principios llevan a: 1. Generalidad 2. Universalidad 3. Carácter público 4. Ordenamiento 5. Carácter definitivo.	Sus principios llevan a 1. Derechos individuales 2. Seguridad individual 3. Agencia de protección 4. Acuerdos privados.
Estado	Establece las normas y la persona acepta sin conocer sus posibilidades de escogencia. Esto impide la realización de lo que para una persona es libertad	Critica la intromisión del Estado como inadmisibles, porque asume que nadie puede ser utilizado para un fin al cual no ha dado autorización. El papel que le da al Estado es de vigilante, garantizando a la persona sus derechos.

Bienes	Habla de los bienes primarios en los cuales incluye los de naturaleza social como derechos, libertades, poderes y oportunidades, los ingresos y la riqueza, a disposición de la sociedad.	Defiende los bienes propios, la propiedad por adquisición o por herencia.
Resultado	Los sustentos teóricos se alejan de la sociedad real. Es poco práctica.	Es una teoría que se enmarca en la realidad. Es práctica.
Concepciones	Al generalizar asume que todos los seres tienen las mismas posibilidades, aunque siempre plantea los que tienen y los menos aventajados.	Distintas formas de ver la vida, quien más se esfuerza más debe tener, eso hace la diferencia.

Fuente: Elaboración propia.

3. Interpretación textual y contextual

Es importante asumir que la Teoría de la Justicia surge luego de una serie de reflexiones que John Rawls desde los 50 estaba generando, partiendo de su posición primera que la Justicia es igualdad, y madura sus pensamientos al observar la posición de otros pensadores, especialmente los utilitaristas quienes asumen una justicia más a conveniencia de cada persona, pero no se enmarca en el Deber ser, por ello, en 1971 expone su teoría y establece sus puntos de vista con la posición original y el velo de la ignorancia para hacer resaltar la importancia de hablar de justicia de igual manera para todos, sin distingos ni especificidades individuales, de allí sus ejemplos para explicar lo que él quería. Por ello, se consideró que era demasiado universal, que generalizaba sus posiciones y no planteaba en sus argumentos las distintas posibilidades.

Aunado a eso, al ser liberal igualitario, pretende resaltar la necesidad de las desigualdades y hace énfasis en que quienes tienen más, aporten a quienes no tienen las mismas opciones. Este argumento suena mucho a comunitarismo, y se acepta en función de su percepción hacia la justicia como igualdad, y no entiende acerca de quienes más hacen, producen, se esfuerzan pudieran tener una riqueza diferente. Esta posibilidad para Rawls en el planteamiento de su Teoría de la Justicia, no se establece, porque para él la distribución de la riqueza es muy importante. Por lo tanto, para Rawls en su Liberalismo igualitario, según Gargarella, (1999:48): “Le otorga

importancia a la libertad positiva de las personas y considera, en principio, que las omisiones tienen (en algunos casos) el mismo rango moral que las acciones”.

Por el contrario, Nozick, expone en 1988 su libro *Anarquía, estado, utopía*, expresando sus puntos de vista acerca de la justicia, y como se presenta en el cuadro que antecede esta explicación, para este autor la experiencia de justicia es un fenómeno individual. Sin embargo, este autor sustenta sus criterios en lo expuesto por Rawls, es por ello por lo que sus fundamentos parten del liberalismo igualitario, pero en sus argumentos hace énfasis en elementos o criterios que tal vez no habían sido claramente expuestos. Según lo explica Saavedra Silva (2007) sin pretender quitarle importancia al pensamiento de Rawls, quien considera una sociedad justa que necesita de un Estado muy activo y presencial, un Estado cuyas instituciones básicas deben estar al servicio de igualar a las personas en sus bienes fundamentales para que puedan llevar una vida digna, asume que:

En cambio, Nozick orienta su trabajo filosófico-político, contenido especialmente en *Anarquía Estado y Utopía*, hacia una crítica a teorías de la justicia como la de Rawls, y a la defensa de una teoría de la justicia muy diferente a la defendida por cualquier propuesta que propende por un igualitarismo social (Saavedra Silva, 2007: 11-12)

Es importante recordar que Nozick se fundamenta en ideas libertarias, por cuanto su liberalismo es conservador, con la cual asumía que no debía permitirse libertades a los individuos para proveerlos al permitirle libertades negativas que considera intervienen en los derechos particulares, manifestando estar en desacuerdo con que se le obligue una persona contribuir con otros, repartiendo sus bienes entre lo que se supone son personas con más necesidades, aunque sea para la protección de sus derechos.

Rawls plantea su Teoría de la Justicia (1975), desde las instituciones sociales, fundamentado en el contrato social, y alimentado en cierta forma por la teoría kantiana, de allí que no especificaba diferencias ni circunstancias, mientras Nozick, toma muy en cuenta lo expuesto por su antecesor y agrega la necesidad de valorar de manera justa lo que el individuo debe tener por lo que hace y se esfuerza, de allí la relevancia de considerar los bienes, salud, vida, posesiones, si eso le pertenece, debe ser suyo, y no tiene el Estado porque intervenir en algo que se merece el hombre de por sí y más cuando ha trabajado por lograrlo, por esto su crítica al pago de impuestos, cuando en realidad según explica, indican el gran esfuerzo realizado por tener más riqueza según su producción, afectando su libertad como persona y su bienestar económico.

Es interesante asumir la posición de Rawls, para quien una sociedad justa necesita de un Estado muy activista, cuyas instituciones fundamentales contribuyan en la primordial tarea de igualar a las personas en sus

circunstancias básicas. Al contrario, para Nozick en su obra *Anarquía, Estado y Utopía*, explica que se requiere de un Estado mucho menos ambicioso en cuanto a sus pretensiones, que proteja a los ciudadanos, pero no haga uso de su poder para utilizarlos como instrumentos que le permita obtener sus objetivos, por lo cual, los individuos no deben ser manejados de cualquier forma como medios para lograr algo determinado, debiéndose respetar sus derechos como personas.

Explica Nozick, el Estado mínimo que avance respetuosamente frente a los derechos de cada uno, frente al desamparo y abusos, que surjan las asociaciones de protección o ayuda mutua, donde se reúnan sus miembros y se brinde protección de forma razonable. Sin embargo, a medida que vayan integrándose, podrían formar un proto-estado al que denomina Estado ultra mínimo, que monopoliza el uso de la fuerza, aunque no garantizaría la protección absoluta de todos los individuos, de allí que su intervención no debe verse en todos los actos del hombre, solo en aquello que exija el respeto de los derechos.

Se evidencian antagonismo con respecto a este criterio porque para Nozick, la intervención del Estado debe ser mínima en cuanto se trate de la justicia desde el punto de vista individual, argumentando que defiende una sociedad organizada como un «marco para la utopía», donde quienes quieran vivir de acuerdo con pautas liberales, conservadoras, comunistas, socialistas, podrán hacerlo, en tanto sepan respetar los derechos de los demás.

Para Nozick la pretensión igualitarista de Rawls para que el Estado contribuya a igualar las circunstancias básicas de las personas constituye una intromisión elemental a la libertad que debe gozar todo individuo para desarrollar sus destrezas y habilidades y, por esa vía, diferenciarse del resto. (Arias de la Mora y Huracha Correa 2015:163).

Nozick, se contrapone a Rawls, al sostener que las personas tienen derecho únicamente a las explotaciones que han adquirido inicialmente de manera justa o que han sido transferidos a ellos de una manera justa, por ejemplo, una herencia, por ello, considera que los impuestos son equivalentes al trabajo forzoso y, por lo tanto, es injusto forzar a una persona a trabajar para el beneficio de otro, siendo las personas dueñas de sí mismas, de su trabajo y de los frutos de éste, lo cual debe ser respetado por el Estado y la sociedad, de manera que cada quien sepa que es lo que posee y puede usar para su beneficio.

Además considera Nozick (1995) que debe explorarse la racionalidad de la decisión y la racionalidad de la creencia, las cuales muestran cómo los principios funcionan realmente en el pensamiento diario y en los esfuerzos por vivir en paz y de manera productiva unos con otros, tomando en cuenta la capacidad que tienen las personas de analizar lo que les conviene y deben hacer y lo que no, por ello, deciden tener y por ello, trabajan, sienten

libertad de pensar y elegir, algo de gran importancia para el desarrollo de una sociedad justa, donde se razona que es lo pertinente.

Expresa al respecto, Caudevilla (2012) que cualquier sistema que distribuya los productos en base a otros criterios es moralmente indefendible para el autor, puesto que viola los derechos individuales al privar a los sujetos de aquello que justamente han adquirido. Otro de los aspectos de la posición de Nozick se refiere a la manera de distinguir entre dos maneras de interpretar el principio de la apropiación considerando uno débil y el otro fuerte, donde:

El principio fuerte afirma que una persona está peor de lo que estaba antes por la apropiación de una pertenencia por otro, si no encuentra ninguna compensación por la pérdida de dicha pertenencia. El principio débil afirma que una persona no puede apropiarse de una pertenencia que es propiedad de otra pero puede compensar su pérdida usando la pertenencia (Nozick, 1988:117).

Este principio de apropiación es criticado por Nozick al tener en cuenta que la distribución de los productos debe hacerse en función de lo que le pertenece y si se le obliga a repartir lo suyo, se están violando sus derechos individuales y, favoreciendo a quien no le pertenece ese beneficio, “los derechos son títulos que podemos exigir plenamente y no gracias a concesiones que dependan del Estado o de las personas con quienes nos relacionamos” (Squella, 2010: 197) menciona que tales derechos, especialmente los que se relacionan con la propiedad, con la vida y con la libertad, son anteriores al Estado e independientes de los sistemas sociales y políticos que puedan existir en un lugar y tiempo dados.

Mientras por el contrario, para Rawls, la distribución de la riqueza es un punto fundamental de su teoría de la justicia, quien más tienen debe dar a los menos aventajados, mostrando con esto, la desigualdad al querer la igualdad, porque si una persona se esfuerza, trabaja más, merece tener más, y no siempre repartir lo obtenido de manera justa con su trabajo, a los otros. Esto indica el derecho social que preconiza el autor, asumiendo la distribución de las riquezas, quien más tiene, debe dar a quienes son más necesitados. Por ello, Nozick argumenta en contra del Estado de bienestar:

Porque piensa que un sistema fiscal distributivo es similar a un sistema de trabajos forzados. Quitarle a una persona las ganancias de un número x de horas laborales es como tomar x horas de las propias personas; es forzar a alguien a trabajar para otras (Nozick, 1988:171).

Para Nozick, una distribución es justa si se ha producido de acuerdo con estos tres conjuntos de normas de justicia, por ello se centra en criticar las alternativas que aportan los comunitaristas, utilitaristas y socialistas de la justicia, en cuanto a redistribuir la riqueza de manera similar entre los ciudadanos de la sociedad, de manera cooperativa, discrepando al respecto porque “la idea la repartición de bienes y honores en la sociedad debe ser

hecha de acuerdo con algún criterio de justicia”(Saavedra Silva, 2007:1), de allí su ideología liberal, que ha reaccionado fuertemente contra esta clase de soluciones. Él, percibe una gran arbitrariedad porque “se están considerando las cosas como si ellas no tuvieran dueño, cuando ellas entran en el mundo social de la mano de su dueño” (Nozick, 1988:356).

Al tomar en cuenta lo expresado, se considera injusto estar obligado a ayudar al necesitado porque producto de su trabajo ha sido remunerado, mientras “que una persona que prefiere no hacer nada, no tenga pero tampoco tiene la obligación de dar” (Dieterlen, 1992: 131)., asumiendo Nozick que: “Una carga fiscal desestimula la producción ya que las personas no pueden gastar en lo que quieran lo que, con esfuerzo, han ganado (Nozick, 1988: 247), por eso, la noción de elección voluntaria, que aparece muy seguido en el libro, le sirve a Nozick para criticar al marxismo.

No obstante, Nozick, reconoce la posibilidad que algunas transferencias o apropiaciones se hayan realizado de modo inadecuado, y admite que tales situaciones requieren de reparación, si es que se trata de presentar una Teoría de la Justicia coherente, por ello, plantea el principio de la rectificación con el cual se exige reparaciones en cuanto a posibles injusticias cometidas a través de previas adquisiciones y transferencias pero “es imposible aplicar el principio de la rectificación de las injusticias cometidas en el pasado” (Dieterlen 1992:134), se podrían hacer en un tiempo determinado, en busca de la justicia para todos, pero sin asumir responsabilidades que escapan de los límites de tiempo y de espacio, por ello, para Nozick, la justicia tiene dos aspectos esenciales: El principio de moralidad en la transferencia de propiedades y la moralidad del acto mismo de la defensa propia.

En ese sentido, luego de hacer un recorrido por las ideas fundamentales que, sobre la Justicia, John Rawls y Robert Nozick han planteado, es interesante resaltar que las percepciones de estos dos filósofos del movimiento libertario, van por dos caminos diferentes, por cuanto Rawls, asume un liberalismo igualitario al considerar que nadie merece las capacidades y talentos que posee y, por lo tanto, “nadie merece que la sociedad le premie o castigue por tales cuestiones circunstanciales” (Luévano Cayón, 2018:116), mientras Nozick considera que cada individuo es merecedor según sus esfuerzos y propósitos de ser y tener, aspecto que resalta al enfocarse en un liberalismo individual.

Conclusiones

Los aspectos antes analizados, permiten llegar a las siguientes conclusiones: Rawls se refiere explícitamente a los talentos naturales de cada uno como formando parte de un acervo común: de ahí que nadie pueda invocar dichos talentos como propios, con el objeto de apropiarse de

modo exclusivo de los frutos que obtenga con ellos. Resulta justo defender un sistema institucional en el cual los más talentosos sean llevados a poner sus talentos al servicio de los menos talentosos.

Al contrario, el liberalismo de Nozick es conservador, parte del hecho que cada uno se esfuerza por lograr lo que quiere ser y tener, y le parece injusto que el esfuerzo de algunos se destine a mejorar la suerte de otros, lo cual, para el autor, violenta el principio de la auto propiedad al punto tal de que cobre sentido hablar de una nueva forma de esclavitud, defendida en el nombre de la justicia, haciendo énfasis años después en su opinión acerca de los intelectuales, considerando como hipótesis, para el autor, comprobada que estos se oponen al capitalismo, en cuanto a la distribución de las riquezas, porque son una baluarte valioso para la sociedad, por producir conocimiento, cuestión que realmente pocas veces se le da el valor que merece, al contrario de quienes hacen riquezas, básicamente económicas, que no representan realmente lo relevante para el enriquecimiento de una sociedad.

Lo que Rawls criticaba al utilitarismo en “tomar a algunas personas como meros medios en favor de los demás”, Nozick lo tomó como crítica para contrariar la posición del liberalismo igualitario (igualitarios). Rawls parte de la idea que los hombres deben obviar sus experiencias, conocimientos, habilidades, posiciones, y actuar como él lo dice desde la posición original bajo un velo de ignorancia que lo haría aceptar la igualdad para todos de manera imparcial, lo cual podría considerarse bueno, pero si se refiere a los derechos en cuanto a las oportunidades que se deben brindar al hombre dentro de la sociedad.

Es allí donde entra en contraposición con Nozick, para quien el hombre por ser único, individuo dotado de diferentes capacidades, tiene un derecho especial y es el de ser tomado por sí mismo, y no dentro de un colectivo, prevaleciendo la igualdad y la libertad, pero según sea el comportamiento de ese hombre en su medio ambiente. Si se analiza la justicia desde el punto de vista legal, otra sería la posición, porque las normas se establecen para todos por igual, deben ser cumplidas de igual manera por todos los ciudadanos y allí el Estado es controlador, haciendo seguimiento para que se asuman los deberes y obtener los derechos como lo supone Rawls.

Sin embargo, Nozick expone que no es justo que el Estado limite al hombre y le exija más de lo que él puede dar, y es allí donde plantea el pago del impuesto, al manifestar que si una persona trabaja más y, por ende, gana en razón de eso, no es justo que deba pagar tributos por su sobrecarga de trabajo cuando se está esforzando por obtener ganancias, y muchos, no lo hacen y pretenden obtener las mismas ganancias. Claramente deja ver que el derecho del hombre allí es violado, exponiendo las diferencias, quien más se esfuerza, más tiene, por eso no está de acuerdo con el principio de la distribución.

Entonces, ¿son antagónicos o se corresponden Rawls y Nozick en sus posiciones de los derechos sociales? Podría decirse que, si son antagónicos, a pesar de ser ambos libertarios, Rawls habla de una igualdad social, de una libertad social, tanto es así que en su obra *Teoría de la Justicia*, plantea las instituciones sociales, mientras Nozick quien analiza la justicia enfatizando en la libertad individual. Ambos piensan en la igualdad, pero el primero no se sitúa en circunstancias específicas, es más teórico, asume el DEBER SER, en un contexto, tal vez, imaginario, por cuanto suena difícil aplicarlo en la sociedad, en la práctica.

Mientras el segundo asume la realidad práctica, el SER, el ESTAR, el TENER donde cada hombre tienen una situación distinta, una posición diferente de la de otros y piensa que tienen derecho a lograr las recompensas que de acuerdo a su producción, merece, tal vez fue muy centrado en la persona, obviando la realidad que el hombre es un ser social y convive con otros donde la igualdad, el respeto, la libertad deben tener caminos de ida y vuelta, y hasta en ocasiones, ser más preciso en cómo reaccionar según sean las circunstancias.

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Perspectives of electronic judicial proceedings' development: international experience and possibilities of its application in Ukraine

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Abstract

The main directions of further development of e-justice are identified and analysed. Particular attention is paid to the current situation in this area in developed and democratic countries. Considering practical experience in the implementation of e-justice, possible ways of implementing progressive forms and methods of e-justice emerged. At present, the development of the judicial system has undergone significant and, first, positive changes in the direction of conducting proceedings in electronic mode. That is, it is commonly spoken of the so-called «electronic litigation», in one way or another it exists in most countries. It is concluded that, even though the international community has implemented measures in which electronic judicial procedures must be carried out, their applicability has been problematic in Ukraine, which has affected the judicial system. Processes related to the administration of justice are one of the key elements of the functioning of society. After all, they are meeting the constantly existing demand for justice on the part of citizens, and this demand is one of the basic human needs.

Keywords: electronic litigation; useful properties; adoption of experience; effective means; international experience.

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Perspectivas del desarrollo de los procedimientos judiciales electrónicos: experiencia internacional y posibilidades de su aplicación en Ucrania

Resumen

Se identifican y analizan las principales direcciones de un mayor desarrollo de la justicia en red. Se presta especial atención a la situación actual en este ámbito en los países desarrollados y democráticos. Teniendo en cuenta la experiencia práctica en la implementación de la justicia electrónica, surgieron posibles formas de implementar formas y métodos progresivos de justicia electrónica. En la actualidad, el desarrollo del sistema judicial ha experimentado cambios significativos y, en primer lugar, positivos en la dirección de la conducción de los procedimientos en modo electrónico. Es decir, se habla comúnmente del llamado «litigio electrónico», de una forma u otra existe en la gran mayoría de países. Se concluye que, a pesar de que la comunidad internacional ha implementado medidas en las que se deben llevar a cabo procedimientos judiciales electrónicos, su aplicabilidad ha sido problemática en Ucrania, lo que ha afectado al sistema judicial. Los procesos relacionados con la administración de justicia son uno de los elementos clave del funcionamiento de la sociedad. Después de todo, están satisfaciendo la demanda de justicia que existe constantemente por parte de los ciudadanos, y esta exigencia es una de las necesidades humanas básicas.

Palabras clave: litigio electrónico; propiedades útiles; adopción de experiencia; medios eficaces; experiencia internacional.

Introduction

Since the earliest times of human existence, individuals have tried to create certain bodies that would be engaged in establishing truth and justice in the conflict between members of society. It is clear that due to the continuous development of society, the courts, as well as other public authorities, continued to improve both organizationally and substantively. Access to justice has become an important issue in many justice systems around the world. Increasingly, technology is seen as a potential facilitator of access to justice, particularly in terms of improving justice sector efficiency. The international diffusion of information systems (IS) within the justice sector raises the important question of how to ensure quality performance (Lupo and Bailey, 2014). The regulatory act should determine the rules, which should be obeyed by the judicial authorities of Ukraine. It is necessary to take into account the law while interpreting the prescriptions of normative acts by the national courts. Such interpretation should proceed from the definitions and formulations available, first of all, in the legislation.

The importance of adhering to the rules and regulations, in the course of such interpretation, used in the law without such unreasonable extension or distortion of their content by relevant court decisions (Lyzohub, 2019).

Numerous studies demonstrate that the application of electronic system of judicial proceedings greatly facilitates litigation. Thus, the level of functioning efficiency of the judicial system of the country significantly increases in the whole. Therefore, Ukraine cannot and should not stand aside from those processes, since modern technology development facilitates all spheres of society's life-sustaining activities. It should be noted that the introduction of electronic judicial proceedings among other things will be categorically a positive step towards the progressive development of the judicial system. In our opinion, this will also make it possible to reduce the level of workload that numerous courts currently have throughout Ukraine. Besides, given the ongoing COVID-19 pandemic, it can be argued that the use of electronic litigation means by the judicial agencies of the country will, first of all, significantly reduce the risks of face-to-face contact between persons involved into litigation; secondly, it will assist to administer justice in remote parts of the country.

Changes in IT information technologies in the judiciary have become particularly evident in the context of the pandemic in an urgent need to file documents electronically, hold online court hearings, and the need to respond and efforts to ensure justice are imposed (Bakaianova *et al.*, 2020). For example, these may be hard-to-reach places that belong to that category due to natural disasters, settlements that are at a considerable distance from district centers, etc. It is known that natural disasters such as floods are extremely common phenomenon in Ukraine, especially on the West and South-West of the country. The country's inability to hold court hearings during such force majeure conditions has been a serious problem in the past. In addition, it ruined the country's image.

The purpose of the article is to determine the perspectives of electronic judicial proceedings' development in Ukraine. In this regard it is planned to solve the following tasks: to carry out the analysis of the current state of affairs in the sphere of electronic judicial proceedings in the developed countries of the world; to conduct a comparative analysis of the forms, methods and means of carrying out electronic judicial proceedings in different countries; to define the possible ways of implementing the progressive forms and methods of electronic judicial proceedings' organization into national judicial system.

1. Methodology of the research

The methodological basis of the work is generally scientific and special methods of scientific cognition, which are used to achieve the set purpose. The comparative and legal method has been used to study international legislation regulating the legal provision of exercising electronic judicial proceedings. The systematic approach is the basis for the analysis of the legislation of Ukraine, the provisions of which determine the procedure for submission of electronic documents to the court, as well as sending procedural documents in electronic form by such participants in parallel with paper documents in accordance with procedural law. The application of the method of systematic analysis and generalization allowed us to identify legislative gaps and conflicts, on the basis of which scientifically based recommendations of theoretical and applied nature have been formulated. The selected methods have been used within interrelation and interdependence that guaranteed the comprehensiveness and objectivity of the obtained results of the scientific research. This is really through that the state of Ukraine is ensuring that issue of electronic judicial proceedings should be carry-out using the international standard put in place in other countries which has succeeded in using the said methods of proceedings. Our concerned here is not just looking at the methods of application in Ukraine, but rather to look at the difficulties that may have made the issue of electronic proceedings unsuccessful in Ukraine and how it can be remedy.

Examining only the methods of application is not enough in ensuring effective electronic Judicial proceedings, rather the issue is in making sure that electronic judicial proceedings should be effectively implemented so that the rationale of justice should be ensure. The question is not just accepting that this method of proceedings should be used in the country, but rather than to question whether it has able in solving those inconsistencies affecting the justice system, if not of what use is the methods important. Every country has its ways that it function, and for a foreign system to be accepted in a given country, it should be able in accepting the various norms of the said country. The fact that the system or proceedings succeeded in other countries, does not necessarily mean that it will be equally be successful in Ukraine.

2. Results and discussion

One can confidently state that electronic system of judicial proceedings is currently one of the highest priorities both in the context of improving the efficiency of the judicial system and in the context of improving the state system in general. It is the result of the constant development of the judicial system throughout the existence of the judicial agencies in society. Despite the existing calls in Ukrainian society for the introduction and development

of electronic systems of judicial proceedings in Ukraine, we can state that it has not been fully implemented in Ukraine (Fabri and Lupo, 2012).

Thus, we currently see that electronic system of judicial proceedings fully operates in only few countries, namely the United States, Canada, Australia and the European Union Member States. All other states, although claiming to have the means to conduct electronic judicial proceedings, actually have only few tools that are not related to each other and cannot fully ensure the functioning of electronic judicial proceedings (Lupo and Bailey, 2014).

According to the researchers of the above processes, there were several reasons for the creation and implementation of an electronic judicial proceedings system in the judicial agencies. First of all, electronic judicial proceedings will significantly reduce the funds that the state regularly allocates for judicial agencies. Conduction of a whole list of court cases in electronic format is considered more effective than organizing these cases in the traditional format (Cano *et al.*, 2015). Secondly, as foreign analysts and researchers point out, the specifics of legal trials, the introduction of a full-fledged system of electronic judicial proceedings will significantly reduce the burden on both judges and the entire judicial system.

Leading scholars tend to argue that the problem of overburdening of some judicial agencies in Ukraine is considered almost critical. At the same time, the absolute reality for the domestic judicial proceedings is that there are certain courts that hear a small number of cases, and most other courts do not cope with the terms for conducting court hearings (Arial, 2001). In turn, researchers recognize it as a serious obstacle in exercising the justice in the country. It is worth noting that unfortunately, it was typical and traditional for Ukraine to have an overburdened judicial system. In particular, it is noted that it is a consequence of inefficient organization of the functioning of judicial agencies.

Significant organizational problems have been historically inherited from the Soviet era, where a totalitarian political regime created and constantly ensured the state of affairs, when low performance, poor organization and numerous abuses were widespread.

Given the above, as well as based on data provided by researchers, we note that low transparency of state authorities, restrictions on freedom of speech and other prohibitions were among the key factors during the Soviet Union era for transforming the courts into agencies that are sources of corruption (Andrade and Joia, 2012).

Electronic system of judicial proceedings, which according to experts could not be implemented in principle in the Soviet or any other totalitarian system, largely eliminates the negative features of the human factor, which a traditional judiciary has. In particular, we recognize the undoubted advantage of the organizational capabilities of the former.

Researchers, among other things, define the functioning of electronic system of judicial proceedings as one that plays a key role in “combining law and technology” into something common. Indeed, scholars state that technology is still able to significantly improve the daily existence of the legal sphere, and the law provides a kind of platform for high-tech achievements of mankind for their practical application (Aiqa Mohamad Zain, 2018).

It has long been accepted as true in the developed countries of the West that the functioning of electronic system of judicial proceedings should be based on certain principles. Regarding such principles, it is stated that they should ensure transparency in the functioning of mechanisms of electronic judicial proceedings, as well as simplify the processes of judicial proceedings in general. At the same time, the principle of equal access to justice for all citizens must be ensured. The latter is one of the fundamental elements of creating electronic judicial proceedings in general. The system of the above mechanisms should have a simple and accessible interface to each user, which assists the users to exercise their participation in the trial (Afshar and Ahmad, 2015).

Analytical observers point out in this context that the creation of an optimally functioning, reliable and at the same time simple and clear system of electronic judicial proceedings is fully in the interests of the state. It is especially true for statesmen who really focus their efforts on achieving high performance in Ukraine in the field of state system’s efficiency and the reality of the rule of law.

Researchers call the achievement of wide use of such systems by participants in various lawsuits, as well as the further increase of the capabilities of such systems as specific interests. Herewith, it will “justify” the amount of money that was spent on the system of electronic judicial proceedings and, along with this, clearly demonstrate the advantages of such approach (Alshibly *et al.*, 2016).

Other scholars argue that achievement of a necessary balance is very important. It should exist between simple and convenient services of the system of electronic judicial proceedings that would not create difficulties for the vast majority of persons involved in trials, but such system should at the same time ensure the maximum opportunities in the field of judicial proceedings. It is this scientific and practical discourse of experts designed to establish a correspondence between the “convenience” of any system of electronic judicial proceedings and its real practical possibilities (i.e. its effectiveness in general), is one of the main discourse in legal science of the developed foreign countries (Saman and Haider, 2012).

In order to increase the efficiency of electronic system of judicial proceedings, as well as to ensure a consistently high demand, it is necessary that such a system successfully solves key problems and neutralizes the

main shortcomings of the current traditional system of judicial proceedings. Some of them have been listed above in this article.

Meanwhile, verbal battles between leading lawyers in Ukraine are only over the meaning and reasonableness of introducing electronic judicial proceedings, and discussions in the developed democratic countries about the peculiarities of daily operation of electronic system of judicial proceedings are almost non-existent.

We believe that any speculation, the essence of which is to invalidate the certainly useful properties of electronic system of judicial proceedings, should be stopped or should be refuted by other participants in such discussions by providing clear and convincing facts in favor of the above systems. In our opinion, electronic system of judicial proceedings should become a mandatory and reliable element of daily processes related to the administration of justice in the country. The basis of such a system should be elements borrowed from the most successful mechanisms of electronic judicial proceedings of the developed countries. It should also be emphasized that the system of electronic judicial proceedings must be well adapted to the possibilities of its continuous improvement. It is recognized as important because technologies in today's world are rapidly changing and its capabilities are improving and expanding. Therefore, the work on the introduction of such a system into the state structure should be comprehensive and take into account the many peculiarities of daily operation. Besides, it is emphasized that the system of electronic judicial proceedings should be componentised, i.e. should consist of certain modules, which, although operate together, but each has a separate purpose. In case of temporary failure of one componentised element of the system, all others will be able to continue to function stably. Currently, such a technological property of electronic systems of judicial proceedings is becoming the most desirable.

There are several systems of electronic judicial proceedings in European countries, which are characterized by a high level of efficiency, but instead are quite easy for everyday use by the average user. Such systems include: the Italian TOL, the Anglo-Welsh MCOL system and e-CODEX that is the world's first interstate system of electronic judicial proceedings. It should be noted that the latter operates throughout the territory of the European Union Member States, strengthening and unifying their judicial systems. Regarding the Italian TOL system, it should be noted that work on its implementation has been underway since 2001 and was successfully completed in 2005 through the official introduction and implementation of this system. It was the first major success in the development of e-justice on the European continent. Certain prototypes of such systems were surely created simultaneously with TOL, or even earlier. However, it is this Italian system that has demonstrated the wide range of opportunities that e-justice can provide.

With regard to the British MCOL system, it should be noted that it operates mainly in the civil law field, as well as in the field of relations between the authorities and citizens, which are called administrative and legal relations in Ukraine. The peculiarity of this system is its structural component, which is aimed at constant interaction with users of the system and is designed to provide continuous assistance to the trial participants. Such assistance includes, but is not limited to, assistance for filling in court documents and forms by the trial participants, verifying the status of a law suit filed by a trial participant, and creating opportunities for forming a legal request for a court order or other restrictive orders.

The e-CODEX system is a unifying force between EU Member States and has many useful functions, some of which are truly considered innovative (Shepherd and Yeo, 2003). We note that most of the characteristic features of this system are that they are implemented and distributed not within a single state, but have the same effect in all EU Member States. It is, for example applied to the issuance of court orders related to a particular case that has legal force throughout the EU (a court of one EU country may decide to seize property in another EU country, or property in several countries at once). At the same time, there is a permanent possibility for each trial participant in any EU country to be able to fill in certain documents or forms while being in any EU country. This feature of wide interstate access to the services of one system of electronic judicial proceedings is also recognized as completely unprecedented. It is possible that this system will operate in Ukraine, in case of its accession to the EU.

Canada, as one of the most developed countries in the world, as well as the country with the lowest level of violence and the lowest number of offenses in North America, also has a fairly developed system of electronic judicial proceedings (Leyh, 2016). Although, the work on the creation of an electronic system of judicial proceedings began in the mid-1990s, but it was failed for a long period of time and did not produce the desired results, namely as an efficient and reliable system. In particular, the Ontario Attorney General David Young after years of painstaking work on such a system said: "We have invested heavily in creating and implementing this system, taking on a lot of responsibility to taxpayers, but unfortunately the system that was created, still has little useful to demonstrate".

Some researchers attribute this issue to the low effectiveness and lack of success in the early stages of Canadian systems of electronic judicial proceedings in refusing Canadian provincial governments to cooperate with the United States of America, where such systems have already been active (Julian and Kelty, 2015). Thus, there was a fundamental decision to create a Canadian system of electronic judicial proceedings or, to be more precisely, several systems for each of the provinces. Researchers claim that the direct result of the refusal of Canadian provincial governments to create

a single system of electronic judicial proceedings is the wide difference between the success and functionality of such systems between different provinces. For example, the Ontario government has failed to establish a more or less efficient system of electronic judicial proceedings, then the local government of British Columbia province, which is situated in the West part of Canada, has succeeded in establishing a powerful and efficient system of electronic judicial proceedings that meets all high standards and requirements of the present day. We believe that Canada is also a good example for Ukraine.

Robot judges are involved for trials in Beijing. China has officially announced that an online program – female judges, guided by artificial intelligence – has been held for the first time in the world in the online service center at the Beijing Internet Court. Body, face, mimicry, voice and actions: everything was modeled by a neural network. The prototype of the virtual judge was an active female employee of the institution. It is the second such trial in the country, the first one was in 2018 in Hangzhou city. This is not the first time when China has demonstrated the work of professional robots. For example, the virtual anchor of the Xinhua state news agency caused last year an unprecedented stir in the media. Despite the fact that the appearance of the anchor controlled by the neural network caused some dissatisfaction, one cannot say that virtual employees will soon replace the real ones. According to an official statement from the Beijing Internet Court, the robot judge works with the help of such technologies as the synthesis of language and images. The robotic specialist currently performs only repetitive basic work. This means that it will be only used to make court decisions and online projects, such as maintaining an official Weitao website or providing advice at a service center (There was the trial in China, 2019).

3. What are the steps made in Ukraine in order to implement electronic judicial proceedings?

According to the conducted study, a modern, advanced state cannot fully exist without the functioning of a fast and transparent system of judicial proceedings. However, the current general state of automation of the judicial system of Ukraine cannot be considered quite satisfactory. Instead, the introduction of the latest information and communication technologies will increase the efficiency of judicial proceedings in terms of comprehensive growth of informatization of society. It, in turn, will allow to adhere to the relevant advanced principles, grounds and standards of electronic judicial proceedings (Zuryan, 2020).

We note that the order of the State Judicial Administration of Ukraine No. 105 “On Implementing the Pilot Project Concerning the Exchange of Electronic Documents between Court and Participants of the Trial” was issued on September 7, 2012. That order approved the Provisional Regulations for the Exchange of Electronic Documents between Court and Participants in the Trial, which determined the procedure for submitting documents in electronic form by court participants, as well as sending procedural documents in electronic form to such participants in parallel with paper documents in accordance with procedural law.

Generally, the order determined:

- 1) registration in the system of exchange of electronic documents between court and participants in the trial;
- 2) the procedure of the user’s operation in the System;
- 3) the submission of electronic documents to the court by the user;
- 4) the receipt of electronic documents by the court;
- 5) sending electronic documents by the court to the user.

The System of exchange of electronic documents between court and participants in the trial is a software package that is part of the web portal of the judicial power, which provides the submission of documents in electronic form to the court and sending documents electronically by the court to the trial participants. The holder of this System is the State Judicial Administration of Ukraine, which ensures its maintenance, monitors the implementation of measures related to the protection of information contained there, and performs other functions provided by the Regulations.

The Concept of the Electronic Court of Ukraine was also adopted in 2012. It considers the issues for building, improving and perspectives for universal formats of interaction between document management systems and record keeping. The system of automation of document circulation and record keeping of the judicial system of Ukraine will speed up the terms of consideration of issues related to citizens, enterprises and organizations, as well as issues of interaction with other state agencies, the MPs of the Verkhovna Rada of Ukraine.

Subsequently, a new order of the same name was adopted on May 13, 2013. It provided the introduction of the exchange of electronic documents between courts and participants in the trial (criminal proceedings) in local and appellate courts of general jurisdiction with the usage of an automated court document circulation system in accordance with the Provisional Regulations for the Exchange of Electronic Documents between Court and Participants in the Trial approved by the order of the State Judicial Administration of Ukraine dated from September 7, 2012 No. 105, except

for the provisions on sending electronic documents by the participants in the trial (criminal proceedings) to the court.

As of November 7, 2016, a new order of the State Judicial Administration of Ukraine has been in force in Ukraine, which approved the Provisional Regulations for Sending Electronic Documents by the Court to Participants in the Trial, Criminal Proceedings.

As we can see, the development of electronic judicial proceedings is an important factor of ensuring the accessibility, transparency and efficiency of justice. Ukraine is gradually introducing world achievements of information technologies into the domestic judicial system. However, those innovations still pass through the prism of a complicated bureaucratic procedure. The COVID-19 pandemic and related quarantine restrictions have significantly accelerated the processes of development and implementation of modern telecommunication technologies.

The degree of efficiency of the IP-court in Ukraine depends on the definition of all these components of jurisdiction, which is currently the key one at the initial stage of the formation of its legal base. The definition of each principle creates the conditions for the operation of the second principle, which makes it impossible for them to function independently. However, each of the principles of the judicial system plays an independent role in its construction and they all together contribute to the effective organization and legal functioning of the judicial system in general, and the activities of the IP-court in particular (Volovyk, 2020).

Conclusions

Summarizing all the indicated in the article statements and scientific views of scholars and researchers who studied the characteristic features of the functioning and purpose of electronic systems of judicial proceedings, as well as analyzing the possibilities of implementing such systems in Ukraine, we state that the electronic system of judicial proceedings is definitely useful for exercising justice in the country. In particular, having studied specific examples of the functioning of electronic systems of judicial proceedings in a number of developed and democratic world countries that have fully implemented electronic systems of judicial proceedings, we tend to conclude that Ukraine definitely needs a system that would be common for the whole country.

Thus, we argue that the implementation models typical for federal countries, where each administrative and territorial unit has its own electronic system of judicial proceedings, are completely undesirable for Ukraine. Instead, given the unitary form of government in Ukraine, we

believe that only a common system of electronic judicial proceedings will be an appropriate way to increase the efficiency of the domestic system of providing and exercising the justice.

In order to create and further fully implement such an electronic system into the structure of the domestic judicial proceedings, it is necessary that several important criteria are met. For example, an independent competitive selection should be made between such systems in order to select the best one. It is also important to ensure that the future Ukrainian electronic system of judicial proceedings is useful and highly efficient. In particular, it is necessary to establish whether it really contains the best successful practices of similar systems operating in the developed world countries. We emphasize that the implementation of the above system is an important and serious matter.

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State policy of the potential-forming space transformation in the context of the regional development intensification

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Abstract

From a documentary-based methodology, the article examines the existing aspects of the state policy of transformation of the space that forms potentialities in the context of intensification of regional development. The framework for the formation of an institutional environment to ensure the space for the formation of potential, includes: legislative basis; institutional and legal support for regions to gain importance in the global market. In addition, the existing shortcomings of the State policy of transformation of the space that forms potentialities in the context of intensification of regional development are highlighted, which are characterized by: imperfection of the legislative basis of regional development; unstable relations between different levels of government; disregard for threats and risks in the formation of priority tasks and regional development goals; the practice of not having to implement strategic plans and regional development tasks, etc. It is concluded that the existing state policy on the subject that can influence regional development requires improvements, these improvements will

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further help to increase the efficiency of management decisions and bring to their full completion the reforms initiated in the direction of political and administrative decentralization in Ukraine.

Keywords: public policy; space for the formation of potential; region; transformation; spatial development.

Política de Estado de transformación espacial formadora de potencial en el contexto de la intensificación del desarrollo regional

Resumen

Desde una metodología de base documental, el artículo examina los aspectos existentes de la política estatal de transformación del espacio formador de potencialidades en el contexto de intensificación del desarrollo regional. La estructura para la formación de un entorno institucional para asegurar el espacio de formación de potencial, incluye: base legislativa; apoyo institucional y legal para que las regiones adquieran importancia en el mercado mundial. Además, se destacan las falencias existentes de la política estatal de transformación del espacio formador de potencialidades en el contexto de intensificación del desarrollo regional, las cuales se caracterizan por: imperfección de la base legislativa del desarrollo regional; relaciones inestables entre diferentes niveles de gobierno; desprecio por las amenazas y riesgos en la formación de tareas prioritarias y metas de desarrollo regional; la práctica de no tener que implementar planes estratégicos y tareas de desarrollo regional, etc. Se concluye que la política estatal existente sobre el tema que puede insidir en el desarrollo regional requiere mejoras, estas mejorar ayudarán más aun a aumentar la eficiencia de las decisiones de gestión y llevar a su plena finalización las reformas iniciadas en la dirección de la descentralización políticas y administrativa en Ucrania.

Palabras clave: política pública; espacio de formación de potencial; región; transformación; desarrollo espacial.

Introduction

The current globalization challenges and processes related to the COVID-19 pandemic require changes in the mechanisms of public policy management in the direction of transforming the potential-forming space

to maximize of the regional development intensification. Today in Ukraine there is a problem of asymmetry of regional development and increasing differentiation in socio-economic spatial development, but each region has its own unique potential-forming features that can ensure the intensification of regional development. The versatility of regional processes, as well as rapid changes in the external environment necessitates purposeful activities of state and local authorities in all areas of socio-economic processes to ensure the intensification of regional development.

The purpose of this study is to substantiate the directions of state policy of the potential-forming space transformation in the context of the regional development intensification. To achieve this goal, the authors set: to define the state policy of the potential-forming space transformation in the context of the regional development intensification; proving the need for the formation of a developed effective institutional and legal environment; the directions of providing preconditions of transformation of potential-forming space in the context of the regional development intensification are formulated; the directions of increase of efficiency by the state policy of the potential-forming space transformation in the context of the regional development intensification are offered.

1. Literature Review

Domestic and foreign scholars have devoted a lot of research to the study of mechanisms of public administration in various fields, features of regional development management, the transformation of potential-forming space, among which the following should be noted: Becerra L., Carenzo S., Juarez P. (2020); Bouckaert (2019); Butko, Ivanova, Samiilenko (2020); Castellanos (2019); De Leon (2019); Efremov (2020); Halkos, Moll de, Todorov (2021); Khanin, Ishchejkin (2021); Khudolei, Mashnenkov, Derkachenko (2021); Kraynyuk, Uhodnikova, Vlashchenk, Sokolenko, Viatkin (2020); Ljungholm (2017); Loginova, Loseva, Polkovnikov (2020); Mukhametzhan; Junusbekova, Daueshov (2020); Rasniqi (2019); Revko (2020); Reznichenko, Shishkin, Shichiyakh, Smolentsev (2016); Sakharova, Avdeeva, Golovina, Parakhina (2021); Salbaroli and Mazzini (2018); Skica and Dvouletý (2018); Soboleva; Matveev; Ilyukhina; Efimenko; Simonov (2019); Vovk, Saloid, Kostyunik (2021); Wu (2018); Xu and Li (2019); Yin (2018); Yukhneva, Mokerova, Kukhtin (2016).

According to the authors (Yukhneva *et al.*, 2017) the system of state strategic management today is an outpost of the state which performs the functions of strategic management development and predicates as well as evaluates the effectiveness and quality of planned trajectories of economic development of regions regions and the state as a whole. The aim of the

research (Soboleva *et al.*, 2019) is to develop a mechanism for assessing the level of regional development and identifying the factors influencing this process. The research (Krasniqi, 2019) is based on the development of a strategic model of regional economic development that will positively influence and support the business environment as well as influence the overall development of the country through coordinated project management and creating synergies between communities local authorities and business. The study (Reznichenko *et al.*, 2016) specifies and adds the principles of substantiation of the effectiveness of the goals of the program for managing the development of socio-economic systems. The scientific novelty of the scientists' article (Sakharova, 2021) is the formation of an effective system of public administration taking into account the specifics of economic and managerial relations with stakeholders which is aimed at the balanced development of the Arctic. The article of scientists (Loginova *et al.*, 2020) is aimed at substantiating the model of information-analytical complex which allows to control the processes of formation and realization of motivational potential of the population in the system of public administration which is considered as a social technology of institutional competitiveness of the region.

The results of the authors' study (Skica and Dvouletý, 2018) are studies for politicians based on information about the regions with the largest / smallest size of public administration at the local level. The authors of the article (Mukhametzhan *et al.*, 2020) recommend the creation of an integrated multilevel management system that provides feedback and preventive management classifying the consequences of urban policy in the regions and the consequences of achieving the goals of strategic development. The researcher (Efremov, 2020) proposes a model of a mechanism for identifying and eliminating systemic legal restrictions on the digitalization of public administration based on a structural and functional analysis of existing legal mechanisms. The researcher (Castellanos, 2019) analyzes the application of social responsibility in the round-the-clock management of public administrations its inclusion in the guidelines governing its activities and responsible actions that administrations are obliged to take in various spheres of life they affect. The study (Xu and Li, 2019) considers the definition of the scientific subtext of the coordinated development of the regional economy and three indicators are put forward to assess the coordinated development of the regional economy.

2. Materials and Methods

The methodological basis of this study were general scientific techniques and special methods of scientific knowledge to study the issues of state policy of transformation of potential-forming space in the context of the

regional development intensification. Namely, the work used a dialectical method to establish the existing relationships of different authorities in the context of decentralization of power. Monographic method and method of generalizations for comparison of institutional support of transformation of potential-forming space in Ukraine and developed European countries and for substantiation of practical recommendations on directing directions of state policy of regional development on its intensification. Method of analysis and synthesis to identify the main factors influencing the transformation of the potential-forming space in the context of intensification of regional development. Method of abstraction and formalization to substantiate the conceptual provisions of the state policy of transformation of the potential-forming space in the context of the regional development intensification.

3. Results

The state policy of transforming the potential-forming space in the context of the regional development intensification should be understood as creating appropriate conditions for the functioning of existing and / or launching new institutions, both at the state and regional and local levels, that can effectively influence the coordination of development and implementation programs and monitoring of the state of spatial development for its intensification.

To ensure the potential-forming space for the intensification of regional development, it is necessary to form a developed effective institutional and legal environment, the basis of which is:

firstly, the legislative basis, which consists in: final consolidation of the legislative foundation for regional policy and local self-government, taking into account the processes of decentralization of power; coordination and legal consolidation of the resource base to ensure the potential-forming space transformation, including financial to intensify the development of regions; solving urgent problems of sustainable development of regions in accordance with state strategies of sustainable and regional development; use of modern tools to intensify the activities of regional entities to ensure the intensification of the development of regional economic systems;

secondly, institutional and legal support for regions to acquire subjectivity on the world market and regulate their economic cooperation and integration to ensure the transformation of potential-forming space for intensification of regional development, accompanied by globalization, improvement of cooperation mechanisms and its intensification between regions as interregional, and at the international level;

thirdly, institutional support for the governance of the potential-forming

space transformation, which consists in building the institutions of local and regional government, which contributes to the establishment of closer relations and closer ties between different branches of government. This, in turn, will help to respond more quickly and meet the specific needs of the subjects of a particular territory, taking into account the specific features of the regions, as well as the ability to jointly achieve national and regional development goals;

fourthly, institutional and legal support for more efficient use of available resources, promotion of the most efficient attraction of capital and capacity building of the regions.

Factors of state policy of the potential-forming space transformation in the context of the regional development intensification are presented in fig. 1.

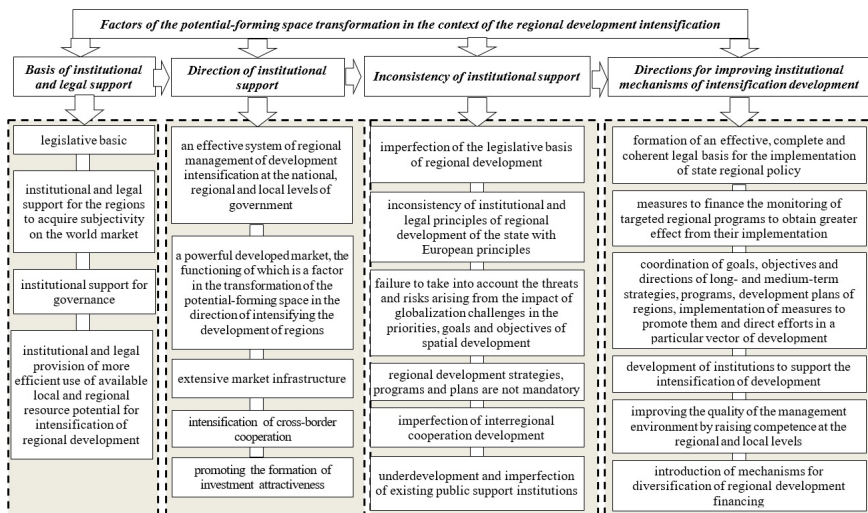


Fig. 1. Factors of the potential-forming space transformation in the context the regional development intensification

Source: suggested by the authors

Institutional preconditions for the potential-forming space transformation in the context of the regional development intensification should be directed towards ensuring:

- an effective system of regional development management at various levels of government, which contributes to the transformation of

the potential-forming space favorable for ensuring the effective operation of the subjects of regional economic systems;

- a strong developed competitive market, the functioning of which affects the intensification of development, acting as a catalyst for the intensification of the activities of the subjects of the regions;
- an extensive modern market infrastructure that will help to use all existing and create new benefits for the regions under the influence of the transformation of the potential-forming space, as well as increase the economic security of regional development and the national economy as a whole;
- intensification of cross-border cooperation, which will allow to use the specific features of border regions and increase their competitiveness in the world market due to the desire and available opportunities to gain a stable position in the international market, as well as increase the potential for regional development;
- promoting the investment attractiveness of the regions, which will help to intensify the development of regional economic systems not only under direct fiscal stimulus, but also other sources of investment resources.

It should be noted that the intensification of regional development in Ukraine has created a regulatory framework that includes: the Constitution of Ukraine, Budget and Tax Codes of Ukraine, as well as a number of laws of Ukraine, including «On Principles of State Regional Policy», «On Local Self-Government in Ukraine», «On stimulating the development of regions», «On local state administrations», «On state target programs», «On state forecasting and development of programs of economic and social development of Ukraine», etc. Various state and regional strategies for the short, medium and long term, but the number of legal acts does not guarantee their coherence and perfection in the transformation of the potential-forming space in the context of intensifying regional development.

Despite the fact that the institutional space in Ukraine as a whole is formed, it does not meet the modern paradigmatic challenges of social development in the context of globalization. This is manifested in the fact that the current institutional support for regional development is characterized by such shortcomings as:

- the imperfection of the legislative framework of regional development, which is manifested in the fragmentary and unsystematic development and implementation of legislation. The reason for this imperfection is primarily a change in political power and, accordingly, a change in the course of efforts and direction of strategic vectors of development of the national economy in general and the regions in particular;

- the unsettled relations between the various levels of government, which is caused by the incompleteness of decentralization reforms and, as a consequence, administrative-territorial reforms;
- inconsistency of institutional and legal principles of regional development of Ukraine with the principles of regional development of European countries, as regions in Ukraine are not considered as self-sufficient objects and separate actors taking into account the principle of subsidiarity and integrity of the state;
- disregard for threats and risks in the formation of priority tasks and goals of regional development related to the globalization challenges of social development, as well as the processes of Ukraine's integration into the world economic space;
- the practice of not having to implement strategic plans and objectives of regional development, which is also sometimes associated with changes in political elites and government, as well as underfunding of development programs;
- the lack of a clear legislative definition of the hierarchy of strategic planning documents in public administration, which is sometimes associated with unsatisfactory information support on the goals and objectives of strategic measures and information on their implementation and results and dynamics of regional development;
- insufficient development of interregional cooperation and interaction, lack of effective institutions of state and regional governance to establish and support these processes. In turn, imperfect interregional integration and cooperation reduces the balance of national, regional and local interests;
- the imperfection of the legal regime of regulation of communal property relations in accordance with international law, where the sale of communal property is limited, and the most common is the transfer of communal property for long-term lease;
- the instability of the political and economic situation in the country, which negatively affects the attraction of investment resources in intensifying regional development and solving urgent problems of regional development, there are legal restrictions on attracting financial resources from the European Union and other international sources;
- the underdevelopment of existing public institutions to support the intensification of regional development, the positive effect of which is evidenced by the experience of leading European countries, which have developed such institutions to support and enhance regional development, as: trade unions; state companies of regional

development and investment corporations to support and stimulate intellectual, innovative, creative activities; development agencies at various levels; employment organizations at the regional and local levels; guarantee and charitable funds; communal foundations; associations of municipalities; chambers of commerce and industry; various enterprises and organizations of innovation infrastructure.

The institutional and legal basis for potential-forming space transformation in the context of the regional development intensification should be improved in accordance with the European experience of institutionalization, where there is a stable system of relations between regions, state and European agencies. The institutional environment of the regional development intensification requires the implementation of European legal relations between state, regional and local authorities.

It should be noted that there are positive changes in institutional changes in the direction of the potential-forming space transformation in the context of the regional development intensification, which are associated with decentralization processes resulting in the delegation of much power from local authorities to the local level:

firstly, to monitor from the public the state of implementation of delegated powers;

secondly, if necessary, provides mechanisms for the return of powers to state execution, if necessary.

However, the delegation of power must be accompanied by the transfer of certain resources to perform the relevant functions. Today, there is no clear delineation of delegated powers at the regional and local levels, as well as the consolidation of sources of funding. This situation has a negative impact on the efficiency of delegated functions and the intensification of regional development.

Decentralization of power in accordance with the principle of subsidiarity allows regions to act as self-sufficient relatively independent subjects of territorial governance and to be drivers of accelerating the development of productive forces, but there must be not only the transfer and delegation of certain functions but also resources. Public authorities should promote the potential-forming space transformation in the context of the regional development intensification.

The study substantiates the need to improve the quality of the management environment, which is caused by the unsatisfactory level of regional management. The level of competence, which is manifested in the adoption of sound and strategically sound management decisions, affects the effectiveness of management of the potential-forming space transformation in the context of intensifying the development of regions as a whole.

Conclusion

Thus, the existing state policy of the potential-forming space transformation in the context of the regional development intensification requires improvement, which will help increase the efficiency of management decisions and bring the initiated reforms in the direction of decentralization to their full completion. This requires improving the legislative framework of state policy of the potential-forming space transformation in the context of the regional development intensification by modernizing the constitutional levers of regional development of the state taking into account the principle of subsidiarity as a basis for strategically oriented state policy towards decentralization.

According to the authors, this can be achieved by standardizing in the Constitution of Ukraine, taking into account the democratic principles of organization of power at the regional level of European countries and the European Charter of Local Self-Government, in relation to the management of territorial development. at the regional and local level, expanding the powers of local self-government and consolidating the relevant resources, including financial ones, for their implementation.

Measures to improve the institutional mechanisms of the potential-forming space transformation in the context of the regional development intensification, which should include:

- formation of an effective, coherent, complete and stable legal basis for the implementation of the state policy of the potential-forming space transformation in the context of the regional development intensification;
- based on the monitoring of all existing targeted regional development programs, it is necessary to make efforts to co-finance them, as one of the problems of targeted planning is their constant underfunding, which has a negative impact on the regional development intensification;
- coordination of the outlined goals and objectives of long-term and medium-term programs, strategies and plans of regional development, as well as the implementation of state policy to direct efforts in a single vector of development and their promotion among the population;
- development of new, effective institutions to support the regional development intensification, which consists in the creation of new institutions, including those aimed at stimulating innovative, intellectual, creative activities of regional development entities for its intensification;

- improving the quality of management by raising the level of competence of employees at both regional and local levels;
- introduction of mechanisms to intensify the attraction of financial resources to intensify regional development, including through the use of potential investment opportunities of the European Structural Funds, directing the State Fund for Regional Development of Ukraine to transparent financing of regional development projects that can transform potentials in the context of regional development.

Further research is required to develop an organizational and economic mechanism of state policy for the transformation of potential-forming space in the context of the regional development intensification, which should include a system of strategic measures to intensify regional development at different levels of government.

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The factor of justice in the consolidation of urban communities

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Abstract

The article analyzes the role of the equity factor in the consolidation of urban communities. The consolidation of the population is considered a way to achieve its stability. Social consolidation is discussed as an ambiguous concept that characterizes the process and outcome of an agreement between different communities on the basis of the unity of values and interests and the establishment of relations of mutual trust and solidarity, in order to achieve common goals. The results of the research have shown that justice is not only the dominant value of urban residents but becomes a factor that determines many daily practices of the population. As a conclusion it has empirically confirmed that, if there are significant discrepancies regarding the understanding of social justice by the inhabitants of the city and their lack of conviction in the practical implementation of this principle, consolidation remains only an illusory opportunity. Therefore, the consistent implementation of the principle of justice and the search for social consensus among various segments of the population are strategic priorities for the development of urban communities around the world.

Keywords: social justice; community consolidation; inequality; urban communities; social consensus.

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El factor de justicia en la consolidación de las comunidades urbanas

Resumen

El artículo analiza el papel del factor de equidad en la consolidación de las comunidades urbanas. La consolidación de la población, se considera una vía para alcanzar su estabilidad. Se discute la consolidación social como un concepto ambiguo que caracteriza el proceso y el resultado de un acuerdo entre diferentes comunidades sobre la base de la unidad de valores e intereses y el establecimiento de relaciones de confianza mutua y solidaridad, con el fin de lograr objetivos comunes. Los resultados de la investigación han demostrado que la justicia no es solo el valor dominante de los residentes urbanos, sino que se convierte en un factor que determina muchas prácticas cotidianas de la población. Como conclusión se ha confirmado empíricamente que, siempre que existan discrepancias significativas con respecto a la comprensión de la justicia social por parte de los habitantes de la ciudad y su falta de convicción en la implementación práctica de este principio, la consolidación sigue siendo solo una oportunidad ilusoria. Por lo tanto, la implementación consistente del principio de justicia y la búsqueda del consenso social entre diversos segmentos de la población son prioridades estratégicas para el desarrollo de las comunidades urbanas en todo el mundo.

Palabras clave: justicia social; consolidación comunitaria; desigualdad; comunidades urbanas; consenso social.

Introduction

A distinctive feature of relations in modern Russian society is social disunity, expressed in a decrease in the level of interpersonal and institutional trust, social and economic polarization of society, and violation of the principle of social justice. Political scientist V.V. Uzunov, emphasizes that:

In Russian realities, society is experiencing a strong lack of trust at all levels of social relations, the dynamics of social inequality is becoming a threat to the security of society, the level of interfaith and interethnic tension, significantly differentiating by region, also makes us watch with alarm the processes of disintegration society (Uzunov, 2019: 85).

These negative phenomena enhance the internal instability of society and actualize the problem of consolidating its constituent entities, which, if unresolved, would not ensure both the reproduction of society and its competitiveness in the global world.

Social consolidation is a multi-layered concept made of structural and cognitive components. The structural component is represented by a variety of civil institutions, associations, organizations, and other structures cooperating with each other. The cognitive component is a system of values, traditions, norms, and patterns of behavior common to actors. Both components are organically interconnected.

Recently, researchers have usually focused mainly on the study of the cognitive component, first of all, its value bases. Many contemporary authors mention them to some extent. For example, A.L. Marshak and L.V. Rozhkova emphasize:

In the ongoing disintegration, crisis processes, the structure and hierarchy of the value space is changing, a common set of values and norms is vanishing. The problem of consolidation of society comes to the fore. Values are the meaning and core of culture, and cultural orientations are the most important motivator for the behavior of individuals. Therefore, by examining the dynamics of values and value orientations, one can understand deep cognitive processes and predict the transformation of the behavioral strategies of individuals (Marshak and Rozhkova, 2020: 27).

T.F. Maslova, analyzing the foundations of the modern consolidation of society, notes that “values fix certain states of stability of integrating subjects, the degree of severity and development of these states” and defines several groups of consolidating values: “Cultural and communicative, moral, psychological, social and legal, socio-demographic, socio-economic etc., reflecting the signs of value unity in the context of the dynamism of modern society” (Maslova, 2016: 539).

Sharing this view, we consider consolidation as the process and result of agreement between different social groups and communities on the basis of the unity of values and interests, the establishment of relations of mutual trust, solidarity, in order to achieve common (deliberate and supported by the majority of members of society) goals.

Justice, which is often considered as a key and even universal value of the Russian axiosphere, takes a special place among the values that contribute to social consolidation. As P.A. Borisova considers: “Ideas about social justice regulate the foundations of social order, the practice of both institutional and interpersonal interactions” (Borisova, 2016: 9). According to Iu.G. Volkov: “Social justice is the basic value of the majority of Russians, as current social inequalities, containing a high potential for social conflict, form a stable demand of society for a fair public order” (Volkov, 2021: 14). V.G. Grechikhin emphasizes that: “Russia has traditionally been a country with the especially acute and particularly important demand for social justice” (Grechikhin, 2020: 14-15). E.V. Karchagin notes that: “Justice in its ultimate foundation is an axiological universal, a versatile sociocultural value” (Karchagin, 2015: 31).

Pointing to the importance of the value of justice in the consolidation of society, T.F. Maslova writes that:

Justice represents the basis, frankly speaking, of the legal, organizational, and resource aspects of sustainability, with the relations between the subjects reflecting the equalization of chances in meeting the needs in the main spheres of life: economic, social, political, spiritual. This is what the process of integration and consolidation cannot begin and develop without (Maslova, 2016: 539).

T.V. Dylnova emphasizes that: “being a morally justified measure and a rational criterion for assessing human deeds, social justice serves as a constructive basis for the consolidation and stability of Russian society and a real factor ensuring its progressive development” (Dylnova, 2005: 10).

In our opinion, social justice in society performs several consolidating functions.

1. It creates the preconditions for the formation of relations of trust, which is understood as the expectation of favorable or, in extreme cases, neutral actions on the part of other citizens, groups or organizations. As practice shows, the completer and more consistent are people’s ideas about justice, the higher the level of trust between them is. A.I. Dontsov and E.B. Perelygina write that: “Trust and justice in society are mutually correlated... the strength of trust within society is positively correlated with the degree of consistency of social ideas about justice” (Dontsov and Perelygina, 2019: 244).
2. Consistent implementation of the principle of justice “relieves” the negative psycho-emotional state, which is usually caused by a feeling of unfairness of the situation. This feeling causes a significant number of communication barriers between citizens, which, naturally, hinders their consolidation.
3. The “atmosphere of social justice” contributes to the formation of an attractive image of the “other” as a person who also lives in justice and therefore deserves good neighborly relations. This motivates citizens to interact with each other and practice social solidarity (mutual assistance, mutual support, etc.).

Thus, social justice significantly determines the characteristics and nature of social interactions and contributes to the consolidation of society.

1. Methodology and Methods

Many issues related to the study of the role of the factor of social justice during consolidation in modern domestic and foreign science are controversial. A debatable nature is manifested, first of all, in the mismatch

of opinions regarding the definition of the concept of justice, which is imprinted by the cultural and civilizational context.

As P.A. Borisova reasonably argues, “the ideas of justice in the domestic and Western cultural traditions have opposite origins. The domestic sociocultural mentality is characterized by an internal (moral and ethical) dimension of justice, while the Western one lays emphasis on its external (objectified) dimension, actualized in adherence to legislation and law, as the English-speaking analogue of justice is the word “justice”, derived from the Latin “*jus*” - law” (Borisova, 2016: 8). Noting the multifaceted and versatile nature of the concept of «justice», N.V. Levichev clarifies that “philosophers treat it as a common part of the picture of the world and a moral ideal, while economists consider it the logic of appropriation and distribution of social wealth, and for lawyers it is the conceptual basis of the rule of law” (Levichev, 2017: 9).

The controversy is centered around the search for a balance between the two main approaches to understanding the phenomenon of social justice: rational and irrational.

When considering social justice, we will rely on the concept of irrational intuitionism by Henri Bergson (Bergson, 1998: 32), which presupposes the presence of two types of knowledge, i.e. rational and intuitive, where rational knowledge is static and mechanistic, and intuitive is dynamic and organic. In our opinion, *social justice is a part of intuitive knowledge, which is a way of an individual's intuitive reflection of social reality that fits into his mental and value system*. Here we should mention the P. Boyer's conclusion that: “The concept of justice, partly based on the ideas of John Locke,” is based on “intuitive ideas” (Boyer, 2019: 436).

The relevance and controversial nature of our study stimulates research interest in its analysis in relation to various locations. These undoubtedly include cities. First, they are highly important as administrative-territorial units, where the main internal challenges of the spatial and socio-economic development of Russia are concentrated. More than three quarters of the population of the Russian Federation is urban citizens living in cities and urban-type settlements. Secondly, the urbanized environment is characterized by a significant mutual alienation (Baudrillard, 1997), and therefore there is a demand for the trend towards the integration of the urban environment. It is also stimulated by the transformation of modern cities into complex hybrid socio-biotechnical systems.

To assess the role of the factor of social justice in the process of consolidation of the urban community, we shall consider the 2017-2018 study of a team of authors of Belgorod State National Research University: «Diagnostics of the consolidation potential of the value of justice in the implementation of civil control into local government practice». The

objectives of the study included the determination of the place and role of the value of justice in the minds of the population; analysis of the essence and content of justice; and diagnostics of the main manifestations of injustice citizens usually face.

A series of survey methods was used as the main methods for collecting primary sociological data. To ensure quantitative objective nature of information, a formalized questionnaire survey was carried out on a regional representative sample, considering the sex, age and settlement structure of the population of the Belgorod region. The study involved a survey of N=665 residents of cities in the Belgorod region (Belgorod, Stary Oskol, Gubkin, Stroitel, Korocha). For an in-depth knowledge of the subject of the research, an expert survey was conducted (N=30 respondents).

The analysis of primary sociological data assumed their grouping by the main socio-demographic characteristics of the respondents (gender, age, type of settlement, degree of education, professional status).

2. Results and Discussion

The analysis of the results of the survey showed the idea of justice to be dominant in the set of values of the surveyed citizens. The majority of the respondents (47%) attributed it to the three basic values «most vital for the functioning of society». In terms of importance, justice is slightly inferior to “trust” (49%) and leaves behind “responsibility” (42%).

At the same time, justice heads the list of values, which, as the respondents think, should serve as the basis for the country’s future. It is important to note that all surveyed groups of respondents have a “dream of justice”, regardless of their gender, age, education level, income, or social status. The fact that justice is one of the leaders in the set of values of urban citizens and their ideas about the future is also confirmed by other studies of various sociological centers.

For example, in 2018, during the survey of the Institute of Sociology of the Russian Academy of Sciences the respondents were asked to determine the bases the future of Russia should be built on. The “value of justice” received the greatest support (Well-being is more valuable than greatness, 2018). Explaining the results of the «Social Justice in Russia» study of VTsIOM in 2018, the general director of VTsIOM, Valery Fedorov emphasized that “the fairness of our economic and social structure is one of the most important issues for Russians. Although “all have their justice”, sociological surveys are helping to gradually clarify an actual image of social justice” (Rimskii, 2020).

In addition to the fact that justice is a fairly stable value setting for the majority of urban residents, it also acts as an indicator (“litmus paper”) for their assessment of social relations and practices.

V.L. Rimskii, analyzing the results of «Public demand for justice and its provision by the state» (2019), notes that: “Justice is of high significance in the life of Russians; they constantly evaluate both their and other’s social practices based on its principles and criteria” (Rimskii, 2020: 104).

Thus, justice, indeed, is not just the dominant value of urban residents but its perception through the prism of urban reality becomes a factor that determines many of the everyday practices of the population. As such, justice will undoubtedly influence the attitude towards the consolidation process.

However, there is a need to consider the blurred replication of fairness by respondents. Despite its interpretation as the most important social value, the question of what exactly it represents caused difficulties among the respondents. The respondents consider justice both as a “principle” (20%), and as a “tradition” (20%), as a value (19%) and as a factor in the “survival” of society (18%). This again confirms the irrational, intuitive nature of justice. In this regard, V. Rimskii notes that:

People almost never provide rational arguments to substantiate justice. In specific situations, citizens determine what is fair and what is unfair, intuitively, based on their social experience, different for everyone. Rational arguments sometimes appear when people state their understanding of general principles of justice (Rimskii, 2020: 56).

Uncertainty in the understanding of justice will inevitably show itself in the perception of the consolidation process. To a large extent, it will not be adequately interpreted as a process of achieving social equality, implemented within the legal framework. It is telling that the surveyed urban residents define the main characteristics of a justly organized society by noting equality of rights and freedoms (73%); equality of opportunity to achieve goals (47%); equality of access to social resources (41%); guarantees of social security (41%). At the same time, the respondents believe justice to be identical to legality and even surpass it. This is evidenced by the position of the respondents (56%) that “it is more important that something would comply with the principle of justice than the law”.

In terms of the problem of justice, support for consolidation can be considered as a desire to eliminate the inherent “injustice”, which, in the opinion of city residents, is quite high.

The results of the study have shown a stable conservation of the ideas of urban residents about injustice. 73% of the respondents consider modern society to be unfair, another 22% found it difficult to assess and only 6% of

the respondents are confident in the fairness of the modern social order. Note that later studies on related topics (2019-2020) recorded citizens' perceptions of the injustice of modern Russian society in the range from 61 to 70% (About justice. What is fair and what is not in modern Russian society? 2018). Urban residents most often see injustice in corrupt practices and the absence of their punishment (56%); lack of citizens' equal access to education, health care and other social services, as well as an increase in the cost of living (54%); social inequality (35%).

64% of the respondents have faced injustice personally, 12% of them "constantly", 52% "sometimes". Injustice was expressed, as a rule, in deception or sub-standard state and municipal services (67%), deception in social payments (42%), misconduct on the part of the employer (35%), etc.

A rather clear injustice of urban reality does not "relieve» but creates a psycho-emotional stress unfavorable for communications, minimizing the present and future prospects for consolidation.

It is quite significant that, when assessing the prospects for a more consistent assertion of social justice, the respondents noted the situation "would probably not change" (46%) or "would get even worse" (30%).

An analysis of the motivation of citizens to restore the value of the principle of justice, including through unification with other people, allows us to conclude about a clear discrepancy in the views of urban residents between the regulatory significance of this value and the willingness to fight for it. 38% of the respondents believe "manifestation of injustice is inevitable and the fight against it will not lead to anything", another 57% still believe it necessary to fight against injustice, however, this should be primarily done by state and local authorities (39%), various public institutions (parties, civil society, non-profit organizations, etc.) and only then by the people themselves (9%).

It is noteworthy that with a fairly clear deficit of social justice, as well as provided that more than half of citizens have faced its various manifestations, 52% of the respondents could not answer the question «What measures should be taken to combat injustice?» Only a third of the respondents (31%) are ready to personally contribute to the elimination of injustice by personal efforts, and 26% are ready to unite their efforts to eliminate injustice.

Facing injustice and various restrictions of civil liberties, citizens become atomized, refuse social interactions, often suspecting (often unjustifiably) their counterparties («Others») in being the bearers of unfair practices. According to the data of the Zircon Research Center based on its study, "Measuring the degree of value-based solidarization and the level of public trust in Russian society" (N = 2520), "65% of Russians believe they should be careful in dealing with people. At the same time, only a third of

the population (30%) believe they can trust people. Every tenth resident of the country found it difficult to give an unambiguous answer, which, to a certain extent, forms the potential rather for the group of “cautious” (Value-based solidarization and public trust in Russia, 2018).

The survey results helped us to identify the relationship between fairness, trust, and willingness to cooperate with other people. Thus, the respondents (6%) who believe modern society to justly be more open to trust other people (68%, against 31%), unite with them to solve generally significant problems and tasks (74%, against 26%). These relationships illustrate the potential of the value of justice as a basis for trust and building of trusting communications between citizens. On the contrary, a deficit in equity triggers a deficit in trust.

Conclusions

Based on the results of our research we can conclude about the nature and role of justice in the life of the urban community, as well as its impact on consolidation processes, in particular.

Given the significant differences in the understanding of social justice and the implementation of this principle among the majority of the surveyed urban residents, the consolidation of the urban community remains illusory. Therefore, the assertion of the principle of justice and the search for its social consensus of various strata of the population, which generally does not cause serious objections, is a strategically important task, which should be primarily solved not only by federal and regional authorities, local self-government, but also by civil institutions, and residents themselves.

However, there is a clear discrepancy in the popular mind between the regulatory significance of justice and the willingness to fight for it. This minimizes the opportunities for consolidation. Facing with injustice and various restrictions of civil liberties, citizens become atomized, refuse social interactions, causing the level of interpersonal and institutional trust in their relations to fall.

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Justice: between law and Conscience

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Abstract

From the philosophical perspective article deals with the correlation between law and consciousness. To address the issue, ideas from renowned thinkers are used. It specifically describes the experience of addressing the subject in Russian philosophy from the late nineteenth to the early twentieth century. The article shows the reasons for preferring law or consciousness in different periods of history and demonstrates the rational nature of law and the irrational nature of consciousness, indicating that law and consciousness are not mutually exclusive. It concludes with an attempt to combine the two concepts in activities of people who must enforce legal norms. Using the experience of Russian philosophy, which regards the law as a moral minimum, people are advised to govern their actions not only by legal rules, but by listening to the voice of their conscience. The authors suggest understanding conscience as a spiritual and moral human law that makes it possible to make decisions without being forced or motivated

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from the outside, governed by the internal realization of good and evil and identifying the veracity, justice, and rectitude of an act.

Keywords: philosophy of law; history of philosophy; law and conscience; justice and morals; conceptual binomials

Justicia: entre la ley y la conciencia

Resumen

Desde la perspectiva filosófica artículo trata de la correlación entre ley y conciencia. Para abordar el tema se utilizan ideas de reconocidos pensadores. Describe específicamente la experiencia de abordar el tema en la filosofía rusa desde finales del siglo XIX hasta principios del siglo XX. El artículo muestra las razones para preferir la ley o la conciencia en diferentes períodos de la historia y demuestra la naturaleza racional de la ley y la naturaleza irracional de la conciencia, indicando que la ley y la conciencia no son mutuamente excluyentes. Concluye con un intento de combinar los dos conceptos en actividades de personas que tienen que hacer cumplir las normas legales. Utilizando la experiencia de la filosofía rusa, que considera la ley como un mínimo moral, se aconseja a las personas que gobiernen sus acciones no solo mediante reglas legales, sino escuchando la voz de su conciencia. Los autores sugieren entender la conciencia como una ley humana espiritual y moral que hace posible la toma de decisiones sin ser obligada o motivada desde el exterior, gobernada por la realización interna del bien y el mal e identificando la veracidad, justicia y rectitud de un acto.

Palabras clave: filosofía del derecho; historia de la filosofía; derecho y conciencia; justicia y moral; binomios conceptuales.

Introduction

Philosophers of various eras and civilisations tried to answer the question of correlation between law and conscience. Losing the link with moral human nature, the law does not evoke any reaction in the human heart and becomes useless, if not harmful, for human society. In a sound society, law and conscience do not contradict but complement each other. It is no coincidence that modern legal theorists point out that, in a lawful environment, each person reasonably has both legal and moral duty to obey the rules because what the law mandates in external behaviour is the same as what the voice of conscience approves of as moral and just (Sorokin, 2010).

Relevance of the topic is due to the need to find a sound basis for justice. The title reflects an eternal dilemma: what should people enforcing the law be governed by? Technically, the answer is obvious: they have to be governed by law since their main goal is to enforce it. Yet, it is not that easy if we try to make sense of it. There are situations where enforcing the law will be at odds with conscience. For instance, there is a law-enforcement practice called “plea bargain”, completely legal but morally questionable. That is why judges, lawyers, prosecutors, police officers, and other people in law enforcement are sometimes caught between law and conscience, when they have to choose between exact law application and clear conscience. The true correlation between law and conscience is possible to understand only through the historical and philosophical study of conscience as applied to justice.

The history of philosophy shows that the true value of the law is exercised when it is based on moral sense of people, when requirements of the law are consistent with the voice of conscience within the human being.

1. Correlation of law and morality in history of philosophy

Ancient thinkers believed that legal requirements had to conform to those of conscience. For example, according to Plato, a legislator was “in their power to make use in their law-making of two methods, namely, persuasion and force” (Plato, 1961). The thinker criticises those who only use the latter. According to him, the law must have a moral mandate apart from force alone. Aristotle also tried to combine legal and moral categories. He viewed justice as the basis of law through compassion, which is a moral feeling: “The equitable man is above all others a man of sympathetic judgement and identify equity with sympathetic judgement about certain facts” (Aristotle, 1999: 136).

Cicero preferred unwritten laws that had appeared before any written law since: “Our lawyers often divide a legal doctrine, which is essentially simple, into an infinite variety of technical distinctions” (Cicerone, 1853: 325). He recurrently mentions the unbreakable link between the idea of justice and Roman laws (Cicerone, 1853). According to Cicero: “For we shall have to explain the true nature of moral justice, which must be traced back the nature of man” (Cicerone, 1853: 63).

Thomas Aquinas “distinguishes two elements in what we should call “conscience” – the *synderesis*, or intuitive grasp of first principles or standards by which alone moral comparisons can be made and the *conscientia*, or process of applying these first principles in estimating the rightness and wrongness of particular actions” (Kirk, 1999).

Before the modern era, all thinkers were united in their understanding of morals as the basis of law. They considered conscience to be a natural source of legal regulation. The modern era brought about an idea of separate existence of law and conscience, independent from each other.

The Christian tradition supported the idea of a divine nature of morality. Naturally, this standpoint implied a superior position of morality in relation to law. However, gradual secularisation of human life was a characteristic of the Renaissance and modern era, with the will of the state becoming the main foundation of law. The Renaissance and modernity were the eras when nations took shape, requiring national legislations based on interests of the state rather than on moral principles. N. Machiavelli stated that politicians had to do evil for benevolent means: “a prince wishing to keep his state is very often forced to do evil” (Machiavelli, 1908). According to T. Hobbes, the law is based on force, with only those appointed by the state having the right to interpret it: “the interpreters can be none but those, which the sovereign... shall appoint” (Hobbes, 2010: 141).

A point of view that would later be called legal positivism started to dominate the ideas on the correlation between law and conscience. This point of view relieves the lawmaker of the necessity to consider moral norms when making laws. The lawmaker is left with the only guidance: rational practicality of the regulations adopted. However, conscience is not rational. It is guided by intuition rather than logic. Encyclopaedia Britannica underlines the intuitive nature of conscience: “Conscience usually informed by acculturation an instruction, is thus generally understood to give intuitively authoritative judgments regarding the moral quality of single actions” (Britannica Encyclopaedia, 1990: 44). The positivist thinking does not accept any phenomena that cannot be unequivocally verified. Consequently, positivist-leaning philosophers started to promote the freedom of reason-based law from moral ideas, primarily, from conscience.

These two interrelated factors – the rise of secularisation and promotion of positivism – resulted in the modern correlation between law and conscience. Its underlying idea is a separate existence of these two spiritual areas of human life. In the 20th century, that state of affairs seemed quite normal. The outer human life and social relations were regulated by universally binding, standardised, and reasonable forms of behaviour described in the law. The inner life was governed by individual ideas depending on the way the person was brought up as well as their cultural and personal background. These ideas are at a significant disadvantage to legal norms: they cannot be standardised; they are unwritten and intuitively perceived by people and therefore unreliable and suspicious. Consequently, they can be applied exclusively to personal human life.

Current state of affairs

Now, in the 21st century, we are starting to understand that the situation is not normal. First, it is becoming increasingly popular to think that people cannot be viewed as exclusively rational beings. It is the ability to have emotions, feelings, and beliefs that makes people different from computers. People cannot be squeezed into the limits of rationality. In particular, they can use their conscience to make the right decision in a difficult situation. It means that conscience has to be taken into account when dealing with people. Secondly, law without a moral sanction loses its authority, turning into an external force people have to obey just because it is a force.

However, such law resembles the laws of nature, which also lack a moral sanction. If an animal eats another one, this action cannot be viewed from a moral perspective because it is just a manifestation of the natural laws those animals live by, which cannot be applied to a situation of one person eating another. In spite of the fact that one of the people has satisfied the natural need for food, the act will be condemned by both public law and moral ideas of the people who have learned about the act. One of the main characteristics of people is their ability of judgement. People always judge what they deal with in two ways: formally, from a legal perspective, and essentially, from the standpoint of their conscience. If, in this judgement, the form (law) contradicts the substance (conscience), a spiritual discord appears within the human being.

When people compare law and conscience, we can observe two curious things:

- 1) in such a comparison, demands of conscience are the criteria of judgement, and law the object of it, but not vice versa.
- 2) it is always conscience that wins, not law.

These phenomena are caused by the fact that conscience is an internal human conviction about what is good and evil, or, according to Kant, an “internal court in man” (Kant, 1991), whereas law is nothing but an external declaration by other people. Consequently, no matter what legal positivists want, people have always judged the law with their conscience and always will. We should accept this situation as a manifestation of a normal human quality and consider it while dealing with problems faced by the people who enforce the law.

2. Russian philosophy's experience in solving the problem

Russian philosophy of the late 19th and early 20th centuries contains some fruitful experience of reflecting on the problem in question, which can be very useful for understanding the current state of affairs. It was the time when a school of scientific positivism formed in Russia. Its representatives

considered it unnecessary to subject law to moral judgement. They made no difference between law as justice and law as a collection of legal norms, its only source being the will of the state. It resulted in a fiery debate between the positivists and representatives of Russian religious philosophy. A lot of Russian philosophers of that era were sceptical towards the technicalities of positivist law, connecting the issue of civil society with the ethnic and religious specifics and culture of Russian spirituality. By the end of the 19th century, criticism of the state and law had become commonplace, sometimes taking an extreme shape. In particular, the great Russian writer Leo Tolstoy criticised the state and law from a moral perspective, declaring an anti-law morality.

Having adopted a lot of Western philosophical ideas on the nature of conscience, representatives of Russian philosophical thought of the late 19th and early 20th centuries gave a new meaning to those ideas. The Russian mind was traditionally characterised by a specifically fine-tuned, “conscience-based” perception of reality, which could be proven by the specific focus on the issue of conscience in Russian religious philosophy.

Aleksei Khomyakov called the state-sanctioned law external law, and conscience was the internal law. According to his opinion, for conflicts to be resolved and social peace to be maintained, internal social regulations, such as customs, traditions, and moral norms, should prevail over external laws (Vinogradov and Yashin, 2018). Khomyakov viewed the state-sanctioned law as a middle ground, with criminals below it and saints above it, adding that the external law was more tolerant to crime than pangs of conscience were (Khomyakov, 1900). Nikolai Lossky considered pangs of conscience to be the true punishment: “The main form of suffering making the most obvious moral sense is pangs of conscience” (Lossky, 1994). Ivan Ilyin viewed conscience as the personal moral genius, source of justice, and “altar of one’s life” (Ilyin, 1993).

However, thoughts on the correlation between law and conscience are most prominently featured in philosophical works by two Russian thinkers: Fyodor Dostoyevsky and Vladimir Solovyov.

For instance, Dostoyevsky’s works show the phenomenon of conscience in its relation to law and explore the pangs of conscience and repentance of a criminal sinner to the depths that had not been reached by philosophical and legal thought before. Dostoyevsky “completely rejects the ethics of pure reason” (Lauth, 1996) and believes that laws of reason cannot hold people within the limits of state-mandated regulation of social behaviour. The philosopher reaches “new hidden layers but does not dive deep into the unconscious but soars to the heights of consciousness” (Hobbes, 2010: 23). So, according to Dostoyevsky, justice invariably contains the idea of a court of one’s conscience as the most just court, without imperative instructions and external will: “The pain of his heart alone, before any punishment, will kill him with its torment. He will judge himself for his crime more ruthlessly,

more mercilessly than the strictest law” (Dostoevsky, 1972: 102). The idea of a court of one’s own makes the state-administered justice pointless.

Whichever of the ideas Dostoyevsky substantiates in his philosophy, the conflict between nature and reason, heart and mind manifest itself. The ethics of the sense is always at the forefront, and the main sense is conscience, “the organ that perceives God” (Berdyayev, 1993: 14), the regulator of ethics that serves as a wake-up call for the moral nature of every person, including a criminal: “Conscience is by itself repentance”, wrote Dostoevsky (Dostoevsky, 1976). Pangs of conscience and suffering punish the evil and calm wicked passions of people. Only through suffering, as a kind of an Orthodox Christian purgatory, will a previously-unknown ethical and moral existence filled with truth revealed to the criminal sinner.

With the character of Dmitry in *The Brothers Karamazov*, Dostoyevsky demonstrated an example of how a spiritually driven person should perceive sin. Technically and legally, Dmitry’s sentence is unjust (it was not him who killed the father), but Dmitry himself sees it as higher justice because he wished death upon his father, and it is a grave sin, a crime in Orthodox Christian ethics. Dmitry therefore sees the twenty years of hard labour as his duty; as a true believer, he realises that it is only through suffering that he can atone for his sin: “...I want to suffer, and by suffering shall I be purged! Well, maybe I will, gentlemen, right?” (Dostoevsky, 1976: 46).

Dostoyevsky believed that formal and soulless legal regulations that do not account for conscience and moral motives of an act lead to unjust verdicts in practice (Dostoevsky, 2004). The writer does not doubt the necessity of legal norms; he merely explains the gap between the legislative authority (government morality) and the spiritual component of personality, calling for “humanising” the legal norms, which is fairly consistent with the spirit of Russian philosophy of law.

The writer also emphasises the issue of conscience in *Crime and Punishment*, where the author basically creates a situation that focuses the whole plot on the issue of conscience. The point of the story is to lead the character to atonement through “worldly law”, “human nature”, and “God’s truth”. The latter is exclusively connected with conscience. Raskolnikov’s atonement required him to judge himself, fully accept responsibility for his crimes, and to understand his deeds from the perspective of conscience. According to the author, conscience is a sense of moral responsibility for one’s actions to others, an ability to recognise the moral nature of one’s behaviour deep inside one’s soul. Conscience implies an absolute moral law of taking good from evil.

In the Christian tradition, every person has a conscience that is both an internal witness and a prosecutor thought to be “God’s eye and voice”. Since God is all-knowing and omnipresent, the judgement by conscience is

inescapable. For Dostoyevsky, Christ is not an abstract ideal, not an intrinsic idea of idealist philosophy, but a historical fact. Conscience is understood as the immaculate way of living Christ had on Earth. For Dostoyevsky, the function of conscience is to lead Raskolnikov to repentance, partially through fear, so as to save him. It is conscience that leads Raskolnikov to admitting: "...was it a little old woman I killed? It was me, not the old woman who I killed. I just did myself in, forever..." (Dostoevsky, 1973: 69).

The issue of conscience, guilt, and shame was elaborated in depth in the works of Vladimir Solovyov. He identified three human needs: to live, to learn about life, and to correct it. Satisfying the former makes people similar to other living beings, and knowledge of life leads people to understanding the sinfulness of natural ways and overcoming it: "Not only does man understand, with his mind, the inadequacy of the natural way as leading to death and nothingness, he also realises in his conscience that this way is sinful" (Solovyov, 1999: 65). The philosopher concludes that people should live their lives obeying their sense of duty and conscience.

Russian culture, where, in 19th and early 20th centuries, the communal and ethics-based nature of all aspects of life, undivided truth, and human-centeredness were main ideas, specifically focuses on people, their moral choice, and ability to improve themselves and society. Works of Russian philosophers show a change in understanding conscience: from a focus on a social fear in the presence of others to a deeper understanding of it as a spiritual core of a personality expressed in the feelings of guilt and repentance.

Law carries the main burden of protecting society from harmful and dangerous deeds of persons who disregard rights and interests of other people and society as a whole. Consequently, law, where state coercion is concentrated and monopolised, restrains and punishes crime against public morals. "...The existence of a society depends on safety for all rather than on perfection of some", wrote Solovyov, "While not secured by itself with moral law that does not exist for people with prevailing antisocial instincts, this safety is guarded by the coercive law that applies to them as well" (Solovyov, 1998: 39).

Solovyov's philosophy formulates the issue of the correlation between law and morality this way: can law be immoral and morality anti-legal? "The interrelation between the moral and legal," he writes, "is one of the core issues of practical philosophy" (Solovyov, 1988: 446). For Solovyov, law is "a certain minimum of morality" (Solovyov, 1988: 446) and it must be correlated with moral ideas and assumptions, the philosopher believes. He therefore concludes that a crime is not merely a technical breach of a legal norm but also a violation of moral Truth that becomes violated in relation to both the victim and the criminal. Violating moral and legal principles, the criminal harms his or her own personality, rejecting God's grace.

In Solovyov's moral philosophy, human sense takes the shape of moral law. Solovyov legitimises sense as a moral instance. For him, sense is not simply a way of cognition of the world, but also a tool of its mortal transformation. According to Solovyov, good cannot be senseless, and the sense of conscience therefore requires a proper attitude towards any life situation rather than a manifestation of "pure will". The philosopher believes that acting in accordance with one's conscience is sufficient for a moral act.

In its meaning, Soloviev's idea of "conscience" is closest to the Kantian *Pflicht* (duty) since the German word *Gewissen* (conscience) is, for Kant, merely a formal notion that does not correspond to what people should do and therefore is not a moral law. For him, "practical reason" alone is responsible for moral decisions. Conscience may require moral actions from a person, but it cannot justify them. Moral justification of such actions is beyond its scope. It is solely a goal of "practical" reason. For Kant, conscience is therefore a moral sense but not a moral law. At the same time, it is the force that makes people observe the moral law (Kant, 1990). That is the reason why Solovyov's idea of conscience is comparable to Kant's idea of duty.

Duty and conscience are related but they are not the same. What they share is the fact that both the sense of conscience and idea of duty include an absolute or unconditional principle. For example, Solovyov thinks that "the moral law is based both in us and independently from us. To put it otherwise, this unconditional law implies an absolute legislator" (Solovyov, 1988).

V. S. Solovyov was profoundly right when he called shame and conscience the primary basis of morality, the senses that serve as a foundation of human existence and ground zero of humanity in people. The "high" senses make people people, and losing them, they lose everything that makes them human.

The notion of conscience is a sense of a sentient being or a sensuous reason. Neither sense without sensibility nor sensibility without sense is moral and therefore human. In the notion of conscience, people overcome both the senselessness of their reason and unreasonableness of their senses and achieve a convergence of the objective basis of morality with the subjective one, i.e. discover and actualise things divine within themselves. Conscience as an internal spiritual and moral law makes it possible to respect and observe the law without external coercion. The law is the external rational coercion whereas conscience is the internal irrational motivation.

3. Practical experience in addressing the issue

It is not surprising that Russian thinkers paid so much attention to the correlation between law and conscience. Historically, the very idea of a Russian system of justice was based on understanding conscience, truth, and fairness. From the ancient times, people in Russia understood the word “law” as moral and religious commandments rather than a legal act. In Russian legal consciousness, true justice can only have a sacral meaning. The government understood that as well; it is no coincidence that in the late 18th century Catherine II created the Court of Conscience in Russia, and the judicial reform of the second half of the 19th century kept the practice of peasant justice based on the traditional customary law. For example, the law of the Russian Empire let peasants instead of litigation in *volost* courts, refer by mutual agreement to arbitration by conscience in any form possible. Justice “by conscience” may be justified when verdicts and sentences are not flawless from the positivist standpoint. Here, it is important to reach a compromise between law and conscience, but the main legitimacy criterion for these judicial decisions is repentance of the criminal because the ideas of mercy and absolution are also fundamental for the philosophy of Russian justice. It is important that the judge, jury, and victim see, in the repenting convict, a miserable person who made a false step by fate or own sinful choice rather than a hopeless criminal. In this case, conscience helps some people to understand their sin and other people to show mercy by conviction or acquittal.

In the second half of the 19th century Russia had both interesting theoretical ideas on the correlation between law and conscience and practical experience in combining them. We mean professional legal scholars who created a truly democratic justice system. Their ideas, in particular, on morality and conscience in administering justice, are relevant and necessary to this day.

Anatoly Koni (1844–1927), a prominent Russian legal thinker of the late 19th and early 20th centuries, theoretically proved and practically exemplified (he presided over the Saint Petersburg district court) what true justice should be. He would put moral values, primarily conscience, on top of his hierarchy of values. His book *Moral Principles in Criminal Proceedings* should be a handbook for a judge. In the book, Koni, a jurist and philosopher, described a paradigm of justice, and there is no doubt that we would have a different system of justice if we followed the spirit of the guidance created by the jurist and thinker. In particular, he emphasised that “... a guilty verdict is a result of complex internal work by the judge who is limited, in determining the strength of evidence, by nothing but guidance from reason and a voice of conscience” (Koni, 1967). He also writes there that “what is called ‘judge’s conscience’ is a force that supports the judge and brings a special, sublime meaning to his trade... He must reckon with

its voice lest he bring a profound discord upon his soul” (Koni, 1967). In another analytical work, *Fathers and Sons of Judicial Reform*, he also points out the decisive importance of conscience in justice: “In no other trade does one need to stir one’s conscience so often, at times calling it to judgement, at times demanding instructions from it, at times searching for support in it alone” (Koni, 1914).

Fyodor Plevako (1842–1908), a contemporary of Anatoly Koni and prominent lawyer, built his defence in court both strictly in line with the law and in accordance with conscience. It was “by conscience” when a case was closed against his client, a priest who had violated the criminal law but repented. F. N. Plevako’s address to the court was short: “Dear members of jury! ...Before you sit a man who has been granting you absolution of your sins at confession. Now he is waiting for you to say whether you will absolve him of his sins” (Plevako, 1909). The priest was acquitted by jury verdict. The case showed the true nature of justice when conscience became the higher judge alongside a strict law.

The current Russian law obliges a judge, in administering justice, to apply law but also be guided by conscience (Article 17 of the Criminal Procedure Code of the Russian Federation). Undoubtedly, conscience enriches the law and fills it with new substance, determining its meaning. Deciding, a judge evaluates both the legal content and moral essence of facts.

Conclusions

Concluding our reflection on the issue of the correlation between law and conscience, we can state that there is a lot of theoretical and practical experience of addressing it. In spite of that, the issue is far from being resolved. A lot of thinkers have tried to define conscience, but we have to state that there is still no commonly accepted definition of this notion. Probably, it is an impossible task. In our view, the reason for this is in the irrational and unverifiable nature of the notion. Even the rational definitions of conscience contain irrational characteristics. For example, Vladimir Dal defined conscience as “moral consciousness; a moral feeling or sense in a person; intrinsic understanding of good and evil; a secret place in the soul reflecting approval or condemnation of every act; the ability to recognise the quality of an act; a sense that attracts the truth and kindness and repels lies and wickedness; an unconditional love of things good and true; an inborn truth, in various degree of development” (Dal, 1882). V. Dal also directly connects justice with conscience: a just court, a just verdict, a decision by law, by conscience, or the truth.

We suggest understanding conscience as a human spiritual and moral law that makes it possible to make decisions without being compelled or

motivated from the outside, governed by internal realisation of good and evil and by identifying the verity, fairness, and righteousness of an act. This definition implies relativity of justice because it is administered by flawed people with their own moral assumptions and understanding of conscience. It means that every person has to solve the issue in question on their own. Nobody can formulate any universal guidelines on the “correct” use of conscience in legal practice. They can only rely on experience in reflection and actions of others, but everyone chooses independently what experience, of what people, and to what degree they will eventually use.

It is a challenging task: the person has to combine the rational law with the irrational conscience. Modern people are used to computers. They are used to trusting the machine with making a lot of decisions for them, that is why, choosing between law and conscience, they mostly prefer the law that fits into a machine algorithm. Yet, they have to remember that machine-like thinking creates machine-like decisions and machine-like actions. Human nature is richer than that. It is not limited to pre-defined algorithms.

Using the experience of Russian philosophy, which views law as a minimum of morality, we can give advice to people enforcing the law in practice. The advice is not to be guided by legal norms alone but to listen to the voice conscience as well. Being included in moral norms, the legal norms are guaranteed to be observed, but there will also appear an opportunity to combine administering justice with making the world a better place.

Conflict of Interests

The authors confirm that the data provided does not contain any conflict of interests

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Legal Aspects of Dividend Payment in a Limited Liability Company

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Abstract

The objective of the study was to identify forms, main objectives and regulatory measures that can improve the development of the legal regulation of dividend payments in a limited liability company. The study involved three methods: direct observation, comparison, and analysis of the content of documents that provide legal regulation of dividend payments at the state and interstate levels. Eight important factors influencing dividend policy are presented. The success of business activity depends directly on the regularity of profits and the amount of capital of the company, while it is inversely dependent on the regularity and size of dividends. It is concluded that the type and form of dividend policy is partly governed by the rule of law and partly determined by non-legal business factors. An optimal dividend policy means that there must be an appropriate balance between the payment of current dividends and the future growth of the company's profits. In this case, the procedure established by law and the sequence of shares preceding the payment of dividends indicates the partial entrepreneurial freedom of the participants in this case.

Keywords: determining factors; dividends; dividend payments procedure; dividend policy; limited liability company.

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Aspectos Legales del Pago de Dividendos en Una Sociedad de Responsabilidad Limitada

Resumen

El objetivo del estudio fue identificar formas, objetivos principales y medidas regulatorias que pueden mejorar el desarrollo de la regulación legal del pago de dividendos en una sociedad de responsabilidad limitada. El estudio involucró tres métodos: observación directa, comparación y análisis del contenido de los documentos que proporcionan la regulación legal del pago de dividendos en a nivel estatal e interestatal. Todo indica que, el éxito de la actividad empresarial depende directamente de la regularidad de los beneficios y la cantidad de capital de la empresa, mientras que es inversamente dependiente de la regularidad y el tamaño de los dividendos. Se concluye que, el tipo y la forma de la política de dividendos se rige en parte por el estado de derecho y en parte está determinada por factores comerciales no legales. Una política de dividendos óptima significa que debe haber un equilibrio adecuado entre el pago de dividendos actuales y el crecimiento futuro de las ganancias de la empresa. En este caso, el procedimiento establecido por ley y la secuencia de acciones que preceden al pago de dividendos indica la libertad empresarial parcial de los participantes en este asunto.

Palabras claves: factores determinantes; dividendos; procedimiento de pago de dividendos; política de dividendos; sociedad de responsabilidad limitada.

Introduction

Corporations have existed for many years, but a limited liability company (hereinafter — LLC) is a fairly new type of business that has proved popular among small business owners (Business Jet, 2019). According to national statistics in 2020, the number of LLCs was 50% in the total number of legal entities —35— in Ukraine (Ukrstat, 2020).

The purpose of all enterprises is to make a profit by its founders, and therefore dividend payment is a guideline in the activities of LLC and its owners. If the results of the company's activities show that the past year was successful, the General Meeting of participants may decide either to pay dividends or to accumulate funds for further business development (Captain Contrat, 2017).

When LLC members have a corresponding share in their companies, they profit from this share differently and face very different tax problems (Payet, n. d.). Despite the fact that there is no definition of “dividends” in the

legislation governing the activities of LLC, dividends (from Latin *dividendus* — the one that is subject to division) is called the part of the company's profits distributed among its founders (Pomulieva and Remenyuk, 2017).

It turns out that it is not possible to collect dividends for the reporting period in court if the relevant decision of the General Meeting of LLC participants was not made. In this case, it is possible to apply to the commercial court to make a decision on the collection of dividends, if there is a relevant decision of the General Meeting of the company's participants. It is possible to demand recovery of the amount of debt incurred, taking into account the established inflation index for the entire period of delay and an additional 3% per annum of the overdue amount in court only (Supreme Economic Court of Ukraine, 2016).

The study will provide further development and improvement of guarantees at the legislative level on the fairness and expediency of regular payment of dividends in LLCs, taking into account the experience of other countries.

In the context of a global pandemic associated with an increase in human morbidity caused by the previously unknown to mankind Covid-19 virus, the company's physical business contacts have sharply reduced. Quarantine restrictions have affected the decline in companies' profitability, including LLCs. For the stated reason, as well as the fact that the LLC is characterised by limited liability of its members, the amount and regularity of dividend payment has decreased. Therefore, some legal aspects related to their dividend payments have become relevant in business.

1. Literature Review

At the national level, the procedure for deciding on the dividend payment in LLCs is set out in the Law of Ukraine "On Limited and Full Liability Companies". In particular, the General Meeting of participants considers the distribution of the company's net profit and dividend payment. Chernenko (2019) notes that the payment of dividends depends not only on the established dividend policy, but also on the owners' willingness to pay them.

Refusal of periodic dividend payments is justified by reinvestment of the received profit in the company's further development. The main factors influencing the company's dividend policy are: profitability, structure of past dividends, legal norms, financial leverage, investments, etc. (Murekefu and Ouma, 2012). A group of scholars, Pinto and Rastogi (2019) found that size and profitability have a significant positive effect on dividend policy. Business risk and debt have a significant negative relationship with dividends, and therefore it is justified to adhere to a stable dividend policy.

The freedom to do business is enshrined in Article 16 of the Charter of Fundamental Rights of the European Union, which has become a legally binding document, with the same legal force as international treaties (Usai, 2019).

Spilnyk and Zahorodna (2014) note that the term “dividend” for participants is income, and for the company it is a payment. Sondakh (2019) found that the company’s policy of retaining dividends negatively and significantly affects the company’s value. Investors prefer companies that distribute dividends because they are confident in the return on their investment. There are four types of dividend policy: regular dividend policy; stable dividend policy; irregular dividend policy; lack of dividend policy (Borad, 2014). Dividend policy is a reflection of the company’s financial performance (Thakur, n. d.).

Due to the high rates of taxes levied on dividends, investors are often reluctant to receive dividends and leave the accumulated profits for the company’s further development (Breaking Down Finance, n. d.).

The law allows members to receive an interim dividend payment by the end of the reporting year. In case of limited liability companies, interim dividend payment may be submitted by the manager/head of the company (if the company has a supervisory board — upon its approval). If the report after the payment of interim dividends shows that the company is not capable to pay dividends, the interim dividends shall be payable. In particular, this clause protects the company’s creditors and suppliers (Kertész, 2016).

Legal systems limit the rights of company members to profit by creating a special reserve fund or limiting the resources (profits) to be distributed (Simčina, n. d.).

The aim of the study: Identification of ways, main objectives and regulatory measures that can improve the development of legal regulation of dividend payment in LLCs.

Research objectives:

- determine the procedure, amount, and possible restrictions in the dividend payment in LLC.
- review the foreign experience of legal regulation of dividend payments in LLC.
- formulate proposals to increase the efficiency of regulation of dividend payment in LLC.

The research hypothesis is in the form of statements about concepts that can be true or false if they relate to an empirically observed and verified phenomenon.

Based on the empirical ground and research methodology, the hypotheses are formulated as follows:

- a) the dividend payment policy in LLC affects the company's value and success.
- b) the tax policy of dividends significantly affects the frequency and willingness to receive dividends by the company's members.
- c) dividend payment in LLC is determined by legal norms only, and there are no other, informal factors that affect the frequency and amount of dividend payment.

2. Methodology

The main empirical ground of the study is collected using three methods: direct observation, comparison, and analysis of the content of documents that provide legal regulation of dividend payment in LLC at the state and interstate level. In the course of *direct observation*, laws, documents and regulations governing the procedure and features of dividend payment to LLC participants were identified. The grounds, conditions, procedure and frequency of dividend payment at the national and interstate levels have been established. The significance and priority of regulatory documents that determine the dividend payment procedure in the company are provided.

In most cases, the frequency of dividend payments is determined by the company in the constituent documents or in the decision of the General Meeting based on the results of the reporting period. If the charter stipulates the payment of dividends at the end of the reporting year, the decision to pay intermediate dividends without making appropriate changes to the constituent documents will be a direct violation of the charter's provisions.

The review of modern scientific opinion found that in addition to formal rules and procedures, there are many other factors that determine the frequency of payment and the amount of dividends.

Besides, a study of current legislation found that the procedure for distribution of profits in the form of dividends is quite flexible and formally regulated by the company's charter, while informally depends on dividend policy.

When using the method of *comparison*, it is established how the countries provide guarantees of dividend payments in LLCs. In times of crisis or in other unforeseen cases the company will not be able to ensure timely dividend payment without an adequate amount of capital reserve fund.

Comparative analysis shows that the company's profitability is the main factor determining the dividend policy. However, the focus on long-term profitability, combined with capital reinvestment will extend the company's life cycle.

The *analysis of the content of various documents* involved the information posted on social networks, scientific journals and on news websites. The current volume and sources regulating the dividend payment procedure in LLCs was established. The tendencies, objectives and directions of legal regulation of dividend payment in LLCs are studied.

3. Results

A LLCs is a type of business association. Therefore, LLCs shall create a reserve fund in the amount established by the constituent documents, but not less than 25 percent of the company's authorised capital. The main feature of dividends paid in LLCs, in contrast to open joint stock companies, is that they are not paid regularly (Verkhovna Rada of Ukraine, 2018a). In France, each company must have a "reserve" of at least 10% of its capital. Until this threshold is reached, it must reserve 5% of its profits annually (Captain Contrat, 2017). In the United Kingdom, the reserve fund for dividends is set at 15% (MRSC, 2021).

The authorities typically discuss the need for contingency funds in the context of securing future capital expenditures, debt obligations, emergencies, economic downturns and imminent contingencies that may cause financial difficulties. It is important to clearly define the intended use of each reserve of the fund and the balance of funds created by the organisation. According to Link Group Dividend Monitor, in 2020 investment funds increased the amount of dividends by 4.2%, despite the fact that payments in the UK decreased by 38% and global dividends — by 12.2%. In the midst of the Covid-19 crisis, more than three-quarters of the world's trusts increased dividend payments. This success is due to the significant reserves of investment funds. Income reserves are an important feature of investment funds, they can be distributed in the future. This is how they differ from open investment companies, which have to pay all their dividends each year (Palmer, 2021). Thus, the company's reserve fund is extremely important in unforeseen cases, such as the economic crisis, debt repayment upon court decision, etc.

It should be noted that there is some uncertainty as for the terms for dividend payment. In particular, in accordance with Part 4, Art. 26 of the Law of Ukraine "On Limited and Full Liability Companies", dividends shall be paid within a period not exceeding six months from the date of the decision on their payment, unless otherwise provided by the company's

charter or the decision of the General Meeting of participants (Verkhovna Rada of Ukraine, 2018b). These rules recommend the payment of dividends based on the decision of the General Meeting, they leave these bodies wide freedom in determining the date of payment, and most importantly — they do not determine the consequences of not specifying this date (Russell Bedford Poland, 2018). As mentioned above, the only civil consequences for LLCs are inflation indices and an additional 3% per annum of the overdue amount. However, as a result of the payment of unforeseen expenses in the form of payment of interest on dividend arrears upon a court decision, the law excludes the obligation to include these amounts in those subject to taxation (Humanitarian Portal, 2021).

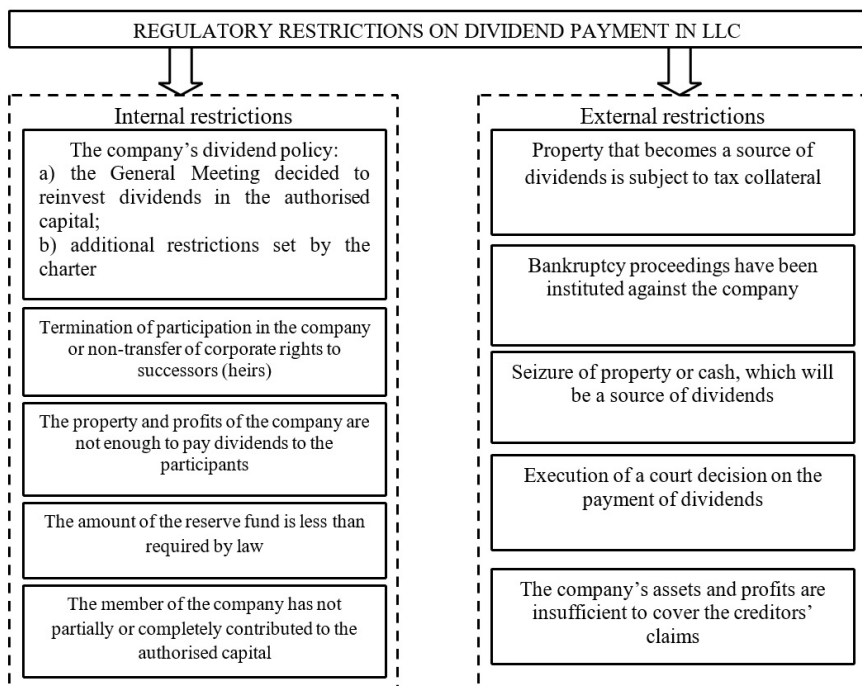
Under national law, dividends are paid out of net income for any period that is a multiple of a quarter, unless otherwise provided by the charter (Bartlett, 2020). Intermediate dividends can be distributed among company members without knowing how much final profit the company will receive. Such a distribution is risky if the deposit remains higher than the actual profit (Janquert, 2020).

In addition to the regulations and rules that determine the dividend payment procedure in LLC, there are a number of legal restrictions and prohibitions which may prevent dividend payment. Based on the results of the analysis of the Tax Code, the Code of Bankruptcy Procedures, the Law on Limited Liability Companies (Verkhovna Rada of Ukraine, 2018a; 2018b; 2019), as well as considering the entities introducing such restrictions, we propose to present them schematically in Figure 1 (Regulatory restrictions on dividend payment in LLC). Without taking into account such restrictions, it is not possible to make an informed legal decision on dividend payment.

Dividends are in fact a form of profit, so they are subject to the relevant taxes, fees and other mandatory payments. For example, the main advantage of LLCs over corporations in the United States is that LLC owners are not subject to double taxation (Murray, 2021). The concept of double taxation does not apply to LLCs. Thus, despite the fact that the LLC as a legal entity is not subject to taxation, the share of a foreign partner or participant of the LLC or actually related income of the LLC is taxed (Schneidman, 2017).

The national system of taxation of LLC is a bit more complicated. The founders of LLC can be both individuals and legal entities, both residents and non-residents. Nevertheless, in addition to the founders, the LLC also has a burden of paying taxes under the general or simplified system.

Figure 1. Regulatory restrictions on dividend payment



Source: own elaboration.

To arrange the type and amount of dividend encumbrances, we propose schematically present the types of taxes, payments and the amount of interest on dividends in LLC in Table 1. The information given in Table 1 is the author's own development and relates to taxes and mandatory payments related to the cash amount of dividends. At the same time, when paying dividends in kind, it is also necessary to pay additional VAT in the amount of 20%. LLCs paying single tax are not entitled to pay dividends in non-cash form, because according to paragraph 291.6 of the TCU they are allowed to make payments for shipped goods only in cash. The form of such payment can be cash or non-cash.

Table 1. Taxes and dividend payments in LLC (author's own development)

	Who pays taxes and fees						
	LLC Individual (resident and non-resident) Resident			LLC participants			
				Legal entity			
				Non-resident			
Type of tax, payment	Income tax	Advance payment when paying to resident legal entities	Repatriation tax for non-resident legal entities	Personal income tax	Military fee	Income tax	
General tax system	The size is determined by the TCU						The size is determined by the laws of the country of the company's registration
	18%	18% (except in cases of exemption of legal entities from payment)	15% (5% according to the international agreement, provided that the non-resident legal entity owns more than 20% of the LLC's property)	5% (18% when the fixed amount of dividends is paid)	1.5%	18%	
Simplified tax system	5% (VAT excluded)	-		9% (18% when the fixed amount of dividends is paid)		5% (VAT excluded)	
	3% (VAT including)			9% (18% when the fixed amount of dividends is paid)		3% (VAT included)	

Source: own elaboration.

So the tax advantage of LLC is its flexibility. Depending on the form of payment (in cash or in kind) and the beneficiary of dividends: individual or legal entity, resident or non-resident, the amount of taxes and required

payments may increase or decrease significantly. Thus, depending on the taxation system and the beneficiary of dividends, the budget will receive from 12% to 54% of taxes and payments from the LLC and its participants. The undeniable tax disadvantage for LLCs is the rather large amount of taxes and mandatory payments withheld from dividends.

The main factor in determining the dividend policy is to maximise the profits of the company's owners. In practice, it has been found that most companies first define the amount of dividends as assets, and the balance is retained earnings. That is, if possible, the firm should withhold a return on investment, which in turn increases profits than the value of retained earnings. If the investment is not provided, the company must pay profits as dividends. This means that the company must treat retained earnings as assets, and dividends as passive residuals (Dhaval, n. d.). At the same time, there is an inverse relationship between the frequency of dividend payments and the company's profitability. The more often dividends are paid, the faster the company's profits will decrease (Docsity, n. d.).

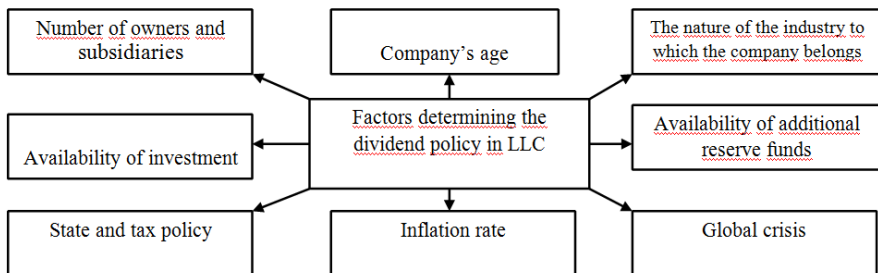
Taking into account the above, we can make a list of general important factors that may affect the dividend policy in the company showing them schematically in Figure 2. They include:

- a) Number of owners and subsidiaries. Companies with a large number of owners and subsidiaries will find it difficult to reach a common agreement on maintaining a conservative dividend policy. On the other hand, a company with a small number of owners and subsidiaries is more likely to have a well-established dividend policy.
- b) The company's age. The younger the LLC, the smaller the size of the reserve fund, the smaller the amount of dividends they can allow to pay. Besides, the older the company, the higher the corporate culture of dividend payment.
- c) The nature of the industry to which the company belongs. The business sector, where earnings are stable, is likely to provide greater dividends, the rate of return will be higher.
- d) Availability of investments. Companies with the prospect of profitable investments will seek to increase their profits and the frequency of their dividends. A study of 179 companies found that 64% of debt investors (unlike other groups of investors) in the company expand their business.
- e) Availability of additional reserve funds. In the event of a financial crisis or unforeseen costs, cash reserves support the business at a sufficient level.
- f) State and tax policy. Adopted or revoked interstate agreements to prevent double taxation of companies, loss of business partners due

to military conflicts (for example, due to the war in eastern Ukraine), as well as the level of taxes and fees set by the state significantly affect the success of society.

- g) Inflation rate. The inflation rate is inversely dependent on the number of dividends paid: the higher the inflation rate, the less dividends should be expected.
- h) The global crisis. For example, due to the Covid-19 pandemic, the world is experiencing a non-business crisis, but it is significantly affecting the efficiency of business operations. Because of the pandemic, governments around the world have imposed restrictions on business (domestic and interstate) and on society. Coronavirus has caused the reduction of dividends worldwide. A group of researchers found that depending on the type of industry, the crisis affects business profitability in different ways. There is no direct dependence of the pandemic impact on the company.

**Figure 2. Factors determining the dividend policy in LLC
(author's development)**



Source: own elaboration.

The negative relationship between profitability, scope of influence and the size of the company in terms of dividend payments proves the theory of irrelevance of dividends as a business goal. The results show that investors are more concerned about the future performance of companies than current profits (Yasin *et al.*, 2017).

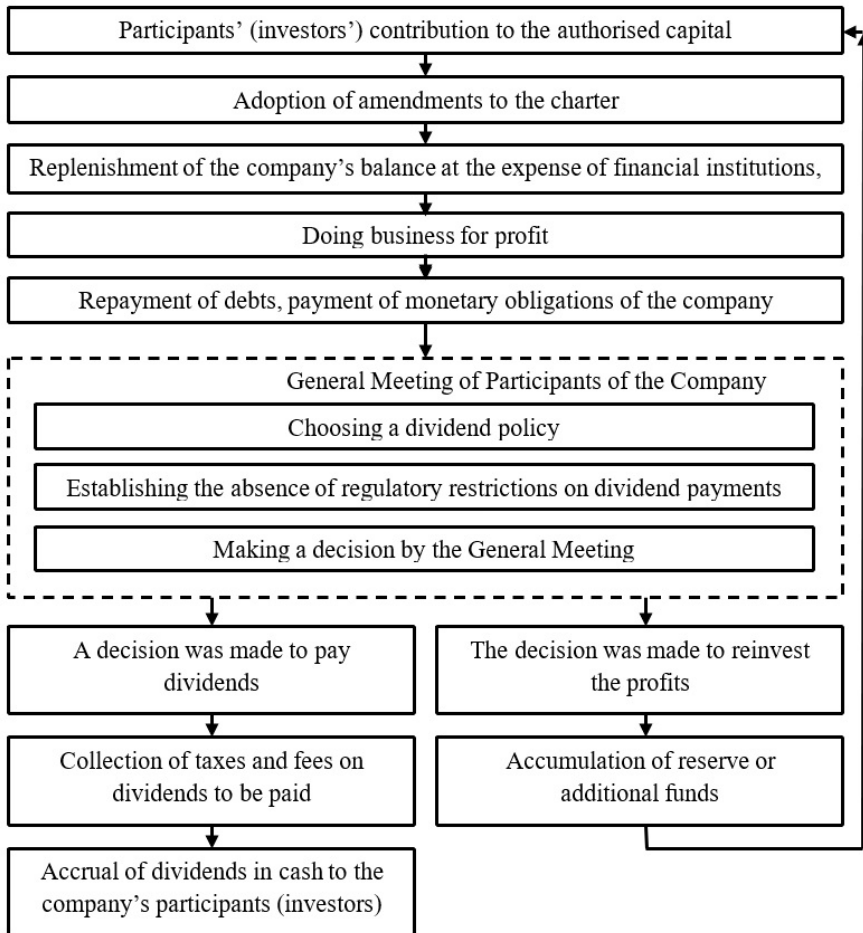
So, summarising the above, we present the general procedure and sequence of actions preceding the payment of dividends in LLC (Figure 3).

However, despite sufficient legal certainty, given the restrictions (including the chosen dividend policy in the company), which may affect the dividend payment procedure, some officials of the company may resort to risky and dishonest actions. Sometimes, resorting to a fictitious calculation, they set inflated profits or balance in order to make illegal dividend payments to the company participants. The Law on LLCs establishes only joint and several liability for obligations to return payments to LLC, if the company's participants were misled about its financial condition, in particular by presenting inaccurate information in the documents of LLC, which led to illegal payments. At the same time, other types of legal liability for "manipulation" of the company's balance, which leads to the payment of fictitious dividends are not provided. Korotash (2016) also rightly proposes to prohibit the adoption of decisions on the payment of dividends in LLCs that have not fully formed the authorised capital.

In the course of the research, the national system of tax and dividend payments in LLCs is schematically generalised. The peculiarity of this generalisation, in contrast to that given by Pomulieva and Remenyuk (2017), is the ease of use and conciseness of tax interest, as well as additional features of the general and simplified tax system.

The regulatory restrictions for payment of dividends in LLC are identified on the basis of generalisations of the current legislation and positions of scholars. In this case, the general list of restrictions is divided into two groups: internal and external, those that are directly regulated by internal economic activity and those that appear at the initiative of third parties, respectively.

Figure 3. The general procedure and sequence of actions preceding the payment of dividends in LLC (author's development)



Source: own elaboration.

4. Discussion

It is confirmed that the right to receive dividends from the participants of the LLC arises only upon the decision of the General Meeting on for such

payment. In case of the failure to pay dividends in a timely manner, they can be collected in court, referring to the LLC participants' liability for monetary obligations. Similar legal positions of the Supreme Court set out in the Supreme Court Rulings dated 30.10.2019 in Case No. 906/904/16, dated 16.06.2020 in Case No. 910/21232/16, dated 18.10.2018 in Case No. 923/1297/14, dated 14.07.2020 in Case No. 904/6379/16, dated 03.06.2020 in Case No. 4/44-B (Supreme Court of Ukraine, 2020). In these cases, the issue of imposing subsidiary liability for the LLC's obligations on the founders (participants) or other persons, including the head of the debtor.

In contrast to the proposed coverage of the peculiarities of the company's dividend policy and the assessment of its effectiveness by groups of scholars Derevinska and Ischenko (2016), a list of common important factors influencing the company's dividend policy was established. This takes into account the position of a group of scholars, namely: Rohov *et al.* (2020), that the financial indicators of dividend policy accurately classify only those firms that do not pay dividends. Therefore, these reasons are given without taking into account the qualitative and quantitative financial indicators.

An optimal dividend policy means that there must be an appropriate balance between the payment of current dividends and the future growth of the company's profits (Simple I Learn, 2016). Dividend payment is not the main goal of the business. To achieve success in business, the following dividend policy will be effective: the optimal compromise between the frequency and size of dividend payments on the one hand, and the investment of profits in the company's development on the other hand.

5. Recommendations

For investors:

Investors and potential investors are recommended to pay attention to the company's size, profitability and other important factors that determine the company's dividend policy. They can also help investors make decisions when acquiring a stake in the company's authorised capital and choosing a financial case based on the company's dividend policy.

For public authorities:

The results of this study can be used by financial managers and government policy makers to make appropriate decisions to increase guarantees and ensure regular dividend payment in LLCs.

Besides, at the legislative level, it is recommended to strengthen the liability of LLC's participants for the distribution of fictitious dividends and to prohibit unjustified and irrational distribution of profits in the form of

dividends on the basis of a decision of the General Meeting.

In a time when the global crisis has affected many modern forms of doing business in almost all sectors of the economy, there is a need for a unique partnership between government and business, especially in the regulatory system of dividend taxation.

For academicians:

It is expected that the limitations of this study will be detailed in further empirical work, especially on the impact of regulatory constraints on the regularity and amount of dividends paid in LLCs.

For lawyers:

It is recommended to lawyers in the recovery of arrears of previously unpaid dividends to use the developed general procedure and sequence of actions which precedes the payment of dividends in LLCs.

Conclusions

Thus, the legal regulation of LLCs in terms of dividend payments is quite flexible. Payment of dividends is not the main goal of business, because the company's success depends on the regularity of profits and the amount of capital of the company, and inversely depends on the regularity and size of dividends.

The results of this study confirm the hypothesis that the dividend payment policy in LLC has a significant impact on the company's value and the amount of capital. The analysis of the content of the documents allowed identifying eight important factors that influence the dividend policy in LLCs. Moreover, depending on the selected dividend policy, the payment of dividends will have a positive or negative impact on the amount of profit.

The study and arrangement of regulatory restrictions that determine the frequency and amount of dividend payment, as well as external and internal factors that determine the dividend policy in LLCs confirmed the second hypothesis. In particular, the tax policy of dividends significantly affects the frequency and the company's participants' willingness to receive dividends.

However, this study refutes the third hypothesis that the dividend payment in LLCs is determined solely by legal provisions, while other, informal factors affecting the frequency and amount of dividend payments, do not exist. Despite the fact that the dividend payment procedure is formally defined and enshrined in law, the decision of the General Meeting and the Company's dividend policy are the determining factors for dividend

payment. Many researchers have tried to cover the problems of choosing the optimal dividend policy, but still there is no decent explanation of the reasons for choosing a certain dividend policy in the company. However, it can be stated unequivocally that the type and form of dividend policy in LLCs is partly regulated by law, and partly determined by business, non-legal factors. The above general procedure and sequence of actions preceding dividend payment in the company indicates the partial entrepreneurial freedom of the company's participants in this matter.

It was found that depending on the tax system and beneficiary of the dividends, the budget will eventually receive a significant amount from 12% to 54% of taxes and fees. However, despite its flexibility, Ukraine is in the world rankings of countries in terms of business support. Therefore, in modern conditions, the system of current taxes and fees needs to be tempered in terms of dividend payments in LLCs.

The issue of liability for the distribution of fictitious (non-existent) dividends in LLCs remains unresolved. Although the participants are jointly and severally liable only for the obligation to return the company's payments for misleading the company's members regarding its financial condition, I propose to prohibit unjustified and irrational distribution of profits in the form of dividends based on the decision of the General Meeting. Besides, in order to increase the efficiency of regulation of dividend payment, depending on the consequences of the failure to pay, I propose to introduce criminal liability for such actions. Under such changes, LLC officials will be more careful when deciding on the payment of fictitious dividends.

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The role of the Prosecutor of the International Criminal Court in strengthening the international legal order

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Abstract

The article examines the special role of the Prosecutor of the International Criminal Court in strengthening the international legal order. This analysis was carried out through the prism of the study of certain issues: the concept of “Prosecutor of the International Criminal Court” and his place in the system of international criminal justice; the powers of the Prosecutor at certain stages of the proceedings in the International Criminal Court; the principles of strategy and priority in the activities of the Prosecutor. Historical, system-structural, analysis and synthesis, comparative legal, formal-legal, and formal dogmatic methods were used in the research. In the article was made conclusion that that the Prosecutor of the International Criminal Court has a preventive effect on international crimes, because the work of the Prosecutor of the International Criminal Court is aimed not only at punishing perpetrators of international crimes, but also at preventing the commitment of such crimes in the future. It is emphasized that such activities of the Prosecutor ultimately have a positive effect on strengthening the international legal order.

Keywords: Prosecutor; Office of the Prosecutor; International Criminal Court; international legal order; international crime.

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El papel del Fiscal de la Corte Penal Internacional en el fortalecimiento del orden jurídico internacional

Resumen

El artículo examina el papel especial del Fiscal de la Corte Penal Internacional en el fortalecimiento del orden jurídico internacional. Este análisis se realizó a través del prisma del estudio de ciertos temas, tales como el concepto de «Fiscal de la Corte Penal Internacional» y su lugar en el sistema de justicia penal internacional; las facultades del Fiscal en determinadas etapas del proceso en la Corte Penal Internacional; los principios de estrategia y prioridad en las actividades de la Fiscalía. En la investigación se utilizaron métodos históricos, sistémicos-estructurales, de análisis y síntesis, comparativos legales, formal-legales y métodos dogmáticos formales. En el artículo se llegó a la conclusión de que el Fiscal de la Corte Penal Internacional tiene un efecto preventivo sobre los crímenes internacionales, porque la labor del Fiscal de la Corte Penal Internacional está dirigida no solo a castigar a los autores de crímenes internacionales, sino también a prevenir la cometer tales delitos en el futuro. Se enfatiza que tales actividades del Fiscal en última instancia tienen un efecto positivo en el fortalecimiento del orden jurídico internacional.

Palabras clave: Fiscal; Fiscalía; Corte Penal Internacional; orden jurídico internacional; crimen internacional.

Introduction

Nowadays, the place and role of international law is being reconsidered, in particular in the context of its ability to respond to the challenges of the XXIst century and to ensure the effective regulation of international relations. Compared to domestic law, there is a lack of classical legislative, judicial, and executive powers in international law. There is no single body that is empowered to create legal norms that would be binding for all actors of international law, as well as an appropriate system of courts with jurisdiction over these subjects without a clear expression of their will. This determines the peculiarity of international justice.

Among the bodies of international justice, a special place is occupied by international criminal courts. International criminal courts and tribunals, according to an idea of their creators, should become bodies that administer justice to persons who are particularly defiant in violating international law, committing the most serious crimes of concern to the world community. At the same time, criminal prosecution is carried out against any person, regardless of possible immunities and status in society. Moreover, international criminal courts and tribunals were essentially

set up to ensure that senior officials did not escape responsibility for the committed crimes, given their special status in country.

The current stage of development of international criminal justice is associated with the establishment and activity of the permanent International Criminal Court (hereinafter - ICC). The ICC is the permanent body empowered to exercise jurisdiction over those responsible for the most serious crimes of concern to the international community. The Court operates on the basis of a multilateral treaty – the Rome Statute of the International Criminal Court, that was adopted on 17 July 1998 and entered into force on 1 July 2002.

The reasons for the establishment of the ICC are outlined in the preamble of the Rome Statute of the ICC (1998). In particular, in the first point of the preamble, it is noted that “the States Parties to this Statute, Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time”. The preamble further states that “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”, “such grave crimes threaten the peace, security and well-being of the world” and “the most serious crimes of concern to the international community as a whole must not go unpunished”. That is, based on the preamble, the connection between the creation of the ICC and the need to ensure international legal order becomes obvious.

The ICC, given its organizational structure, rules and procedures of activity, especially the election of judges, the ICC Prosecutor and his deputies, the Secretary and other officials, the peculiarities of funding and relations with the UN, allows us to speak of its institutional independence. This, in turn, is a prerequisite for an independent and impartial proceeding. Therefore, if the ICC prosecutes any high-ranking officials, there is no doubt that such prosecution is not political in nature. Of course, there are still some problems with the ICC’s cooperation with both the States Parties to the Rome Statute and other states, which is the biggest obstacle to the administration of justice before the ICC (The Prosecutor v. Omar Hassan Ahmad Al Bashir, 2018).

On the other hand, it should be noted that, compared to national authorities, the ICC has a much better reputation and credibility for its criminal proceedings. Because if national authorities prosecute their former high-ranking officials, it raises the issue of possible political persecution. In turn, this makes it difficult to put them on the international wanted list by issuing an Interpol warrant. There are no questions about possible political motives in criminal proceedings in the ICC.

Moreover, the principle of depoliticization is the main guarantee of the effective functioning of international criminal justice and excludes any influence of factors with a political component that are within the states.

A special place among the ICC bodies is occupied by the Office of the Prosecutor headed by the ICC Prosecutor. It is this body that can launch a mechanism of criminal prosecution in the ICC (Wenqi, 2006). However, it seems that its functions should be considered in the light of the goal of the ICC - not only to punish for international crimes but also to prevent the commission of new crimes in the future (Gutnyk, 2017).

This article has been solving the following tasks:

- to define the concept of “the ICC Prosecutor” and its place in the system of ICC organs.
- to find out the specific features of the powers of the Prosecutor of the International Criminal Court at certain stages of the proceedings.
- to identify the principles of strategies and priorities in the work of the ICC Prosecutor.
- to characterize the contribution of the Prosecutor of the International Criminal Court to the prevention of international crimes.

1. Literature Review

The legal status of the ICC Prosecutor has been the subject of research by a number of scholars. In particular, V. Roben researched the status and function of the Prosecutor of the ICC. Prosecutorial independence in the Rome statute, prosecutorial discretion, modes of accountability, the legitimacy of the prosecutor, and a call for prosecutorial guidelines were analyzed by A.M. Danner. Z. Wenqi explored the specifics of cooperation with states not party to the ICC. S. Grover researched “prosecuting international crimes and human rights abuses committed against children”.

However, the Prosecutor of the International Criminal Court in the point of view of his/her influence in strengthening the international legal order has not been the subject of separate scientific research until this time.

2. Methodology

This article has been devoted to analyzing of the role of Prosecutor of the International Criminal Court in strengthening the international legal order.

The study was made through the analysis of international law doctrine, legal documents of the ICC and the practice of the ICC. The focus is on the deterrent effect of the ICC Prosecutor's work on the prevention of new international crimes.

The subjects of the research were norms of the Rome Statute, internal legal documents of the Office of the Prosecutor of the ICC as well as the practice of the ICC. The subject study is the influence of the ICC Prosecutor on the international legal order.

In the article were used historical, system-structural, analysis and synthesis, comparative legal, formal-legal and formal dogmatic methods.

3. The concept of «the ICC Prosecutor» and its place in the system of ICC organs

The system of international criminal justice, having absorbed the best standards of the national criminal process, has not refused from borrowing the institution of the prosecutor's office. Moreover, the prosecution, based on the functions assigned to it by the world community, in the system of international criminal justice is a priority (The Prosecutor v. Stankovic, 2005).

The Statute of the ICC, the Rules of Procedure and Evidence of the ICC, the Regulations of the ICC, the Regulations of the Office of the Prosecutor, the ICC Agreement on the Privileges and Immunities, as well as other ICC internal documents repeatedly mention the Prosecutor.

The analysis of the above-mentioned documents allows us to conclude that the term «Prosecutor» is used in two meanings:

1) for the official - the head of the ICC Prosecutor's Office (see, for example, article 42 (2-9), articles 45-49 of the ICC Statute); 2) for all persons who work in the Prosecutor's Office- and whose powers include powers related to the investigation and criminal prosecution (see, for example, articles 53-56, articles 61, articles 65-66, article 68, article 72, article 76, articles 81-84 of the ICC Statute). Therefore, the legal status of the ICC Prosecutor is not limited to his procedural powers in the field of criminal prosecution; it includes his authority to manage the Office of the Prosecutor, cooperation (on his own behalf) with states and international organizations, etc.

To define the role of the ICC Prosecutor in strengthening the international legal order, it is first of all need to determine the place of the ICC Prosecutor's Office in the system of ICC organs, as well as to establish its structure and powers.

One of the four main organs of the ICC is the Office of the Prosecutor. This organ, given the tasks assigned to it, plays a key role in the ICC system (Danner, 2003; Novak, 2015; Nerida, 2016). The Prosecutor's Office headed by the ICC Prosecutor can launch a prosecution mechanism (Wenqi, 2006). In accordance with paragraph 1 of Art. 42 of the ICC Statute the Prosecutor's Office has three groups of tasks: to obtain and study any information about crimes under the jurisdiction of the ICC, conducting investigations and prosecutions.

The detailed list of powers of the Prosecutor's Office as a separate body of the ICC is not contained in the Statute, the Regulations of the Prosecutor's Office, or any other internal act of the ICC. Such powers can be identified only by generalizing the powers of its structural bodies.

An analysis of the Regulations of the Prosecutor's Office allows us to conclude that the Prosecutor's Office has the following organizational structure: the Executive Committee, divisions, sections and the Gender and Children Unit. The Prosecutor's Office is managed by the ICC Prosecutor, who may have one or more deputies. Let's consider the competence of these bodies more detailed.

The Executive Committee is responsible for developing and adopting the strategy, policy and budget of the Office, providing strategic guidance and coordinating the activities of the Office. The Executive Committee consists of the Prosecutor and the heads of the divisions.

The Prosecutor's Office consists of three divisions: the Jurisdiction, Complementarity and Cooperation Division, the Investigation Division and the Prosecution Division, each of which is the subject of a separate regulation of the Regulations of the Prosecutor's Office.

An analysis of the Regulations of the Prosecutor's Office allows us to conclude that the Division of Jurisdiction, Complementarity and Cooperation performs three functions: assessment and verification of information on the possibility of conducting an investigation; conducting analysis and providing recommendations on matters of jurisdiction; providing recommendations for cooperation.

The Investigation Division is tasked with: preparing the necessary security programs and protection policies in each case to ensure the safety of victims, witnesses, Office staff, and those at risk due to their interaction with the ICC, etc.; conducting an investigative examination; preparation and coordination of the sphere of activity of the Office staff; establishing the circumstances of the crime and analyzing information and evidence in support of the initial investigative actions, investigation and prosecution. The Investigation Division includes investigative teams that involve consultants with professional knowledge in areas such as military affairs, politics and economics (Wenqi, 2006).

The Prosecution Division is responsible for providing legal advice on issues that arise during the investigation and may affect future trial proceedings; preparation of a trial strategy for review and approval by the Executive Committee and their subsequent implementation in the ICC Chambers; conduct the prosecution in the ICC Chambers; coordination and cooperation with the ICC Registrar on related issues in trial proceedings.

Thus, the work of one of the divisions of the Prosecutor's Office is aimed at fulfilling each of the tasks provided for in paragraph 1 of Article 42 of the ICC Statute.

The structure of the Prosecutor's Office includes two sections: the Services section and the Section of legal advisers (Regulations of the Office of the Prosecutor, 2009); Sections perform ancillary functions.

A separate body of the Prosecutor's Office is the Gender and Children Unit, which provides assistance to victims of gender-based violence and violence against children during the investigation and trial of cases at the ICC (Grover, 2009).

Hence, the organizational structure of the ICC Prosecutor's Office is quite broad, due to the fact that the tasks of the ICC Prosecutor are much wider than in national legal systems, including those related to the specifics of international crimes and their prevention in the future.

The Prosecutor and his deputies must be citizens of different countries. Interestingly, the ICC does not prohibit the same citizenship for judges and prosecutors. The latter provision, according to W. Schabas, provoked heated discussions during the development of the Rome Statute of the ICC, as this norm allows for the possibility of combining prosecution and trials by representatives of the same state (Schabas, 2011).

4. Powers of the Prosecutor of the International Criminal Court at certain stages of the proceedings

An analysis of the ICC Statute and the Rules of Procedures and Evidence allows us to conclude that the Prosecutor has broad powers at each stage of criminal proceedings. However, it appears that the Prosecutor has the broadest powers at the pre-trial stages.

Information on crimes falling within the Court's jurisdiction shall be transmitted to the ICC Prosecutor. In accordance with paragraph 2 of Article 15 of the ICC Statute, the Prosecutor assesses the seriousness of such information. He may request additional information from States, the United Nations bodies, intergovernmental and non-governmental organizations or from other sources as it deems appropriate. If he considers that there are

sufficient grounds to initiate an investigation, he shall apply to the Pre-Trial Chamber to authorize the investigation. The latter, having examined the materials provided, may authorize or refuse the investigation. However, even such a refusal does not prevent the Prosecutor, in the presence of new facts or evidence, from re-applying to the Pre-Trial Chamber for a sanction for the investigation.

After authorizing the investigation, the Prosecutor proceeds directly to the investigation itself. At the same time, he equally investigates the circumstances that indicate both the guilt and innocence of the person.

The powers of the Prosecutor during the investigation are defined in Art. 54 (3) of the ICC Statute, according to which the Prosecutor shall: “a) collect and examine evidence; b) request the presence of and question persons being investigated, victims and witnesses; c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate; d) enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person; e) agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and f) take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence”.

Upon completion of the investigation, Pre-Trial Chamber shall hold a hearing to confirm the charges, on the basis of which the Prosecutor will request a trial. During such a hearing, in accordance with paragraph 5 of Article 61 of the ICC Statute, the Prosecutor supports the charge with evidence sufficient «to establish substantial grounds to believe that the person committed the crime charged».

After the confirmation of the charges, the case is on trial. It should be noted that Part 6 of the ICC Statute («The trial») does not contain a separate article on the powers of the Prosecutor during the trial. His powers, according to V. Roben, are similar to those he has during the investigation (Roben, 2003). The Prosecutor supports the charges in the Trial Chamber. To do this, he must present the facts and provide evidence that proves the guilt of the accused in the crime (Roben, 2003).

With regard to the stage of the appellate proceedings, in accordance with art. 81 (1)(a) of the ICC Statute, “the Prosecutor may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, or (iii) Error of law”. The prosecutor has the right to appeal the sentence on the basis of the disproportion of the sentence to the crime committed. Interesting is the power of the Prosecutor to file an appeal on behalf of the

convicted under Article 81 (1) (b) of the ICC Statute, according to which, “the convicted person, or the Prosecutor on that person’s behalf, may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, (iii) Error of law, or (iv) Any other ground that affects the fairness or reliability of the proceedings or decision”. This situation may cause confusion because the prosecution and the defence are opposite parties in the process. It seems, this provision is enshrined in the Statute to confirm the position of the Prosecutor not only as a party to the proceedings but also as a body acting in the interests of justice.

The ICC Statute and the Rules of Procedure and Evidence of the ICC do not contain a separate article on the powers of the Prosecutor during the proceedings of the case in the Appeals Chamber. However, based on the fact that in accordance with rule 149 of the ICC Rules of Procedure and Evidence «parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber», the Prosecutor has powers similar to those he has during the pre-trial and trial.

The next stage of the proceedings is the stage of revision. The Prosecutor has the right to ask the Appeals Chamber to review the final decision on conviction or sentencing. However, in this case, in accordance with paragraph 1 of Article 84 of the Rome Statute of the ICC, the prosecutor has the right to request a revision only on behalf of the convicted, but not as the prosecution. Such a request for revision in accordance with art. 84 (1) of the ICC Statute, may be filed on the following grounds: “a) new evidence has been discovered that: (i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; b) it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; c) one or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46”.

The ICC Chamber revising the sentence shall exercise, *mutatis mutandis*, all the powers of the Trial Chamber in accordance with Part 6 and the rules governing the examination and presentation of evidence in the Pre-Trial Chamber and the Trial Chamber. Consequently, in the revision of a sentence, the Prosecutor has, *mutatis mutandis*, the same powers as in the proceedings before the Pre-Trial Chamber and the Trial Chamber.

5. Discussion

The ICC Prosecutor has broad powers at every stage of the ICC proceedings, but the question arises: what is the strategic purpose of the Prosecutor's work? It seems that such a strategic goal, based on the functions of the Prosecutor and the purpose of the ICC, is prevention - to avoid committing new international crimes, which in turn affects the strengthening of international law and order.

The role of the ICC Prosecutor can be analyzed based on the strategic directions of its activities, which are contained in the Prosecutor's Strategy (strategic plan) and which are de facto the principles and directions of the Prosecutor's Office. It was developed (adopted) five times – in 2006 (Report on Prosecutorial Strategy, 2006), 2010 (Prosecutorial Strategy 2009 – 2012, 2010), 2013 (Strategic plan June 2012-2015, 2013), 2015 (The strategic plan of the Office of the Prosecutor 2016 – 2018, 2015) and 2019 (The strategic plan of the Office of the Prosecutor 2019-2021, 2019) – for a period of three years. For the first time, the main directions of the prosecutor's strategy were contained in the Report on the Prosecutorial Strategy of September 14, 2006. Now the activities of the Prosecutor's Office are carried out on the basis of the Strategic plan 2019-2021.

According to the Strategic Plan 2019-2021, the following mission of the ICC Prosecutor's Office is defined:

Complementary to national jurisdictions and in full respect of the jurisdictional regime, the mission of the Office of the Prosecutor embraces the effective and efficient conduct of preliminary examinations, investigations and prosecutions of the perpetrators of the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, so as to help end impunity for the commission of such crimes, respond to the suffering of victims and communities affected by them, and thus contribute to their prevention in the future (The strategic plan of the Office of the Prosecutor, 2019: 56).

That is, all the work of the Prosecutor and his Office is directed "to help end impunity for the commission of such crimes, respond to the suffering of victims and communities affected by them, and thus contribute to their prevention in the future". The prosecutor performs his functions on the basis of the principle of positive complementarity, which is a compromise between the duty of the state to bear primary responsibility for bringing perpetrators to justice in its territory and the activities of the ICC (Pichon, 2008). The Office of the Prosecutor shall commence its activities in the territory of the State only in cases where such State is unwilling or unable to conduct effective criminal proceedings.

Therefore, because one of the goals of the ICC is to prevent future international crimes, ensure peace and security (Doria, 2010), the Office has a preventive influence in every area of its activities, from preliminary

examination to sentencing (Report on Prosecutorial Strategy, 2006; Prosecutorial Strategy 2009 – 2012, 2010). Crimes under the jurisdiction of the ICC are committed by large groups of persons or organizations and are accompanied by careful planning of such crimes. A simple announcement of the activities of the ICC, monitoring of situations can have a preventive effect on the commission of such crimes.

The ICC Prosecutor's Office has certain human and financial resources, and therefore the priority of the materials received by the ICC needs to be determined (Politi and Gioia, 2008). Such issues in the ICC Prosecutor's Office are regulated on the basis of the Policy paper on case selection and prioritization, 15 September 2016 (Policy paper on case selection and prioritisation, 2016). This Policy paper sets out the criteria for the exercise of prosecutorial discretion in the selection and prioritization of cases in investigations and prosecutions. It defines the policies and practices of the Office of the Prosecutor regarding the process of selecting incidents, persons and acts to be investigated and prosecuted in a particular situation, as well as the identification of priority situations (Policy paper on case selection and prioritisation, 2016).

It should be emphasized that this priority is quite flexible. In particular, as emphasized in the Policy paper, the selection of cases and the setting of priorities should be regularly updated on the basis of information and evidence obtained during the investigation of any ongoing crimes and the development of operational conditions that may affect the Office of the Prosecutor's ability to succeed in investigation and prosecution. It is important that «as part of this process, not only could a selection or prioritisation decision need to be revisited over time, the case hypothesis itself may need to be adjusted to take into account the evidence that has been collected. As such, case selection and prioritisation, as well as the preparation of the overall Case Selection Document, should be considered a dynamic process that seeks to continually refine the focus of the Office's investigations until such time as an article 58 application is made» (Policy paper on case selection and prioritisation, 2016).

The Office of the Prosecutor, in accordance with para.24 of the Policy paper, must ensure that cases selected for priority investigation and prosecution fall within the jurisdiction of the Court; that they be acceptable in terms of complementarity and severity; and that they do not conflict with the interests of justice (Policy paper on case selection and prioritisation, 2016).

Pursuant to para. 34 of the Policy paper, the Office of the Prosecutor selects a case for investigation and prosecution in view of the gravity of the crimes, the degree of responsibility of the alleged criminals and the potential charges. The weight given to each criterion should depend on the facts and circumstances of each case, each situation and the stage of development of the investigation (Policy paper on case selection and prioritisation, 2016).

Conclusion

Thus, the Prosecutor of the International Criminal Court is entrusted with very important tasks, which are primarily aimed at prosecuting those responsible for committing the most serious crimes of concern to the entire world community. For states where the justice system is inefficient, this is the only way to punish those who have committed such crimes, despite their immunities and status in society. International criminal justice also has a deterrent effect on the committing of new international crimes and, as a consequence, aims to ensure the sustainability of the international legal order.

The ICC Prosecutor exercises preventive influence in every area of his / her activity, from preliminary verification of information, investigation, trial to sentencing. Crimes falling within the jurisdiction of the Court are committed by large groups of persons or organizations and are accompanied by careful planning of such crimes. Even informing about the activities of the ICC, monitoring situations can have a preventive effect on the committing of crimes in the future.

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Legal aspects of cryptocurrency's circulation: international experience and possibilities of its application in Ukraine

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Abstract

Based on documentary scientific methodology, the legal aspects of the circulation of cryptocurrencies in Ukraine and other countries of the world are analyzed. The relationship between the state's level of economic development and the level of its interest in cryptocurrencies is demonstrated. It was shown that almost all successful states can create and implement their own cryptocurrency. In addition, it was noted how important the issue of choosing the proper form of legal regulation of the cryptocurrency industry is today. For example, many researchers and experts have emphasized that a kind of compromise must be reached on issues related to the legal regulation of cryptocurrencies. It is therefore concluded that this applies to both the sphere of domestic and international law, where clarity, transparency and unambiguousness of legal norms must prevail. Regarding the latter, it is clarified that cryptocurrencies should no longer exist as a shadow source of income for unidentified individuals. Instead, they should be completely banned and eliminated in both the economic and legal fields, or they should be legalized and regulated by current legislation.

Keywords: cryptocurrency; legal regulation; international experience; legislative support; state policy.

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Aspectos legales de la circulación de criptomonedas: experiencia internacional y posibilidades de su aplicación en Ucrania

Resumen

Con base a metodología científica de tipo documental se analizan los aspectos legales de la circulación de criptomonedas en Ucrania y otros países del mundo. Se demuestra la relación entre el nivel de desarrollo económico del estado y el nivel de su interés en las criptomonedas. En particular, se demostró que casi todos los estados exitosos pueden crear e implementar su propia criptomoneda. Además, se señaló cuán importante es hoy en día el tema de elegir la forma adecuada de regulación legal de la industria de la criptomoneda. Por ejemplo, muchos investigadores y expertos han enfatizado que se debe llegar a una especie de compromiso en cuestiones relacionadas con la regulación legal de las criptomonedas. Por lo tanto, se concluye que esto se aplica tanto a la esfera del derecho interno e internacional, donde debe prevalecer la claridad, la transparencia y la falta de ambigüedad de las normas jurídicas. Con respecto a esto último, se aclara que las criptomonedas ya no deberían existir como una fuente de ingresos en la sombra para las personas no identificadas. En cambio, deberían ser completamente prohibidos y eliminados tanto en el campo económico como legal, o deberían legalizarse y regularse por la legislación vigente.

Palabras clave: criptomoneda; regulación legal; experiencia internacional; apoyo legislativo; política de Estado.

Introduction

The modernization of the economic sector is primarily related to information technologies, which are essentially objects of intellectual property rights and are designed to improve it by adapting to the growth rate and the nature of demand from users of such a system. Thus, the introduction and further application of information technologies in the, for example, banking sector aim to expand the range of users (customers), maintain the competitiveness of the bank, attract foreign investment, and increase the reputation of the banking sector of Ukraine abroad. Trying to reach a new level of economic relations, institutions are actively implementing information know-how in the main aspects of their activities (Gramatskyy *et al.*, 2020).

There are currently countries in the world that have introduced the legal regulation of cryptocurrency's circulation in any form into their own national systems. Thus, such states include economically developed Asian countries,

such as Japan, Singapore, Thailand, South Korea, and others. Most of the indicated Asian countries have either recognized any cryptocurrency (for instance, bitcoin) as a legal payment instrument or allowed cryptocurrency payments only under certain conditions. Instead, most countries in Northern and Western Europe have refused to simultaneously recognize any of the cryptocurrencies as a legal payment instrument. Instead of this, they have chosen the path of gradual adoption and gradual introduction of the rules and regulations for the use of cryptocurrencies.

Details and individual specifics of using cryptocurrencies by each state are different. In particular, we note that some countries although have not recognized cryptocurrencies as a legal payment instrument, but at the same time have received certain rights and certainty in the legal field. Given the extremely high relevance of the problems and issues addressed in this article, a lot of attention of scholars was paid to their research.

Topicality of the research is determined by: firstly, the need of cryptocurrency market functioning in the legal field, which will unify understanding of the legal nature of cryptocurrency by all subjects of currency legal relations, public authorities, business entities, individuals; secondly, the need to harmonize Ukrainian legislation governing the cryptocurrency market with European considering Ukraine's European integration course; thirdly, the importance of balancing interests of state and interests of cryptocurrency market participants; fourthly, the need for timely prevention, detection and response to the commission of offenses in the field of cryptocurrency circulation, which are carried out using the latest information technology; fifthly, the need to expand the client base of financial institutions at the expense of individuals who prefer to use cryptocurrencies to pay for goods and services (Ivaniuk, 2021).

1. Purpose and objectives of the research

The purpose of this article is based on the recognition of the growing importance of cryptocurrencies in society, especially in its financial and accounting sphere. Therefore, it is planned to analyze and compare currently existing ways and methods of legal regulation of cryptocurrencies' circulation in different world countries and to find the legal regime of circulation and use of cryptocurrencies among them, which would better interact with the domestic realities of today.

2. Methodological basis of the research

The methodological basis of the article consists of modern methods of scientific cognition, which are currently used while conducting research. The authors of the article have combined generally scientific and special methods in order to best achieve the purpose set in the article. All methods have been used in conjunction and complementarity that ensured the objectivity of the conclusions.

The formal and legal method has been used while studying scientific sources focused on the problems of legal regulation of cryptocurrencies in various foreign countries. It is through the analysis of different scientific points of view, in particular regarding the legal regulation of cryptocurrencies, the authors were able to rethink the issue raised in the article more thoroughly.

Applying the hermeneutic method, the texts of scientific works in the field of legal regulation of cryptocurrencies in Ukraine and some foreign countries of the world have been interpreted. The authors have also clarified the relationships between the norms explaining the essence and certain norms concerning the legal field of cryptocurrency's circulation.

The analytical method has been used in the analysis and substantiation of some theoretical authors' positions, for example, it is advisable to use the experience of European rather than Asian countries during the improvement of Ukrainian legislation in terms of legal regulation of cryptocurrency.

The deduction method has assisted to study the relationship between amendments at the international level and their possible implementation in the legislation of Ukraine in regard to legal regulation of cryptocurrency. This method has been used mainly in conjunction with the comparative and legal method, which provided the identification of common and distinctive features of legal regulation of cryptocurrency activities and its circulation. The authors have compared the positions of different states on the legal regime of cryptocurrencies in order to identify advantages, disadvantages, risks and perspectives for the development; have suggested favorable ways to integrate international experience into Ukrainian practice.

3. Results and discussion

There are generally accepted views on cryptocurrency as a thing (a mean of financial arrangement) in the scientific and legal environment, which sooner or later should be the subject to proper legal regulation.

Cryptocurrencies are a completely new economic and legal phenomenon, different from traditional fiat or electronic money. One of the current

tendencies in the development of information technology is the spread of cryptocurrencies (Kaznacheyeva and Dorosh, 2020). One of the first and most well-known cryptocurrency is bitcoin. The bitcoin wallet software can operate with any number of addresses, or each address can be served by a separate wallet (Nosov and Manzhai, 2021). However, the world has not formed so far, a stable terminology and unified approaches to the definition, regulation, economic and legal substantiation for the use of cryptocurrencies. Cryptocurrencies are decentralized convertible digital currencies based on mathematical principles that are generated and managed automatically by software. Blockchain technology has become widespread in parallel with the introduction of cryptocurrency. The most popular cryptocurrency in the world – bitcoin is functioning based on such technology (Kaznacheyeva and Dorosh, 2020).

Researchers are actively discussing the path that Ukraine should chose regarding its possible methods and ways of legal regulation of public legal relations in the field of cryptocurrency's circulation. Domestic researchers and scholars having such discussions often refer to the experience of their foreign colleagues. They are interested in countries that have already made or are currently making significant successful changes in this direction especially in the context of legal regulation of the circulation and use of cryptocurrencies (Cvetkova, 2018). Discussions are currently underway regarding the choice Ukraine should take in the area of cryptocurrency's legal regulation. Namely, whether it should be the model of legal regulation and the state's attitude to cryptocurrencies that take place in the countries of East and South Asia, or Ukraine should be in line with its European and North American allies and partners. In order to better understand the choice that Ukraine should make in the nearest future, first of all represented by its leading researchers and scholars, and later represented by its state and political leadership, it is necessary to consider in detail the nature and characteristic features of models of legal regulation of cryptocurrencies, which take place in different, mostly economically developed countries of the world (Papantoniou and Hilton, 2021).

Having studied the economic and legal characteristics of economically successful Asian countries, researchers state that one of the characteristic features of these countries is their innovation nature and desire to be "leaders in everything". Of course, the desire to succeed in various spheres of public life is inherent in many (if not all) countries. However, such a desire is observed among the above-mentioned Asian countries more strongly than among others. Thus, it is noted that the high thirst for innovation motivates the "economic tigers" of Asia to actively implement the norms of legal regulation of those spheres of public life that have not been regulated anywhere else in the world yet. It is also pointed out that besides the experience of official use and legal regulation of cryptocurrencies, the indicated countries have already proven their success as world leaders in

the field of economic, cultural, and legal innovations (Sadok and Maknouzi, 2020). Singapore, already mentioned above in this article, is one of the leading countries in the context of Ease of Doing Business and economic prosperity. Taiwan and South Korea are close to Singapore within the world economic and business rankings.

Summing up the essence and specific nature of the functioning of economic, legal, and other sectors of society in Asian countries, one can argue that they have no peers in their drive to break records in various spheres of life sustaining activity. However, at the same time, we note that the speed of implementing certain changes or innovations does not always mean their quality and usefulness to society. On the contrary, careless reforms or innovations that have been introduced into the existing system in a particular area of public life without taking into account the specifics of the region can be extremely harmful (Gómez *et al.*, 2020). Although some of the achievements of Asia's economic and political "giants" can be truly impressive and fascinating, they are not the product of a coherent and integrated organization of society, but rather the result of separate, not related to each other political and economic manifestations.

Having studied European countries, we observe that certain innovations (including cryptocurrency) are trying to introduce into society more harmoniously. Revealing this statement in detail, we note that most of developed Western countries pay not so much attention to the speed of carrying out reforms or to introduce a new object of public legal relations, but to maintain existing harmony in society without violating it (Chandy and Bhardwaj, 2020). Thus, before officially recognizing a cryptocurrency or several of them, politicians and, above all, legislators of European countries will study and analyze whether their relative social harmony, which is expressed by the stability and prosperity of the financial system among other things, suffer from negative consequences in case of recognition of cryptocurrency. On this basis European countries have set a course for the gradual official recognition of cryptocurrencies and their legal regulation. European countries independently decide on the degree of recognition or regulation of a cryptocurrency in the country.

Thus, some EU Member States recognize cryptocurrency as an unofficial, but not prohibited mean of financial payments. And cryptocurrency in some other EU Member States has the official status of a legal payment instrument (Garcia-Teruel, 2020). It should be also noted that considering the degrees of legal regulation of cryptocurrencies in different European countries, researchers have concluded that they directly depend on which legal family a particular country specifically belongs to. For example, it is a well-known and proven fact that countries belonging to the Romano-Germanic legal family are traditionally more prone to codified or non-codified legal regulation of certain processes. Accordingly, this state of

affairs has not bypassed the legal regulation of cryptocurrency's circulation. It is expected that we will see a significant increase of legal acts in the next few years aimed at global and at the same time detailed legal regulation of cryptocurrency's circulation (Pahl *et al.*, 2019).

In addition, countries that are part of the Anglo-Saxon or it is also called Anglo-American legal family do not likely have such a large scope of codified and non-codified regulatory legal acts. Instead, given the fact that the states belonging to this legal family have strong traditions of the legal system and a large number of court precedents, which mean a number of court decisions made by courts of different instances at a certain period of time, which establish the features of legal "behavior" (regulation) in any particular sphere of public life, they also have significant success in resolving relations whose object is a cryptocurrency. Therefore, based on the differences between the legal systems of Western countries, which were identified and emphasized as a result of the above consideration, we note that Ukraine, which, according to the generally accepted view of the vast majority of lawyers, is part of the Romano-Germanic legal family, which is characterized by the strong and comprehensive codification of written sources of law in almost all spheres of public life, should follow the examples of those countries that are also part of the Romano-Germanic legal family.

Despite some useful elements in the effective organization of the functioning of a particular area of public legal relations (including the circulation of cryptocurrencies), which take place among the countries of the Anglo-American system, which includes the United Kingdom, the United States, Canada and some other countries that were colonies of the former British Empire and now part of the British Commonwealth, their traditions, which are based more on precedents than on elements of written law (Crompton and Jensen, 2018), are not useful for Ukraine. After all, Ukraine has been building a legal system for many past centuries with regard to the states of the Romano-Germanic legal family. Among other things we can single out the period when the Ukrainian lands were under the rule of the Russian Empire. At that time, when building own branches of law, including civil, criminal, and administrative, the rulers of the Empire of that period took as an example mostly German states, especially Prussia, as well as France and Austria (Montes and Goertzel, 2018).

Taking into account the problems and issues that domestic and foreign lawyers have when they begin to consider options (methods and ways) to implement legal regulation of cryptocurrencies' circulation in Ukraine, we note that discussions about this are in most cases reduced to statements about the possibility or impossibility to introduce certain innovations into the domestic system, taking into account its specifics and many local subtleties. Instead, we consider it appropriate to note that in response to such statements, researchers, whose opinion we fully agree, state that the

successful solution to the above problem will be the reform of the domestic specifics and the legal system in the whole.

Revealing the above, we state that “domestic specifics” and “local features” are often understood as low overall efficiency of the Ukrainian state system and its inability to effectively respond to the threats and challenges of the present time. This inefficiency and “non-viability” of state authoritative mechanisms of the country is supported by a high level of corruption in any form, which prevents the country and Ukrainian society from being properly developed, forcing citizens to continue living and functioning under old and ineffective “rules of the game” (Dimitropoulou *et al.*, 2018). The mentioned corruption, in turn, is a fairly broad and pervasive phenomenon within domestic society, covering almost all spheres of daily life. It can exist and still successfully exists in the form of nepotism, stealing state and local budgets (embezzlement), receiving illegal benefits by statesmen and other criminal acts (Lin *et al.*, 2018).

Foreign researchers considering all those facts insist that Ukraine should conduct systematic and high-quality work on reforming all, without exception, government mechanisms, as well as that they will be fully cleansed of corruption schemes. With regard to the latter, it has been noted that in order to clean up government agencies and departments from corruption crimes, we must carry out a full and objective lustration of persons about whom information is legally confirmed in their illegal activities while holding state positions. Appropriate conditions must be created for the fair certification of new and current staff within state agencies for the gradual and high-quality cleansing of the state system from low efficiency and past atrocities.

All the above changes are of great importance to understand how the legal regulation of cryptocurrency's circulation can be potentially effective in Ukraine, if it is introduced in the country (McGinn *et al.*, 2018). Thus, the country urgently needs to achieve the right balance in terms of harmony and stability of state mechanisms and institutions' functioning, but at the same time to provide appropriate conditions for further positive development of the state, especially in the field of new technologies, which include cryptocurrencies. Because we must remind that the stability of any legal relations in a particular area without timely development and the necessary improvement will quickly turn into stagnation and decline. Therefore, considering all the challenges and needs of today, we state that no country in the world can be currently effective and powerful, if it does not pay enough attention to its own capabilities in the field of high technologies (Ochiai *et al.*, 2018).

Cryptocurrencies are certainly an integral part of the high-tech industry and the guide of the country in the future. Besides, it is impossible to disagree with the points of view that cryptocurrencies will function in the

world financial systems in the nearest future on a par with the current, official national currencies of different countries. There are even theories in the scientific community that cryptocurrencies can eventually completely replace existing currencies and thus completely reformat the entire world system of financial and monetary arrangements. In this regard it should be noted that the countries of the world, including Ukraine, need to properly prepare for possible changes in the future and start working to improve domestic legislation so that it allows effective legal regulation of cryptocurrencies' circulation, allowing the latter to fully demonstrate its enormous benefit to society.

It should be emphasized that the purpose of the state and its lawyers, as well as domestic legislators, should be not only the adaptation of domestic legal norms for the proper introduction of circulation and use of cryptocurrencies in Ukraine (Li *et al.*, 2017). Instead, it is recognized that the work on improving the national legal base should be broader and include all the conditions necessary to increase the scope and pace of the development of domestic scientific and technological sector of the economy. It is applied to the high-tech industry as part of the scientific and technical sector of any country. It has been emphasized that the development and effective implementation of technologies into society will assist the latter to remain effective (Brambilla *et al.*, 2016).

Conclusions

Cryptocurrencies have every chance to become the main financial and accounting currencies around the world in the nearest future. In this regard researchers insist that the necessary qualitative reforms in the field of legal regulation of the circulation and use of cryptocurrencies will be carried out in Ukraine as soon as possible. Taking into account the results of scientific and legal discussions between researchers and scholars, we emphasize that scholars have chosen the example of Western allies and partners of Ukraine in choosing the direction of the development and adaptation of domestic legislation to the realities and challenges of the present day. It has been determined that the option of carrying out reforms in line with the model of some economically developed countries in Asia is not acceptable. Despite some impressive achievements of those countries in terms of innovations in business and economics, we note that their ability to rapidly introduce innovations is not common to the Ukrainian state system.

European countries in contrast to Asian countries are gradually introducing the circulation of cryptocurrencies. It has been indicated that they first remove the circulation of cryptocurrencies from the criminal and legal field, later they allow the use of cryptocurrencies as one of the alternative

currencies for certain types of financial and accounting operations. And finally, they officially recognize any cryptocurrency as a legislative payment instrument. The quality and speed of all necessary changes and adaptations to the circulation of cryptocurrencies depends on the prosperous status of Ukraine in terms of further development of the global financial system.

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World experience of legal regulation of road safety

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Abstract

The article analyzes the characteristics of the legal regulation of road safety in different countries of the world. In addition, current issues in the field of road safety are revealed, which can be conditionally divided into several groups. Such issues include legal regulation; the structural organization of legal regulation: personnel, material, technical and financial support. The key directions of the state policy of different countries of the world in the field of ensuring road safety are identified, as well as new principles for the formation of criteria to guarantee road safety. It analyses the positive experience of some countries in the field of road safety. In particular, the experience of China, Japan, and some European countries in the field of ensuring road safety could be considered by other countries at the same time as the legal regulation of road safety. It is concluded that, to improve the efficiency of the legal regulation of road safety, a systematic approach is required, including the development of objective indicators, the use of systematic and evidence-based measures aimed at preventing road accidents and reducing the severity of their consequences.

Keywords: road safety; motorized transport; accidents; traffic accidents; traffic rules.

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Experiencia mundial en regulación legal de la seguridad vial

Resumen

El artículo analiza las características de la regulación legal de la seguridad vial en diferentes países del mundo. Además, se revelan temas de actualidad en el campo de la seguridad vial, que pueden dividirse condicionalmente en varios grupos. Tales temas incluyen la regulación legal; la organización estructural de la regulación legal: personal, material, soporte técnico y financiero. Se identifican las direcciones clave de la política de estado de diferentes países del mundo en el campo de garantizar la seguridad vial, así como nuevos principios para la formación de criterios para garantizar la seguridad vial. Se analiza la experiencia positiva de algunos países en el ámbito de la seguridad vial. En particular, la experiencia de China, Japón y algunos países europeos en el campo de garantizar la seguridad vial podría ser tomada en cuenta por otros países al mismo tiempo que la regulación legal de la seguridad vial. Se concluye que, para mejorar la eficiencia de la regulación legal de la seguridad vial, se requiere un enfoque sistemático, que incluya el desarrollo de indicadores objetivo, el uso de medidas sistemáticas y basadas en evidencia dirigidas a prevenir accidentes viales y reducir la severidad de sus consecuencias.

Palabras clave: seguridad vial; transporte motorizado; siniestralidad; accidentes de tráfico; normas de tráfico.

Introduction

The transport sector is a strategic component of the infrastructure that should ensure the interests of individuals. The leading place in it is occupied by motor transport. Without it, modern society cannot exist. At the same time, along with the positive consequences, motorization has created a number of issues. First of all, it is a high level of mortality and injuries due to traffic accidents.

The relevance of ensuring the safety of road users is indisputable, and causes the alarm of the entire world community. This circumstance makes this direction one of the priorities in the social and economic policy of the ONN. The UN General Assembly adopted the “Global Plan for the Implementation of the Decade of Action for Road Safety 2011-2020” (World Health Organization, 2011), which was considered within the framework of the 2030 Agenda for Sustainable Development of the year. The Global Plan recognizes the inevitability of the consolidation of the forces of the world community in overcoming the problems of ensuring the safety of road users. As a tool to achieve this goal, the World Health Organization

(WHO) and the UN Regional Commissions are tasked with coordinating the follow-up to the Global Plan using a phased series of reports on the state of global road safety. The first report was presented in 2009 in anticipation of the adoption of this UN resolution, the second in 2013, the third in 2015, and the fourth in 2018.

The latest report from the World Health Organization (WHO), published in December 2018, notes that road traffic deaths continue to rise, with 1.35 million deaths per year. The 2018 WHO Global Road Safety Report highlights that road traffic injuries are currently the leading cause of death in children aged 5 and under and young people under 30. This report encourages national governments to significantly intensify their efforts to implement measures to prevent car accidents. Strong government action, traffic enforcement, smart road construction, and powerful public awareness campaigns can save millions of lives in the next decades around the world.

By the beginning of the XXI century, most of the developed countries of the world have accumulated a fairly large and diverse experience in the field of road safety. There is no doubt that the socio-political, economic, legal characteristics of each state, together with historical and cultural traditions, determine the variety of principles for the formation, definition of competence and functioning of state road safety systems. Their analysis allows us to identify some common features and determine stable trends in this activity.

1. Historical aspects of formation and development of legal regulation of road safety

Tracing the evolutionary path of development of the world states, it can be noted that with the development of urbanization, it became necessary to influence the authorities on road traffic. Attempts were made to alleviate the position of pedestrians to some extent by protecting them from the effects of horse-drawn vehicles. In Rome there was a ban on the entry of carts and carriages during the daytime. The use of chariots was the exclusive privilege of the upper classes.

In the Middle Ages, there were practically no carriages, and the rules of behavior on the road were determined, first of all, by the social rank of the traveler. In particular, a knight could trample a peasant, but everyone was obliged to yield to the passage of the bishop or lord of the sovereign.

The rapid development of trade, manufacturing, money circulation caused the rapid growth of cities of a different type. The population grew rapidly, and new ties arose between regions. The intensity of freight and

passenger traffic on the roads grew. At the same time, there were also problems of road traffic and its safety. In each country, they tried to solve them in their own way. However, the general tendencies were considered even then.

Along with the rules governing road traffic, responsibility for their violations was introduced everywhere. Thus, in 1687, in North America after an accident with a child crushed by a horseman, a fine was imposed for excessively fast driving. In 1767, in England, a law was renewed prohibiting the parking of carriages on the streets.

In 1822, the British authorities have already introduced the real rules on the order of movement. They implemented rules to keep to a certain side, to not go too fast, to not come close to the front carriage, to not block the road for others, etc.

The creation of an internal combustion engine in the middle of the 19th century paved the way for the development of a new industry - the automotive industry, which has been leading its history since 1887.

The first laws associated with the emergence of the car, set the maximum speed of the car: on state and highways - 6 km / h; in a village - 3 km / h. It was forbidden to give sound signals at crowded intersections. In Germany, at the beginning of the century, there was a law according to which cars could only be driven on certain days and only along the route permitted by the police (Chamlin and Sanders, 2017).

In 1910, there were 20 million cars in the world. Having become one of the main types of mechanical means of transportation, the car has had a strong impact on the development of road infrastructure. It caused not only widespread road construction in all European countries and the USA, but also changed the type of road surface itself. The construction of highways of a new type has been especially intensive since the 1930s in Germany and the USA. The need to ensure road safety was evident in the middle of the 19th century. In the 1860s, street traffic controllers appeared in London, manually controlling light, gas signals. The first installation of modern traffic lights, originally two-section, took place in England in 1926 (Mayorov and Andreeva, 2017).

Moreover, in England and Germany, a certain order was immediately established: the red signal was placed at the top, the green one at the bottom. In the cities of the USSR and the USA, the location of red and green lights remained arbitrary (Agureeva, 2006).

The first traffic lights were made in the form of cups, like a turtle's shell, which had glass slots. In 1908, the first four international road signs were approved by the first international congress and the International Tourism Conference held in Paris. They designated "turn", "bumps", "railway

crossing” and “crossroads”. The results of the long work to create a kind of traffic code, binding on all countries, were summed up in 1968 at the United Nations Conference on Road Traffic, held in Vienna. There were adopted two fundamental documents - the Convention on Road Traffic and the Convention on Road Signs and Signals. The adopted documents formed the basis for the regulation of international road traffic and the establishment of uniformity of traffic rules, basic rules and signal signs.

The first victims of road accidents were officially registered in England in 1896, when two people died as a result of car accidents. Across the ocean, the tragic countdown of deaths under the wheels of cars began in 1899. Subsequently, the number of victims of the car multiplied with such a terrifying speed that it assumed the dimensions and nature of a natural disaster. A similar situation developed for many reasons: low quality roads, imperfect traffic management, non-observance of traffic rules by drivers and pedestrians.

2. Current issues of legal regulation in the field of road safety

The issues of legal regulation in the field of road safety are divided into three main groups (Bulavkin, 2016):

- 1) regulatory legal regulation.
- 2) the structural organization of legal regulation.
- 3) personnel, material, technical and financial support.

Most governments have taken vigorous steps to develop and improve the legal framework governing the main groups of public relations in the field of road traffic. At present, the entire set of such acts is a certain system, which consists of international legal acts that apply to all countries of the world community, to a separate continent (for example, Europe, unions of states (EU), national legislation). It should be noted that the system of normative legal regulation in the considered area of public relations in European countries is built and developed on certain principles of state regulation, key directions of state policy, criteria for ensuring road safety and the main trends in the state of road safety.

It is important to emphasize that during the development and implementation of legal norms, their social orientation is traced. This position is quite understandable and is due to the deep connection of public administration in the field of road traffic with social processes and phenomena occurring in the state, where the main goal is to implement measures aimed at creating conditions that ensure a dignified life and free human development (Hysing, 2021).

Therefore, the leitmotif of the legal regulation of the relevant activities is to consolidate as the main principle the leading role of the state in ensuring road safety and its responsibility for the final results. The key directions of the state policy in the field of road safety are recognized by experts from many countries:

- a) risk reduction in road traffic: applying new approaches to land use issues; stimulating the transition from high-risk modes of transport to safer vehicles, for example, giving priority to the movement of vehicles carrying more passengers; introduction of a phased system for issuing driving licenses.
- b) creating a safer road environment: classifying roads and setting speed limits according to their function; separation, if possible, motorized and non-motorized movement; implementation of safety audit in the process of design and construction of roads; equipment of roads with means of protection in case of collision; reconstruction of the most dangerous sections of the road network.
- c) transition to more advanced and safer vehicles: increasing the visibility of vehicles on the road; improvement of vehicle design (installation of so-called pedestrian-friendly front bumpers on all vehicles, ensuring the protection of the driver and passengers with restraints and inflatable devices); stimulation of the operation of "intelligent" vehicles, equipping them with systems of anti-alcohol blocking, speed adaptation, stabilization of braking, alarm reminiscent of seat belts, etc.
- d) ensuring compliance with traffic rules: improving supervision over compliance with the established speed, the use of seat belts and protective helmets, the regime of work and rest of drivers; active control of the sobriety of vehicle drivers; adoption of relevant legislative and other normative acts; propaganda in the media.
- e) improving the system of providing medical assistance to victims of road accidents: improving the procedure for providing emergency care; improving the organization of trauma treatment in hospitals; provision of rehabilitation of victims (Mayorov and Gorovenko, 2018).

Experts from WHO and the World Bank note that in recent years there has been a major shift in understanding the issue of road safety, new principles for the formation of criteria for ensuring road safety have been defined and are becoming more widespread:

1. Road traffic accidents cannot be completely prevented, but road traffic injuries can be predicted and reduced.

2. Reliable data and a scientific approach are essential to enable rational analysis and plan effective remedial actions.
3. Road traffic injuries are such an important issue that many sectors, including health, must fully share responsibilities and participate in advocating for the necessary action to prevent road traffic injuries.
4. All parties involved in the operation of the transport system must consistently build in and ensure safety elements in order to avoid common mistakes, better take into account the vulnerability of the human body and understand the key importance of speed management.
5. Road traffic injuries are a social equity issue, so equal protection of all road users should be sought to avoid unfairly shifting the burden of injury and death onto poorer and more vulnerable users, such as pedestrians and children.

Even in high-income countries, children from low-income families are five times more likely to be injured than those from wealthy families.

6. The transfer of knowledge and best practices is beneficial if local issues, conditions, traffic patterns and local expertise are taken into account.
7. Action at the local, regional and national levels helps to ensure an effective and rapid response to road traffic injuries (World Health Organization, 2011).

At the same time, the main event of recent times in the road safety policy, according to foreign experts, was a departure from the previous emphasis on the fact that road traffic safety issues are more likely to be blamed on the victims of road accidents than on various structural elements and the functioning of a highly demanding modern transport system.

The Road Safety Committee of the International Association of Police Chiefs has formulated 10 major trends in road traffic in the 21st century (Simonson, 2021):

- increase in the congestion of highways and the number of congestions on them.
- the emergence of “smart” vehicles and “smart” highways.
- reducing the speed of movement (cars and roadside posts will be equipped with electronic devices capable of controlling and interrupting the operation of ignition and fuel supply systems of vehicles, forcing the driver not to exceed the set speed).

- changes in the size and weight of vehicles (a decrease in the world's mineral reserves will contribute to an increase in the number of light and fuel-efficient vehicles, while trucks will become longer and more carrying capacity, which will make cars more vulnerable in collisions with trucks and will cause an increase in the number of deaths in such accidents);
- increasing aggressiveness on the road.
- an increase in the number of accidents caused by elderly drivers, whose share in the structure of the population will increase.
- wider use of devices for automatic detection and fixation of traffic violations.
- the use of the latest technical means when working at the scene of an accident.
- reducing the time for stopping and checking the driver and vehicles.
- preservation of the important role of the traffic police in the fight against crime (criminals will continue to come to and from the crime scene in cars, illegally transport drugs, weapons, stolen property in them. Therefore, the active work of the traffic police will remain an equally important means of suppressing criminal activities and crime detection).

3. Good practices in the field of legal regulation of road safety

In countries where progress has been made in road safety, it is largely attributable to improved laws regarding key risk factors such as speeding, drunk driving and not wearing seat belts, motorcycle helmets and child restraints; enhancing the security of infrastructure, for example by building sidewalks and paths for cyclists and motorcyclists improving vehicle standards, for example, through the mandatory requirement of an electronic safety system and anti-lock braking system; and improved medical care after accidents.

Despite the increase in the total number of deaths, mortality rates remain stable. This suggests that the measures taken in 48 countries of the world with middle and high income, contribute to a significant mitigation of the situation and reduce deaths from road accidents.

However, no low-income country has experienced a decline in overall mortality, largely due to the lack of specific measures in the field of road safety. In fact, the risk of road traffic deaths in low-income countries is still three times higher than in high-income countries. The highest rates

are observed in Africa (26.6 cases per 100,000 people), and the lowest in Europe (9.3 cases per 100,000 people).

Differences in road traffic death rates have differential differences according to the types of road users (drivers, passengers, pedestrians). Globally, pedestrians and cyclists account for 26% of all road traffic deaths, with 44% in Africa and 36% in the Eastern Mediterranean. Motorcyclists and their passengers account for 28% of all road traffic deaths, but in some regions this figure is higher - for example, in Southeast Asia it is 43%, and in the Western Pacific 36%. According to the general forecast, as the number of vehicles grows, road traffic injuries may become the eighth leading cause of death in the world by 2030 (Snyder and Ni, 2017).

Pursuing the achievement of the “global” goal of improving road safety for its participants, it is necessary to take into account that the organization and functioning of state systems in this area depend on many factors, and above all on the economic level of the country, on the quality of life of citizens, on the development of public institutions. The low level of ensuring the safety of road users in developing countries is associated with insufficient funding for activities aimed at prevention and preventive means of accidents. Countries with a high risk in the field of road safety, as a rule, are characterized by significant wear and tear of vehicles, an inappropriate level of road infrastructure, inconsistency in the actions of emergency services, low efficiency of medical care, imperfect legal framework, and in this perspective, they are considered either “lagging” or “catching up” (Petrov, 2016). The relevant UN organizations provide assistance and support to states in strengthening the basic foundations of ensuring the safety of road users, and also call for the study of effective experience in this area.

Low rates of road accidents and human casualties in Western Europe, USA, Canada, Australia, which have significant experience and constant improvement in the security system, in modern conditions show a steady trend (4-8%) to further reduce the risk for the health and life of road users, with a high level of motorization. In the reports of the WHO, it is noted that among the milestones of the regions of the world, only the countries of the European Union have achieved the best results.

Such results in the field of road safety in the EU countries are explained primarily by the legal provisions on liability for traffic violations. The main emphasis is placed on material responsibility. This is not only heavy fines, deprivation of a driver’s license, linking the number and severity of violations to the payment for compulsory car insurance, but also confiscation of the vehicle.

In European countries, a new approach to calculating fines for traffic violations has also emerged: the amount of the fine directly depends on the

offender's monthly salary or the minimum wage established in the country, and the offender's annual earnings (income).

In addition, the minimum fines for especially dangerous violations on the road have been increased from 2 to 10 times. In the case violators pay a fine on the spot to the police or within 3-7 banking days, the amount of the fine is reduced from 30 to 50%. The amount of the fine is increased by 2–3 times (due to penalties) if the offender has not paid for it within 1 month or more.

In some countries (Belgium, Israel, Spain, USA), for non-payment of a fine, it is envisaged to confiscate a vehicle on bail or pay for storage in a parking lot, and revoke a driver's license (Japan).

Nowadays, the center of gravity of the global political and economic activity is shifting more and more from West to East. In the Asia-Pacific region (APR), in the countries of the east coast (China, Japan, Republic of Korea, Mongolia, Singapore, India, etc.), where almost half of the world's population is concentrated (more than 3.5 billion people), legal regulation, organization and maintenance of road safety is carried out with different levels of efficiency. The APR states are included in the largest integration communities of countries (ASEAN, APEC, SCO, BRICS), which gives an intensive impetus to their development (Tsygankov, 2016).

Over the past decade, China has been actively addressing issues related to transport, road and social risks in the field of road safety. China has a population of about 1.4 billion, making it the most populous country in the world. According to the forecasts of authoritative studies, including the Morgan-Stanley banking holding, by 2022 the volume of China's gross domestic product may increase to \$ 12 trillion and reach the level of the United States. Such a rapid economic growth would have been impossible without the development of transport infrastructure, which is constantly being modernized, including the increase in the number of highways and car parks (Troshchinsky, 2015). Intensive rates of road construction in China were in the period 2000-2005, when the length of public roads increased almost 3 times. The total length of China's roads, including rural ones, is 4.69 million km. By now, China has one of the most developed road networks in the world (Aleksandrov and Petrykin, 2017).

Particular attention in the legislation of most countries is paid to driving a car in a state of alcoholic (or drug) intoxication. This offense is considered one of the most dangerous (along with exceeding the speed limit and passing a red traffic light) and is severely punished. In China, for quite a long time, they did not attach particular importance to the high degree of public danger to this offense. Statistical data show that in 1998, due to the fault of drivers in a state of alcoholic (drug) intoxication, 2,363 people died in the country, in 2008 - 3,060 people. Nevertheless, for this offense

(without road accidents and human casualties), 12 points were canceled (limit for 1 year), deprivation of the right to drive a car from three to six months, a fine from 500 to 2000-yuan, administrative arrest up to 15 days (Chimarov, 2015).

However, everything changed “at a critical point” in 2009, after several high-profile cases (traffic accidents with a large number of victims, due to the fault of young drivers in a state of alcoholic intoxication), the most decisive and harsh measures were taken, changes were made in the current legislation of the PRC, establishing criminal, administrative and disciplinary responsibility for driving while intoxicated. In the event of the death of two or more persons, severe measures of criminal liability are provided in the form of life imprisonment, and in some cases - the death penalty (Mayorov and Dunaeva, 2018).

The traffic police (transport departments) stepped up activities to identify drivers in a state of alcoholic intoxication, and in the same 2009, 722 thousand similar cases were identified, with corresponding consequences. The result is a sharp reduction in road accidents and human casualties due to the fault of drivers in a state of intoxication. General positive results were achieved with the help of consistent state (program) policy, improving the legislative framework, increasing the effectiveness of the activities of the People's Police of the PRC.

Japan has been demonstrating one of the vivid and stable examples of a successful solution to the problem of ensuring the safety of road users for several decades. The country has 1.2 million km of roads, which have high-quality road surface and developed infrastructure, an efficient transport system that serves the country's population of 126 million people. In the world statistics on the rate of decrease in the number of fatalities as a result of road accidents and road safety, Japan occupies one of the first places. In 1990, the country recorded 14,595 deaths as a result of road accidents, in 2003 - almost 2 times less - 8877 people, and in 2013 - 4373 people, (who died within 24 hours), the death toll in road accidents later amounted to 5151 people (in Japan, those who died within 30 days after an accident are separately taken into account), in 2017 - 3904 people (who died within 24 hours), which corresponds to the statistics of 1949 (Polyakova and Dunaeva, 2019).

Since the 2000s, the Government of Japan has been carrying out road safety activities within the framework of the adopted long-term Program (until 2020). Currently, Japan has a Universal Traffic Management System (UTMS), which began in the 1990s, which significantly increases the mobility and safety of road users. The main functions of UTMS are as follows: 1) prevention of road traffic accidents; 2) quick response to road traffic accidents; 3) reduction of “traffic jams” in “rush hour” 4) assistance to the elderly and disabled 5) expansion of mobile communication with

other systems (related to road transport) 6) reduction of “interference and pollution” of the road environment.

The main trend in the organization of road safety is the reduction of direct contacts between the police and traffic offenders, due to centralized electronic control points, automatic complexes for photo and video recording of traffic violations, as well as other innovations, which reduces the factor of psychological stress in potentially conflict situations. Despite a significant decrease in the personal presence of police representatives on the roads of Japan (mainly only in road traffic accidents), the social significance of the department is highly appreciated by the public (Mayorov and Sevryugin, 2015).

Thus, a high level of efficiency in ensuring safety in the field of road traffic in Japan should be sought in the key factors:

- 1) a flexible and timely legislative framework for the organization of road traffic corresponding to the changing conditions of development.
- 2) program-targeted nature of state policy in this area;
- 3) timely improvement of road infrastructure.
- 4) application of innovative road safety management systems.
- 5) preventive work on the involvement of the entire population of the country in the observance of traffic rules and maintenance of safety.

The long-term result of the state policy is that in modern Japan (as well as in the “closest neighbor” South Korea, which has adopted this positive experience), one of the lowest rates of road accidents not only in the Asia-Pacific region, but also in the world. Violation of traffic rules is considered by the Japanese and Koreans as a sign of “low culture”, “bad taste” and is very much condemned by society (Chimarov, 2015), which may indicate a stable social institution of road safety and high legal integration of society.

Conclusions

Thus, the modern development of public institutions, economics and technologies qualitatively change road traffic, which increases the requirements for public administration, for improving legislation, for the activities of the traffic police in the field of ensuring the safety of road users.

The analysis of statistics shows that the most serious violations on the road in the whole world are considered to be exceeding the established speed, driving a car under the influence of alcohol and drugs, driving at a red traffic light. The greatest responsibility is established for these offenses in almost all countries of the world.

The above analysis of the practice of legal regulation in the field of road safety allows us to draw the following main conclusions:

1. At present, a systematic approach to ensuring road safety, which includes the development of target indicators, the use of systematic and evidence-based measures aimed at preventing road accidents and reducing the severity of their consequences, as well as providing medical assistance after an accident, is an objectively necessary condition for reducing accident rate.
2. The regulatory legal framework in the field of road safety is built primarily on the basis of the constitutional principles of building legislation and national characteristics.
3. In the overwhelming majority of countries, the general principle of “primacy of the law” is in effect, i.e. all requirements that are binding on traffic participants are enshrined in legislative acts.

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Prospects of Ukraine's foreign economic policy concerning Latin America

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Abstract

The objective of the research was to analyze the perspectives of Ukraine's foreign economic policy with respect to Latin America. An overview of the economic and political situation in Latin America is characterized by intensification of inflation in the region, reduction of exports and foreign investment, erosion of the level of business and consumer confidence. She used the following research methods: methods of analysis and synthesis, systematic approach, methods of induction and deduction, generalization, and systematization, economic, etc. Defined strategic orientations have been identified to improve foreign economic cooperation between Ukraine and Latin America to seek new foreign markets and increase foreign trade, such as: opening representative offices of Ukrainian companies in Latin America; active participation of Ukrainian companies in trade fair and exhibition events taking place in the countries of the region; establishment of bilateral industrial cooperation in the territory of MERCOSUR member countries. It concludes on the need to develop a long-term strategy to activate trade and economic cooperation between Ukraine and the countries of the Latin American region with the identification and justification of sectoral priorities.

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Keywords: foreign economic policy; exports; imports; Ukraine and Latin America; international cooperation.

Perspectivas de la política económica exterior de Ucrania con respecto a América Latina

Resumen

El objetivo de la investigación fue analizar las perspectivas de la política económica exterior de Ucrania con respecto a América Latina. Un panorama de la situación económica y política de América Latina se caracteriza por: intensificación de la inflación en la región, reducción de las exportaciones y la inversión extranjera, erosión del nivel de confianza empresarial y del consumidor. Se utilizaron los siguientes métodos de investigación: métodos de análisis y síntesis, enfoque sistemático, métodos de inducción y deducción, generalización y sistematización, económicos, etc. Se han identificado orientaciones estratégicas definidas para mejorar la cooperación económica exterior entre Ucrania y América Latina para buscar nuevos mercados exteriores e incrementar el comercio exterior, tales como: apertura de oficinas de representación de empresas ucranianas en América Latina; participación activa de empresas ucranianas en eventos feriales y de exhibición que tienen lugar en los países de la región; establecimiento de cooperación industrial bilateral en el territorio de los países miembros del MERCOSUR. Se llega a la conclusión sobre la necesidad de desarrollar de una estrategia a largo plazo para activar la cooperación comercial y económica entre Ucrania y los países de la región latinoamericana con la identificación y justificación de las prioridades sectoriales.

Palabras clave: política económica exterior; exportaciones; importaciones; Ucrania y Latinoamérica; cooperación internacional.

Introduction

Prospects for economic development of the country are determined by its investment potential and ability to use the opportunities of globalization of the economy and technology. In the medium term, technological advances that will ensure a rapid transition to a digital platform of economic relations will strengthen the integration of countries into the global space and the quality of their development. This creates both opportunities and threats at the national level for countries in achieving their economic development goals. The ability to realize the economic and national

interests of the country requires an effective economic strategy and political stability. Political risks, both external (in neighboring countries or trading partners) and internal (in the country itself) are increasingly determining the investment attractiveness of the country and the decision of investors to implement their projects in the country (Prikhodko, 2016). The correctness of the choice of economic strategy is ensured by the adequacy of the applied incentives and motivations to the level of development of its economic and institutional space.

Dependence and interaction of economic and political risks is becoming increasingly important for entrepreneurs in choosing the scale and intensity of investment. According to experts, if economic risk reflects the ability to return capital, then political risk is the willingness of political power to return it (Managing Risk in An Unstable World, Ian Bremmer, 2005). The main concept proposed by other authors (Acemoglu and Robinson, 2002) is a direct relationship between the level of political competition and the level of economic development (or backwardness) of the country. That is, the higher the level of competition, the better the government stimulates investment, innovation, and hence the quality development of the country.

Since 2014, there have been significant changes in Ukraine's foreign trade relations with some countries, in particular with traditional foreign trade and economic partners, which was caused by the aggravation of problems in political and trade and economic relations with Russia. In addition, the development of foreign trade was significantly affected by unfavorable conditions in key world markets for Ukraine, fluctuations in world currencies and commodity prices, instability of the national currency, irrational structure of domestic exports, dominated by raw materials and products with low processing, low competitiveness of Ukrainian goods and services, etc., (Foreign Economic Cooperation of Ukraine: State, Development Prospects, Threats and Risks, 2014).

The spread of technology and the deepening of economic cooperation through trade, investment and labor migration create both opportunities and risks for Ukraine's sustainable development. An important task is to ensure the real, not illusory competitiveness of the national economy (Sustainable Development Goals, Ukraine, 2017). In particular, the country has a high level of trade openness and investment, but low growth rates and gross domestic product per capita.

The general cataclysm in society caused by the crisis of the coronavirus pandemic has become a favorable scenario for the reinforcement or strengthening, depending on the situation, of public policy (Finol, 2021). The success of Ukraine's European transit directly depends on the state's ability to acquire historical subjectivity at this time of crisis, as well as on strategic certainty on priority foreign policy issues (Holonič *et al.*, 2018).

The current crisis of the European Union and the Pacific Trade Partnership has revealed a number of certain political and economic patterns that require scientific understanding and give an idea of the general logic of global transformations in the modern world. These are, in particular, models of interaction that characterize relations outside the traditional division of countries into center and periphery, superpowers and dwarf states.

Based on the forecast trends in Ukraine's foreign trade policy, diversification of its geopolitical and regional priorities, it is important to address the reorientation of exports and search for new foreign markets in accordance with the requirements and existing niches of the world market (Romanyuk, 2015). One such potential foreign market is Latin America, which is projected by the International Monetary Fund to be a fast-growing market (Review of Emerging Markets, 2015). Latin America is a large economic region, accounting for about 9% of world gross domestic product. Brazil accounts for about a third of the region's gross domestic product, followed by Mexico, followed by Argentina, Colombia, Chile, and Venezuela.

Due to the loss of markets, Ukraine is more interested than ever in diversifying economic ties and is in dire need of new trading platforms. In this sense, it is worth paying attention to Latin American countries, as due to the weak political, trade, economic and diplomatic activities of Ukraine, this geopolitical direction remains understudied. Thus, we consider it important to determine the prospects of Ukraine's foreign economic policy towards Latin America.

1. Methodology of the study

The theoretical and methodological basis of the scientific article were the works of scientists on the problems of foreign economic policy, as well as on improving the efficiency of marketing activities. To achieve the goal and solve the problems in the work used the following general and special techniques and research methods: methods of analysis and synthesis – to diagnose the market of Latin America and assess its prospects for Ukraine; systematic approach – to systematize scientific and methodological approaches to assessing the prospects of Ukraine's foreign economic policy towards Latin America; methods of induction and deduction, generalization and systematization – to streamline economic opportunities, foreign policy of the studied countries; method of sample observations – to determine the assessment of the efficiency and prospects of the market in Latin America; methods of coefficient and comparative analysis – to assess the foreign economic and marketing activities of the Latin American region;

methods of hypotheses – to justify measures to improve Ukraine's foreign economic policy towards Latin America; economic – to determine the level of market development of the study region; method of system analysis and modeling – to assess the effectiveness of individual industries of Ukraine in the international arena, to determine the relevant vectors of strategic foreign economic nature.

2. Analysis of recent research

Implementation of reforms is key in most strategies and programs of socio-economic development of Ukraine, and investment policy always occupies one of the main positions in them. Therefore, the study of ways to ensure its effectiveness today is critical. It is extremely important to define approaches to the formation of priorities for stimulating investment in Ukraine to ensure quality economic development in the medium and long term. The issue of choosing effective strategies for the development of the state is widely studied in the expert community and is the subject of public debate.

In scientific circles, these works are devoted to fundamental works on management and international economic relations M. Meskon (Meskon, 1992), D. Acemoglu, J. Robinson (Acemoglu and Robinson, 2002), G. Kindratskaya (Kindratskaya, 2006), Y. Sytnyk (Sytnyk, 2008), M. Nebava and O. Ratushnyak (Nebava M. and Ratushnyak O., 2012), I. Romanyuk (Romanyuk, 2015), O. Malinovskaya (Malinovskaya, 2016), Gutorova (Gutorova, 2017). The scientific achievements of these scientists, as well as empirical and statistical data contributed to the disclosure of problematic issues and develop ways to solve them.

3. Results and discussion

After World War II, the United States began active economic expansion on the American continent. Huge sums have been invested in the three largest countries in Latin America - Brazil, Argentina, and Mexico. For half a century, these countries have become industrial giants, and after them began to actively develop other countries in the region, including Chile. The economic policy of these countries was aimed at eradicating their dependence on imported goods, replacing them with their own products. Export orientation was secondary, in contrast to similar countries in Asia (Holonič *et al.*, 2018).

At present, the countries of Latin America, having passed the path from colonial dependence to political and economic independence, occupy

an intermediate position between the highly developed countries of the developing world (NEWLY INDUSTRIALIZED COUNTRIES OF LATIN AMERICA, 2021). We consider a brief overview of the economies of these countries, priorities in trade, as well as in the formation of foreign policy important in view of the selected issues of the scientific article - determining the prospects of Ukraine's foreign economic policy towards Latin America.

Mexico is an industrial and agricultural country. The main sectors of the economy: food, tobacco, chemical, steel, oil, mining, textile and light industry, engine building, tourism. Mexico's fuel and energy balance is characterized by a predominance of oil and gas. Mexico has a highly developed oil and gas industry. When commercial oil production began in the early twentieth century, it began to play an important role in Mexico's economy and foreign economic relations (Holonič *et al.*, 2018).

Mexico is an export-oriented economy. Mexico's main exports are finished goods (83% of total supplies), oil and petroleum products (13%). Among finished products, cars account for about 26% of total deliveries (Holonič *et al.*, 2018).

Mexico's imports consist of metal products, machinery and equipment (50% of total imports), mining products (13%), chemical products (6.3%), plastic and rubber products (6%). The main import partners are the United States (51% of total imports), China and Japan (21%). Mexico's imports amounted to 38.97 billion dollars. Imports increased due to the purchase of consumer goods (18%), namely petroleum products (40%); intermediate goods (17%) and fixed assets (9.2%). Imports to Mexico averaged \$ 13,574.67 million (Mexico Imports by Country, 2021).

At present, Mexico has effectively renounced its leadership in regional integration processes and is looking for an effective format for cooperation in the process of promoting common interests in the international arena with roughly equal players. Ukraine must take these circumstances into account in order to invent and develop new vectors for mutually beneficial cooperation between countries.

Brazil's economy is currently emerging from a severe and protracted recession. The reasons for the country's economic downturn were political uncertainty, consumer and business distrust of government action, and low levels of investment. The Brazilian market has grown as more investors enter the market, hoping to profit from low stocks over the past few years. Positive economic indicators, such as improved gross domestic product and trade balance, also provide support for the recovery of the Brazilian market.

The main risks to Ukraine's foreign economic cooperation with Brazil are that the country's leadership is currently focusing on transforming the country into a global player not by expanding its role in regional integration processes, but primarily by providing its own economic and military

leadership. Given this, as well as the current state of trade and economic cooperation with Brazil, Ukraine's ability to use the strategic partnership format to promote domestic products with the Brazilian side to other markets in the region will be limited.

The Argentine Republic is considered one of the major developing economies. Argentina is an industrial and agricultural country that benefits from rich natural resources, skilled personnel, export-oriented agricultural sector, and a diverse industrial base. For most of the 20th century, the country suffered from periodic economic crises, persistent financial and current account deficits, and high inflation, which led to an increase in the country's external debt and capital outflows (The Economy of Argentina, 2021).

Currently, Argentina's economy is developing due to a large supply of minerals, high literacy and has a large sector focused on the export of agricultural products. In addition, it has a diversified industrial base. Gross domestic product per capita at the purchasing power parity of currencies is 14.2 thousand dollars (The Economy of Argentina, 2021).

Food production is traditionally one of the main sectors of the economy (8-9% of gross domestic product), with a relatively high level of which Argentina stands out among Latin American countries. Argentina's agriculture almost completely meets its own food needs, while being one of its leading exporters. Especially developed production of grain (grain and oilseeds), which leads the country's exports. In particular, soybean production (together with beans, potatoes, oil, flour and biofuels) is (like gasoline production) the main export activity (Holonič *et al.*, 2018). The main export goods in Argentina's relations with Ukraine are fertilizers, ferrous metals, and machinery. The main imports are fish and crustaceans, edible fruits and nuts, seeds and fruits of oilseeds, tobacco and industrial tobacco substitutes (Honorary Consulate of Ukraine in Seattle, 2021).

The basis of Ukrainian exports in relations with another representative of the region - Colombia are: structural carbon steel, ferrous metal products, equipment, machinery, mineral and nitrogen fertilizers. The basis of Ukrainian imports are: coking coal and refined products, wood, coffee, tea, cocoa, food (Honorary Consulate of Ukraine in Seattle, 2021).

Modern Venezuela remains heavily dependent on oil revenues, which account for almost all export earnings and almost half of government revenues. At the end of 2017, Venezuela also made a selective default on some of its sovereign and state oil companies, Petroleos de Venezuela, SA, (PDVSA). Domestic production and industry continue to fall sharply, and the Venezuelan government continues to rely on imports to meet basic food and consumer goods needs (World Book of Facts, 2021).

Despite Venezuela's accession to Mercosur, the prospect of turning the country into a full member of the union is linked to a lengthy process of bringing its country into line with the bloc's requirements. It should be noted that Mercosur is a trade union of South American countries, which unites 250 million people. and more than 75% of the total gross domestic product of the Latin American continent. In terms of size and economic potential, MERCOSUR is the second customs union after the European Union and the third free trade zone after the European Union and the North Atlantic Treaty Organization. Permanent member countries of MERCOSUR: Argentina, Brazil, Venezuela, Uruguay. Associated member countries of MERCOSUR: Bolivia, Ecuador, Colombia, Peru, Chile (Samoilov, 2016). The recent escalation of Argentina's trade disputes with Brazil and Chile has made it virtually impossible to develop common approaches to Mercosur's strategy for further development. Against this background, the permanent internal conflict of the leaders of this union (Argentina and Brazil) with other members has a destructive effect on the prospects for the development of this integration union.

At the same time, there are positive changes in Ukraine's foreign economic relations with some Latin American countries. In particular, since 2018, the trade turnover between Ukraine and Chile has grown to \$ 51.4 million. But, as experts note, Ukraine has every chance to increase this figure. Ukrainian business, which has modern technologies, has the opportunity to start joint ventures without attracting significant financial resources and make a profit in the fast-growing market of Chile. The implementation of infrastructure projects may also be of potential interest to Ukrainian enterprises. Promising cooperation with Chile is seen in attracting Chilean investment in the reconstruction of refineries, exploration, production and refining, in the field of informatics, food industry, energy, ferrous and nonferrous metallurgy, in the modernization and construction of railways, seaports and irrigation projects. Ukraine, in turn, is interested in implementing investment projects in Chile, establishing joint ventures, including on a compensatory basis, production cooperation in energy, ferrous and nonferrous metallurgy, mechanical engineering, transport construction, irrigation, urban transport, agriculture and fisheries (The Chamber of Commerce and Industry of Ukraine and the Ukrainian-Chile Chamber on Trade and Tourism Signed a Memorandum of Cooperation, 2019).

It should be noted that at the present stage Ukraine's relations with Chile in the trade and economic sphere have not yet reached the desired dynamics of development given the geographical remoteness of countries and the lack of long-term bilateral political contacts at high and highest levels. However, there is every chance to intensify bilateral cooperation. The first shifts in this direction are already there. In particular, in 2018, the Chamber of Commerce and Industry of Ukraine and the Ukrainian-Chilean Chamber of Commerce and Tourism signed a memorandum of cooperation between Ukraine and Chile.

Recently, there has been a decrease in world prices for raw materials, which will have a negative impact on the largest economies of MERCOSUR. The main risks for the economies of the Pacific Alliance will be the possibility of growing domestic political instability in Colombia, as well as too high social orientation of the ideological foundations of economic policy of Chilean President M. Bachelet. The main efforts of the leadership of the Latin American region will be aimed at counteracting external threats and challenges in the economic and financial spheres by diversifying and deepening trade and economic relations with developed countries (Foreign Economic Cooperation of Ukraine, 2014).

Summing up the interim results of the review of the economic and political situation in Latin America, we note that its characteristics are the intensification of inflation in the region, reducing exports and foreign investment, the level of business and consumer confidence. Today, the development of trade and economic relations between Ukraine and the Latin American region is hampered by the slow formation of close commercial ties, weak cooperation between Ukrainian and Latin American firms, the dominance of traditional trade in economic relations with a clear lag in investment and production cooperation.

According to statistics, the Latin American region is not yet one of Ukraine's main trading partners. Thus, according to 2014, its share in the total foreign trade of Ukraine was 1.3%, in particular in Ukrainian exports - 1.0%, and in imports - 1.6%. The top five foreign trade partners of Ukraine in the Latin American region include Brazil, which accounts for 27.2% of Ukrainian-Latin American trade, Mexico (18.2%), Argentina (6.7%), Cuba (6.3%) and Colombia (5.1%) (STATE STATISTICS SERVICE OF UKRAINE, 2021). During 2016-2021, the main commodity groups of domestic exports to these countries were: cereals, fertilizers, mineral fuels, pharmaceuticals, rubber and rubber, tanning extracts, ferrous metals, nuclear reactors, boilers, machinery and electrical machinery, ground transport, except rail, aircraft (Romanyuk, 2015).

It should be noted that in the foreign policy of Ukraine the resource and human potential of the Latin American region is underestimated. Meanwhile, these countries have large markets. Exports to the countries of the region of aircraft and machine-building products, agricultural and heavy automobile equipment, cooperation in the space industry can be attractive for Ukraine. In addition to the economic interest that was crucial for Ukraine in the region until 2014, the political component of cooperation is now intensifying - Ukraine's international support in countering Russian aggression (Ukraine's foreign policy outside the European Union and the North Atlantic Treaty Organization).

It is important to emphasize that modern Latin America is a country that is not only homogeneous in terms of geo-economics' factors, but also

has different geopolitical interests. It is important to note the existence in Latin America of a strong tradition of respect for international law and governance based on the principle of territorial integrity. Factors of geographical distance, the absence of Ukraine's voice in the information space of Latin America, as well as the active (especially recently) spread of Russia's interests to the continent are working. At the same time, the influence of the United States of America on the countries south of the Rio Grande, as well as the growing influence of China, which pursues an independent international policy by strengthening its economic position in the Latin American region.

We should agree with I. Samoilov's point of view that today Ukraine can and should make the most of the different and ambiguous political and diplomatic positions of Latin American countries regarding world events and start working seriously in this direction. Then Ukraine, sensitive to the mood of Latin American countries, could not only diversify its exports, but also through adequate explanation of its position on the annexation of Crimea and the military conflict in Donbas could attract new like-minded people and enlist the support of Latin American countries. For example, this is critical when voting in international organizations on Ukraine (Samoilov, 2016). It is worth noting that in poor countries the political influence is much greater, as it is well known that governments here have limited resources and, in many cases, do not even have effective control over the entire territory occupied by their country (Arbeláez-Campillo *et al.*, 2019).

Some experts note that today there is not only a low level of penetration of Ukraine into the Latin American region, but also an extremely low level of awareness of both Russian aggression and Ukrainian potential. Frequent cases of representation of Ukrainian industry through the Russian Federation (aircraft, military-industrial complex). Today in Central and Latin America there are six diplomatic missions of Ukraine (Argentina, Brazil, Cuba, Mexico, Peru, Chile). Instead, there are four Latin American embassies in Ukraine (Argentina, Brazil, Cuba, and Mexico). Until 2014, most Latin American countries were represented through their embassies in Moscow, which limited communication and had an impact on Ukraine's perception (Ukraine's Foreign Policy Outside the European Union and the North Atlantic Treaty Organization, 2019).

The region as a whole and none of its countries were included in the Export Strategy of Ukraine for 2017-2021 developed by the Ministry of Economic Development and Trade of Ukraine. Since 2014, there has been a sharp decline in Ukrainian trade exports to countries in the region. Its peak came in 2015-2016, and in 2017-2021 there is a positive trend of export growth. At the same time, in recent years none of the 6 joint intergovernmental commissions on trade and economic cooperation (Ukrainian-Argentinean, Ukrainian-Brazilian, Ukrainian-Paraguayan, Ukrainian-Peruvian, Ukrainian-Mexican and Ukrainian-Chilean) has met.

We also have direct financial losses: due to Brazil's unilateral denunciation of the agreement on long-term use of the Ukrainian Cyclone-4 launch vehicle at the Alcântara cosmodrome in 2015, Ukraine's financial losses could reach \$ 800 million (loans under state guarantees amounted to \$400 million). Ukraine did not even sue the Brazilian side. At the same time, lawsuits were filed by international investors against Ukraine due to their lack of profits (Ukraine's Foreign Policy Outside the European Union and the North Atlantic Treaty Organization, 2019).

In order to develop trade and economic cooperation between Ukraine and Latin America, the work of the government, diplomatic missions, chambers of commerce and industry to establish a favorable trade regime between Ukraine and the countries of the Latin American region is important today; purposeful study and development of the most promising commodity markets for Ukrainian exporters and consolidation of their positions on them; political, financial, informational and legal support of the state for the process of promoting Ukrainian goods on Latin American markets; a significant increase in the structure of Ukrainian exports of the share of goods with a high degree of added value, especially mechanical engineering products and high-tech production; formation of effective systems for the protection of Ukraine's economic interests in Latin America.

There are some changes in this direction. In particular, in 2015 the Agreement on Friendly Relations and Cooperation between Ukraine and the Republic of Paraguay was ratified (dated April 26, 2012); in 2016, an agreement was ratified with Argentina on mutual assistance in the investigation of customs offenses, and in 2018, three intergovernmental agreements in the field of criminal justice were signed with Argentina. In the same year, the First Vice Speaker of the Verkhovna Rada of Ukraine I. Gerashchenko paid a significant visit to Colombia, during which she got acquainted with the experience of reintegration of the territories destroyed by the long internal conflict and the peculiarities of post-conflict dialogue.

In 2017, for the first time, representatives of the youth of the Ukrainian diaspora from Argentina and Brazil took part in an internship program in the Parliament of Ukraine (Ukraine's Foreign Policy Outside the European Union and the North Atlantic Treaty Organization, 2019).

In our opinion, it is important to establish official contacts between Ukraine and MERCOSUR. In order to advance Ukraine's interests and strengthen its position in Latin America, it is very important to have relations with such countries as Argentina, Brazil, and Mexico, which are members of the G20 and are interested in further expanding their regional and international influence. Today, the Ukrainian issue is on the agenda of world politics, and Ukraine must use the current trend to make it important and promising for the global world. Therefore, against the background of prolonging or freezing the conflict in Donbass, Ukraine should intensify

its efforts to revive and bring a new fresh impetus to relations with Latin America.

At the first stage it is important to address a range of issues: the establishment of bilateral industrial cooperation in the member countries, including through the creation of joint ventures, whose products would be in demand throughout MERCOSUR (in particular, tractor and aircraft construction, production of energy equipment, cooperation in space, production of mineral fertilizers, supply of steel, agro-industrial, pharmaceutical products, maintenance of military transport aircraft «AN», etc.); granting preferential treatment to Ukrainian exporters in the markets of MERCOSUR countries by concluding relevant agreements; promoting the expansion of Ukrainian technologies.

Ukraine's future prospects in the international arena will depend on its ability to effectively use the stabilization funds of international funds, as a result of which the measures of the anti-crisis program on public finance management and the real fight against corruption must be implemented. Ukraine's prospects in relations with Latin American countries will also depend on activity in the search for new foreign markets and an increase in foreign trade.

For greater effectiveness of such steps for Ukraine, some scholars recommend: to hold a series of round tables on the topic of this area of work on the basis of the Ministry of the Armed Forces of Ukraine with the involvement of the public, to determine the strategy and tactics. Assess the quality of work and, if necessary, rotate staff at the level of embassies in Latin America. Involve representatives of public diplomacy in the work. Raise the role of ambassadors as sales agents of national business. To actualize the issues of efficiency / inefficiency of the Chamber of Commerce and Industry of Ukraine (taking into account the presence of state functions in this public organization) in terms of its impact on the country's economy, export potential, and improving Ukraine's image in the world (Samoilov, 2016).

At present, the Latin American region retains the features of internal political instability, oppositional sentiments of the population, which are turning into military confrontation (for example, Ecuador, Peru, Chile, and others), frequent changes of government, and others. A prerequisite for mutually beneficial economic partnerships is the presence in Latin America of huge reserves of minerals, which can be the basis for the development of heavy industry. These are primarily copper (Chile, Peru, Mexico), tin (Bolivia), oil (Venezuela, Mexico), coal and iron ore (Brazil), aluminum raw materials - bauxite (Jamaica, Republic of Suriname).

Given the new, more favorable political situation in Latin America, Ukraine faces the task of making the most of all available opportunities to

promote Ukrainian exports and implement joint projects. The market of this region in the future can be considered as a space for the promotion of Ukrainian competitive goods and services. In our opinion, only a systematic approach to the formation of incentives for entrepreneurial activity will have the effect of increasing productivity, and the coherence of regional and national economic policy will determine the prospects of the country as a whole.

Conclusions

We believe that in modern conditions Ukraine has a real opportunity and need to cooperate with the markets of Latin American countries, which are no less attractive than the markets of the European Union and Asian countries and should take their rightful place in bilateral and multilateral cooperation on mutually beneficial terms. The strategic development of economic partnerships between Ukraine and Latin America in the recent period should be based on the following basic principles:

- intensifying and strengthening the dialogue on deepening trade and economic cooperation through a system of trade policy instruments, primarily reducing tariff and non-tariff protection of the Latin American market.
- optimization of trade, economic and investment cooperation to gain leverage over the development of global and European economic infrastructure.
- development of a long-term strategy for the development of trade and economic cooperation between Ukraine and individual countries of the Latin American region with the identification and justification of sectorial priorities.

In order to implement the outlined areas of optimizing cooperation between Ukraine and Latin America, we consider it expedient for the Committee on Foreign Affairs of the Parliament of Ukraine with the participation of representatives of the Ministry of Foreign Affairs, the Ministry of Economic Development and Trade of Ukraine, the Chamber of Commerce and Industry, working in Ukraine, economic and political problems in bilateral relations, including legislation that hinders the intensification of cooperation.

Prior to the Coalition Agreement, the list of promising markets should include both the Latin American region and state support for national exporters in this region. We also consider it useful to intensify the work of the relevant parliamentary groups on interparliamentary relations of the Verkhovna Rada of Ukraine with the parliaments of the Latin American

region and to promote the work of «friendship groups» with Ukraine there.

Measures such as: opening of representative offices of Ukrainian enterprises in Latin American countries will contribute to the growth of exports of Ukrainian enterprises in the markets of Latin America; active participation of Ukrainian enterprises in exhibition and fair events taking place in the countries of the region; initiating contacts between delegations of industry experts, as well as initiating business representatives to conclude agreements between the Chamber of Commerce and Industry of Ukraine with the relevant Latin American business associations. Contacts with Latin America could help Ukraine diversify its national exports, which in turn would boost the industrial development of the Latin American region.

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Activities of the court to investigate the circumstances of criminal proceedings and their assessment under the laws of Ukraine

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Abstract

Sand investigates the procedural possibilities of the court to investigate the circumstances of the criminal process at the trial stage, by analyzing the current criminal procedural legislation of Ukraine, judicial practice, the positions of scientists, as well as by using modern methods of scientific knowledge (dialectic, systematic analysis of legal norms, comparative, statistical, synergistic, hermeneutic, structural, and formally dogmatic system). It also clarifies the essence of scientific and legal categories such as «circumstances of criminal proceedings», «verification of evidence», «evaluation of evidence», etc. It was concluded that during the trial the evidence is examined in accordance with a certain procedure and with the participation of the participants in the criminal proceedings, who have the right to ask questions, draw the attention of the court, lodge appeals, etc. Investigative (search) actions have been identified as the most common procedural means of examining evidence in criminal proceedings. It is emphasized that the evaluation of the evidence by the court, unlike inspection, is not combined with any practical action and is a purely mental, logical activity, which aims to determine the admissibility, relevance, reliability, value (strength) of each.

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Keywords: court in Ukraine; criminal proceedings; evidence; circumstances of a crime; evaluation of evidence.

Actividades del tribunal para investigar las circunstancias de los procesos penales y su evaluación con arreglo a las leyes de Ucrania

Resumen

Se investigan las posibilidades procesales del tribunal para investigar las circunstancias del proceso penal en la etapa de juicio, mediante el análisis de la legislación procesal penal actual de Ucrania, la práctica judicial, las posiciones de los científicos, así como mediante el uso de métodos modernos de conocimiento científico (dialéctico, análisis sistemático de las normas legales, derecho comparado, estadístico, sinérgico, hermenéutico, sistema-estructural y formalmente dogmático). También, se aclara la esencia de categorías científicas y jurídicas como «circunstancias del proceso penal», «verificación de pruebas», «evaluación de pruebas», etc. En particular, se concluyó que durante el juicio la prueba se examina de acuerdo con un determinado procedimiento y con la participación de los participantes en el proceso penal, quienes tienen derecho a formular preguntas, llamar la atención del tribunal, presentar recursos, etc. Las acciones de investigación (búsqueda) han sido identificadas como el medio procesal más común para examinar pruebas en procesos penales. Se enfatiza que la valoración de la prueba por parte del tribunal, a diferencia de la inspección, no se combina con ninguna acción práctica y es una actividad puramente mental, lógica, que tiene como objetivo determinar la admisibilidad, relevancia, confiabilidad, valor (fuerza) de cada uno.

Palabras clave: tribunal en Ucrania; proceso penal; prueba; circunstancias de un delito; evaluación de la prueba.

Introduction

Large-scale transformational changes in society, which are characteristic of the beginning of the new millennium, have put many new challenges «on the agenda» before humanity. The progressive development of all countries of the world, including Ukraine, which constitutionally declared itself as a sovereign and independent, democratic, social, legal state, depends on their solution (Article 1 of the Constitution of Ukraine) (Constitution of Ukraine, 1996).

The Strategic Plan for the Development of the Judiciary of Ukraine for 2015-2020 emphasizes that it is the state's responsibility to provide its citizens with an effective remedy and the right to a fair trial in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms. (Strategic Plan For The Development Of The Judiciary Of Ukraine For 2015-2020, 2012). Judicial reform also provides for the renewal of the criminal procedure law (Strategy for the Reform of the Judiciary, Judiciary and Related Legal Institutions for 2015–2020.) (Strategic Plan For The Development Of The Judiciary Of Ukraine For 2015-2020, 2012). The main purpose of such an update is to improve the procedural provision of justice and the right to defense during criminal proceedings (). Such legislative approaches encourage theoretical and praxeological discussion, actualize the discussion of issues of optimization of the court's research and assessment of the circumstances of criminal proceedings.

According to modern opinion polls, society has less and less trust in courts and judges. Thus, the level of trust in the judiciary of Ukraine among the persons who participated in court proceedings is 40%, and among the persons who were not participants in court proceedings, 13% (All-Ukrainian Survey Of Citizens On Democratic Change In The Political And Social Spheres, Judicial Reform And The Process Of Cleansing The Government In Ukraine: Summarizing The Results Of The 2016 Study And Comparison With Data For 2015, 2016). One such factor is the unjustifiably lengthy consideration of criminal proceedings in court. Proper and timely consideration of criminal proceedings, able to ensure an adversarial criminal process which is a characteristic feature of the modern rule of law. This fact should encourage a rethinking of certain forms of functioning of the judicial system, taking the necessary measures of theoretical, legislative and applied nature in this direction.

Changes in the field of criminal procedure legislation have put on the agenda a revision of many methodological provisions of the criminal process. This is due to the fact that the amount of modern scientific knowledge is increasing extremely rapidly, while changing and improving legislation. This, in turn, necessitates the improvement of existing and the creation of new, more effective methods of learning and practical application of knowledge. The reform of the criminal procedure legislation and the judicial system of Ukraine highlights, in particular, the need for a comprehensive scientific study of the powers of a judge to study and evaluate evidence in the judicial process of Ukraine.

1. Methodology of the study

To achieve the goal set in the scientific article, general scientific, philosophical and special methods are used, in particular: dialectical method of cognition - in clarifying the essence of such concepts and categories as «study of circumstances», «evaluation of evidence», «activity» and «initiative», analysis of their common and distinctive features; systematic analysis of legal norms - to identify gaps and inconsistencies in regulations and formulate proposals for improving existing legislation; comparative law - to compare the rules of criminal procedural law of Ukraine and the provisions of other regulations in terms of investigating the circumstances of a criminal offense by the court at the stage of trial; statistical - for research of materials of criminal proceedings, statistics and generalization of the received results; synergetic, hermeneutic, system-structural and formally dogmatic - to clarify the specifics of the judge, to identify the system of relationship and interaction with other subjects of criminal proceedings, to formulate proposals for improving criminal procedural law. The use of all research methods in conjunction ensured the persuasiveness and reliability of scientific research results.

2. Analysis of recent research

With the adoption of the new Criminal Procedure Code of Ukraine in 2012, issues related to court proceedings received somewhat different legal regulation. In particular, numerous provisions of the criminal procedure law are aimed at ensuring the real adversarial nature of the parties, introduced many other positive novelties, aimed primarily at protecting the rights, freedoms and legitimate interests of man and citizen.

The legislator repeatedly uses the concept of «examination of evidence» in relation to the stage of the trial (Articles 319, 322, 339, 349, 352, 357, 358, 359, 386 of the Criminal Procedure Code of Ukraine) (Criminal Procedure Code Of Ukraine, 2012). All subjects of criminal proceedings are endowed with certain powers, rights, and responsibilities in the field of evidence. The nature of these powers, rights, and responsibilities, of course, is different and depends on the criminal procedural function of the subject, his interest in criminal proceedings, the general criminal procedural status, etc. (Lytvyn, 2016).

The participation of the court in the evidence in criminal proceedings is accompanied by numerous procedural and applied difficulties and requires an immediate solution. Given the controversial nature of certain provisions of the Criminal Procedure Code of Ukraine in terms of the court's exercise of its powers at the trial stage, the question arises: how can a court in criminal proceedings investigate the circumstances of a crime and assess them?

Problematic issues of court participation in the study of the circumstances of criminal proceedings and their assessment in criminal proceedings were the subject of research of such domestic proceduralists as V.O. Gryniuk (2012), Yu.M. Groshevyi and S.M. Stakhivsky (2006), O.I. Korovaiko (2010), V.Ya. Korsun (2011), T.V. Lukashkina (2013), V.T. Nor (2013), O.V. Rybalka (2013), V.I. Slipchenko (2009).

Most of such works relate to the general provisions of evidence in criminal proceedings, while only some modern works are devoted to the study of our issues. This necessitates the need to clarify the possibility for a judge to directly conduct research and evaluation of testimony, things, documents in criminal proceedings.

Today in the doctrine of criminal procedure the issue of court activity is debatable, and scientific positions vary from the requirement to complete, comprehensive, objective investigation and establishment of objective truth to the court and to the complete denial of the possibility of court manifestations of any forms of activity. do not correspond to the essence of its procedural function (Kuchynska, 2011). Clarification of this issue is important to determine the degree of activity of the court in the examination and evaluation of evidence.

3. Results and discussion

It is legally defined (Article 23 of the Criminal Procedure Code of Ukraine) that the court examines the evidence directly and receives the testimony of the participants in the criminal proceedings orally. It follows that the oral testimony of the participants in the criminal proceedings as a result of their direct examination during the trial is perceived and evaluated by the court on the basis of the so-called internal conviction of the judge. (Criminal Procedure Code Of Ukraine, 2012). Failure to comply with the principle of immediacy leads to a violation of other principles of criminal proceedings: the presumption of innocence and proof of guilt, ensuring the right to defense, adversarial parties and freedom to present their evidence and prove their persuasiveness before the court (paragraphs 10, 13, 15 of Article 7 of the Criminal Procedure Code). Code of Ukraine). Therefore, the principle of immediacy is a necessary element of the procedural form of trial, non-compliance with the court, based on the content of the second part of Article 23 and Article 86 of the Code, means that evidence that was not the subject of direct investigation of the court cannot be considered admissible and taken into account. The decision of the court, except in cases provided by the Criminal Procedure Code of Ukraine, and therefore, the court decision in accordance with Article 370 of the Code cannot be recognized as lawful and reasonable.

In addition, the rules of criminal procedure law on the invariability of the court ensure the direct perception and evaluation of evidence by all judges from the beginning to the end of the trial, guarantee the comprehensiveness, completeness and objectivity of all criminal circumstances, without which it is impossible to rule lawfully, reasonably and fair sentence.

The court to verify the relevance, admissibility and reliability of evidence provided by the parties to the criminal proceedings, has the power: to include issues in the decision to conduct an examination (Part 3 of Article 332 of the Criminal Procedure Code); ask questions during the interrogation of the accused (Article 351), witnesses (Article 352 of the Criminal Procedure Code), a victim (Article 353 of the Criminal Procedure Code) or an expert (Article 356 of the Criminal Procedure Code) (Criminal Procedure Code Of Ukraine, 2012). Certain provisions of the Criminal Procedure Code of Ukraine also indicate the need for the court to take a certain activity in establishing the circumstances of a criminal offense. On the initiative of the court, some investigative (search) actions may be carried out, in particular: interrogation of an expert (Part 1 of Article 356 of the Criminal Procedure Code); examination of documents 160 (Article 358 of the Criminal Procedure Code); on-site inspection (Article 361 of the Criminal Procedure Code); examination in accordance with Part 2 of Art. 332 of the Criminal Procedure Code; repeated interrogation of a witness (Part 13 of Article 352 of the Criminal Procedure Code); simultaneous interrogation (Part 14 of Article 352 of the Criminal Procedure Code) (Criminal Procedure Code Of Ukraine, 2012).

An important group of issues to be decided by the court are those related to the provision and examination of evidence during the trial. We share the point of view of O.V. Lytvyn, who understands the examination of evidence in court as the mental and practical activity of the court regulated by the Criminal Procedure Code with the active participation of participants in the proceedings with the assistance of other participants in criminal proceedings, aimed at establishing the relevance, admissibility, reliability of evidence by analyzing each of them other evidence and obtaining evidence that confirms or denies the relevance, admissibility, reliability of the evidence under investigation (Lytvyn, 2012).

The importance of such a direction of judicial activity as the administration of justice requires the creation of such conditions for the study of the actual circumstances of a criminal offense, which would ensure the adoption of a reasoned court decision. Given the adversarial principle, litigants enjoy equal rights to examine evidence and prove their persuasiveness in court, and the court must create the necessary conditions for litigants to exercise their procedural rights and direct the investigation to ensure that the parties exercise their rights.

As a general rule, the court receives the testimony of participants in criminal proceedings orally. The information contained in testimonies, things and documents which were not a subject of direct research of court, except for the cases provided by Art. 23 of the Criminal Procedure Code of Ukraine (Criminal Procedure Code Of Ukraine, 2012). It is a question of immediacy of research of indications, things, documents as the general principle of criminal proceedings which is defined in item 16 of h. 1 Art. 7 and formulated in Art. 23 of the Criminal Procedure Code of Ukraine.

This principle is important for the full clarification of the circumstances of the criminal proceedings and its objective solution. The immediacy of the perception of evidence allows the court to properly examine and verify them (both each piece of evidence separately and in conjunction with other evidence), to assess them according to the criteria set out in Part 1 of Art. 94 of the Criminal Procedure Code of Ukraine, and to form a complete and objective view of the facts of a particular criminal proceeding. Also in paragraph 18 of the Resolution of the Supreme Court of Ukraine of 21.01.2016 in the case №5-249x16 states that the immediacy of the examination of evidence means addressed to the court requirement of the law to examine all evidence collected in a particular criminal proceeding by questioning accused, victims, witnesses, expert, review of physical evidence, announcement of documents, reproduction of sound and video recording, etc. (Resolution Of The Supreme Court Of Ukraine, 2016).

Determining the limits of the court's participation in the examination of evidence in the trial, we support the position of V.T. Nora that the court in resolving the case - a lawful and reasonable decision - should not remain a passive observer of the legal duel of the parties, monitoring only the observance of its procedure (rules). The court should be able, with the assistance of the parties, but independently of them, to examine the evidence submitted by them by all procedural means, including investigative and judicial actions, which the law makes available to it. (Nor, 2010).

The most common procedural means of examining evidence in criminal proceedings are investigative (search) actions, which, in particular, include interrogation in court. The general procedure and sequence of interrogation, interrogation of witnesses, victims, suspects and accused, features of interrogation of minors of different procedural status, interrogation by video conference, etc., are defined in Art. Art. 351-354, 356 of the Criminal Procedure Code of Ukraine (Criminal Procedure Code Of Ukraine, 2012). Failure to comply with the procedural rules of interrogation is a violation of the law and entails the invalidity of the investigative (search) action and the inadmissibility of the testimony obtained as a source of evidence.

Judicial interrogation is carried out by obtaining testimony in court from persons who have information about the circumstances of the criminal case to be established by the court. And this method is not limited to the

process of voicing the testimony of the interrogated person in court, but its essence is to interrogate the interrogated person, giving him oral testimony (in the form of a free story or answers to questions), perception (hearing) testimony by a subject whether it is situationally determined to conduct the relevant type (stage or phase) of judicial interrogation.

During the trial, the interrogated person may, in the manner prescribed by law, be induced to testify not only by the prosecutor or the court, but also directly by the accused, his defense counsel, the victim and other participants in the trial. The results of the judicial interrogation in the form of testimony form in the court an inner conviction about the investigated event, its circumstances and other issues that are important for the proper resolution of criminal proceedings. N.M. Maksymyshyn emphasizes that during this investigative (search) action there is no need to comment or correct the interrogated, it is necessary to give them the opportunity to speak fully, and then by asking questions to supplement and detail gaps in their testimony and clarify information about the circumstances are essential to the case (Maksymyshyn, 2016).

It should be emphasized that asking supplementary, control questions to the interrogated is the exclusive right of the court and the parties to the criminal proceedings. For example, after interrogation of the victim (direct and cross) with the permission of the presiding victim in the order of priority may ask questions and other participants in criminal proceedings, as well as the presiding judge, other judges (Article 353 of the Criminal Procedure Code of Ukraine). However, to clarify and supplement the answers of the victim, the presiding judge may ask questions throughout the interrogation of the victim (by analogy with Part 1 of Article 351 of the Criminal Procedure Code of Ukraine) (Criminal Procedure Code Of Ukraine, 2012).

After the interrogation of a witness, a victim, an expert by the parties to the criminal proceedings, they may be asked questions by the presiding judge and judges (Part 11 of Article 352, Part 2 of Article 353, Part 2 of Article 356 of the Criminal Procedure Code of Ukraine). The presiding judge also interrogates the accused by the latter, which does not deprive him of the right to ask questions during the entire interrogation by the participants in the proceedings (Part 1 of Article 351 of the Criminal Procedure Code of Ukraine). Such powers of the presiding judge to examine evidence during a court interrogation are much broader than those of other participants.

In our opinion, such an order of interrogation of persons does not create obstacles for the court to take an active position in clarifying the circumstances of the criminal proceedings during the interrogation. We substantiate our position through the prism of the study of the category «activity» and «initiative».

As V.V. Vapnyarchuk emphasizes, it can be argued that the concepts of «activity» and «initiative» are close in meaning but not completely identical. Yes, not every active activity and not in all cases can be proactive. Intense activity is realized in a larger volume and more intensively (more vigorously than usual). For example, the court makes a decision at the request of the investigator, prosecutor (for example, on the application of a certain measure to ensure the proceedings, conducting a separate investigative (search) action). Such activities are intense, but not proactive (Vapnyarchuk, 2014).

Initiative activity is manifested in the fact that it is carried out at its own discretion, at its discretion, is not mandatory for the subject who carries it out, but the element of activity is present in it in connection with the implementation of certain energetic actions. In particular, when taking the initiative, a certain subject is thus active (does, although he could not do, that is, could remain passive). That is, initiative activity is a narrower category, an integral part of the intense activity of the court.

If during the trial there are contradictions between already interrogated participants in criminal proceedings, only the presiding judge has the right to appoint simultaneous interrogation of two or more already interrogated participants in criminal proceedings (witnesses, victims, accused) to determine the reasons for differences in their testimony. rules established by Part 9 of Art. 224 of the Criminal Procedure Code of Ukraine (Part 14 of Article 352, Part 2 of Article 353 of the Criminal Procedure Code of Ukraine) (Criminal Procedure Code Of Ukraine, 2012).

It is worth paying attention to the procedural order for clarifying the circumstances of criminal proceedings in the examination of written and physical evidence determined by the Criminal Procedure Code of Ukraine. Before the examination of material evidence, the presiding judge explains to the participants in the proceedings about their right to draw the court's attention to certain circumstances related to the thing and its inspection, as well as the right to ask questions about physical evidence to witnesses, experts, specialists. inspected. After clarifying the circumstances established during the criminal proceedings and verifying them with evidence, the presiding judge is obliged to find out from the participants in the proceedings whether they wish to supplement the trial and how exactly (Part 1 of Article 363 of the Criminal Procedure Code Of Ukraine) (Criminal Procedure Code Of Ukraine, 2012).

The provisions of the criminal procedure law determine the general rules for determining the authenticity of testimony, things and documents. For example, in order to verify the authenticity of documents, participants in criminal proceedings have the right to: 1) ask questions about documents to witnesses, experts, specialists; 2) ask the court to exclude them from the evidence and decide the case on the basis of other evidence or to appoint

an appropriate examination of this document (parts 2 and 3 of Article 358 of the Criminal Procedure Code of Ukraine) (Criminal Procedure Code Of Ukraine, 2012).

In case of discrepancies between the examined document and other evidence, the court, in order to find out the reasons for these discrepancies, has the right to conduct other procedural actions: mainly, the examination of witnesses and the appointment of an expert examination. As a rule, in case of discrepancies between the document and other evidence, the person who drew up this document is subject to interrogation as a witness. Determining the authenticity of documents, depending on their type, the court also has the right to appoint autographic, handwriting, phototechnical examination, technical examination of documents, examination of video and audio, etc. (Dekhtyar, 2014). In this case, participants in criminal proceedings have the right to ask the expert questions to be included in the court decision on the appointment of examination, except when the answers do not relate to criminal proceedings or are not relevant to the trial (Part 3 of Article 332 procedural code of Ukraine).

We agree with the position of M.I. Shevchuk, that lawful and admissible is also the activity of the court to examine the evidence, which is manifested in its ability to fill in the incompleteness of the study of specific evidence, which is caused by the passivity of the parties in its submission and examination in court, by more careful, comprehensive study of evidence. For example, the court may examine in more detail the objects and documents provided to it by a party or other participants in the proceedings; ask the interrogated witness additional, clarifying questions; consider it necessary to conduct an inspection of the scene; the court at the place of inspection may also ask questions to the participants in the criminal proceedings who take part in it (Shevchuk, 2015).

As rightly noted by O.V. Dekhtyar, in case of replacement of a judge in accordance with Art. 320 of the Criminal Procedure Code of Ukraine, the principle of immediacy is fully implemented, as the reserve judge was present during the direct examination of evidence by the court of first instance. In the case of replacement of a judge under Part 2 of Art. 319 of the Criminal Procedure Code of Ukraine, this principle is limited, because the perception of evidence by a judge who intervenes in the case, is not directly, but by reviewing the course of court proceedings and materials of criminal proceedings. Such conclusions of the scientist concern the replaced judge who before was not in the status of the reserve, and therefore could not personally perceive the circumstances of criminal proceedings investigated during trial. In the event of a replacement of a judge, the substitute judge shall be empowered to verify the affiliation, authenticity and sufficiency of the evidence, to obtain new evidence, thereby ensuring that all the circumstances of the criminal proceedings are clarified. (Dekhtyar, 2014).

It is worth noting the undeniable organizational influence of the chairman, on which Art. 321 of the Criminal Procedure Code of Ukraine entrusts managing the course of the hearing, ensuring compliance with the sequence and procedure of procedural actions, the implementation of participants in criminal proceedings their procedural rights and responsibilities, directing the trial to ensure clarification of all circumstances of criminal proceedings, eliminating it anything that is irrelevant to criminal proceedings.

According to Art. 94 of the Criminal Procedure Code of Ukraine, the court in its internal conviction, which is based on a comprehensive, complete, and impartial examination of all circumstances of criminal proceedings, guided by law, evaluates each piece of evidence in terms of relevance, admissibility, reliability, and the set of evidence - from the standpoint of sufficiency and relationship to make an appropriate procedural decision ... No evidence has a predetermined force (Criminal Procedure Code Of Ukraine, 2012).

Evaluation of evidence is final to address issues arising during the criminal proceedings, and the Criminal Procedure Code of Ukraine provides for the appropriate procedural procedure for participants in criminal proceedings in case of non-compliance of factual data with the criteria of relevance, admissibility, reliability. Evaluation of evidence, unlike verification, is not combined with any practical actions and is a purely mental, logical activity, the purpose of which is to determine the admissibility, relevance, reliability, value (strength) of each piece of evidence and the sufficiency of their totality to establish the circumstances in the subject of proof.

In the process of developing the theory of evidence as one of the directions of the criminal process, different approaches to defining the concept of evaluation of evidence have been outlined. Some proceduralists consider the evaluation of evidence as a statutory activity of subjects of knowledge (Strogovich, 1968). Other scholars understand the evaluation of evidence as a logical mental process, determining the value of the evidence collected to establish the truth (Lupinskaya, 1997). From a philosophical point of view, evaluation as an activity is a subjective relation to the object of cognition (Shinkaruk, 2002). The right authors are those who believe that the evaluation of evidence is not limited to the purely mental work of the subject of knowledge. It has internal (logical) and external (legal) sides (Gromov and Zaitseva, 2002). We believe that the evaluation of evidence can be defined as the statutory practical and mental activity of authorized subjects of criminal proceedings to determine the relevance, admissibility, sufficiency, reliability of evidence and their relationship to make a procedural decision.

One of the most important criteria for evaluating evidence is its admissibility. Inadmissibility of evidence is the antithesis of their admissibility. The inadmissibility of evidence is determined by the following criteria: obtaining evidence by unauthorized entities; obtaining evidence

from an improper source; violation of the procedure for obtaining evidence established by law. Obviously inadmissible evidence is evidence that: obtained by the pre-trial investigation body in a manner not provided by procedural law; received by the body of pre-trial investigation in violation of the procedure provided by procedural law; evidence obtained as a result of a significant violation of human rights and freedoms. In case of obvious inadmissibility of evidence during the trial, the court declares this evidence inadmissible, which entails the impossibility of examining such evidence or terminating its examination in court, if such investigation was initiated (Part 2 of Article 89 of the Criminal Procedure Code of Ukraine) (Criminal Procedure Code Of Ukraine, 2012).

The scientific literature has repeatedly emphasized that the court can never independently initiate the procedure of declaring evidence inadmissible during the trial, arguing that otherwise the principle of adversarial proceedings will be violated. The court must decide on the admissibility of evidence in the sentencing process, determining the reasons for which it declares this or that evidence inadmissible (Criminal Procedure Code of Ukraine, 2012). Scholars also rightly point out that to legislate for the court the right to initiate the procedure of declaring evidence inadmissible during the trial, the court can hypothetically become a hostage of its own activity, namely: the more persistently with its own intentions and initiative it will act during the examination of evidence, it will be more difficult for him to be in the role of an impartial arbitrator in the future when making a final decision in criminal proceedings.

The final assessment of the admissibility of evidence is made by the court in sentencing. According to the Criminal Procedure Code of Ukraine, it is the court that decides the admissibility of evidence during their evaluation in the deliberation room during the court decision (Part 1 of Article 89).

Judicial consideration of criminal proceedings, resolution of petitions filed during the trial by the parties, their substantiation, oral hearing of testimony of the accused, victim, witnesses, announcement of protocols of investigative (search) actions, conclusions of experts, specialists, content of other documents aimed at investigating criminal circumstances form an objective vision of what is done. Such an objective vision contributes to the formation of an inner conviction in the judge.

The law requires that the court consider all the circumstances of the criminal proceedings as a whole and, on that basis, develop its internal conviction to assess the evidence. Only in this case can he develop full conviction that certain factual circumstances have indeed occurred in the past. Yu.M. Groshevyi notes that the judge's inner conviction is a conscious need of the judge, the use of his own thoughts, views and knowledge. It is related to the legal consciousness of the judge, which is seen as a form of social consciousness that combines a system of views, ideas, ideas,

theories, as well as feelings, emotions and experiences. They characterize the attitude of people and social groups (including through actual behavior) to the existing and desired legal system (Groshevyi and Stakhivskyi, 2006).

Having systematized and analyzed the positions of researchers, we can conclude that the inner conviction - an element of mental activity for the study and evaluation of evidence, formed during the criminal case in essence, the judge's idea of how to resolve the dispute.

Therefore, the court remains solely responsible for resolving the issues provided for in Art. 368 of the Criminal Procedure Code (Criminal Procedure Code Of Ukraine, 2012). A conviction cannot be based on assumptions, it is passed only if during the court the guilt of the defendant in committing a criminal offense is proven (Dyakov, 2016).

Conclusions

Thus, the activity of the court to investigate the circumstances of criminal proceedings and their assessment under the laws of Ukraine is a complex practical and mental activity. The evaluation of evidence by the court can be defined as regulated by law its practical and mental activity as a competent subject of criminal proceedings to determine the relevance, admissibility, sufficiency, reliability of evidence and their relationship to make a procedural decision.

The most common procedural means of examining evidence in criminal proceedings are investigative (search) actions. The concept of «examination of evidence» by the court within the criminal procedural law in its essence and content almost coincides with the «assessment of evidence», because as a result of perception of certain procedural sources and mental activity of the judge new knowledge is formed, which allows to form judgments and inferences. At the stage of court proceedings, they are expressed in the form of procedural court decisions with the appropriate reflection in the text of such considerations and conclusions. The difference between these concepts is in the subject composition.

The court assesses the evidence independently, while being personally responsible for the decisions made. Evidence is investigated according to a certain procedure and with the participation of participants in criminal proceedings, who have the right to ask questions, draw the court's attention, make appropriate motions, and so on. That is, the «assessment of evidence» by the court requires personal direct perception of evidence as part of the materials of criminal proceedings by the court (judges), without direct and simultaneous perception of them by other participants in the proceedings. Evaluation of evidence, unlike verification, is not combined

with any practical actions and is a purely mental, logical activity, the purpose of which is to determine the admissibility, relevance, reliability, value (strength) of each piece of evidence and the sufficiency of their totality to establish the circumstances in the subject of proof. The court's assessment of reliability, as well as the assessment of the appropriateness of evidence and their procedural sources is a long process, which ends only at the time of formulating the final conclusions in criminal proceedings on the basis of the totality of evidence collected. The sufficiency of the evidence gathered in the case for a reliable conclusion in the criminal proceedings is determined by the internal conviction of the court.

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Status and directions of perspective of the development of legal education: analysis of international experience

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Abstract

The current situation of legal education is analyzed. In the modern world, quality legal education is a key component in ensuring the proper functioning of the entire legal system. Legal science began to appear fragmented and improved in ancient times. This is particularly true for Ancient Greece and later Ancient Rome, where legal doctrine and its practical application began to gain importance in society. Today, the field of law is closely related to the branches of public management and administration, as well as to the political sphere. Considering legal education in a broad historical context, researchers highlight its importance for everyday relationships between subjects of social relations. Thanks to the field of systematized knowledge about the essence, content, and characteristics of the law (i.e., jurisprudence), representatives of a society can obtain more information about the rules and mechanisms by which the relationship between them is arranged. It is concluded that legal education contributes to detailing the knowledge about the socio-political and social phenomena that surround us and provides this knowledge to citizens who need it.

Keywords: legal education; legal doctrines; jurisprudence; quality education; scientific basis.

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Situación y direcciones de perspectiva del desarrollo de la educación jurídica: análisis de la experiencia internacional

Resumen

Se analiza la situación actual de la educación jurídica. En el mundo moderno, la educación jurídica de calidad es un componente clave para garantizar el funcionamiento adecuado de todo el sistema jurídico. La ciencia jurídica comenzó a aparecer fragmentada y mejorada en la antigüedad. Esto es particularmente cierto para la Antigua Grecia y más tarde la Antigua Roma, donde la doctrina legal y su aplicación práctica comenzaron a ganar importancia en la sociedad. Hoy en día, el campo del derecho está estrechamente relacionado con las ramas de la gestión y administración públicas, así como con el ámbito político. Considerando la educación jurídica en un contexto histórico amplio, los investigadores destacan su importancia para las relaciones cotidianas entre los sujetos de las relaciones sociales. Gracias al campo del conocimiento sistematizado sobre la esencia, el contenido y las características del derecho (es decir, la jurisprudencia), los representantes de una sociedad tienen la oportunidad de obtener más información sobre las reglas y mecanismos mediante los cuales se arregla la relación entre ellos. Se concluye que, la educación jurídica contribuye a detallar el conocimiento sobre los fenómenos sociopolíticos y sociales que nos rodean y brinda este conocimiento a los ciudadanos que lo necesitan.

Palabras clave: educación jurídica; doctrinas jurídicas; jurisprudencia; educación de calidad; fundamento científico.

Introduction

Today it is impossible to imagine the normal development and functioning of the state and its individual structural elements without a systematic and high-quality improvement of the labor resources of this country. The issues of improving the quality of personnel is becoming especially important not only for Ukraine, but also for every modern democratic state (Shvets, 2018). In the context of considering the social importance of legal education, as well as assessing its impact on the development of various spheres of public life, it is necessary to analyze not only the current situation in this area in Ukraine, but also to study the situation in developed countries. Such an analysis will be much deeper and more useful for society, because considering the problems and issues that form the basis of the subject of this article, it is necessary to take into account examples of historical experience. First of all, it concerns the opportunity to better understand all the features of the current state of legal education both in Ukraine and in

the world by studying their historical background. For example, one of the top priorities for modern researchers is to understand why the legal field is so closely linked to governance, coercive mechanisms, and other elements of power..

Legal education cannot be covered only by the information sphere. It should promote the formation of a high level of legal awareness and legal culture of citizens, education of strict compliance with current legislation, lawful conduct of the individual and the acquisition of knowledge and skills to navigate in the legal space. That is why the Ukrainian state needs to carry out a reform in the field of education, one of the directions of which should be a careful study of the basics of law by all subjects, not just those who study. Legal education should be carried out in theoretical, practical, preventive, informational, scientific, educational and consulting areas. It is important to create a continuous system of legal education, starting with preschool educational institutions, followed by continuation in secondary, higher and other educational institutions (Makarova, 2010).

It is important to remember that, according to many experts, the quality of legal education and the level of effectiveness of its practical application depend on a number of reasons and factors. In particular, the quality of jurisprudence depends on the overall level of quality of educational services in a given country. Jurisprudence can be influenced by the political situation in the country, the corruption factor, as well as certain problems related to the functioning of various power-bureaucratic mechanisms within the state system.

It should be noted that many specialists paid attention to the modern state of legal education in different states (including Ukraine). Also, many of them not only studied the problems of the current state of jurisprudence, but also suggested possible prospects for its development.

The purpose of the article is to determine the characteristics of the current state of legal education in Ukraine and in the world, as well as to focus on the most effective methods and means of further development of jurisprudence. Examples are the successful development of legal education and science in developed and democratic countries.

1. Methods and materials

During the study, the authors used a system of methods of scientific knowledge, namely general scientific (analysis, synthesis), private methods of scientific knowledge used in many sciences (comparative analysis), as well as special legal methods (historical and legal, formal and legal).

The authors applied the philosophical (universal) method of cognition at all stages of the cognitive process, which allowed to emphasize the importance of legal science for modern society. This fact is generally accepted, because every day people enter into legal relations with each other, most of which require legal knowledge. This is also further confirmed by the use of historical and legal method, which showed that legal education has ancient roots, as it was known since ancient times (Ancient Greece).

The general provisions of introduction and use of legal knowledge in public legal relations are investigated with the help of methods of analysis and synthesis, the political course of the state on the development of legal branch of knowledge is studied.

Formal-legal method has become indispensable in interpreting the content of basic concepts, their basic characteristics, as well as in the interpretation of legal norms governing legal education.

The system method revealed the general properties, connections and patterns that arise when using legal knowledge acquired during training in the field (field of knowledge) «Law» (in the general sense, this is legal education). In addition to identifying the problems faced by states in the development of legal education in connection with the development of public relations, the comparative legal method has helped to trace the current state of the legislation on the regulation of legal education. A logical addition was the application of the method of generalization and logical-legal method, which highlighted the main problems and vectors of legal education in Ukraine, as well as formulated proposals for further improvement of legal education (reflected in the conclusion).

2. Results and discussion

Studying the content, nature and characteristics of the current state of legal education in Ukraine, researchers have largely agreed that domestic jurisprudence suffers from a number of factors that stop and complicate its development and effective functioning among the subjects of society.

First, it should be noted that many of the researchers, both domestic and foreign, studying the peculiarities of the functioning of legal education in Ukraine, argued that the above factors that have a negative impact on legal education can be divided into two groups (Meyer, 2020). The basis of one group is made up of factors inherent in legal education and science as such, and the second group consists of a number of negative features that are inherent not so much in the domestic jurisprudence itself as in the entire educational industry of Ukraine in general.

To the second group, some researchers tend to add features that are more characteristic of the state system of Ukraine and Ukrainian society as a whole. For example, detailing the above, we note that the reasons specific to the second group are usually recognized by scientists from various fields as the main national problems of Ukraine. These include, in particular, corruption as one of the main deterrents that harm every sector of domestic society (UNESCO, 2019).

Given that corruption is an existing (even acute) problem for all, without exception, elements of public life, it is also present in the provision of educational services, including in the field of law. It is claimed that obtaining legal education in higher educational institutions of Ukraine poses high risks of meeting with corruption schemes and requirements. Problems that are somehow related to corruption for almost thirty years since the proclamation of the independence of Ukraine, have not found a successful solution, i.e. have not been eliminated.

Scholars rightly point out that one of the most important reasons that the domestic society, including the legal sector, suffers from corruption, is the long stay under the rule of authoritarian, despotic regimes (Pivovarov, 2019).

With a few exceptions, Ukraine was not under democratic rule until 1991. Instead, the despotic rule of Russian tsarism and the 70 totalitarian years of Soviet rule played a key role in Ukraine's current unsatisfactory state of legal and other education. In general, it is believed that it was during the Soviet era that legal education in Ukraine was finally brought to a state in which it had remained almost unchanged until recently. Only in the last few years in the domestic sphere of jurisprudence and law enforcement have begun to take steps aimed at a real departure from the Soviet past and the transformation of legal education into a tool for ensuring and protecting the democratic values of man and citizen.

Some scholars rightly point out that despite the adoption in the first years of independence, *de jure* democratic slogans and their transformation into the content of official documents, their practical implementation was much more difficult or impossible (Hess and Hunter, 2018.). It is worth noting the rather democratic and human-centered Constitution of Ukraine, which in its formal content and description is recognized as one of the most democratic constitutions in the world. However, according to the observations of numerous researchers, many provisions and principles enshrined in the domestic constitution, in reality, are either not provided or are not fully implemented (Lindgren, 1999).

With regard to legal education, it can be argued that until recently its declared focus on the protection of fundamental rights, freedoms and legitimate interests of man and citizen was purely formal. In fact, based on

numerous reliable facts, we state that in the field of domestic jurisprudence, in particular in specialized schools, the legacy of the Soviet era prevailed. Namely, it is a question of the fact that as a result of long-term authoritarian rule in the past, in educational institutions, in particular among the teaching staff of educational institutions, unspoken principles and rules were formed that protected the legacy of the totalitarian corruption system (Bowman III, 2017).

One of the factors of such a corruption system is the long-term presence in positions (including leading) of persons who were appointed to these positions during the existence of the Soviet Union or in the first years of the independence of Ukraine. This state of affairs is currently quite typical for the post-Soviet countries, especially Russia, Belarus, Ukraine and some Central Asian countries. For example, until recently, it was not uncommon for these countries to hold long-term positions as university rectors and heads of individual educational units. In practice, this was a circumstance that was very detrimental to the development of the educational institution. After all, if a person who grew up during the domination of a corrupt, authoritarian regime in the state, got to power, in most cases he prefers to get the maximum benefit from his position, acting in his own favor, rather than in favor of its accountable structure (Bilionis, 2019). In other words, when the rector of a university, including a legal higher educational institution, has held his post for more than ten years, there is a strong possibility that he will create a group (a certain team) of persons whose actions will be subject to violation of articles of the current legislation of Ukraine.

On many real examples, researchers of such processes have established that the result of the above conditions is, first of all, the absence of positive development of the university and, on the contrary, its gradual and sometimes rapid degradation. The absence of changes in the management staff of the institution of legal education is recognized as an extremely negative phenomenon due to the fact that there is a real risk of orientation of the staff of the educational institution not towards achieving high-quality results in their direct activities, but towards their loyalty and even devotion to the management of the educational institution. Also, corruption under such conditions is consistently high, and the presence of the same persons in the leadership of an educational institution allows numerous employees of this institution to abuse their positions, demonstrating their loyalty to the leadership (Gary, 2017).

This problem is one of the main dangers for the development of legal education in Ukraine. It will be fair to note that although over the past few years in the domestic educational system, including the legal one, certain changes and reforms related to the introduction of Western models of the functioning of education have been carried out, they mostly were «cosmetic». In fact, qualitative changes and reforms have not yet been carried out, and

their proper implementation is a direct way to a powerful improvement of the legal education system in Ukraine and its greater interaction with the educational systems of developed and democratic countries in Western Europe and North America. That is, the final overcoming of the corrupt and low-effective «legacy» that was left by the Soviet domination, this is the fundamental direction in the development of the Ukrainian legal education system in modern realities (Wald, 2018).

As for other areas (methods and tools) of improvement and development of legal education in Ukraine, it is emphasized that it is important to introduce into the domestic, educational legal system programs and measures that will be able to really improve the state of this system. First of all, it is about the tools and methods of training that are currently used in developed countries. The term «developed» refers to states that are successful, among others, in matters related in one way or another to jurisprudence and law enforcement.

Many authoritative researchers have substantiated and proved that the concept of «law» has much more in common with the concept of «democracy» than it seems at first glance. They state that without the existence of a real democratic system within a state, the real rule of law cannot be ensured (Areen, 2017). And vice versa, after the successful establishment and further development of a liberal-democratic regime in a certain state, which will subsequently establish an independent and impartial judicial system and other legal institutions, these legal mechanisms will protect democracy in the state.

In a broader sense, we have observed and continue to observe how democratic state-legal mechanisms in some European countries, as well as in the United States (especially during the presidency of Donald Trump), reliably protect the state, its democracy, social and political-legal order from the encroachments of populist politicians who, although they came to power in a democratic way, are trying to undermine the existing rules and regulations (Deborah, 2015). At the same time, it can be argued that all claims that the rule of law can exist and function freely in states with authoritarian political regimes are complete fiction. After all, in the absence of opportunities to bring to justice the governing bodies of the state, the legal system will not be fair.

Authoritarian regimes often tend to falsify the very terms «rule of law», «law and order» and «state of law». For them, the proper rule of law is the complete submission of all subjects of society to their own dictates (Finkelstein, 2015). However, the vast majority of scholars argue that this perception of law is wrong and «tarnished». According to their views, the main task of law and, accordingly, legal education, is reliable protection and proper provision of the rights, freedoms and legitimate interests of each subject of public legal relations without exception. In this context, we detail

that in the modern world, every legal doctrine in a developed and democratic country, or in states that prefer to approach this status, must contain some clarification of the high and crucial importance of democracy and the true rule of law for security and welfare of the state, its citizens, power and legal mechanisms, state institutions, etc. However, as emphasized above, legal doctrines must not only point to the obvious superiority of democratic and legal values, but also reveal exactly how these benefits can be achieved.

Thus, modern scientific and educational works and publications in the field of law should be based largely not only on the theoretical validity of the above values and positions, but they should also offer specific ways to qualitatively solve a problem in domestic or international law (Pistone, 2015). For our part, we believe that concrete ways to increase the efficiency of the domestic legal system, and along with these «engines» of its development, will be a few things that must be done well, but as soon as possible, without undue delay. First, we are convinced that the so-called «legacy» of the former times of authoritarian and totalitarian rule must be finally overcome in Ukraine. After all, without full fulfillment of this condition, the further path towards the development of domestic legal education, together with the development of the entire legal field as a whole, will be greatly complicated, or impossible at all.

Under the so-called «legacy» of the past, we tend to understand corruption as the greatest threat not only to the legal sector, but also to society as a whole. Also a significant and completely undesirable risk is the return of the political regime back to authoritarianism (especially to a one-man dictatorship) (Minow, 2016). Of course, since 2014, Ukraine has taken many positive and correct steps towards ensuring within the state the basic principles of democracy, the rule of law and the responsibility of state and local leadership to citizens, i.e. their accountability to society. However, according to the ratings of independent Western agencies, there are still high risks in Ukraine of losing some democratic enrichment due to the protracted economic crisis and apparent political instability. Due to these factors, the work on the development of legal education is extremely difficult, but it can be carried out qualitatively, and therefore must be carried out as one of the integral elements of the general reform of the state in a liberal-democratic, legal direction.

In addition, attention should be focused on the need to introduce into the curriculum for future domestic lawyers techniques and practices that are successfully taught legal knowledge in the developed countries of the West. One of the most useful of these programs, we define the methodology for solving the so-called «cases» by students, that is, tasks that are similar to real situations in the field of practical application of law (Sunstein, 2015).

Given the above, we argue that despite some problems and issues related to the combination of foreign curricula with domestic specifics, they should be introduced into the legal education of Ukraine.

Conclusions

Legal education in Ukraine, despite its relative successes in certain areas, as well as the presence of truly professional specialists in its ranks, is only at the beginning of its movement to eradicate the ineffective legacy of the past and to achieve true rule of law. In particular, we emphasize that relieving the domestic, legal education system from the burdens of past and present problems that it currently faces is a priority. It should be noted that such issues include corruption as a major factor that is an obstacle to the quality development of the domestic sphere of law, including its educational and scientific element.

The importance of overcoming corruption and other negative manifestations precisely in educational institutions (mainly universities and academies) is also argued by the fact that the vast majority of domestic lawyers, in aggregate, carry out the lion's share of all research and scientific publications related to jurisprudence, work in higher educational institutions of legal profile, or at separate law faculties of public and private universities. This fact explains well that the elimination, or at least a significant reduction in the level of corruption in legal schools, can directly affect the entire field of law in Ukraine, radically changing the rules and principles of its operation and making it much more productive and coordinated. It is added that active cooperation with Ukraine's partners and allies will not be superfluous for this purpose.

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Tactical and procedural features of the search in the investigation of crimes against public security

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Abstract

Based on the review of legislation and other scientific sources, the results of the generalization of investigative and judicial practice, the legal and organizational principles of search in criminal proceedings in the investigation of crimes against public security are studied. The study used both general scientific methods to determine certain legal categories that characterize the search in the investigation of crimes against public safety, and special methods. It is based that the conditions of search in the criminal process in the investigation of crimes such as the creation of a criminal organization, assistance to members of criminal organizations and cover-up of their criminal activities, banditry, terrorist act, illegal handling of weapons, ammunition, or explosives, etc. are generalized and substantiated. It is concluded that the fulfillment of such conditions during registration is established by the Law, which determines the admissibility of the evidence obtained in the subsequent investigation. The faculties of the researcher and the employees of the operating units are highlighted, as well as the algorithm of their actions during the start and realization of the search.

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The procedural procedure for carrying out a search in the investigation of crimes against public security was considered.

Keywords: crimes against public security; criminal proceedings; search for evidence; faculties; researcher.

Características tácticas y procesales de la realización de un registro en la investigación de delitos contra la seguridad pública

Resumen

A partir de la revisión de la legislación y otras fuentes científicas, se estudian los resultados de la generalización de la práctica investigativa y judicial, los principios legales y organizativos de búsqueda en procesos penales en la investigación de delitos contra la seguridad pública. El estudio utilizó tanto métodos científicos generales para determinar ciertas categorías legales que caracterizan la búsqueda en la investigación de delitos contra la seguridad pública, como métodos especiales. Se fundamenta que las condiciones de allanamiento en el proceso penal en la investigación de delitos tales como la creación de una organización delictiva, asistencia a miembros de organizaciones delictivas y encubrimiento de sus actividades delictivas, bandidaje, acto terrorista, manejo ilegal de armas, municiones o explosivos, etc. están generalizados y fundamentados. Se concluye que el cumplimiento de tales condiciones durante el registro lo establece la Ley, que determina la admisibilidad de la prueba obtenida en la investigación posterior. Se destacan las facultades del investigador y los empleados de las unidades operativas, así como el algoritmo de sus acciones durante el inicio y realización de la búsqueda. Se consideró el procedimiento procesal para la realización de un allanamiento en la investigación de delitos contra la seguridad pública.

Palabras clave: delitos contra la seguridad pública; proceso penal; búsqueda de pruebas; facultades; investigador.

Introduction

Public safety creates an atmosphere of the public peace, an atmosphere of confidence in the reliability and effectiveness of security, its guarantee, a sense of security that can be relied on, in which they are confident, which is reassuring. The downside of the need for public safety is the state of public unrest, concern for reliable protection of the community, feelings of

insecurity from criminal encroachments, the presence of danger, threats to life and health, property, loss of security, lack of it, fear for life and health.

Crimes against public safety are provided by Section IX of the Special Part of the Criminal Code of Ukraine (Articles, 255-270-1) (CRIMINAL CODE OF UKRAINE, 2001), generally dangerous, guilty (international or negligent) acts (actions or omissions) that violate safe conditions. vital activity, protection from physical and psychological threats and create a general danger of death or other serious consequences or cause such consequences. Their generic object is public (general) security - safe living conditions, health and property (property), their protection, which ensures the prevention and neutralization of threats of causing them significant harm, and the direct objects are areas (subsystems) components of public safety due to sources of increased danger.

The subject of these crimes are weapons, ammunition, explosives, radioactive materials, explosive devices, nuclear explosive devices that disperse radioactive material or emit radiation, flammable and corrosive materials, and another chemical, biological, explosive materials, and other dangerous objects. for the environment. These items are intended or can be used as a means of destroying a living target, destroying or damaging the environment. In view of this, it is extremely important in the investigation of crimes against public safety to conduct investigative (search) actions aimed at obtaining (collecting) such evidence or verification of already obtained evidence in a particular criminal proceeding.

However, it should be noted that the conduct of investigative (search) actions are often accompanied by restrictions on human rights, which provides for coercive influence applied to the participants of investigative (search) actions by authorized bodies and persons in order to ensure procedural order, criminal procedural evidence (Kun, 2017). The Criminal Procedure Code of Ukraine not only proclaims the requirement to respect the rights and legitimate interests of participants in criminal proceedings but also defines the duty of the investigator, prosecutor to create conditions and ensure the opportunity to exercise their rights, implement them (Galagan and Dulskiy, 2019).

One of the most effective and at the same time the most difficult ways to find evidence is a search. Proper conduct and registration/recording of the obtained data is an extremely important component of criminal proceedings. There is an objective need to develop practical recommendations for improving the efficiency of investigative bodies to collect and verify the evidence by conducting a search, which will help to avoid errors during its conduct. Thus, the tactical and procedural features of this investigative (search) action in the investigation of crimes against public safety will be the subject of our study.

1. Methodology of the study

The study used both general scientific methods (observation, description, comparison) to determine certain legal categories that characterize the search in the investigation of crimes against public safety, and special methods, in particular: systematic analysis, as well as system-structural and formally logical - provided an opportunity to clarify the legal nature and essence of the search; thanks to the comparative legal method, the views of scientists on certain aspects of procedural and organizational features of the search were analyzed; thanks to the formal legal method, the provisions of the Constitution of Ukraine, the Criminal Procedure Code of Ukraine, other laws were investigated, the content and meaning of the used concepts and terms were clarified, conclusions and proposals on their interpretation during the search were substantiated; structural and functional - was used to analyze the procedural order of the search, and statistical - in order to summarize the results of the study of materials of criminal proceedings; With the help of modeling and forecasting, specific proposals were formulated for the organization and tactics of searches in the investigation of crimes against public safety.

2. Analysis of recent research

Despite the significant number of studies on the search (Belkin, 2001; Kohutich, 2008; Shumylo, 2013; Komarova, 2019; Chornous, 2021; Stakhivskiy, 2009; Zaitsev *et al.*, 2020), some issues related to this investigative action in the investigation of crimes against public safety remain unresolved. Today there is a need, taking into account current trends in the development of criminal procedural relations and criminology, a new theoretical understanding of the legal nature of the concept and the concept of search; clarification of the powers of search participants and legal guarantees of their implementation; determination of organizational and tactical features of carrying out the specified investigative (search) action, the establishment of things and documents which need to be withdrawn; the procedural impossibility of conducting a search at the initial stage of investigation of crimes against public safety in the absence of sufficient information about the person being searched, registration of search results, etc. Active use of search in criminal proceedings of this category is a permanent, but constant improvement of its legal regulation, and, at the same time, the presence of legal and organizational problems in the practice of bodies and persons conducting searches and involved in its conduct, determine the feasibility of this investigative (search) actions in the investigation of crimes against public safety.

3. Results and discussion

Search as an investigative (search) action in the system of means of obtaining evidence in the investigation of crimes against public safety is one of the most effective among other investigative (search) actions. This is due to the fact that its implementation ensures the recording of traces of a criminal offense. The main tasks of the search conducted at the initial stage of the investigation of crimes of this category are: to establish the location of persons involved in the crime; finding money, valuables, vehicles, computer equipment, other property, as well as weapons and objects used as instruments of crime, clothing, shoes and other things of the suspects, means of communication used during the crime, other things, and documents, belonging to both criminals and victims and relevant to criminal proceedings. Items that have been withdrawn from circulation by law are subject to seizure regardless of their relation to criminal proceedings.

In accordance with Part 1 of Art. 234 of the Criminal Procedure Code of Ukraine search is carried out in order to identify and record information about the circumstances of a criminal offense, finding a weapon of a criminal offense or property obtained as a result of its commission, as well as establishing the location of wanted persons (Criminal Procedure Code, 2012). First of all, it is worth noting the lack of a legally defined purpose of the search - the possibility of conducting it to find, including items and documents relevant to criminal proceedings or securing a civil lawsuit, which has repeatedly emphasized scientists (Strakhova, 2014).

In the context of the problem we are studying, there is no doubt about the need to improve the legal regulation of the search by expanding the purpose of its search - finding other items and documents relevant to criminal proceedings or securing a civil lawsuit (Tertishnik, 1997).

After all, this is the goal of the investigator in most cases of investigating crimes against public safety. The investigator obtains the factual data on the basis of which the decision to conduct a search in the investigated criminal proceedings is made, first of all, from procedural sources by conducting investigative (investigative) and covert investigative (investigative) actions. At the same time, it is impossible to ignore the indicative information obtained as a result of operative search activities (Kikinchuk *et al.*, 2018).

The most important conditions for a successful search in case of a crime against public order by a group of persons are the availability of complete and accurate information about the items sought, the availability of technical means that can store both video and voice information on advice, instructions on the actions of individuals with the illegal shipment, technical devices for the production of forged documents, seals, etc. Therefore, careful preliminary preparation for the search should be carried out (collection of

indicative information about the objects of the future search and persons to be searched, correct selection of search participants, and preparation of the necessary technical means). However, when conducting a search at the initial stage of an investigation, full compliance with these conditions is often impossible. At the same time, delaying a search can lead to the irreversible loss of valuable evidence that can be destroyed, relocated or hidden.

Based on the general provisions on search tactics set out in the forensic literature, it is possible to formulate certain rules for conducting a search of crimes against public safety: 1) if there are sufficient grounds to believe that the crime was committed by members of an organized criminal group several objects (requires the creation of several investigative teams); 2) provide access to the search object; 3) the head of the investigative task force should personally distribute powers among its members, explain their rights and responsibilities; 4) if necessary, prohibit those present during the search to make telephone calls and any contacts; 5) warn about the use of technical means of fixation.

When conducting a search, the provisions of the Criminal Procedure Code are subject to unconditional execution, according to which a search of a person's home or other property based on a decision of an investigating judge must be recorded by audio and video recording (Part 10 of Article 236) (CRIMINAL PROCEDURE CODE OF UKRAINE, 2012). After all, in accordance with Part 6 of Art. 107 of the Code of non-application of technical means of recording criminal proceedings in cases where it is mandatory, entails the invalidity of the results obtained as a result of the procedural action (CRIMINAL PROCEDURE CODE OF UKRAINE, 2012).

Given that a search is a complex and time-consuming investigative (search) operation, the prosecutor must involve a specialist when planning the investigation. When planning a search, he should consider the activities that a specialist or group of specialists may carry out during the search. It should be taken into account: whether there are types of work that are impossible or difficult to perform without the participation of this person; whether there is a need to study a complex situation that requires the use of special knowledge; whether a significant amount of work will be carried out, part of which can be performed by a specialist; whether there is a need to perform work that requires high qualification. The need to involve a certain specialist during the search should be carefully considered, as the search may be ineffective (Yaremchuk, 2016).

The success of a search is largely determined by the thorough preparation for it. Preparatory measures for the search include a collection of indicative information (about the place of the search, about the persons who are planned to be searched, about the nature of the searched items); determination of search time; selection of search participants; preparation

of technical means of fixation; study of material evidence found before the search in the course of other investigative (search) actions.

Training may consist of conducting investigative (search) actions and other activities in order to obtain information about: a) the identity of the searched person, his lifestyle, connections, daily routine, in particular, information about the living conditions and upbringing of the minor, his family and circle of acquaintances); b) the place of the search (location of the premises, the situation, the presence of a homestead, garden, utility rooms, the presence of hiding places); c) wanted items, as well as whether the suspect could not transfer them for storage to neighbors, acquaintances, relatives or stored in public or non-residential premises (not being able to hide certain items at home, minors seek help from peers, and not only accomplices in the crime, but also comrades, friends or just acquaintances (Komarov, 1972).

Based on the information received, the investigator decides who should be involved in the search, what technical means can be used during the search. The search must involve operatives, whose tasks will be to protect the place of the investigative (search) action, to assist the investigator in inspecting certain premises or areas, as well as to monitor the psychological reactions and behavior of the searched person, because the teenager such age traits as hyperexcitability, lack of self-control, less than an adult, can control their emotions and experiences. To strengthen the emotional impact will help the use of tactics «verbal intelligence», when the investigator announces his intentions, checking the reaction of the searched.

For the correct organization of the expert's work, it is necessary to define forms of his help. Based on the object of search and the object of perquisition, the specialist helps the investigator to choose the order of this investigative (search) action. When choosing the tactics of involving a specialist in the search should take into account: what type of perquisition will be conducted (premises, terrain, vehicle, hiding place, person); an object of search (documents, tools used to transport persons, personal belongings, as well as other items that are important for establishing the circumstances of the crime); the subject of the search; the purpose of the search; which specialist should be invited; invitation of several specialists to conduct a search; the situation in which the search will be carried out (based on the available materials of the criminal proceedings); whether it will be an additional, repeated search; involvement of a specialist in conducting a tactical operation «group search».

Thus, during a search of the organizer of the illegal smuggling of persons across the state border, it is desirable to involve a specialist in the field of computer technology, whose participation will seize a variety of equipment that may contain important information about the organization of the crime. In addition, the specialist will help to avoid the seizure of equipment

that does not contain information related to the investigation. A specialist in the field of computer technology can assist in finding data contained in e-mail archives, hard drives, other media and prevent the destruction of information after turning off a computer or other digital device (Chernyavsky *et al.*, 2017).

As a specialist, in some cases it is advisable to invite a forensic inspector, whose task will be the use of various search devices, fixing the technical means of the detected caches and found objects. Sometimes a search dog should be used to search for certain items, as well as a person suspected of robbery (for example, an accomplice). Thus, the assistance of a specialist in conducting a search in the investigation of crimes not only helps to find and seize weapons and objects that will be the subject of expert research from the direct perpetrators of illegal smuggling of persons across the state border but also to collect information about persons who are coordinators or organizers of the crime.

According to the analysis of the materials of criminal proceedings, in practice, there are many cases when investigators during a search in criminal proceedings on the grounds of crimes against public safety do not comply with the procedural requirements of the Criminal Procedure Code of Ukraine. As a result, this has a negative effect on the effectiveness of the taking of evidence in criminal proceedings in this category, as the facts obtained as a result of the relevant searches cannot be recognized as admissible evidence. Thus, on April 15, 2020, the Criminal Court of Cassation of the Supreme Court in case № 753/21466/18 satisfied the defense's cassation appeal, finding that the expert's conclusion was derived from inadmissible evidence. In the cassation appeal, the defense counsel noted that without the proper legal assessment of the courts of both instances was the fact that during a search of the residence of a person conducted in violation of the Criminal Procedure Code, resulting in a protocol and video recording of the investigative (search) action. the conclusions of the examinations derived from them were declared inadmissible evidence, two signal pistols were also seized, one of which, according to the conclusion of the forensic ballistic examination, was recognized as a firearm. However, this expert opinion cannot be considered admissible evidence and is the basis of the accusation, as it is derived from inadmissible evidence - a search report, and the courts' reference to the fact that the convict voluntarily gave him a firearm and confirmed by the court of the first instance that he kept these weapons without the permission provided by the law is not based on case materials. The court overturned the decision and ordered a new hearing in the appellate court (RESOLUTION OF THE SUPREME COURT OF UKRAINE: CRIMINAL COURT OF CASSATION, 2020, Case No. 753/21466/18).

Indicative in this case are the illegal actions of the investigator in the criminal proceedings № 12017040440002016, who carried out a search of V.'s apartment without video recording, and the seizure of weapons - without witnesses. In addition, during the search, the investigator left the premises together with the found hunting weapon «Saiga 12 K», which was later found to make structural changes in order to acquire the signs of a firearm (CRIMINAL PROCEEDINGS. 2017. № 12017040440002016). In addition to the above, it is worth mentioning the violation of the rights to the inviolability of the home of the person who is its tenant. In situations where a person is not a homeowner, but only a user, the question arises: from whom to obtain consent to inspect the premises. The Supreme Court in its decision № 346/7477/13-k of 31.10.2019 notes that investigative actions with the permission of the owner of the apartment in the part of the apartment rented by the person violate the inviolability of the latter's housing (RESOLUTION OF THE SUPREME COURT OF UKRAINE, CRIMINAL COURT OF CASSATION, 2019, No. 346/7477/13-k.).

We share the position of S.V. Ilyuk, that in the procedural legislation it is necessary to detail the concept of another possession, which is owned by a legal entity, as the property can be an integral property complex. Under such conditions, the question arises as to the legality of the search permit for the entire property complex or the identification of specific objects from one complex that are subject to search. That is why determining the part of the ownership of the legal entity where the search is planned requires concretization and legislative regulation (Ilyuk, 2020).

Analysis of the state of investigation of crimes of this category shows that in the vast majority of cases the search is carried out in the home, other property of the person (apartment, basement, country house, garage, etc.) (83%), less often - in the office, car (17%). At the same time, the person is detained in the room, the search of which was authorized by the court. Under such conditions, the investigator has the right to search a person following the provisions of Part 5 of Art. 236 of the Criminal Procedure Code of Ukraine. However, in practice, problems arise when a person is detained in a room or property owned by another person whose search warrant has not been obtained, or when the person is in a publicly accessible place.

Given the lack of regulation of such situations, the investigator may conduct a search, applying the provisions of Part 3 of Art. 233 of the Criminal Procedure Code of Ukraine, on the grounds, for example, direct prosecution of a person suspected of committing a crime. However, immediately after such actions are taken in accordance with the same norm, the prosecutor or investigator, in agreement with the prosecutor, is obliged to apply to the investigating judge for a search. Otherwise, the evidence established as a result of such a search will be inadmissible.

The defense counsel's request to participate in the investigative (search) action must be mandatory for the investigator. A person whose home is searched, regardless of whether he or she is in the procedural status of a suspect or a witness, demands that he or she be entitled to protection. The absence of a report on the investigative (search) action should be considered as a significant violation of the right to defense (Milova, 1998). If previously the right to legal assistance during a search at the stage of pre-trial investigation could be used only by a suspect, now it can be counted on by other persons whose interests are affected by this investigative (search) action, including the homeowner. The investigator or the prosecutor has no right to prohibit the participants of the search to use the legal assistance of a lawyer or representative. Thus, the investigator, the prosecutor is obliged to allow such a lawyer or representative to be searched at any stage of its conduct (Part 3 of Article 236 of the Criminal Procedure Code of Ukraine) (CRIMINAL PROCEDURE CODE OF UKRAINE, 2012).

When the investigation is carried out «in hot pursuit», the search is carried out immediately. The time of the search should be chosen so that it provides the easiest access to the searched premises, territory, corresponds to the period of the most probable location of relevant persons and objects at the search site, creates favorable conditions for search, and complicates counteraction by interested persons.

A search usually begins with an overview of the object being searched. For example, when investigating the illicit trafficking of a weapon during a search of the search site, its features, the most probable places of storage, processing, and manufacture of weapons are identified, and suspicious areas are identified that require particularly careful investigation. The behavior of the searched persons should be taken into account when determining possible places of shelter. If the investigator has information about the location of weapons, ammunition, explosives or explosive devices, obtained as a result of operational and investigative measures, it is better to inspect the place at the end of the search (Zvarygin, 2013).

It is advisable to search the room clockwise or counterclockwise so that the survey is thorough and carried out from object to object, from one room to another. The search should begin with non-residential premises: basements, barns, attics, etc., and then proceed to the search of residential premises. The whole room is subject to careful inspection, because, for example, weapons are often stored in various hiding places, which can be a variety of household items. In each case, it is necessary to focus on the nature of the situation and the place of the search.

When searching the area, which may be a homestead, yard, garden, or other areas, you must first pay attention to the existing structures (cellar, barn, well, etc.), and then to objects such as haystacks, stacks of firewood, tree hollows, etc. During a search of outbuildings, bullet casings, bullet

marks in walls and boards may be found in the yard, which may indicate the use of weapons by the suspects. In this case, even if the weapon is not found during the search, the bullet casings are found, the bullets must be removed, so in the future they can be used to identify the weapon, to confirm the version of criminal intent.

If during the search the found weapon is investigated in a certain way. Yes, S.V. Denisyuk and V.Yu. They whisper that it is necessary to indicate the type, type of weapon, system, brand, number, size, quantity, brand of the manufacturer. The investigator should only indicate the data he sees on the weapon. When describing the weapon, the caliber is also indicated in the protocol (Denisyuk and Shepytko, 1999).

During the search of the office premises, the workplace of the searched person is first inspected. The hidden caches, weapons, and ammunition must be photographed or videotaped, as well as a layout of the hiding places or places of storage of weapons. If during the search there was an attempt to destroy or hide weapons, ammunition, this must be noted in the report. In some cases, research is quite effective.

It should be noted that, despite the effectiveness of the search in identifying evidence, it is often superficial: the entire area to be searched is not investigated, no attention is paid to the detection and seizure of other items relevant to criminal proceedings. The search reports do not fully describe the detected instruments of the crime, weapons and other material media, do not specify in detail the location of the evidence, and so on.

In addition to a search of a person's home or other property, according to the law, another type of search can be distinguished - search of a person (Part 3 of Article 208, Part 5 of Article 236 of the Criminal Procedure Code of Ukraine). However, its normative regulation in the Criminal Procedure Code of Ukraine is not fully regulated. Therefore, it is quite difficult to conclude on the grounds and procedure for this procedural action, which leads to difficulties in law enforcement. In particular, as L.D. Udalova, the question of the possibility of conducting a search of a person remains open, if he was not detained or is not in the home or other property in which the search is conducted (Udalova, 2013). No less relevant are these issues regarding the investigation of crimes under Art. 2631 of the Criminal code of Ukraine. Currently, the law provides for only two cases for conducting a search of a person (during a search of a home or other property of a person or during the detention of a person in accordance with Part 3 of Article 208 of the Criminal Procedure Code of Ukraine).

In addition to the general recommendations on the objects of search set out above in the investigation of the criminal offenses under investigation, the focus should also be on finding such material evidence that the suspect has links with other members of the criminal group. Some things can be in

a certain room, and be on the person. Therefore, a search of the premises must be combined with a personal search, in accordance with the general procedural rules.

Objects found during a search must be handled with great care, as fingerprints of the suspect and the victim may appear on their surfaces. Therefore, it is necessary to take them in hand so as not to destroy possible traces. This is especially true of items found not in the suspect's home, but in common areas, non-residential and utility rooms and buildings, in the backyard, as he may declare that he has nothing to do with them. Detection of fingerprints of the suspect on the specified objects will help to expose his lie, and fingerprints of the victim - their belonging to the suspect.

In situations of a crime against the public safety by a group of persons, simultaneous searches, the so-called group search, become important. As members of criminal groups usually maintain close ties, they immediately inform each other about the events that are taking place in order to be able to coordinate their actions promptly, to take measures to hide the stolen and other traces of the crime. The preparation and conduct of a group search is a rather complex tactical operation that requires careful determination of the composition of the members of the investigative task forces and their careful instruction. It should also provide for the simultaneous initiation of searches of different persons and well-established communication between groups for the prompt exchange of information on its progress and results. Sometimes the results of a search conducted by one group are very important for another (Shvydky, 2006). The results of the study of criminal proceedings of the studied category show that the tactical operation «group search» is rarely used by investigators, although the circumstances of the criminal proceedings showed the expediency of conducting a group interrogation.

When investigating crimes against public safety, a personal search is conducted both during a search of a person's home or other property (Article 236 of the Criminal Procedure Code of Ukraine) and during the detention of a suspect (Part 3 of Article 208 of the Criminal Procedure Code of Ukraine). Personal search facilitates the prompt receipt of the necessary factual data about the crime, which allows in the future to organize substantive work with the suspect. During the personal search, the suspect's clothes, hat, shoes, wearables, and, if necessary, the body of the searched person must be examined. Subjects that are in the person are also subject to inspection: bags, briefcases, bags, etc. It should be borne in mind that some household items can be adapted for weapons. If the weapon is not found, attention is paid to places where it could be stored: pockets, near the belt. It is there that traces of grease, metal microparticles, gunpowder, etc. can be found (Ishchenko, 2010).

Conclusions

We conclude that the procedural procedure for submitting, considering and resolving requests for a search, as well as the actual procedure for conducting a search, has features related to the restriction of the rights and legitimate interests of the person. The factual grounds of the search determined a set of sufficient data, the authenticity of which was duly verified and substantiated, that the instrument of the crime, property obtained as a result of its commission, objects and documents relevant to establishing the circumstances of the crime are in housing, other property, person or any person.

The objects of searches in this category of criminal proceedings are households, warehouses, offices, outbuildings, cars, individuals. Searches of searches in this category of criminal proceedings are not only private houses, apartments, dormitories, offices, outbuildings, cars and persons, but also places of predominant leisure time for suspects and other persons, homesteads, utility rooms, basements, attics, garages, etc.

The tactical features of the search in the investigation of crimes against public safety are determined by: a preliminary inspection of the territory; a ban on attending phone calls; a warning about the use of technical means of fixation. The search makes it possible to identify: the perpetrators themselves, documents, including forged ones, diagrams, draft records, vehicles, camouflage, personal organizers, credit cards, other things, and objects that indicate the circle of accomplices and their connections, etc.

The use of the relevant generalized knowledge described in this scientific article during the search during the investigation of crimes against public safety will contribute to the achievement of the tasks of the criminal process, the exercise of their powers by authorized entities during the pre-trial investigation.

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Principles of mediation as an alternative way to protect human and citizen rights

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Abstract

The purpose of the investigation is to analyze the principles of mediation as an alternative way of protecting human and civil rights specified in Ukraine's draft law "On Mediation", to reveal their relationship and interdependence. During the investigation, it was recognized that mediation should be understood as negotiations organized in a special manner with the participation of a neutral mediator who assists the parties in developing a mutually beneficial solution. This approach can be considered one of the most effective ways to restore violated subjective human rights. The methodology includes a comprehensive analysis and generalization of the available scientific and theoretical material, as well as the formulation of relevant conclusions. During the research, the methods of scientific cognition were also used: terminological, logical-semantic, functional, system-structural, logical-normative. During the research, it was concluded that the formation of legislation on mediation should be based on the principles of mediation determined on the basis of the theoretical and

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methodological analysis of the principles contained in the legislation in force in the developed world and the principles of law, as well as defined by the Constitution of Ukraine.

Keywords: mediation process; dispute; negotiations; principles of mediation; mediator.

Principios de la mediación como forma alternativa de proteger los derechos humanos y ciudadanos

Resumen

El propósito de la investigación es analizar los principios de la mediación como una forma alternativa de proteger los derechos humanos y civiles especificados en el proyecto de ley de Ucrania «Sobre la mediación», para revelar su relación e interdependencia. En el transcurso de la investigación, se reconoció que la mediación debe entenderse como negociaciones organizadas de manera especial con la participación de un mediador neutral que asiste a las partes en el desarrollo de una solución de beneficio mutuo. Este enfoque puede considerarse una de las formas más efectivas de restaurar los derechos humanos subjetivos violados. La metodología incluye un análisis integral y generalización del material científico y teórico disponible, así como la formulación de conclusiones relevantes. Durante la investigación se utilizaron también los métodos de cognición científica: terminológico, lógico-semántico, funcional, sistema-estructural, lógico-normativo. En el transcurso de la investigación, se estableció como conclusión que la formación de la legislación en materia de mediación debe basarse en los principios de mediación determinados en base al análisis teórico y metodológico de los principios contenidos en la legislación vigente en el mundo desarrollado y los principios del derecho, así como lo definido por la Constitución de Ucrania.

Palabras clave: proceso de mediación; disputa; negociaciones; principios de mediación; mediador.

Introduction

The main ways to protect violated rights, freedoms and legitimate interests are litigation and other jurisdictional mechanisms for resolving legal disputes. Due to the rapid development and formation of civil society, these methods are not always effective enough. Reconciliation, as a way of resolving the conflict, plays a significant social role, which is to

restore and preserve social harmony and to ensure a sense of stability and confidence of the participants in public relations in the existing legal order. Reconciliation in law is seen as a complex legal institution that combines different procedures provided by law, as a special way to influence public relations.

Mediation is a new promising way to resolve disputes in both the public and private spheres. In Ukraine, at the level of legislative initiatives, the foundations have been formed for the introduction of mediation and mediation procedures, but these legislative novelties require the formation of a clear theoretical basis.

The need to introduce the institution of mediation in the domestic legal system is extremely high, which is based on the positive results of the practice of applying the institution of reconciliation in many countries, and this shows its effectiveness. In addition, this is in line with Ukraine's general position on the harmonization of national legislation with EU legislation.

Analysis of the content of international legal acts on mediation, in particular in terms of their definitions of "mediation" and mechanisms to stimulate the integration of mediation into national legislation, shows the importance of mediation at the international level as a tool with significant potential to reduce conflict and labor burdening the courts, reducing the duration, reducing financial costs and facilitating dispute resolution and conflict resolution procedures in various areas of public relations (civil, commercial, criminal and administrative proceedings, international relations, family and labor jurisdictional and non-jurisdictional disputes).

1. Literature review

I. Yasynovsky (2014) devoted his research to the historical aspect of the development of the institution of mediation and modern trends in its development. Problems of theory and practice are considered by N. Mazarakis, who notes that in contrast to litigation, which is strictly regulated, formalized, and focused on the essence of the claim, mediation allows a flexible approach to dispute resolution, taking into account all aspects of the dispute, regardless of their legal or legal significance. The main task of judicial settlement of disputes for the parties is to resolve the dispute in their favor, and for judges – to make such a decision. At the same time, in the process of mediation the parties face the task of finding a mutually acceptable (compromise) solution to the dispute between them, based on the principles of voluntary participation and equality of the parties, and the role of mediator – competently and professionally assist parties in finding such a solution (Mazaraki, 2016).

Considering the issue of mediation through the prism of European experience and Ukrainian realities, N. Bezkhlibna notes that for Ukraine the issue of the need to implement the law “On Mediation” has long been controversial among the mediation community. On the one hand, this is due to the fact that mediation is a way of resolving disputes, the application of which in the private sphere does not require the mandatory existence of a certain legal framework. This process is voluntary for the parties and flexible. As a rule, it is carried out on a contractual basis and may well “fit” into the plane of the existing regulation of civil and commercial relations (Bezkhlibna, 2019).

2. Results and discussion

Instead, it should be noted that mediation mechanisms cannot replace an effective, fair and accessible judicial system, and therefore mediation is complementary to existing dispute resolution and conflict resolution mechanisms.

However, the general international trend is that the scope of guarantees and the variety of mediation mechanisms are expanding and have the preconditions for a significant increase in the future, giving significant impetus to the development of national legislation on mediation.

Ukraine’s integration into the European social and legal space necessitates rethinking a number of key concepts and principles underlying the theoretical modeling and practical implementation of legal regulation and necessitates improving the system for resolving disputes arising in various spheres of human life (Yesimov, 2020). The urgency of peaceful settlement of legal disputes is due to the consideration by the Verkhovna Rada of Ukraine of the draft law “On Mediation”, which aims to promote the development of business partnerships and harmonization of social relations (Draft Law of Ukraine “On Mediation”, 2020).

The essence of mediation is manifested in a combination of two opposite elements – the autonomy of the parties and guarantees to develop a common position and achieve a mutually beneficial result. Any legal system can be viable if it is built and operates on the basis of certain consistent principles (Tylchik and Leschynsky, 2021).

Under the principles of law should be understood as the original, cross-cutting ideas, general requirements that express the main and decisive in the legal framework of society. The principle is an ideological category, because the principles of mediation enshrine people’s attitude to this institution as a social value. In the scientific literature to the deontological, legal principles of mediation, construction and implementation of meditative mechanisms for dispute resolution and conflict resolution include:

- legal principles: the principle of freedom and informed voluntariness of the parties and mediators; equality of the parties in the mediation process; independence of the parties in the mediation process; non-competitiveness; simplicity and speed of the mediation procedure, flexibility and informality; limited powers of the mediator (the mediator does not have the authority to impose a dispute resolution on the parties); confidentiality (confidentiality and professional secrecy of data obtained during the mediation procedure, unless the parties have agreed otherwise than the information that must be disclosed in accordance with applicable law or for the purpose of enforcing a mediation agreement, the information the disclosure of which required in the interests of public order); prohibition of harm (this principle requires mediators to avoid the procedure so that the conflict is exacerbated or its participants will be harmed); special attention to the interests of children, the disabled, the elderly, dependents (this principle determines the duty of the mediator to make sure that the proposed option for resolving the dispute will not harm third parties who may be children); professional multidisciplinary nature of the mediator (he must have a certain set of professional competencies in law, psychology, conflict, economics, etc.); the presence of the expressed consent of the parties to the presence of third parties, as a condition of such presence:
- communicative and psychological principles that have legal significance: the integrity of the parties to the conflict and the mediator; impartiality and neutrality of the mediator; personal nature of the mediation procedure (personal presence of the parties and the mediator) and direct interaction of the parties; ethics of behavior and the desire for psychological comfort during mediation procedures (the desire for mutual trust, the refusal of mutual invectives, resentment).

The draft law “On Mediation” contains the principles of voluntariness, equality of arms, neutrality and impartiality, confidentiality. Experts in the field of mediation suggest the possibility of continuing the discussion on the qualitative and quantitative composition of those principles that are not reflected in Art. 3 of the draft law “On Mediation” and are derived from the general content of the legislation (dispositiveness, mutual respect of the parties, neutrality of the mediator, transparency of the procedure and others).

It is important to note that there is no legislative definition of the principles of mediation. In order to study the problem of the principles of conciliation with the mediator, it is important to reveal the essence of the concept of “principles of mediation”.

The principles of mediation are understood as the initial, fundamental principles, ideas, moral and ethical norms, and procedural bases of optimal interaction of the parties to the mediation process, general requirements of the conciliation procedure, observance and application of which guarantees conflict resolution to build further legal relations. This optimality should be determined in relation to the state between the ideal legal principle and the prevailing reality (Kovalev *et al.*, 2017).

The main ideas that underlie mediation activities and express its essence are normatively defined in Art. 3 of the draft law “On Mediation”. This norm includes an exhaustive list of guidelines, which are the basis for the implementation of mediation activities in the national legal reality and are considered as the starting point of legal regulation of the institution of mediation. The legislator has defined seven normatively defined principles: voluntariness, confidentiality, independence and neutrality of the mediator, impartiality of the mediator, self-determination, and equality of rights of the parties to mediation.

The content of the principle of voluntariness is as follows: the freedom to enter the mediation procedure is due to the fact that the parties jointly decide to conduct a mediation procedure, the coercion of which is unacceptable, even if there is a mediation clause in the contract.

According to the draft law on mediation, agreements on the application and conduct of conciliation with the mediator and the direct conduct of such proceedings do not preclude recourse to a court or arbitral tribunal, unless otherwise provided by law. Freedom to withdraw from the mediation procedure – either party may refuse to continue the procedure without explaining the reasons for such refusal. It is inadmissible to force a mediation procedure or to conduct it without one party. Freedom to determine the terms of the mediation agreement – the parties determine the terms of the agreement, make proposals, and reject the proposals of the opposite party. The mediation agreement includes only those conditions that were the result of mutual free agreement of the parties.

According to the draft law on “Mediation”, the mediation agreement is subject to implementation on the basis of the principles of voluntariness and good faith of the parties, ie the principle of voluntariness must be observed at the stage of implementation of the mediation agreement. However, there is a problem of non-performance of the agreement. The content of the principle of confidentiality is disclosed in Article 5 of the draft law “On Mediation”. During the mediation procedure, it is necessary to maintain the confidentiality of information related to the specified procedure, except as provided by law, unless otherwise agreed by the parties. The mediator has no right to disclose information that became available to him during the conciliation procedure. A mediator may be liable for the disclosure of information, as defined by the statute or regulations on the association of mediators of which he is a member (Tylchyk and Tylchyk, 2021).

None of the participants in the procedure, regardless of whether the court or arbitration proceedings are related to the subject matter of the dispute, has the right to refer to information: about the readiness of the parties to participate in such proceedings; the positions, opinions or decisions expressed by one of the parties regarding the possibility of settling the dispute; about confessions made in the process of mediation; on the readiness of the parties to accept the mediator's proposal and settle the dispute (Tylchuk and Tylchuk, 2021).

It is inadmissible to demand from the mediator and from the organization carrying out the mediation procedure information relevant to the case, except as provided by law, and cases unless otherwise agreed by the parties. The mediator may disclose to the other party information relating to the mediation procedure only with the consent of the party who provided this information.

Confidentiality of mediation does not coincide with the concept of "trade secret" defined in Article 505 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003). A trade secret is a mode of information that allows the owner of the information, under existing or possible circumstances, to increase revenue, avoid unjustified expenses, maintain market position, or obtain other commercial benefits.

The introduction of a trade secret regime requires organizational conditions, in particular the issuance of an order determining the composition of information relating to such a secret. To establish the confidentiality of mediation information, such actions are not required, it must be carried out in accordance with the direct instructions contained in the normative act on mediation. The principle of cooperation and equality of the parties is that the very request for mediation procedures, further steps and the overall result are due to the willingness of the parties to cooperate. Neither mediation nor individual agreements within mediation are possible without recognizing the parties as equal in their capabilities.

The principle of equality is one of the foundations of mediation and includes two components: cooperation between the parties and equality. The principle of cooperation reflects the private components of the institution of mediation. In essence, the principle has common features with the principle of solidarity of interests and business cooperation. According to T. Podkovenko and N. Figun, the principle of cooperation between the parties follows from the essence of conciliation proceedings (Podkovenko and Figun, 2017). The whole mediation procedure should be based on mutual agreements, concessions, and an atmosphere of trust and mutual respect should be maintained during the procedure. The principle of cooperation provides a rule according to which the parties, in seeking options for resolving the dispute, assist each other in order to achieve the end result. In the mediation procedure, the participants

jointly develop solutions to the existing problem, while in the course of an adversarial trial they substantiate and prove the claims and objections. The principle of equality of arms means a rule in which both parties have equal opportunities to perform all procedural actions. This principle, similar to the principle of procedural equality of the parties in civil proceedings, is a private manifestation of the constitutional principle of equality before the law and the court. However, in the conciliation procedure, the principle of equality of arms is considered a prerequisite for cooperation, as it has no significant independent significance (Ivanovich *et al.*, 2019).

The effect of this principle is that during the mediation procedure both parties equally choose a mediator and determine the terms of the conciliation procedure, express positions, ask questions, determine topics for negotiations, participate in the drafting of the agreement, have an equal right to an individual interview mediator.

The consolidation of this principle is implemented in the draft law “On Mediation”, according to which during the conciliation procedure the mediator has no right to put one of the parties in a preferential position and diminish the rights and legitimate interests of one of the parties. The mediator guarantees equal opportunities to the parties involved in the process. The principle of impartiality of the mediator is that during the dispute settlement procedure, the mediator has no right to show personal interest, cannot be associated with either party. The mediator is obliged to immediately inform the parties about the existence of circumstances that may affect independence and impartiality.

According to S. Yosypenko, the main thing in the mediation process is the impartiality of the mediator, which allows the participants to work in an atmosphere of cooperation and ensures equal rights to participate in negotiations (Yosypenko, 2015). It should be noted that the guarantee of impartiality of the mediator provided by Art. 7 of the draft Law “On Mediation” stipulates that the mediator has no right to make proposals for the settlement of the dispute unless the parties have agreed otherwise.

In the event that a mediator, using a variety of mediation techniques, cannot communicate to the parties an acceptable way to resolve the conflict, the mediator’s activities have no value or meaning.

The purpose of this provision in the draft law is to consolidate the essential feature of mediation that distinguishes this method of dispute resolution from all others. Only the parties themselves can make a decision that is in the best interests of the true interests and which they will then be willing to implement voluntarily, without external coercion. In this case, the actions of the mediator, his understanding of the conflict within the legal field and the transfer of this to the parties should contribute to the formation of the latter’s responsibility for the mediation decisions (Leheza *et al.*, 2018).

The principle of mediator independence is closely related to the principle of impartiality. This principle is similar to the principle of impartiality, which until recently was associated mainly with the administration of justice. This principle is enshrined in the Constitution, judges are independent and subject only to the Constitution and the law (Constitution of Ukraine, 1996). However, the draft law “On Mediation” defines the principle of independence differently: like judges, a mediator, conducting the conciliation procedure, should not be under the influence of citizens, officials, state, and other bodies that restrict or predetermine a particular its action; must be independent materially, administratively or otherwise from the parties to the dispute or other interested parties (Leheza *et al.*, 2020).

According to V. Skrypchenko, “independent” and “independent” have interrelated meaning (Skrypchenko, 2020). Therefore, V. Skrypchenko concludes that the legislator, noting in Article 126 of the Constitution of Ukraine the independence of judges and subordination to the Constitution and the law, means not only the fact that judges, administering justice, are guided by the Constitution and law, but also their independence.

V. Skrypchenko notes that according to the Constitution of Ukraine, the principle of independence has a downside: the subordination of judges only to the Constitution of Ukraine and the law, declared by the Constitution of Ukraine, actually results in their subordination (in the sense of duty) to almost all types of legal acts. which they are obliged to follow during the administration of justice (Skrypchenko, 2020).

Conclusion

The analysis of the normatively established principles of mediation shows that the imperative principles of the draft law “On Mediation” have formed the basis for the legal regulation of mediation activities. At the same time, the term “mediation” refers to specially organized negotiations with the participation of a neutral mediator, who assists the parties in developing a mutually beneficial solution. This approach is one of the effective ways to restore violated subjective rights.

The mediator is free from emotional assessments of the parties to the dispute, impartial and independent in their judgments. A mediator has the right to undertake to organize the mediation process if he is able to maintain neutrality and in a particular situation can maintain emotional alienation, which implements the principle of equality in the mediation procedure.

The principles of mediation are divided into legal and communicative-psychological, which have legal significance. The legal principles include

freedom and informed voluntariness of the parties and mediators; equality of arms; independence of the parties in the mediation process; non-competitiveness; the principle of simplicity and speed of the procedure, its flexibility and informality; limited powers of the mediator; the principle of confidentiality; prohibitions on harm; professional multidisciplinary nature of the mediator; the presence of the expressed consent of the parties to the presence of third parties during the procedure, as a condition of such presence.

The communicative and psychological principles that have legal significance include the principles of good faith of the parties to the conflict; impartiality and neutrality of the mediator; personal nature of the procedure and direct interaction of the parties; ethics of behavior and the desire for psychological comfort during mediation procedures. At the same time, the draft of the analyzed law defines the principles: voluntariness, confidentiality, independence and neutrality of the mediator, impartiality of the mediator, self-determination, and equality of rights of the parties to mediation.

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The stability of State information in the face of terrorist threats

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Abstract

The objective of the study is to identify the key factors of the stability of state information in the face of terrorist threats based on the review of existing research in this area, and to identify the main approaches to ensure the stability of state information in the face of terrorist threats. Based on the analysis of scientific works, the factors of the state's resistance to cyberterrorism are identified and the main approaches are organized to ensure the stability of state information in the face of terrorist threats. The results of the study provide an understanding of the key factors needed to achieve the legal, technical, organizational, and operational areas of state resilience to cyber threats. Further research may aim to perform empirical calculations of indicators from around the world to determine certain dependencies in the field of cybersecurity. It is concluded that factors such as the growing impact of information and communication technologies on public relations, production activities, the operation of infrastructure facilities and the activities of public authorities, indicate that the issue of security as a line of scientific research is urgent.

Keywords: information stability; state; cyberterrorism; cybersecurity; threats.

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La estabilidad de la información del Estado frente a las amenazas terroristas

Resumen

El objetivo del estudio es identificar los factores clave de la estabilidad de la información del estado frente a las amenazas terroristas basándose en la revisión de la investigación existente en esta área, e identificar los principales enfoques para garantizar la estabilidad de la información del estado frente a las amenazas terroristas. Con base en el análisis de trabajos científicos, se identifican los factores de la resistencia del estado al ciberterrorismo y se organizan los principales enfoques para garantizar la estabilidad de la información del estado ante amenazas terroristas. Los resultados del estudio proporcionan una comprensión de los factores clave necesarios para lograr las áreas: legales, técnica, organizacional y operativa de la resiliencia del estado a las amenazas cibernéticas. La investigación adicional puede tener como objetivo realizar cálculos empíricos de indicadores de todo el mundo para determinar ciertas dependencias en el campo de la ciberseguridad. Se concluye que factores como el creciente impacto de las tecnologías de la información y la comunicación en las relaciones públicas, las actividades de producción, el funcionamiento de las instalaciones de infraestructura y las actividades de las autoridades públicas, indican que urge el tema de la seguridad como línea de investigación científica.

Palabras claves: estabilidad de la información; estado; ciberterrorismo; ciberseguridad; amenazas.

Introduction

The threats that pose both local and global dangers are growing with the development of information and communication technologies (ICTs), their spread and penetration into virtually all spheres of human activity. Information and communication technologies allow access to information, doing business, developing and maintaining professional and personal communication, as well as involving public authorities and expanding governance. Cyberspace and ICT provide huge growth potential at virtually every level (United Nations, 2017), which requires the state to provide a clear vision of threats and coordinated action to implement security functions (Kruhlov *et al.*, 2020). The growing number of users, the operation of critical infrastructure systems based on digital software involves incidents of external unauthorised interference with the aim of committing crimes, attacks, fraud and terrorist acts. Today's scale of negative impact on security systems has reached the international level, when terrorist attacks and hybrid information warfare are realised through interventions in the information infrastructure.

Because the cyberspace environment is not limited by any regulatory limits, clandestine cyber-attacks can be carried out by a person or group of people at an incredible speed from a distance of thousands of miles without significant physical cost. The damage from such cyberattacks can be as critical as from ordinary war. A terrorist organisation with limited manpower and infrastructure can carry out cyber-attacks from anywhere, causing significant loss of infrastructure, finances or human life. In the absence of a formal definition of a cyber-terrorist, countries use different strategies to combat this phenomenon, but the very perception of the threat of cyber-attack is fully understood by all countries in the world as regards the possibility of causing significant harm (Albahar, 2019).

The study (UNICRI, 2014) found that, although cyber threats consisted mainly of viruses, Trojans, over time cybercriminals began to take advantage of social engineering technologies, such as phishing, targeting employees with direct access to databases with confidential information; credit card fraud; special denial-of-service attacks; theft of public and private data. The World Economic Forum estimates that cyber-attacks and cybersecurity violations will be one of the most likely risks to humanity in the next ten years (WEF, 2021).

The FBI said the financial loss from cyberattacks in 2019 exceeded \$ 3.5 milliard, and the United States was not ready to defend itself against cyberattacks. Following the 2020 coronavirus pandemic and the implementation of large-scale remote operation plans, the threat of possible attacks and crisis plans have become more dangerous. According to the International Monetary Fund, the number of cyberattacks has increased significantly, with the largest number of victims being government agencies and financial services (IMF, 2020).

As cyberspace evolves rapidly, the cyber threats of the recent past have also changed. Not only have they multiplied in terms of the means to commit them, but they have also grown into cybercrime, cyberterrorism, cyber espionage, and cyberwarfare (United Nations, 2017). At the same time, the threat of terrorism is increasingly being considered as one of the greatest threats to society, affecting the quality of life of people around the world (Kumar *et al.*, 2019). Terrorist acts can destabilise governments, undermine civil society, threaten peace and security, threaten social and economic development, and have a particularly negative impact on certain groups (United Nations, 2008).

Cyberterrorism is defined as terrorism-related activities that can be organised from anywhere in the world using a computer with a hidden Internet Protocol address. Cyberterrorism involves the use of information technology by terrorist groups or individuals to pursue their own goals, which may include organising and carrying out attacks on networks, computer systems and telecommunications infrastructures, as well as exchanging

information or creating threats electronically (Palasinski and Bowman-Grieve, 2017). In the process of an act of cyberterrorism, a deliberate attack or threat is made by private entities based on the use of cyberspace to entail real consequences in order to cause fear, coercion to fulfil social or ideological goals. The consequences can be physical, psychosocial, political, economic, environmental or other problems outside of cyberspace (Plotnek and Slay, 2021).

Cyberterrorism actually uses modern technology to take advantage of the strategic weaknesses of the system and use them to achieve their own goals. Areas of illegal action may be: the use of the Internet for interaction between terrorists; creating access to a variety of information stored on the Internet, indicating possible purposes, as well as providing technical details; use of the Internet to spread terrorist ideas and ideologies of a terrorist organisation and to carry out terrorist attacks via the Internet. Most terrorist groups use basic methods: electronic attack which blocks computer systems; introduction of malware into computer systems and information transmission channels; attack on computer networks using malware and taking advantage of vulnerabilities in computer software in order to steal some data or destroy them (Vilić, 2017).

Cyberterrorism usually involves illicit actions against computer systems, computer networks, and the Internet using malware, viruses, and other technologies to achieve their goals (United Nations, 2017; Backhaus *et al.*, 2020). Contemporary literature offers a conceptual explanation by placing cyberterrorism in a typology of cybersecurity challenges (Veerasamy and Grobler, 2015).

The risk of cyber-terrorist attacks on the country's critical infrastructure is extremely high. Due to their vulnerability and complexity, damage to the country's infrastructure can negatively affect the country's development (Dombe and Golandsky, 2016). A system of targeted cyber-terrorist attacks can include a country's critical infrastructure that creates problems in the telecommunications system, transportation system, power grid system, utility system, and other important systems needed to run the country. The threat of cyber-terrorist attacks will continue to grow as people become addicted to the Internet, increasing the potential for cyber-terrorist attacks. The introduction of mechanisms of secure technologies, policies, actions of law enforcement agencies allow the computer network and systems to be less vulnerable and manage the risk of cyberterrorism, as each mechanism has its own functions in this fight (Ponnusamy and Rubasundram, 2019).

Critical infrastructure refers to organisational and physical facilities and structures that are vital to society and the economy, and failure or degradation will lead to persistent service shortages, significant public safety breaches, or other negative consequences (Rass *et al.*, 2020).

Considering cyberterrorism as illegal actions, causing harm, causing damage and negative impact or violation of the integrity and effectiveness (in some cases — destruction) of critical infrastructure, it can be determined that the actions of the state and entities performing cybersecurity functions should use a wider approach to issues of ensuring information resilience to terrorist threats. The concept of cybersecurity should consider cyberterrorism as one of the most dangerous crimes against individuals, politicians, society, legal entities, information and physical objects and the state. It follows that measures to ensure the information stability of the state to the terrorist threat should include actions provided in the event of the occurrence and detection of cyber fraud, cyber espionage, cybercrime, cyber-attacks and other widespread cyber threats.

Cybersecurity is an important part of local governance based on reliable information technology. Thus, well-defined key factors of information stability of the state to terrorist threats should become an important regulatory development, which can in some way adjust a separate vision of cybersecurity policy and directions of both scientific and practical developments in the field of cybersecurity.

The aim of the study is to identify key factors of information stability of the state to terrorist threats (resilience of the state to cyberterrorism) based on the review of existing research in this area and identify key approaches to ensuring information resilience of the state to terrorist threats. The main research objectives are the following:

1. Develop methodological approaches to the search and identification of modern research related to aspects of information stability of the state to terrorist threats.
2. Identify key factors in the state's resilience to cyberterrorism.
3. Arrange the identified factors and identify the main areas of cybersecurity.
4. Compare the obtained results with the existing methodological approaches of the world's leading institutions on cybersecurity and countering cyberterrorism to identify the reliability of the research results.
5. Propose approaches that can ensure the information security of the state from terrorist threats.

1. Methods

The methodological approach of the study is based on several stages. From 2014 to 2021, the Scopus search was used to identify scientific

publications related to the information stability of the state to terrorist threats. Applying the review method considered by previous researchers (Yi and Chan, 2014; Osei-Kyei and Chan, 2015; Darko and Chan, 2016; Yu *et al.*, 2018), scientific articles on the information stability of the state to terrorist threats are reviewed in order to identify trends in the study of this topic and consider key areas of research. The review method includes: selection of journals (Social Sciences; Computer Science; Business, Management and Accounting; Economics, Econometrics and Finance); selection of relevant articles; identification of factors that ensure the information stability of the state to terrorist threats.

A visual examination of the titles, abstracts and keywords of the articles, which explore the means of ensuring the information stability of the state to cyberterrorist threats, helped to identify the necessary sources. The selected articles identify the key factors of information stability of the state to terrorist threats and provide the classifications. When choosing the key factors, the condition of their research was taken into account in at least two articles for a certain period of time. Suggestions and conclusions are drawn based on the obtained data.

The search in the Scopus database according to the established restrictions found 389 articles. Visual examination of the titles, abstracts and keywords of the articles, which explore the means of ensuring the information stability of the state to cyberterrorist threats, identified 40 articles for further analysis. Although the sample size is small, it may be sufficient for further analysis and can be considered satisfactory for drawing conclusions.

2. Results

As a result, selected 40 articles published in 26 scientific journals were reviewed to identify key factors in the information resilience of the state to terrorist threats. Table 1 summarises the results of the analysis of key factors of information protection of the state, which are published in 26 scientific journals.

Table 1. The results of the analysis of identifying key factors of information resilience of the state to terrorist threats

No	Factors that ensure information stability	Publications	Number of publications
1	Detection of network intrusions and attacks	(Quincozes <i>et al.</i> , 2021), (Kannari <i>et al.</i> , 2021) (Binbusayyis and Vaiyapuri, 2021). (Moraboena <i>et al.</i> , 2020), (Thapa <i>et al.</i> , 2020), (Tian <i>et al.</i> , 2020), (Handa <i>et al.</i> , 2019), (Camacho <i>et al.</i> , 2019), (Bhamare <i>et al.</i> , 2020), (Jamei <i>et al.</i> , 2016), (Taha <i>et al.</i> , 2018), (Adhikari <i>et al.</i> , 2016), (Rehman <i>et al.</i> , 2021).	14
2	Application of international law and legal regulation	(Branch, 2020), (Kulesza and Weber, 2021), (Sturc <i>et al.</i> , 2020), (Carvalho <i>et al.</i> , 2020), (Markopoulou <i>et al.</i> , 2019), (Park <i>et al.</i> , 2018), (Kulesza and Weber, 2021).	7
3	Detection of current threats, data anomalies and malware	(Cascavilla <i>et al.</i> , 2021), (Sadik <i>et al.</i> , 2020), (Lee and Lim, 2016), (Gonzalez-Granadillo <i>et al.</i> , 2018), (Catak <i>et al.</i> , 2021), (Jagtap <i>et al.</i> , 2021), (Ma <i>et al.</i> , 2021).	7
4	Cyber intelligence and cyber deterrence	(Yau, 2020), (Wilner, 2017), (Nespoli <i>et al.</i> 2021), (Gourisetti <i>et al.</i> , 2020).	5
5	Interstate cooperation	(Lee and Lim, 2016), (Cho and Chung, 2017), (Górka, 2018).	3
6	Cybersecurity certification	(Neisse <i>et al.</i> , 2020), (Hernandez-Ramos <i>et al.</i> , 2021).	2
7	Cyber insurance	(Herr, 2021), (Lau <i>et al.</i> , 2020).	2
8	Standardisation of countermeasures and use of cybersecurity standards	(Nespoli <i>et al.</i> , 2021), (Syafriзал <i>et al.</i> , 2020).	2
9	Threat simulation and risk assessment	(Välja <i>et al.</i> , 2020), (Cascavilla <i>et al.</i> , 2021).	2
10	Digital forensics	(Lee and Lim, 2016), (Alharbe, 2020).	2

Source: own elaboration.

The above 10 key factors of information stability of the state to terrorist threats are further analysed and classified into different areas of approaches to cybersecurity. Based on the analysis, the identified factors were arranged and three key areas of approaches to cybersecurity were identified, taking into account the tools studied above, which provide information stability (Table 2). As cybersecurity has a wide scope, covering many industries and different sectors, level of development or opportunities, it should be noted that mainly approaches to ensuring information stability of the state to terrorist threats are focused on legal, technical, organisational and operational areas.

Table 2. Analysis of key areas of approaches to information stability of the state to terrorist threats

Key areas of approaches to cybersecurity	Factors that ensure information stability
Legal area	Application of international law and legal regulation. Interstate cooperation. Cybersecurity certification. Cyber insurance.
Technical area	Detection of network intrusions and attacks. Detection of current threats, data anomalies and malware. Standardisation of countermeasures and use of cybersecurity standards.
Organisational and operational area	Cyber intelligence and cyber deterrence (reduction of danger and vulnerability). Threat simulation and risk assessment. Digital forensics.

Source: own elaboration.

According to the analysis, it is necessary to dwell on individual provisions that define the established limitations in the study.

3. Discussion

Thus, after reviewing and analysing the factors of information resilience of the state to terrorist threats, 40 articles were identified from 26 journals that explored various issues related to cybersecurity and cyberterrorism. The review identified 10 key factors in the state's information resilience to terrorist threats. The most widely studied factors were: "detection of network intrusions and attacks", "application of international law and legal regulation" and "detection of current threats, data anomalies and malware". These 10 factors of information stability of the state to terrorist threats were used to develop a generalised approach to determining the legal, technical, organizational and operational areas used in ensuring the resilience of the state to cyberterrorism.

As noted, the search for scientific sources established limits on the time period of the sample. We believe that the found studies for 2014-2021 more relevantly reflect the approaches used to ensure the information stability of the state to terrorist threats. However, a wider period of time would allow identifying additional approaches that are not considered in this study. The use of the Scopus search was substantiated as follows: most scientific publications in the fields of management, accounting, engineering, business and social sciences have been archived in this database (Hong and Chan, 2014). However, the research does not take into account the articles indexed in the Web of Science database, which probably reduces the number of studies addressing the issue of state resilience to cyberterrorist threats. Another feature is the limitation of the number of key factors by the presence of two or more publications where certain factors have been studied. In our opinion, this demonstrates more relevant and interesting areas of research on the state's resilience to cyberterrorist threats.

The current approaches reflected in the study seek new levels of countering cyberattacks, especially when related to government facilities and critical infrastructure, namely power system security, industrial management systems (Handa *et al.*, 2019). Other areas of the fight against cyberterrorism may be: risk, threat and vulnerability assessment; emergency response plan; assessment of security procedures; intelligence data collection; partnership with special rapid response services.

Information security issues are constantly on the agenda in the EU, as member states need strong cybersecurity for their markets, significant progress in countries' technological capabilities and a broader understanding of everyone's role in countering cyber threats. In response, new initiatives are proposed in three key areas: strengthening resilience to cyber-attacks and strengthening the EU's cybersecurity capacity; creating an effective criminal law response; strengthening global stability through international cooperation (Carvalho *et al.*, 2020).

From the point of view of the consequences of measures aimed at ensuring the information stability of the state to terrorist threats, the issue of determining the level of prevention of cyber threats in different countries is methodologically considered by individual research institutions. The E-Governance Academy (eGA), established as a joint initiative of the Estonian government, the Open Society Institute (OSI) and the United Nations Development Programmes, has developed its own methodology for determining the National Cyber Security Index (NCSI). The National Cyber Security Index is a global index that measures countries' readiness to prevent cyber threats and manage cyber incidents. NCSI is also a database with publicly available evidence and tools to build national cybersecurity capacity. NCSI focuses on measurable aspects of cybersecurity implemented by the state: current legislation (legal acts, regulations, orders); provided administrative structures (existing organisations, departments); formats of cooperation (committees, working groups); results (policies, technologies, websites, programmes) (EGA, 2021b).

Analysing the indicators of the National Cyber Security Index of 100 countries in 2018 and 2021, we can see that the vast majority of studied countries have improved their Cyber Security Index (Figure 1).

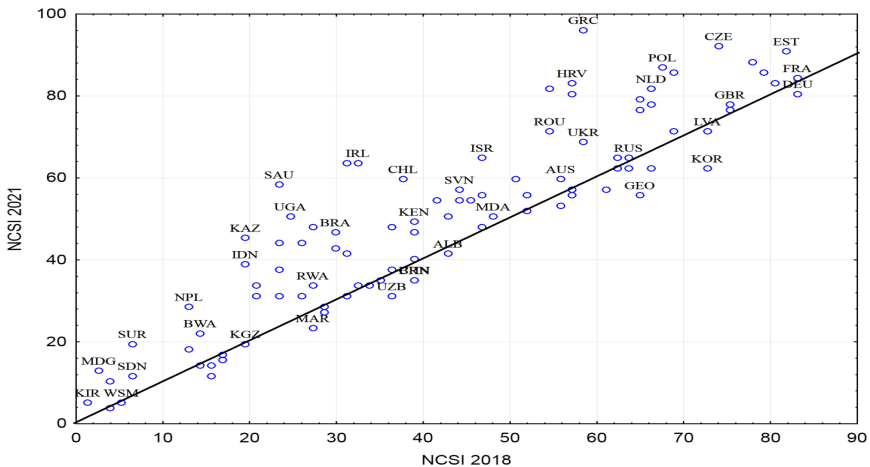


Figure 1. Diagram of the progress of individual countries in the world according to the National Cyber Security Index, 2018-2021 (EGA, 2018; EGA, 2021a)

The readiness of the potential to fight cybercrime is assessed by the following dimensions: political framework; legal framework; criminal law; electronic evidence; jurisdiction; guarantees; international cooperation; capacity building (United Nations, 2017). Another approach to determining the level of cybersecurity in the country is the Global Cybersecurity Index (GCI). International cooperation of many stakeholders in the field of cybersecurity at the initiative of the International Telecommunication Union (ITU) focuses on the following aspects: legal (legislation, regulation, measures based on the legal institutions and entities in the field of cybersecurity and cybercrime); technical (technical mechanisms and capabilities, measures based on the institutions and response entities in the field of cybersecurity); organisational (national cybersecurity development strategies, cybersecurity indicators, policy coordination institutions and cybersecurity development strategies); capacity building (standards of certification and accreditation of cybersecurity specialists and public sector institutions, public information, research and development, educational and training programmes); cooperation (existence of partnerships, cooperation frameworks and information exchange networks, multilateral agreements, participation in international forums). These identified aspects form the basis of the indicators for the Global Cyber Security Index, as they are an integral part of the national cyber security culture (ITU, 2019).

Thus, in addition to traditional methods of action through policies, laws and institutions, governments must also seek additional resources, including consumer information and private sector involvement. The state constantly faces with the problem of ensuring international compatibility. Issues of jurisdiction and international cooperation pose significant difficulties for the investigation and prosecution of multinational cybercrime cases. Moreover, the challenges of some states operating within an insufficiently specific cybercrime legal framework often hinder the fight against transnational acts (United Nations, 2017).

Strategic autonomy in the age of digital technologies allows the EU countries to maintain their independence and authority. The Strategy Paper of the European Political Strategy Centre (EPSC) defines three dimensions of digital sovereignty: industrial, operational and political (EPSC, 2019). Industrial dimension requires meeting digital needs (use of digital technologies to ensure the resilience of infrastructure to cyberattacks). The operational aspect is related to the sustainability of the European communication infrastructure, as well as information and communication technology (ICT) systems. The political dimension determines the impact on norms and standards of information technology and the ability to define one's actions and norms (Debar *et al.*, 2021).

The institutional approach envisages the creation and effective functioning of bodies that shape cybersecurity policy and are at the forefront

of the fight against cybercrime. One such institution is the European Union Agency for Network and Information Security (ENISA), which is the most important institution in the European Union in the field of network and information security, being part of the European cyber security strategy. ENISA was set up to promote better cooperation between the authorities of different Member States. ENISA's role is to establish a high level of network and data security in the European Union, to warn citizens about the risks and to promote a safety culture on the Internet for the benefit of citizens, consumers, businesses and public authorities. ENISA's responsibilities are to support the development of European Union policies and regulations in the field of network and data security; supporting the development of new solutions in the digital world; cooperation between competent authorities and other interested institutions; support for research, development and standardisation; cooperation with EU bodies and organisations, including those responsible for protection against high-tech crimes, confidentiality and data protection; working with international organisations to promote international cooperation in the field of network and data security (Carvalho *et al.*, 2020). ENISA identifies data security, robust software platforms, cyber threat management and response, robust hardware platforms, user-oriented cryptography and security tools, and digital communications security as cybersecurity research priorities as (Debar *et al.*, 2021).

As we can see, the approach used in identifying key factors of information stability of the state to terrorist threats identified the main directions in research on the state's resilience to cyberterrorism: legal, technical, organisational and operational areas. Emphasising the need to further expand the time limits in the study and the use of various scientometric databases, it should be noted that institutions that analyse and ensure cybersecurity around the world mainly focus on legal aspects, technical approaches, organisational and operational areas. This supports the correctness of the methodological approach, as well as the generalisations and conclusions made.

The results of the study allow determining the need to implement approaches that can ensure the information security of the state from terrorist threats. Information protection should be based on the constant study of cyber threats, their evolution, the emergence of vulnerable elements; study of modern changes and monitoring of cyberterrorism technologies; defining goals and priorities of information stability; actions to prevent and respond to unauthorised intrusions and attacks; outsourcing of individual functions; checking the effectiveness of actions related to ensuring information stability.

One of the effective ways to implement cybersecurity should be the use of public-private partnerships, which will attract private businesses that use elements of critical infrastructure; server equipment manufacturers,

software developers. The use of public-private partnership in approaches to protection against cyberterrorism will strengthen the functions of control, coordination and motivation to ensure the information stability of the state.

The studied range of issues should include strategic approaches to the implementation of state programmes to strengthen cyber resilience, establishment of the necessary sectoral institutions, the development of procedures and processes, improving the management of intelligence activities. Separate objectives of further development of the information stability of the state to terrorist threats are the improvement of legislation in the field of cyber defence and cybercrime, protection of critical infrastructure; ensuring standardisation and certification; regulation of technical safety and data processing; expansion of international cooperation; increasing technical support and attracting qualified specialists. The formation of the state's capabilities in the field of cybersecurity involves the implementation of priority projects, strategy development in the field of critical infrastructure protection, cooperation with partners.

Conclusion

The issue of factors of information stability of the state to terrorist threats has become one of the most widely studied, given the penetration of information and communication technologies in critical infrastructure, public authorities, livelihoods, and significant consequences of threats and cyberattacks.

Given the wide scope of cybersecurity, the main approaches to ensuring the information stability of the state to terrorist threats should identify legal, technical, organisational and operational areas. The results allow considering research and monitoring of cyberterrorism technologies; outsourcing of individual functions; use of public-private partnership; implementation of state programmes to strengthen cyber resilience; expansion of international cooperation; technical support, etc. as approaches to ensuring the information stability of the state to terrorist threats.

The results of this study significantly contribute to the existing approaches to finding the state's resilience to cyberterrorism and inform practitioners about the key areas that need to be considered when developing national cybersecurity policies. In addition, the results provide a deep understanding of the key factors necessary to achieve the legal, technical, organisational and operational areas of state resilience to cyber threats.

This study has some internal limitations that affect the generalisation of the research results, namely: the approach to the number of works selected

for further analysis, which does not allow to cover individual research. However, the results are useful for further research, as the aim was to identify and summarise the existing key factors in current research that are important in the cybersecurity system. Further research may accept a certain list of factors of information stability of the state to terrorist threats and make empirical calculations of indicators of different countries to determine the existing dependencies in the field of cybersecurity.

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Hypernomie as a Phenomenon of Modern Society *

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Abstract

The purpose of the article is to clarify the essential characteristics of hypernomy as a social phenomenon. The comparative-historical, structural-functional and evaluative methods were used. Reference to the works of R. Dahrendorf, E. Gellner, K. Stenner, theorists of anomie, allowed us to identify several characteristic features of hypernomy. The first must include strict disciplinary control over the behaviour of citizens that affects bodily customs. There is another characteristic of hypernomy which is the identification of the functions of power and control over power. This is inherent not only in communist and post-communist countries, but also in traditional democracies that exert control over citizens through the Internet. The third characteristic of hypernomy is the predominance of production planning and control. Hypernomic societies impose a utilitarian understanding of good and evil, erasing traditional moral language. The fourth property of hypernomy is the ubiquitous spread of conformism, self-deception, and the cult of authoritarian personality. Two main conclusions are formulated: while hypernomics is the opposite of anomie, dialectically they complement each other and can pass from one to another.

Keywords: anomie; power; hypernomia; social control; conformism.

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Hipernomía como fenómeno de la sociedad moderna

Resumen

El propósito del artículo es aclarar las características esenciales de la hipernomía como fenómeno social. Fueron utilizados los métodos comparativo-histórico, estructural-funcional y valorativo. La referencia a los trabajos de R. Dahrendorf, E. Gellner, K. Stenner, teóricos de la anomia, nos permitió identificar una serie de rasgos característicos de la hipernomía. El primero debe incluir un estricto control disciplinario sobre el comportamiento de los ciudadanos que afecte las costumbres corporales. Existe otra característica de la hipernomía que es la identificación de las funciones de poder y el control sobre el poder. Esto es inherente no solo a los países comunistas y poscomunistas, sino también a las democracias tradicionales que ejercen control sobre los ciudadanos a través de Internet. La tercera característica de la hipernomía es el predominio de la planificación y el control de la producción. Las sociedades hipernómicas imponen una comprensión utilitaria del bien y del mal, borrando el lenguaje moral tradicional. La cuarta propiedad de la hipernomía es la difusión ubicua del conformismo, el autoengaño y el culto de la personalidad autoritaria. Se formulan dos conclusiones principales: si bien la hipernomía es lo opuesto a la anomia, dialécticamente se complementan y pueden pasar de uno en otro.

Palabras clave: anomia; poder; hipernomía; control social; conformismo.

Introduction

Postindustrial society, the main value of which is information and knowledge, contributes to the creation of new relations between people, including in the political sphere. Despite the fact that a strong civil society, political pluralism and the gradual erasure of class differences are usually referred to the main features of a post-industrial society, it is information (authority) and knowledge (power) that will determine the further development of a post-industrial society. Therefore, the simultaneous possession of information and knowledge opens up wide opportunities for the authorities in matters of mass control of the population, de-individualization of citizens, and destruction of traditional forms of relations. At the same time, these processes are clothed in a legal and technologically progressive form, which makes it possible to characterize them as hypernomie – a state of overcontrol, overregulation of everyday life. Hypernomie is the excessive attachment of citizens to role standards that determine the nature of their behavior in society with the application of positive and negative sanctions by the controlling state bodies. In this regard, the refusal of initiative, the strictly obligatory fulfillment of one's

social roles, and adaptation to imposed norms without manifesting a personal position are an obligatory behavioral ritual. At the same time, the phenomenon of hypernomie remains relatively poorly studied in science, therefore, in this article we will consider it in more detail.

The object of our research is society, the subject is hypernomie as a state of society. The purpose of the article is to highlight the essential features of hypernomie as a social phenomenon.

The study of hypernomie refers to the phenomenon of political power. Power is usually understood as the ability to have a determining influence on the activities and behavior of other people through authority, law, and violence. Unfortunately, a situation often arises when the rulers, endowed with power, do not properly care about the welfare of their citizens, the political elite is busy with issues of personal enrichment and tries to maintain its influence over society. In this case, when solving internal problems, the main support of the existing government is the coercive organs, which are entrusted with the functions of intimidation and control. Having lost its weight, the authorities are trying to compensate for their influence over society by developing a new effective mechanism, which is total control over all spheres of public life. All this is facilitated by the disunity of society, the underdevelopment of its civil institutions, leading to the suppression of individual consciousness by the power and the imposition of certain forms of behavior. Thus, the issue of hypernomie is associated with the essence of power and its transformations in modern times.

In general, in the article we will consider the theoretical and methodological prerequisites for the study of hypernomie, its modern characteristics and some debatable issues. In the conclusion, findings and guidelines for further research will be formulated. Our work should be considered a description of general issues related to hypernomie.

1. Theoretical framework. Methodology

The theoretical and methodological basis of the research is, first, the study of hypernomie in the works of the sociologist and political scientist R. Dahrendorf; secondly, studies of right-wing authoritarianism and nationalism, first of all, by T. Adorno, E. Gellner, K. Stenner; thirdly, a number of works on the theory of anomie and deviantology.

The appeal to anomie is not accidental: as we will show below, anomie (a state of normlessness, lawlessness, loss of normative-value coordinates) is often a consequence of hypernomie in the preceding period of social development. The study of hypernomie allows us to understand the features of the development of an individual in a post-industrial society, including

the tendency to deviations. Many publications are devoted to the study of the emergence of anomie during the transformation and modernization of hypernomic societies, including in the aspects of the growth of the terrorist threat, the rise of theft, murder and corruption (Galtung, 1996; Zhao, 2015; Messner *et al.*, 2017; He and Messner, 2020).

Three methods were used. The comparative historical approach allowed us to examine hypernomie from a historical perspective. The structural-functional method was used to determine the elements of the social structure that contribute to the formation of hypernomie. Value analysis revealed the dynamics of norms and values in a hypernomical society.

2. Results and discussion

The concept of “hypernomie” was introduced by the Anglo-American political scientist and sociologist R. Dahrendorf in his work “Letter to a Polish friend” (Dahrendorf, 1994). In it, he notes that hypernomie for a short time contributed to the flourishing of communist regimes, but in post-communist societies it was replaced by anomie (lack of norms and their mismatch). However, hypernomie cannot be regarded as the exclusive domain of communist countries, as we will show below.

Communist societies rely on strict discipline, including in everyday life. The political space is built with the help of technologies of power oriented towards control over the human body: obligatory subbotniks, marches and demonstrations, passing the norms of physical training, military field training, etc. When detailing the technologies for the implementation of political power in the USSR, one should list the social technologies of localization (passport regime, registration, “invisible queues” for housing), technologies for manipulating scarcity (housing, food, cultural values, educational opportunities), indoctrination technologies (ideology and propaganda), isolation technologies (restrictions on travel abroad, closed cities, prisons and psychiatric hospitals for dissidents) and confiscation technologies (conscription) (Korolev, 2008). Other communist regimes add their own characteristics. In modern China, for example, this is also the birth rate (no more than two children per family) and even the compulsory communication with relatives, and in the DPRK – a ban on living in cities for “disloyal” and food corruption.

The classical analysis of disciplinary institutions was given by the French philosopher M. Foucault, singling out as the most important schools, the army, a psychiatric hospital, and a prison (Foucault, 2018); he believed, however, that the communist reality was not much different from the reality of Western societies (with the exception that party discipline still existed under communism). Thus, political dominance takes on the features of biopolitics.

Modern Western society also has a hypernomical character in relation to human corporeality. The difference is that control is clothed in softer features and is implemented, as a rule, not directly by the state, but by private structures, nevertheless, associated with the government. Typical examples of hypernomie in the field of bodily control are transhumanism, neuropharmaceuticals, cosmetology, and plastic surgery. One can even speak of “posthuman showcase corporeality” as the demonstrativeness of body modifications and orientation towards sensory perception (Barichko, 2010: 101). Often, modern bodily practices (tattoos, piercings, surgical deformations of one’s own body (scarring, tunneling, replacing bones with artificial alloys, etc.) subordinate biological nature to the cult of social prestige. The fact of their extreme prevalence in the modern world is also confirmed by medical practitioners (Shepherd, 2019).

Other examples are biohacking – the improvement of the human body with the help of biomedical procedures, including direct intervention in the work of the body and the CRISPR / cas9 – widely known and, unfortunately, scandalous technology of the human genome modifications that could potentially divide humanity into the people of a different nature and therefore biologically and socially unequal.

Concentration on caring for health means devaluation of caring for the soul and mind, that is, eternal life (salvation) in heaven is replaced by a pleasant life on earth. This kind of human perception reflects the process of cultural primitivization. Sports propaganda, the reclame of cosmetics, the widespread introduction of drugs and other things contribute to the oblivion of the spiritual and the perception of the bodily as intrinsic value in isolation from the higher reality. The unrestricted exploitation of corporeality testifies to the transformation of the body into a symbol, into an object of consumption, i.e., to the enslavement of man by the mass media (Baudrillard, 2000). Moreover, these biotechnological practices can become constituents of new social relations. It is no coincidence that F. Fukuyama, in his work “Our Posthuman Future” (Fukuyama, 2004), speaks of a change in society and culture as a whole if the biological nature of man changes.

Another feature of hypernomical societies is the identification of the functions of power and control over power. If in a democratic society power and control functions are separated, in a society of an authoritarian kind they continue each other. The best indicator is the status of the prosecutor’s office. If in a democratic country it is usually a civil structure, then in an authoritarian country its representatives usually wear shoulder straps and are thus actually subordinate to the executive branch.

The purpose of identifying power and control functions is the formation of “power over power”, endowing certain people or structures with exclusive authority. Examples from the communist past and present: the General

Secretaries and the Politburo itself of the Central Committee of the CPSU and the Communist Party of China, the General Secretary and the Central Committee of the Workers' Party of Korea, etc. Many post-communist states (Azerbaijan, Belarus, Kazakhstan, Uzbekistan, etc.) retained this function of "power over power", most often in the hands of the country's president.

It is impossible, however, to draw in this aspect rigid boundaries between democratic and authoritarian countries, since the former are also subject to the erosion of fundamental principles. One-sided presentation of the racial issue and open terror of dissent, legal humiliation of indigenous Europeans before migrants, excessive emphasis on sexual issues, scandalous elections in the United States in 2020 and much more symbolize the onset of a kind of time of "controlled democracy". It is associated with the removal of a number of issues outside the scope of public discussion, which means the introduction of ideological control and the imposition of sanctions on freedom of thought. If the Soviet society left citizens the freedom of "kitchen conversations", then during the period of "electronic democracy" this freedom is increasingly taken away due to the influence of the media. The story of the Telegram service, which refused to transfer the keys to decrypt messages to the Russian special services, as well as the scandal with the Facebook social network, which used the personal data of users to form targeted advertising and transfer this data to the governments of various states, became widely known.

The very activity of a person on the Internet in general and on social networks in particular is hypnomical: on the one hand, every citizen has the right to anonymity, on the other hand, it cannot but be public in the space of mass interactions. Internet companies have the right to form the rules of human activity, but the question is their humanity and morality. It also raises the issue of memory and its use. If human memory tends to forget and is always limited by personal experience, then digital memory is potentially eternal and accessible to many. As noted by the Russian academician V.A. Lektorsky:

In principle, digital memory of you can be stored forever. You stop being the owner of information about your life and its owner. Your personal space turns out to be hacked, as it were, and you become the subject of control by other people (Lektorsky, 2020: 17).

The apotheosis of hypnomie on the Internet is the so-called "cancel culture". This is "a special form of behavior of Internet users who begin to massively boycott or express their contempt for some public figure who has spoken out on a sensitive and controversial issue not in a popular fashion" (Trufanova, 2021: 31). The fate of D. Trump's Twitter page is a vivid example of the "annihilation of existence" of a user in public discourse. For the average person, this culture can cost an unfair loss of reputation, job, family conflicts and health problems. Let us emphasize that Soviet society,

often demonized on the same Internet, at least left a person a chance for public repentance and the preservation of common life benefits. Modern hypernomie is becoming more and more dehumanized.

Another feature of hypernomie is the dominance of plan, control, and regulation of production. In the USSR, that was reflected in the classical principles-slogans “Five-year plan in four years”, “Overfulfill the plan”, “Catch up and overtake America”, etc. Modernity offers new forms of the plan. Leaving aside the DPRK Songbun system, let us turn to the “social rating” model officially introduced in China in 2016.

According to the Chinese rating system, all actions of a person are assessed by adding or subtracting points to the originally assigned indicator of 1000 points. The rating is changed electronically, regardless of the will of the person. Absolutely everything affects the rating: attitude to the authorities, communication with relatives, credit history, even the cleanliness of the place of residence. Interestingly, a decrease in the rating automatically “pulls into a funnel” of unreliability: a low-rated person cannot buy tickets for a plane or train, cannot work in a prestigious position, other people will not want to communicate with him (this leads to a decrease in their points), it sharply decreases chances of getting quality medical and educational services or even a fair trial. In fact, this is a system of social exclusion and alienation of people from the blessings of life, providing for unquestioning loyalty. At the same time, power claims to differentiate between good and evil as fundamental ethical categories: good is behavior that meets the criterion of politically established utility and expediency, evil is all alternative. The requirement to “do the right thing” and “understand rightly” becomes the basis of social morality.

The very existence of a “social rating” does not allow us to talk about moral and immoral in our usual sense. Traditional moral language is inadequate to describe the moral state of such a society. As Russian researchers note:

The archaizing mechanism of palliative resolution of conflicts and contradictions begins to consist in the fact that different social groups cease to be compared with each other in the same normative space. Some citizens are becoming more and more unequal to others, which cannot receive a convincing moral justification... (Martyanov *et al.*, 2016: 65).

Thus, the “plan” becomes an end in itself and acquires an internal logic that dictates indifference to everything that is not related to its conduct. The very system of “social rating” speaks of the close attention of the Chinese authorities to absolutely everything except human life. It is institutionalized indifference based on technical and technological dominance. The myth of “e-democracy” cannot be realized without all-encompassing technological progress.

In the middle of the last century, the German philosopher R. Guardini accurately noted the changed role of technology in modern society and its place in maintaining power:

Technique ultimately has nothing to do with either benefit or well-being, it is about power; about power in the broadest sense of the word. The bearer of such power is trying to lay his hand on the primary elements of nature and human existence. This means the boundless possibilities of construction, but also destruction, especially where it comes to a human being, which is far from being so firm and reliable in itself, as is usually believed. So, there is an undeniable danger, immeasurably growing because it is trying to impose its own authority and power – not someone specific, but an anonymous “state” (Guardini, 1990: 144).

This opens up prospects for qualitatively new totalitarian and authoritarian regimes. Their technical basis is the Internet of Things, which allows total control of all human actions. It is no coincidence that some scientists, such as the Canadian sociologist V. Mosco, talk about: “the emergence of a new type of panopticon – an impersonal controlling structure” (Kravchenko, 2019: 30).

Finally, we note one more feature of hypernomie – the widest spread of collectivism and conformism, idealization of obedience, self-sacrifice for the sake of the group, rejection of private property and personal independence. Therefore, in a “hypernomical society” there is a cult of violence and coercion, and much attention is paid to historical events associated with the use of force, and historical revisionism is often spread. Communist societies, again, are not alone: for example, the events in the United States in 2020 clearly illustrate the validity of this thesis, and above all, for democratic societies. To survive in such conditions, an individual needs to educate and develop the following negative qualities: conformism, opportunism, acceptability of corruption, deception, pretense, and doublethink.

British anthropologist E. Gellner reveals this feature in more detail. First, he wrote about the USSR as follows (although his thought is valid not only in relation to the USSR):

Social control presupposes the purposeful drawing of practically all members of society into the mud of hypocrisy and demagoguery, both moral and economic. Everyone had to express support for the persecution of dissidents, recite sacred truths, and participate in illegal economic activities. And since everyone was somehow guilty – before morality or before the law – the likelihood of moral rebellion turned out to be extremely low... (Gellner, 2004: 155).

Secondly, he notes that, in a paradoxical way, many hypernomic societies speak of high culture, the purification of the people’s soul, the affirmation of truth, and other serious things. The general meaning of these speeches is the affirmation of unity, but in reality, these societies are internally divided.

A society striving to become an Ummah, that is, to embody some unique truth bordering on revelation, a charismatic community that affirms truth on earth and makes virtue the main goal of its state – such a society can be atomized and in reality is atomized in the name of achieving higher goals (Gellner, 2004: 155-156).

These higher goals are illusion, painstakingly indoctrinated into the mass consciousness. However, without this disunity, there will be no higher goals, as well as vice versa. Real higher goals have already been given to the value consciousness in religious and moral rules, and there is no need to rediscover them. The sacred and the social are two interconnected, but still different spheres of society, and only with hypernomie they try to merge them together.

For this reason, a distinctive feature of hypernomical societies is the weakening of the ability of many citizens to make independent and rational judgments and a tendency to conformism. T. Adorno, B. Altemeyer, E. Fromm, K. Stenner and other researchers of right-wing authoritarianism concluded that reduced intelligence indicates adherence to ultra-conservative ideology and love of hierarchy. Right-wing authoritarianism provides simple answers to people with low abstract thinking abilities (Adorno, 2001; Altemeyer, 2006). There is some difference between right and left authoritarianism, however, according to the common belief of some contemporary authors, it is not fundamental, and conformism is inherent in both left and right authoritarians (Stenner, 2009a; Stenner, 2009b).

The psychological boundaries of authoritarian thinking are quite wide: its carriers may tend to all-encompassing conformism, turning into submission even to criminal orders. Virtually all military and political criminals were pathological conformists. As Russian psychologists write, “the conformist consciousness is automated, it lacks a sense of responsibility, there is no distinction between good and evil, a person becomes a “cog” of a machine, an automaton, ready at any moment on the command to “turn on” and blindly execute any orders, orders coming from above” (Korolenko and Donskikh, 1990: 148-149). They emphasize that both hypernomie and anomie are essentially based on widespread deviations, which in value and psychological terms brings them closer to each other.

Conclusions

Thus, hypernomie is the opposite of anomie, however, dialectically they complement each other, they are able to pass into each other according to Hegel's law of dialectics. This happens due to the fact that overcontrol gives rise to a person who is ill-adapted to life in a free society. Hypernomie rests on fear and the imposition of a primitive worldview, which often disguises the incompetence of the social elite. Such a model of behavior is pathological, because it kills in the bud the sense of justice, any positive

initiatives, encourages skepticism, nihilism, hypocrisy, deception and self-deception – that very doublethink. On the other hand, anomie can result in the establishment of hypernomie. Typical examples are the history of any totalitarian country right before the establishment of a totalitarian regime. Chaos, crime, extreme decentralization of power and other crisis phenomena can be eliminated with strict control of the behavior of the population by the authorities.

The destruction of the hypernomic order inevitably leads to the growth of anomie, as we have already noted above. There are many reasons for this: the abolition of social institutions of moral control of society (for example, the party and its youth wing), the collapse of the centralized economy, a sharp withdrawal from deficits, a management vacuum, weakening of ideological control, and much more. Although hypernomic societies have their own strengths, they are nevertheless characterized by hypertrophy of certain traits, which eventually leads to their historical defeat. However, modern hypernomie is increasingly acquiring electronic features, which allows us to speak of the emergence of a completely new, *network hypernomie*, which inevitably encompasses any socialized person. It is likely that this opens the stage of a new totalitarianism, more resistant to all threats.

An inevitable problem of traditional hypernomie is the difficulty and cost of control and the ineffectiveness of technological and disciplinary action. On the one hand, citizens resist the right of the state to interfere in their daily existence and therefore actively double-think, that is, they behave demonstratively obediently, deep down in their hearts denying their obedience. On the other hand, overregulation slows down social progress and is increasingly becoming the subject of intra-elite power struggles. In the digital age, this is taking on unpredictable directions. Therefore, the sustainability of modern hypernomic societies is an open question and only the development of human civilization can give an answer to it.

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Legal regulation of prevention of domestic violence in Ukraine

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Abstract

The aim of the article is to clarify the limits and content of the normative regulation of the prevention of domestic violence in Ukraine based on the values of natural law, the theory of criminal, civil and administrative law, and current legislation. In addition, an analysis of the legal support for the training and implementation of State policy in the field of protection of victims of domestic violence is carried out. The legal nature and content of the legal regulation of the prevention of domestic violence in Ukraine are revealed. The dialectical method contributed to the consideration and study of the problem in the unity of its social content and legal form and to the implementation of a systematic analysis of the normative regulation of the prevention of domestic violence in Ukraine. Everything allows us to conclude that the norms of international, European, and national law that regulate the relations of prevention and fight against domestic violence in Ukraine are articulated. Finally, special attention is paid to the organizational and legal aspects of the fight against domestic violence in relation to changes in Ukrainian legislation.

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Keywords: domestic violence; international standards; gender equality; Ukrainian legislation; prevention of domestic violence.

Regulación legal de la prevención de la violencia doméstica en Ucrania

Resumen

El objetivo del artículo es aclarar los límites y el contenido de la regulación normativa de la prevención de la violencia doméstica en Ucrania sobre la base de los valores del derecho natural, la teoría del derecho penal, civil y administrativo y la legislación vigente. Adicionalmente, se realiza un análisis del soporte legal para la formación e implementación de la política de Estado en el campo de la protección de víctimas de violencia intrafamiliar. Se revelan la naturaleza jurídica y el contenido de la regulación legal de la prevención de la violencia doméstica en Ucrania. El método dialéctico contribuyó a la consideración y el estudio del problema en la unidad de su contenido social y forma jurídica y a la aplicación de un análisis sistemático de la regulación normativa de la prevención de la violencia doméstica en Ucrania. Todo permite concluir que, están articuladas las normas de derecho internacional, europeo y nacional que regulan las relaciones de prevención y lucha contra la violencia doméstica en Ucrania. Por último, se presta especial atención a los aspectos organizativos y legales de la lucha contra la violencia doméstica en relación con los cambios en la legislación de Ucrania.

Palabras clave: violencia intrafamiliar; estándares internacionales; igualdad de género; legislación ucraniana; prevención de violencia intrafamiliar.

Introduction

Domestic violence is a recognized global problem. If the victims of domestic violence are distributed according to gender, the number of women victims is 90–95%, and the number of men victims is 5–10% (Bandurka, 2015). According to United Nations research, now every third woman in the world has faced one of the types of domestic violence in her life (Kaczynska, 2016). According to age, about 40% of victims of domestic violence are children and 60% are adult family members. According to various estimates, every year 2 million children in the world become victims of violence. A total of 40 million children suffer from disability, including those who were injured in the family (Bandurka, 2015).

At the beginning of the 21st century, Ukraine became one of the first countries in Eastern Europe to recognize domestic violence as an important social problem, depriving offenders of the opportunity to hide behind the screen of non-interference in private life. At the same time, in some segments of Ukrainian society, including, unfortunately, legal circles, there is a generally accepted, erroneous and dangerous position, according to which family relations are a family affair and even domestic violence is not a crime. According to the Ukrainian Institute for Social Research, only 27% of women consider offences as a manifestation of violence and only 32% similarly assess humiliation. Victims tend to justify their tormentors for many reasons: financial dependence, lack of housing, lack of understanding of how to avoid aggression, and disbelief that someone can help. Such disbelief is not unfounded. After all, almost 40% of employees of the criminal justice system - police, prosecutors, judges - consider domestic violence a private matter, and about 60% believe that the victims are to blame for what happened to them (*Economic Consequences Of Violence Against Women In Ukraine, 2017*).

Modern legal doctrine, international law and the European Convention Heritage oblige Ukraine to create an effective system for preventing and combating domestic violence, accessible to victims of such violence, aimed at protecting their security, and the state policy of protection of victims of domestic violence and other illegal actions should put a strong barrier that would provide protection of potential victims from violent encroachments (Lesko, 2019). However, according to scientists, this system is far from adequate to the current state of society, which is now widespread negative phenomena and processes that directly and indirectly contribute to the commission of crimes against children (increasing divorce, increasing the number of disadvantaged families, alcoholism, drug addiction, drug addiction, the dominance of legal nihilism, the growth of offenses in general) (Levitska, 2003).

The rules of law permeate the entire legal matter of society. It is not enough just the constitutional declarations proclaimed in Art. 3 of the Constitution of Ukraine: "A person, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the state. The state is accountable to man for his activities. The establishment and protection of human rights and freedoms is the main duty of the state" (Constitution of Ukraine, 1996). Freedom and human rights without a mechanism for their implementation and effective protection, which takes into account the realities of modern life - fiction. The twenty-first century is the age of informatization, the information resources industry and, most importantly, the process of actively ensuring the protection of human rights and freedoms. Fulfillment of the task of ensuring rights and freedoms as components of the process of formation and

development of spirituality in society - this is the reality of human progress towards a humanistic future (Bryzhko *et al.*, 2006). Public relations that arise in the field of preventing and combating domestic violence cannot be an exception to this rule (Manjos, 2019).

Based on the values of natural law, the theory of criminal, civil and administrative law, and current legislation, we aim to clarify the boundaries and content of regulations on the prevention of domestic violence in Ukraine.

1. Methodology of the study

A system of methods of scientific knowledge is used to achieve the goal and objectives of the scientific article, to ensure the reliability of the results and conclusions. The dialectical method contributed to the consideration and study of the problem in the unity of its social content and legal form and the implementation of a systematic analysis of the normative regulation of the prevention of domestic violence in Ukraine.

The system-structural method allowed to study the main international and national regulations that regulate the relationship to prevent and combat domestic violence as a holistic set of elements that interact with each other. The use of the statistical method contributed to the generalization of legal practice, analysis of empirical information related to the topic of the scientific article. The historical and legal method was used to study the stages of development of legislation on the state policy of Ukraine in the field of protection of victims of domestic violence and other illegal actions. The comparative legal method was used during the review and study of legal literature, the main scientific approaches to solving the tasks of research and analysis of domestic legislation in the process of clarifying its relationship with international standards for regulating this problem. The formal-legal method was used in the study of normative sources of scientific work, which allowed to identify shortcomings of current legislation of Ukraine, which regulates the activities of entities in the field of protection of victims of domestic violence and other illegal actions and formulate proposals to improve their activities.

These methods in conjunction with general logical methods and techniques (analysis, synthesis, induction, deduction, analogy) allowed a comprehensive and effective study of regulatory and legal support for the formation and implementation of state policy in the field of domestic violence prevention in Ukraine, aimed at bringing national legislation in a state that would lead to the possibility of ratification of the Istanbul Convention.

2. Analysis of recent research

We consider it expedient to give a general description of normative-legal documents aimed at preventing domestic violence in Ukraine.

Legal theorists inextricably link regulation with legal regulation as the regulation of people's behavior through regulations designed to be reused in the circumstances. That is, the scope of public relations, which is subject to regulatory legal regulation, is quantitatively uncertain (Kurakin, 2013).

In general, such a construction is suitable for public relations of normative regulation of prevention and counteraction to domestic violence in Ukraine, which involve numerous norms of international, European and domestic law. Moreover, the latter consist of the norms of the Constitution and other laws of Ukraine, in particular codes and bylaws. Among the international legal acts it is worth mentioning the Universal Declaration of Human Rights, the preamble of which emphasizes the belief in fundamental human rights, the dignity and worth of the human person, equality of men and women (Universal Declaration Of Human Rights, 1948).

International and European regulations, such as the United Nations Declaration on the Elimination of Violence against Women (UN Declaration On The Elimination Of Violence Against Women, 1993), the UN Convention, are literally permeated with positive principles for preventing and combating domestic violence against women and children. on the Rights of the Child (UN Convention On The Rights Of The Child, 1989), the UN Convention on the Elimination of All Forms of Discrimination against Women (UN Convention On The Elimination Of All Forms Of Discrimination Against Women, 1999), Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (Council Of Europe Convention For The Protection Of Human Rights And Fundamental Freedoms, 1997), Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter referred to as the Istanbul Convention) prevention of and fight against violence against women and domestic violence), the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Council Of Europe Convention On The Protection Of Children Against Sexual Exploitation And Sexual Abuse, 2012).

European Convention on the Exercise of Children's Rights (European Convention On The Exercise Of Children's Rights, 2006). Thus, according to the UN Declaration on the Elimination of Violence against Women, States must condemn violence against women and must not invoke any customs, traditions or religious motives to evade their obligations to eradicate it. States must immediately implement policies to eradicate violence against women by all appropriate means (UN Declaration On The Elimination Of Violence Against Women, 1993). The Council of Europe Convention

on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention, 2013) is the first legal instrument on this issue at European level, as well as one of the most promising international treaties in this field. The Convention enshrines the absolute inadmissibility of violence against women and domestic violence. It also sets out a number of responsibilities of participating countries to protect refugees and asylum seekers from domestic and gender-based violence and establishes a number of safeguards for this category of persons. In particular, Art. 60 of the Convention obliges countries to take measures to ensure that gender-based violence against women can be recognized as a form of persecution. Parties should take the necessary legislative or other measures to develop gender-sensitive reception and support procedures for asylum seekers, as well as gender-based gender guidelines and asylum procedures, including refugee status determination and applications for international protection (Convention Council Of Europe On The Protection Of Human Rights And Fundamental Freedoms, 1997).

Despite positive developments in public policy and practice, various forms of domestic violence remain a common problem at all levels of society in all Council of Europe member states, including Ukraine. So far, there are virtually no comprehensive international legal acts that would systematically establish international standards for the prevention of domestic violence. Most international acts are aimed at promoting gender equality and preventing violence against children and women (UN Convention On The Rights Of The Child, 1989; Declaration On The Elimination Of Violence Against Women, 1993) (Lomakina, 2020).

The Constitution of Ukraine clearly states that citizens have equal constitutional rights and freedoms and are equal before the law. There may be no privileges or restrictions based on race, color, political, religious or other beliefs, gender, ethnic or social origin, property status, place of residence, language or other characteristics. Equality of rights of women and men is ensured by: providing women with equal opportunities with men in socio-political and cultural activities, in education and training, in work and remuneration for it; special measures for the protection of labor and health of women, the establishment of pension benefits; creating conditions that enable women to combine work with motherhood; legal protection, material and moral support of motherhood and childhood, including the provision of paid leave and other benefits to pregnant women and mothers.

The use of women and minors for work that is hazardous to their health is prohibited. Marriage is based on the free consent of a woman and a man. Each spouse has equal rights and responsibilities in marriage and family. Parents are obliged to support their children until they reach the age of majority. Adult children are obliged to take care of their disabled parents.

The family, childhood, motherhood and fatherhood are protected by the state. Children are equal in their rights regardless of their origin, as well as whether they are born in or out of wedlock. Any violence against and exploitation of a child is prosecuted under the law (European Convention On The Exercise Of Children's Rights, 2016).

Ukraine's adoption of the latest legislative changes in this direction is aimed, among other things, at bringing national legislation into a state that would lead to the possibility of ratification of the Istanbul Convention. In particular, the relevant Law of Ukraine "On Prevention and Counteraction to Domestic Violence" defines the organizational and legal framework for preventing and combating domestic violence, the main directions of state policy in this area, aimed at protecting the rights and interests of victims of such violence (On Prevention And Counteraction To Domestic Violence, 2017).

In addition, some provisions relating to the analyzed issues are concentrated in other laws of Ukraine, namely: "On Child Protection" (On Child Protection, 2002), "On Social Services" (On Social Services, 2019), "On Free Legal Aid" (On Free Legal Aid, 2011), the Code of Ukraine on Administrative Offenses (Code Of Ukraine On Administrative Offenses, 1984), the Civil (Civil Code Of Ukraine, 2003), the Criminal (Criminal Code Of Ukraine, 2001) and the Family (Family Code Of Ukraine, 2002) codes. In particular, according to Art. 173 2 Code of Ukraine on Administrative Offenses, provides for administrative liability for domestic violence, on the grounds of sex, i.e. intentional commission of any acts (actions or omissions) of a physical, psychological or economic nature (use of violence that did not Cause bodily harm, threats, insults or harassment, deprivation of housing, food, clothing, other property or funds to which the victim is entitled by law, etc.), as a result of which the physical or mental health of the victim may or has not been harmed. Such acts are punishable by a fine of ten to twenty non-taxable minimum incomes or public works for a period of thirty to forty hours, or administrative arrest for up to seven days (Code Of Ukraine On Administrative Offenses, 1984).

The legislative act, which contains norms aimed at protecting the rights of the child, is the Civil Code of Ukraine of 16.01.2003, which states: "Personal intangible goods protected by civil law are: health, life; honor, dignity" (Article 201) (Civil Code Of Ukraine, 2003). The Code provides for the right to "restoration of the violated right, as well as compensation for non-pecuniary damage caused by its violation" (Article 276), "refutation of inaccurate information" about an individual (Article 277). In Art. 288 of the Civil Code of Ukraine states that "any form of physical or mental pressure on an individual, his involvement in the use of alcohol, drugs and psychotropic substances, other acts that violate the right to liberty" (Civil Code). In paragraphs 1, 2 of Art. 289 of the Civil Code of Ukraine

stipulates that an individual has the right to personal inviolability, that he may not be subjected to torture, cruel, inhuman, or degrading treatment or punishment. Paragraph 3 of this article states the inadmissibility of corporal punishment by parents (adoptive parents), guardians, trustees, educators of minors, minors, and wards. In Art. 293 of the Civil Code of Ukraine states that an individual has the right to appropriate, safe, and healthy learning conditions, etc. (Civil Code Of Ukraine, 2003). Thus, the norms of the Civil Code of Ukraine provide the idea of the inadmissibility of any violence against a person, and therefore against a child, as legal capacity is acquired from birth, as well as the right to safe learning conditions. It should be emphasized that in the Civil Code of Ukraine violence is identified with pressure. Thus, Article 231 “Legal consequences of a transaction committed under the influence of violence” stipulates that “a transaction committed by a person against his true will as a result of physical or mental pressure from another party or another person is declared invalid by a court (Civil Code Of Ukraine, 2003).

In Art. 173-2 of the Code of Ukraine on Administrative Offenses, the term “violence” is used only to establish liability for domestic violence, violence on the grounds of sex (Article 173-2 of the Code of Ukraine on Administrative Offenses) (Code Of Ukraine On Administrative Offenses, 1984).

There is also no definition of violence in the Criminal Code of Ukraine, although the term and its derivatives are used in both the General and Special Parts (Criminal Code Of Ukraine, 2001). Thus in the General part they are used at construction of norms about the circumstances excluding criminality of act (item 36 “Necessary defense” and item 43 “Execution of a special task on the prevention or disclosure of criminal activity of the organized group or the criminal organization”). Such types of violence are not negative and have no antisocial character. In the Special Part, the term “violence” is used more than 100 times. In addition to the above, the Criminal Code provides for a number of socially dangerous acts, which are inherently violent, but in their construction were used other means of describing the crime without the use of the term “violence” (Blaga, 2014).

Although the Criminal Code of Ukraine does not contain a special rule that would provide for liability for domestic violence, it contains a number of sections that provide punishment for the actions of a person who has committed a domestic offense, which is a crime, namely: crimes against life and health of a person; crimes against the will, honor and dignity of the person; crimes against electoral, labor and other human and civil rights and freedoms; crimes against property; crimes against public order and morality; crimes in the field of trafficking in narcotic drugs, psychotropic substances, their analogues or precursors and other crimes against public health, etc.

Special attention of criminal law is focused on violations of children's rights and violence against them by parents. Criminal liability is provided for the involvement of parents of minors in criminal activities, drunkenness, begging, gambling (Article 304 of the Criminal Code of Ukraine). For inflicting light bodily injuries in the event of domestic violence, criminal liability arises under Art. 125 of the Criminal Code of Ukraine (Criminal Code Of Ukraine, 2001).

Part 2 of Article 155 of the Criminal Code of Ukraine provides for liability for sexual intercourse with a person under the age of sixteen, committed by a father, mother or a person replacing them. Also the sanction of Art. 156 of the Criminal Code of Ukraine determines the responsibility for committing lewd acts against a minor by a father, mother or a person who replaces them. Other crimes committed during domestic violence are also prosecuted (Criminal Code Of Ukraine, 2001).

Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine in order to implement the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence" of 06.12.2017 № 2227-VIII (On Amendments To The Criminal And Criminal Procedure Codes Of Ukraine In Order To Implement The Provisions Of The Council Of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, 2017) amended the Criminal Code of Ukraine to determine liability for any form of intentional systematic domestic violence (psychological, physical, sexual or economic) (Article 126-1 of the Criminal Code of Ukraine). Persons who force another person to marry will also be prosecuted. An amendment was made to Art. 154 of the Criminal Code of Ukraine. It provides for the onset of criminal liability for forcing sexual intercourse with another person.

Although the Criminal Procedure Code of Ukraine does not provide a definition of the term "violence", it does use it several times: firstly, when explaining the procedure for establishing the voluntary conclusion of an agreement by the parties (Article 474), and secondly, to specify the scope of certain criminal offenses in respect of which certain specifics of criminal proceedings are provided (Articles 224 and 477) (Criminal Procedure Code Of Ukraine, 2012). In Part 3 of Art. 477 of this Code specifies the procedure for instituting a criminal case in the form of private prosecution in case of crimes under this article, if they are committed by the victim's husband (wife), another close relative or family member of the victim (Criminal Procedure Code Of Ukraine, 2012).

These laws are aimed at introducing an integrated approach to preventing and combating domestic and gender-based violence, expanding the list of tools and instruments to combat domestic and gender-based violence, and creating a legal basis for ratification of the Council of Europe Convention on

Preventing Violence against Women and Domestic Violence. violence and combating these phenomena. The most numerous among the normative legal acts in the researched sphere are by-laws of general action. Among them are: Decree of the President of Ukraine № 501/2015 of August 25, 2015 “On approval of the National Strategy in the field of human rights” (On Approval Of The National Strategy In The Field Of Human Rights, 2015), Resolution of the Cabinet of Ministers of Ukraine of August 22, 2018 № 658 “On Approval of the Procedure for Interaction of Entities Carrying Out Measures in the Sphere of Prevention and Counteraction to Domestic Violence and Gender-Based Violence” (On Approval Of The Procedure For Interaction Of Entities Implementing Measures In The Field Of Prevention And Counteraction To Domestic And Gender-Based Violence, 2018), Resolution of the Cabinet of Ministers of Ukraine of August 22, 2018 № 655 “On approval of the Standard Regulations on Asylum for Victims from domestic and / or gender-based violence ” (Standard Regulations On Asylum For Victims Of Domestic Violence And / Or Gender-Based Violence, 2018), Resolution of the Cabinet of Ministers of Ukraine of January 23, 2019 № 43 “On Approval of the Standard Regulations on Mobile Brigade of Social and Psychological Assistance to Victims from domestic and / or gender-based violence ” (Standard Regulation On The Mobile Brigade Of Social And Psychological Assistance To Victims Of Domestic Violence And / Or Gender-Based Violence, 2019), Resolution of the Cabinet of Ministers of Ukraine of March 20, 2019 № 234 “On Approval of the Procedure for Forming, Maintaining and Accessing the Unified State Register of Domestic Violence and Gender-Based Violence “ (On Approval Of The Procedure For Formation, Maintenance And Access To The Unified State Register Of Domestic Violence And Gender-Based Violence, 2019), Order of the Ministry of Internal Affairs of Ukraine of August 1, 2018 № 654 “On approval of the Procedure for issuing urgent prohibitions by authorized units of the National Police of Ukraine regarding the offender “ (On Approval Of The Procedure For Issuing Urgent Prohibitive Instructions Against The Offender By Authorized Units Of The National Police Of Ukraine, 2018), Order of the Ministry of Education and Science of Ukraine of May 22, 2018 № 509 “On approval of the Regulations on psychological services in the education system of Ukraine” service in the education system of Ukraine), the order of the Ministry of Education and Science of Ukraine dated October 2, 2018 №1047 “On approval of Guidelines for detection, response to cases of domestic violence and interaction of teachers with other bodies and services” (On approval of Guidelines for detection, response to cases of domestic violence and interaction of teachers with other bodies and services), order of the Ministry of Social Policy of October 1, 2018 № 1434 “On approval of the Standard program for abusers” (On Approval Of The Standard Program For Abusers) Offenders, 2018), order of the Ministry of Social Policy of Ukraine № 564/836/945/577 of August 19, 2014. “On approval of the Procedure for consideration of appeals and reports

regarding child abuse or threat of its commission (Ministry of Social Policy of Ukraine, Ministry of Internal Affairs of Ukraine, Ministry of Education and Science of Ukraine, Ministry of Health of Ukraine)” (On approval of the Procedure for consideration of appeals and reports on child abuse or threats of child abuse), Order of the Ministry of Social Policy of Ukraine № 281 of May 8, 2014 “On approval of Guidelines for the organization of correctional programs for perpetrators of domestic violence” (On Approval Of Methodical Recommendations On The Organization Of Correctional Programs For Persons Who Commit Domestic Violence, 2014), Order of the Ministry of Social Policy of Ukraine № 1852 of December 11, 2018 “On the establishment of the State Institution” Call Center of the Ministry of Social Policy of Ukraine trafficking in human beings, prevention and counteraction to domestic violence, gender-based violence and violence against children” (On the establishment of the State Institution“ Call Center of the Ministry of Social Policy of Ukraine for Combating Trafficking in Human Beings, Prevention and Counteraction to Domestic Violence children).

For example, according to the latest legal act, the Call Center is a non-profit state budget institution established to ensure the implementation of tasks related to the proper response to citizens’ complaints about human trafficking, domestic violence, gender-based violence and violence against children. The main tasks of the Call Center are: to ensure a proper response within the competence to citizens’ complaints about the facts of human trafficking, domestic violence, gender-based violence, violence against children; informing and advising on combating trafficking in human beings, preventing and combating domestic violence, gender-based violence, violence against children; interaction with actors implementing measures in the field of preventing and combating domestic and gender-based violence; ensuring response within the competence to citizens’ appeals on the facts of human trafficking through interaction with entities that implement measures in the field of combating human trafficking; maintaining, filling and updating the database for consultations on issues and exchange of information with entities implementing measures in the field of prevention and counteraction to domestic violence and gender-based violence (On The Establishment Of The State Institution “Call Center Of The Ministry Of Social Policy Of Ukraine Combating Trafficking In Human Beings, Preventing And Combating Domestic Violence, Gender-Based Violence And Violence Against Children, 2018).

The state policy of protection of victims of domestic violence and other illegal actions is a direction of the internal legal policy of the state, which forms the main tasks, principles of legal influence on violence and other illegal actions against children, as well as providing comprehensive assistance to victims and expressed in law, the practice of their application.

An important normative legal act in the field of protection of victims of domestic violence and other illegal actions is the Concept of the State Social Program “National Action Plan for the Implementation of the UN Convention on the Rights of the Child” until 2021 from April 5, 2017 N°230-r. The State Social Program “National Action Plan for the Implementation of the UN Convention on the Rights of the Child” until 2021 is a logical continuation of the National Program “National Action Plan for the Implementation of the UN Convention on the Rights of the Child” until 2016, which should promote an updated model public authorities and local governments at all levels in the direction of ensuring the best interests of children (On The National Program “National Action Plan For The Implementation Of The Un Convention On The Rights Of The Child” Until 2016, 2009). Understanding the relevance of these issues is reflected in the Council of Europe Strategy on the Rights of the Child (2016-2021), adopted on March 2, 2016 by the Committee of Ministers of the Council of Europe. The Council of Europe will help to eradicate violence in all areas, including education, the media, justice, equality, the family, migration, alternative care, and violence against children with disabilities. The Council of Europe will act as a focal point for ensuring access to national strategies in this area at national, regional and local levels (Council Of Europe Strategy On The Rights Of The Child (2016-2021, 2016)).

Summing up this block of research, we note that the problem of protection of victims of violence and other illegal actions is extremely serious, and its solution requires the joint efforts of not only government agencies, public and international organizations, but also scientists and practitioners. In this process, the most important role is given to the state, which should formulate an appropriate state policy to protect victims of violence and other illegal actions, and purposefully implement it. Ukraine takes the problem of domestic violence seriously. Important steps have been taken to combat gender-based violence and domestic violence, namely, Ukraine has joined the Biarritz Partnership, and the President of Ukraine has signed Decree N° 398/2020 “On Urgent Measures to Prevent and Combat Domestic Violence, Gender-Based Violence, and Protection of Rights victims of such violence” (Protecting Human Rights And Combating Violence Is A Priority For The Ministry Of The Interior, 2020).

It would be logical to proceed to the analysis of the relevant law on the prevention and combating of domestic violence.

Since the entry into force of the Law of Ukraine “On Prevention and Counteraction to Domestic Violence” on December 7, 2017, the Law of Ukraine “On Prevention of Domestic Violence”, which applied only to family members, has expired. This act also regulates the relationship not only between the spouses and their children, but also between the former spouses, the bride and groom; persons who are in a civil marriage; persons

with common children; grandparents, grandchildren, adopted children, guardians, trustees, stepsons, stepdaughters, stepfathers, stepmothers, brothers, sisters. The law applies to such persons regardless of the fact of cohabitation. The legislator also provided for an open list on the possibility of applying the provisions of the Law to other relatives or persons who have a common life and have mutual rights and obligations. However, subject to cohabitation.

The Law of Ukraine “On Prevention and Counteraction to Domestic Violence” defines the concept of domestic violence as acts (acts or omissions) of physical, sexual, psychological or economic violence committed in the family or within the place of residence or between relatives, or between past or present spouses, or between other persons who live (lived) together with one family, but are not (were not) in a family relationship or marriage with each other, regardless of whether the person who committed (lived) lives (lived), in the same place as the injured person, as well as threats to commit such acts. The term “domestic violence” has replaced the term “domestic violence” used in the repealed Law of Ukraine “On Prevention of Domestic Violence”.

In our view, the definition of threats to commit acts as a form of domestic violence does not seem entirely justified given that psychological violence includes threats and intimidation. Article 1 of the Law stipulates that a person who has suffered from domestic violence (victim) is a person who has suffered domestic violence in any form (On Prevention and Counteraction To Domestic Violence, 2017).

Progressive is the provision of the Law that a child victim of domestic violence (victim child) is not only a person who has not reached 18 years of age and has experienced domestic violence in any form, but also who has witnessed (eyewitness) such domestic violence. In addition, the rights of the injured child are defined separately, and it is emphasized that the exercise of such rights should be in the best interests of the child, his or her age, gender, health, intellectual and physical development (On Preventing And Combating Domestic Violence, 2017). This provision of the Law is in line with the provisions of the Istanbul Convention, the preamble of which recognizes that children are victims of domestic violence, including as witnesses of domestic violence. Article 26 of the Convention imposes an obligation on States parties to aid children who witness domestic violence. The term “child witnesses” refers not only to those children who were present during the violence and became active witnesses to what was happening, but also to those who heard howls and other noise from their hiding places, or those who became hostages of long-term consequences of such violence proceedings (On Prevention And Counteraction To Domestic Violence, 2017).

The understanding of sexual violence has changed significantly. Thus, if earlier sexual violence was considered an unlawful encroachment on the sexual integrity of another family member, now it is any act of a sexual nature, the key is the concept of “consent”. In the note to Art. 152 of the Criminal code of Ukraine the consent is recognized as voluntary as a result of free will to enter into sexual intercourse or carrying out actions of sexual character (Criminal Code Of Ukraine, 2001). The issue of consent must be considered in conjunction with the accompanying circumstances and in accordance with the rules of criminal procedure. Also, according to Ukrainian law, sexual violence differs from rape in that it is not related to penetration into the partner’s body. It does not matter whether such an act was committed with the help of genitals or any other objects.

The Law also defines the list of rights of victims of domestic violence, as well as establishes the types of assistance and protection provided to such persons. The age, health, gender, religious beliefs, ethnic origin, and special needs of such persons are taken into account when providing assistance and protection to victims. Assistance to victims is provided at the place of application and does not depend on the application to law enforcement agencies or the court, on their participation in criminal or civil proceedings (On The Prevention And Combating Of Domestic Violence).

It is important from the point of view of the researched problem that the Law of Ukraine “On Prevention and Counteraction to Domestic Violence” expands, in comparison with the previous legislation, the system of measures to counteract domestic violence. Special measures to combat domestic violence include: an urgent injunction against the perpetrator; restrictive injunction against the offender; taking on preventive maintenance of the offender and carrying out preventive work with him; referral of the offender to the program for offenders (On Prevention And Counteraction To Domestic Violence, 2017). It is seen that the most prompt and effective measures to combat domestic violence will be an urgent injunction and a restraining order against the perpetrator. The other two measures are aimed both at combating violence and at re-educating and correcting the offender.

It should be noted that with the help of the Law of Ukraine “On Prevention and Counteraction to Domestic Violence” Ukraine, declaring zero tolerance for domestic violence and recognizing its social danger, introduced new approaches to combating this social phenomenon and introduced such a new legal instrument - a restrictive prescription. In deciding whether there are grounds for issuing a restraining order, courts should establish what forms of domestic violence the applicant has been subjected to and assess the risks of future domestic violence in any form.

Thus, the analysis of the provisions of the Law of Ukraine “On Prevention and Counteraction to Domestic Violence”, as well as the practice of its law

enforcement, that the adoption of this legal act will undoubtedly contribute to: combating discrimination on the basis of gender; prevention of all forms of domestic violence against women; introduction of additional measures aimed at creating preventive and protective mechanisms to combat all forms of domestic violence, in particular gender-based violence, violence against children; providing additional guarantees for the protection of the right to equality between men and women, parents and children, removal of legal provisions that cause discrimination; improving legal remedies for victims of domestic violence.

Conclusions

Thus, the effectiveness of state policy to protect victims of domestic violence and other illegal actions is primarily based on the effectiveness of the law, depends on the operation of the entire mechanism of legal regulation and is determined by the level of achievement, adequacy between planned and achieved.

The similarity of the laws governing the prevention and combating of domestic violence in Europe is not only a desire to implement the provisions of the Istanbul Convention, but also common social values that are protected - health and life, peace and well-being of the family and more. Undoubtedly, the European experience should be studied and analyzed in our country in order to avoid possible mistakes and implement useful developments in overcoming domestic violence in Ukraine. The introduction of modern forms and methods of combating domestic violence, based on international best practices, requires the development of an appropriate system for monitoring not only the effectiveness of legislation, but also monitoring the effectiveness of actors implementing measures to prevent and combat domestic violence. The criterion for the effectiveness of these actors may be an increase in the total number of complaints about domestic violence, which will increase confidence in the system of actors implementing measures to prevent and combat domestic violence, increase their awareness of the possibility of assistance and reduce the overall tolerance of violence in society.

Despite the deep doctrinal development of the basics of prevention policy, it has not been consolidated in Ukraine at the conceptual level. Today, at the conceptual level, there is an urgent need to develop and approve at the state level the concept of crime prevention, the adoption of the Law of Ukraine "On Crime Prevention", theoretical substantiation and consolidation at the normative level of the system and types of crime prevention measures, procedures for their implementation. Ukraine should take all possible measures to ratify the Council of Europe Convention on Preventing and

Combating Violence against Women and Domestic Violence. By ratifying the Istanbul Convention, Ukraine will be able to receive specialized support from the Council of Europe and the international community on these issues.

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Había una vez un Estado... notas para problematizar el Estado a partir de interpretaciones complementarias

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Resumen

El objetivo central de estas notas es explorar una serie de aspectos asociados con las miradas institucionales y antropológicas sobre el Estado, respectivamente y de manera complementaria. En términos metodológicos, el presente escrito es una reflexión de carácter estrictamente teórico. En este sentido, y al carecer de referencia empírica concreta, no se discutirán aquí, la escalaridad del Estado, o los alcances de este en términos de funciones, instituciones y reformas. Se trabajará desde los aspectos institucionales y no-institucionales -antropológicos- del mismo, abordando diferentes perspectivas y autores. Se considera que estas dos miradas ofrecen abordajes distintos, pero necesariamente complementarios que permitirán problematizar al Estado comprendiendo sus planos macro y micro como campos en tensión. El escrito concluye con una reconsideración analítica del vínculo del Estado con la sociedad civil, la ciudadanía y sus heterogéneas manifestaciones.

Palabras clave: Estado; Instituciones; Antropología del Estado; Sociedad Civil; Ciudadanía

Once upon a time there was a State... Notes on problematizing the State on the basis of complementary interpretations

Abstract

The main purpose of the notes here presented is to explore a series of aspects associated with institutional and anthropological views of the State, respectively and in a complementary manner. From a methodological

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perspective this study is of a strictly theoretical nature therefore, since it lacks concrete empirical support, questions such as the schooling of the State or its scope in terms of functions, institutions, and reforms will not be discussed here. Furthermore, We will work from the institutional and non-institutional -anthropological - aspects of the State, addressing different perspectives and authors. It is considered that these two positions offer different but necessarily complementary approaches that will make it possible to problematize the State by understanding both its macro and micro levels as areas in conflict. The paper concludes with an analytical reconsideration of the State's link to civil society, citizenship, and its heterogeneous manifestations.

Keywords: State; Institution; State Anthropology; Civil Society; Citizenship.

Introducción

El tema central de este artículo es el Estado². Interesa recuperar este concepto esencialmente moderno para problematizarlo desde un enfoque que está tomando una relevancia cada más creciente: la antropología política y del Estado. Es ese contexto, es oportuno preguntarse por qué y cómo dicha relevancia se hace presente, cuáles son aquellos aspectos que nos acercan otra vez al Estado como concepto central de la teoría política moderna y contemporánea, pero también como un referente social, un lugar al que el ciudadano recurre en forma constante.

El objetivo central de estas notas es explorar una serie de aspectos asociados con las miradas institucionales y antropológicas sobre el Estado respectivamente y de manera complementaria.

En términos metodológicos, se trata de una reflexión de carácter estrictamente teórico. El recorrido que aquí se realiza no lo incorpora como una unidad de observación empírica en la construcción del objeto de estudio. Para la construcción teórica, la categoría analítica principal es el *Estado*. En este sentido, y al carecer de referencia empírica concreta, no se discutirán aquí cuestiones tales como la escalaridad del Estado, o los alcances del mismo en términos de aparato, funciones, instituciones y reformas. Se trabajará desde dos dimensiones de análisis denominadas *institucional* y *no-institucional* en términos amplios, que serán abordadas desde diferentes autores y perspectivas.

Para organizar la discusión, el punto de partida resulta considerar al Estado como una *institución* (analizando su institucionalidad) pero también como una *relación social*. Se considera que este tipo de análisis

2 A lo largo de todo el escrito se referirá al Estado, con mayúscula, con la excepción de citas textuales que lo indiquen con minúsculas.

permitirá una visión macro, referida al *Estado-institución* y otra micro, referida al *Estado no-institución* siempre bajo el supuesto de que éstas no se presentan como dicotómicas y resultan más bien complementarias.

En forma adicional, es relevante considerar al Estado en su contexto. Como señalan Oszlak y O'Donnell en un clásico artículo de 1976, el “nivel de contexto” resulta central para cualquier indagación de la realidad social. Estos autores definen ese contexto como aquellos factores que se encuentran por fuera del objeto específico de investigación –en este caso, el Estado– y que resultarán centrales para su comprensión, descripción y explicación. En este sentido, las referencias que siguen han sido consideradas, en general, en contextos de regímenes políticos democráticos, independientemente de sus grados intrínsecos de democratización (Tilly, 2010; Whitehead, 2011), los cuales requerirían una investigación específica.

Dicho esto, el escrito se divide en cuatro apartados. A esta Introducción, le sigue un apartado que establecerá los principales aspectos asociados a la comprensión institucional del Estado. En segundo lugar, se introducirán aquellos aspectos definidos como no-institucionales, abordando en particular una mirada de la antropología política. Para finalizar, se presentan unas conclusiones en las que se despliegan los aspectos más destacables que sugieren el análisis propuesto.

1. La institución estatal

A riesgo de no ser original, se iniciará este apartado con la definición institucional, de raíz weberiana, de Estado. A propósito, y se citará *inextenso*, el Estado es:

Una asociación con base territorial, compuesta de *conjuntos de instituciones y de relaciones sociales* (la mayor parte de ellas sancionadas y respaldadas por el sistema legal de ese estado) que normalmente penetra y controla el territorio y los habitantes que ese conjunto delimita. Estas instituciones reclaman el monopolio en la autorización legítima del uso de la coerción física y normalmente tienen, como último recurso para efectivizar las decisiones que toman, supremacía en el control de los medios de esa coerción sobre la población y el territorio que el Estado delimita (O'Donnell, 2010: 76. Énfasis propio).

A los fines de esta exploración, se destacarán dos términos que este autor considera: instituciones y relaciones sociales, y que aparecen, aunque de distinta forma, en toda su obra³. En esta línea, Oszlak (1978) también señala esta diferencia en términos analíticos. Es decir, para la comprensión del

3 El politólogo argentino Guillermo O'Donnell “interviene” la célebre definición del pensador alemán, en relación con el sustento de ese reclamo: la autorización legítima. Esto, como bien indica, le permite asociar su definición de Estado a una de las dimensiones constitutivas: la *legal*. Asimismo, la consideración del Estado no aparece de manera homogénea durante toda su obra. Las particularidades de esto pueden revisarse en Bertranou (2015).

Estado en abstracto; señalando que el este como tal articula dos planos que lo constituyen: el de las relaciones sociales y el del aparato institucional. En el primer caso, la referencia es a un conjunto diverso de relaciones sociales (intergubernamentales, políticas, administrativas, etc.), mientras que, en el segundo, se refiere a las organizaciones burocráticas (la burocracia estatal) que resultan, en rigor, su “objetivación institucional”. De este modo, para este autor, el aspecto institucional del Estado se vincula directamente con sus burocracias.⁴

El Estado es, entonces, una institución que, como agrega O'Donnell, “condensa y procesa poderes que emergen de la sociedad (a nivel local, internacional y transnacional)” generando sus propios poderes, devolviendo así un producto: las políticas públicas pudiendo ser éstas, también, grandes omisiones (2010:78).

El Estado, en palabras de Mann (1991) es un concepto confuso. Ha sido consecutivamente abordado haciendo foco diferencial en instituciones y relaciones sociales por autores marxistas, weberianos, estructural-funcionalistas, sistémicos, neomarxistas y neoweberianos y la lista se amplía tal como remarcan Skocpol (1989) y Jessop (1999). En ese devenir teórico diverso, algunos acuerdos destacan y nos facilitan su abordaje conceptual. Evans (1996), por ejemplo, identifica al Estado como un agente de cambio y a partir de allí observa su influencia en diferentes países con trayectorias estatales diversas. Retomando a Polanyi (2016) señala que aún sin intervenir, el Estado interviene, es el tejido que permite al mercado operar. El clásico polaco advierte, de hecho, que el mercado sólo es posible en un contexto de normas sociales generalizadas y de formas y políticas fijadas por el Estado.

Evans señala los fines de la década de 1980 como la “tercera ola” en materia de estudios estatales indicando que allí comienza a recuperarse el interés en el Estado no en términos de sus capacidades, carácter y alcance de sus burocracias sino en cuanto estructura institucionaliza y eficaz (Evans, 1996. Énfasis propio).

Aquello que resulta una estructura institucional en Evans es el primero de los aspectos que destaca Mann (1991) en su definición de los atributos estatales: 1) conjunto diferenciado de instituciones y personal; 2) carácter centralizador (las políticas públicas van del centro a la periferia); 3) limitación territorial de su área de aplicación y; 4) el monopolio de dominación coactiva autoritaria sostenida en el monopolio de la violencia física, considerando a Weber. Mann sostiene que aquí se puede observar lo institucional y funcional del Estado, pero advierte, “la definición de Estado

4 Es preciso señalar que estas dimensiones no se desarrollan necesariamente de una manera armónica y simultánea. Oszlak advierte sobre esto dado que su estudio enfatiza sobre la construcción del Estado-nación en términos de un proceso histórico y no abstracto.

se concentra en su naturaleza institucional y territorial centralizada” (...) “el Estado es una arena, una condensación, una cristalización, una *sumatoria de relaciones sociales*” (Mann, 1991: 66 y ss. Énfasis propio).

Este autor destaca además un elemento que se considera fundamental en cuanto es el supuesto inicial de este escrito: los Estados son centrales para comprender a la sociedad. ¿Supone esto una división entre Estado y sociedad civil? En verdad no, el propio Mann señala que es común la separación de Estado y sociedad civil/ propiedad pública y privada en este sentido; sin embargo, se trata de observar estos dos planos como entrelazados de manera permanente. Muchos de los autores, entre otros los que hemos venido señalando que responden a esta tradición “institucionalista” del Estado, parten o adscriben a este supuesto teórico fundamental.

En Mann el Estado otorga límites territoriales a las relaciones sociales por fuera de él. De este modo, indica el autor:

El Estado penetra la vida diaria más de lo que hizo cualquier Estado histórico. Su poder infraestructural se ha incrementado enormemente. Si existiera una Reina de Corazones, todos nos empujearíamos ante ella: de Alaska a Florida, de las Shetland a Cornwall no hay lugar para esconderse del alcance infraestructural del Estado moderno (Mann, 1991:71).

Esta clara aportación nos sitúa en los alcances del Estado, y en buena medida, en la dimensión legal de este complejo institucional. En este punto, es posible observar un primer desplazamiento de la dimensión institucional a la de las relaciones sociales. Esto tiene sentido pues en rigor, estas dimensiones analíticas son difíciles de comprender por fuera de la articulación que les provee el Estado como tal (Oszlak, 1978). Se considera que una perspectiva de relevancia en este aspecto la constituye la conceptualización de Bourdieu (1996). El pensador francés reconoce al Estado a partir de la acumulación de diferentes tipos de capital. Podríamos agregar, de diferentes relaciones sociales que constituyen capitales de distinto origen. La génesis del Estado se vincula directamente con ese proceso de acumulación de capitales. A través de esta dinámica el Estado, en sus palabras, “Se encarna en la objetividad y en la subjetividad”. El Estado se instituye como estructura, pero, además, es profundamente estructurante: “En nuestras sociedades el Estado contribuye en una parte determinante a la producción y a la representación de los instrumentos de construcción de la realidad social” (Bourdieu, 1996: 2).

El Estado es entonces, institución y relación social. Esto nos acerca al segundo plano de análisis. Es sugerente mencionar que, en lo que se ha denominado visión institucional, hay un reconocimiento de esas relaciones sociales. Menciona O'Donnell al respecto:

El Estado también es, y no menos fundamentalmente, un conjunto de relaciones sociales que establece un cierto orden y en última instancia lo respalda

con una garantía coactiva centralizada, sobre un territorio dado. Muchas de estas relaciones se formalizan en un sistema legal surgido del Estado y respaldado por él. El sistema legal es una dimensión constitutiva del Estado y del orden que éste establece y garantiza en un cierto territorio. Este orden no es igualitario ni socialmente imparcial (O'Donnell, 1993: 166).

Para marcar esa desigualdad, este autor desarrolla los alcances del Estado en términos de dicha legalidad y lo hace a partir de establecer “zonas” que describen hasta dónde (o cuánto) el Estado penetra en el territorio (parafraseando a Mann). Se considera que este es un aspecto fundamental que, en ocasiones es “olvidado” por esta visión institucional que pone énfasis en el aparato estatal, las funciones, el funcionamiento interno de las burocracias, etc.

Por su parte, O’ Donnell se pregunta en forma textual “¿Qué ocurre cuando la efectividad de la ley se extiende irregularmente (si no desaparece por completo) por el territorio, las relaciones sociales? (...) ¿qué se supone que debe regular?” (1993: 169). Distintas “zonas” hablan del Estado en el territorio con el trasfondo de la dimensión legal, aunque no nos dicen mucho aún sobre qué es el Estado para quienes habitan esos territorios. Allí, como señala este autor, es donde las visiones antropológicas tienen un enorme interés.

2. Lo no-institucional en el Estado

Hace ya algunos años que re-circulan con fuerza distintas perspectivas de la antropología política y, más en particular, del Estado entre los estudios sociales. Como señala Schavelzon (2010), probablemente en los territorios de América del Sur, la creciente participación de campesinos e indígenas en la realidad política, en la formación del Estado, haya contribuido a este interés. Pero también, y por diferentes razones, en Europa esta perspectiva cobra relevancia en contextos en los que el Estado-Nación como institución fundacional de la política occidental pierde peso sobre las estructuras supranacionales como las propuestas por la Unión Europea, tal como advierte el propio Abélès (citado en Schavelzon, 2010).

Desde las perspectivas más asociadas con la ciencia política, sin embargo, autores como Beck plantearon hacia finales del siglo XX que el Estado moderno continuaba, pese a sus derroteros, siendo una institución *simbólicamente* rica (Beck, 1998). Esta afirmación cobra una singular relevancia en contextos excepcionales: la pandemia iniciada a comienzos del año 2020, por ejemplo. Se abrirá aquí un breve paréntesis contextual: en febrero de ese año, Giorgio Agamben cargaba contra la excepcionalidad del estado de emergencia italiano, en un contexto paradigmático de crecimiento de casos de la enfermedad por COVID-19, y trágicamente también, de

muertes en ascenso. El filósofo recupera la cuestión de la excepcionalidad del Estado vinculada con la suspensión del orden jurídico y, en definitiva, de las libertades individuales, uno de sus temas de análisis más relevantes. A partir de allí, se dispara una muy sugerente discusión respecto de los límites del estado de excepción y también, como era lógico, de los alcances del Estado (Martínez Olguín, 2020; Carmona, 2020; Observatorio Social del Coronavirus, 2020; Ruíz Valdivia, 2020, entre otros muchos).

Sólo por sintetizar y referir una posición diferente, se mencionará el análisis que De Sousa Santos (2020) que se ofrece como alternativa en el debate. En referencia a la inicial posición de Agamben, marca con claridad:

La excepcionalidad de esta excepción no le permitió pensar que hay excepciones y excepciones, y que, por lo tanto, en el futuro no solo tendremos que distinguir entre Estado democrático y Estado de excepción, sino también entre Estado de excepción democrático y Estado de excepción antidemocrático (De Sousa Santos, 2020:40).

Esto nos sitúa en un nuevo plano, en el que el Estado, aún uno excepcional, *necesita seguir siendo interpelado*. La narrativa de la pandemia habilita a problematizar el Estado, sobre todo sus componentes históricamente cuestionados, tales como: la ineficacia de sus burocracias, el deterioro de las instituciones del bienestar o su avasallamiento sobre las libertades, entre otros aspectos. Como señala el autor portugués, el paradigma neoliberal ha “incapacitado” al Estado para gestionar la emergencia y, de nuevo, los recortes presupuestarios en materia sanitaria, por ejemplo, están en el aire. Este contexto también habilita a problematizar ese Estado en todas sus dimensiones y se abre este paréntesis en consecuencia.

En estos contextos “excepcionales” la lectura que ofrece la antropología política resulta de enorme interés permitiendo “salir” de la cuestión estrictamente institucional para abordar el Estado desde una perspectiva cultural, simbólica ausente en los abordajes institucionales. De las diferentes lecturas asociadas a estos trabajos (Schavelzon, 2010; Clastres, 1981 y 2010; Abélès, 2020) se comprenden dos grandes posibilidades de análisis. La primera tiene entre sus principales referentes a Pierre Clastres. Para este autor, el Estado es el origen de la desigualdad. Las mal llamadas “incompletas” sociedades primitivas son sociedades igualitarias precisamente por la ausencia de la institución estatal. Esto es así pues en las sociedades primitivas, largamente estudiadas por Clastres, lo político y lo social forman una unidad. No existe allí la ficción moderna que *separa* sociedad de Estado. En estas sociedades el poder circula, pero no implica coerción, uno de los atributos esenciales del Estado. Las sociedades primitivas ignoran la desigualdad, desconocen los preceptos de unos mandar y otros obedecer. En este aspecto, la sociedad que describe Clastres tiene un parecido de familia con el estado de naturaleza de los pensadores contractualistas desde la ciencia política, y especialmente del descripto por

Thomas Hobbes en su *Leviatan*. Pero, existe una diferencia, en el estado de naturaleza lo habitual es el caos, el Hombre pacta, construye el Estado, delega su autonomía plena, pero crea orden. Como es sabido el planteo hobbesiano es profundamente negativo respecto del futuro del Hombre en una sociedad “primitiva”. El problema del orden, tan presente en Hobbes, en otros contractualistas, y mucho tiempo después retomado por el propio Durkheim, es quizá aquello que invita a seguir pensando cuáles son los aspectos que legitiman el permanecer en la forma-Estado.

Evidentemente, y como señalan varios especialistas en su obra, la perspectiva de Clastres posee un supuesto anarquista. Esto queda expresado con claridad en uno de sus escritos citado a continuación *inextenso*:

El ejemplo de las sociedades primitivas nos enseña que la división no es inherente al ser social; en otros términos, que el Estado no es eterno, que tiene en todas partes una fecha de nacimiento. ¿Cuál ha sido la causa de su surgimiento? La pregunta sobre el Estado debe precisarse así: ¿en qué condiciones la sociedad deja de ser primitiva? ¿Por qué las codificaciones que se conjuran al Estado fallan en tal o cual momento de la historia? Es indudable que sólo la interrogación atenta al funcionamiento de las sociedades primitivas permitirá esclarecer el problema de los orígenes. Y quizá la solución del misterio sobre el momento del nacimiento del Estado permita esclarecer también las condiciones de posibilidad (realizables o no) de su muerte (Clastres, 1981: 186).

Es posible considerar que los estudios que focalizan en las relaciones de poder, en la construcción de lo político que caracteriza a una sociedad determinada olvidan, sin embargo, el rol del régimen político en los Estados modernos. El régimen nos ofrece una variable “mediadora” de interés ya que define aspectos centrales en el Estado: los orígenes de la legitimidad, las formas de gobierno, el ejercicio del poder, etc. Es por esto que buena parte de la literatura asociada con el Estado, ha abordado también la cuestión del régimen político: autores como O'Donnell (2010) o Iazzetta (2007) entre otros, lo recuperan como un elemento “co-constitutivo” de la democracia.⁵

Pero, la antropología política también elabora una minuciosa reflexión sobre el Estado en *la sociedad moderna*. Es decir, considera la interacción con lo “no estatal” que puede permitir un “acercamiento diferente al Estado” (Schavelzon, 2010: 85). En este sentido, en el marco de los estudios *antropológicos* también sería posible mencionar los trabajos de Foucault (1997), Das y Poole (2004), Auyero (2008 y 2013) entre otros autores que se mencionarán más adelante. Schavelzon, los sitúa en: “Un bagaje

5 El Estado en el contexto de un régimen democrático supone, al menos, la institucionalización de los principios básicos de la democracia política o poliarquía. La democracia define un modo de acceso y ejercicio del poder. Como explica Iazzetta (2011), el primero refiere al tipo de régimen, lo segundo, se vincula especialmente con el Estado que “acompaña” a ese régimen. En definitiva, el análisis de estas categorías supone una relación necesaria para comprender el funcionamiento de las democracias en la actualidad dado que: “Los atributos que definen la *estatalidad* de un Estado no garantizan su *democraticidad*; esta cualidad dependerá de otras iniciativas y dispositivos que lo tornen compatible con una democracia. Ésta afecta el modo de operar del Estado y le impone nuevas responsabilidades que lo tornen consistente con ella” (Iazzetta, 2011: 88. *Cursiva en el original*)

disciplinar de estudios de *afuera*” (2010, p. 85. Énfasis en el original). Esto podría suponer un *acercamiento diferente al Estado*. Es decir, la interacción de lo estatal con lo no-estatal, o, dicho de otra manera, lo estatal con lo social, el Estado con la sociedad civil, en la interpretación moderna de la sociedad occidental que, por supuesto, sólo es posible interpretar en forma separada en términos cognitivos y analíticos. Esta perspectiva ofrece una interpretación complementaria a los estudios institucionales ya mencionados, a los que enriquece con el: “Estudio de la continua interacción con lo no estatal, con lo que está en vías de estatalización o con lo que, al mismo tiempo, se manifiesta dentro y fuera del Estado” (Schavelzon, 2010:88. Énfasis propio). A continuación, se recuperan algunas miradas en este sentido.

3. El Estado desde “afuera”

El análisis anterior da lugar a considerar *otra cara* del Estado. Desgranar el Estado para su análisis no significa comprenderlo desde una perspectiva individualista, o incluso voluntarista, sino observar que desde esta dimensión es necesaria su problematización. Como menciona Jessop (1999), la preocupación por el Estado, al menos desde su perspectiva institucional, se desvanece a partir de la visión de Foucault. Esta afirmación puede, sin embargo, dar lugar a interpretaciones equivocadas. En el cuestionamiento de este pensador francés al Estado-institución, se destaca la definición de gubernamentalidad. Ésta es: “Entendida en el sentido amplio de técnicas y procedimientos para dirigir el comportamiento humano. Gobierno de los niños, gobierno de las almas y de las conciencias, gobierno del hogar, del estado o de sí mismo” (Foucault, 1997: 82). Evidentemente esto instala al “gobierno del Estado” en el plano tradicionalmente vertical de la política en cuanto existe un ejercicio de control constitutivo en cada uno de estos aspectos. En otras palabras, la racionalidad política se orienta al control y eso se identifica con la idea de gobierno.

Ese vínculo vertical de la política y lo político es cuestionado en términos de una racionalidad única. El análisis iniciado por Foucault no sólo interroga la dimensión institucional del Estado, sino que ofrece un nuevo deslizamiento desde las instituciones a las relaciones sociales y al ejercicio de poder en la ciudadanía. En verdad, no hay un Estado, un “cuerpo único” que resulte responsable de controlar la conducta de los ciudadanos; por el contrario, existen “una gran variedad de autoridades (que) gobiernan en sitios diferentes y con distintos objetivos” (Rose *et al.*, 2006: 116). En este punto, es relevante introducir a un autor pionero de la corriente antropológica que intentamos problematizar -casualmente- contemporáneo a Foucault. Abrams (1977) sentencia en cuanto al Estado institución: no hay Estado, sólo máscaras de dominación política que proyectan ilusoriamente

una unidad que, en verdad, no existe. Esto no significa negar al Estado, implica sí concebirlo de una manera radicalmente diferente que supone, en parte, “desestatizar el pensamiento sobre los modos de ordenamiento social” (Franzé Mudanó, 2013: 12).

La lectura de Touillot acerca de Abrams, sugiere que los estudios sobre el Estado “edificio” tienen una función clara en cuando legitiman: “La imagen de una entidad supuestamente desinteresada” (Touillot, 2011:153). Sin embargo, si se consideran las concepciones señaladas en el marco de la perspectiva institucional, el Estado en abstracto no aparece casi nunca en forma “desinteresada”. Desde la más ingenua interpretación del marxismo clásico hasta los elaborados enfoques de Evans o Mann, el Estado responde a racionalidades diversas en relación con actores diversos: clases sociales, élites políticas, empresarios, etc. Dicho de otro modo, no habría Estado, sino Estados. Se considera que lo más sugerente y epistemológicamente constructivo de esta perspectiva se vincula con la imposibilidad de comprender al Estado como una unidad, con una racionalidad unívoca.

Siguiendo esta tradición, otro autor paradigmático resulta Gupta (2015). En buena parte de su obra, Gupta aborda las prácticas corruptas de los funcionarios del Estado con la población rural de una localidad india. Para hacerlo realiza una etnografía de ese Estado, a partir del examen de los discursos de corrupción en la vida contemporánea de sus ciudadanos. La práctica etnográfica, como instrumento teórico-metodológico permitió: “Desagregar al estado centrándose en las diferentes burocracias” (Gupta, 2015: 73). Este tipo de estudios niega, precisamente, la cosificación inherente a las descripciones unitarias de “El Estado”.

Además, destacan también los trabajos de Auyero (2013 y 2008) cuyo eje de análisis resulta el funcionamiento de la dominación política en los sectores urbanos pobres. Siguiendo a Gupta (2015), Auyero indaga especialmente en los encuentros cotidianos de los ciudadanos con las burocracias estatales (*everyday practices of bureaucracies*), conceptualizándolos como fundamentales para la construcción cotidiana del Estado. Auyero comprende al Estado desde la burocracia “diaria”, es decir, la cara visible del Estado para la ciudadanía: funcionarios de diversos tipos y rangos que forman parte del aparato y que representan, en este sentido, el “Estado vivido”. Este situarse en el plano de la dominación política –a partir del relato de estos funcionarios y sus efectos en la ciudadanía– en términos de la comprensión del Estado, no significa, sin embargo, negar la dimensión institucional que se ha establecido previamente. Supone, sí, establecer una dimensión de análisis igual de relevante: la representación de la dominación estatal en el plano micro, a nivel de los ciudadanos: “El Estado es a la vez una estructura abstracta a nivel macro y un conjunto de instituciones a nivel micro con las cuales los habitantes urbanos pobres interactúan de manera directa e inmediata” (Auyero, 2013: 21).

Algunos trabajos en esta línea recuperan el término de Lipsky (1980), “burócratas de calle” en relación con aquellos funcionarios del Estado de circulación territorial permanente, mediadores entre las normas –legales y no– que lo constituyen y la ciudadanía. Ejemplos de este burócrata serían maestros, policías, trabajadores sociales, etc. Aunque esto representa un aspecto innovador de la burocracia como institución del Estado, y nos sitúa en un plano micro de vínculo entre el burócrata y el ciudadano, la noción de política y, en términos más específicos, del Estado, sigue manteniendo una profunda interpretación institucionalista o estadocéntrica (Franzé Mudanó, 2013). De hecho, Lipsky señala que: “Los burócratas de la calle determinan si los ciudadanos son candidatos adecuados para recibir beneficios o sanciones de gobierno” (1980: 782). Es decir, se observa una interpretación vertical de la política, donde hay un centro decisor que “devuelve” políticas a la ciudadanía. Y, como se ha podido observar, el proceso es algo más complejo e involucra a varios actores.

Esta idea de Lipsky resulta, a criterio de quien escribe, una especie de posición intermedia entre la posición institucional antes descrita y los estudios de corte antropológico y etnográfico. Estos últimos (Gupta, 2015 o Auyero, 2013, por ejemplo) se sitúan bastante más allá de la sola interpretación del plano micro y el vínculo burócrata-ciudadano; avanzan más bien en una interpretación del Estado en términos micro y con esto prestan especial atención a los alcances simbólicos del *Leviatan*, no desde la dimensión legal que antes era recuperada desde O'Donnell, y sí desde una forma más amplia de comprender el objeto de estudio, en la que parten del ciudadano y su comprensión del Estado.

Dentro de esta perspectiva, autores como Shore (2010) se preguntan acerca de la relevancia de abordar las políticas públicas (y aquí, se agrega, el Estado), desde la antropología. La pregunta tiene una muy pertinente, aunque compleja respuesta: el aporte de una perspectiva crítica para comprender la manera en que las políticas funcionan como símbolos, como estatutos de legitimidad y, en última instancia, como tecnologías políticas.

Se coincide plenamente con Franzé Mudanó respecto de la necesidad de “conceptualizar al estado y las políticas como objeto de investigación etnográfica requiere, pues, contextualizar los modos de acción y los campos de tensión, según las peculiaridades y giros contemporáneos, retornando a las *prácticas sociales cotidianas en las que se concretan las relaciones entre gobernantes y gobernados*, aunque no se expresen en formas de acción explícitamente políticas (...)” (2013: 14. Énfasis propio).

Estas miradas ofrecen una serie de herramientas teórico-metodológicas relevantes para un abordaje del Estado que la ciencia política más “ortodoxa” suele olvidar: la etnografía resulta fundamental para la comprensión de esos campos de tensión mencionados previamente. Desconocer esto es, en parte, desconocer al Estado y situarse, incluso tácitamente, en una posición

que desentien­de al Estado de la sociedad civil. Una de las grandes riquezas de enfocar la problematización del Estado en este plano supone ponderar simultáneamente dos cuestiones: la necesaria conceptualización del Estado como una relación social (a veces suspendida por la visión institucional) y la incorporación en su estudio de uno de sus actores centrales: la ciudadanía, pero no en términos de la dimensión legal sino a nivel micro, en el plano de los encuentros cotidianos con el Estado territorialmente dispuesto. Este es uno de los importantísimos aportes de esta perspectiva de carácter antropológico-etnográfico.

Una riqueza “extra” de estos enfoques radica en la generalización de una visión de la política asociada también a esa tensión formativa. No hay aquí decisores únicos, ciclos de políticas inalterables, cajas negras o *inputs* y *outputs*, por el contrario, las relaciones de poder se materializan de manera compleja en las prácticas y los discursos de los actores estatales y no estatales.

Asimismo, y como señala con enorme claridad Shore (2010), en el contexto neoliberal que nos convoca de manera estructural, y pandémico en términos coyunturales, los alcances de estas perspectivas asociadas a las prácticas estatales aportan una enorme vitalidad. La apelación a la gobernanza proveniente del *New Public Management* en términos políticos, y el emprendedurismo exagerado en términos económicos sitúan como un valor central en la sociedad el plano de lo individual. No importa ya el lazo social o, en última instancia, el tradicional planteo durkheimniano acerca de la constitución de ese lazo social, todo eso quedó en la modernidad. Hoy, se impone el plano individual, y las “técnicas del yo”:

El arte del gobierno moderno se ha convertido, en efecto, en el arte de gobernar desde la distancia, inculcando los hábitos de la autogestión y de la autorregulación. Las políticas asociadas con el neoliberalismo (que incluyen la teoría del New Public Management y la reforma de las instituciones públicas) proveen ejemplos excelentes de cómo funcionan estas formas de gubernamentalidad (Shore, 2010: 32).

Dicho esto, se procederá a establecer un conjunto de comentarios finales –abiertos– que abogan por un uso complementario de estas visiones cuya operacionalización conceptual es de necesario trabajo y ofrecerá, sin dudas, análisis mucho más ricos y, sobre todo, reales, del Estado en nuestro tiempo.

Conclusiones

Como bien señala Bourdieu (1996), la acción de “pensar” el Estado tiene el riesgo de no operar críticamente y más bien: “En su provecho, al aplicar al Estado categorías del pensamiento producidas y garantizadas por el Estado” (1996: 20). En este sentido, la propuesta por una problematización

del Estado supone eludir esa crítica, que seguiría legitimando una visión “tradicional”.

Problematizar el Estado en la actualidad resulta una tarea central de las ciencias sociales. Se refiere de este modo a todas aquellas disciplinas que desde aportes diferentes contribuyen a la comprensión –en un sentido weberiano– de la realidad social. Problematizar el Estado supone, ante todo, ir más allá de los enfoques reduccionistas de las fórmulas “más o menos” Estado, para situarse de un modo crítico en la construcción de un marco analítico que lo aborde a partir de otros aspectos. Resulta un desafío de construcción y operacionalización de una serie de categorías que, aplicadas de modo recíproco, permitirían una mirada realmente global del Estado, no ya de arriba hacia abajo o de abajo hacia arriba, sino de modo transversal. Del análisis previo, se sugieren algunos ejes para abordar esta construcción:

En primer lugar, la *necesidad de un planteo interdisciplinar*. Es decir, poder abordar el objeto propuesto desde diferentes campos disciplinares con el supuesto de una construcción colaborativa en la que puedan eludirse aspectos que se pretenden *a priori* exclusivos en cada caso.

En segundo lugar, el *reconocimiento de un nuevo contexto*. Es decir, el Estado hoy no puede comprenderse sólo desde la interpretación que de él forja la modernidad y la modernización, o lo que es lo mismo, la noción de progreso vinculada con el capitalismo como sistema político, económico y cultural. La propuesta de Negri y Hardt (2017) en este sentido es bien sugerente: ¿qué implica el Estado posmoderno? No ya el moderno, sino este Estado con el que convivimos. Esencialmente, paradojas. Y éstas se expresan en el vínculo con la sociedad civil, un vínculo amplio y complejo. Este Estado neutraliza el poder de la sociedad, lo *horizontaliza* en la forma-Estado: “El Estado posmoderno anula todo poder social y le obliga a cobrar su significado sólo en la forma del Estado” (Negri y Hardt, 2017: 93). Esto implica que los Estados generan estrategias de participación social en términos institucionales o, “absorben” esas estrategias de participación construidas desde la sociedad civil. La pregunta de Clastres tiene mucho valor: ¿implica esa expresión genuina de lo social la posibilidad de anular el Estado? o, ¿es posible la construcción de políticas sin el Estado? En este momento, estas preguntas no encuentran una respuesta precisa. Esto es, de modo ambivalente el Estado sigue teniendo ese carácter simbólicamente rico que se planteaba desde Beck, pero, simultáneamente formas colectivas, movimientos sociales, y diversos protagonistas no-estales producen políticas por fuera de éste (Nogueira, 2021).

En tercer lugar, *reconocer la amplitud del Estado*. Se menciona esta idea de amplitud en cuanto a los abordajes posibles. Abordar el Estado-institución, pero también el Estado no-institución y todo lo que éste puede implicar: las burocracias estatales, su configuración, el carácter de los funcionarios, la representación de éstos por parte de los ciudadanos, lo que

los ciudadanos piensan acerca de esos vínculos. Más allá de los aspectos institucionales, estas dimensiones nos posicionan en el afuera del Estado, pero no de una forma desconexa, por el contrario, nos ofrecen nuevas herramientas para considerar el Estado-institución.

Para finalizar, la *consideración del régimen político* resulta un elemento de interés que suele olvidarse. Como se ha mencionado, cualquier análisis sobre el Estado resulta incompleto sin la interpretación del régimen político. En general se aborda, por ejemplo, la idea de Estado democrático, pero el Estado no ha sido siempre democrático, y la democracia es un régimen político dinámico y diferencial al considerar territorios, sociedades y prácticas.

Para finalizar, y volviendo al Estado, es absolutamente relevante reconsiderar el vínculo del Estado con la sociedad civil, con la ciudadanía y sus heterogéneas manifestaciones. Si el Estado “elabora” las políticas públicas, ¿cómo puede hacerlo sin los ciudadanos? En este sentido, y como señalan Das y Poole (2004),

La etnografía es un modo de conocimiento que privilegia la experiencia y la cotidianeidad. Incorporar estas cuestiones —experiencia y cotidianeidad— en el accionar del Estado supone también incorporar subjetividades y aportar diversidad a las respuestas posibles en términos de acciones y políticas públicas. Pero, como indica Gupta, “si bien es necesaria la investigación sobre las prácticas de los funcionarios estatales locales, por sí misma no es suficiente para comprender cómo se llega a construir y representar el Estado (2015: 76).

Y allí, el plano institucional es fundamental y legítima la relación circular que se ha sostenido a lo largo de todo el escrito. Como se ha afirmado desde el principio, se considera que estas dos miradas ofrecen abordajes distintos, pero necesariamente complementarios, que permitirán problematizar el Estado comprendiendo los planos macro y micro como campos en tensión. Esto puede resultar un desafío para todos quienes como cientistas sociales, comprenden que el Estado, a pesar de sus denominaciones coyunturales —o gracias a ellas— tiene aún mucha tela para cortar.

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Implementation of the International Convention on the Rights of the Child in the South Urals in the 1990s

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Abstract

The relevance of the studied problem is determined by the subject of the study, namely the policy of the Russian Federation towards children. Children are the future of the state. The younger generation determines the future technological, intellectual, political, economic, demographic, and ecological wealth of the country. The objective of the article is to study the degree of implementation of the International Convention on the Rights of the Child in one of the largest regions of Russia – the South Urals in the 1990s. Research methods: synchronous, systemic-structural, historical-comparative, historical-genetic. As a result of the study, the authors draw conclusions and offer practical recommendations on the improvement of the state policy in the field of educating the younger generation in modern Russia. The practical significance of the conducted study is that the authors of the article investigated the first steps of implementation of the International Convention on the Rights of the Child in Russia. At the same time the authors explored unresolved issues in the field of children's rights and public policy mistakes to prevent them from happening in the future.

Keywords: The United Nations Convention on the Rights of the Child; South Urals; state policy; children's rights; Russia.

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Implementación de la Convención Internacional sobre los Derechos del Niño en los Urales del Sur en la década de 1990

Resumen

La relevancia del problema estudiado está determinada por el tema del estudio, a saber, la política de la Federación de Rusia hacia los niños. Los niños son el futuro del estado. La generación más joven determina la futura riqueza tecnológica, intelectual, política, económica, demográfica y ecológica del país. El objetivo del artículo es estudiar el grado de implementación de la Convención Internacional sobre los Derechos del Niño en una de las regiones más grandes de Rusia: los Urales del Sur en la década de 1990. Se emplearon los siguientes métodos sincrónico, sistémico-estructural, histórico-comparativo, histórico-genético. Como resultado del estudio, los autores extraen conclusiones y ofrecen recomendaciones prácticas sobre la mejora de la política estatal en el campo de la educación de la generación más joven en la Rusia moderna. La importancia práctica del estudio realizado es que permite visualizar los primeros pasos para la implementación de la Convención Internacional sobre los Derechos del Niño en Rusia. Al mismo tiempo, los autores exploraron cuestiones no resueltas en el campo de los derechos del niño y errores de política pública para evitar que sucedan en el futuro.

Palabras clave: la Convención de las Naciones Unidas sobre los Derechos del Niño; Urales del Sur; política estatal; Derechos de los niños; Rusia.

Introduction

In the modern world, the problems of protecting and realizing the rights of children occupy one of the priority directions both in the internal politics of individual states and in the whole world community. The governments of all states must understand that the future of the state, its development, and ultimately its national security, is determined by what kind of young generation will come to power in decades. Therefore, already now, various concepts, programs, plans for the development of youth policy are being elaborated, approved, and received practical implementation. The key criterion is to educate the younger generation in the spirit of peace, tolerance, freedom, equality, citizenship, patriotism, respect, and responsibility. It is especially necessary the ecological and legal education of children, as well as to bring up the modern “digital generation” based on traditional moral and ethical principles.

According to the UN Convention of 20 November 1989 “On the Rights of the Child”, ratified by the USSR in 1990, and then by the Russian Federation in order of succession, which assumed obligations in full, every child is assigned basic and inalienable rights. Among them are “the right to life”, “the right to know and be cared for by his or her parents”, “the right of the child to education”, “the right to protect the child from all forms of physical or mental violence”, “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health” and a number of other rights. At the same time, the Article 3 emphasizes that “the best interests of the child shall be a primary consideration”.

In the 1990s, when Russia embarked on the path of democratic transformations, many provisions of the Convention on the Rights of the Child were only declarative. In reality the state of society in general, and children in particular, caused great concern. On the pages of the press of that time, such a definition appeared in relation to children of the 90s 20th century as “The Lost Generation” (Kuzmin, 1999: 2). And it wasn’t accidentally. Indeed, in reality, there was a generational gap, the connection of times was destroyed, there were attempts to completely reject and erase the entire Soviet past. In new Russia people began to bring up globalists children, which were “open to the world” under the slogan of de-ideologization and new thinking. In this regard, the essential ideas of morality and ethics have radically changed in children to compare with the Soviet era. Now everything that was previously “banned” became possible, including the sex education of children. In general, in society, as well as among the children were widespread unbelief, indifference and self-interest.

The South Urals (Chelyabinsk region), as one of the regions of Russia, was no exception in the development of these processes. During the period under study, many children were in reality deprived of the right to be cared for by their parents, which was primarily due to the economic situation. The number of homeless and neglected children in the country and in the region has sharply increased because of many factories reduced production capacity or was completely destroyed. As a result of which the salaries of parents were not paid for a long time, state benefits were paid with great delays. A lot of families in Russia were on the brink of survival.

The situation began to change only towards at the end of 1990s in early 2000s, when Vladimir Putin became the head of the state. Many people in Russia associated the election of Vladimir Putin with hopes for a noticeable improvement in people’s lives, preserving the unity of Russia, and strengthening state power. A strong state is able to ensure the effective implementation of all obligations assumed, including children’s rights enshrined in the Convention on the Rights of the Child.

1. Literature Review

The problem of protecting and realizing the children's rights and interests is one of the most studied and discussed in the world. Modern authors studying the problem of children's rights in the spirit of the International Convention on the Rights of the Child focus on such aspects as the protection of children's rights in the context of the Covid-19 pandemic, as well as the related restrictions on children's rights and changes their lifestyles (Lynch *et al.*, 2021; Liefgaard, 2020; Peleg *et al.*, 2021; Minson, 2021).

Another area of research by scientists is the problem of developing gender identity in children, raising transgender children and giving children the right to determine their own gender at an early stage of development. In the works of American researchers, we can observe some differences in the interpretation of the concept of "gender identity". Some scientists (Polderman *et al.*, 2018; Chin, 2016; Robinson *et al.*, 2021) believe that gender identity is fixed at birth by genetic or other biological factors. Others (Fine, 2010; Case, 2019; Guzzetti *et al.*, 2018) argue that "gender identity" is determined by society and cultural influences, i.e. can be socially constructed. Still others believe that "gender identity" is constructed rather than expressed by the continuous execution of gender behavior (Butler, 2020; Thorn, 2019; Soh, 2020). One way or another, Jason Rafferty (2018), MD in Rhode Island, believes that gender identity in children develops from the age of 2, and by the age of 4, a child already has a stable idea of his gender identity. And here, as the author supposes, parents can make sure that the environment of their young child reflects the diversity of gender roles and encourages the child to choose the gender in the future.

Russian scientists (Lyadova, 2018; Makeeva, 2011; Makarova, 2018; Alekseeva, 2020) in their works study the articles of the International Convention on the Rights of the Child, its features, while highlighting such groups of norms in this document as - general principles, special measures of protection and norms of implementation. The authors attach particular importance to the problem of implementation of international legal norms in the field of protecting the children's rights in Russia, focusing on the difference between children brought up in families with parents and orphans or children left without parental care and brought up in families of adoptive parents, guardians (trustees), foster parents, in institutions for children who are more vulnerable and need even more protection.

Thus, the scientific literature emphasizes the need to provide even greater rights to underage children, including the ability to independently determine their gender. However, at the same time, in many countries of the modern world, we can see how many articles of the Convention on the Rights of the Child are not observed or are grossly violated. Unfortunately, in part, this also applies to Russia in the 1990s. It is necessary in every

possible way to prevent such a situation. This determines the need for our research.

2. Materials and Methods

The methodological basis of this scientific article was formed by the most important principles of research: objectivity, scientific character, and historicism. Objectivity presupposes the study of the subject of research without bias, without ideologically set schemes and stereotypes. Therefore, the authors sought to show both the advantages and disadvantages in the possibility of implementing the main articles of the Convention on the Rights of the Child in the South Urals in the 1990s, qualitative and quantitative indicators. In the fight of the state against child homelessness and neglect, juvenile delinquency which sharply increased during the period under study.

The scientific principle requires authors to avoid political and ideological conjuncture when studying the life of children in the 90s 20th century. The fact is that, in the assessments of various political figures, the state of Russian society, including children and adolescents, looked different. For example, in the report about the implementation of youth policy in the 1990s, the first deputy governor of the Chelyabinsk region A.N. Kosilov emphasized that “in terms of the number of students per 100 thousand of the population, the Chelyabinsk region came close to the leading Western European countries” (Aleksandrovich, 2000: 10). However, for example, the chairman of the board of the Russian Fund “Future of the Fatherland named after V.P. Polyanichko” M.F. Nenashev spoke directly about what concerns children, their situation in Russia, and therefore in the South Urals, has never been so difficult. In order to avoid various “distortions”, considering all the circumstances, in this article the authors give a balanced objective assessment of the implementation of the main provisions of the International Convention on the Rights of the Child in the South Urals at the end of the 20th century.

The principle of historicism helped to study the subject of research in a holistic manner and in the interconnection of all its aspects, in the context of general historical phenomena and processes. The key factor in changing the vector of state policy towards children in the 1990s in Russia, the main principles, and approaches in working with adolescents were the collapse of the Soviet Union, the whole authoritarian political system and the transition to a new, not yet formed, democratic one.

The methodological principles noted above also led to use special research methods in our work. So, the authors use the synchronous method. It allows making a horizontal (cross) section of the assessments

and conclusions of political and public figures of the South Urals on the implementation of the International Convention on the Rights of the Child, the further development of organizations and institutions for children in Russia in a particular period of time. The authors took into account their political positions – communists, liberal democrats.

The systemic and structural method made it possible to consider the main directions of activity towards children of the state authorities of the Chelyabinsk region as part of the federal system for the implementation of youth policy, which includes concepts, federal and regional programs, plans, which recorded the main directions of modernization and development of policies carried out in attitude of children and also in the framework of interaction with various structures – public organizations and movements, unions, organizations of additional education for children, religious organizations.

The historical-comparative method helped to reveal the general and specific features of the main mechanisms of interaction between the state authorities of the Chelyabinsk region and children in comparison – in different historical periods – the Soviet Union and the Russian Federation. The historical and genetic method made it possible to consider the reasons for the genesis and specificity of the change in thinking in relation to the spiritual and moral values of children, which was undoubtedly facilitated by such processes as “perestroika”, “glasnost”, “democratization”.

To write the article, the authors involved documents of a legislative and regulatory nature, documentary and statistical collections, periodicals, and Internet sources. The authors also involved documents from the State Archive of the Russian Federation and the Consolidated Archive of the Chelyabinsk Region.

3. Results

According to world practice, a state that has assumed obligations must fulfill them. First, this applies to signed international treaties, ratified international documents. The Russian Federation, as the legal successor of the Soviet Union, assumed such obligations towards children by ratifying the International Convention on the Rights of the Child. Certain steps were taken to implement the Convention in Russia, in particular in the South Urals, but there were great obstacles along the way. At the end of the 20th century the Russian state and society was in a condition of crisis, which most painfully affected the fate of children and adolescents. 1990s were a transitional period from one socio-political system – authoritarian, to another – democratic. Reforms of the 1990s revealed and exacerbated negative tendencies in Russian society. The crisis of moral values gave rise

to conflict, and even a generation gap. Crime, drug addiction, prostitution have become the norm of many children and adolescents. In the face of the struggle for survival, the need for reading for many people became “luxury”. A huge number of illiterate children have appeared in the country.

In the 1990s for the South Urals, as for most of the constituent entities of the Russian Federation, similar political and socio-economic upheavals associated with the creation of new institutions of power and the transition to a market economy were characteristic. “In conditions of a shortage of time and personnel, namely, an unjustifiably high turnover, as well as the need to organize serious study in new working conditions, the first president of Russia B.N. Yeltsin acted decisively” (State Archive of the Russian Federation. F. 10115. Op. 1. D. 100. L. 14.). In the South Urals, the formation of a new statehood was also related with a crisis of power. “The administration of the Chelyabinsk region led by V.P. Solovyov confronted to the Chelyabinsk regional executive committee led by P.I. Sumin” (Consolidated Archive of Chelyabinsk Region. F. P–274. Op. 3. D. 46. L. 2.). There were two governors in region. This situation didn’t have the best effect on the development of the region, especially economic.

Most of the factories in towns in the South Urals reduced their production capacities or they were completely destroyed. Large factories, including the military-industrial complex, ceased their interaction with countries such as Kazakhstan, Ukraine, Lithuania, Latvia, Estonia because of the collapse of the Soviet Union also led to the destruction of economic ties. Such situation led to a social tension. “In August 1998, as a result of the financial economic crisis and default, real incomes of the population decreased by 31.1 %” (RIA News, 2013). “The price growth index for food products in 1999 amounted to 151.6 % of the previous year, including for children’s clothing – 166.0 %” (Report of Chelyabinsk region’s Administration, 2000: 2).

Such circumstances made it real for the development of child homelessness and neglect, juvenile delinquency, and deviant behavior among minors. At the beginning of 1999, according to the report of the Prosecutor General’s Office of the Russian Federation (2000), there were 2 million street children and 15 million neglected in the country and according to the Russian Children’s Fund (2000), there were 657 thousand orphans “as compared with May 1945 (after the Great Patriotic War), there were 678 thousand of them in the USSR” (RIA News, 2004). According to the prosecutor of the Chelyabinsk region A.I. Bragin, the crime situation in the region in the 1990s, including the level and dynamics of juvenile crime, was deeply anxious. The total number of crimes committed in the region was constantly growing. So, “in 1992, 4991 crimes committed by minors and with their complicity were registered, in 1995 – already 5606, the number of offenses increased from 14 926 in 1993 to 31 178 in 1995” (Information and statistical collection, 1998: 14). Also “increased the number of crimes

committed by minors repeatedly (so-called recidivism) from 572 in 1994 to 645 in 1995” (Statistical collection, 1999: 25).

The increasing influence on children and adolescents in the period under study was exerted by such extremely dangerous phenomena as drug addiction and alcoholism. In 1999, in the South Urals, according to official data, there were “5150 drug addicts who were registered in narcologists and the police, including 272 teenagers and 10 children” (Report of the prosecutor of the Chelyabinsk region, 2000: 3). Throughout the period under study, the process of alcoholization of the younger generation was observed. According to statistics, almost every fourth teenager committed crimes while intoxicated. This has become a real threat to the existence of a healthy gene pool of the Russian nation.

Another result of the socio-economic upheavals of the 1990s is the appearance of the so-called “demographic hole”. In 1999, only 12 out of 89 regions in Russia experienced natural population growth (Unified interdepartmental information and statistical system, 1999). Over the past 10 years (the period of the 1990s), 6 million fewer children were born than in the previous ones. The population did not want to give birth. In this context, the statement of one of the governors of the Chelyabinsk region V.P. Solovyov became “popular”: “If you can’t feed your children – don’t give birth!” (Samokhina, 2014: 95).

All this taken together posed a serious block to the progress and renewal of Russian society, created obstacles in the implementation of the International Convention on the Rights of the Child. It was compulsory to do something with this, both at the federal level and in each region.

4. Discussions

In Russia, the period of the 1990s can be marked as the period of the formation of a new state policy towards children. If in the past the Komsomol and Pioneer organizations were part of a unified state system for the upbringing of the younger generation, then in the early 1990s their socio-pedagogical potential turned out to be unclaimed by the state. At this time, new concepts, programs and mechanisms for the implementation of measures to educate children and adolescents, as well as to improve their situation, were developed. The first legal acts in the field of social protection of children and adolescents, which fully comply with the Convention on the Rights of the Child, are beginning to appear by the late 1990s – early 2000s. For example, the Law of the Chelyabinsk Region of 11 June 1998 N° 46–ZO “On state support of youth and children’s public associations of the Chelyabinsk region” was adopted, and in the same year, the Resolution of the Governor of the Chelyabinsk Region N° 234 “On measures to support

youth in the Chelyabinsk region” was adopted. After two years the Law of the Chelyabinsk Region of 24 February 2000 № 114-ZO “On the organization of guardianship and trusteeship in the Chelyabinsk region” was adopted. Next year the Law of the Chelyabinsk Region of 17 December 2001 № 54-ZO “On the protection of children’s rights in the Chelyabinsk region” was adopted.

According to the Resolution of the Legislative Assembly of the Chelyabinsk region of 27 December 2001 № 386 “On the regional program “Children of the South Urals” for 2001–2005” the Concept of State Youth Policy in the Chelyabinsk Region was adopted. In the same year, financing of a new regional program “Children of the South Urals” began. This program unites a number of targeted programs of various departments related to childhood problems – “Disabled Children”, “Orphans”, “Safe Motherhood”, “Gifted Children”, “Social protection of families and children”, “Family planning”, “Prevention of neglect and juvenile delinquency”.

The issue of combating drug addiction among children and adolescents was of particular importance. For example, in the South Urals, there were facts of suppression by the law enforcement agencies of huge consignments of smuggling drug supplies from Kazakhstan and Tajikistan (Aleksandrovich, 2000). The fight against drug addiction of the children and adolescents was carried out not only by the forces of law enforcement agencies, but also through the medical care system. The regional narcological dispensary continued its activity, where normal conditions were created for the treatment and rehabilitation of children and adolescents who suffered from drug addiction, thereby ensuring the right of children to receive health care services. Of course, these actions were not enough. The main preventive measures in the fight against drug addiction continued to be – the organization of employment in socially useful labor, recreation, educational activities, and sport.

As a result of the dire consequences of the reforms of the 1990s the younger generation was left “on its own” and was very acutely experiencing the problem of employment in their free time. To solve this situation, a system of temporary employment for adolescents was formed in the South Urals, especially during vacations. This program made it possible to get additional income in families, distracted teenagers from idle sitting outdoors and, in general, helped to reduce the level of unmotivated juvenile delinquency. For difficult teenagers, a system of summer sports field camps was created and operated. In 1998, “750 adolescents were sent in such camps, in 1999 – 3 thousand people” (Aleksandrovich, 2000: 48).

In matters of combating juvenile delinquency in the system of state authorities, commissions on juvenile affairs played a positive role. The main aims of the commissions on juvenile affairs were “the protection of the child from domestic violence”, “the protection of the child from the

harmful influence of the asocial environment”, “the protection of the child from illegal actions of the parents”, etc. (Resolution 29–P/2006 of February 22). The existence of a separate authority – commissions on juvenile affairs made it possible to solve the problems of child protection more effectively.

The prevention and elimination the reasons of offenses, the commission of crimes among minors were related with the formation of the respect for the law at the level of their personal conviction. Therefore, the legal education of children, in the first place, was focused on preventing compliance to negative manifestations in society. For this, in the South Urals, classes were held with teaching staff to consolidate a clear understanding of the initial legal concepts, the possibilities of using legal means of influence on students prone to committing offenses, and on the unfavorable family and household environment around them. Extracurricular forms of work were used – disputes, meetings with law enforcement officials, conferences, competitions, visits to law enforcement agencies. Employees of libraries were involved, whose task was to collect books and materials from periodicals for teachers, parents, children on the legal education of the younger generation. Such universities as Chelyabinsk State Pedagogical University, Magnitogorsk State University, Academy of Physical Culture and Sports, Academy of Culture and Art continued training students to develop their professional skills to educate children.

At all times, the school has been the most important unit of the moral education of children. According to the Federal Law of 10 April 2000 N° 51–FZ “On Approval of the Federal Program for the Development of Education” a new federal program for the development of education in Russia was approved, according to the main provisions of which, among the priorities for the development of school education were fixed – accessibility, quality of education, information support, at the same time such an important direction of the school’s activities as the moral education of future citizens of Russia, was not named. At the same time, educational organizations, as the most important social institutions, simply needed to more actively form a new way of life for the young generation, which really contributes to the upbringing of a physically healthy, spiritually rich, highly moral personality, respecting the traditions and culture of their own and other people. It was necessary to direct efforts to educate patriotism, citizenship, respect for human rights and freedoms, responsibility to oneself and society. Educational organizations, such a school, have to create favorable conditions for the full development of children, their adaptation to social changes, to form in children’s stable motives and attitudes towards a healthy lifestyle.

In the 1990s in connection with the destruction of the previous system of pioneer and Komsomol organizations, the system of additional education for children is beginning to play an increasingly important role

in the implementation of youth policy. In the South Urals, due to additional funding, the number of sections was increased. A system of work with children and adolescents through clubs at the place of residence was carried out. The movement of sports and courtyard teams “Golden Puck” and “Leather Ball” was developed. During the period under study, a program was launched to increase sports grounds at the place of residence. Military sports competitions were held for school teams. They began to pay more attention to the development of military-applied and technical sports. In the region, such a program as “Development of patriotism, citizenship and preparation of young people for service in the Armed Forces” has been implemented. The team of the Chelyabinsk region won first place at the European final of the Odyssey of Mind program, which took place in Frankfurt am Main.

In the 1990s the most important tool for creating the foundations of a democratic state for the future was the development of children’s public associations and organizations, youth associations, various public structures, centers acting in the interests of children and their interaction with public authorities. Prevailing by the beginning of the 2000s the system of political, educational, cultural and leisure organizations had significant social and pedagogical potential for the implementation of the main principles of the state’s youth policy and solving the most important problems associated with the socialization of children.

During the period under study, a very important problem for young people was the problem of accessibility of higher education. In this connection, the Governor’s recruitment system was created in the South Urals, which guaranteed that up to 500 children from low-income families – children from rural schools, small territories – entered the region’s universities annually only based on the Governor’s recommendation. This program was aimed at solving two main problems at once – to educate children from low-income families, as well as to train the necessary specialists.

A significant contribution to the upbringing of children and adolescents began to be made by the Chelyabinsk Regional Public Charitable Foundation “Future of the Fatherland” created in 1995 named by V.P. Polyanichko. The purpose of creating this fund is to form true spiritual values in children. The path of development of Russia, both in the present and in the future, depends on how prepared children and adolescents will be for a new type of social relations, what value orientations they will develop. Therefore, the main directions of the Fund’s activities were to support the youth movement, increase social activity, create conditions for the development of creative abilities and talents of children and adolescents, educational success, mastering the chosen specialty, maintaining health, and maintaining a healthy lifestyle.

Considering the experience of previous years, we have formulated practical recommendations in the upbringing of the children, which will contribute to the implementation of the Convention on the Rights of the Child in the South Urals in modern times:

1. In the upbringing of children and adolescents, there is no principle more effective than the principle – “do as I do”. Therefore, the process of raising children should be based on an example of the activities of real people, contemporaries, whose life, and deeds are an example for those who follow them. Such a citizen of his country, a patriot of his Fatherland was V.P. Polyanichko (First Secretary of the Chelyabinsk Regional Komsomol Committee, Deputy Prime Minister of the Russian Government), who said: “Moral progress is stable and reliable where the connection of times is not interrupted, where the authority of the elders is high” (Polyanichko, 2017: 371).
2. The idea of patriotic service to Russia should form the core of state and social education, the formation of moral values in a democratic society, the national ideals of which are nationality, statehood, and spirituality. Civic education in the young generation is a respectful and responsible attitude to the rule of law, moral norms, customs and traditions of the people, a separate social community, and every Russian family.
3. Humanization of education and upbringing based on universal human values such as religious virtues, freedom, labor, citizenship, patriotism, rejection of nationalism, extremism, and terrorism.
4. Continuity of generations and traditions, “connection of times”, to preserve and pass on to modern children the best traditions, cultural values of the past, including at the level of each individual region. Substantive directions of this activity should be traditions and state, traditions and society, traditions and family. The success of education based on folk traditions will depend on the fruitful cooperation of teachers with various state and social institutions and services such as public funds and movements, children’s and youth organizations, political parties, councils of war and labor veterans, cultural and art institutions, health care institutions, law enforcement agencies, sports societies, travel agencies and mass media.
5. The constant involvement of children in active social and creative activities – actions, contests, projects, competitions, expanding their social rights and opportunities, through the development of self-government, manifestation of activity in various activities, excluding aggression, ethnic and religious tension, bad habits such as drug addiction, tobacco smoking, alcoholism.

Thus, the most important criterion for the upbringing of the younger generation will be its conscious, voluntary participation in public life; the highest indicator is the ability to serve the Fatherland.

Conclusion

Of course, the modern realities of life in Russia should be aimed at protecting and fully realizing the rights of children in accordance with the norms of international and national legislation. In turn, the state assumes responsibility and certain obligations in providing of these rights.

Children are one of the most important population groups in the country. This is the future of the state. Therefore, state policy towards children should be a priority if we think about national security.

In the 1990s, when the link between generations was significantly destroyed, children in Russia were in a very difficult situation. In these conditions, the state needed to ensure the historical continuity of generations in country; the preservation, development, and dissemination of national culture; to educate a respectful attitude to the cultural and historical heritage of all people in Russia. After all, it is well known that a society that does not remember the past is doomed to degradation, and, on the contrary, a society that honors the old acquires immortality.

Based on this, the main objective of the state policy towards children, its main goal was to create favorable economic and political conditions for the social development of the younger generation, to solve the most actual problems of children and adolescents (health, education, labor and creative activity, morality, homelessness, drug addiction, crime), attracting the younger generation to active political, socio-economic, and cultural activities. For this purpose, all social and state structures formed moral norms and rules in children, used the previously created material base – palaces of pioneers and schoolchildren, children's health camps, sections of children's scientific and technical creativity, hotels, tourist centers in the interests of patriotic, civil, labor, physical, aesthetic, moral and environmental education of children and adolescents. Socially significant initiatives of children were supported. New public organizations with the participation of adolescents, such as "Yabloko", "Medved", and "Zhirinovskiy's Falcons" were developed. There were proposals to create an All-Russian Children's Organization – "Russian Pioneer Organization named after Yuri Gagarin". Summer sports and work vacations, excursions and travels around native country were organized for children. However, the above steps were not enough.

During the period under study, society faced a serious aim – the upbringing of the young generation of a renewed, reviving Russia, the upbringing of highly moral, educated young people who will ensure the rise and prosperity of our country and the South Urals, which remains relevant in modern times.

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¿Educar o evitar el pensamiento? Un análisis sobre el lenguaje y el poder

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Resumen

Desde la perspectiva de ensayo, este artículo es una lectura analítica, pero sobre todo hermenéutica, de las relaciones que ha mantenido la educación con el pensamiento, el lenguaje y el poder. La investigación está sustentada, en primer lugar, en una documentación rigurosa y sistemática, para luego pasar a la selección de aquellos textos que, a juicio de la autora, tienen mayor pertinencia con la temática y que, además, representan los planteamientos nucleares de Michel Foucault y Edgar Morín. Se detallan y analizan los argumentos de estos dos autores, como arduos críticos de la pedagogía clásica, sus actores y estrategias.

Se concluye que, en ambos autores hay un esfuerzo por encontrar los hilos del poder que sostienen en la periferia, algunos discursos, propios de una educación que cuestiona la racionalidad dominante y que postulan formas de pensar diferentes, como pueden ser: una arqueología del saber al estilo de Foucault o el pensamiento complejo propuesto por Morín.

Palabras Claves: Educar; pensar; lenguaje; poder; complejidad.

Educate or avoid thinking? An analysis of language and power

Abstract

From the perspective of essay, this article is an analytical, but above all hermeneutic, reading of the relationships that education has maintained with thought, language, and power. The research is based, in the first place, on a rigorous and systematic documentation, and then move on to the selection of those texts that, in the opinion of the author, have greater relevance to the subject and that, in addition, represent the nuclear approaches of

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Michel Foucault and Edgar Morín. The arguments of these two authors are detailed and analyzed, as arduous critics of classical pedagogy, its actors, and strategies. It is concluded that, in both authors, there is an effort to find the threads of power that sustain in the periphery, some discourses, typical of an education that questions the dominant rationality and that postulate different ways of thinking, such as: an archaeology of knowledge in the style of Foucault or the complex thought proposed by Morín.

Keyword: Educate; think; language; power; complexity.

Introducción

“El lenguaje es, como saben, el murmullo de todo lo que se pronuncia, y es al mismo tiempo ese sistema transparente que hace que, cuando hablamos, se nos comprenda; en pocas palabras, el lenguaje es a la vez todo el hecho de las hablas acumuladas en la historia y además el sistema mismo de la lengua”.

-Michel Foucault-

Se entiende que entre educación y sociedad existan desde sus orígenes unos nexos genéticos indisolubles, pues, el quehacer educativo es, en esencia, socializador. Lo que es discutible, y de allí partimos, es que educar, implique colocar ciertos dispositivos de poder en acción, un poder que regula, que restringe y que delimita los espacios, tanto de las formas en que se relacionan las personas, como de aquello que está permitido decir o callar. Desde esa perspectiva, asumimos una posición filosófica y crítica para abordar preguntas sobre este tema que es pluriforme y controversial: ¿Desde dónde y para que se educa en esta sociedad? ¿Qué lugar ocupan, en ese proceso, el lenguaje y el poder?

La modernidad es, en tanto, una fábrica de criaturas sociales que se agrupan a partir de ciertas prácticas y discursos sociales, los cuales, a su vez, posicionan las formas del lenguaje. La finalidad de ese posicionamiento puede ser variable, pero sin duda tiene que ver con el ejercicio del poder, un poder sobre la vida, un poder que trasciende lo político y se re-crea en cada una de las relaciones que es posible tejer en sociedad. Lenguaje y poder, aparecen entonces entrelazados, fusionados podríamos decir, para preformar las subjetividades que se activan en la interacción de los seres humanos.

De esta forma, podemos agregar que nuestro análisis, tiene un carácter dialectico y hermenéutico. Se quiere visibilizar, y hacer visible, con la ayuda metodológica y teórica de intelectuales como Foucault y Morín, esa madeja social que se va formando con, desde y por el lenguaje. Leyendo desde esta

perspectiva, la educación se erige, no como una actividad desde la cual los individuos o, los ciudadanos, objetivan sus aspiraciones sociales; sino como un nicho en dónde pensamiento es recortado, de acuerdo con las medidas esnobistas que impone una determinada actualidad.

Así, este estudio se plantea como objetivo general: “interpretar la relación entre educación, pensamiento, lenguaje y poder, desde la perspectiva del análisis de discurso y el pensamiento complejo”. El punto de partida es un registro de algunas nociones filosóficas y teóricas, en cuanto a lo que significa la educación, sus aristas y sus mediaciones discursivas; pasando por las implicaciones que el acto de educar tiene con las formas de producción de pensamiento, mediado por el lenguaje; hasta llegar a la interpretación de las múltiples relaciones entre el educación, lenguaje y poder teniendo como referencias principales, los planteamientos de Michel Foucault y Edgar Morín. La praxis metodológica, se estructura desde el arqueo documental de algunos textos representativos de la temática, hasta su hermenéutica crítica para construir algunas líneas de desarrollo a posteriori.

1. La educación como criatura socio-política “ilustrada”

Se ha convertido en un lugar común afirmar entre sociólogos, educadores y científicos sociales en general que enfrentamos una época de incertidumbre. Que hoy en nuestro mundo nada es simple o sencillo. Que los problemas que genera la sociedad actual requieren una manera de pensar totalmente novedosa para la cual la gran mayoría de nosotros no fue formada. Educar para el tercer milenio es, no solo formar para enfrentar nuevas situaciones sino preparar para una vida de cambios permanentes pues, “Desde una dimensión social, la educación puede operar como un medio tanto de control como de transformación” (Guzmán, 2014:110).

Ahora bien, enfocada desde la complejidad que representa, la educación no es, ni de lejos, una actividad lineal en la que unos individuos enseñan a otros con menos experiencia, a vivir en sociedad. Por el contrario, pareciera que, desde la Ilustración francesa, existe una connivencia entre quienes educan y quienes gobiernan para que los educandos, sean propulsores de la sociedad que “conviene”. No en vano, una de las alianzas más fuertes que mantuvo la educación moderna en sus inicios fue con la religión, más concretamente, con la Iglesia Católica, de hecho, en palabras de Illicachi (2014), desde la egida religiosa se delinean las subjetividades que interactúan en aquel naciente mundo moderno que nace con el Siglo de las Luces.

La Ilustración, aparece entonces, como el marco contextual de una cosmovisión novedosa que, al tiempo que requiere nuevos guiones y actores, los promueve y los determina. En ese contexto, la teología enmarca

el proceso de socialización, aun cuando no lo parezca, es decir, la presencia de la iglesia se traduce en prácticas y discursos que se reproducen de forma que los individuos los internalizan en sus interacciones con el entorno y con los demás. En la sociedad que se consolida en ese proceso socio-histórico y los progresos de la racionalidad científica, surgen para imponer una nueva visión del mundo que toma distancia de los preceptos divinos. El sujeto moderno que se engendra allí se conecta rápidamente con los dispositivos culturales del cambio, a saber, La Ciencia y la Educación.

El discurso social acerca de la necesidad del progreso permea cada uno de los espacios sociales que se construyen alrededor de esa pareja dialéctica que constituyen la ciencia y la fe. Si bien, en apariencia existe allí una contradicción ontológica, lo cierto es que la sociedad moderna termina por ser la consecuencia de lo que ambas representan para el ser moderno. La organización social, política y económica de la sociedad se articula alrededor de esa idea. Los sistemas educativos que comienzan a generarse con la Modernidad están orientados por una cosmovisión que coloca a la educación al servicio de los procesos de socialización política y cultural, esto es, se piensa y se diseña una educación para la racionalización moderna de la sociedad, se construyen desde ella las fidelidades necesarias para la consolidación del cambio cultural ilustrado.

El cambio social operado en ese contexto representa un verdadero hito histórico que viene a consolidar cada una de las criaturas de la modernidad. Es así como se puede hablar de una Ciencia Moderna, una Familia Moderna, un Estado Moderno, y, por supuesto, una Educación Moderna, esta última, convertida en el centro neurálgico de construcción de las realidades sociopolíticas para que, ese “sujeto moderno” que también emerge en ese contexto sea “formateado” axiológicamente para “integrarse” o, en su defecto, ser integrado.

1.1. Algunas aproximaciones al “acto de educar”

Dado que uno de nuestros intereses en este artículo, tiene que ver con la relación entre lenguaje y educación, parece lógico acercarse a esta última a través de lo que las palabras transmiten. Como diría Foucault (2002), el discurso encierra y promueve prácticas, las palabras nunca son neutras, sino que están siempre llenas de contenido y son excelentes para “decir” pero también para “dejar de decir”. Así para ocuparnos de la relación entre educación y sociedad, ocupémonos un momento de “educar” y socializar; sus significados, sus precisiones, pero también sus imprecisiones porque de eso se trata el lenguaje.

Etimológicamente la palabra “Educar”, significa enseñar, adoctrinar, formar, instruir; de manera más amplia, desarrollar las facultades intelectuales y morales (Acosta, 2016). Varias cosas que destacar aquí: si

se toma literalmente este significado, educar sería casi como amaestrar. Las personas serían “amaestrables” en la medida en que aprendieran a reaccionar de manera similar, instintiva casi, frente a ciertos estímulos, en tanto, la educación se encargaría de preparar a las personas para repetir y repetir hasta la eternidad ciertas actitudes y las mismas soluciones aun cuando los problemas sean distintos. Algo así hacen los animales ante los imponderables que se le presentan en su cotidianidad, reaccionan de la forma en que están genéticamente preparados o han sido amaestrados.

La situación no mejora, si se asume que educar sinónimo de adoctrinar. El adoctrinamiento alude a una acción para inducir: lo que se debe hacer y lo que se debe decir. Instruir o adoctrinar colocan a la educación como el instrumento para que el ser humano aprenda solo algunas respuestas ante preguntas previamente determinadas, tal y como los animales aprenden a camuflarse y defenderse frente a enemigos centenarios de una única y sola manera.

Cuando se examina la palabra “socializar”, las certidumbres son menores aún. La definición literal de esta palabra puede aludir a compartir información o bienes, y también puede sugerir un proceso mediante el cual se incorpora un individuo a la vida social. Este último significado, es el más cercano a lo que se pretende en este estudio, pues la conexión entre las dos palabras empieza a asomarse. Si al educar, adiestramos, es lógico que ese adiestramiento se haga pensando en ciertos roles que le tocara jugar a quien se adiestra, y si ese adiestramiento o como se ha llamado también adoctrinamiento implica aprenderse ciertas respuestas ante futuras preguntas es cuando menos adecuado que se tome en cuenta las características de la vida social para que el “adiestrado” tenga éxito.

En esta cadena de circunstancias la educación se termina transformando en un mecanismo de la socialización. ¿Es esto correcto? Nos referimos por supuesto al nexo genético y conflictivo entre educar y socializar. Dos preguntas pueden formularse al respecto: ¿La socialización crea sus mecanismos de reproducción, entre ellos el educativo?, lo cual implicaría que la educación es una criatura social o, ¿La educación representa un tránsito necesario para la socialización del individuo?, lo que significaría defender la tesis, según la cual toda socialización, es el resultado de un proceso educativo.

A simple vista este dilema quedaría resuelto, si quien responde, adopta un determinado enfoque teórico, desde donde evaluar la relación entre educación y sociedad. Si se acepta que somos estamos determinados por las estructuras sociales, es lógico concluir que la educación nos “formatea” para un tipo de sociedad específica. Si nos consideramos determinantes como individualidades y, eventualmente libres para realizar nuestro albedrío, la educación sería una más de las criaturas sociales. A nuestro entender, la cosa no es tan sencilla porque el ser humano y, la sociedad en general, nunca

podrán ser leídos en blanco y negro. La sociedad está llena de matices, y la relación entre sociedad y educación se encuentra sometida a esos matices de manera que no hay forma de alcanzar la verdad al respecto sino, en el lenguaje de Foucault, cierto “régimen de verdad” (Castro, 2016).

2. Sinuosidades entre educar y pensar

En este análisis se comparten dos premisas teóricas fundamentales, la de Michel Foucault acerca de las sociedades disciplinarias y de control, y el planteamiento de Edgar Morín sobre la necesidad de reinventar la educación impulsando el pensamiento complejo. Metodológicamente, esto implica una lectura a dos manos pero que pretende ser complementaria. Ambos autores se bifurcan en una gran cantidad de relecturas que colocan en el foco de atención; por el lado de Foucault, al poder que se reproduce en las prácticas disciplinarias, incluyendo la educación y, en el caso de Morín; la fragmentación que sirve para invisibilizar ciertas formas de pensar contestatarias.

2.1. Foucault: pensar entre el saber y el poder

La amplitud temática de este filósofo francés, controvertido por demás, es una dificultad para traerlo a una discusión que solo se ocupe de la relación entre educar y pensar. Para Foucault, comprender el funcionamiento de la educación moderna, requiere asumir una actitud crítica frente a la sociedad de control que esta sustenta. En las sociedades tradicionales, suele afirmar este autor, la normatización de los individuos pasaba por el castigo del cuerpo frente a la desobediencia. Las sociedades actuales han sustituido el castigo del cuerpo por el castigo del alma (Urraco et al, 2013).

¿Desde dónde y, quienes “castigan el alma”? Se puede interpretar que esta tarea está en manos de los especialistas, es decir, aquellos que, en la sociedad moderna, están habilitados para juzgar y establecer los criterios de la verdad. Entre esos especialistas, bien pueden contarse a los maestros, los educadores en general que, a partir de su discurso y sus prácticas de poder en el aula, regulan “las palabras y las cosas”. Precisamente es así como pueden ubicarse los vínculos que conectan el saber y el poder. Los sistemas educativos que comienzan a generarse con la Modernidad están orientados por una cosmovisión que coloca a la educación al servicio de los procesos de socialización política y cultural, esto es, se piensa y se diseña una educación para la racionalización moderna de la sociedad, se construyen desde ella las fidelidades necesarias para la consolidación del cambio cultural que el poder requiera.

Los educandos aprenden a pensar, orientados por el poder que, indudablemente no les enseñará a pensar en su contra. El poder del

educador cimenta una determinada cultura política y, promueve en este sentido, una gama de dispositivos reproductores del poder que solo posibilitan la transformación que el mismo poder requiera. El estado moderno no es, por tanto, un aparato inerte de funcionamiento meramente administrativo sino, por el contrario, un entramado complejo de guiones, escenarios y actores cuya dinámica resulta en la configuración de la cultura política. “El poder produce saber, y el saber está atravesado por relaciones de poder” (Díaz et al, 2017: 44).

Esa constante confrontación entre quienes gobiernan y quienes educan, muchas veces se resuelve en alianzas que favorecen el ejercicio del poder, pero, en otras ocasiones, tensa aún más los procesos que definen la dominación encubierta a través de la educación. Esto, sin embargo, no implica una ruptura entre cultura política y cultura educativa puesto que ambas se nutren por igual del proyecto de la modernidad. Así las cosas, la necesidad de interpelar el poder político para poder impulsar cambios en la educación, pasa por insubordinar el pensamiento. Si lo que existe es un adoctrinamiento, en el sentido clásico que esta palabra tiene, una rebelión educativa debe articularse con un re-pensamiento del “acto de educar”. Esa rebelión del pensamiento incluye un cuestionamiento de la autoridad del especialista-docente que, en su rol de agente de la dominación, recorta y acorta, el saber para que el aprendiz, solo piense, lo que al poder le conviene que piense.

Es, en ese contexto, casi filosófico del pensamiento educativo, en el que el planteamiento de Foucault, alerta sobre el poder desmedido que adquirió la institucionalización del saber. En ese proceso, el sujeto moderno termina objetivado, de manera que pierde su sensibilidad para detectar la dominación y la manipulación. Su capacidad para leer la realidad es también modelada por el uso de un vocabulario que las fuerzas de la autoridad imponen. Expresiones como “crisis sistémicas”, “reformas sistémicas”, “entropías sistémicas”; buscan robustecer la imagen de una sociedad que solo atraviesa el malestar propio de la evolución o el desarrollo. El sujeto socializado desde la institución escolar está impedido para insurgir contra aquellos que le han formado, es decir contra sus creadores (Conforti, 2017).

2.1.1. ¿Pensar desde el lenguaje o, a pesar de él?

Si hay un tema esencialmente Foucaultiano, ese es el lenguaje. Sus formas transformadas en discurso, sus prácticas y sus tensiones, forman parte de esa caja de herramientas a la que este autor se refería con frecuencia (Foucault, 1970). Es el estudio del lenguaje lo que, finalmente lo conduce al análisis de lo que él llama “formaciones discursivas”, desde esa categoría, el autor se adentra en el análisis “...de los asuntos oscuros de la sociedad, las cuestiones sórdidas de la humanidad, el lado inconfesable y oculto de los procesos colectivos e históricos” (Rodríguez, 1995:164). La institución

educativa forma el pensamiento para que sus lecturas de la realidad sean inteligibles para el individuo, por tanto, este aprende a nombrar y conceptualizar, casi siempre en términos de una sociedad de control.

Al descifrar las “oscuridades” del acto de educar, Foucault nos conduce al análisis de las relaciones invisibles entre saber y poder. La mayoría de las acciones de control social: recluir, encarcelar, hospitalizar, reprimir; comienzan a ser edificadas desde el lenguaje. La palabra alineada en los discursos de la medicina, del derecho y de la sexualidad, por nombrar tres de las áreas más estudiadas por el autor; sirve para producir y reproducir las prácticas del poder. De aquí se puede deducir que la institucionalización del saber, que encarna la educación moderna puede ser considerada una práctica del poder. Las palabras son también una forma de sujeción que limita a los aprendices a ser autónomos, aunque a veces, ellos crean serlo.

Los “actos del habla”, son, en esta perspectiva, acciones prácticas que consolidan los procesos mediante los cuales los sujetos interactúan y actúan en contra de los otros. Mediante la internalización de las palabras y los conceptos, las personas crean las relaciones con los demás, incluso sus relaciones con los objetos. En pleno siglo XXI, por ejemplo, muy pocas personas ignoran lo que es un celular y cuáles son sus “funciones”. Pero si, por un acto de magia, traemos a una persona de 30 años atrás y le mostramos uno, seguramente se asombrará porque no lo tiene registrado en sus, ni como discurso ni como práctica. Podemos decir entonces, como lo hacen Bethencourt *et al*, (2006), que las palabras, el lenguaje, en definitiva, está cargado de significados relacionales.

En esta línea de reflexión, ir en contra de lo que se enseña en la institución educativa, requiere una alta dosis de independencia que no siempre aparece entre los educandos. Su posición de subordinación es, a un tiempo, una forma de relación que le ha sido enseñada, desde la práctica social y, sobre todo, desde la praxis discursiva. La educación es una discursiva y su análisis no puede prescindir del “sujeto que habla”. Es la figura de ese sujeto lo que determina el camino de los “sujetos hablados”, el hombre objetivado que, en el proceso educativo adquiere nomenclatura propia, y se convierte en un nuevo especialista, un juez, un guardián de las verdades que la racionalidad dominante impone.

Pensar, a pesar de la educación, podría ser la superación de ese estado de sumisión derivado de la institucionalización del saber. Y es que esa cultura escolarizada, ha limitado las posibilidades de formar individuos independientes con un sentido de protagonismo social que les imprima una verdadera identidad y autonomía como dispositivos para el cambio social. Visto en clave foucaultiana, eso es lo que debe ser revertido pues, el itinerario de los cambios que requiere la civilización occidental a raíz de la decadencia ilustrada supone una racionalidad distinta que explore las posibilidades de nuevos caminos para la formación de un sujeto fuera de la

cárcel que terminó siendo el proyecto civilizatorio de la modernidad.

2.2. Morín: el sujeto pensante, el sujeto complejo

Edgar Morín, al igual que Foucault se mueve en ese mundo de las reconceptualizaciones y las revoluciones paradigmáticas. A nuestro entender, menos prolijo que su coterráneo, es, sin embargo, un apasionado del tema educativo y de la relación entre educar y pensar. Una premisa parece surcar, de norte a sur, de este a oeste, cada uno de los planteamientos de Morín cuando se le analiza en virtud de la relación entre educar y pensar: “educar es enseñar a vivir” (Morín, 2015). En ese libro que el autor, subtitula, “Manifiesto para cambiar la educación”, su definición de “vivir”, pretende ser una conceptualización de la enseñanza. Visto así, para Morín, la educación moderna ha sido castradora del pensamiento y de la ilusión-emoción que representa aprender desde la vida. La escuela no puede enseñar a vivir, aunque sí puede preparar para reaccionar ante ciertas circunstancias de la vida.

2.2.1. Pensar desde la pedagogía

Podría decirse que Morín es menos suspicaz que Foucault cuando evalúa las falencias de la educación moderna y sus relaciones con el poder. Ciertamente hay una fuerte crítica contra el quehacer pedagógico que, en esencia, transmite verdades prefabricadas que poco fomentan la libertad de pensamiento. La escuela moderna, las relaciones entre maestros y alumnos, los mecanismos de enseñanza y aprendizaje, los instrumentos de evaluación están muy lejos de ser motivadores de la autonomía. Más aún, la cultura escolar en Occidente está llena de rasgos autoritarios que convierten a la institución escolar en una prisión más de la creatividad.

Sin embargo, desde el pensamiento pedagógico que estimula Morín, se reivindica esa visión humanista que coloca en el centro del debate educativo al estudiante con todo su ser. En las instituciones educativas debe fomentarse un aprendizaje que se autorregule y se autogenera. En todo caso, se trata de un aprendizaje para la vida, basado en la complejidad, en el entendido que “El término complejidad no puede más que expresar nuestra turbación, nuestra confusión, nuestra incapacidad para definir de manera simple, para nombrar de manera clara, para poner orden en nuestras ideas” (Morín, 1994:10).

Si se escudriña con atención estas palabras de Morín, debe considerarse que el pensamiento es una labor de esclarecimiento que se encuentra en permanente acción. No se piensa desde una vez y para siempre, se piensa toda la vida y para toda la vida, por lo que esa complejidad es inherente al acto de pensar y, también lo debería ser al acto de educar. Desde la pedagogía, puede considerarse que el paradigma clásico comenzó a hacer

aguas, una vez fue avanzando la visión constructivista de la enseñanza que substituyó, incluso este último término por la expresión compuesta enseñanza-enseñanza. Se cuestiona entonces la institucionalización del saber de la que nos habla Foucault, abogando por la instauración de un modelo pedagógico que abreva sus conceptos en la libertad de pensamiento.

En ese orden de ideas, la pedagogía no puede coartar los caminos individuales, limitar los talentos o encauzarlos hacia un solo tipo de desarrollo que, generalmente, obedecen a una lógica política y a un determinado programa gubernamental, avalado por un discurso del poder. La educación debe superar las prescripciones o adscripciones teóricas automáticas que lo que hacen es inmovilizar el conocimiento, en su lugar el acto pedagógico debe ser un acto de crecimiento creativo, desde el que cada persona, construya sus caminos para desarrollar su potencialidad ensayando caminos de convivencia con los demás pero sin minusvalía de su propio talento.

Ciertamente hay mucha resistencia al cambio en el ámbito educativo, ceder el protagonismo a los estudiantes es todo un reto para el pedagogo, pero es parte de la refundación de su praxis, es una necesidad, incluso epistemológica, ante la estruendosa caída de los paradigmas clásicos de las ciencias y la emergencia cada vez más notable de tendencias globalizantes y complejas. Para Morín esa propuesta de una pedagogía pertinente, requiere una concepción holística de la educación, en la que tienen que estar involucrados, el pensamiento y el descubrimiento (Lorenzon et al, 2019). Desde nuestra perspectiva, el pensar se convierte en sinónimo de descubrir, pero no como develamiento de lo que estaba oculto; más bien, como un acto creativo en el que el sujeto pensante, al tiempo que piensa, cuestiona su propio pensamiento.

2.2.2. Pensar la educación y el lenguaje desde la complejidad

Pensar desde la complejidad conlleva sortear las limitaciones que la vieja racionalidad científica impone. Supone, trascender los obstáculos que colocan las palabras cosificadas a partir de las formaciones discursivas que establecen los linderos de la verdad pedagógica. Ese discurso educativo en cuyo centro se erige la figura del docente como el enunciado desde donde se emiten, tanto el lenguaje como la estructura de la realidad que ese lenguaje permite. El pensamiento en clave compleja busca consolidar la concepción de un conocimiento que se re-crea constantemente, aun subvirtiendo el orden del discurso oficial. Por supuesto, hay una relación bidireccional entre lenguaje y pensamiento, es imposible pensar fuera del lenguaje y, cualquier expresión del pensamiento pasa por una construcción lingüística (Espinoza, 2016).

Para la complejidad, la educación y el lenguaje también coexisten porque no hay manera de construir o “deconstruir” la realidad sin intervención de las palabras y el lenguaje. No se trata de hablar sobre lo que se observa, eso sería una mera acción refleja, lo importante para el desarrollo del pensamiento es que los pedagogos utilicen las herramientas para despertar en los educandos la capacidad heurística de mirar detrás de lo que se nos muestra, tanto desde los discursos estandarizados como de los objetos educativos. Una educación auténtica, se logra en la medida en que se mueve y cambia y, “...debe forjarse desde lo incierto, lo indescriptible, lo no tan obvio” (Martínez et al, 2017: 34).

Ahora bien, desde la pedagogía clásica, se nos han inculcado una serie de verdades, lenguaje mediante, que terminaron convirtiéndose en certidumbres incuestionables, estáticas por demás. El pensamiento complejo interpela esas seguridades, las desecha, no sin antes valorarlas y, puede volver sobre ellas, pero con un nuevo armazón de palabras y prácticas que contextualicen y rearmen esas viejas certezas. Claramente, la educación moderna entra en crisis a mediados del siglo XX y desde allí se ha mantenido en una suerte de limbo epistemológico, que debería ser aleccionador. La crisis de la pedagogía tiene que traducirse, según Morín, en una formación para la incertidumbre, porque así es el mundo real o, al menos, aquello que se ha construido desde el lenguaje como, la realidad (Morín, 2015).

Entonces, cuando se forma para pensar desde la educación desde la complejidad, se debe restituir el lugar de un sujeto que piensa por sí mismo, pero no solo desde sí mismo. Es un sujeto que se restituye desde esa nueva racionalidad que, para Morín, como para Foucault, debe confrontar a la realidad, aunque esta se le resista. Es una racionalidad de nuevo tipo que revierte toda intención de instituir verdades, su razón de ser se mece entre lo abstracto y lo concreto; entre lo inédito y la experiencia. Esa racionalidad es, antes que nada, humanística, con una fuerte predilección por el sujeto que conoce pero que también siente, ama y se emociona con ese conocimiento.

Una pedagogía soportada en el pensamiento complejo abrevia los plazos de una formación para la vida. No es que se vaya a la escuela para luego poner en práctica ciertos conocimientos, cierto lenguaje técnico, en nuestras relaciones sociales. ¡No!, se va a la escuela y se aprenden un conjunto de palabras, un grupo de conceptos; pero la vida y la realidad a la que se refieren esas palabras, se encuentran tanto dentro como fuera de la institución escolar. En tanto, la connivencia, entre razón, es decir, conocimiento, lenguaje y vida tiene que ser constantemente revalorizado desde la pedagogía, para que la formación sea pertinente y oportuna.

Educar para la vida, se traduce en un esfuerzo pedagógico que debe luchar a diario contra la obsolescencia del conocimiento. Llegar a un momento en que lo que se aprende en la escuela y en las universidades se

vuelve estéril ante la realidad, este distanciamiento social del conocimiento y el hecho educativo es uno de los aspectos determinantes al momento de evaluar la idoneidad de lo que se enseña y lo que se aprende, es en todo caso inaceptable que el conocimiento se convierta en un prisionero escolar, que solo sirva para ser debatido intramuros puesto que lo transforma, no solamente en algo inaplicable, sino en un contrasentido social.

Una educación para la vida, supera al lenguaje pedagógico tradicional que, a pesar de haber incorporado las premisas del constructivismo, continuó y, continúa hoy día, reproduciendo prácticas y discursos reduccionistas en cuanto a la necesidad de pensar. Se impone un giro paradigmático que coloque a los educandos frente a la incertidumbre como punto de llegada más que de partida. Es el avivamiento de la complejidad como principio cultural que deviene creatividad y discernimiento, una especie de orientación teleológica que llevará al individuo más allá de los límites disciplinarios que suelen convertirse en camisas de fuerza, tanto empíricas como abstractas.

En ese proceso de liberación del pensamiento y complejización de la mirada “educada”, se activa el lenguaje como el instrumento que más puede convenir al poder, pero, también desde el que se le puede hacer más daño. La palabra está pensada para fundar, pero asimismo para derruir y, tanto lo sabe el poder, que utiliza el lenguaje como una de sus armas predilectas para lograr la sumisión social. Muchas veces las realidades solo son construcciones del lenguaje de las cuales el aprendiz no advierte su inexistencia, el pedagogo que se apoya en la complejidad desnuda los artilugios del lenguaje para reposicionarlo frente a la realidad y las subjetividades de quienes aprenden desde el uso de ese lenguaje.

Conclusiones

Este itinerario hermenéutico por los planteamientos que permiten una aproximación seria, pero también sensible a la vinculación entre la educación, el lenguaje, el poder y las formas de pensamiento en la sociedad actual, deja más inquietudes que certezas. No podía ser de otra manera, las fuentes principales de este estudio: Foucault y Morín, son maestros de la irreverencia intelectual, son especialistas en el cuestionamiento de las verdades absolutas, incluso de aquellas que por su naturaleza puedan considerarse relativas.

No obstante, metodológicamente hablando, una gran conclusión salta a la vista: el lenguaje, el poder y el pensamiento están zurcidos mediante fuertes hilos, con las formas que adopte la educación. En el caso de Foucault, por ejemplo, encontramos un grave enjuiciamiento a institucionalización del saber, y desde allí, a la réplica de un poder y un lenguaje sacralizado;

para este autor, la educación se constituye en reproducción del discurso dominante, es su fuente, pero además su desembocadura. Conclusión, hay que transformar la educación para que sus discursos se deslinden de formatos automatizantes.

En Morín, encontramos una preocupación más constreñida, pero, igualmente abrevada en el tema de la educación como el pivote central, alrededor del cual se componen y recomponen, el lenguaje, el poder y el pensamiento. Su propuesta es una visión compleja que restituya la imagen del sujeto pensante, el cual advierte un mundo global, aun cuando lo que este observando sea solo un fragmento de la realidad. Es ese sujeto que piensa trascendiendo lo concreto, elevándose sobre lo abstracto y, recomponiendo los retazos que ese proceso de pensamiento le deja, tanto para juzgar lo que ve, como para hablar de ello.

Saber y lenguaje, permanecen así en una convivencia simbiótica constante, que no por ello deja de ser controvertida y, a momentos, como no, contradictoria. En definitiva, la educación como dispositivo del cambio social en estos autores, emerge, entre otras cosas como: a) como una acción permanente de impulso para pluralizar el pensamiento; b) la formación para la incertidumbre como derivación de la pedagogía compleja; c) el perfilamiento para la vida, con sus racionalidades y sus emociones y; d) la construcción social y compartida del saber, desde la praxis discursiva y la experiencia concreta.

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Biopoder y ciudadanía en América latina. Una lectura desde Foucault

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Resumen

En este artículo se realiza un análisis del discurso de Foucault para comprender la formalización de ciertos dispositivos han fundado una gramática de la dominación, expresada en las relaciones entre el poder sobre los cuerpos (el Biopoder) y el ejercicio de la ciudadanía. Aunque el propósito es eminentemente teórico, se pretende lograr una aproximación factual al caso latinoamericano, en el entendido que las democracias de la región son hijas dilectas de la modernidad y, además, de los esquemas gubernamentales que privilegian la figura del ciudadano como actor político y sujeto histórico. Metodológicamente se realiza un análisis crítico-hermenéutico, desde el cual se trata, de visibilizar las estrategias de dominación e interpretar en la teoría de Foucault, la instauración discursiva de un nuevo orden societal, basado en la narrativa que relaciona poder y ciudadanía. Estudio permite concluir que, las categorías teóricas foucaultianas, develan al poder como un conjunto de relaciones, siempre en tensión, que, en épocas de cambios, siempre haya espacio, para construir nuevas reglas y regímenes de existencia.

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Palabras Claves: Biopoder; Biopolítica; ciudadanía; América Latina; Foucault.

Biopower and citizenship in Latin America. A reading from Foucault

Abstract

In this article, an analysis of Foucault's discourse is carried out to understand the formalization of certain devices that have founded a grammar of domination, expressed in the relationships between power over bodies (Biopower) and the exercise of citizenship. Although the purpose is eminently theoretical, it is intended to achieve a factual approach to the Latin American case, in the understanding that the democracies of the region are beloved daughters of modernity and, in addition, of government schemes that privilege the figure of the citizen as a political actor and historical subject. Methodologically, a critical-hermeneutical analysis is carried out, from which it is a matter of making domination strategies visible and interpreting in Foucault's theory, the discursive establishment of a new societal order, based on the narrative that relates power and citizenship. Study allows us to conclude that Foucaultian theoretical categories reveal power as a set of relations, always in tension, that, in times of change, there is always room to build new rules and regimes of existence.

Keywords: Biopower; Biopolitics; citizenship; Latin America; Foucault.

Introducción

Este trabajo está orientado por una intencionalidad teleológica que no necesariamente se expone explícitamente en el texto: comprender el fenómeno del poder, no en sus evidencias concretas, sino en sus rastros poco visibles, diría Foucault, en sus "rarezas", sus accidentes y sus emergencias (Foucault, 2002). Se trata de hilar una búsqueda conjuntamente con sus encuentros, sobre lo que ha significado la ciudadanía en América Latina (con algunas referencias nacionales específicas), visto el ejercicio ciudadano, como un dispositivo en el que confluyen los ideales de realización de la democracia, en donde el poder, ilusoriamente se considera "repartido colectivamente" y los ciudadanos como individuos concretos sobre los que se ejerce la tecnología del poder que Foucault llama "Biopoder" (Foucault, 1996).

Partiendo de estas consideraciones, aunque el título de este artículo puede transmitir la idea de una escisión entre el ejercicio de la ciudadanía y esa "tecnología del yo", llamada Biopoder, lo cierto es que se trata de presentar las diferentes conexiones, reconocidas o no, entre ambas esferas de la

discusión foucaultiana. A la manera del filósofo francés, nuestro argumento es que no hay manera de presentar la construcción de la ciudadanía, sin que la misma termine siendo el resultado de la puesta en práctica del poder gubernamental sobre los cuerpos (Biopoder). No obstante, la dominación –así entendida– se ejerce, no desde un “aparato institucional”, sino desde los mismos individuos, porque el poder representa allí, unas determinadas estrategias discursivas en las que los dominados también toman una posición protagónica.

En el contexto conceptual del Biopoder como dispositivo o “caja de herramientas”, propuesta por Foucault, engrana su visión de la Biopolítica. Esto es, la concepción que analiza la integración de la vida en las estrategias de la política y en su ámbito de influencia. “Si hubo alguna mutación en el siglo XVIII, si se produjo allí la irrupción de algo realmente novedoso, fue la aparición de la vida en el escenario de la política” (Castro, 2010: 4). Desde aquella época, el discurso y la praxis política es permeada por la vida misma, restándole responsabilidad a la teología, en cuanto a la orientación de la cotidianidad humana y trasladando el centro del Biopoder (poder sobre la vida y los cuerpos), hasta los escenarios en los que se configuran y toman las decisiones.

La Biopolítica y su sucedáneo, el Biopoder, asumen el protagonismo a la hora de establecer los criterios, principios y normas que regularán el comportamiento del ciudadano. La vida ya no está en manos de Dios, sino en el poder político, el cual a su vez disciplina las formas de existencia. En esta cosmovisión teórico-filosófica, los sujetos ciudadanizables, son tocados por las estrategias que –desde el Estado– pretenden controlar la vida misma. Por supuesto, al adoptar el enfoque crítico foucaultiano acerca del poder político –todas estas figuras, el Estado, la democracia o la ciudadanía– no son más que realidades fronterizas, de las que es posible alejarse, al menos como determinantes para el ejercicio de la dominación. Son solo parte de la apariencia que queda sobre la “superficie social”, la cual hay que trascender, para encontrar, por ejemplo, la praxis histórica que las engendra.

La importancia de leer en clave foucaultiana y hermenéutica la relación entre Biopoder y ciudadanía en Latinoamérica, radica en la necesidad de superar las visiones políticas, intencionadamente simplistas que, en algunos casos –como el ecuatoriano–, por ejemplo, pueden utilizar metáforas ambiguas que reúnen figuras arquetípicas tales como “revolución ciudadana” para dar cuenta de los resultados del ejercicio del poder y no de su distribución popular. El ciudadano difícilmente pueda llegar a escalar al umbral revolucionario, porque –precisamente él– es la consecuencia del control político. Si se quiere hablar de una ciudadanía insurrecta, sediciosa y rebelde, los parámetros para su valoración no pueden ser los límites normativos de un Estado que solo busca perpetuar su dominio sobre la vida, más que sobre las estructuras institucionales.

Siendo así, nuestra propuesta es examinar en las líneas que siguen, las particularidades teóricas, filosóficas y hasta epistemológicas del concepto/categoría definida por Foucault, como Biopoder, pero solapando su comprensión con las estrategias prácticas o discursivas que han marcado el ejercicio de la ciudadanía en América Latina. Es obvio que, al tratarse de un ejercicio de reflexión teórica, más importante que cualquier referencia empírica sobre los temas, nos interesa colocar en contexto la potencia heurística del pensador francés cuando se introduce en el campo de las tecnologías del yo y la determinación del sujeto histórico, llámese este último, “ciudadano” o “revolucionario”. El aspecto central es que ninguno de ellos escapa a la infiltración del control de la vida y de la política en las que establecen sus relaciones sociales.

1. El Biopoder: constructo teórico o praxis sociopolítica

Una de las ideas más recurrentes de Foucault es su rechazo a la normalización del saber y –por supuesto– de su praxis, ya sea en el campo de las disciplinas científicas, de la historia o de la política misma. En ese sentido, puede parecer un contrasentido que, en un análisis que le toma como referencia central, se quiere construir una historiografía de Biopoder. La intención es realizar una aproximación, más que al origen, a los intersticios discursivos entre los cuales emerge esta categoría foucaultiana, haciendo énfasis –por intereses propios de la investigación– en las proximidades que se dan entre Biopoder, Biopolítica y ciudadanía.

De acuerdo con Hernández (2014), es a mediados de la década de 1970, que Foucault menciona por vez primera al Biopoder como una de las formas en que la dominación se está trasmutando. Específicamente en el campo de la política, el autor observa un desplazamiento de los dispositivos clásicos del poder (la economía, la raza, entre otros), hacia la regulación de la estructura biológica de los individuos (Biopoder). En adelante, es posible analizar la normalización de la vida colectiva y la formulación de las políticas públicas como una estrategia de control sobre los cuerpos. La idea de Biopoder amalgama la “caja de herramientas”, a partir de la cual, Foucault reafirma su concepción de la historia, no como ese devenir lineal, ascendente y plácido que muestra la historia clásica, sino como un constante ir y venir, entre regulaciones y tensiones.

La acuciosidad de la filosofía foucaultiana le lleva a encontrar, en el contexto del siglo XIX, esa transformación del poder que busca saltar de regulación estructural al control biológico de los ciudadanos. Es así como los mecanismos estatales que se encuentran legitimados por las lógicas del poder establecido apuntan hacia el establecimiento de restricciones más cercanas, físicamente hablando, de las personas. La ordenación

de la sociedad procura consolidarse desde lo más íntimo y subjetivo, se trata de un orden sobre la vida, que ya no podrá ser considerada como la manifestación del libre albedrío de quien la vive: “Si hubo alguna mutación en el siglo XVIII, si se produjo allí la irrupción de algo realmente novedoso, fue la aparición de la vida en el escenario de la política” (Gómez, 2010: 4).

1.1. Biopoder como teoría. Teóricamente, el Biopoder es parte de una madeja conceptual a través de la que se puede explicar las peripecias de la dominación para mantener sus orientaciones sobre las subjetividades, sin recurrir a la objetivación formal de ese control. Esta noción es, además, pertinente con la teoría que alude a la “Microfísica del Poder” (Foucault, 1980), con su visión focalizada sobre los pequeños espacios de la vida. Cuando las estrategias y los mecanismos del poder se orientan hacia esas relaciones sociales no estandarizadas, esos vínculos en los que suelen mostrarse las particularidades no colectivizables, se está en presencia del juego biopolítico. Un juego en el que los escenarios de interacción se estructuran en los niveles de la intersubjetividad, pudiendo incluir elementos como la sexualidad, la procreación, las orientaciones de géneros, entre otros.

Como constructo teórico, el Biopoder no busca ser más sólido que otras categorías foucaultianas, porque su interés no está en producir arquetipos conceptuales. Por el contrario, en este autor, priva la necesidad de develar las imposiciones que los grandes saberes disciplinarios han logrado, acallando las voces que surgen de los pequeños espacios. Su idea de las ciencias está muy lejos de la rigidez positivista, creyente de “las corrientes de pensamiento”. En su trabajo intelectual hay un esfuerzo constante por descubrir los hilos ocultos de las redes del saber subordinado. De hecho, cuando se trata del Biopoder, su comprensión no se completa, sino se le aproxima a lo que ya el mismo autor reconocía como Biopolítica. Mientras esta última está referida a la capacidad de los gobiernos para controlar al ejercicio de la ciudadanía, al Biopoder se le muestra como la articulación de esa Biopolítica con las antropológicas o gobierno de uno mismo (Vásquez, 2013).

Es en su vinculación con la Biopolítica en la que la categoría de Biopoder adquiere mayores dimensiones teóricas. De esta forma, en los controles gubernamentales –a través de las instituciones políticas sobre las poblaciones–, se observan con mayor precisión los límites entre el ser y el deber ser; es decir, entre lo teórico y lo práctico. En este punto, es conveniente recordar que, según autores como Virno (2003), hay que cuidar de no ensanchar de tal manera el concepto de Biopolítica, porque eso podría vaciarlo de contenido, convertirlo en una palabra fetiche que sirve para nombrar muchas cosas sin definir ninguna. Esta advertencia, en cuanto a la Biopolítica como concepto es prolongable al Biopoder, es necesario que su fuerza descriptiva se quede merodeando los espacios en

los que puede explicar el control del poder político sobre la “operatividad” de los cuerpos, designando solo aquello para lo que –en apariencia– fue pensado por Foucault.

1.2. La praxis política. En este ámbito, el Biopoder no se aleja mucho de sus características como dispositivo gubernamental o constructo teórico. Las estrategias para el control de la vida de los individuos que están cobijados por un Estado pueden concebirse como un conjunto de herramientas discursivas, pero –en la concepción de Foucault– esos discursos no son mera retórica, su valor procedimental radica en la capacidad que tienen para generar prácticas que, institucionalizadas o no, concretan la relación entre “las palabras y las cosas”. En un escenario con estas características, los individuos normalizados, actúan siguiendo la lógica que impone la dominación Biopolítica. Se logra así una moderna forma de sujeción, en el marco de la cual, no existe el poder como abstracción, sino como fórmula de subordinación material-corporal que dirige u orienta las decisiones subjetivas, bajo marcos de presunta objetivación racional.

Distinguir las prácticas del Biopoder en las sociedades contemporáneas, particularmente en Latinoamérica, resulta relativamente sencillo. Basta con observar, con detenimiento las estrategias gubernamentales que instauran modelos de registro, seguimiento y control de la salud y la enfermedad, por ejemplo. Los niños deben ser vacunados de forma obligatoria contra ciertas enfermedades, incluso antes de salir de los centros de salud y continúa así en sus primeros años de vida. Estas políticas no solo están por encima del control familiar, sino que forman parte de todo un entramado coercitivo diseñado desde el Estado para aceptar la incorporación de los nuevos ciudadanos. Precisamente, es quizá en el terreno de la medicina en donde se siente con mayor fuerza ese Biopoder que implica la estructuración de la convivencia social en la actualidad. Obtener ciertos medicamentos, no es posible, aunque el enfermo tenga la afección que la requiera, hasta que su prescripción sea avalada por un médico que funge como juez de la verdad.

Políticas de regulación de la natalidad, de orientación vocacional hacia las profesiones que interesan al poder establecido, de tratamiento y reclusión de quienes sean considerados enajenados, e –incluso– de discriminación por razones de sexo y etnia, son algunos de los controles que muestra al Biopoder como la ejecución de cierta praxis sociopolítica, claramente perceptible en algunas realidades de América Latina y el mundo entero. Esa praxis es –a un tiempo– evidencia y contraste respecto a la transformación del ejercicio del poder político sobre la ciudadanía. Esto significa que, por un lado, representa la visibilización del control de la vida desde la política; y, por el otro, muestra como ese control muta, se transforma y transfigura a lo largo del tiempo.

Considerado como un conjunto de discursos y prácticas sobre la necesidad de ordenación de los cuerpos, el Biopoder asume un carácter

sociohistórico que obliga a su contextualización frecuente para no caer en generalizaciones que poco aportarían en la comprensión de las realidades específicas, como las latinoamericanas. Y es que el poder es visto como el resultado de las relaciones sociales de cuyos rasgos toma sus características y manifestaciones, por lo cual difiere en sus formatos o fórmulas de presentación, que son siempre disímiles. Al colocar el análisis en el terreno de esa forma de dominación que permuta según el contexto y los actores, la praxis sociopolítica del Biopoder también adquiere valores distintivos, asociados a lo que sería el régimen de existencia de la sociedad en la que se ubica.

En este orden de ideas, el esfuerzo intelectual que Foucault emprende para diagnosticar el presente en el que se inscribe su reflexión, muestra la exigencia de trascender la ambigüedad teórica de algunos términos para colocarlos en clave de praxis sociopolítica. Esto –en el caso del Biopoder– le vincula al concepto de gubernamentalidad; es decir, la auscultación de las acciones del gobierno cuando se trata de construir una sociedad disciplinaria, que regule las prácticas de la subjetivación (Botticelli, 2015). Esa sociedad que surge –como ya se dijo– a partir del siglo XIX, se ordena en función de la capacidad de los gobiernos, pero ya no bajo la fórmula de “dejar vivir, hacer morir”, que tenían los regímenes antiguos, los cuales podían infringir la muerte a quien quisiera huir de su control. En la contemporaneidad de las sociedades, se busca la adecuación de la vida biológica de los ciudadanos, sin llegar a amenazar con la muerte, por el contrario, tal cual lo señala Botticelli:

Desde esta caracterización, el biopoder aparece como una dinámica regulatoria que apunta a la administración de la vida de ese nuevo sujeto colectivo que es la población, buscando gestionar su potencia vital para hacerla más productiva, más eficiente, más segura, más regular (2015:86).

De esta manera, la convivencia social se convierte en un intercambio entre individuos que parecen interactuar libremente, pero que en realidad están asidos unos a otros por las manos invisibles del poder. No es “una sola mano”, porque el poder no es único, ni este poseído por una persona, un grupo o una corporación. El poder penetra los cuerpos y les imprime la dirección que deben tomar para vivir, de acuerdo con los *juegos de verdad* institucionalizados, no a partir de estructuras o instituciones políticas, sino desde las concesiones que los mismos ciudadanos, como seres vivientes han acordado. El Biopoder se estructura así, como parte de una “anatomopolítica” que limita –por medio de la normativización social– las expresiones de la subjetividad, esta herramienta del poder sobre los cuerpos se instaure, en un principio, bajo el esquema de “vigilar y castigar”, pero –posteriormente– es adecuada a las necesidades que los individuos, como seres vivientes desarrollan a lo largo de su vida, a través de los regímenes de salud, educacionales y de empleo.

En suma, Biopolítica, Biopoder y Anatomopolítica, más que dispositivos institucionales, representan las herramientas heurísticas que le otorgan a Foucault las licencias teórico-prácticas para indagar –genealógicamente– las formas que adopta la dominación, desde sus manifestaciones más abstractas y estructurales, hasta aquellas maneras de controlar la configuración biológica de los individuos. Sí, son parte de las redes conceptuales o formaciones discursivas que utiliza el autor como “caja de herramientas”, para desentrañar la microfísica del poder, pero –además– son elementos de su hermeneusis a la hora de seguir los rituales de la verdad que orientan la relación entre lo que se dice y lo que se hace o entre lo que está permitido decir y –en consecuencia– lo que la dominación deja hacer.

2. En torno a la ciudadanía y sus límites teórico-prácticos

El debate acerca de la gubernamentalidad y los cambios que se han producido en los esquemas, estrategias y dispositivos de la dominación, adquiere un mayor nivel de significación histórica cuando se coloca en clave ciudadana. En otras palabras, explorar las dimensiones filosóficas, teóricas y conceptuales de la construcción de la ciudadanía, es un trabajo ineludible para comprender en su justa dimensión espacio-temporal, las expresiones actuales de la ciudadanía contemporánea. En todo caso, no intentamos aquí realizar un recorrido por las teorías clásicas o contemporáneas acerca de la ciudadanía, mucho menos, delimitar los escenarios históricos en los que surge el “ciudadano” como sujeto político, ni sus rasgos más representativos en los sistemas democráticos, que son sus espacios naturales. Lo que se quiere, es una aproximación hermenéutica a la manera en que se han ido dando los cambios en la concepción de la ciudadanía como expresión concreta de una sociedad disciplinaria, que establece como obligatorios, ciertos principios y requisitos para la socialización de los cuerpos.

2.1. La ciudadanía como idea democrática. Al igual que muchas de las ideas políticas que circulan en los debates clásicos y contemporáneos, el tema de la ciudadanía está relacionado con el origen de la democracia en la Grecia antigua. En tal sentido, no es posible tratarla, de forma independiente o abstracta, sin correr el riesgo de perder el potencial descriptivo que ella posee. Ahora bien, como una idea inherente al modelo societal que implica la democracia, la ciudadanía también se llena de ambigüedad y polisemia. Y es que la democracia en la que toma su significado la ciudadanía ha trascendido su presentación como forma de gobierno o sistema político, pasando a convertirse en una forma de vida para los habitantes de la mayoría de los países del hemisferio occidental. Mucho más que una manera de organizarse políticamente para elegir representantes y repartir el poder esta palabra designa una cultura.

Consecuentemente, cuando a la idea de ciudadanía se le contrasta con la noción, siempre más amplia de democracia, hay que distinguirla de esa palabra fetiche conocida como “pueblo”. Ser ciudadano es ser parte de un Estado o de la Polis, si asumimos el discurso de los griegos, más que del “pueblo”. No obstante, en el lenguaje clásico vivir en democracia implica estar sometido a la voluntad del pueblo, o, lo que sería igual, someterse a los designios de la mayoría. La idea de dominación popular subyace en la teoría de la legitimidad del poder político, preocupación central para los demócratas.

Leída en clave democrática, la ciudadanía es una situación social en la que los individuos que comparten un territorio y una nacionalidad, se les garantiza un conjunto de derechos para una convivencia armónica, en equilibrio, pero; paralelo al gozo de esos derechos han de cumplir ciertos deberes que consolidan esa convivencia (Ortiz, 2009). Sin embargo, aunque su relación con la democracia aporta claridad a la idea de ciudadanía, lo cierto es que eso no le libra de tergiversaciones o, en la mayoría de los casos, manipulaciones para legitimar regímenes completamente ajenos al concepto democrático. Es decir, la materialización del concepto está asociada a la interpretación de los actores políticos y es precisamente allí donde comienzan los matices que terminan extendiendo el significado y enmarañando la idea más que la palabra.

2.2. La ciudadanía y su praxis. El ejercicio de la ciudadanía no se activa automáticamente en el momento en que los nuevos ciudadanos son registrados por la sociedad disciplinaria. Para que una ciudadanía implique acciones concretas para el disfrute de los derechos adquiridos es condición indispensable que existan los mecanismos, herramientas e instituciones a través de las cuáles los ciudadanos puedan manifestar su presencia. Por supuesto, esas estrategias formalizadas pueden diferenciarse, de acuerdo con el modelo democrático que se trate, pero lo que no puede pasar es que las mismas no existan.

Detenidos en la reflexión foucaultiana, hay que estar claro que las formalidades no tienen por qué tomarse como indicios de la realidad. Por ello, en el caso de la relación entre ciudadanía y democracia, con las consecuencias prácticas que ella tiene, Foucault estaría más cerca de lo que se conoce como Democracia Sustancial, es decir, aquella en la que las formalidades dan paso a las manifestaciones de la realidad concreta, esa en la que se edifica el régimen de existencia de los ciudadanos. Esto es, no importa si formalmente existen garantías para el acceso a la educación, a la salud o a un salario digno si, quienes ostentan el poder entorpecen o se niegan a acatar las formas establecidas. La sustancia democrática y ciudadana suponen así, la necesidad de que se respeten las normas más allá de las apariencias. La ciudadanía se convierte en una forma de actuar que involucra principios y valores reflejados en el quehacer diario. En todo

caso, como señala Bobbio (1987), una verdadera democracia requerirá la convergencia entre democracia formal y democracia sustancial.

Como ha podido verse hasta aquí, originalmente la praxis ciudadana remite a la observación de un conjunto de deberes frente a la colectividad que comparte un determinado espacio societal, por parte de aquellos que han asumido el rol de ciudadanos. Es el cumplimiento de esos deberes lo que puede garantizar, llegado el momento, reclamar los derechos que se han adquirido como integrantes del Estado. En ese contexto es clara la relación que existe entre el éxito del control social y la figura ciudadana, pues sin una consolidación de esta última. Es la ciudadanía la que garantiza el control biopolítico en los estados modernos, esa posibilidad de que “el gobierno de los hombres sobre los hombres”, sea una realidad histórica, pasa por el fortalecimiento de las responsabilidades sociales de los ciudadanos.

Ahora bien, cabría preguntarse si, ¿acaso el ejercicio de la ciudadanía ha sido siempre conformista y adecuado a los parámetros de la Biopolítica? La respuesta, por supuesto es no. Este “no” se radicaliza cuando se responde desde la concepción de poder que maneja Foucault, pues “donde hay poder hay resistencia”. Tanto el ciudadano clásico, como el moderno y el contemporáneo trasiegan los significados de la ciudadanía para diseñar sus estrategias de lucha; el poder sobre la vida y sobre los cuerpos, le garantiza al estado cierto margen de maniobra para imponer sus agenciamientos, políticos e ideológicos, pero allí, donde se construyen las estrategias de la dominación, persisten los forcejeos por mantener identidades y/o agendas ciudadanas que nacen de los conflictos, ya sean estos de tipo económicos, educativos, culturales o, políticos propiamente dichos.

Precisamente hoy día existe una praxis contestaría de la ciudadanía, que se recrea al calor de las disidencias contra el proceso globalizador, homogeneizante por demás y productor de múltiples situaciones discriminatorias, en las que la ciudadanía parece haberse escindido. Hay una clara tendencia, tanto desde lo teórico como en el terreno de la convivencia factual, para otorgar una multiplicidad de significados y sentidos al concepto de ciudadanía. Considerando el planteamiento de Giraldo (2015) la praxis ciudadana representa la concreción de la transformación de las formas de hacer política cuyo objetivo, al menos en teoría, es la consolidación de la democracia. Una ciudadanía crítica, no es solamente aquella que se resiste ante las herramientas coercitivas de la Biopolítica, para obtener mayores grados de libertad; es también aquella que logra crearse espacios propios para la determinación de su vida y su bienestar.

3. El Biopoder en el “Régimen de Existencia” de la ciudadanía en Latinoamérica

Finalmente, como corolario de este análisis, queremos establecer las relaciones implícitas o explícitas; visibles o invisibles; entre la concepción de Biopoder y la ciudadanía, particularmente, las formas en que esta última ha sido asumida, desde el discurso y la praxis sociopolítica en América Latina. En tal sentido y siguiendo el hilo metodológico asumido del Análisis de Discurso propuesto por Foucault, hemos querido tomar prestada la categoría “Régimen de Existencia” para abordar, muy sucintamente, las venturas y desventuras de la ciudadanía en el subcontinente. De acuerdo con Navia (2007), Foucault describe este enunciado, como las posibilidades ciertas que tiene un objeto de discurso de ser hablado o no, mostrado u ocultado, legitimados o desvirtuados.

En el caso de la ciudadanía, Latinoamérica muestra un desarrollo coherente con las formas en que se ha venido desarrollando, paralelamente, el pensamiento democrático. Desde el punto de vista práctico y jurídico, la figura de la ciudadanía se ve influida por las estrategias que despliegan las organizaciones políticas para impulsar el equilibrio y el orden social. Apuntando todo esto, a la consolidación de un Estado que requiere, al igual que en otras latitudes, fortalecer la Biopolítica, y, sobre todo en las últimas décadas, el Biopoder. Sin querer ir tan atrás en la historia del proceso democratizador en la región, nos gustaría detenernos, brevemente, en lo que ha ocurrido desde finales del siglo pasado y comienzos del actual.

Latinoamérica, sufre en la década de 1990, un proceso controversial que transformó las relaciones de poder en algunos de sus países. Destacan entre ellos, los casos de Venezuela, Ecuador, Bolivia y Chile, por mencionar solo los más emblemáticos. En Venezuela, después de una larga sucesión de gobiernos que podrían considerarse de corte liberal, llega al poder Hugo Chávez, un ex militar, que, aunque al principio mantuvo un discurso conciliador, fue endureciendo su talante y proponiendo una Revolución Bolivariana que, en esencia, requería una transformación total, al menos desde el punto de vista nominalista, de las viejas herramientas y estrategias para vincular al gobierno con los gobernados. Hay en su propuesta, una intencionalidad de construir un nuevo Régimen de Existencia para la democracia venezolana y, por supuesto, para los rasgos de la ciudadanía.

Venezuela, cambió la Constitución y, en la nueva carta magna, se instituyeron, nuevos objetos del discurso político, socavando los principios de la vieja ciudadanía, ejercida en función del modelo de la democracia representativa, para crear o, en algunos casos re-crear, los dispositivos que fueran delineando una reconfiguración del Biopoder. Claro está, una democracia participativa y protagónica como la propuesta por el discurso del chavismo, debería echar mano a un ciudadano con mayores grados de

libertad frente al poder establecido. Aunque, en la práctica, estos cambios solo muestran una re-normativización de la esencia de la ciudadanía, que sigue respondiendo a la relación entre derechos y deberes y que, de cualquier manera, no puede eludir, los controles coercitivos que impone el gobierno sobre la vida de los individuos.

El Biopoder se refuerza, en el caso venezolano, al favorecer la construcción de la figura de una soberanía popular que tiene ahora su representación en el fuerte liderazgo caudillístico de Hugo Chávez, el cual: "...funge al igual que otros instrumentos, como manifestación del poder soberano para controlar la vida y la muerte de los individuos" (Hernández, 2014:100). Ese control, queda manifiesto en la inauguración de una nueva nomenclatura discursiva que alude al patriotismo, al nacionalismo y al bolivarianismo, como principios axiológicos de la nueva ciudadanía venezolana. En términos foucaultianos, podríamos decir que la democracia participativa, si bien procura un mayor protagonismo de "cada uno y cada quien", tiene una mayor deuda con el poder soberano del Estado. En adelante, los venezolanos observarán la emergencia de novedosos controles para la obtención de los recursos y bienes necesarios para una vida digna; para disponer de los alimentos, la educación, el empleo, la salud, muchos ciudadanos requieren del "carné de la patria", que pareciera ser la fetichización del Biopoder y una forma de transar el goce de la ciudadanía.

En el caso ecuatoriano el tema de la ciudadanía es emblemático una vez superada la situación de convulsión sociopolítica que vivió el país, previo a la llegada de Rafael Correa al poder. La inestabilidad de la democracia ecuatoriana, a finales del siglo XX, fue superada con la insurgencia del liderazgo correista, el cual, también modificó la Constitución y planteó una revolución, en este caso con un referente si se quiere menos abstracto: el ciudadano. Una revolución ciudadana, implica una revalorización formal, pero también ideológica de lo que significa el ser ciudadano, más aún cuando se está en un Estado Plurinacional, con una gran diversidad de culturas interactuando socialmente y queriendo ver reconocidos sus estilos de pensar, de sentir y de vivir.

Si la Biopolítica, o sea el gobierno de la población, y el Biopoder, el gobierno sobre los cuerpos, es compleja en las sociedades con cierta homogeneidad cultural, es lógica que su complejidad alcance, niveles mucho más altos en el Ecuador. De hecho, debe reconocerse allí una ciudadanía intercultural que va más allá de la afirmación por separado de cada ciudadanía, como sería en el caso de las comunidades indígenas. En este sentido, el caso Ecuador es interesante porque, en el contexto de una autodenominada "Revolución Ciudadana", persisten los conflictos sociales, propios de la democracia representativa. Muchos de los grupos indígenas, por ejemplo, que apoyaron a Correa en sus inicios, adoptan, más tarde, posiciones contestatarias contra su discurso, reclamando incumplimiento de las promesas originales de la revolución.

El correísmo en Ecuador, ciertamente se inscribe en ese conjunto de gobiernos que a inicios de este siglo representaron un giro hacia la izquierda en algunos de los sistemas políticos de la región, lo que significa, según Burbano, una: “...aproximación de los partidos y movimientos de izquierda hacia la noción de ciudadanía, pero también los esfuerzos por llevar la política Iberoamericana, más allá de los umbrales de la tradición democrática liberal” (2017:180). Vale decir que a pesar de estas nuevas circunstancias en las que algunos grupos sociales, frecuentemente discriminados, ganan protagonismo, el ejercicio ciudadano no se aleja de las estrategias del poder establecido para implementar las herramientas del Biopoder. Las nacionalidades indígenas en el Ecuador quizá sean el más fiel reflejo de esas mutaciones que sufren las estrategias discursivas para colonizar de a poco los escenarios que van surgiendo en esos procesos en los que los tradicionalmente excluidos, ganan espacios.

Es así como, cuando las mujeres indígenas ecuatorianas, discuten nuevas reglas de juego en sus relaciones con los hombres de sus propios pueblos, no están haciendo otra cosa que, revelándose contra las viejas prácticas de la Biopolítica, bifurcado ahora en Biopoder. Entonces, si la Revolución Ciudadana liderada por Correa conlleva una democracia de nuevo tipo, ello no supone una dislocación de la dominación en sus más añejas presentaciones, tales como el patriarcalismo y el racismo social. Por el contrario, pareciera que el Biopoder, tal como sucede con la energía, no se destruye, solo se transforma, y es de suponer que, en cada transformación gana invisibilidad y sutileza para mantenerse sin cambiar en su esencia, solo modifica los elementos u objetos que alimentan su Régimen de Existencia, sus condiciones y allí sigue consolidado.

Latinoamérica, resulta un caso interesante cuando se analizan las relaciones entre ciudadanía y Biopoder a la luz de los acontecimientos sociales que se han desarrollado en el periodo que va de finales del año 2020 e inicios del 2021. Y es que la pandemia del Covid-19, ha generado una serie de reacciones en nuestros países, tal como sucede en algunas otras latitudes, en las que los ciudadanos plantean verdaderas querellas contra el control de sus cuerpos, manifestado en la aplicación o no de la vacuna. De hecho, la situación es aún más compleja e interesante, cuando en países como Venezuela, se moviliza toda una tendencia de la opinión pública en contra de la posibilidad de que el gobierno aplique a sus ciudadanos una vacuna de procedencia rusa, bajo argumentos básicamente ideológicos, tanto desde la posición gubernamental como desde la ciudadana.

El “hacer vivir, dejar morir”, parece más vivo que nunca, también en el contexto de la pandemia, cuando en países como Colombia, se intensifica el debate acerca de la pertinencia o no de mantener las cuarentenas estrictas, cuando el ahogo de la economía parece amenazar claramente la subsistencia de grandes capas poblacionales que dependen de su

capacidad de movilización para obtener el sustento diario. El Biopoder y la Biopolítica parecen, hoy más que nunca, estar siendo interpelados, tanto en la necesidad de su existencia, como en la exigencia de flexibilizar los dispositivos de control del ser viviente. Por su parte la ciudadanía, al menos en Latinoamérica, transita territorios poco explorados, acicalada por circunstancias históricas inéditas que la obligan a buscar asir con mayor fuerza sus preceptos de independencia y autonomía crítica frente a las viejas argucias del Biopoder.

Conclusiones

El análisis foucaultiano se revela altamente pertinente cuando se trata de profundizar en la praxis de la política moderna, con especial atención, en aquellos procesos en los que hay juegos de poder involucrados. Así, el recorrido realizado por las categorías de Biopoder, Ciudadanía y su expresión en el contexto latinoamericano, nos han aproximado a una realidad que, aun manteniendo los nexos originarios con los modelos clásicos del ejercicio del poder político, apunta hacia una nueva geografía de la dominación. Someter el cuerpo y la vida de los seres vivientes es una tarea en la que las estructuras del poder, siempre sigiloso, pero persistente se han aplicado con detenimiento aun en una época en la que la ciudadanía ha devenido fuertemente crítica.

Siendo el ejercicio ciudadano, un conjunto de acciones en las que generalmente se transan deberes y derechos, lo cierto es que las estrategias del poder, en sus dimensiones más formalizantes, forcejean constantemente para mantener el control desde diferentes ámbitos del Biopoder: la salud, la sexualidad, el manejo de los talentos, entre otros. Lo que se constata es que, a pesar del tiempo que transcurre y provoca alteraciones importantes en las formas que adopta el poder, modificando incluso juegos de verdad que involucran los objetivos del Estado y la ciudadanía; siguen manteniéndose las viejas reglas de existencia. Emergen nuevos modelos de normativización ciudadana, a la par que las estrategias de la Biopolítica y el Biopoder se reconfiguran.

Cuando la reflexión se sitúa en el contexto de América Latina, aunque puedan encontrarse algunas similitudes entre países, lo más conveniente es explorar los objetos del discurso ciudadano y del Biopoder que se encuentran en algunas realidades. Focalizar la atención, puede aflorar, “la parte sumergida del barco”, es decir, puede brindar una mayor claridad sobre fenómenos particulares como los vividos por Venezuela y Ecuador, en los que, en apariencia se agitaron las viejas formas de hacer política, se inauguraron nuevas nomenclaturas institucionales y se abrieron espacios para una mayor resonancia de los sujetos o actores políticos por excelencia:

los ciudadanos. En ambos países, aunque hubo emergencias, prácticas y discursivas sobre los dos enunciados principales trabajados en este artículo, las realidades del Biopoder y la ciudadanía solo parecen haber cambiado nominalmente.

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Obtaining the testimony of a minor during the pre-trial investigation under the laws of Ukraine

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Abstract

The scientific article, based on the provisions of the theory of criminal procedure, criminology, psychology, reveals the problems of obtaining the testimony of a minor during the pre-trial investigation according to the laws of Ukraine. It is noted that the method of obtaining testimony should be based on the age and procedural status of the minor, which requires a special approach considering the vulnerable state, social immaturity, and the risk of violation of the rights and freedoms of such persons. The study used general scientific methods to determine certain legal categories that characterize the interrogation procedure of a minor, as well as special methods. The practice of introducing «green rooms» in the field of criminal justice is recognized as promising, as the child's environment during relevant procedural actions is extremely important for establishing contact with the child. It is concluded that the lack of desirability of classifying a minor suspect as a subject for questioning in court during a pre-trial investigation is justified, as it would be contrary to the requirements of the law on the immediacy of the examination of evidence in court.

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Keywords: test; youthful testimony; interrogation of a minor; pre-trial investigation; juvenile legislation in Ukraine.

Obtención del testimonio de un menor durante la investigación previa al juicio bajo las leyes de Ucrania

Resumen

El artículo científico, basado en las disposiciones de la teoría del procedimiento penal, criminología, psicología, revela los problemas de obtener el testimonio de un menor durante la investigación previa al juicio según las leyes de Ucrania. En particular, se observa que el método de obtención del testimonio debe basarse en la edad y situación procesal del menor, lo que requiere un enfoque especial teniendo en cuenta el estado vulnerable, la inmadurez social y el riesgo de vulneración de los derechos y libertades de tales personas. El estudio utilizó métodos científicos generales para determinar ciertas categorías legales que caracterizan el procedimiento de interrogatorio de un menor, como también métodos especiales. La práctica de introducir «salas verdes» en el campo de la justicia penal se reconoce como prometedora, ya que el entorno del niño durante las acciones procesales pertinentes es extremadamente importante para establecer contacto con el niño. Se concluye que, la falta de conveniencia de clasificar a un menor sospechoso como sujeto para ser interrogado en el tribunal durante una instrucción previa al juicio está justificada, ya que sería contrario a los requisitos de la ley sobre la inmediatez del examen de las pruebas en el tribunal.

Palabras clave: prueba; testimonio juvenil; interrogatorio de un menor; averiguación previa al juicio; legislación de menores en Ucrania.

Introduction

In order to quickly and fully disclose a crime, expose the perpetrators and ensure the correct application of the law, the person conducting the pre-trial investigation must have indicative and evidentiary information, which is «collected by means of criminal procedure law and from sources of evidence, material evidence. documents, expert opinions» (Part 2 of Article 84 of the Criminal Procedural Code of Ukraine) (Criminal Procedural Code of Ukraine, 2012).

Investigative (search) actions, which are enshrined in a logical sequence in Section III of the Criminal Procedural Code of Ukraine, are one of the main ways to gather factual information for further evidence. They are the measures consisting of a set of search cognitive and certifying techniques, conducted by a subject authorized by the criminal procedure law in the manner prescribed for each of them in order to identify and consolidate factual data and information about their sources to obtain evidence in criminal proceedings and their verification.

In Part 1 of Art. 223 of the Criminal Procedural Code of Ukraine stipulates that investigative (search) actions are actions aimed at obtaining (collecting) evidence or verification of already obtained evidence in a particular criminal proceeding. The content of the Criminal Procedural Code of Ukraine shows the existence of such types of investigative (search) actions as interrogation (Articles 224-226, 232 of the Criminal Procedural Code of Ukraine); presentation for identification (Articles 228-232 of the Criminal Procedural Code of Ukraine); search (Articles 234-236 of the Criminal Procedure Code of Ukraine); review (Articles 237-239 of the Criminal Procedural Code of Ukraine); investigative experiment (Article 241 of the Criminal Procedure Code of Ukraine); examination (Articles 242-245 of the Criminal Procedural Code of Ukraine) (Criminal Procedural Code of Ukraine, 2012).

1. Methodology of the study

A comprehensive study of the method of obtaining the testimony of a minor during the pre-trial investigation is possible only through a combination of different methodological studies. The methodological basis of the scientific article is a system of general scientific and special methods of cognition. General scientific methods used in the scientific article include the dialectical method, deductive and system method, methods of analysis and synthesis.

With the help of the dialectical method it became possible to learn the content of such categories as «interrogation», «testimony», «evidence», «minor» and others. Methods of analysis and synthesis allowed to select and analyze information on the research topic, provided the formulation of intermediate conclusions in the article.

The essence of the systemic method is that the process of investigating war crimes is seen as a certain system that is included in a broader system, performs certain functions and is associated with various connections. The systematic approach made it possible to analyze the investigative and judicial practice of investigating juvenile delinquency.

Special scientific methods used in writing a scientific article include hermeneutic, formal-legal method, sociological and statistical methods.

The application of the hermeneutic method allowed to qualitatively analyze and clarify the content of legal documents, including the provisions of the Criminal Procedure Code of Ukraine, which regulate the legal relationship between the investigator and the juvenile who testifies. The formal-legal method was used to interpret certain legal concepts and categories. Sociological and statistical methods were used in the study of materials of law enforcement practice and generalization of scientific results.

2. Analysis of recent research

The study of scientific literature shows that the study of issues related to the peculiarities of the investigative (search) actions with the participation of a minor or a juvenile in criminal proceedings, actively engaged in such scientists as O.G. Babenko (Babenko, 2020), E.V. Vasque (2010), S.W. Kuznetsova, T.C. Kobtsova (2004), D.B. Sergeeva (2018), S.I. Smyk (2018), O.S. Starenkyy (2018), G.O. Chorniy (1998), O.B. Yakovina (2020) and others. However, in the conditions of constant amendments to the current the Criminal Procedural Code of Ukraine, development of investigative and judicial practice, the need to fulfill Ukraine's international legal obligations, some theoretical issues need to be revised and brought into line with the new conditions of criminal proceedings.

Carrying out investigative (search) actions against minors requires a special approach, taking into account the vulnerable state, social immaturity and the risk of violation of the rights and freedoms of such persons (Babenko, 2020). Thus, there is a need to cover these issues, provide scientifically sound proposals for their solution and, on this basis, the specifics of the evidentiary activities during the pre-trial investigation by conducting investigative (search) actions based on standards of rights and legitimate interests of minors as participant in criminal proceedings.

3. Results and discussion

The complex and multifaceted nature of the interrogation of minors (regardless of their procedural status) is that it covers procedural, tactical, organizational, psychological, pedagogical, and ethical aspects (Kuznetsova and Kobtsova, 2004).

Article 226 of the Criminal Procedural Code of Ukraine, which regulates the specifics of interrogation of minors during pre-trial investigation

(including suspects), provides that the interrogation of a minor or a juvenile is conducted in the presence of a legal representative, teacher or psychologist, and if necessary - a doctor. Prior to the interrogation, they are explained the obligation to be present during the interrogation, as well as the right to object to questions and ask questions. Also, when conducting investigative (search) actions with the participation of a minor or a juvenile, the participation of a legal representative, teacher or psychologist is provided, and if necessary - a doctor. Prior to the beginning of the investigative (search) action, the legal representative, teacher, psychologist or doctor is explained their right to ask clarifying questions to an underage or a minor. In exceptional cases, when the participation of a legal representative may harm the interests of a minor or juvenile witness, victim, investigator, prosecutor at the request of a minor or juvenile or on its own initiative has the right to limit the participation of a legal representative in certain investigative (search) actions. in criminal proceedings and involve another legal representative instead (Article 227 of the Criminal Procedural Code of Ukraine) (Criminal Procedural Code of Ukraine, 2012).

The interrogation of a juvenile in criminal proceedings in accordance with the current Criminal Procedural Code of Ukraine is carried out in the general order under the rules of Art. 224 of the Criminal Procedural Code of Ukraine, but with certain features. In particular, a doctor is involved in the interrogation of a juvenile (minor) witness or victim, if as a result of a criminal offense, a witness (victim) of which he was, the latter developed temporary mental disorders or physical health disorders.

The interrogation as an investigative (search) action is conducted by a specially authorized investigator. This conclusion, according to the fair statement of D.B. Sergeeva and O.S. Starenkogo man, follows from Part 2 of Art. 484 of the Criminal Procedural Code of Ukraine, in particular criminal proceedings against a minor, including if criminal proceedings against several persons, at least one of whom is a minor, are carried out by an investigator specially authorized by the head of the pre-trial investigation body to conduct pre-trial investigations against minors (Starenkyy and Sergeeva, 2018).

The Joint Order of the Ministry of Internal Affairs and the Prosecutor General's Office of Ukraine «On Improving Cooperation on the Rights and Interests of Minors in Criminal Proceedings» of August 9, 2013 № 79/867 provides that criminal proceedings against minors are carried out by a specially authorized investigator with no investigative experience. less than three years (On The Peculiarities Of The Performance Of The Functions Of The Prosecutor's Office On The Protection Of The Interests Of Children And Combating Violence, 2020).

Despite the fact that the current the Criminal Procedural Code of Ukraine does not establish appropriate requirements for the specialization

of prosecutors as procedural leaders in criminal proceedings against minors. However, paragraph 5 of the Order of the Office of the Prosecutor General «On the peculiarities of the functions of the prosecutor's office on the protection of the interests of children and combating violence» from 04.11.2020. № 509 defines the duty of the juvenile prosecutor to ensure the performance of the functions of the prosecutor in criminal proceedings provided by the Criminal Procedural Code of Ukraine: in the field of child protection; in which a minor is involved in the proceedings as a victim or is a person whose rights and interests have been violated or may be violated as a result of a criminal offense; in respect of a minor, including if criminal proceedings are instituted against several persons, at least one of whom is a minor, in respect of a person who has not reached the age of criminal responsibility (On The Peculiarities Of The Performance Of The Functions Of The Prosecutor's Office On The Protection Of The Interests Of Children And Combating Violence, 2020).

Given that the principle of legality requires that laws and other regulations of Ukraine, the provisions of which relate to criminal proceedings, comply with the Criminal Procedural Code of Ukraine (Part 3 of Article 9 of the Criminal Procedural Code of Ukraine), D.B. Sergeeva and O.S. Starenkyy The old man gives convincing arguments to supplement Art. 484 of the Criminal Procedural Code of Ukraine provisions on the conduct of pre-trial investigation of minors not only the relevant investigator, but also the prosecutor, who is specially authorized to provide procedural guidance in criminal proceedings against minors (Starenkyy and Sergeeva, 2018).

Evidence obtained during the proceedings in criminal proceedings against a minor by an official who by virtue of Part 2 of Art. 484 of the Criminal Procedural Code of Ukraine is not authorized to conduct investigations into minors. Thus, the decision of the appellate court changed the verdict of the court of first instance against A. and B., whose actions were reclassified by the appellate court under Part 2 of Art. 187 of the Criminal code of Ukraine on h. 2 Art. 186 of the Criminal code of Ukraine. The cassation appeal, among other things, raised the question that the forensic examination to determine the severity of injuries to the victim is inadmissible evidence, as this examination is based on the decision of an official who by virtue of Part 2 of Art. 484 of the Criminal Procedural Code of Ukraine is not authorized to investigate minors. The Supreme Court upheld the impugned decision, *inter alia*, stating that the prosecution had not proved on appeal that Investigator V. had been authorized to conduct the said criminal proceedings against the minors A. and B. On the basis of the above, the Court of Appeal found that that the forensic medical examination to determine the severity of injuries to the victim is inadmissible evidence, as it is appointed on the basis of the decision of the official, which by virtue of Part 2 of Art. 484 of the Criminal Procedural Code of Ukraine is not authorized to conduct investigations into minors. The prosecutor's arguments that the investigator, who was not

authorized to investigate minors, had an investigator who had such powers as to ensure the legality of investigative (search) actions, were declared incompetent by the Supreme Court and the decision of the appellate court was lawful, substantiated. and motivated (Resolution Of The Supreme Court, 2018 in case № 158/2313/15-k).

Interrogation is the most common investigative (search) action, which is repeatedly conducted in each criminal proceeding, and the results of his testimony contain numerous references in both indictments and verdicts. The specified investigative (search) action is «a universal action by means of which the investigator can obtain evidentiary information in almost all circumstances of the subject of evidence» (Solov`ev, 2002). The main purpose pursued by the investigator during interrogation is to obtain from the juvenile interrogated by giving him the testimony of reliable, comprehensive factual data (evidence) on the circumstances known to the interrogated, which are relevant to criminal proceedings.

The interrogation of a juvenile suspect is an important means not only of verifying the legality and validity of criminal prosecution and protection against the reported suspicion, but also a means of establishing those circumstances of the crime that were unknown to the investigator or of which he had only reasonable assumptions. adult accomplices, other criminal episodes, etc.).

The interrogation of a juvenile suspect is a process of communication (interaction) involving the investigator, the prosecutor and the interrogated (juvenile suspect), during which the authorized person influences the juvenile, prompting him to provide information about the circumstances that are or may be relevant to the proper criminal investigation. offense. From the forensic point of view, it is important that the specified investigative (search) action is a means of collecting and verifying not only evidence but also indicative information that the authorized person receives from the interrogated through verbal and non-verbal communications.

The criminal procedural aspect of the significance of the interrogation of a juvenile suspect is determined by the fact that the testimony obtained is a source of evidence. It should be emphasized that they should not be the main evidence or the «queen of evidence», as was the case until recently, when investigations in individual cases had to be completed within ten days and, accordingly, only the testimony of the accused was sufficient for an indictment.

Manifestation of increased legal protection of minors in criminal proceedings is their double representation because the law allows the simultaneous representation of the interests of a minor by a lawyer and legal representative, given the incomplete legal capacity of the juvenile and the fact that the legal representative is responsible for the upbringing and

conduct of a minor (Larin *et al.*, 1997). If a lawyer provides qualified legal assistance to a juvenile in criminal proceedings, the legal representative is called upon to provide the juvenile primarily with moral and psychological support.

The legal representative is involved in criminal proceedings on the part of the defense if the suspect, accused is a minor or a person recognized incapacitated or partially incompetent in the manner prescribed by law (Part 1 of Article 44 of the Criminal Procedural Code of Ukraine). The Criminal Procedural Code of Ukraine establishes the range of persons involved as a legal representative: parents (adoptive parents), and in their absence - guardians or trustees of the person, other adult close relatives or family members, as well as representatives of guardianship authorities, institutions and organizations, under the guardianship or custody of a minor, incapacitated or partially incapacitated (Part 2 of Article 44 of the Criminal Procedural Code of Ukraine) (Criminal Procedural Code of Ukraine, 2012).

The legal representative of the juvenile suspect, as well as the defense counsel, not only has the right, but also the obligation to be one-sided, to prove only the circumstances that justify the juvenile, mitigate his punishment, as he performs the procedural function of protection. As the literature rightly points out, the suspect's legal counsel and legal representative are obliged to protect the interests of minors, who appear to them to be legitimate from the standpoint of a unilateral acquittal approach to the assessment of circumstances and evidence in criminal proceedings. (Nikandrov, 1993). The legal representative must also be explained his / her rights during the interrogation, other investigative (search) action: to object to the questions and ask questions; with the permission of the investigator before the beginning of the investigative (search) action to ask clarifying questions to a minor or juvenile witness (Panchuk, 2013).

Here is an example from case law, which shows the inadmissibility of evidence obtained during the investigative (search) action with the participation of a minor in the absence of a lawyer and a legal representative. In particular, the verdict of the court of first instance found A. not guilty of committing a crime under Part 1 of Article. 309 of the Criminal Code. The decision of the appellate court upheld the sentence. In his cassation appeal, the prosecutor relied on an inadequate assessment of the evidence, which led to A.'s unfounded acquittal of the charges. Assessing as evidence the scene inspection report, the trial court took into account that during the investigation with the participation of a minor A. were absent as a legal representative and defense counsel, whose participation in this criminal proceeding is mandatory from the moment of establishing a minor or occurrence any doubt that the person is an adult, as established by the requirements of paragraph 1 of Part 2 of Art. 52 of the Criminal Procedural

Code of Ukraine. In view of this violation of A.'s right to defense, the court concluded that the evidence had been obtained as a result of a violation of his rights and freedoms, and therefore the use of the facts obtained during such an investigative action was reasonably inadmissible. The Court of Appeal, having considered the criminal proceedings on the prosecutor's appeal, reasonably concluded that there were no grounds for its satisfaction. The Supreme Court also agreed with this decision (Resolution Of The Supreme Court. 2018 IN CASE № 760/13866/15-k).

We consider the proposal of OV to be reasonable. Panchuk on supplementing the Criminal Procedural Code of Ukraine with the provision on the provision of free legal aid to: a witness who does not have sufficient funds to pay for the services of a lawyer; a minor witness deprived of parental care; a witness to whom security measures are applied. (Panchuk, 2013). Providing such legal assistance is one of the types of legal activity, which consists in providing the witness with legal information, consultations and explanations on legal issues, participation in the interrogation of the witness and other procedural actions, preparation of statements, complaints aimed at interests of the witness, prevention of their violations, as well as to facilitate their recovery in case of violation (Panchuk, 2013).

The presence of outsiders during interrogation contradicts moral norms and requirements. Investigative practice is aware of cases when the investigator invites an interrogator for questioning so that during the interrogation, when receiving data in criminal proceedings, they could be immediately verified. You cannot invite a stranger because his presence at the interrogation violates the atmosphere of trust, which is necessary during the interrogation of a minor, prevents the minor from gathering his thoughts, keeps him in constant mental stress, limits him.

The evidentiary value of the testimony of a juvenile suspect is determined by two factors. First, the suspect is usually better than anyone else aware of all the circumstances of the criminal offense. Therefore, he has the most complete evidence. However, on the other hand, the suspect is often more than anyone interested in concealing this information or distorting it, because the fate of the case depends on the outcome of the case (Orlov, 2000). Therefore, the investigator has a difficult task to obtain from the suspect complete and reliable information about how everything was.

Indications may correspond to real events, partially correspond and not correspond to them. Depending on whether the juvenile suspect gives true testimony, their informational nature depends. The testimony of a juvenile suspect includes information that not only relates to the criminal offense. Among other evidence, they help to understand the etiology of criminal encroachment, in particular, to find out how the idea of committing a criminal offense was formed, whether it was prepared in advance, considered, and what circumstances contributed to its commission.

It is necessary to distinguish several variants of conflict situations: 1) when the juvenile does not admit his guilt, and there are gaps in the system of evidence; 2) when a juvenile pleads guilty, there is some evidence of his involvement in the criminal offense, but the investigator has reason to believe that the teenager is stipulating himself; 3) when the juvenile does not plead guilty, but the investigator has all the evidence of his guilt.

To resolve conflict situations, it is important to identify a number of procedural actions, the conduct of which in court will allow to establish the maximum amount of information, to refute false testimony. The analysis of typological groups of juvenile defendants significantly influences the determination of tactics of proof aimed at refuting false testimony. In particular, depending on the nature of anti-social orientation, based on motivation, there are: a) violent type, which is characterized by a pronounced negative attitude towards the human person and its vital benefits: life, health, physical and sexual integrity; b) selfish, whose behavior is characterized by a selfish tendency, disrespect for all forms of ownership, ignoring the rules of distribution of funds established in the state; c) malicious socially disorganized, which is characterized by a negative attitude to various socially established requirements, as well as any prohibitions; d) careless, characterized by careless irresponsibility, careless attitude to their responsibilities and possible consequences of behavior (Turkot and Shcherbakova, 2015).

In our opinion, the resolution of the conflict depends on how well the investigator was prepared for interrogation, how much he studied the materials of the criminal proceedings, how much he knows the psychological characteristics of the juvenile suspect, the investigator's ability to penetrate the teenager's inner world, plans and intentions.

Testimony obtained in a conflict-free situation should be clarified and detailed as carefully as evidence obtained in a conflict situation. The main tactics for this, in our opinion, are: asking additional questions; use methods to activate memory and obtain explanations about the evidence available in criminal proceedings.

It is indisputable that the fact of the defense counsel's participation disciplines the investigator, forcing him to be stricter in the formation of evidence, to take a more critical approach to the evaluation of evidence (Grishchenko, 2021). Defendant who participates in the interrogation of a juvenile suspect is obliged to respond to any violations of the law and the rights of the interrogated that are allowed by the investigator (for example, asking investigators leading questions). The literature rightly states that a lawyer must stop any interrogations that are inadmissible in relation to a minor: harsh tone, threats to bring parents to justice, etc. (Kuznetsova and Kobtsova, 2004). To this should be added the right of a lawyer to warn a minor that he should not answer questions posed with procedural violations or with the use of unauthorized tactics (Enikeev, 2002).

In accordance with Part 1 of Art. 107 of the Criminal Procedural Code of Ukraine the decision on fixing of procedural action by means of technical means during pre-judicial investigation, including during consideration of questions by the investigating judge, is accepted by the person who carries out the corresponding procedural action. At the request of the participants in the procedural action, the use of technical means of fixation is mandatory.

The peculiarity of recording the course and results of the interrogation of juvenile suspects is that the protocol of this investigative (search) action should be drawn up after the oral part of the interrogation, and not during it. It is impractical to draw up a report at the same time as the juvenile's testimony: first, the investigator thinks more about how to record the testimony, instead of listening carefully to the adolescent and critically evaluating what he said; secondly, such interrogation technique leads to the weakening or loss of psychological contact with the adolescent, distracts him, adds tension to the interrogation, creates the impression of superficial interest in the information transmitted to minors. Parallel drawing up of the report by the formality can frighten the teenager, influence the maintenance of his testimony. Therefore, you must first listen to the teenager, making the necessary notes, and then draw up a report. In this regard, we consider the correct recommendation of L.L. Kanevsky, who noted that during the interrogation of the suspect it is impractical to enter his testimony in the record, as it distracts the interrogated and prevents the investigator to focus on the implementation of the tactical plan of interrogation (Kanevsky, 1978).

Video and audio recordings of adolescents' testimonies provide greater opportunities for verification and evaluation of evidence, including investigations of the facts reported by the juvenile respondent, as he said, in response to which the content and form of the question was a statement. Thus, video and sound recording make it possible to control the correctness of the investigator's interpretation of the statements of a minor suspect.

Noting the usefulness of sound recording during the interrogation of minors, A.A. Levy rightly points out that the need for sound recording "... is due to the fact that the vocabulary and language features of children and adults are different. The child is often inclined to tell what he or she thinks the investigator would like to hear. It is possible to understand all this only as a result of the detailed analysis of indications (Levi *et al.*, 1987).

The best option for recording the testimony of juvenile suspects is video, as an additional means of recording the interrogation report. The video enhances the persuasiveness of the investigative (search) action, allows the investigator and the court to directly perceive the process of testifying to juvenile suspects, contribute to the so-called «presence effect». At the same time, it should be emphasized that video and audio recording do not replace traditional logging, they should be considered as an additional tool that facilitates logging, making it more complete.

It should be noted once again that the interrogation of a minor should be preceded by careful, based on knowledge of the age and psychological characteristics of a particular child, preparation. The core of this training is the study of the adolescent's personality, the motives of his criminal behavior, deciding who will be present at the interrogation, determining the place of interrogation, drawing up an interrogation plan.

It is also important to determine the range of investigative (search) actions that, in the circumstances of criminal proceedings, it is advisable to conduct before the interrogation of a minor or immediately after it. According to investigative and judicial practice, the results of some of them immediately before the interrogation of the adolescent may affect the formation of specific conditions in the juvenile, which contribute to the decision to give truthful testimony. Such investigative actions should include the presentation of a suspected juvenile for identification to victims and witnesses, a search of the place of residence or place of study (if the juvenile lives and studies in a special institution).

To ensure the rule of «immediacy of the examination of testimony, things and documents» during the interrogation of a juvenile who is «*de jure*» suspected of committing a criminal offense (after notification of suspicion), OG Babenko proposes to take testimony from him in accordance with the requirements of Art. 225 of the Criminal Procedural Code of Ukraine, by interrogation during the pre-trial investigation in court. According to the researcher, the proposed judicial procedural form of taking evidence in the pre-trial investigation will avoid re-interrogation of the juvenile during further trial (Babenko, 2020). We consider the position of the scientist questionable, given that this provision would contradict the requirements of Art. 23 of the Criminal Procedural Code of Ukraine on the immediacy of the examination of evidence in court. Therefore, it is impractical to classify a juvenile suspect as a subject to be questioned in court during a pre-trial investigation.

It is necessary to indicate the value of the testimony of the suspect and from the standpoint of their evaluation when choosing a measure of restraint. Thus, in one of the criminal proceedings, based on the assessment of the available evidence and testimony of the suspect, the prosecutor concluded that there were insufficient grounds for detention. Denying the request for detention, the prosecutor pointed to the inconsistency of evidence, insufficient verification in a number of cases of the suspect's arguments, the need to obtain additional evidence (Palyukh, 2016).

Interrogations of juvenile witnesses and victims are, for the most part, conflict-free. Therefore, during their implementation a set of tactics is used, based on the psychology of the investigator's relations with the participants of investigative (search) actions in conflict-free situations: stress relief; creation and constant maintenance of psychological contact with the

interrogated; formation of a mental task; settings; expectation; analysis of indications, etc. (Chorniy, 1998.).

Unlike a witness, the victim is interested in the relevant results of the pre-trial investigation because he was harmed. As V.V. Pyaskovsky noted, such interest has two sides: on the one hand - the desire of the victim to solve the crime, and on the other - the reason for its possible bias (Pyaskovsky, 2004).

The tactics of interrogating a juvenile victim and the range of issues to be clarified are determined by the personal qualities of the child, adolescent, psychological state and position (in particular, the willingness to actively assist the investigation). Therefore, during the preparation for this investigative (search) action it is necessary to collect information about the identity of the victim, his behavior before and after the crime, the relationship with the suspect and others, using knowledge of forensic characteristics of the crime (Yakovina, 2020). Thus the investigator needs to show special delicacy and respect to the victim. It is inadmissible to exert any pressure on the victim during the interrogation.

False testimonies of juvenile victims may be the result of a good faith mistake caused by strong emotional anxiety, fear, confusion as a result of criminal encroachment. In this regard, the investigator must take into account the psychological state of the victim during the interrogation and carefully check the information provided by him. During the interrogation of a minor victim in a conflict situation, it is advisable to use techniques aimed at exposing lies. E.V. Vaske includes: waiting, consistency, suddenness, use of «weak spots» of the interrogated person, forced pace of interrogation, distraction, inertia, creating the impression of awareness of the investigator, creating «emptiness», etc. (Vasque, 2010).

Due to the increased attention to juvenile delinquency and the search for ways to solve them, the state and the international community are trying to find humane ways to solve the problem of juvenile delinquency. This includes the creation of so-called «green rooms» - a system of measures to ensure the rights and freedoms of the child in investigative and procedural actions through the creation of modern conditions and the introduction of European standards in communication between police officers and a child who has witnessed or suffered a crime or is in conflict with the law (Kovalenko *et al.*, 2013). This approach has long been used in countries such as Estonia, Georgia, Germany and Poland.

In general, the practice of introducing «green rooms» in the field of criminal justice should be considered promising, as the child's environment during the relevant procedural actions is extremely important for establishing contact with the child.

When deciding on a simultaneous interrogation with the participation of minors, the investigator, the investigating judge, first of all, must take into account the peculiarities of their psyche and the impact of these features on the course and results of this investigative (search) action. Peculiarities of the psyche of minors are associated with a lack of their life experience, knowledge, ideas, the formation of adaptive behavioral skills. They are also characterized by fantasy, emotional hyperbole of the event they saw, and this often leads to their incorrect assessment of the event under investigation, or its individual elements (Kovalenko *et al.*, 2013).

In our opinion, simultaneous interrogation with the participation of minors should be conducted only in the case when other methods of establishing the disputable circumstances of a criminal offense have been used and have not yielded results. In case of impossibility to eliminate contradictions in another way before the investigating judge there is a necessity of carrying out simultaneous interrogation with participation of the minor in the presence of the bases defined in h. 1 Art. 225 of the Criminal Procedure Code of Ukraine.

Peculiarities of the tactical component of simultaneous interrogation of two or more interrogated persons is that taking into account the peculiarities of the psyche of minors in preparation for this investigative (search) action of great importance are the choice of venue (Shabalin, 1975.). We share the position of SV According to Smyk, these recommendations do not apply to the procedure of simultaneous interrogation of two or more already interrogated persons at the stage of pre-trial investigation in court (not in the office, but in the usual places for minors (children's institutions, etc.)). In this case, the investigating judge is somewhat limited in the possibility of choosing the place of simultaneous interrogation of two or more already interrogated persons at the stage of pre-trial investigation in court. This is either the location of the court or the stay of a sick witness (Part 1 of Article 225 of the Criminal Procedural Code of Ukraine), or the place of the out-of-court hearing (Part 2 of Article 225 of the Criminal Procedural Code of Ukraine) (Smyk, 2018).

Conclusions

The study of the methods of obtaining the testimony of a minor during the pre-trial investigation under the legislation of Ukraine allowed to reach the following conclusions.

1. Among the methods of gathering evidence, such an investigative (search) action as interrogation has the largest share. During the investigation of criminal offenses against minors, or with their participation, the need to consolidate existing and obtain new evidence by interrogating

victims, witnesses, suspects, simultaneous interrogation of these persons and other investigative (investigative) actions. Their peculiarity is that the taking of testimony should take into account the age and procedural status of the minor, requires a special approach, taking into account the vulnerable state, social immaturity and the risk of violation of the rights and freedoms of such persons. The interrogation must be preceded by careful preparation based on knowledge of the age psychological characteristics of a particular child, the core of which is the study of the adolescent's personality, motives for his behavior, decision-making about the place and participants of the investigative (search) action. Their peculiarity is that the taking of testimony should take into account the age and procedural status of the minor, requires a special approach, taking into account the vulnerable state, social immaturity and the risk of violation of the rights and freedoms of such persons. The interrogation must be preceded by careful preparation based on knowledge of the age psychological characteristics of a particular child, the core of which is the study of the adolescent's personality, motives for his behavior, decision-making about the place and participants of the investigative (search) action.

2. We consider the practice of introducing «green rooms» in the field of criminal justice to be promising, as the child's environment during the relevant procedural actions is extremely important for establishing contact with the child. The inexpediency of classifying a minor suspect as a subject to be interrogated in court during the pre-trial investigation is substantiated, as it would contradict the requirements of Art. 23 of the Criminal Procedural Code of Ukraine on the immediacy of the examination of evidence in court.

3. The investigator should remember that in addition to obtaining the testimony of a minor through interrogation, at the stage of pre-trial investigation may be necessary and extensive application of a set of other investigative (search) actions, such as investigative examination, search, examination, presentation for identification, investigative experiment, forensic examination.

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Protection of Human Health: Medical and Legal Aspects

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Abstract

The purpose of study is to develop scientifically based recommendations for introducing amendments and additions to existing legislation, as well as the development of new regulatory legal acts and measures, aimed at systematic counteraction to criminal offences against human health. In paper have been used a systematically structural method (to investigate the concept of harm to human health). Using the statistical method by degree of coverage of units a one-time statistical questionnaire (statistical observation of a certain part of the units of the statistical population based on the principles of voluntariness of responses and the possibility of incomplete return from respondents of filled statistical forms) was held. The results of the study the following points are proposed: to consider the protection of human life and body at the international level to be interconnected associated categories forming an organic unity, which require equivalent protection; to modify an existing criminal legislation in terms of criminal offences against health of a person; to offer a range of proposals to detail signs of bodily injury and take them into account during the developing of new Rules of forensic medical determining the severity of bodily harm.

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Keywords: damage to human health; medical malpractice; emasculations; suffering; crimes against health.

Protección de la salud humana: aspectos médicos y jurídicos

Resumen

El objetivo del estudio es elaborar recomendaciones con base científica para introducir enmiendas y adiciones a la legislación vigente, así como el desarrollo de nuevos actos jurídicos reglamentarios y medidas, destinados a contrarrestar sistemáticamente los delitos contra la salud humana. Se ha utilizado un método sistemáticamente estructural (para investigar el concepto de daño a la salud humana). también se utilizó el método estadístico por grado de cobertura de las unidades y se realizó un cuestionario estadístico único (observación estadística de una cierta parte de las unidades de la población estadística sobre la base de los principios de voluntariedad de las respuestas y la posibilidad de retorno incompleto de los encuestados de los formularios estadísticos cumplimentados). En los resultados del estudio se proponen los siguientes puntos: considerar la protección de la vida y el cuerpo humanos a nivel internacional como categorías interconectadas que forman una unidad orgánica, que requiere una protección equivalente; modificar la legislación penal existente en términos de delitos contra la salud de una persona; ofrecer una serie de propuestas para detallar los signos de lesiones corporales y tenerlos en cuenta durante el desarrollo de nuevas Reglas de medicina forense que determinan la gravedad de los daños corporales.

Palabras clave: daños a la salud humana; mala praxis médica; emasculaciones; sufrimiento; delitos contra la salud.

Introduction

There is several criminal offenses against health in a report of General Prosecutor's Office of Ukraine (2021). It states that there were 36253 offences in 2016; 29518 – in 2017; 29359 – in 2018; 29678 – in 2019; 27292 – in 2020. According to the summarized statistical information, it is possible to draw a conclusion that such criminal offences are not a singular phenomenon in Ukraine. Humanity is faced with brutality and physical violence every day. This leads to various negative consequences (open and closed fractures of the *bones of the fornix* or the base of the skull, brain contusions of severe degree, both with or without compression of

brain, closed injuries of the spinal cord in the cervical spine, abdominal injuries that have penetrated the abdomen, etc.). Every country is actively engaged in combating offences against health and convert into a fact various programs and measures aimed at counteracting this negative phenomenon. The research of criminal offences against human health has been carried out since 1991 in Ukraine. However, they were all based on the provisions of the CC of Ukraine 1960. Scientific developments in this sphere have intensified with the adoption of the Code 2001, considering changes in legislation. Nevertheless, the studies in the field of health care from criminal encroachments were not comprehensive and did not fully reveal all signs of bodily harm.

For the first time in the theory of domestic criminal law 2010 Mitrofanov and Linov investigated “Injuries (criminal and medical aspects)” (2010). The authors proposed to change the terminology of bodily harm and examined the types and signs of bodily injuries in criminal and medical terms, which are positive aspects of work. However, there are some inaccuracies in the work, regarding the medical aspects of injuries and the classification of criminal offences against human health.

Nakonechnaya carried out a thorough research “Violence as a cross-cutting criminal concept” in 2016. In his work, the author clarifies the content of the concept of violence (2016: 163). According to this definition, we cannot agree that the violence is intentional because, as the author further states, the expressions of violence include drubbing, beatings, torture, torment, ill-treatment, bodily injury, murder, which may also be imprudent. The consequences, listed by the author – physical (to a person or vertebrate animal) and (or) mental harm (to a person) can be caused not only by physical pressure, but also by mental pressure.

A dissertational work by Lakhova “Criminal Liability for Intentional Trivial Bodily Injury, Beating, Torture” (2017) contains provisions insufficiently reasoned by the author. The author’s proposal concerning the advisability of drawing up a list of such injuries and conditions, which is generally accessible to persons with no special medical education, is controversial. “This can be arranged by classifying the types of specified injuries and condition groups” (Lakhova, 2017). However, it is impossible to attach in the directory for law enforcement practitioners, solving criminal offenses related to causing bodily injuries and performing criminal investigations about these criminal offenses, all the issues. Even if we consider that this “directory” should be used by the person carrying out primary qualification, then all the questions related to determining the severity of bodily injuries are transferred to the employee, but not a person with specialized knowledge in this area - forensic pathologist. Also, the proposed author’s definition of bodily harm is not sufficiently developed. Firstly, taking the circumstances which exclude criminal wrongfulness of

an act into account, bodily injury is not always unlawful. Secondly, not all injuries have health harming consequences. In addition, this interpretation cannot be found in the Rules on forensic determination of the degree of bodily injury (hereinafter referred to as Rules) (MHU, 1995), because it contains terminology that is purely legal and not within the scope of knowledge of forensic experts: “unlawful”, “must”, “socially dangerous consequences”.

The purpose of the article is to develop scientifically based recommendations for amendments and additions to existing legislation and to develop new legal and regulatory instruments and measures to systematically counteract criminal offences against human health.

The assignment: to analyze human health regulations; to identify deficiencies and gaps in legislation which need to be addressed; to propose possible solutions to problems in the field of normative protection of human health.

The *object* of the study protection of human health; the *subject* of the study medical and legal protection of human health.

1. Methods and Materials

The methods of research constitute a certain system, considering the goals and objectives of the object and the subject of the research. Therefore, we used the same methods in the pursuance research in the field of human health: 1) a comparative-legal method gave an opportunity to evaluate the legislation on criminal responsibility for the protection of human health in international documents and to compare these norms of the national legislation of Ukraine; 2) a systematically structural method was used to study the duration of harm to a person`s health, taking into account the interdisciplinary links of the science of criminal law with related sciences - forensic medicine; 3) a dialectic method – to define the essence and content of certain concepts and categories as well as to study other problems in their development and interconnection. The use of this method has made it possible to establish a range of issues requiring legislative action; 4) a dogmatic method of analyzing existing legislation and its application in order to identify the obvious aspects of legal phenomena through penetration into the internal essential aspects and connections; 5) a statistical method, namely a statistical questionnaire survey was also used in the study to collect data from the questionnaires of 272 general forensic experts from different regions of Ukraine with the exception of Autonomous Republic of Crimea, Donetsk and Luhansk Regions from January 2019 to May 2020.

The results of the questionnaire have been used to draw conclusions and develop practical proposals. The results of the study were synthesized and systematized by induction method. Conclusions and practically significant positions were produced by using the interpretation method. The analysis of the methods by which the study was conducted indicates the importance of scientific achievements in this area.

2. Results and Discussion

2.1. Human Life and Health as the Object of Protection

International instruments governed by international law are mandatory for the states that have ratified them. Among the instruments designed to protect person`s and citizen`s rights, freedoms and obligations, the following documents should be emphasized: the Universal Declaration of Human Rights (UN, 1948); the Convention of the Protection of Human Rights and Fundamental Freedoms (CE, 1950); the International Covenant on Civil and Political Rights (UN, 1966a); the International Covenant on Economic, Social and Cultural Rights (UN, 1966b) and many others. The analysis of these documents demonstrates that all of them enshrine and protect a number of traditional guarantees of person`s and citizen`s rights and freedoms which allow everyone to choose the type of their behavior, enjoy economic and sociopolitical freedoms and social benefits both in the personal and public interest.

One of the fundamental rights is the right to life, which is a naturally inviolable human right. Every international instrument includes provisions to protect the benefit. However, during the analyzing of the content of these documents, we have noticed that they do not fully ensure the realization of the human right to health. Being a fundamental, inherent, and absolute right, the human right to health, from our point of view, should be placed alongside the human right to life. These two categories of “life” and “health” are naturally interconnected as they are priority common and universally recognized values from an international law perspective. The main reason for this is that these time frames are interdependent, mutually supported and cannot exist in isolation from each other.

Thus, one of the fundamental legal guarantees of human and civil rights is the right to health. Therefore, the proclamation, at the international level, of fundamental human rights –to life and health as a single and indivisible concept - should be the common heritage of the whole human race.

2.2. Harm to Human Health: Issues of Concern

The term “harm to health” is one of the most contradictory definitions, which belongs not only to criminal law, but also to other sciences - forensic medicine, labor law, civil law and others. The identification of its types is equally problematic. We have not found a consensus among most scientists during the researching of this issue. The definition of “harm to health”, which is used by the legislator, is ambiguous in its understanding. Harm to health is characterized by qualitative (nature) and quantitative (degree) indexes. The nature is determined by the form of pathology caused to the human body (bodily injury, disease). Scientists besides the term “harm”, use the term “disorder” and note that this is a change in human health caused by injury, disease, or pathological condition. It objectively appears to be a sign of: “Impaired functioning of an organism in comparison with those, which occurred before the commission of a wrongful act” (Sharapov and Konovalov, 2007: 127). In addition: “It may manifest itself as deteriorating health status, lowering it to a lower quality level” (Vermel and Gritsaenko, 1997: 43).

The term “bodily harm” is a purely legal definition. It does apply in medicine. In such a case, the forensic expert would be beyond the scope of the assigned duties. Moreover, the classification of injuries in medical practice is based on a specific injury morphology. For example, the disturbance of the surface layers of epidermis is called abrasion or scratch depending on the shape and area. In this case, such effects, that is, superficial injury to the epidermal layer is usually not accompanied by harm to health unless other external or internal environmental factors are added. “Harm to health” is a more overarching term than “bodily injury”. Injuries may occur posthumously, but in such a case they do not harm human health. The reason for this is the fact that the existing legislation protects only the health of a living person. Mental illness can also not be a sign of bodily harm, because it manifests itself in decreasing mental capacity of a person. That is why it is appropriate to define this sign as one of the indicators of bodily harm.

In case of injury to a person's health, criminal liability is provided for under the article of the PC of Ukraine. But there may be cases when a person consents to harm to her health, according to certain circumstances. For example, there are sports competitions which may be harmful to human health. It is essential for such sport events to be permitted by competent authorities. Besides, the injury caused to the participants must not be the result of intentional violation of established rules.

Rastoropov suggests that “the infliction of harm to a person's health with his or her consent is preceded by the totality of the obligatory conditions for its occurrence. These circumstances include: 1) legal capacity of a person

(sanity and reaching a certain age); 2) free consent (free expression of the person's will, consent to harm to one's own health); 3) right to consent (a person has the right to consent to harm his health); 4) timeliness of the consent (the consent is given before or during the act causing injury to health); 5) definiteness of the consent (consent must be specified in relation to the type of harm and the circumstances in which it is given and in which the harm is caused); 6) purpose of harm (socially useful, neutral, antisocial)" (2003a; 2003b).

2.3. Bodily Injuries as a Component Part of Health Damage

The objective features of bodily harm constitute offences that criminalize bodily harm. The consequence of any bodily injury is also the damage caused by the guilty activities of the subject to human health. Scholars note that "by using the term "bodily injury" the Penal Code emphasize combating visible and prevalent types of harm to health of traumatic origin and ignoring the possibility of violent harm against the background of latent pathology" (Sharapov and Konovalov, 2007). The term "bodily harm" is a criminal legal definition. There is no such concept in medicine. It is advisable to replace the concept of "bodily harm" with the broader concept of "harm to health".

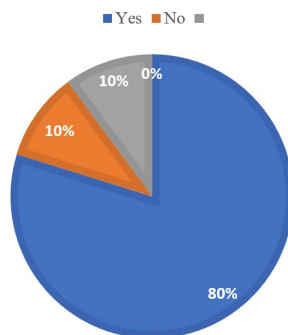
Bodily injury refers to physical harm and the results of that harm. The term is used in many types of business insurance to clarify what is covered by a policy (Bonner, 2020).

The ISO CGL states that bodily injury means bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time. The current PC of Ukraine still does not contain a clear definition of the concept of "bodily harm" which has a negative impact on the practice of applying rules that provide for liability for bodily harm of various degrees of severity (Tatsiy *et al.*, 2017: 159). There is therefore a debate among scholars on the definition of this concept in the theory of criminal law.

An analysis of the publications of scientists and the personal data of forensic experts (64%) makes it possible to claim that it is sufficient and correct to consider a period of health regret - an impairment of the anatomical integrity of tissues, organs, or their functions, arising from the action of one or more factors of the external environment - physical (mechanical, thermal, barometric, radiant, etc.), chemical, etc.

Figure 1. Correlation of the concepts “violation of anatomical integrity...” and “and their functions” in relation to the term “harm to health”

Is the definition of harm to health as a disorder of anatomical integrity of tissues, organs or their physiological functions arising from the action of one or more environmental factors - physical, chemical and other, sufficient and correct?



Source: compiled by the authors based on the results of a sociological survey.

In the definition of harm to health one must put the union “or” between “violation of the anatomical integrity ...” “and their functions”. Otherwise, it can be interpreted as a violation of the integrity and function of the organ in the text. It is advisable to remove biological and mental factors. If we do not pay attention to the biological factor, all viral and bacterial diseases (influenza, syphilis, typhoid fever, cholera, tuberculosis, viral hepatitis, tetanus, and many others) should be considered harmful to health. Mental factor is also incomprehensible. It may include quarrel, conflict, fighting, fear, stress. In this case, this may relate to the sphere of psychiatrists but not of forensic experts.

The criminal legislation of Ukraine distinguishes between bodily injury by degree of severity: serious injury (article 121 of the Penal Code of Ukraine), moderate injury (article 122 of the PC of Ukraine) and minor injury (article 125 of the Penal Code of Ukraine) (VRU, 2001). According to article 121 part 1 of the Penal Code of Ukraine, serious bodily injury is bodily harm dangerous to life at the time of the injury or resulting in: a) loss of any organ or its functions; b) genital mutilation; c) mental illness; d) other health disorder accompanied by a permanent disability by at least one third; e) interruption of pregnancy; f) irrecoverable face deformation. According to article 122 part 1 of the Penal Code of Ukraine intentional bodily injury

is moderate intentional bodily injury which is not life-threatening and does not have the consequences provided for in the article 121 of the Penal Code of Ukraine. However, it is such a phenomenon that caused a long-term health disorder or a significant permanent disability of less than by one third. Article 125 of the Penal Code of Ukraine defines types of minor bodily harm (VRU, 2001). They include part 1 minor bodily injury; part 2 minor bodily harm resulting in a short-term health disorder or a minor disability.

The first sign of the intentional grievous bodily harm (article 121 part 1 of the Penal Code of Ukraine) is a danger to life at the time of the injury. Such a sign of grievous bodily harm is defined by the legislator in since some bodily injuries may not leave consequences, traces including visible ones, but at the time of infliction are dangerous to life. When comparing the signs of grievous bodily harm contained in the Penal Code of Ukraine, we found some inaccuracies in the Regulations. Therefore, one of the signs of grievous bodily injury is danger to life (part 2.1.1.a) (MHU, 1995). This interpretation does not correspond to article 121 of the PC of Ukraine, since the danger to life must be precisely at the time of the occurrence, which is further in paragraph 2. 2.1.2 determined that the danger to life is the damage that occurred at the time of the occurrence (causing) or clinically, at different intervals, cause life-threatening events (part 2.1.3.o) (MHU, 1995) and, without medical assistance, end or may end in death as they normally do. The Regulations in part 2.1.3 provide an exhaustive list of possible injuries that are life-threatening at the time of occurrence.

It is clear from some paragraphs that certain injuries to the body are only life-threatening when accompanied by severe shock or life-threatening phenomena, that is, it is the severity of the injury that is life-threatening. Therefore, they should be considered as one of the defining signs of life-threatening injury (Mitrofanov and Linov, 2010: 471).

In some articles of the Penal Code of Ukraine the legislator notes along with “danger to life” the phrase “danger to health”. The Rules contain definitions of only one of them concerning the “danger to human health”. In scientific literature “health danger” is interpreted differently. Paragraph 9 of the Resolution of the Plenum of the Supreme Court of Ukraine dated 06.11.2009 No 10 “On judicial practice in cases of crimes against property” provides clarifications “dangerous to life or health violence” (Article 187, part 3 of article 189 of the Penal Code of Ukraine) is the intentional infliction on the victim of a minor bodily injury resulting in a short-term health disorder or insignificant loss of capacity for work, moderate or serious bodily harm, as well as other violent acts which did not have these effects, but were dangerous to life or health at the time they were committed.

These include in particular violence that has led to unconsciousness or a low degree of torture, strangulation, dropping from a height, applying of *electro-shock devices*, weapons, special tools etc. (SCU, 2009). According to

the Decree, these are the consequences of bodily harm (articles 121, 122 and 125, part 2, of the Penal Code of Ukraine) and other possible consequences to which acts causing pain and suffering (physical and psychological) can be attributed. However, it remains unclear what effects can be considered to be dangerous to life or health at the time they occur.

The Rules on Forensic Determination of Injuries provide explanations of life-threatening injuries as injuries, at the time of occurrence (causing) or clinically at different intervals cause life-threatening phenomena (cf. P. 2.1.3. b) and which without medical assistance on their normal course end or may end in death. The prevention of death caused by medical treatment shall not be taken into account when assessing the threat to the life of such injuries “(part 2.1.2). However, the terminology “dangerous damage to health” is inconceivable as there are no clear criteria for distinguishing them. It is possible to solve this problem by their logical analysis, that is the threat to life automatically becomes the threat to health, as these categories are interconnected and mutually conditioned. However, it is impossible to compare them in enforcement.

Therefore, it is possible to resolve this issue in the following ways. The first way is trying to consider actions causing a threat to health as distinct from those that cause a threat to life. In such case, it can be considered to be any criminal misbehavior towards a person without the use of violence which poses a threat to life by its nature, for example, without the use of a weapon. The second method is to remove the prefix “or” and replace the union “and”. Another way is to leave the phrase “life-threatening violence”, thus eliminating “dangerous damage to health” in the provisions of the PC of Ukraine.

In order to avoid contradictions, we consider it useful to define this concept in the Rules. A majority (60.8 per cent) of respondents (forensic experts) indicate that such an innovation is appropriate.

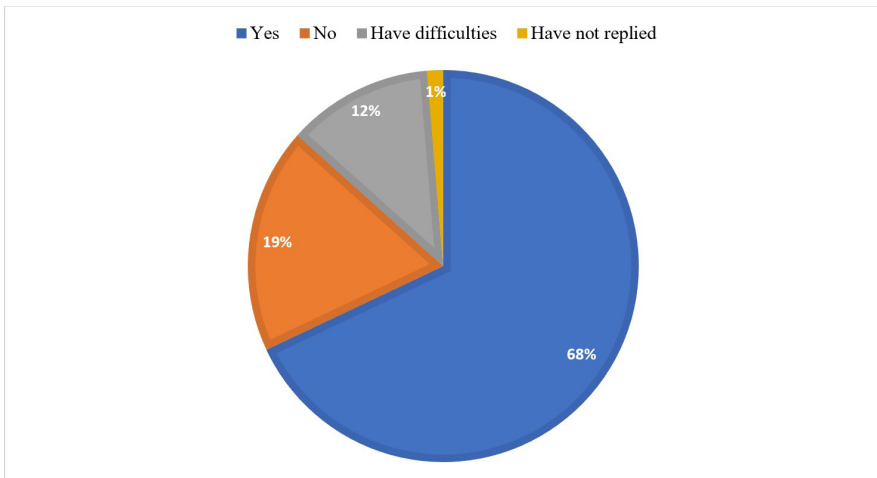
In addition, the Rules also define “non-life-threatening injuries” belonging to the severe injuries according to their final results and consequences: the loss of an organ or the loss of an organ’s function - loss of vision, hearing, language, arm, leg and reproductive capacity.

Vision loss must be interpreted as total permanent blindness in both eyes or a condition where vision is reduced while counting fingers at a distance of two meters or less (visual acuity in both eyes 0.04 and below). But qualification issue in case of loss of one of the paired organs (eyeball, kidney etc.) as one of the signs of severe bodily injury remains unresolved:

As paired organs have a complementary and common function, the total loss of one such organ may have little immediate overall effect. Impairment of or loss of the second organ of the pair commonly results in a major increase in disability (VAC, 2019: n.p.).

Thus, the loss of one of the paired organs is one of the signs of severe physical injury - organ loss. The matter was resolved by the Zbarazh District Court of the Ternopil Region. The accused filed a motion at the hearing supported by his counsel, to appoint a complex forensic examination of the case. It should be decided either the loss of one testicle with an appendage is the loss of a whole organ (right and left testicle are functional), or it is a loss of a whole organ that will no longer be able to perform the function of reproductive capacity for fertilization, conception. If the main function of the organ is maintained (after the loss his parts of the right testicle are functioning), can the reproductive capacity for fertilization and conception be attributed to the injury of the right testicle as a moderate injury? Having analyzed evidence collected in their entirety the court imposed a punishment under article 121 part 1 of the PC of Ukraine for intentional grievous bodily injury which caused the loss of an organ. The injury to the right testicle with its loss is a serious injury (ZDC, 2016). Ternopil Regional Court of Appeal upheld the verdict of the Zbarazh District Court of the Ternopil Region of 5 May 2017 without changes (2017). Survey data of forensic experts demonstrates that the loss of one of the paired organs (eyeball, kidney, etc.) can be considered as one of the signs of severe injury 72 per cent (figure 2).

Figure 2. Can the loss of one of paired organs (eyeball, kidney etc) be considered as one of the signs of severe injury?



Source: compiled by the authors based on the results of a sociological survey.

Each organ has certain characteristics, performs certain specific functions and is a part of human body. For example, an auditory organ has signs and functions, but in the case of loss of an ear (an ear shell) which is not an organ but only one part of the hearing organ. That being the case, it belongs to one of the signs of serious injury. In case of loss of hearing function (one ear) – it is moderate injury significant permanent disability less than by one third, in this case it counts 15%. “Loss of vision in one eye or loss of eye is also determined to be severe bodily injury, as in this case there is loss of working capacity by more than one third or irrecoverable deformation of the face” (Mitrofanov and Linov, 2010: 129). However, it is difficult to accept some of the scientific claims, since the loss of an eye, which has led to one-sided blindness, cannot be attributed to such signs of grievous bodily harm as irrecoverable deformation of the face. According to part 2.1.8 of the Rules “when operational treatment (cosmetic surgery) is necessary to eliminate the damage to the face, it is considered irrecoverable”. In this case, the prosthetics of the eyeball are performed without surgery, so the loss of the eye as one of the paired organs belongs to one of the signs of severe bodily injury - the loss of an organ.

On the opinion of Zavalniuk the loss of an organ is considered to be both the anatomical loss of his body and the loss of its functions (2016). There is rather similar terminology in forensic medicine

Impairment of functions is a complete or partial disorder of the specific activity of an organism, its organs, tissues or cells under the influence of various internal or external factors. The disruption of the functions of any organ may be temporary and permanent (for the whole life) of minor, insignificant, moderately or grievous severity until its total loss. Persistent impairment of functions is generally covered by a sign of permanent disability to varying degrees (2016: 337).

Therefore, the term “impairment of functions” is broader than “loss of functions”. Thus, in accordance with the provisions of the Regulations:

1. hearing loss should be understood as total persistent deafness on both ears and such irreversible state where the victim does not hear a spoken speech at a distance of three to five centimeters from the ear shell. In case of hearing loss in one ear what was the result of the injury the actions of the perpetrator will be qualified in accordance with article 1, part 122 “Intentional moderate bodily injury” of the PC of Ukraine on the basis of a permanent loss of total capacity to work by less than one third (25%).
2. loss of language (speech) should be interpreted as the loss of the ability to express one’s thoughts with vocal sounds that are understandable to others. A stutter is not to be interpreted as a loss of speech, except for severe stuttering, since it is impossible to perceive sounds, a certain word or a phrase.

3. loss of an arm or leg should be understood as the separation from the torso or loss of function (paralysis or other condition excluding their activity). Anatomical loss of the arm or leg is understood to mean both the separation of the arm or leg from the torso and amputation at or above the ulna or knee joints; all other cases should be treated as loss of limb and assessed against the basis of permanent disability.
4. loss of reproductive capacity must be understood as loss of capacity for coition or loss of capacity to fertilize, conceive and reproduce (childbirth). Some scholars have proposed new offences against human health – Illegal implementation of surgical sterilization of men or prevention of pregnancy in a woman without the consent of a person (Hrychuk, 2021).

Genital mutilation is also one of signs of bodily injury. This question of whether this topic should be identified has been discussed in the scientific community. For example, Baida determined that such actions are the result of religious or ethno-religious traditions and are performed as part of the rite of adulthood, preparation for marriage, adulthood, preservation of the virginity of women. The aim of the aforementioned actions is also often “deterrence” of sexual needs for ensuring “purity” of future family relations, ensuring “fidelity” of wife, preservation of family, increasing sexual satisfaction of man, membership in secret women’s associations, etc. (2016). Another group of scientists noted that this practice of “Female circumcision has no basis in any religion (religious texts do not prescribe such practice) and is related to deep-rooted cultural beliefs about women and girls, their hygiene, sexuality and place in society” (Shkodiak, 2019). The world recognizes 6 February as the International Day of Zero Tolerance for Female Genital Mutilation. “Although the practice of female genital mutilation is concentrated mainly in 29 countries in Africa and the Middle East, it is a universal problem that also affects some countries in Asia and Latin America. Destructive female genital mutilation continues spreading in some immigrant communities living in Western Europe, North America, Australia and New Zealand” (Hrychuk, 2021).

All kinds of female genital mutilation are considered to be mutilation (mutilatio; lat. “circumcision”, “shortening”) by the World Health Organization (hereinafter referred to as WHO) which is a violation of human rights (USAID, 2016: 64-75).

WHO identifies the following types of female genital mutilation:

1. Clitoridectomy is when the clitoris is partially or completely removed and, in very rare cases, the skin fold surrounding the clitoris is also removed.

2. Excision is commonly referred to as partial or complete removal of the clitoris and labia.
3. Infibulation usually occurs when the opening of vagina is narrowed by the creation of a cover seal which is formed by cutting and repositioning the minor labia or labia (sometimes by stitching). It can be combined with clitoris removal.
4. The fourth type includes all other harmful female genital procedures for non-medical purposes, such as injections, puncture, cutting, scraping, and burning of the genital area (Kushpit, 2020).

All female genital mutilation intentionally alters or injures the female genital organs for non-medical reasons, such as removal, infibulation, or any other mutilation, in whole or in part, of the labia majora, labia minora or clitoris (Borosdina *et al.*, 2018).

In summary, a review of the special literature reveals that female genital mutilation is prevalent throughout the world.

Even article 38 of the Istanbul Convention makes it clear that liability arises in the case of female genital mutilation.

“...such injuries are directly related to certain religious movements and ethnic groups not inherent in Ukrainian society. In addition, the basis for criminalizing the modification of certain additional grounds to the existing PC is the corresponding criminological ground. It also should be noted that reference to the fact that the mutilation was carried out with the consent or at the request of the minor is void and the consent of the adult can only be regarded as a mitigating circumstance, since there is an express prohibition on such acts. Secondly, such injuries do not correspond to that level of privacy in a person`s life, may not be ground for non-interference of the person in the private life of the victims” (Pazenko, 2019: 59).

In our opinion, the rights of men and women in all legal relations in society should be equalized, in order to eliminate social barriers and create equal social opportunities. Therefore, it is not appropriate to apply criminal law protection exclusively to women or men. In case of damage to an organ or a part thereof the function of which was lost earlier (before the injury) the severity of the damage is established on the basis of the actual duration of the impairment.

Mental illness as a result of injury to health caused by serious bodily harm is a matter for forensic and psychiatric experts. When studying this issue, we have noticed that scientists use different terminology, videlicet: “mental disorder”, “mental disease”, “psychiatric disease”, “psychiatric disorder” in special literature. Law of Ukraine “On Psychiatric Care” in Art. 1 defines psychiatric disorders as disorders of mental activity recognized as such in accordance with the International Statistical Classification of Diseases, Injuries and Causes of Death in force in Ukraine (VRU, 2000).

The Law of Ukraine “On Psychiatric Care” in Article 1 defines psychiatric disorders as disorders of mental activity established in accordance with the International Statistical Classification of Diseases, Injuries and Causes of Death in force in Ukraine (VRU, 2000). Analyzing the aforesaid, we consider that the terms “mental disorder”, “mental disease”, “psychiatric disease”, “psychiatric disorder” to be synonymous. The legislation of Ukraine uses them in different ways at the same time. Emotional illness must be understood as mental disease (mental disability). Reactive states (psychosis, neurosis) associated with damage (part 2.1.5) (MHU, 1995) cannot be classified as mental diseases. Therefore, the terms “mental disorder”, “mental disease” is synonymous. The term “mental disease” is a relic of the past system, the term “mental disorder” is also widely used. In our opinion the legislation of Ukraine should have a common terminology to prevent misunderstanding and interpretation of these terms, namely “mental disorders”, since in national legislation and ICD-10 is used exactly the name of brain diseases.

The Rules clearly state the duration and curability of a mental illness an injury resulting in the development of a mental illness, regardless of its duration and degree of curability.

The next sign of grievous bodily injury is another health disorder associated with a permanent disability by at least one third (at least 33%).

“Health disorder”, “disability”, “permanent disability” and “permanent loss of capacity to work” are considered to have different meanings as signs of bodily injury.

A health disorder is to be understood as a painful process directly related to damage, consistently developed (Regulations, part 2.1.6) or painful state of a person or disruption of normal human activity. Persons who are employed and those who are not employed (children, pensioners, persons with disabilities, etc.) may develop a health disorder as a result of any bodily injury. Therefore, persons who do not work are established to a health disorder in case of injury and another group to a health disorder related to permanent disability.

Articles 121, 122, 125 of the PC of Ukraine refer to loss of capacity to work. However, loss of working capacity is possible to be general and professional. The provisions of the articles of the Penal Code of Ukraine do not specify the type of working capacity referred to which provokes a lot of discussions. Thus, “the overall working capacity is a person’s ability to serve himself or to perform unskilled job in normal living conditions” (Zavalniyk, 2016: 348). “Professional ability to work is the ability of a certain employee to work in his profession (specialty)” (Mitrofanov and Linov, 2010: 201). Thus, in case of bodily harm, it is possible only general loss of capacity, since it is the same for all. The loss of working capacity is defined in civil

law relations and will be different for each person, as these persons have different professions (specialties).

The general disability must be stable (permanent). Rules define it as irreversible loss of function, not fully restored. That means that it is the kind of disability that lasts during the whole life.

We consider it advisable not to refer the definition of “permanent loss of capacity to work” to signs of grievous bodily injury which is being discussed in the scientific community. For example, if it is assumed that professional efficiency, like general efficiency, is a sign of grievous bodily injury, then the intentional breaking the fingers of a pianist (violinist, etc.) in order to further prevent performance of professional functions, these injuries should be qualified in accordance with article 121 of the PC of Ukraine. In such a case, the existing legislation does not give forensic experts the power to determine the loss of professional capacity. Such functions are assigned to the Medical and Social Expert Commission (MSEC) who are not entitled to determine the severity of bodily injury.

The term “permanent capacity to work” as an indicator of the severity of bodily injury, article 121, 122 part 1, article 125 part 1 of the PC of Ukraine should be replaced by “general permanent capacity to work”. Interviews with forensic experts (64 %) make it possible to confirm the advisability of including terminology in the above-mentioned articles of the Penal Code “general permanent capacity to work”. The Rules stipulate that the amount of permanent (stable) loss of general working capacity in case of damage shall be determined after the injury has occurred and shall be defined on the basis of objective data according to the documents governing the work of the Medical and Social Expert Commission. Therefore, it is necessary to distinguish the terms “health disorder related to a permanent disability” and “health disorder related to a permanent loss of general capacity to work”. Consequently, it is necessary to make appropriate amendments to both the Penal Code and the Regulations.

“Loss is an action when someone is left without someone, something, loses someone as a result” (Dictionary, n.d.). Basically, it’s a 100% loss of ability. Such terminology does not correspond to the grounds stated in the PC of Ukraine, since the legislator establishes a certain percentage of such “loss”. Therefore, it is advisable to use the term “reduction”.

When asserting the severity of bodily injury, the expert shall take into account not the duration of the temporary disability or treatment, but shall objectively determine the duration of the impairment, objectively determine the general condition of the victim and take into account the duration of the impairment and the time which the victim need to recover (Zavalniyk, 2016: 381).

One of the signs of grievous bodily harm is the irrecoverable deformation of the face. The Rules for the Determination of the Degree

of Bodily Injury stipulate that the Forensic Expert shall determine whether the injury is recoverable or irrecoverable. The recovery should be interpreted as a significant reduction of the signs of pathological changes (scarring, deformation, facial dysfunction etc.) over time or not by surgical interventions. When operational treatment (cosmetic surgery) is necessary to remove injuries, the damage to the person is considered to be irreparable (MHU, 1995). Thus, the forensic expert defines the sign of severe bodily injury as irreparable deformation of the face only concerning “irreparability” (or as stated in the Rules “irretrievable”). The question of the definition of term “face disfigurement” and the identifying the specialist who is responsible to establish this remains unclear.

Criminal law theory and scholars suggest that a person is considered to be disfigured when he or she has an unpleasant, disgusting appearance (for example, no nose or lips). The severity of the harm caused by disfigurement is not only physical but also psychological since it humiliates the victim and causes him severe emotional distress and anguish (Kyrenko, 2002: 45). This position claims our attention. However, the theory does not clearly define the criteria for disfigurement and who is responsible to establish those criteria.

Discussions also arise on defining the boundaries of irreparable facial disfigurement. Kyrenko noted that permanent disfigurement is possible not only on the face, but also on other parts of the body. In cases of disfigurement of the back, arms or other parts of the body, a person feels depressed, worries that he cannot wear open clothes, actively participate in sports with all others, go to the beach etc. This problem should therefore be solved and it should be recognized that not only face but also other parts of the body may be classified as serious injuries. The author proposes to supplement article 121, part 1 of the PC of Ukraine with such sign of serious bodily injury as irreparable disfigurement of face or body (2002: 45-48). 76.9 % of the forensic experts questioned replied positively to the question: “Is it necessary to specify in the Regulations the anatomical boundaries of the person taking into account and ear shells? “. This indicates that national legislation requires changes and additions and indicates the practical importance of the study. Therefore, in order to eliminate contradictions in the Rules, it is necessary to specify the anatomical boundaries of face taking into account the auricles, because the topographic anatomy of the facial section of the head which is governed by the forensic experts determines the boundaries of face without auricles.

In addition, according to the analysis of criminal proceedings, the expert determines the type of injury, its characteristics and the mechanism of formation, and whether the injury is recoverable or irrecoverable (part 2.1.8). However, in order to establish “facial deformation” other participants of the process - a specialist, namely a cosmetologist, are invited. Therefore,

in our opinion, in order to resolve procedural disputes, the Rules should provide for the right of a forensic expert to determine definitively the degree of injury in cases of undoubted post-traumatic facial disfigurement. Only 36.9% of forensic experts interviewed determined that such changes were inappropriate.

I. Mitrofanov and M. Linov note that “life-threatening harm can be both bodily harm and disease and pathological conditions” (2010: 188). Russian scientists Veklenko and Galiykova single out such a possible consequence of a serious bodily injury as a pathological condition. It is defined as a stable deviation from the norm, having a biologically negative value for the organism (2004) medical literature. Harm to health includes bodily harm as the most pronounced traumatic form of health disorder, together with illness and pathological condition notions used to denote pathological changes which are not bodily injuries (Popov, 1999: 5).

Conclusion

Clarification of problems of criminal law protection of human health makes it possible to adopt a comprehensive approach in defining the main directions of improvement of the normative regulation of criminal liability for infringements of human health and in accordance with them to develop a holistic theoretical model of such liability regulation. We consider it advisable to specify a medical definition of “harm to human health” violation of the anatomical integrity of tissues, organs or their functions arising from the action of one or more factors of the external environment - physical (mechanical, thermal, barometric, radiant, etc.), chemical, etc. In this definition of term harm to health one must put the union “or” between “violation of the anatomical integrity ...” “and their functions”. Otherwise, it can be interpreted in the text of the Rules as a violation of the integrity and function of the organ. Biological and mental factors should also be removed. Biological factors include all viral and bacterial infectious diseases (influenza, syphilis, typhoid fever, cholera, tuberculosis, viral hepatitis, tetanus, and many others) that do not need to be considered to be harmful to health. The mental factor is a quarrel, conflict, fear, stress, depression, which is the domain of psychiatrists, not forensic experts.

Within the specified directions, it is proposed to amend the list of criminal offences against the health of a person in the Penal Code, namely the main grounds: Article 121. Intentional infliction of grievous bodily harm.

1. Intentional infliction of grievous bodily harm, that is, life-threatening at the time of the infliction or resulting in the loss of any organ, including one of the paired organs, or of its functions, mental disorder, or other health disorder, with a steady reduction in the overall working capacity by at least

one third or termination of pregnancy or permanent disfigurement of the person.

Article 122. Intentional infliction of moderate bodily injury

1. Intentional infliction of moderate harm to health which is not life-threatening and does not have the consequences provided for in article 121 of the existing Penal Code, but has caused a long-term health disorder or a significant long-term decrease in general working capacity by less than one-third.

Article 125. Intentional minor injury to health

1. Intentional infliction of a minor injury to health resulting in a short-term impairment of health or an insignificant permanent reduction in general working capacity.

In addition, considering the above said considering the provisions of the by-laws and regulations which guide the work of general forensic experts in determining the degree of bodily harm, there is a need to develop fundamentally new instruments (Rules for the Forensic Determination of the Severity of Bodily Injury) which will define the signs of bodily injury and contain definitions and clarifications of the evaluation terminology. In this way, the results obtained can be useful in law enforcement in determining the severity of bodily harm and in standard-setting, scientific and scientific-pedagogical work in the teaching of criminal law and medical subjects.

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The interests of state and civil society as a determinant of the democratic political development of Central and Eastern Europe countries

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Abstract

The article analyses the state and development of civil society in Central and Eastern Europe as basic determinants of its development, using integrative indices of civil society sustainability. The external and internal logic of these indices for 2019 is studied. The research uses methods of cluster analysis, linear correlation, and multiple regression analysis to model the interaction of the determinants of civil society development in the region. The results of the analysis in the Central and Eastern European region reveal interesting links not only between the status of civil society and the state, but also in the relationship of factors that reflect the analytical triangle of relationships. People's satisfaction with government is not a simple consequence of the economic situation: the relationship between social wealth and economic progress. The status of civil society also turns out to be a factor in this system of relationships, along with the quality of social relations and the existing sociopsychological characteristics of the population. The numerical values

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of the civil society situation and development indices obtained in this way can be used in statistical models.

Keywords: civil society; state; integral indices; statistical modelling; Central and East Europe.

Los intereses del Estado y la sociedad civil como determinante del desarrollo político democrático de los países de Europa Central y Oriental

Resumen

El artículo analiza el estado y el desarrollo de la sociedad civil en Europa Central y Oriental como determinantes básicos de su desarrollo, utilizando índices integradores de sostenibilidad de la sociedad civil. Se estudia la lógica externa e interna de estos índices para 2019. La investigación utiliza métodos de análisis de conglomerados, correlación lineal y análisis de regresión múltiple para modelar la interacción de los determinantes del desarrollo de la sociedad civil en la región. Los resultados del análisis en la región de Europa Central y Oriental revelan vínculos interesantes no solo entre el estatus de la sociedad civil y el estado, sino también en la relación de factores que reflejan el triángulo analítico de relaciones. La satisfacción de la gente con el gobierno no es una simple consecuencia de la situación económica: la relación entre la riqueza social y el progreso económico. El estatus de la sociedad civil también resulta ser un factor en este sistema de relaciones, junto con la calidad de las relaciones sociales y las características sociopsicológicas existentes de la población. Los valores numéricos de los índices de situación y desarrollo de la sociedad civil obtenidos de esta manera pueden utilizarse en modelos estadísticos.

Palabras clave: sociedad civil; estado; índices integrals; modelación estadística; Europa central y oriental.

Introduction

Civil society and the network of its institutions, the so-called civil society organizations (CSOs), determine the existence of modern democracy. According to the views of F. Fukuyama, the weakness of civil society, the displacement of its institutions by state institutions, leads to negative consequences. They include the development of dependency in citizens and the loss of the ability to joint actions not caused by external coercion, which are a prerequisite for political democracy and development, the degradation of human capital (Fukuyama, 2000).

According to modern views, the relationship between the state and civil society is not always harmonious. As a rule, there is opposition between the state and civil society. In authoritarian states, such disharmonious relations take the form of open conflict. And even in political democracies, such as France (Fukuyama, 2000), the strong role of the bureaucracy can stifle the free development of civic activity.

Modern democracies are characterized by the complementarity of state and civil society institutions, the productive distribution of competencies. However, there is a historical difference in the formation of civil society-related discourse between Western and Eastern European countries (Mastnak, 2005) and the institutional differences between their societies (Letki, 2004).

In its simplest form, civil society institutions are divided into two groups. The first includes those that provide citizens with the necessary public goods in the areas of social assistance, culture, and environmental protection. The second group includes organizations that focus on protecting the rights of citizens and involving them in an active position on a certain socially significant issue. These areas are intersecting in some places (Diyjak and Forbici, 2017). Currently, the role of civil society institutions is widely recognized, which is manifested in their inclusion in the policy of public finances, involvement in the formation of state and municipal policies in a wide range of areas. Social development trends that pose a threat to civil society are also analysed in relevant national, regional, European, and global policies, in particular development policy (Wood and Fällman, 2019).

The concept of “civil society” is widely used and involved in the field of policy-making at various levels and directions. However, it should be noted that its use is associated with a number of theoretical and methodological problems. The main ones are the following. To date, there is not generally accepted and complete definition of CSO (Diyjak and Forbici, 2017). The assessment of the sphere of civil society, CSOs, their interaction with the state is not based on a stable and informative system of indicators, and the publications on the problem are dominated by qualitative methods and evaluative judgments.

There are several international databases that should reflect information on civil society institutions. First of all, it is a database of the UN and its agencies. The Integrated Civil Society Organizations System provides information on the number, names and contact details of CSOs by region, field of activity and type of organization (UN Department of Economic and Social Affairs, 2020). A similar set of information is contained in the database of non-governmental organizations UNESCO (United Nations Educational, 2021). The database of civil society organizations — The Swedish International Development Cooperation Agency (Sida) — contains information on partnerships and funding received by CSOs (The Swedish

International Development Cooperation Agency, 2021). There are thematic databases of CSOs that carry out activities in a specific area. For example, The Peace Women Organizations Database for Women's International League for Peace and Freedom, which also provides a list of existing CSOs that declare their activities in this area.

Quantitative characteristics of civil society are available in national and European statistical systems. In the group of indicators of the quality of life of the Eurostat system, the characteristic of the activity of civil society in the countries is the indicator of active involvement of citizens, which is analysed along with other indicators of civic activity of the EU population. In 2015, it ranged from 31.3% (Sweden) to 2.1% (Cyprus) for the EU-28 (Eurostat, 2021; European Commission, 2020). The system of European statistics is complemented by information on national and multi-beneficiary initiatives to support civil society — The Civil Society Facility (CSF), established in 2008 (European Commission — European Neighbourhood Policy and Enlargement Negotiations). National statistical systems, including those outside the European Union, can be even more problematic in terms of the characteristics and dynamics of civil society. For example, official statistics of Ukraine are marked by a general weakness of the system of indicators that characterise the social and political life of society.

The State Statistics Service of Ukraine records the number of public organizations (in terms of their types and regions of activity), the number of their members, sources and volumes of their revenues and expenditures (for example: Activities of Public Organizations in 2016: Statistical Bulletin, 2017). Independent research centres publish more information on the country's CSOs. In particular, these are survey data on the involvement of citizens in CSO activities, volunteering, public confidence indicators (Civil Society of Ukraine: Figures and Facts, 2018). The possibility of comparing non-EU national statistics with European statistics is a problematic issue. The issue of the proposed classification of national NGOs, as well as their affiliation with civil society, may be raised (Gorelov, 2014; Yakymenko, 1991; State Statistics Service of Ukraine, 2017). This is important given the proposed classifications of civil societies that indicate their structurally and fundamentally different nature (Peerenboom, 2003).

As a result, qualitative methods, descriptive data, and subjective assessments predominate in those summaries that compare the situation and development of civil society in different countries. A representative study Civil Society in Central and Eastern Europe: Monitoring 2019 conducted by ERSTE Foundation experts is based on 1,758 questionnaires that were subjected to manual processing and summarised by descriptive analysis (More-Hollerweger *et al.*, 2019). The obtained numerical indicators reflected the feelings of CSO respondents from the legal conditions of their activity and the status of interaction with public authorities.

Finally, the methodology based on identifying the subjective feelings of CSO respondents or members of the expert community is used to construct the existing integrated indices — USAID's Civil Society Organization Sustainability Index (USAID, 2021) and Nations in Transit Freedom House index (Freedom House, 2021), where the civil society development index is a component.

The aim of the study is to verify the validity of integrative indices of interaction between civil society (CSO) and the state on the development of civil society in Eastern Europe. We plan to investigate a subjective component and their suitability for identifying trends in the development of civil society in the countries of the region. The hypothesis of this study is that the integrated indices of the status and development of civil society in Central and Eastern Europe, based on expert surveys, are determined by subjective factors, and have limited relationship with objective indicators of the dynamics of interaction between state and civil society. That is, research objectives are the following: 1) study of the external logic of index values, their compliance with the current political situation in the region; 2) study of the internal logic of indices, their interconnectedness and interaction; 3) study of the validity of these indices and their relationship with indicators that describe the state and the relationship between civil society and the state.

1. Methods

The sample is based on the numerical sequences of the USAID's Civil Society Organization Sustainability Index (CSOSI) and the Nations in Transit Freedom House (NIT). Both indices are based on a survey of experts who assess the changes in the state of the relevant indicators. These are 7 indicators of the state of civil society (Legal Environment, Organizational Capacity, Financial Viability, Advocacy, Service Provision, Infrastructure, Public Image) for CSOSI; and 11 indicators of the state of national democracy (National Democratic Governance, Electoral Process, Civil Society, Independent Media, Local Democratic Governance, Judicial Framework and Independence, Corruption) for NIT. Both indices are measured on an interval scale with a range of 1-7 points, where 1 is higher for CSOSI and lower for NIT. The study includes data for 24 countries in Central and Eastern Europe and the Caucasus, including Russia. Complete data for all 24 countries are available for the period 2000-2019 for CSOSI and 2005-2020 for NIT.

The following methods are used to fulfil research objectives. The first stage of the study involved the method of hierarchical cluster analysis with the calculation of Euclidean distances and using the method of Ward's

minimum variance in order to group and study the external logic of index values, their compliance with the current political situation in the region. The sample included transit countries in Central and Eastern Europe, including Transcaucasia and Russia, which are close in terms of political, social, cultural, and historical conditions of development. Index data were analyzed for 2019; these data are the most complete and devoid of the inevitable distortions caused by the conditions of the COVID-19 epidemic in 2020-2021. In the second stage, the method of calculating paired linear correlations in the system of indicators that form indices was used to study the internal logic of indices. In the third stage, a method of multiple linear regression models was used in order to study the validity of indices and their relationship with indicators that describe the status and the relationship between civil society and the state, where civil society indices are included in the predictors, along with other indicators of state efficiency, and their impact on the dependent — target — variable is revealed (Table 1).

Table 1. Composition of the analyzed variables

Title of variable	Abbreviation	N	Mean	SD	Min	Max
CSOSI	CSOSI	24	3.608	0.874	2.100	5.900
NIT	NIT	24	4.813	1.362	1.000	6.250
GDP per capita PPP (current international \$)	GDP	24	25191	9983	11971	43005
Healthy life expectancy at birth	HLE	24	67.677	1.888	64.300	71.400
Perceptions of corruption	Corr	24	0.810	0.138	0.457	0.963
Gini of household income	Gini	24	0.360	0.055	0.254	0.454
Human capital index (HCI) (scale 0-1)	HC	24	0.654	0.070	0.557	0.777
GDP growth (annual %)	Gr	24	3.582	1.333	1.400	7.600
Confidence in national government	CNG	24	0.387	0.151	0.160	0.858
Life Ladder	LL	24	5.757	0.597	4.702	7.034
Social support	SS	24	0.875	0.074	0.675	0.949
Freedom to make life choices	Fre	24	0.785	0.068	0.657	0.945
Generosity	Gen	24	-0.121	0.119	-0.289	0.267
Democratic Quality	DQ	24	0.138	0.601	-1.097	0.985

Source: World Happiness Report (2020).

The Gini Index was used according to the Gallup Institute. Data on this indicator provided by the World Bank's World Development Indicators are based on official country statistics and are unreliable in some cases.

The composition of variable models was selected according to the step-by-step algorithm of the Akaike Information Criterion (AIC).

2. Results

Classification of countries by the CSOCI index allows identifying four groups of countries (Figure 1).

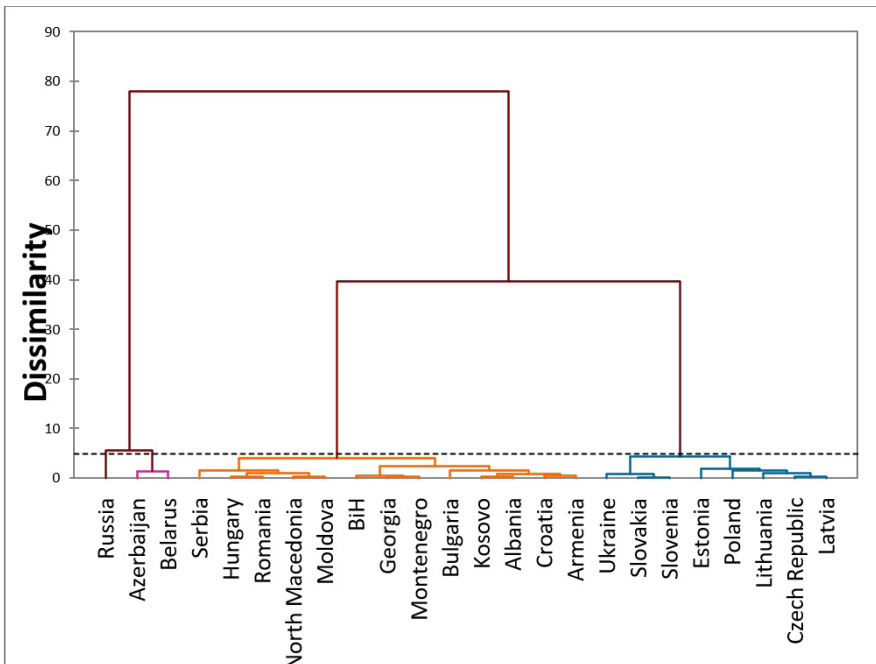


Figure 1. Cluster dendrogram of the classification of countries in the region by the CSOCI (2019) Source: calculated according to USAID (2021).

This classification is intuitive and can be interpreted as: a group of authoritarian countries with underdeveloped civil society (Azerbaijan, Belarus); countries that pursue a policy of systemic counteraction to civil society (Russia); middle-income civil society countries with two subgroups;

countries with a stable and developed civil society. Classification of some countries into groups may raise questions. Ukraine belongs to the group of strong civil societies.

According to the NIT, we grouped on a broader basis — the indicator of the development of civil society is in the system of other features of the state of democracy (Figure 2).

The selection of three groups of countries is also intuitive and can be easily interpreted as: countries with authoritarian political regimes (Azerbaijan, Belarus, Russia); countries with a medium level of democracy in the region (Albania... Ukraine); countries with developed democracies (Estonia... Slovenia). In the second group we can observe the subgroups like the CSOCI classification, which can be interpreted as groups of problematic/degrading democracies (Hungary, Serbia, etc.) and progressive democracies (Armenia, Ukraine, etc.). This corresponds to the classification of political regimes given in the index itself. CSOCI indicators reflect the opinion of experts on the status of individual indicators that describe civil society in countries.

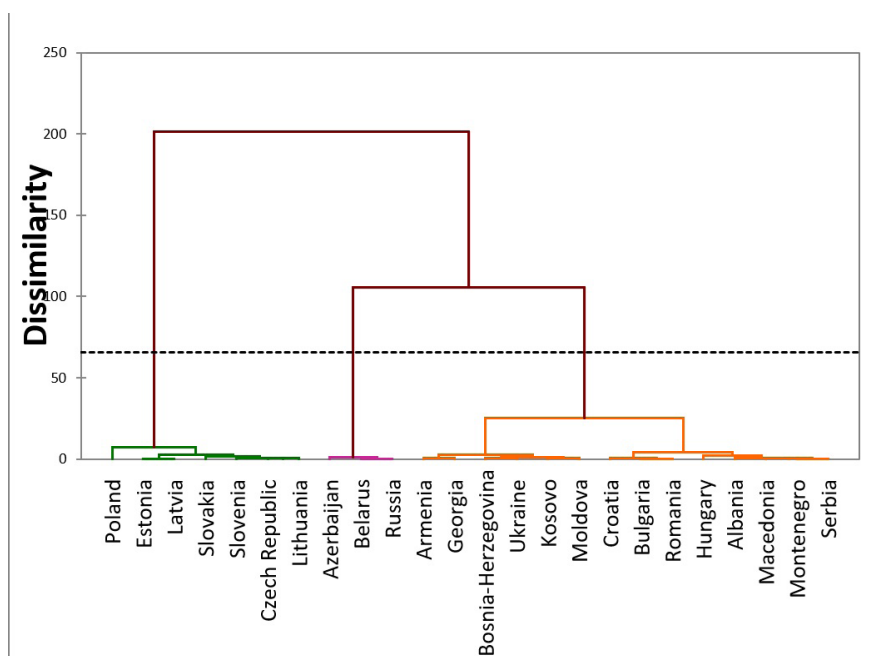


Figure 2. Cluster dendrogram of the classification of countries in the region by NIT (2019)

Source: calculated according to Freedom House (2021).

They are strongly mutually correlated (Table 2) with linear correlation coefficients of 0.91-0.79. A correlation of the legal conditions of activity with other indicators that make up the index is a relatively smaller. This can be understood as the fact that the interviewed experts tend to have a single impression of the state of civil society, transferring it to all areas outlined.

Table 2. Table of correlation of the CSOCI components

	<i>Legal Environment</i>	<i>Organizational Capacity</i>	<i>Financial Viability</i>	<i>Advocacy</i>	<i>Service Provision</i>	<i>Sectoral Infrastructure</i>	<i>Public Image</i>
Legal Environment	1.00						
Organizational Capacity	0.82	1.00					
Financial Viability	0.79	0.91	1.00				
Advocacy	0.89	0.88	0.83	1.00			
Service Provision	0.84	0.88	0.90	0.85	1.00		
Sectoral Infrastructure	0.80	0.88	0.88	0.79	0.90	1.00	
Public Image	0.90	0.91	0.87	0.90	0.88	0.80	1.00

Source: authors development.

Among the individual components of the index is the strongest degree of statistical relationship between organizational capacity, financial viability, and the public image of civil society organizations. Such results are logical, they outline the importance of the institutional stability of civil society. In authoritarian countries, there is systemic pressure on these aspects of civil society organizations. They are weakened through discrediting campaigns in state-controlled media, discriminatory legal norms regarding the conditions of their organizational activities and exerting pressure to limit their sources of funding. Such a system of measures is implemented in Azerbaijan and the Russian Federation in its fullest form. The most favorable conditions for the institutional activity of civil society organizations are in the Central European countries of the EU and the Baltic countries.

In the NIT structure, individual indicators are marked by almost the same strength of correlation (Table 3) with linear correlation coefficients of 0.96-0.83.

Table 3. Table of the correlation of the NIT components

	<i>National Democratic Governance</i>	<i>Electoral Process</i>	<i>Civil Society</i>	<i>Independent Media</i>	<i>Local Democratic Governance</i>	<i>Judicial Framework and Independence</i>	<i>Corruption</i>
National Democratic Governance	1.00						
Electoral Process	0.90	1.00					
Civil Society	0.84	0.94	1.00				
Independent Media	0.93	0.93	0.88	1.00			
Local Democratic Governance	0.93	0.94	0.86	0.89	1.00		
Judicial Framework and Independence	0.96	0.90	0.83	0.92	0.92	1.00	
Corruption	0.94	0.89	0.85	0.91	0.90	0.92	1.00

Source: authors development.

It is reasonable to interpret these data in the same way — the general impression of the state of democratic development of the country is transferred by experts to all outlined spheres. The indicator of the state of civil society in the system of indicators assessed by the survey shows the greatest degree of correlation with the electoral process (linear correlation coefficient 0.94) and relatively smaller with the state of the legal system (linear correlation coefficient 0.83). It should be noted that there is the strongest correlation between such indicators as civil society and the electoral process. This may indicate the importance of this aspect of the interaction between the state and civil society as the most basic determinant of the democratic vector of political development. The degree of democratic electoral process is manifested in the interaction of the state and civil society in its organization. Such interaction can have many aspects, but one way or another civil society creates an environment for a positive electoral process, and it is the language of the fullest realization of democratic choice of society through the effectiveness of all its stages — from nomination of candidates (parties, blocs) and representation in society to the counting of votes.

Statistical analysis of the validity of the indices of the status and development of civil society was conducted according to three models of multiple linear regression (Table 4).

Table 4. Results of statistical analysis

	Model 1	Model 2	Model 3
Dependent variable*	CNG	LL	DQ
Multiple R ²	0.8315	0.5816	0.9092
Adjusted R ²	0.7578	0.4935	0.8901
F-statistics	11.28	6.0602	47.55
p-value	3.843 x 10 ⁻⁵	0.001659	1.221x10 ⁻⁹
Statistical significance of t-statistics of independent variables			
CSOSI	-	0.287280	-
NIT	0.000190	0.488169	0.00035
GDP	0.023393	0.000292	5.86x10 ⁻⁵
HLE	-	-	0.01527
Corr	-	-	-
Gini	0.016557	-	-
HC	0.007857	-	-
Gr	0.000644	-	-
CNG	-	-	-
LL	-	-	-
SS	-	-	0.08113
Fre	0.148415	-	-
Gen	0.030083	0.017869	-
DQ	-	-	-

* The codes of the dependent variables are given in Table 1

Source: authors development.

Model 1 has as a dependent variable indicator of confidence in the national government. This connects the relationship between the state and civil society. Confidence in the government is seen as a general indicator of

citizens' satisfaction with the political regime, politics, and the ruling class. The statistical quality of the model is high. The impact of basic economic indicators of economic development, income distribution, freedom in social life on the attitude of citizens to the government is logical. At the same time, the indicator of the development of civil society as part of NIT shows high statistical significance in this model. The model can be considered as one that reflects the relationship between the basic indicators of the effectiveness of interaction between the state and civil society in the field of public welfare. Achieving effective values of wealth and social stability of society is associated with a developed and sustainable civil society. This dependence is statistically significant and reproducible even though in the group of authoritarian countries in the region the value of individual indicators of wealth (GDP per capita) may be high, but the value of social stability of society (social income distribution, human capital development) still remains at low or medium values.

In Model 2, the target is the indicator of the so-called "life ladder". According to the methodology, it is based on a survey, where citizens answer a direct question about the subjective feeling of satisfaction with their own lives. The involved algorithm excludes the analysed indices of the state and development of civil society from the composition of variables for this model. Their inclusion leads to a slight deterioration of its statistical characteristics, which are not high. The indicator of self-satisfaction is statistically related to the indicator of society's wealth and the indicator of people's readiness for charity. Such a model may have plausible socio-psychological explanations, but in this case, they do not include or indicate the importance of civil society.

The target variable of Model 3 is the democracy quality indicator. This indicator itself is an integrated index calculated on the basis of seven separate statistical indicators of the quality of democratic governance (World Happiness Report, 2020). The statistical quality of the model is high. As such, the values of this index are well related in the model to the indicators of society's well-being — wealth and quality of life, as well as social comfort. The NIT civil society indicator is also included in the model with a high statistical significance. In general, Model 3 reproduces the same substantive inferences about the principles of balance of interests of the state and civil society, as a basic determinant of the democratic vector of political development of Central and Eastern Europe, as Model 1.

3. Discussion

Thus, both indices quite effectively reflect the current understanding of the nature of political regimes in Central and Eastern Europe. In this study,

differences in indices were considered within one region, which narrowed the possibilities for determining the cross-cultural component in CSO activities, as defined, for example, in Kim and Jung (2021). Both CSOSI and NIT are suitable for this purpose, at least when it comes to comparing countries within one region without drastic cross-cultural differences. When it comes to diagnosing the status of civil society in countries where there is an assumption of the development of another socio-cultural model (Kessler, 2018), such a comparison based on the indices under consideration may be problematic.

However, it is not advisable to use these indices without analyzing the methodology and content of their indicators, as the analytical report Civil Society of Ukraine: Policy of Promotion and Involvement, Challenges and Transformations does (Yablonskyi *et al.*, 2019). The changes on the index scale for an individual country are not informative. The formation of classification models indicates the possibility of grouping and comparing countries within the group. However, the analysis with the construction of structural models of civil society, such as with vertical or horizontal systems of relations (Solioz, 2011), heteronomous or autonomous types of civil society (Riley and Fernández, 2014), is not possible.

The state of civil society is an assessment of democratic and authoritarian ways of governing the countries of the region. In the practices of authoritarian countries, one can find signs of underdeveloped or consistently suppressed civil society, which is almost not a factor in the political process in the country — Azerbaijan, Belarus, and signs of policy to fight the existing civil society — the Russian Federation. If we turn to the values of the CSOSI components, Azerbaijan is most characterized by strict legal conditions against civil society, unfavorable conditions for organizational and financial activities of civil society organizations.

For Russia and Belarus, given the general negative background of the activities of civil society institutions, along with the strict legal regime, such indicators as the public image of civil society institutions play a negative role. Until recently, there was a tendency to underestimate the level of authoritarianism in the Russian political system (Tandon and Brown, 2013), although this is reflected in the indexes. This points to the role of the media and state-organized propaganda as means of suppressing civic activism. Similarly, the results of the situational analysis indicate a greater degree of progress of civil society after Euromaidan in Ukraine (Krasynska and Martin, 2017; Lyasota, 2018a) than the indices show, and the importance of supporting civil society institutions for democratization in the region. This is also relevant to the Ukrainian experience (Korenke, 2017) analyzed in this study, and the findings of other democratizing societies, including those that do not belong to the region of Central and Eastern Europe (Kim and Jeong, 2017).

An analysis of the internal structure of CSOSI and NIT raises questions about their subjectivity and the influence of “general attitudes” in determining them. NIT is more effective. As noted above, the indicator of the status of civil society is one of the components of its structure. It is possible to construct statistically qualitative equations that link the electoral process well with the status of civil society and the status of local democratic government. This scheme is fully linked to theoretical and practical ideas about modern social democracy. It is appropriate to clarify the relationship between the assessment of the level of sustainability of civil society in terms of its individual institutions.

Thus, the connection of participation in trade unions with the level of perception of corruption revealed in statistical models (Zakaria, 2013) should be clarified through the materials of countries in the region where trade unions have a different nature —the experience of post-Soviet countries and Poland (Praszkier *et. al.*, 2017) can be seen here as contrasting. It can also be clarified through the materials of gender inclusion in the organization of civil society and gender equality (Ruxton and Van Der Gaag, 2013; Liasota, 2018b; Public organization information and analytical center “Public Space”, 2018). In this regard, it is important to assess the difference between the development of CSOs caused by the spread of the EU welfare state system to some countries in the region (Cook, 2015; North, 2006). In the authoritarian countries of the region, for example, in the Russian Federation, there is a tendency to establish and develop vertical links between civil society organizations involved in social work and political elites (Ljubownikow and Crotty, 2017), which is also a factor to be taken into account.

The analysis for the region of Central and Eastern Europe revealed interesting connections not only between the status of civil society and the state, but also in the set of factors that reflect the analytical triangular or quadrangular relations. People’s satisfaction with government is not a simple consequence of the economic situation — the relationship of social wealth and economic progress. The state of civil society also proves to be a factor in this system of relations, along with the characteristics of the quality of social relations and the existing socio-psychological peculiarities of the population.

Conclusions and recommendations

Thus, the availability of tools to assess the status and degree of development of civil society in its relations with the state is a necessary tool used in both scientific and political research, which can be observed in practice. Such indices make them not only a scientific but also a political

factor, which increases their relevance. Indeed, the use of common integrated civil society status indices based on expert surveys is relatively effective, as evidenced by the models built. The use of modern methods to improve the quality of the results obtained during the survey (rejection of extreme estimates, etc.) really makes them effective. The numerical values of the indices of the status and development of civil society obtained in this way can be used in statistical models.

However, the main problem of these indices is the method of subjective assessments, which is the basis of their methodology. The nature of these indices is largely a “black box”, which may be the ability of surveyed experts to identify the characteristic public attitudes. These indices may have little practical value and reflect banal provisions that are also obvious to society. It is important to create such integrated indicators of the status and development of civil society and its interaction with the state which would be based on objective measurable indicators. Accordingly, such indices can be expected to have better prognostic potential.

A positive balance of interests of the state and civil society as a basic determinant of the democratic vector of political development of the country can be ensured through a wide range of conditions. According to the literature review and analysis of the research materials, these conditions are different due to cross-cultural, institutional, historical and discursive differences, which can be observed even within a relatively homogeneous region, such as Central and Eastern Europe. Measuring the degree of their development requires the definition of a wider range of statistical indicators, which should be objective in nature. That is, they should be based on indicators that reflect the measurable changes in the process of interaction between the state and civil society in the diversity of aspects of this process. Coverage of various aspects of the interaction between the state and civil society, such as regional differences in the nature of civil society organizations, cross-cultural differences, gender equality, etc. are necessary.

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The restrictions of the freedom of information during the Covid-19 pandemic

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Abstract

The article is devoted to the study of the issues of restrictions on the freedom of information that has arisen under the impact of the novel coronavirus outbreak. Another goal of the paper is identifying ways to protect such rights or to indicate which amendments to the law might be of use. The research methodology is based on general and special scientific methods, in particular: analytical, comparative-legal, systemic, and structural. The structure of the work includes: the review of international and Ukrainian legislation related to the freedom of information; the possibilities of its restriction; possible ways to enabling safe and secure management of the freedom of information during the coronacrisis. An analysis of international experience was carried out, as well as aspects of the protection of civil liberties such as freedom of speech, the right of peaceful assembly, etc. Several problematic issues were identified. Although, the general results of the study can be interpreted as alarming trends in the field of human rights and civil liberties. Particularly, it is multiple violations of the freedom of information all around the world under quarantine restrictions.

Keywords: freedom of Information; freedom of Speech; Covid-19; Restrictions; Human Rights.

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Restricciones a la libertad de información durante la pandemia COVID-19

Resumen

El artículo está dedicado al estudio de los problemas de las restricciones a la libertad de información que han surgido bajo el impacto del brote del nuevo coronavirus. Otro objetivo del documento es identificar formas de proteger tales derechos o indicar qué enmiendas a la ley podrían ser útiles. La metodología de investigación se basa en métodos científicos generales y especiales, en particular: analítico, comparativo-legal, sistémico y estructural. La estructura del trabajo incluye: la revisión de la legislación internacional y ucraniana relacionada con la libertad de información; las posibilidades de su restricción; posibles formas de permitir una gestión segura de la libertad de información durante la coronacrisis. Se realizó un análisis de la experiencia internacional, así como aspectos de la protección de las libertades civiles como la libertad de expresión, el derecho de reunión pacífica, etc. Se identificaron varios temas problemáticos. Todo permite concluir que, sin embargo, los resultados generales del estudio pueden interpretarse como tendencias alarmantes en el campo de los derechos humanos y las libertades civiles. En particular, se trata de múltiples violaciones de la libertad de información en todo el mundo bajo restricciones de cuarentena.

Palabras clave: libertad de información; libertad de expresión; COVID-19; Restricciones; Derechos Humanos.

Introduction

The year 2020 has become a kind of litmus test for many humanistic concepts that have long been part of the national legislation of developed countries. One of them is the concept of human rights, which is rightly recognized as fundamental and the starting point for the formation of the legal order at both national and international levels.

Thus, during the pandemic in many areas of social life, there is a departure from the principle of inviolability of human rights. In some cases, such a deviation is dictated by the public interest, and in others, the public interest is only a cover for numerous violations. As an example, there are indicators according to which states with recent experience of authoritarian regime reign or which were moving towards the suppression of civil and human rights at the beginning of the pandemic have only intensified those trends of suppression under the influence of quarantine (Trein, 2020).

There is another side of a problem which occupies the cyberspace, the internet, and information/digital technologies. The studies completed by several scholars (Flaxman *et al.*, 2020), show that temporal restrictions may be of use to hold the spread of the virus, but it forces us to question oneself: how to balance human rights and the public demand for safety and health in such a situation? In this context, one particular study (Degeling *et al.*, 2020) shows that individuals begin to tend to neglect some of their own rights and civil liberties for the benefit of the public good, which manifests itself in the protection of public health. At the same time, with such a donation in the form of the fulfillment of a civil duty, albeit an indirectly beneficial one, the demand for strengthening the protection of personal data is increasing. However, the results of the study show that such an interpretation of the findings is relevant only in extreme situations such as the Covid-19 pandemic. In turn, it raises a question of confidentiality, privacy, and the right to secure personal data which are all human rights and civil liberties.

Additionally, there is a problem of the use of personal data during a pandemic (Ting *et al.*, 2020). Specifically, it is related to the ethical dimension of this issue (Taddeo, 2020). After all, it is about the balance of interests: how much of our personal freedoms are we willing to sacrifice in the name of protecting public health? Thus, studies show that under the influence of the coronavirus pandemics, trends in tracking and surveillance have only intensified and become even more sophisticated (Taddeo, 2020; Woodhams, 2021). In this regard, it is necessary to note four key aspects in the direction of which the situation is developing and which in one way or another pose a threat to the freedom of information, namely:

1. applications for Covid-19 Digital Health Certificates, 82% of which, as follows from the report (Woodhams, 2021), are services with an undeveloped privacy policy, and 41% of which can track the exact location of the user.
2. contact tracing apps, 19% of which have no privacy policy at all.
3. digital tracking measures.
4. physical (optical) tracking initiatives: 22 countries have used drones for that purpose, and Europe has introduced the most of such measures compared to other regions.

On the one hand, there is significant technological progress, but on the contrary and in the situation of panic and uncertainty these innovations entail new challenges for the freedom of information and related civil liberties, which is not only a legal but also an ethical dilemma (Morley *et al.*, 2020; Servick, 2020).

We can now see from this perspective that the freedom of information is significantly disturbed by the pandemics of Covid-19. Therefore, it is vital for us to investigate domestic and foreign legislation in order to find answers whether some restrictions to this kind of civil liberty are appropriate or not.

1. Methodology

Concerning the study, a certain methodology was used to carry out a thorough analysis of topical issues of restriction and protection of the freedom of information under quarantine.

To find the positive and negative aspects of the international experience, to compare them with the Ukrainian legislation, a comparative legal method was used. We used it in order to highlight what are the common and different characteristics of the legal norms of various countries, starting from Ukraine. The main international laws were also taken into account. Particular attention was paid to the norms regarding the freedom of information, hence the freedom of speech, the right to freely express oneself, as well as the components of the right to information such as the right to obtain, create and distribute it.

What is more, the dialectical method was used to analyze the causes of restrictions on civil liberties on the Internet. It is essential to note that in this aspect the development and trends before the pandemic were considered since they had their impact on the current situation serving as preconditions for what we can observe now, for example, when it comes to the strengthening of authoritarian regimes since such trends existed before the pandemic. This also applies to surveillance issues and problems with personal data storage and sharing. We considered these problems in their unity in time, and therefore in their development and change over time.

Further, the system-structural method was used to consider the whole set of international and national regulations and the relationship between them. The main point here was not to look at particular legal norm, problem, or category as separated, or isolated from others, hence seeking the interconnections between them.

Finally, it should be noted that the formal-legal method was used to find purely legal reasons for the above restrictions and the existing legal grounds for them.

2. Review of International and National Legislation in the Field of the Freedom of Information

One of the most important guarantees of the right to access the Internet is to ensure the freedom of information. The basic act that guarantees its observance is the Universal Declaration of Human Rights (1948). Article 19 proclaims the right of everyone to freedom of opinion and expression, which includes the freedom to seek, receive, and impart information and ideas by any means and regardless of frontiers. The need for and importance of respect of these civil liberties are further underlined by the fact that it is enshrined in the Preamble to the Human Rights Declaration as one of the core values to which humanity should strive. International Covenant on Civil and Political Rights (1967) in Art. 19 continues the idea of the previous international law and guarantees everyone the right to freely express their views. In addition to the general principles set out in the Universal Declaration, the International Covenant establishes how this freedom can be exercised – orally, in writing, through the press or artistic forms of expression, or in any other way of one's choice. No less significant is also Art. 10 of the Convention of Human Rights and Fundamental Freedoms (1950), which enshrines the right of everyone to freedom of expression. Unlike the previous two documents, the European Convention establishes an extremely important guarantee of freedom of information – non-interference by public authorities.

In regard of the Internet, special regional legislation of the Council of Europe has been developed, including the Declaration on Human Rights and the Rule of Law in the Information Society (2005), the Declaration on Internet Governance Principles (2011), the Declaration on Freedom of Communication on the Internet (2003) etc. Particularly, the Declaration of the Committee of Ministers of the Council of Europe “On Freedom of Communication on the Internet” adopted on May 28, 2003, establishes the obligation of the member states of the Council of Europe not to impose restrictions on the content of information posted on the Internet and to refrain from state control over information posted on the Internet, except for harmful data, for example, for children.

Ukrainian legislation has absorbed the key provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the European Convention on Human Rights. The Constitution of Ukraine (1996) in Art. 34 guarantees everyone the right to freedom of thought and speech, and the free expression of their views and beliefs, which can be considered as parts of the freedom of information as we can see that to impose certain restrictions censorship, on information posted on the Internet is almost excluded under this Article.

To specify the provisions set out in the Constitution in Art. 302 of the Civil Code of Ukraine (Verkhovna Rada of Ukraine, 2003) enshrines the right to information, which includes the right to free collection, storage, use, and dissemination of information. In addition, to achieve an optimal balance between the rights of this article, restrictions were also set, which will be discussed in the following sections.

Specific laws, such as the Law of Ukraine “On Access to Public Information” (Verkhovna Rada of Ukraine, 2011), the Law “On Telecommunications” (Verkhovna Rada of Ukraine, 2004) and the Law “On Information” (Verkhovna Rada of Ukraine, 1992) define the basic principles and principles of using the Internet, including in the aspect of receiving and disseminating information. Also, the Law on Telecommunications defines the concept of the Internet, according to which the Internet is a global information system of public access, which is logically connected to the global address space and is based on the Internet protocol defined by international standards.

To ensure the implementation of these provisions, a large number of bylaws are also set out. Thus, the Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Rules for Information Protection in Information, Telecommunication and Information-Telecommunication Systems” of March 29, 2006, No. 373 approved the basic principles of information protection, the need for protection of which is provided by law.

3. Possibilities of Restricting the Freedom of Information

The freedom of information is not absolute as it may be limited in particular cases provided by law and international standards. Most of all, they are about great dangers to national security, risks to public health, or the situation when the rights of other individuals may be violated by the publication of particular information. For example, International Covenant on Civil and Political Rights in Part 3 of Art. 19 determines the possibility of imposing restrictions on the right to free expression of one’s views if this is necessary to respect the rights and reputation of others or to protect state security, public order, health, or morals of the population. Accordingly, Art. 15 of the European Convention of Human Rights provides the possibility for States parties to derogate from the provisions of the Convention in the event of war or an emergency within the limits of the “urgency of the situation”. It is also provided that such measures do not conflict with other obligations of the State under international law.

An important condition for compliance with this Article is also to inform the Secretary-General of the Council of Europe of the restrictions taken and the reasons for such measures. At the same time, it is the prerogative of

the European Court of Human Rights to identify the criteria according to which all conditions are confirmed and, accordingly, the withdrawal of the state from its obligations under the Convention can be recognized as lawful. For example, in *Denmark, Norway, Sweden, and the Netherlands v. Greece* (1969), the European Court stated that, in order to comply with a condition of the public danger threatening the life of a nation (emergency) such a threat must be exceptional in the sense that ordinary measures permitted by the Convention to ensure public safety, health, and order are recognized as clearly insufficient. European Court for Human Rights developed following criteria to decide whether restrictive measures deployed by the State go beyond reasonable cause. Consequently, the following questions need answers (Handbook of Article 15 of the European Convention on Human Rights, 2016):

1. Was the existing national legislation sufficient to deal with the threat posed by the public danger (in our case, COVID-19 pandemics)?
2. Can the implemented measures be considered as a legitimate response to an emergency (COVID-19 pandemics)?
3. Is the need for the assignment being reconsidered?
4. Are the measures used for the purpose for which they were authorized?

Therefore, the court will need to filter the appeal through these criteria in order to determine if the restrictions imposed by the jurisdictional State were lawful and legitimate, that is, justified from the point of view of the European Convention on Human Rights.

As for the Constitution of Ukraine, Art. 34 stipulates that the right of everyone to freedom of thought and speech, to freely express their views and beliefs, the right to freely collect, store, use and disseminate information may be limited by law in certain cases. Such cases are in the interests of national security, territorial integrity, or public order to prevent riots or crimes, to protect the reputation or rights of others, to prevent the disclosure of information obtained in confidence, or to maintain the authority and impartiality of justice.

All the above conditions for the restriction of this right indicate that it is not absolute, and many scholars emphasize this in their work. Politansky (2016) speaks of the relativity of the right to information due to the existence of statutory possibilities for its restriction, necessary in a democratic society.

The Constitutional Court of Ukraine (2020) has the same opinion in the decision on the constitutional complaint of Pleskach (concerning the compliance of the Constitution of Ukraine (constitutionality) with the provisions of the second sentence of part four of Article 42 of the Law of Ukraine "On the Constitutional Court of Ukraine" (Verkhovna Rada of

Ukraine, 2017). The court that the legislator is obliged to introduce legal regulation that will optimally achieve a legitimate goal with minimal interference in the exercise of the right to information. Moreover, the court agreed that it is essential not to violate the substrate of such a right. It means that governmental response which is out of hand in comparison to the measures of minimal interference is unconstitutional or will be proclaimed as such by Constitutional Court of Ukraine in the future. For example, it can be internet blackouts, coronavirus cases stats manipulation, banning peaceful Covid-19 restrictions-compliant protests, banning freedom of speech, censorship, personal health information mismanagement, etc.

4. Restriction and Protection of Civil Rights on the Internet during the COVID-19 Pandemic

It is necessary to take into account how the concept of false information is regulated at the legislative level and what is the responsibility for its dissemination. As an example, we prefer to start from domestic legislation in Ukraine.

Ukraine's Law "On Information" in Art. 28 names as one of the offenses the abuse of the right to information, Art. 302 of the Civil Code of Ukraine indicates such an offense as the use and dissemination of information about the personal life of an individual without their consent. Numerous offenses in the field of violation of the right to information are contained in Art. 212-3 of the Code of Ukraine on Administrative Offenses (Verkhovna Rada of Ukraine, 1984). For example, restriction of access to information, if it is expressly prohibited by law. Art. 302 of the Civil Code of Ukraine establishes the obligation of a natural person who disseminates information to make sure of its authenticity unless such person disseminates information obtained from an official source with reference to it. Besides, in Art. 277 indicates the possibility of a natural person whose personal non-property rights have been violated as a result of the dissemination of unreliable information about him or his family members to demand refutation of this information. Accordingly, there is a provision in Ukraine's legislation for only civil liability for the dissemination of inaccurate information, and only if it violated the personal intangible rights of individuals (Judgment of the Civil Court of Cassation of the Supreme Court of 17 June 2020 in case No. 346/5700/17).

To clarify the concept of "unreliable information" we should refer to the Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of protection of dignity and honor of individuals, as well as the business reputation of individuals and legal entities" of February 27, 2009, No. 1. In particular, following paragraph 15, unreliable information

is considered unreliable or false, i.e., contains information about events and phenomena that did not exist at all or that existed, but information about them does not correspond to reality (incomplete or distorted). Kucheryavenko (2019) referred to the definition of “unreliable information” regarding the possibility to divide it onto fictional (information about events, phenomena, or facts that did not take place at all) and false information (the course of events is distorted).

According to Ishchenko (2020), currently, in Ukraine, the most acute problem is not censorship, but the dissemination of unreliable information. Citing many examples, the researcher points to the high level of misinformation and disorientation (intimidation along with reassurance) of the population about the coronavirus situation.

An example is insufficient information of the people in Novi Sanzhary, Ukraine, during the procedure of observation of Ukrainian and foreign passengers from Wuhan, China – the original epicenter of the Covid-19 pandemics (Shirokova, 2021). The scandal occurred on February 20th, 2020. Then, locals reacted violently and inadequately to the arrival of passengers from China for observation at the sanatorium with throwing stones at buses with evacuees, which, in addition to psychological trauma, could lead to severe physical injuries and other adverse consequences (Goncharova, 2020). The fact is that not enough has been done by the authorities, if not the opposite, in the situation in Novi Sanzhary (Zaichik, 2021; Shirokova, 2021).

On the contrary, it can be debated that at that time they did not have enough information about the ways of coronavirus spreading, and all media attention was focused on passengers arriving from Wuhan. It can be understood that it was pointless in some sense and in such a situation to communicate against the media and to assure villagers and the rest of the country of the complete safety and formal character of the observation measures. But the authorities had to do it properly anyways as it is their duty to communicate with the public in full effect in order to prevent panic (Isaacs *et al.*, 2020; Lawrence *et al.*, 2020). The question that should arise here is: how does this relate to the violation of a person's civil rights on the internet? The fact is that at that time of disturbance in Novi Sanzhary some fakes such as conspiracy theories of unknown origin were spreading on the local Viber network, which only increased the panic and tension among the locals (Zaichik, 2021; Shirokova, 2021).

While we still do not have confirmed data on who was dispersing the protest mood among the villagers at that time, the head of the Ukrainian Ministry of Culture and Information Policy made a statement with a hint that it could be Russian bot farms (Ukrinform, 2021). He also pointed out that his Ministry plans to open the platform for fact-checking the information from various sources to help citizens upgrade their digital well-being.

However, we do not currently have reliable data, which provides evidence and investigates on who were spreading panic among the locals. This shows that a thorough check of the information and proper communication with the public is needed in order to help to avoid any negative consequences and significantly reduce the wave of disinformation about Covid-19.

Besides, certain measures are needed to prevent restrictions on the right to freedom of expression and to protect the right to receive reliable information on the Internet at the state level. First, the existence of a large number of regulations related to information relations and information offenses causes certain difficulties for both ordinary people and lawyers. The way out of this situation may be to codify the legislation by creating an appropriate Code of Law, which would include the provisions of regulations, or by issuing certain information or recommendation letter by the Ministry of Information Policy of Ukraine, the Supreme Court, or another state body of certain information or recommendation letter indicating the procedure for applying existing regulations.

Secondly, if we turn to the experience of foreign countries in the fight against fakes, then, as an example, we can cite the Network Enforcement Act, adopted in Germany in 2017. It provides for the material responsibility of social networks for not removing inaccurate information or aggressive messages to which users complain. However, it is also obvious that such laws enshrine the idea of censoring the Internet, which is desirable to prevent in Ukraine in the future.

Additionally, it is vital to provide access to official information on the situation with Covid-19 on the internet to the entire population (Lawrence *et al.*, 2020). During a coronavirus pandemic, it is significant to inform the public about all possible measures to combat Covid-19, changes in legislation, and official statistics. At the same time, it is necessary to ensure that a person can choose the source from which he wants to obtain relevant information. In this regard, there is a necessity to protect the right of access to public information, which, for example, is a component of the personal right defined in Art. 34 of the Constitution of Ukraine.

Public information is information that is obtained as a result of the exercise of their functions by the subjects of power, or which is in the possession of such subjects or other administrators. Access to such information, following Art. 5 of the Law of Ukraine "On Access to Public Information" is provided either by systematic and prompt disclosure of information, including on official websites and a single state web portal of open data or by providing information at the request of the population (Nekit *et al.*, 2021).

Under Part 4 of Art. 15 of the above-mentioned Law, information on facts threatening the life, health and / or property of individuals, and on the

measures taken in this regard (directly related to information on Covid-19) is subject to immediate disclosure by administrators. However, according to the monitoring of the Office of the Commissioner for Human Rights, only 76% of public information managers publish on their official website's information on the administrative documents they have adopted to combat the spread of coronavirus disease. Action plans to combat the spread of coronavirus are properly published by only 50% of administrators, while information on contacts through which the public can obtain official information on the state of combating the spread of coronavirus is posted on official websites by 44% of administrators (Parliament Commissioner for Human Rights, 2020).

Such disappointing statistics indicate a direct restriction of the right of citizens to access public information, guaranteed by the Constitution and other legal acts. Currently, for non-disclosure of information, the mandatory disclosure of which is provided by the Law "On Access to Public Information", administrators are administratively liable under Art. 212-3 of the Code of Ukraine on Administrative Offenses.

However, given that the untimely disclosure of such information, especially during the implementation of new quarantine measures in connection with the coronavirus pandemic, can have serious consequences for human health and well-being, and cause non-compliance by the population, it is necessary to establish more strict administrative or disciplinary liability for official administrators, in particular for the systematic non-disclosure of such information. To accomplish this, it is recommended to create a special law, which prescribes persons to whom liability may be applied, and the mechanism and algorithms for holding accountability for concealing publicly important information about Covid-19 disease or for manipulating available information that is of public significance in the context of Covid-19.

An example is information related to state's medical purchases, the volume of available medicines, manipulations in the pharmaceutical market, artificial underestimation of the number of cases of Covid-19 infections, manipulation of statistics, etc. Accordingly, it may be helpful to raise fines and strengthen responsibility for manipulating the data, which in this special time should exceed the one under normal conditions. An alternative way to solve the problem is to amend the existing legislation on access to public information with tougher responsibility for concealing and manipulating information on Covid-19, which should be separately emphasized in amendments to the particular law. To accomplish this goal, these amendments can be temporary. For example, they can last until the expiration of the quarantine restrictions or have a prolonged duration. We recommend making such edits permanent, given the scale and historical significance of the Covid-19 challenges and the number of people affected

by the disease. In case of temporal effect of such amendments, their duration should be scripted in the final and transitional provisions of the law to which they are introduced.

Another problem is the compliance of quarantine measures with a right to peaceful assembly, which is scripted, for example, in Art. 315 of the Civil Code of Ukraine and prominent sources of international law such as Art. 20 of the Universal Declaration of Human Rights, Art. 21 of the International Covenant on Civil and Political Rights, and Art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Negligent and brutal actions of policing structures in this case only shows that it became common for authoritarian regimes like those in the Republic of Belarus and Russian Federation to use repressive law enforcement like as it were about punishing the protesters for not keeping the social distance as a Covid-19 precaution (Wesolowsky, 2021). Consequently, unlawful police brutality was used as an instrument of pressure on peaceful protesters, which also includes violation of the right to information when disabling internet access (so-called “blackouts”) before or during the protest (Auseyushkin and Roth, 2020; Bush, 2020). This issue should still be kept as a concern for other countries.

Such a personal non-property right, as the right to education, perhaps the largest among other rights, began to be exercised on the Internet precisely because of the quarantine measures imposed. In particular, the Letter of the Ministry of Education and Science of Ukraine “On the organization of the educational process in general secondary education during quarantine” of March 23, 2020, recommended that all general secondary education institutions organize distance learning using distance learning technologies.

The right to work as a personal non-property labor right also needed to be implemented on the Internet. Many workers have been transferred to telecommuting to minimize the risk of Covid-19 infection. According to Gallup, 62% of Americans now work from home, when before the pandemic the percentage of such workers was only 7% (Zojceska, 2020).

Ukraine is no exception. According to the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (Covid-19)” (2020), the spread of a pandemic in the order of the owner or his authorized body may be a condition of remote (home) work without the mandatory conclusion of an employment contract for such work.

The right to freedom of movement is guaranteed by Art. 33 of the Constitution of Ukraine and Art. 313 of the Civil Code of Ukraine. In many countries, including Ukraine, special mobile applications have been

introduced to monitor compliance with the self-isolation regime. The official state application “Action at home” was created to monitor compliance with the regime of self-isolation of persons crossing the state border of Ukraine at the time of the introduction of quarantine measures and chose the option of self-isolation at the place of residence (Cabinet of Ministers of Ukraine, 2020). During use, the system at various times sends a message confirming the location of the person by uploading a photo with the face. In addition, the system receives geolocation data of the person for verification with the geolocation of the place of residence. In case of non-compliance with the application requirement, the system sends a message to the National Police. Thus, we can talk about the restriction of the right to freedom of movement through official government online applications (Krusian *et al.*, 2021).

However, in this situation, this is not the main problem that arises when using such an application. Among other problems, there are:

- the presence of only one language – Ukrainian, which makes it impossible for people who do not speak Ukrainian to use it.
- a large number of bugs, due to which users simply could not upload photos in time, after which, even if the citizens observed self-isolation, the National Police officers issued fines.

Besides, for early termination of self-isolation, it is necessary to pass a coronavirus test. However, the Ministry of Health of Ukraine has independently selected laboratories that have the right to enter the relevant information into the system after the test, although the tests are done for money. Also, to these inconveniences, excessive bureaucracy and artificial barriers create the basis for corruption (Romanenko, 2020).

Thus, in addition to the restriction of the right to freedom of movement, the existence of other problems described above makes such a right quite unprotected in the online space. Therefore, it is debatable that the introduced measures were fully effective and compliant with the observance of civil liberties since their “side effects” in the form of shortcomings directly or indirectly encroached on a persons’ right to privacy and the convenience to dispose of personal time freely, without interruptions, and inconveniences, which are not of their responsibility. We are convinced that all of this will be the subject of judicial review in the future. Perhaps, some complex cases will reach the European Court of Human Rights (1969). However, we do not yet have enough scientific data on this matter, since the cases are under consideration at the moment and taking into account the current development of events. Consequently, the court practice on these issues has not yet been finally formed.

It should also be noted that on June 27, 2016, the UN Human Rights Council adopted a Resolution “On the promotion, protection, and realization of rights on the Internet”, which stressed that all rights that belong to people

offline should be protected online. Additionally, the leading role of the state in promoting this was taken into account, in particular through cooperation with civil society, the private sector, the technical and scientific community.

However, to fully protect all human rights that he has offline on the Internet, it is necessary to amend the existing legislation on the equalization of the rights of person's offline and online rights. Undoubtedly, there is also a need to refine the existing application "Action at home" for more comfortable use and the development of such a mechanism by which a person can independently choose any officially registered laboratory to test for coronavirus at a negotiated price.

Conclusions

The Covid-19 pandemic and the implemented quarantine measures have revealed the problems of restriction and protection of civil liberties, which have long hung over our societies.

The emergence of a large number of fake news about the coronavirus on the internet has led to two key problems. First, the problem is the very existence of so many fakes and, in most cases, the inability to prosecute those who intentionally distribute them, even in the presence of negative consequences. The solution to this problem can be the codification of existing legislation on information and information offenses into a single law or code, giving social networks the status of the media and establishing legal liability for disseminating inaccurate information, in case such actions cause harm.

Given the serious consequences that may result from the untimely disclosure of vital information about coronavirus, it is necessary to establish stricter administrative or disciplinary liability of public information managers, in particular, for systematic misrepresentation or non-disclosure of public information of high importance.

The development and implementation of the mobile application "Action at Home" not only limited the right of individuals to freedom of movement but also caused several related problems. Moreover, the use of the application is complicated by a large number of bugs and the lack of languages other than Ukrainian. The solution is to constantly improve the application, eliminate all bugs, and introduce a mechanism by which a person can independently choose a laboratory to test for coronavirus to prematurely end the self-isolation regime.

In addition, tracking and surveillance trends become alarming. Under the influence of the pandemic, authoritarian regimes do not hesitate to introduce more sophisticated restrictions under the pretext of observing

quarantine measures, which poses a threat to human rights all around the world as it can serve as a bad example even for developed democracies.

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Administrative Liability for Environmental Offences: A Comparative Study

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Abstract

The article addresses the basic concepts of administrative liability for environmental crimes based on international experience and practice through the investigative method of sociological analysis. Administrative sanctions that have a positive effect on the existing legislation of countries and those that have a positive effect only in certain regions were identified. It is argued that there are administrative and legal norms that do not have much influence and effectiveness in addressing environmental problems based on the structural and comparative research methods of the system. The issue of the consciousness of man and society in violation of environmental law is emphasized as a kind of administrative responsibility due to logical-semantic and formal-logical research methods. The key elements of the effectiveness of administrative responsibility in the field of environmental crimes are highlighted. It is concluded that the analysis of the implementation of environmental policy and its relationship with the practice of administrative responsibility for environmental crimes through the use of a dialectical research method ensures maximum efficiency in the identification of the topics of this study.

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Responsabilidad administrativa por delitos ambientales: un estudio comparative

Resumen

El artículo aborda los conceptos básicos de responsabilidad administrativa por delitos ambientales basados en la experiencia y práctica internacional a través del método de investigación del análisis sociológico. Se identificaron las sanciones administrativas que tienen un efecto positivo en la legislación vigente de los países y las que tienen un efecto positivo solo en determinadas regiones. Se sostiene que existen normas administrativas y legales que no tienen mucha influencia y efectividad en el abordaje de los problemas ambientales basándose en los métodos de investigación estructural y comparativa del sistema. Se enfatiza el tema de la conciencia del hombre y la sociedad en su conjunto en violación de la ley ambiental como una especie de responsabilidad administrativa debido a los métodos de investigación lógico-semántica y formal-lógica. Se destacan los elementos clave de la eficacia de la responsabilidad administrativa en el ámbito de los delitos ambientales. Se concluye que el análisis de la implementación de la política ambiental y su relación con la práctica de la responsabilidad administrativa por delitos ambientales mediante el uso de un método de investigación dialéctica asegura la máxima eficiencia en la identificación de los temas del presente estudio.

Palabras clave: Responsabilidad administrativa; infracción administrativa; ecología; delitos ambientales; protección del medio ambiente.

Introduction

Relevance of the research topic

Among the current issues worldwide there is a problem of rational use of natural resources and their reproduction, environmental protection, and environmental safety. Since future generations rely heavily on the solution of issues regarding the environmentally and anthropogenic living conditions of human beings and society, the conservation of the natural environment is important and multifarious.

The urgent need to address the problems of environmental protection, rational use of natural resources and environmental security calls for the effective measures, including legal ones. One of them can be the introduction of administrative liability for environmental offences. In fact, one of the underlying causes of environmental problems in Ukraine is the unsatisfactory control over compliance with environmental legislation and failure to ensure the inevitable liability for its violation. Therefore, the administrative leverage for violations of environmental legislation should be considered one of the legal factors aimed at ensuring the environmentally sustainable nature management and compliance with environmental law enforcement.

Environmental damage has been a major problem for decades. Legal systems have implemented a variety of legal instruments to prevent environmental damage, one of which is environmental liability. The accountability mechanism was likely to be first developed in the United States (Revesz and Stewart, 1995) but was increasingly used in EU member states in the 1980s, especially after contamination locations were identified in quite a few member states, predominantly soil contamination with orphaned sites, which often entails to huge expenditures for governments (and therefore puts a strain on taxpayers).

Currently, Ukraine is at the stage of developing the relevant regulations that would clearly impose liability, including administrative, for environmental safety violations. The driving mechanism of such changes is the European integration processes, the implementation of which requires revising and updating of Ukraine's environmental legislation, considering EU environmental standards for sustainable development, and preserving the environment for future generations.

Having ratified the Association Agreement with the European Union, at the present stage of development Ukraine worked out the strategic ways of economic, political, and legal development all the way through to a full membership in the EU. The radical reforms to follow and the positive results of their implementation are of particular importance for the successful solution of the of environmental protection issue, in the framework of which the state, national, regional, and global aspects are closely intertwined.

The object of the study is the public relations that developed in the process of enforcing the administrative liability for environmental offences.

The subject of the study is the environment and human health, for the violation of which liability may be imposed, administrative liability included.

The purpose of this study is a comprehensive analysis of the administrative leverage for environmental offences as exemplified by the best international practices. Having identified the main legal provisions

regulating the offences committed in the environmental sphere and for which administrative liability is applied, it will be possible to determine whether the dynamics of the environmental situation in these countries is improving with specific regulation of administrative liability for environmental offences.

In view of the above, the main tasks include:

- the scope of a person's and society's awareness of an environmental law violation as a kind of administrative liability.
- the analysis of the implementation scope of environmental policy and its interaction with the practice of administrative liability for environmental offences.
- determination of effectiveness level of laws and regulations on the implementation of administrative liability for environmental offences in foreign countries.
- the effectiveness of regulations on the application of administrative liability in the field of environmental offences.

1. Literature review

In the national legislation of the EU member states, the legal mechanisms of environmental liability were scattered. As such, those were concerned with certain categories of damage, however not properly specified. Consequently, the categories were not effective enough in protecting the environment and preventing damage to the environment.

As stipulated in the national legislation, preservation, protection and sustainable use of the environment are seen as a defining vector of European environmental policy. One of the instruments aimed at ensuring the above is environmental liability, the legal framework of which is defined by Directive 2004/35/EC of the European Parliament and of the Council "On environmental liability for the prevention and remedying of environmental damage" dated April 24, 2004 (hereinafter – Directive 2004/35/EC on environmental liability or Directive 2004/35/EC) (Verkhovna Rada of Ukraine, 2004).

The Association Agreement outlines Ukraine's commitment in the environmental field, in particular on enhancing cooperation between Ukraine and the EU on environmental issues with a view to its preservation, protection, improvement and reproduction. Ukraine has committed itself to gradual approximation of the national legislation to the requirements of directives and regulations (Verkhovna Rada of Ukraine, 2014).

At the international level, the issue of administrative liability is much spoken about. For example, the sources of French environmental law are quite diverse: international law (bilateral and multilateral agreements); European Union law (directives and regulations); Constitution (the Constitution of 1958) (Constitute., 2021), Environmental Charter) (Conseil Constitutionnel, n.d.); laws (mostly codified in the Environmental Code); regulations; decrees; and decisions (Martinet and Savin, 2021).

It is noteworthy that in the United States there is no general regime of environmental damage. Statutes, regulations, and common law can impose different types of liability, including administrative, civil and criminal. In their turn, courts set a precedent for liability in cases arising under various environmental laws. Presumed violators may be involved in administrative lawsuits, civil lawsuits or civil lawsuits. Moreover, only the government can initiate and prosecute a case in the court of law (Beveridge & Diamond PC, 2018).

Despite these starting points, it is not uncommon in many countries that the environmental responsibility has difficulty in achieving its goals. This is, on the one hand, partly due to the general difficulties for victims in using the accountability mechanism. In fact, the barriers to justice access can be high; damage to the environment can sometimes be widespread (as a result of which there cannot be a single victim who can sue); uncertainties over causation and delays may also contribute to difficulties in applying the accountability mechanism in addition to general difficulties in accessing justice (such as the high cost of the legal system). On the other hand, to crown it all turns out that especially when companies do harm to the environment, the liability mechanism often remains ineffective for the sole reason that companies do not de facto have to pay for the damage they have caused by their activity (European Parliament, 2020).

2. Methods and Materials

For a comprehensive analysis of examining the administrative liability for environmental offences, the activities of several countries in this area were analysed, namely: Britain, Australia, USA, Germany, and Ireland. These countries regulate administrative liability for environmental offences in quite different ways, which makes it possible to take a more specific approach to this issue.

However, despite the specific considerations of this study from the standpoint of these five countries, the experience of other countries was also scrutinized.

From this perspective, the legal framework of Canada on this issue was analysed, namely the Environmental Violations Administrative Monetary Penalties Act (EVAMPA) (Government of Canada, 2017), which defines the concept of a fair and efficient regime of administrative monetary penalties. AMP is a penalty intended to create a financial deterrent for non-compliance of certain legal requirements and to supplement existing enforcement measures that may be ineffective or available in any situation. The Regulations on Administrative Penalties for Environmental Violations (AMP Regulations) complement the AMP regime by establishing key details of this regime (Justice Law Website, 2017).

Further, particular attention should be paid to administrative liability for environmental offences in Latvia. A number of environmental issues and conformity to the current legislation were investigated (European Commission, 2019).

The present analysis was performed on the basis of official analytical data, so they fully correspond to the state of administrative enforcement in the field of environmental offences.

The study used the methods of sociological analysis, which contributed to the generalization of international practice of administrative sanctions for environmental offences, as well as the analysis of empirical information.

System-structural and comparative methods allowed to examine the administrative and legal principles of supervising the compliance with environmental legislation, issues of administrative and jurisdictional activity in the field of environmental protection, information, and analytical support as well as planning.

Logical-semantic and formal-logical methods were used in the study of the conceptual apparatus. Drawing on these methods, definitions are formulated within the research topic. The dialectical method was used in considering the studied problems and determining the main directions of developing the mechanism of environmental protection.

The study draws heavily on the scientific works of domestic and foreign scientists as a theoretical basis, relying on analytical data, statistics on administrative liability in general and in the field of ecology in particular.

3. Results

Administrative enforcement for environmental offences has become increasingly relevant. To understand the reasons, it is expedient to consider in more detail the international experience.

To compare the effectiveness of administrative liability for environmental offences and a detailed analysis of the application of certain sanctions in different countries, we present Table 1 for consideration of the sanctions.

Table 1: Comparative analysis of some types of administrative enforcement for environmental offences

Sanction	Description	Britain	Australia	USA	Germany	Ireland
Mandatory environmental audit	The regulator forces the company to audit its activities	+	+	+	+	+
Fixed administrative monetary penalties	Payment of the specified amount of money for the offender or compensation for the violation	+	+	+	+	–
Variable & discretionary administrative penalties	Payment of a variable amount should be determined at the discretion of the regulator for the discharge or compensate the offence.	–	–	–	–	–

Source: designed by the author, according to current legislation

The first sanction, namely mandatory environmental audit, applies in all the countries, but operates differently.

In particular, in the UK there is no general status for this condition, but it is a frequent condition for the issuance of various permits. Thus, this sanction is applied, although not a direct legal requirement (Coxall and Hardacre, 2020). The United States exercises this sanction instead of other fines or fines in general (GovInfo, 2018).

To that end, this sanction is most coordinated in Australia, Ireland, and Germany. However, it is in Germany, which is not only applied to the most extent, but also the most effective.

To get an insight which countries apply the first sanction to a greater extent, it is expedient to study Figure 1.

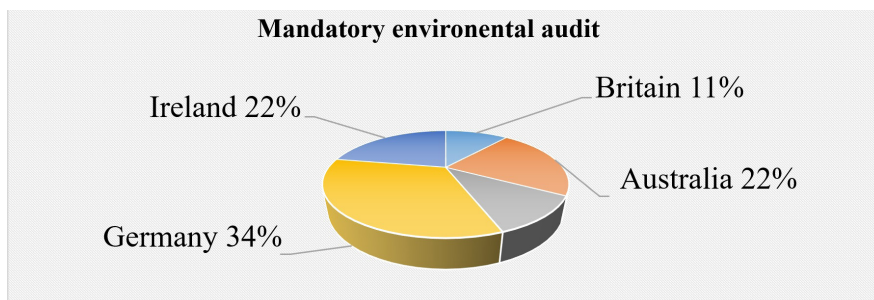


Figure 1.: Leverage of mandatory environmental audit

The second sanction, namely a fixed administrative monetary penalty is not enforced in all countries, which will further allow us to determine both the benefits and downsides of this sanction.

Drawing on the example of the UK, this sanction is used but normally only for an agreement with minor offences, i.e., it is not widely enforced. An unlimited fine may be imposed in the UK for an administrative offence of environmental legislation.

It is also worth noting that Australia, which also does not widely use this sanction, but rather enforces it in relation to exceeding the permissible limits set by law (Australian Federal Police, n.d.).

In the United States, this sanction is used only in permits that may provide for surcharges for exceeding the permissible. That said, only in occasional cases an administrative sanction in the form of a fine can be imposed.

This sanction works best in Germany, where it is successfully used in accordance with current legislation. An administrative fine for an environmental offence can amount EUR 50,000 (Elspaß and Feldmann, 2020).

When it comes to Ireland, there is no similar sanction in this country.

Thus, if we create a diagram for the application of the second sanction exemplified above, it is expedient to consider Figure 2.

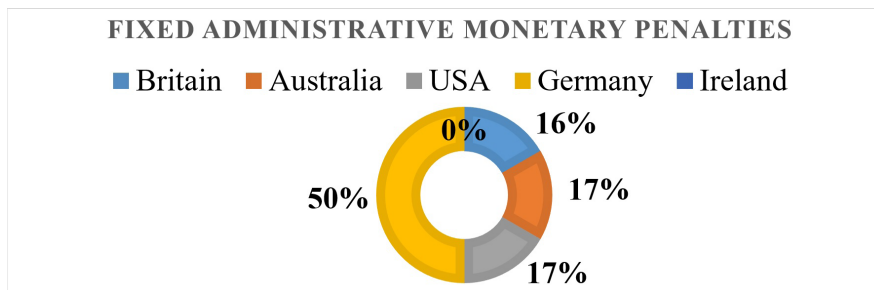


Figure 2: Leverage of a fixed administrative monetary penalties

However, there are sanctions that are applied very rarely, as exemplified by our third sanction, namely the variable administrative sanctions. It is not applied in the studied countries and there are no similar ones, but it is quite interesting because it provides for a variable payment, the amount of which must be determined at the discretion of the regulator for the category or to fully compensate for violations.

It is noteworthy that there are many administrative offences in the field of ecology, but the first two sanctions exemplify how countries can regulate their current legislation and how seriously they address administrative liability. To do this, we move to consider Figure 3.

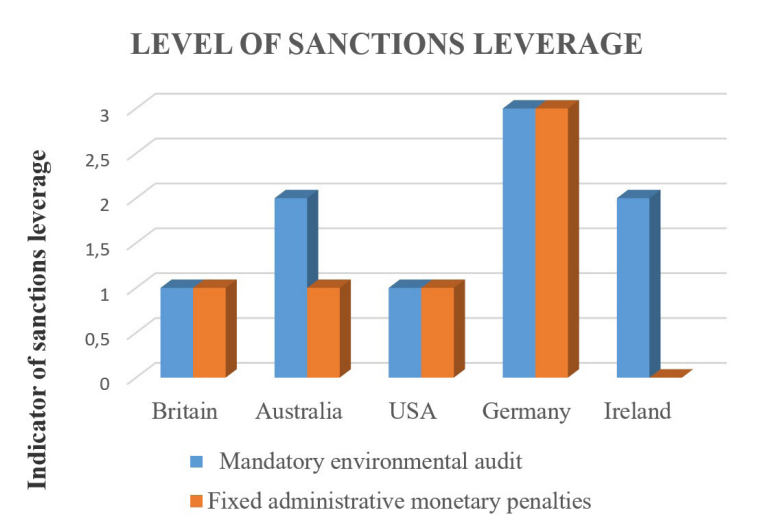


Figure 3: Comparative analysis of sanctions leverage

It is clear from the comparative analysis in the above diagram that Germany has the most regulation regarding administrative liability for environmental offences, while in Ireland and Australia it is not addressed to the fullest degree. Nevertheless, there are countries that are consistently straining after the development of administrative liability for environmental offences. Those include the United Kingdom and the United States.

Given the above, some particular studies on administrative liability for environmental offences should be summarized. With this in mind, some potential administrative sanctions are currently in place in Ireland for environmental violations, which include mandatory inspections, enforcement notices and environmental safety orders.

Apparently, Ireland's position on administrative sanctions is similar to that of the United Kingdom, i.e., non-compliance with the regulatory sector has led to significant reliance on strict liability offences. Moreover, Ireland (similar to the United Kingdom) has not yet developed and implemented a comprehensive administrative regime. However, the introduction of any new regime of administrative sanctions must take into account and address certain potential problems of the state in the field of ecology.

Environmental regulators in England rely heavily on administrative sanctions, especially those that are more informal. However, a key issue in the UK is the lack of a diversified administrative regime to achieve optimal regulation of administrative liability in accordance with the scope of delimitation of environmental aspects.

In Germany, administrative sanctions are widely used, which is why prosecutions and criminal proceedings play only a minor role in environmental protection. It should be noted that administrative sanctions were introduced to ensure consistency between large organizations and companies, as other types of liability rested only with the individual and not with the company. Administrative sanctions have been very effective in complying with environmental standards, mainly due to their flexibility and large-scale approach.

There is a common law system in Australia, and the Stevenson Harwood Report identified New South Wales (Stephenson Harwood, 2020) as the main study, as there is a well-established enforcement regime in that state. The report confirms that there is a very wide range of administrative sanctions in New South Wales. These sanctions were introduced in 1999, as it became clear that criminal law failed to adequately address the diverse nature of environmental violations and that flexibility required a wide range of sentencing options. In Australia, administrative sanctions have been proved to be highly effective.

In the United States there is a system of federal and state law. Various types of liability, including administrative, are established for violations of

environmental legislation. It should be noted that administrative sanctions are widely applied in the United States, but their effectiveness is ambivalent (Environmental Protection Agency, 2009).

Latvia should get into the limelight, where the public, in particular individuals and non-governmental organizations, are provided with very wide access to justice in environmental matters, ie the right to protect common interests. Everyone has the right to apply to the responsible administrative institution or to appeal to the administrative court for the environment without any other specific conditions. In other words, a complaint can be filed if a person believes that an administrative decision, actual action, or omission violates the law protecting the environment and nature or threatens to harm the environment. The right to file complaints and appeals solely for environmental reasons is the only exception allowed in administrative institutions or before the courts. In any other legal dispute, applicants must prove that their personal rights have been violated to be entitled to appeal or appeal to a court (Valsts valodas centrs, 2004).

In Canada, the policy framework for implementing the Environmental Monetary Sanctions Act, namely Chapter 4, clearly defines who may be subject to the AMP, what are the types of violations and what are the aggravating factors. It should be noted at once that the law not only defines the main criteria of the violated right, but also additional ones. For example, the type of violation, the basic level of violation and aggravating factors are considered to determine the punishment, and only then the amount of environmental damage is determined (Government of Canada, 2018).

In the Republic of Tatarstan, administrative liability in the field of environmental protection is regulated by the Code of administrative divisions of the Republic of Tatarstan, which in fact contains only one definition of an offence in this domain – destruction of rare and endangered animals or plants (Article 3.1 of the Administrative Violations Code of the Republic of Tatarstan) (Pravo Tech, 2006).

Thus, the conservation, protection and sustainable use of natural resources is a defining vector of European environmental policy. One of the tools aimed at ensuring it is environmental responsibility, and the legal framework thereof is defined by law. The purpose of regulations is to establish a framework of environmental liability to prevent and eliminate the consequences of environmental damage.

The principles on which the EU's environmental policy is based are enshrined in Article 191 of the Treaty on the Functioning of the European Union (EUR-Lex, 2012). In particular, part 2 states that the policy is based on the precautionary principle and the principles of the need to take precautionary measures, eliminate the consequences of environmental damage and the principle "the polluter pays". The legal mechanisms of

environmental liability were fragmented in the national legislation of the EU member states, also were related to certain categories of damage, were not properly specified, as a result they were not effective enough in protecting the environment and preventing environmental damage.

Thus, summarizing the international practice of applying administrative sanctions for environmental offences, we can identify the main directions of development of this type of liability in Ukraine.

The system of administrative enforcement for environmental offences in Ukraine comprises penalties determined by the Code of Ukraine on Administrative Offences, as well as those enshrined in other legislative documents. It should be noted that the most common type of administrative penalties for violating environmental legislation in Ukraine is a fine. The amount of the fine is determined within the sanctions of a specific article of the Code of Ukraine on Administrative Offences, taking into consideration the gravity of the offence, the identity of the offender, the degree of their guilt, property status, as well as the mitigating or aggravating circumstances.

According to Art. 24 of the Code of Administrative Offences of Ukraine, the following administrative penalties may be applied for committing administrative offences: 1) warnings, 2) fines, 3) penalty points; 4) paid sequestration of an object that has become an instrument of commission or a direct object of an administrative offence; 5) confiscation: an object that has become an instrument of commission or a direct object of an administrative offence; money received as a result of committing an administrative offence; 6) deprivation of a special right granted to a given citizen (right to drive vehicles, right to hunt); 7) community works; 8) corrective works; 9) administrative arrest; 10) arrest with detention on guard duty (Verkhovna Rada of Ukraine, 1984).

It is worth noting that administrative liability is an effective means of protecting the environment, its facilities and resources, as well as the citizens' lives and well-being. The advantages of this type of legal liability are primarily the focus on preventing and non-admission of significant damage to the environment and human life and health, as well as the prompt response to violations, which is especially important in the field of environmental protection.

That is why, in the case of an administrative offence in the field of environmental law, fines should be imposed, as they are the most effective way to sensibly address the problem. However, it should be emphasized that this issue should be clearly monitored by the authorized bodies and officials, who should, in accordance with their official duties, promptly respond to environmental offences. This will make it possible in the future to reduce the overall number of environmental violations.

4. Discussion

Having conducted research in the field of administrative liability for environmental offences, it should be noted that it is far from being unambiguous. Some countries prefer to apply administrative sanctions for this type of violation to a greater extent, and some countries consider them ineffective and, as a result, do not leverage comprehensive regulation of administrative offences, including in the field of environmental offences.

Examining the standpoints of foreign scholars, we can agree with the statement that the development of administrative liability for environmental offences constantly calls for changes in legislation, as the environmental situation worldwide is constantly changing.

Sharing the standpoint of the British scholars Michael Coxall and Elizabeth Gardakre, it should be noted that the legislation needs constant change, which greatly complicates the work of the legislator as a whole. However, this minimizes all negative processes and actions, including issues related to environmental safety, with regard to administrative responsibility and the environment.

Furthermore, the same position is held by German scientists Matthias Elschpas and Felix Feldman. Therefore, taking a closer look at the Ukrainian legislation, it is necessary to draw an analogy between the studied countries and develop only the most effective reforms of administrative legislation, in particular concerning environmental aspects.

To that end, Germany, the Netherlands, and a number of other countries where administrative sanctions are applied are the main enforcement tools for dealing with environmental violations.

Administrative sanctions are easier to impose than other types of liability, such as criminal (and therefore they are cheaper).

Overall, the administrative enforcement is the most effective one. According to the researchers, they need administrative sanctions for crimes that do not deserve an expensive criminal procedure, but still require some form of punishment. Without administrative options, a number of moderately serious cases may not be prosecuted.

It should be noted that the researchers did not examine the effectiveness of the different approaches in terms of whether companies improved environmental compliance or achieved better environmental protection. Besides, the researchers identify limitations effected by the lack of data. There were no reliable data on the number of violations and their consequences in many cases. Therefore, they recommend a harmonized system for collecting data on inspections, breaches, measures and sanctions across Europe (European Commission, 2016).

It is worth noting the fiscal year (FY) 2020 of the Environmental Protection Program (EPA), which achieved tremendous results for the public and the environment, increasing the environmental benefits of its cases despite the COVID-19 public health emergency. The Office of Enforcement (OECA) obtained these results by rapidly adapting and focusing resources on priority issues during a global pandemic.

“In fiscal year 2020, EPA of Enforcement and Compliance Assurance staff demonstrated extraordinary resilience, creativity, and perseverance as they continued to assure compliance with environmental laws,” stated Susan Bodin, Assistant Administrator for Enforcement and Compliance Assurance. “I am very proud of the work we accomplished this year” (Environmental Protection Agency, 2020).

This indicates that the issue of environmental safety is changing every year, and this is reflected in the changes that are taking place at the legislative level in each country as a whole.

Thus, administrative liability for environmental offences will pursue its growth in some countries to a larger and in some to a lesser extent. This is what serves as an exchange of international experience and the formation of so-called “supporters” of administrative responsibility, or its “opponents”.

The positive aspect of the situation lies in the fact that almost no environmental offence will go unpunished, even if the legislation on environmental protection changes and the legislation on administrative liability will not be able to make appropriate changes in due time.

However, there is a negative impact of general norms in the legislation: very often the executor of the law prefers to use general standards and does not try to prove that certain environmental offences are specific, which reduces the effectiveness of administrative responsibilities in the field of environmental protection (Selivanovskaya and Gilmudinova, 2018).

In light of the above, it should be noted that currently the liability for environmental offences attracts a lot of attention, largely owing to influential people who are really trying to help resolve certain environmental issues.

Youth climate activist Greta Thunberg, making recently accusations of environmental negligence, has urged almost all countries to pay attention to the legal regulation of environmental offences, including administrative (Kids Rights, 2019).

Conclusion

Currently, there is little doubt that administrative liability for environmental offences is important for each country and the entire society.

For that reason, this issue has always been attracting the scientific interest and the scholars are ready to probe deeper theoretically into this topic, as well as to provide their suggestions for improving legal regulations.

Drawing on the study of international experience, including countries such as the United Kingdom, Australia, USA, Germany and Australia, the functioning and operation of the administrative and delict jurisdiction provisions to hold individuals accountable for environmental offences.

Thus, having conducted a comprehensive analysis of administrative liability for environmental offences on the example of foreign countries, it should be noted that a serious approach to administrative norms, specifically their explicit consolidation in current legislation, allows to address certain issues in a more timely and efficient manner. Since civil and criminal liability involve the solution of a problem in a court of law, which most commonly is a fairly long process, the application of administrative sanctions to the forefront is the delivery of offence settlement with ultimate convenience for each party (i.e. just as for man or society, so for the environment and the state taken as a whole).

The findings obtained can be used in research, lawmaking, law enforcement and educational process. For example, research provides a basis for further theoretical research in the development of these problems, in the preparation of draft laws and other regulations aimed at enhancing administrative liability for environmental offences. Moreover, the results obtained in lawmaking are worth taking into account because as a result of the study, real insights were articulated to improve the legislation regarding the enforcement of administrative liability for environmental offences. Application in law enforcement activities is bound to provide an opportunity to enhance practices, increase the effectiveness of control and supervision measures for environmental protection. It should be noted that equally important is the use of the present study in the educational process, since the findings of the study can be used in law classes at educational institutions to master disciplines that involve the study of administrative liability for environmental offences.

Recommendations

Having conducted the study on the application of administrative liability for environmental offences, it is feasible to identify specific limits of the violated right or category of a misconduct, where the application of administrative sanctions could be relevant. One example is the assessment of certain types of offences where administrative sanctions are held appropriate (to which the ERM included: enforcement undertaking, warning letter, fixed penalties, variable and discretionary penalties, civil

penalties, monetary benefits penalty order, environmental services order, compensation order, the “name and shame” process, verbal warnings, etc.).

Limitations

The European Convention of Human Rights has several issues that can be raised by an individual or a corporation where civil administrative sanctions are imposed for violating the environmental law.

For instance, in terms of the monetary sanctions, smaller firms may not have the funds to pay a fixed penalty or fine. In his report, Professor Macrory refers to the “spill over” effect, which makes it possible for the company to pass on financial costs to third parties, such as shareholders, customers, employees and creditors, and to direct responsibility from the company’s management. Shareholders who subsequently experience losses caused by monetary penalties due to the devaluation of shares and the reduction of dividends, may potentially claim that their right to earn a livelihood has been infringed.

Fines can potentially be considered discriminatory and have an unequal impact on small businesses, which tend to be more vulnerable to monetary penalties.

The sheer possibility of relying on sanctions imposed on businesses can also be perceived as a representation of discriminatory and unfair practices against individual offenders, who apparently may have to face a far more severe punishment (e.g., imprisonment).

Finally, although a number of administrative sanctions are effective at deterrence, there are certain administrative sanctions, such as a publicity order, that may have consequences for a corporation’s reputation, for instance, if it has been imposed without good reason. In such case it can be challenged on the basis of the individual’s right to a good name.

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The Role of a Lawyer's Request as a Means of Legal Communication in the Field of Human Rights Advocacy

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Abstract

Judicial practice shows that the request of all lawyers is not answered, so the study of the role of the application is relevant. The objective of the research was to carry out a theoretical and legal analysis of the role of the lawyer's request in the field of the defense of human rights due to the peculiarities of its normative support as a means of legal communication. The following methods were used: direct observation; comparison method; analysis of the content of the documents governing the procedure for giving and receiving a response to a lawyer's request. Documents and normative-legal programs that regulate the order and peculiarities of the legal work of lawyers and their requests were identified. The article also examines the legal practice of using applications and analyzes the activity of lawyers to ensure the role of the application as an effective means of legal communication. It was found that, in Ukraine, the application practice itself remains an ineffective means of legal communication. However, the attorney does not always collect the information and documents necessary for the defense in due time.

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Keywords: legal practice; collection of documents and evidence; adequate response; legal communication; defense of human rights.

El papel de la solicitud de un abogado como medio de comunicación jurídica en el ámbito de la defensa de los derechos humanos

Resumen

La práctica judicial muestra que no se da respuesta a la solicitud de todos los abogados, por lo que el estudio del papel de la solicitud es pertinente. El objetivo de la investigación fue realizar un análisis teórico y jurídico del papel de la solicitud del abogado en el campo de la defensa de los derechos humanos debido a las peculiaridades de su soporte normativo como medio de comunicación jurídica. Se utilizaron los siguientes métodos: observación directa; método de comparación; análisis del contenido de los documentos que rigen el procedimiento para dar y recibir una respuesta a la solicitud de un abogado. Se identificaron documentos y programas normativo-legales que regulan el orden y las peculiaridades del trabajo legal de los abogados y sus solicitudes. El artículo también examina la práctica jurídica de utilizar las solicitudes y analiza la actividad de los abogados para garantizar el papel de la solicitud como un medio eficaz de comunicación jurídica. Se descubrió que, en Ucrania, la práctica de solicitud en sí misma sigue siendo un medio ineficaz de comunicación jurídica. Sin embargo, el abogado no siempre recopila la información y los documentos necesarios para la defensa a su debido tiempo.

Palabras Clave: práctica jurídica; recopilación de documentos y pruebas; respuesta adecuada; comunicación jurídica; defensa de los derechos humanos.

Introduction

Legal communication of human rights organisations is a type of activity, aimed at forming constructive cooperation to defend human and civil rights and freedoms (Pohosian, 2020). The lawyer's request ensures the flow and dissemination of regulatory and legal information and documents, aimed at human rights activities, between the lawyer and the authorities, local governments, enterprises, institutions, organizations, and physical parties. Lawyers' professional privileges include the right to a lawyer's request as the right to a special means of legal communication.

In human rights advocacy, lawyers have the right to use various means of communication with government agencies and municipal authorities, such as lawyers' requests, statements, complaints, petitions, and answers to them; information on the facts that can be used as evidence; other means of legal communication under the Law (Wolters Kluwer, 2020). Recently, however, Ukrainian lawyers have been confronted with difficulties in requesting for the documents and data that their clients need during the defence. A lawyer's request can usually be made electronically or in writing. However, due to the COVID-19 pandemic, lawyers often must work remotely, making it difficult to obtain a proper written response to a lawyer's request.

A study of court practice and comparison of legislation regarding advocacy activity in eight countries (Ukraine, the USA, the UK, the Republic of Kazakhstan, the Russian Federation, Italy, France) in general shows the effectiveness of the lawyer's request as a proper means of a lawyer's legal communication. In Ukraine, the number of violations of lawyers' professional privileges, including the right to information and the appeal rights, is increasing every year due to the failure to provide the necessary response to a lawyer's request. The court practice shows that the answer is given only to every fourth lawyer's request (Unified State Register of Court Decisions of Ukraine, n. d.).

The problem of lawyer's requests is the subjective assessment of the satisfactory form, reception and provision of responses to them and becomes the judicial matter (National Association of Lawyers of Ukraine and Council of Lawyers of Ukraine, 2020). However, in his professional activity, a lawyer must rely on the effectiveness of procedural rules and regulations, according to which his rights are exercised. Respect for the lawyers' professional privileges is an element of legal culture of society and the state (Boryak, 2021).

Thus, examining the role of the lawyer's request as a means of legal communication in the field of human rights advocacy is relevant.

1. Literature Review

COVID-19 crisis has stimulated the use of digital technologies that allow lawyers to work remotely, improve the efficiency, reduce the risk of COVID-19 disease, and achieve better results. However, it turned out that not all law firms are ready to work with electronic lawyer's requests. Thus, due to lack of technological knowledge or skills, 31% of the surveyed law firms are not ready to switch over to electronic document exchange, 43% of respondents have organizational, and 26% of respondents have financial difficulties in using new technologies (Wolters Kluwer, 2020).

In a judicial dispute, the parties rely on different types of evidence when providing the court with their claims or objections – they are allowed to provide any documents, videos, and other materials relevant to the case. Although the evidence is weighed by the court, it is important to gather it before the trial (Rothman, 2019). In this case, the lawyer acts as an assistant to the defence team in obtaining and further legal analysis of the evidence.

At the same time, the lawyer's request is the main and unique tool for practicing advocacy activity, which is implemented in the form of a written document, used to request the information, recorded during the activities of authorities, local governments, and physical parties (Verkhovna Rada of Ukraine, 2013a). By means of lawyer's requests, it is possible to obtain evidence and documents that were known or not to the trial participants after filing a lawsuit. However, the amount of information that a lawyer is allowed to collect is quite large, but there are certain limitations to prevent abuse of the judicial process (Brown & Fortunato, 2020). Even though a lawyer in his professional activity can apply to any country in the world, the general rules of evidence gathering, their use and evaluation are laid down exclusively by national procedural legislation (Garamvölgyi *et al.*, 2020).

Gathering of information and documents is a significant part of a lawyer's work, they are presented as evidence in court and are used during negotiations and in advisory work. Effective preparation of the trial is impossible without such documents and information, and it is the responsibility of the parties in civil and commercial proceedings to gather evidence (Layevskiy *et al.*, 2019). In this case, the basic principles of advocacy activity should be honesty, independence, confidentiality, and decency.

1.1. Aims

The purpose of the study is to conduct a theoretical and legal analysis of the role of the lawyer's request in the field of human rights advocacy due to the peculiarities of its legal and practical support as a means of legal communication.

In the furtherance of this goal it is necessary to solve a number of tasks: to explore the relevant national and international legal standards in the field of advocacy in the use of legal means of communication; to identify endemic problems in the implementation of lawyers' guarantees in the right to a lawyer's request in domestic legislation and in practical terms, as well as the causes of such problems; to identify and analyse the examples of problems in the process of seeking a proper response to a lawyer's request.

2. Methods

The input data for this study were the data, obtained from 60 official sources - academic papers and articles, generalizations of international sociological organizations. The main data of the study were obtained using three methods: direct observation, comparison method and analysis of the content of documents governing the procedure for providing and receiving a response to a lawyer's request in Ukraine and in other countries (the USA, the UK, the Republic of Kazakhstan, the Russian Federation, Italy, France).

Using the method of *direct observation*, it is necessary to identify normative legal documents and programs that regulate the procedure and peculiarities of the legal work of lawyers with lawyer's requests, to identify standard forms for submitting lawyer's requests, their review duration, and the practice of providing appropriate responses. Having analysed modern scientific research papers, we will also be able to find out or refute the need for further implementation and development of legislation and digital technologies to enable the submission of a lawyer's request in electronic form.

With the help of the *comparison method*, it is possible to establish how some countries in the world in their own way provide regulatory and practical implementation of the right to a lawyer's request and its guarantees.

When *analysing the content of various documents*, we are to examine the information posted on social networks, scientific journals and on news websites, which is related to the possibility of implementing a lawyer's request as a means of legal communication in human rights advocacy.

3. Results

At the national level, a lawyer's request is made exclusively in writing (not electronically), with the obligatory addition of documents confirming the lawyer's credentials. To receive a response to the request, the lawyer may be asked to reimburse the costs of copying or printing physical documents, but electronic documents must be provided to the lawyer free of charge.

When submitting a lawyer's request, a lawyer should not only state that the information is necessary for him within his legal activity, but also confirm his credentials by means of a copy of the warrant or procuratory of the body (institution), authorized by law to provide free legal aid, stating that he/she needs this information for the protection of a specific client in a specific court case. At the same time, the amount of personal data that can be provided to a lawyer upon such a request is much larger than can be provided in accordance with the Law of Ukraine "On Access to Public

Information” (Oleksiyuk, 2020). In addition, the information request is submitted only to legal entities (Verkhovna Rada of Ukraine, 2011), while the scope of persons to whom a lawyer's request can be submitted is much wider, they include public authorities; local governments, their officers, and public individuals; enterprises; institutions; organizations; public associations; physical parties (with their consent).

In their turn, the authorities and individuals who have received a lawyer's request must respond to it within five to twenty working days, depending on the complexity of the database search. Exceptions for the refusal to provide information to a lawyer's request is only the information that has limitations (Unified State Register of Court Decisions of Ukraine, n. d.). There are legal grounds not to provide information to a lawyer's request, for example, requests for confidential, private, and restricted information (Verkhovna Rada of Ukraine, 1992).

However, in case of unlawful refusal or providing misinformation response to the lawyer's request, the perpetrators may be fined in accordance with Article 212-3 of the Code of Ukraine on Administrative Offenses. The administrative protocol under this article may be drawn up by the Chairman or the authorized person of the relevant regional bar council, to which the lawyer should apply (Verkhovna Rada of Ukraine, 1984). However, this article does not provide for repetition.

A lawyer's request cannot relate to counselling and interpretation of the provisions of legal documents (National Association of Lawyers of Ukraine and Council of Lawyers of Ukraine, 2020), and the refusal to answer should be distinguished from the inability to draw conclusions on the questions, asked by the lawyer.

Domestic legislation does not include the commitment to provide the lawyers with restricted, confidential, secret, and official information (for example, information containing medical secrecy, banking information, materials of operational or investigative activities, intelligence operations etc.). This deprives the lawyer of the opportunity to obtain and use such information in the preparation of the case, which reduces the effectiveness of legal assistance and violates the principle of adversarial proceedings and equality of arms between the defence and the prosecution, restricts the right of individuals to effective judicial assistance and right to a fair trial. The causes of such problems are the lack of a legislative possibility for lawyers to obtain limited information; ineffective mechanism of responsibility; unwillingness of individuals and organizations to provide information at the request of lawyers due to misunderstanding of the nature and importance of advocacy for the protection of rights and freedoms or their neglect (Human Rights House Network, 2015) . While a lawyer's request is often answered within the time limit set by criminal procedural law, prosecutors and the judiciary may seek a response immediately or much earlier than

the lawyers, which puts the latter at a disadvantage to the prosecution (Verkhovna Rada of Ukraine, 2013b).

In accordance with the legal ethics, a lawyer is obliged to use his knowledge and professional skills in his professional activity to properly protect and represent the rights and legally protected interests of individuals and legal entities, complying with current legislation of Ukraine, promote the establishment and practical implementation of principles of legality and rule of law (Congress of Lawyers of Ukraine, 2017).

Guarantees of advocacy activity are set out in the United Nations (UN) Basic Principles on the Role of Lawyers, which stipulate that member governments should ensure lawyers the possibility to exercise their professional responsibilities conveniently, which requires the authorities to provide lawyers with early access to the necessary information, files and documents at their disposal or under their control, so that lawyers would have the opportunity to provide effective legal assistance (International Commission of Jurists, 2020). In addition, it is the responsibility of the authorities to provide a lawyer with access to information, documents, and case materials in a timely manner (United Nations' Office of the High Commissioner for Human Rights, 1990). The role of lawyers should be respected and considered by judges, prosecutors, all types of authorities, society as a whole and governments within the limits of domestic legislation and practice.

However, intentional abuse of the right to a lawyer's request may be interpreted as a violation of the Model Rules of Professional Conduct, for which the lawyer may be subject to a disciplinary sanction (Mamchenko, 2021). It is also inadmissible to "sell" a lawyer's request (its transfer to a principal for money so that the latter could use it at sole discretion) and to use the lawyer's request for personal purposes (Makarov, 2020).

In the United States, lawyers may also collect data on persons or information that may serve as evidence, but there are special private services that seek the necessary information instead of lawyers. So, databases are of business interest to large companies that exist solely to simplify and provide information to lawyers, as searching and collecting data is painstaking and hard work (Taylor, 2020). In addition, evidence gathering only in favour of the client may jeopardize the lawyer's ethical responsibilities, as a lawyer can be the only person who knows where the evidence came from. As a result, the lawyer will cease to be a defence attorney and move to the "category of witnesses", so the best option is to conduct an objective collection of evidence in the case or to entrust such work to third parties (Technology Safety, 2018). At the same time, lawyers on the side of the disputing party may submit requests for pre-trial discovery of evidence (Civil Law Self-Help Center, n. d.), and the time and method of documents' delivery should not be calculated in such a way as to disadvantage or embarrass the party

receiving the documents (United States District Court of Northern District of California, n. d.). The parties are limited to the number of requests of each type on the set form: 30 requests for access, 30 requests in the form of a survey and 30 requests for the production and discovery of documents. Similar requests may also be made to third parties, who must respond within 14 days (Law Office of Aaron D. Bundy, n. d.). In some states, a lawyer's request is elevated to the status of a judge's request, and ignoring it involves various types of liability, including criminal liability (Dergunova, 2017).

As information management systems simply do not keep up with progress, computers, e-mail, mobile technology, collaboration on the Internet have changed the way lawyers work. Thus, during 2015, lawyers on average created and received more than 70 documents daily or approximately 26,000 documents per year. These include e-mails and document files, e-mail offers, appointments with clients and opponents, etc. In the period from 2013 to 2015, on average, a lawyer processed only 18,000 documents per year. Some of us still remember the 80's - the world of paper, when the lawyers processed about 80 documents a week or about 16 documents every day. That's about 4,000 letters and contracts, letterheads and notes about customers' phone calls every year (Meta Jure, 2016). However, this does not mean that the lawyers should retreat and reduce the pace of digitalization in the organization of advocacy activity. On the contrary, lawyers need to demonstrate a high level of professionalism and willingness to handle e- lawyer's requests (Makarov, 2019). A survey of 700 lawyers from the United States and nine European countries (the UK, Germany, the Netherlands, Italy, France, Spain, Poland, Belgium, and Hungary) provided an assessment of reliability and sustainability of the legal sector in the future. Thus, 60% of the surveyed law firms plan to increase investment in digital technologies (Rothman, 2019).

In the Netherlands, information technology is already widely used in the formation of relevant databases and in obtaining information from them. Thus, advocacy is provided through the participation in the case not only of a lawyer, but also of a representative, whose letter of attorney is contained in the relevant register and can be provided in electronic format (Ministry of Justice of the Netherlands, 2019).

Generalized information on the international practice of normative exercise of right to the lawyer's request and its guarantees in eight countries (Great Britain, Italy, the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation, the USA, Ukraine, France) is given in Table 1.

Table 1. International practice of normative and practical exercise of right to the lawyer's request (author's development)

Country	The set form of the lawyer's request	Request type	Limit on the number of requests submitted	Key response time (days)	Additional response time (days)	Consequences of failure to provide a proper response to a request	Chances for answers, %
United Kingdom	Yes	Written Electronic	Yes	30**	0	The loss of the case.	90
Italy	No	Written Electronic	No	15	***	Lawsuit	90
Republic of Belarus	No	Written Electronic	No	15	30	No consequences	
Republic of Kazakhstan		Written Electronic	No	10	0	Money penalty	
Russian Federation	Yes	Written Electronic	No	30	30	Money penalty	60
USA	Yes	Written Electronic	Yes	30**	0	The loss of the case. Criminal liability.	90
Ukraine	Yes	Written	No	5	20	Money penalty	20
France	Yes	Written Electronic	No	15	30	Lawsuit	75
Note: * - Except for discovery of notarial documents. ** - deadlines are set only during the judicial inquiry. *** - corresponds to the complexity of the request.							

Source: Adygezalova and Kovaleva (2020), Avvocato Facile (2020; n.d); Demidov (2018); Domaine Legale (n. d.), Les Echos Solutions (2016), Ministry of Justice of the Republic of Kazakhstan (2018); Ministry of Justice of the Russian Federation (2016); Ministry of Justice of the UK (2020); Nazarbaev (2018); Nikonov and Hodzhaeva (2016), Ukrainian National Bar Association (UNBA) (2021).

From the table in Ukraine, in contrast to the United States, Britain and Italy, a lot of lawyer's requests are made in practice, but only some of them are answered, because officials know how not to answer or answer without providing the information, necessary for advocacy in court (Pysarenko, 2016). Given the difficulties that lawyers face in obtaining evidence, it becomes problematic to prove these circumstances in court. It turns out that in relation to the prosecution, which has much broader powers to obtain evidence, the defence is not acting on an equal footing (Hromko, 2020).

In the period from 2016 to 2020, for unlawful refusal to provide information, late, or incomplete provision of information, provision of misrepresenting information in response to a lawyer's request, the Unified State Register of Judicial Decisions (n. d.) contains approximately 1,500 decisions of the first-instance courts. On average, only in every third case the court established the body of the offence, among which in 33% of cases 160 people were fined, in 27% a verbal warning was given and in 40% of cases the lawsuit was closed due to expiration of the term of bringing to responsibility. Figure 1 schematically shows the quantitative results of the hearing of administrative violation cases under Part 5 of Article 212-3 of the Code of Ukraine on Administrative Offenses.

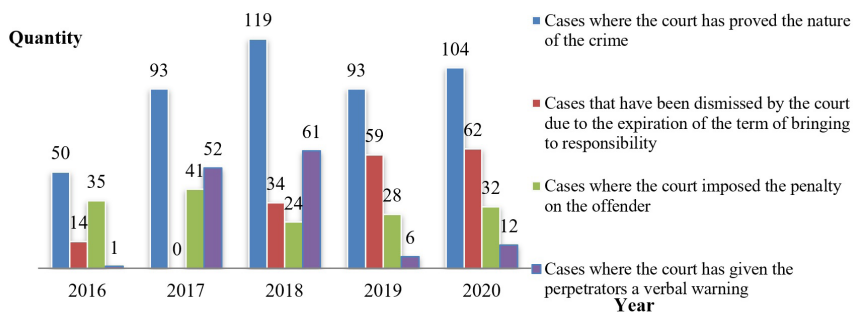


Figure 1: Quantitative results of the hearing of administrative violation cases under Part 5 of Article 212-3 of the Code of Ukraine on Administrative Offenses (author's development).

However, it turned out that a more accessible way of restoration of violated right of lawyers, who did not receive a response to a lawyer's request was a civil or administrative lawsuit to oblige them to take action, namely, to undertake a substantive review of the lawyer's request and provide a fuller answer. Thus, during 2019-2020, there was the increase in the activities of lawyers in ensuring the role of the lawyer's request as an effective means of legal communication by discovery of information on the ignored lawyer's requests. Figure 2 schematically shows quantitative results of civil and administrative cases where the court has obliged to provide a lawyer with a complete response.

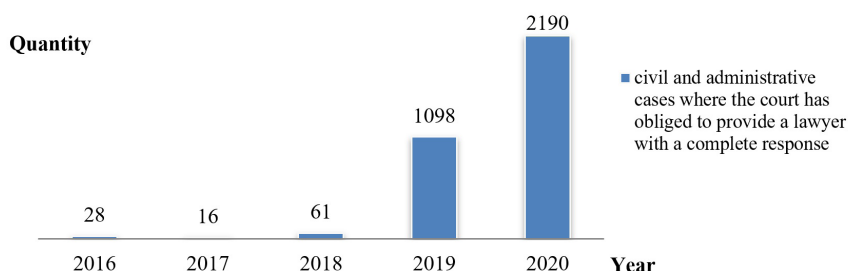


Figure 2: Quantitative results of hearing of cases on adjudication of illegal actions or inactivity of governing institutions or local self-government bodies on failure to provide complete or necessary response to a lawyer's request for the period of 2016-2020 (author's development).

However, the diplomatic missions of most CIS countries always respond to lawyer's requests, although the diplomatic missions of European countries ignore requests, addressed to them. Thus, even despite the contentious political relationship, the Embassy of Ukraine in Russia always responds citizen appeals, while the Embassies of Switzerland and Italy did not respond to a request for the reasons for banning entry to Switzerland of a Russian citizen who has a money deposit in a Swiss bank (Sodikov, 2018).

In the Republic of Kazakhstan, failure to respond to a lawyer's request is treated as resistance to a lawyer's lawful activity, and according to the results of court proceedings, most administrative cases of this category end in bringing offenders to administrative responsibility. During 2020, according to the results of the trial, 97% of the perpetrators were fined (Sizintsev, 2021).

Regarding the deadlines for the submission of a respond to a lawyer's request, it should be noted that not all questions in lawyer's requests can be easily answered, as the law is extremely complex. If the answers were quick or easy, then there would be no need for lawyers and courts. In other words, there is no such notion as a "quick question" in the legal sector. This approach to communicating with a lawyer can be unpleasant for both the client and the lawyer (Robichaud, 2020).

In addition, issues related to the ownership of documents are as common as the proper collection of fees from the client for photocopying. Lawyers are usually copyrighted for the results of their activities, and the client's documents are only his/her property. Exceptions are cases where the agreement with the lawyer provides that the copyright to the product

of the activity reverts to the client. At the same time, the ownership of documents, obtained through lawyer's requests, is not regulated by law or the lawyer's code of professional ethics. Lawyers may use documents they have prepared for other clients as precedents or templates without disclosing the client's confidential information. Therefore, every law firm must develop its own policy on the organization, storage, and disposal of clients' documents, otherwise during the relationship between the lawyer and the client it is necessary to execute the agreement on the storage and disposal of documents and property relevant to the case (Law Society of British Columbia, 2017). In addition, a lawyer may keep the client's documents as collateral for unpaid legal assistance (Law Society UK, 2020).

4. Discussion

A lawyer's request, provided it is properly executed, can be a very effective tool for obtaining the necessary information. To avoid administrative liability, it is better to provide an adequate response to a request than to give a formal fudge or ignore it (Krenets, 2018). However, a comparison of international experience shows that shortening the deadlines governing the response to a lawyer's request has the opposite effect on the quality and completeness of the answers to lawyer's requests, as not all questions in a lawyer's request can be easily answered. Besides, without adequate administrative and criminal liability, it is difficult to receive a proper response to a lawyer's request.

The problem of the effectiveness of a lawyer's request in obtaining information and evidence concerns not only lawyers but also courts, as they are interested in ensuring that, for example, in civil lawsuits, the claim papers are prepared as fully as possible and submitted to the court almost ready for the trial, so that the judge would not waste time on discovery of evidence at the request of the parties. Thus, the article provides the practical effectiveness of lawyer's requests, provided in electronic and written form. It is unacceptable to use a lawyer's request for personal purposes or to abuse this right. The client's documents obtained during the delivery of legal services, including in response to a lawyer's request, are the customer owned property. In addition, it has been established that at the national level, a lawyer's request can be an effective tool if a lawyer is willing to defend his or her interests in court in the future.

The advantages of a lawyer's request are: a limited and short period of consideration of the request and provision of information and documents; it belongs to the category of requests with special status - some countries provide for liability for failure to provide response, for giving late or incomplete response to the request (Ukraine, the USA, the UK, the Republic

of Kazakhstan, the Russian Federation, Italy, France) or it is possible to lose the case in court (the UK, the USA). Criminal liability, provided by law in the United States, forces the addressees to respond to a lawyer's request in any case. It is paradoxical that in Ukraine the legislation sets the shortest basic term for providing an answer in five days, but the chances of getting a proper answer are the smallest and are 20%.

In fact, initiation of a procedure for accountability for the crimes at the national level through the mechanism of appealing to the Bar Council is ineffective. It would be expedient to provide an opportunity for the lawyers with more than four years of experience, to draw up protocols under Part 5 of Article 212-3 of the Code of Ukraine on Administrative Offenses and to recommit them to the court, thereby relieving the regional bar councils (Kachura, 2020).

Thus, a lawyer's request can be an effective tool if a lawyer is willing to defend his or her interests in court in the future. The law sets out specific requirements for a lawyer's request, but the reasons for refusing to provide information to it may be unexpected: seemingly confidential information, impossibility to provide original certificates, the wrong address (Yasinskaya, 2020) or the wrong recipient. At the same time, lawyers do not make active use of the right to a lawyer's request (United States District Court of Northern District of California, n. d.). Thus, during 2019, refusals to respond to a lawyer's request were appealed to a court only in 24.3% of cases in the Russian Federation, and in 23.5% of cases in Ukraine (UNBA, 2019).

Conclusions

In human rights advocacy, lawyers have the right to use various means of communication with government agencies and municipal authorities, the main of which is the lawyer's request. At the national level, the lawyer's request itself continues to be an ineffective means of legal communication. A lawyer does not always collect the information and documents required for defence in a timely manner. Thus, despite the legal regulations that give much power to a lawyer's request, lawyers' requests are often ignored by employees of government agencies and municipal bodies, who in fact provide an adequate response to every fifth request only. However, it is possible to request by judicial means the necessary and complete information that was previously required in the lawyer's request. In addition, shortening the deadlines governing the response to a lawyer's request has the opposite effect on the quality and completeness of the answers, as not all questions in lawyer's requests can be easily answered.

Recommendations to the lawyers aimed at ensuring the role of the lawyer's request as a means of legal communication: it is necessary to mention in the request the responsibility for unlawful refusal to provide information, late or incomplete provision of information, providing untrue information in response to a lawyer's request; comply with the requirements for writing a lawyer's request and attach the necessary documents; to seek proper delivery and registration in the office of the addressee to whom the lawyer's request is directed with the reclamation of the appropriate receipt acknowledgements or documents; to make a request only for information that has no restriction on access; to give a proper answer to a lawyer's request; not to use a lawyer's request for personal purposes and not to abuse this right; in case of illegal refusal to provide information at the request of a lawyer, untimely or incomplete provision of information, provision of irrelevant information, to immediately to prosecute the perpetrators, with a simultaneous obligation to provide an appropriate response; the information and documents obtained by lawyers as a result of a lawyer's request may be used by lawyers as precedents or templates without disclosing the client's confidential information.

The state and society must respect the lawyers' professional rights and privileges. In addition, ignoring lawyers' requests by international diplomatic missions can also exact a toll on legal communication.

Moreover, amidst the COVID-19 pandemic, the governments' strategic direction should be legislative optimization and digitalization of advocacy activity. Digitization of personal details databases may provide better technological opportunities for government agencies and organs of local self-government, in the process of analysis and selection of data at the lawyer's request. However, at the national level, the law does not yet provide for the possibility of submitting a lawyer's request electronically.

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Features of Interrogation of Minor Victims in the Pre-Trial Investigation

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Abstract

Comprehensive protection of minors is one of the priority areas of criminal law policy. The pre-trial investigation, and their interrogation as its part, occupies a special place in the process of protection of minors and restoration of their violated rights. The interrogation of minors is a special procedure with clearly defined requirements. The aim of the study was to identify gaps in the regulation of interrogation of minors and suggest ways to address them. The methods used: system approach; descriptive statistics; comparison and juxtaposition; descriptive analysis; pragmatic approach; prognostication. The tactics of interrogation of a minor victim of a crime are legally defined in the national criminal procedural legislation of the vast majority of countries. The principles, rules, main measures, and purpose of interrogation of this category of victims in the pre-trial investigation are enshrined in the provisions of international regulations. These rules are based on the principle of child-friendly justice. But the practical conduct of the interrogation has several gaps, so it is necessary to clarify the rules of international and national regulations on certain provisions.

Keywords: Interrogation of minors; interrogation tactics; minor victim; pre-trial investigation; international legislation on minors.

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Características del Interrogatorio de Víctimas Menores en la Investigación Previa al Juicio

Resumen

La protección integral de los menores es una de las áreas prioritarias de la política penal. La investigación previa al juicio, y su interrogatorio como parte, ocupa un lugar especial en el proceso de protección de los menores y restitución de sus derechos vulnerados. El interrogatorio de menores es un procedimiento especial con requisitos claramente definidos. El objetivo del estudio fue identificar lagunas en la regulación del interrogatorio de menores y sugerir formas de abordarlas. Los métodos utilizados fueron: enfoque de sistema; estadísticas descriptivas; comparación y yuxtaposición; análisis descriptivo; enfoque pragmático; pronóstico. Las tácticas de interrogatorio de un menor víctima de un delito están legalmente definidas en la legislación procesal penal nacional de la gran mayoría de países. Los principios, normas, principales medidas y finalidad del interrogatorio de esta categoría de víctimas en la instrucción preliminar están consagrados en las disposiciones de la normativa internacional. Estas reglas se basan en el principio de justicia adaptada a los niños. Pero la conducta práctica del interrogatorio tiene una serie de lagunas, por lo que es necesario aclarar las reglas de las regulaciones internacionales y nacionales sobre ciertas disposiciones.

Palabras clave: Interrogatorio de menores; tácticas de interrogatorio; víctima menor; averiguación previa al juicio; legislación internacional sobre menores.

Introduction

Minors are a special category of the population, which has its own characteristics in physiological, psychological, and social spheres. That is why minors (children) are considered to be the most vulnerable social group (United Nations Office on Drugs and Crime (UNDOC), 2015). Their vulnerability is due to the excessive susceptibility of minors to suggestion, combined with their inherent naivety and immature thought processes (Krzewinski, 2002), which ultimately manifests itself in their behaviour and in their perception of the environment.

Given that minors are immature in psychological, mental, physiological, and social spheres, as well as their immaturity and inability to fully adequately assess the situation (Thompson, 2021), one of the main tasks of the state is to protect and ensure the rights of minors for their normal physical, psychological, mental and social development. Comprehensive protection of minors is one of the priority areas of criminal law policy of

each individual state and the world community (Lopez, 2021). For this purpose, the state uses all possible means to protect minors from criminal encroachment. But unfortunately, such protection is not always effective and the number of crimes against minors is not decreasing. After all, the situation in the world is such that the surge in crime in general entails an increased delinquency against minors.

To restore the rights of minors violated by crime, the state uses certain mechanisms, one of which is to prosecute and punish the perpetrators. This is possible only through a lawful, fair and impartial pre-trial investigation and trial of a criminal proceeding involving a minor.

A pre-trial investigation, which involves interrogation of some participants in criminal proceedings, including victims, occupies a special place in restoring the violated rights of a minor. The information obtained during the pre-trial investigation during the interrogation of victims is extremely important, as it is often the victims who can most accurately describe the commission of a crime, indicate the circumstances that accompanied its commission, and identify suspects, even taking into account their special condition (McGarry and Walklate, 2015). Although there is a clear mechanism for questioning victims and witnesses, the same interrogation methods cannot be applied to minors as for adults, as minors need to be treated differently, given their age and developmental differences (International Association of Chiefs of Police, 2013). To regulate this process, the state must introduce certain guarantees to protect the rights and interests of minors (Krzewinski, 2002).

The interrogation of minors is a special procedure with clearly defined requirements, which are enshrined at the level of both international and national law (Liefwaard and Van den Brink, 2014). The rules and mechanism of interrogation of minors, including victims, in criminal proceedings are enshrined in a number of international regulations, the provisions of which are based on the relevant provisions of national law of the member states of these international regulations.

But interrogation of minors quite often involves a violation of their rights, the use of unacceptable means and procedures of interrogation, in particular, coercive tactics of interrogation by the police (Juvenile Law Center, 2020); the Miranda warning is often violated (Caccaro, 2014); the injury of children during interrogation in special rooms and the lack of voluntary consent of the child to interrogation are hidden (Grane, 2017). It is the authorities that are obliged to ensure the rights of minors that most often grossly violate the rights of children during interrogation, which has a negative impact on both the minor's health and the results of the pre-trial investigation.

This draws the scholars' attention to the problem of tactics and the mechanism of interrogation of minor victims in criminal proceedings, in particular at the stages of pre-trial investigation (Cleary, 2017); during the cooperation of a psychologist, lawyer, investigator and judge in criminal proceedings (Plavinskaya, 2016). The importance of training police officers in new tactical methods of interrogating minors in pre-trial investigations is also noted (Cleary and Warner, 2016). Some studies deal with the interrogation of minor victims of specific types of crimes, in particular, sexual violence (Vaske, 2015); violent crimes in general (Korkman *et al.*, 2018) sex trafficking (Lavoie *et al.*, 2019).

But not all aspects of the interrogation of minor victims in the pre-trial investigation have been resolved in scientific achievements. The issues of interrogation of minor victims of different ages, psychological development and degree of socialisation; structures of questions asked to minors during interrogation; the use of special means during the interrogation of minor victims in a pre-trial investigation (those may be special schemes, drawings, graphics, dolls) (Tozik, 2019) remain unresolved and insufficiently covered. The main thing in the context of globalisation is the development of a universal unified legislative approach to the process of interrogation of minor victims during the pre-trial investigation from the standpoint of child-friendly justice.

The above determines the aim of this study, which will be to identify gaps in the regulation of the interrogation of minors and suggest ways to address them. The aim involves such objectives as determining the features of the interrogation of a minor victim, the principles and rules of its implementation, as well as the analysis of the legally defined mechanism of their interrogation in the pre-trial investigation.

1. Methodology and Methods

This study was conducted in a clear sequence, following the stages of studying the issue, based on the logic of the presentation of the material, in order to achieve the goals, set in the article and fulfil certain objectives. These stages were: formulation of topics and defining the boundaries of the study; search and selection of literature; selection and study of statistical data; analysis of the material presented in selected literature and evaluation of the results of these studies; identification of unresolved issues during the interrogation of minor victims in the pre-trial investigation; determining the aim of the article; drawing conclusions and making practical recommendations for solving the problems chosen for research; outlining prospects for further research in this area.

This study used statistics on the number of crimes committed against minors by type; analysis of criminal procedural norms of criminal procedural legislation of different countries and international legislation governing the interrogation of a minor victim in a pre-trial investigation. The provisions of international regulations defining certain aspects of the procedure for interrogation of minor victims in criminal proceedings were studied in detail to identify gaps and make proposals for their elimination both in international regulations and in the provisions of national legislation of individual countries to ensure child-friendly justice.

The legal framework of the study consisted of the provisions of the United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (United Nations, 2005); Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (Council of Europe, 2011); UN Approach to Justice for Children (United Nations, 2008); Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Council of Europe, 2007); Convention on the Rights of the Child (United Nations, 1990); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (United Nations, 2000). The provisions of the criminal procedure codes of 15 countries were analysed to analyse the provisions of the national criminal procedure legislation, which determine the procedure for interrogation of minor victims in the pre-trial investigation.

Achieving this aim involved the following methods: *systemic approach* was used to analyse the mechanism of interrogation of minor victims in pre-trial investigation as a system of interconnected and interdependent procedural mechanisms and develop proposals to improve legislation on this stage of criminal proceedings; *descriptive statistics*, which was used for processing, systematisation and visual demonstration in the form of tables of basic statistical indicators on crimes against minors, their qualitative composition and dynamics; *comparison and juxtaposition* was used to establish the characteristics of minors that affect the tactics of interrogation of such victims in the pre-trial investigation; *descriptive analysis* was used to systematise, classify and summarise information on possible ways to interrogate minor victims in the pre-trial investigation and shortcomings in the activities of law enforcement agencies during its conduct; *pragmatic approach* to data collection and analysis, which was used to develop tactics during the interrogation of minor victims in the pre-trial investigation; the forecasting method was used to develop proposals and recommendations for improving the legal regulation of the interrogation of minor victims during the pre-trial investigation.

2. Results

The commission of crimes against minors is unfortunately quite common in the world. According to the World Health Organization (2020a), almost three out of four children in the world (30 million children!) between 2 and 4 are regularly subjected to corporal punishment or psychological abuse by adults; one in five women and one in thirteen men under the age of 17 have been sexually abused; 120 million girls and women under the age of 20 were forced to have sex. Crimes involving minors are not homogeneous. They differ in social danger, the main object of encroachment, nature, etc. The most dangerous for minors are violent crimes, including domestic violence. Crimes against sexual freedom and inviolability need to be mentioned separately, as these crimes often lead to future deviations in moral and psychophysiological development. As for the interrogation of minor victims of sexual crimes, it is noted that interrogation is significantly complicated by the fact that children are often unaware that a crime has been committed against them; are dependent on the suspects, and therefore do not talk about what was done; there is shame and fear of confessing to the crime committed against them. Minor victims of these violent crimes are the most difficult to interrogate because they have to talk about too personal intimate things and often about the loss of trust in loved ones.

Table 1. Types of crimes against minors (by individual countries) in 2020 (% of the total number of minors living in the country)

Country	Types of crimes against minors									
	Sexual violence		Psychological violence (bullying)		Physical violence (ill-treatment)		Involvement in violent crime		Domestic violence (witnesses)	
	male	fem	male	fem	male	fem	male	fem	male	fem
Albania			23	17	49	45				
Armenia			11	7	61	67				
Austria			39	33						
Bolivia			32	28			45	21		
Cambodia	6	4	23	22			15	12	18	15
Canada			33	38						
Denmark			20	20						
El Salvador	3	14	21	24	55	50	34	17	12	23
Estonia			39	37						

Finland			31	24						
France			30	28						
Georgia					70	63				
Germany			23	24						
Latvia			49	50						
Lithuania			54	54						
Montenegro			64	63						
Northern Macedonia			10	10	71	67	41	18		
Norway			23	20						
Republic of Poland			32	29						
Republic of Moldova			34	35	77	74				
Serbia					44	42				
Sweden			11	14						
Ukraine			39	37	58	55				
USA			28	27			34	23		

Source: World Health Organization (WHO) (2020b).

These data indicate that psychological violence against minors (bullying) is widespread in countries with a high standard of living. However, it should be noted that these data do not show the situation with crimes against minors, as only partial data were taken, which were open to the public. We must also keep in mind the high level of latency of delinquency against minors, especially criminal offenses such as domestic violence and sexual offenses.

It should be borne in mind that these and other crimes committed against minors have particularly dangerous negative consequences: significant deterioration of physical and mental health in further life; committing violence by them in adulthood; social maladaptation; excessive victimisation. In order to avoid the recurrence of crimes against minors who are already victims, in order to restore the rights of minor victims, criminal offenses that have already been committed should be investigated using all available legal means in criminal proceedings, one of which is the interrogation of victims and witnesses in the course of pre-trial proceedings.

But no matter how difficult it is for minors to recall and recount the details of the crimes committed against them, interrogation is an important tactical pre-trial investigation procedure that is conducted in every criminal

proceeding without exception. Interrogation is a specific investigative action carried out in accordance with the law by an authorised person, which is aimed at obtaining information about the procedurally significant circumstances of a criminal offense from the participants in criminal proceedings (witness, victim, suspect, expert) (Walsh *et al.*, 2017). And, as noted above, the interrogation of minors should be conducted according to different rules and with the use of other tactics than the interrogation of adults.

The tactics of interrogation of a minor victim of a crime are legally defined in the national criminal procedural legislation of the vast majority of countries. In addition, the principles, rules, basic measures, and purpose of interrogation of this category of victims in the pre-trial investigation are enshrined in the provisions of international regulations (see Table 2).

Table 2. Enshrinement of the procedure for interrogation of minors in a pre-trial investigation (according to national and international criminal procedural legislation)

Country	Regulation
Republic of Azerbaijan	Art. 96 “Specialists” Art. 228 “Questioning of under-age witnesses” Art. 429 “Circumstances to be established during proceedings concerning minors”
Albania	Art. 58/a. “The rights of the minor victim” Art. 169 “Grounds for confrontation”
Georgia	Art. 50 “Persons who are not be obliged to act as a witness”
Republic of Moldova	Art. 6 “Terms and Expressions Used in this Code” Art. 110 “Special Methods for Examining a Witness and for His/Her Protection” Art. 371 “Reading Out in a Hearing Statements of a Witness”
Russian Federation	Art. 280 “Specifics in an Interrogation of a Minor Victim and Witness”
Republic of Estonia	§ 70 “Specifications concerning hearing of witnesses who are minors”
Ukraine	Art. 226 “Specificities of interrogating a child or an underage” Art. 227 “Participation of a legal representative, pedagogue, psychologist, or medical practitioner in investigative (detective) actions with involvement of a child or an underage” Art. 336 “Conducting of procedural actions during court proceedings through video conference” Art. 354 “Specific features of examining a minor or underage witness or victim”
Republic of Bulgaria	Art. 140 “Interrogation of a juvenile witness” Art. 212 “Initiation of pre-trial procedure” Art. 223. “Interrogation of a witness before a judge”

France	Art. 80-3 (the start of the investigation) Art. 706-17 (investigation of minors) Art. 706-47 (PECIAL PROCEDURE APPLICABLE TO SEXUAL OFFENCES AND TO THE PROTECTION OF JUVENILE VICTIMS)
Netherlands	Section 167a (about a minor who is twelve years or older) Section 488 (Criminal Proceedings in Matters concerning Persons who have not yet reached the Age of Eighteen Years)
Norway	Section 128 (examine a child under 16 years of age)
Republic of Poland	Chapter 21 “WITNESSES” (art. 177-192)
Portugal	Art. 91 “Oath and commitment” Art. 132 “Rights and duties of witnesses” Art. 134 “Refusal to testify” Art. 138 “Examination rules”
Turkey	Art. 172 “Decision on no-ground for prosecution” Art. 233 “Summoning of the victim and the claimant” Art. 234 “The rights of the victim and the claimant” Art. 236 “Hearing of the victim and the claimant”
UN Convention on the Rights of the Child	Art.39
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	Art. 8
Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime	Art. 29 Art. 30 Art. 31
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse No. 201	Art. 35
Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice	Part 6 “Children’s testimonies/statements”

Source: Council of Europe (2007, 2011); Legislation online (n. d.),
United Nations (1990, 2000, 2005, 2008).

All these procedural rules are built with maximum regard to the principle of child-friendly justice. According to the legal definition, child-friendly justice is an accessible system of justice that guarantees respect for the rights of the child in justice (the right to respect for private and family life, the right to inviolability, the right to dignity) and their realization, taking into account the principles of justice and the child's maturity and his/her understanding of the events that have taken place; is careful, adapted and aimed at the realisation of the child's right to participate in court proceedings in the manner prescribed by law (UNDOC, 2015). Within this understanding of child-friendly justice, the basic principles of investigative actions at all stages of criminal proceedings are identified, as well as the rules of its implementation, the so-called "Miranda Warning" (Caccaro, 2014) (see Figure 1).

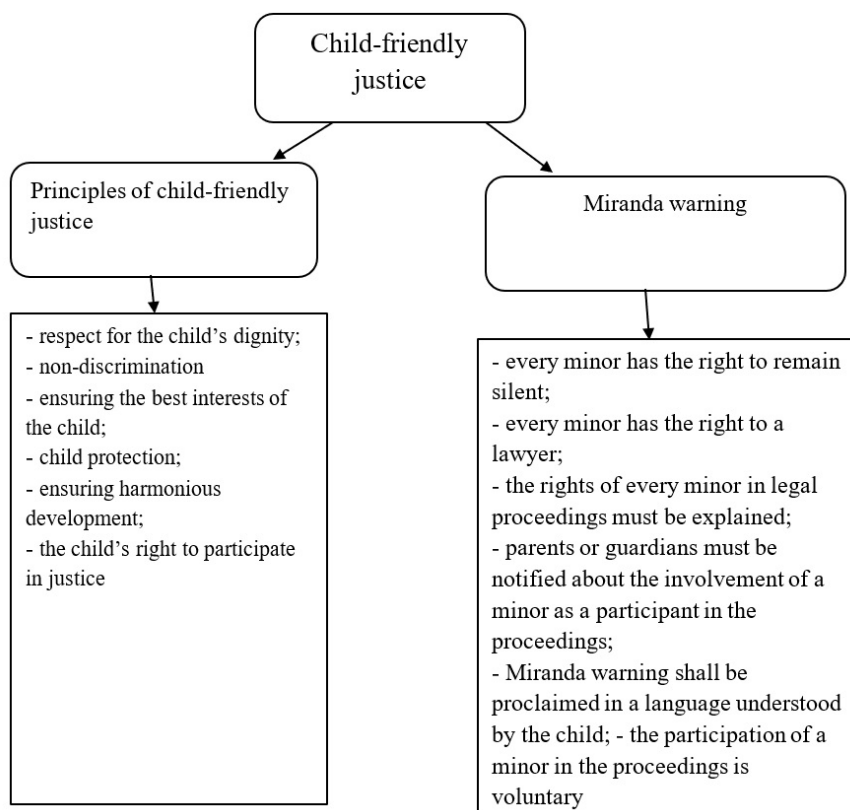


Figure 1. Rules and Principles of Child-Friendly Justice

Interrogation at the stage of pre-trial investigation, taking into account these principles and compliance with established rules, is conducted by specialists in the field of justice. Their attitude to minor victims and the way of communicating with them should be special, different from the attitude to adult victims, taking into account the peculiarities of the socio-psychological development of children. A sincere and friendly attitude towards children should be as follows: children - victims and witnesses of crimes should be provided with comprehensive support throughout the proceedings in the interests of the child; ensuring the maximum degree of certainty about the process by forming in children a clear idea of the course of pre-trial and judicial investigation; ensuring the shortest possible terms of pre-trial and court proceedings with the possible avoidance of re-interrogation; ensuring the availability of special rooms for children for interrogation, adapting courtrooms to the interests of children, determining breaks and deadlines for hearing children and creating a special notification system for summoning a child to pre-trial and court proceedings (UNDOC, 2015). And as part of the interrogation of minor victims in a pre-trial investigation, the investigator and other law enforcement officials must follow certain rules (August and Henderson, 2021) (see Figure 2).

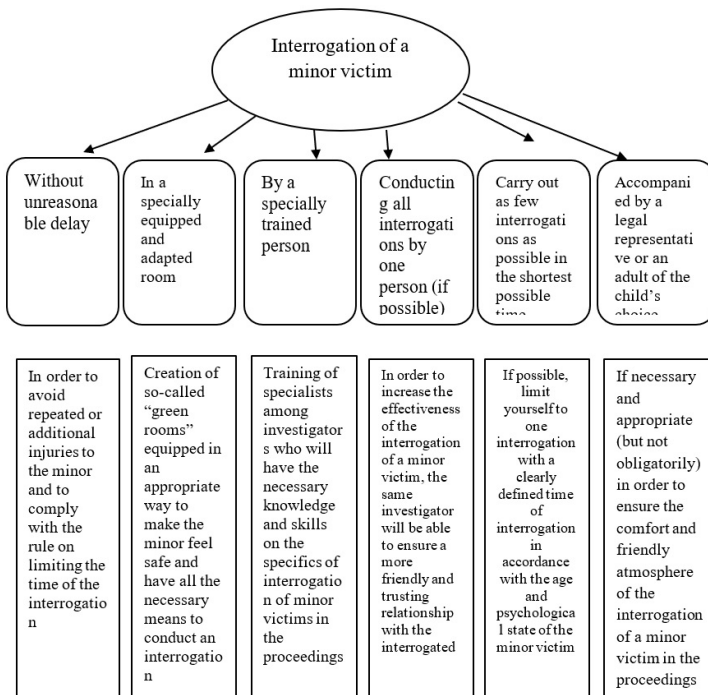


Figure 2. Rules of interrogation of a minor victim

Despite the legislative regulation of tactics and methods of interrogation of minor victims in pre-trial proceedings in both international and national law, the practical conduct of this investigative action has a number of imperfections, legislative inaccuracies and gaps, which negatively affects both minors and does not give the desired procedural result. First of all, these inaccuracies relate to the declarative nature of the vast majority of the provisions of the above rules, because the content of these provisions is almost not disclosed and not specified. This, in turn, creates obstacles for the procedural practice of interrogation of minor victims in pre-trial proceedings. The need to specify the main provisions of the legislation in this area of regulation is due to the psychological component of the interrogation of a minor victim in pre-trial proceedings, which is not often paid attention to by the persons authorised to conduct interrogation in pre-trial investigation.

First of all, the psycho-physiological and psychological characteristics of both children of a certain age in general and each individual child should be taken into account during the interrogation of a minor victim. Forensic psychology experts come to the aid in this matter, conducting a number of psychological examinations of the minor victim before the pre-trial investigation: first, it is an examination of individual psychological characteristics of the minor victim, which helps predict the behaviour of this person in a particular situation; second, examination of the minor's ability to be understand and control his/her actions, to correctly perceive and describe the circumstances, to resist. On the basis of such an examination, the investigator finds out how important and informative the interrogation of such a person will be and how important it will be to establish the identity of the perpetrator and the circumstances of the crime. In this case, the examination of a psychologist becomes extremely important. Therefore, such an examination should not be appointed at the investigator's request and not in some cases, but always if the victim being interrogated is a minor.

A safe and friendly environment must be created during the interrogation in order for the minor to provide the necessary and true information, which will facilitate the establishment of psychologically comfortable contact between the victim and the investigator. It also depends on the psychological characteristics of the development of the child of a certain age category, and the ability to assess and identify these features will help to establish an appropriate atmosphere of interrogation. Specialists in age pedagogy and psychology have the necessary knowledge in the field of determining communication tactics and creating a favourable atmosphere. Therefore, first, in each case the person who will conduct interrogation of a minor victim should consult specialists in age pedagogy and age psychology, and second, the presence of a teacher and psychologist during the interrogation of a minor victim and assistance to the investigator must be mandatory throughout the interrogation.

The interrogation of a minor victim in pre-trial proceedings is an investigative action with its own specifics, and therefore its implementation by an investigator without special training, knowledge and skills will not be effective and will not bring the desired procedural result. Therefore, the investigator must undergo special training in order to understand the peculiarities of communication with minor victims and apply in practice a specific interrogation technique to prevent further psychological trauma to the child on the one hand and obtain truth and clear evidence. Such training can be provided by special educational courses for investigators, who will further specialise in working with minors in pre-trial investigation. Every institution carrying out a pre-trial investigation should have such investigators. In addition, it is desirable that such investigators be of both sexes, as depending on the nature of the crimes committed against minors and the specifics of the child victims themselves, in some cases minor victims are more open to communicating with women (victims of sexual crimes, female victims). All this will ultimately contribute to the preservation and faster recovery of the mental and psychological health of the minor victim.

In pre-trial proceedings there is a person endowed with specific powers — an investigating judge. An investigating judge is a judge of the court of first instance who, within the criminal proceedings, exercises judicial control over the state of observance of human rights and freedoms, including at the stage of pre-trial investigation. To monitor the observance of the rights of a minor victim, the investigating judge must know the principles of criminal proceedings involving a minor, as well as the rules and rights of a minor victim during interrogation in the pre-trial investigation mentioned above. But such specialisation also requires special training and appropriate qualifications of this specially authorised person. The participation of such an investigating judge should also be mandatory in pre-trial proceedings involving a minor victim.

The authorised person conducting the interrogation should take into account the differences in the way the child perceives information when communicating with adults, in particular the persons conducting the interrogation, and the way children communicate in general. In particular, this concerns the wording of the questions to which the investigator expects to receive a reliable and complete answer. The questions should be clear and understandable (preferably formulated in advance, before the interrogation), in the most simplified language with the use of specific guiding question words “Who?”, “What?”, “How?”, “Which?”; taking into account the emotional state of the child and the specifics of the description of events, using elements of the game, the child’s analytical abilities, in accordance with the age characteristics of minors; the questions should not be alternative and should not lead to a “correct” or “incorrect” answer from the investigator’s point of view.

However, these problematic aspects of the interrogation of minor victims can be resolved. In order to eliminate inaccuracies and fill legal gaps in the interrogation of minor victims during pre-trial proceedings, it is necessary to clarify the rules of international and, accordingly, national regulations as follows, including the following provisions: examination by a psychologist is mandatory if the interrogated victim is a minor; in each case of interrogation of a minor victim a person who will conduct it shall consult specialists in age pedagogy and age psychology; the presence of a teacher and psychologist during the interrogation of the minor victim and assistance to the investigator throughout the interrogation must be mandatory; the interrogation of a minor victim should be conducted by an investigator who has undergone the necessary training on the specifics of this investigative action involving minors, which must be in each institution conducting the pre-trial investigation; investigators of both sexes must be specially trained for the interrogation of a minor; to monitor the observance of the rights of a minor victim, an investigating judge should have special training and appropriate qualifications, whose participation should be mandatory in pre-trial proceedings with the involvement of a minor victim; the questions should be clear and understandable, in the most simplified language with the use of particular guiding words, taking into account the emotional state of the child and the specifics of the description of events, with no alternatives and putting answers in minor's mind. Regulatory enshrinement of such clarifications will greatly simplify the interrogation of a minor victim in pre-trial proceedings in practice.

3. Discussion

The interrogation of a minor victim in a pre-trial investigation is a specific investigative action that is regulated at the level of both international and national law, although not as perfectly as practice requires. But this does not mean that the provision of comprehensive protection and regulation of the rights of this category of persons does not receive adequate state support and necessary resources. In particular, in recent years, the protection of children's rights in criminal proceedings was the focus at the level of both international justice and national procedural law of individual countries (Liefwaard and Van den Brink, 2014).

It is believed that the characteristics of minor victims, which are the immaturity of judgments and considerations, adversely affect their ability to provide reliable information during interrogation in the pre-trial investigation. We cannot fully agree with this statement, as compliance with procedural and psychological aspects, strict compliance with the law on preparation, conduct and recording of interrogation and consideration of mental characteristics, socio-psychological characteristics, temperament

of the interrogated, adherence to high moral and tactful behaviour during interrogation of a minor victim will ensure the effectiveness of this investigative action (Dekailo and Blashchak, 2020). Indeed, when conducting an interrogation taking into account all the features of minor victims, the specifics of the perception of the environment and in accordance with the recommendations of a psychologist, the child is fully able to consciously and accurately testify about the crime against him/her, to build his/her own opinion so that the course of events and circumstances its commission would be understandable.

Psychologists also question the fact that minors are able to fully exercise their rights due to their immaturity and emotional and psychological vulnerability and are therefore immune to interrogation tactics in criminal proceedings. But, as noted above, this is all due to the use of standard interrogation tactics applied to adults, and the vast majority of courts do not require special procedural guarantees to interrogate minor victims. In this case, the application of special tactics of interrogation of this category of persons in the pre-trial investigation will help to overcome obstacles related to the sociological and psychological characteristics of minors, and allow minors to exercise their rights.

The conclusions made in this study are confirmed by the indication that taking into account the psychological characteristics of minor victims during interrogation will reduce the protective reaction of the child's psyche, reduce the likelihood of additional trauma during interrogation and significantly increase the effectiveness of interrogation (Miloradova and Pashko, 2020). That is why the participation of an expert psychologist in the pre-trial investigation during the interrogation of a minor victim should be mandatory, not optional.

Conclusions

The interrogation of minor victims in pre-trial proceedings should be conducted according to different rules and with the use of other tactics than the interrogation of adults. The tactics of interrogation of a minor victim of a crime are legally defined in the national criminal procedural legislation of the vast majority of countries and in the provisions of international legal acts. But the practical implementation of this investigative action has a number of imperfections, legislative inaccuracies and gaps, which negatively affects the minors themselves and does not give the desired procedural result.

In order to eliminate inaccuracies and fill legal gaps in the interrogation of minor victims during pre-trial proceedings and increase its effectiveness, it is necessary to clarify the rules of international and, accordingly, national regulations, including the following provisions: psychologist's

examination is mandatory if the interrogated victim is a minor; in each case of interrogation of a minor victim it is necessary to consult specialists in age pedagogy and age psychology; the presence of a teacher and a psychologist during the interrogation of a minor victim is mandatory; the interrogation of a minor victim must be carried out by a specially trained investigator, who must be available in each institution conducting the pre-trial investigation; investigators of both sexes must be specially trained for the interrogation of a minor; an investigating judge shall exercise control over the observance of the rights of a minor victim, who shall have a special training and appropriate qualifications and whose participation should be mandatory in pre-trial proceedings with the involvement of a minor victim; the questions shall be clear and simple, without alternative.

This study is not exhaustive and does not address all issues related to the interrogation of minor victims in criminal proceedings. Instead, the coverage of problematic aspects of this investigative action opens up prospects for further research in this area, which will help improve the regulatory framework and the practical implementation of the tactics of interrogation of minor victims.

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Political Extremism in Modern Democratic Transformations

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Abstract

Modern political transformations involve free choice of ideology, ability to communicate with society and maintenance of their political preferences. Political struggle often leads to radical action and political extremism. The aim of this study involved an analysis of political extremism that occurs in modern democracies, and identification of the main factors underlying the development of political extremism. The determinants of the political stability/extremism are analysed based on the algorithm of hierarchical clustering. It is proved that 26 European countries studied in the work can be grouped into four clusters, which are characterised by the number of parties of extremist ideology in the national parliaments of European countries; Elite Quality Index (EQx); the Freedom in the World Index; Political Stability and Absence of Violence Index, which is part of The Worldwide Governance Indicators (WGI). It is revealed that today ideological trends of authoritarian populism, conservatism and extremism are spreading in European countries. Cluster analysis has shown that the political extremism is influenced by the level of quality of national elites, the development of fundamental rights and freedoms, the political stability,

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and the absence of violence. Further research should focus on econometric simulation of factors shaping political extremism through economic development indicators.

Keywords: political activity in Europe; status; democracy; political extremism; radicalism.

El Extremismo Político en las Transformaciones Democráticas Modernas

Resumen

Las transformaciones políticas modernas implican la libre elección de ideología, la capacidad de comunicarse con la sociedad y el mantenimiento de las preferencias políticas. La lucha política a menudo conduce a una acción radical y al extremismo político. El objetivo de este estudio involucró un análisis del extremismo político que ocurre en las democracias modernas y la identificación de los principales factores subyacentes al desarrollo del extremismo. Los determinantes de la estabilidad política se analizan con base en el algoritmo de agrupamiento jerárquico. Está comprobado que 26 países europeos estudiados en el trabajo pueden agruparse en cuatro clústeres, que se caracterizan por el número de partidos de ideología extremista en los parlamentos nacionales de los países europeos; Índice de calidad de élite (EQx); el Índice de Libertad en el Mundo; Índice de Estabilidad Política y Ausencia de Violencia, que forma parte de los Indicadores de Gobernanza Mundial (WGI). Se revela que hoy en día las tendencias ideológicas de populismo autoritario, conservadurismo y extremismo se están extendiendo en los países europeos. Se concluye que, el análisis de conglomerados ha demostrado que el extremismo político está influenciado por el nivel de calidad de las élites nacionales y el desarrollo de los fundamentales.

Palabras clave: actividad política en Europa; estado; democracia; extremismo político; radicalismo.

Introduction

The dynamism of political life in the state is the result of the influence of internal and external factors on society. These multi-vector actions form certain preferences, which further determine the activities of active social groups. Forms of expression of political views, which sometimes leads to quite severe consequences, are a reaction to social stimuli, changes in the

established way of life, the realization of the political will of the majority. Political activity is often shifted from centrist currents to extreme right or left ideologies, which in essence can be based on radical views and reactions. The results of democratic transformations and approaches to the expression of citizens' will be broad support for those areas that profess radical and extremist actions in politics.

Radicalisation and extremism are a major problem for societies around the world. The consequences of radical behaviour are unauthorised actions during political speeches and demonstrations, causing physical influence on citizens, government officials and law enforcement agencies, terrorist, and cyberterrorist acts. According to the Global Terrorism Index (GTI), about 100,000 people died in terrorist attacks between 2014 and 2017 (Institute for Economics and Peace, 2018). Systemic surveys conducted in recent years have found that 5 to 10% of adults in Germany have far-right worldviews (Best *et al.*, 2016). Many rallies of hatred and violence in recent years have been linked to the adherents of far-right and right-wing ideology, including the neo-fascist movement in Italy (Gattinara *et al.*, 2018), national action in Britain (Macklin, 2018), the refugee crisis in Germany (Koehler, 2018), federalist and Christian fundamentalist ideologies in the United States (Sweeney and Perliger, 2018, Windisch *et al.*, 2018), and others.

In recent years, populists and extremists have had strong electoral positions in Europe, Asia and America, both in relatively new democracies (Latvia, the Czech Republic) and in more established ones (Germany, France). In some countries (Hungary, Poland, Venezuela), extremist parties have received significant electoral support to legally influence the government and make significant changes to laws and the constitution (Schupmann, 2020). A recent study by Western scholars based on an analysis of data from 18 Western European countries for 1985-2018 showed that growing electoral support for right-wing radical parties is forcing systemic parties to adjust their socioeconomic policies toward left-wing ideology (Krause and Giebler, 2019).

Support for political parties with extremist ideologies is often seen as a protest vote against mainstream politics or the political system as a whole (Kutiyski *et al.*, 2021). The change in the economic system by right-wing radical parties was the result of the proletarianisation of their electorate, the formation of a new model of class voting in Western Europe with the involvement of voters from the working class, opponents of globalisation, and others.

Extremism is seen as an ideological phenomenon, an instrument of domination and legitimacy that serves the interests of dominant groups and blocks utopian thinking (the idea of better ways of life). Extremism is part of the modern positional struggle initiated from the camp of liberal elites. Conceptually, extremism usually gets its essence through association

with other ideas — fundamentalism, totalitarianism, authoritarianism, and terrorism, referring to the opposition of such concepts as democracy, openness, liberalism, tolerance and moderation. Extremism contains ideological and behavioural elements: substandard values; anti-democracy; anti-liberalism (hostility or indifference to rights, tolerance, choice, pluralism); utopianism and the struggle against the present; totalization; justification of illegality (El-Ojeili and Taylor, 2020).

1. Literature Review

Extreme political beliefs are often seen as a mechanism for combating feelings of fear, anxiety, and uncertainty. People perceive rigid ideological beliefs because it allows them to defend simple solutions to complex social and political problems (Van Prooijen and Krouwel, 2019). Political extremists are particularly prone to distrust other competing political parties and are more likely to demonstrate a high level of Euroscepticism (Kutiyski *et al.*, 2021).

The findings of a study of voters in the Netherlands (Kutiyski *et al.*, 2021) indicate that radical voters have a common feature characterized by lower political trust than moderate centrist voters, as evidenced, for example, by a case study on Sweden (Krouwel *et al.*, 2017). The results show that political radicalism, regardless of its specific ideological orientation, is associated with a low level of trust. Similarly, the high level of Euroscepticism has also been linked to the preferences of radical parties. Radical political orientations provoke a negative attitude towards both national and European politics.

Extremists perceive and legitimise political violence, seek to restore the past, becoming anti-democratic with restrictive conceptions of human rights, having problems of coexistence with democracy (Böttcher, 2017). Ideology is a major driver of extremist threats and terrorism (Ackerman and Burnham, 2019). More generally, ideology is seen as a worldview with a set of ideas that provide a person with a collective context, meaning and belonging (Campion, 2019).

Popular support for political extremism in democracies gives these parties and movements the visibility of democratic legitimacy they need to legitimately make illiberal and anti-democratic changes to legislation. They seek to transform a liberal-democratic state into an illiberal and anti-democratic one (Schupmann, 2020).

The vectors that best understand extremism are world economic and class structures, posthegemonic geopolitics, and geocultural features. It can be assumed on the basis of (Davies, 2017) that liberalism, in general,

has gone through three phases since the 1970's: the period of militant neoliberalism (early 1970's — late 1980's); victorious neoliberalism (late 1980's — 1990's); and post-hegemonic liberalism, which began in the late 1990's. This last period was marked by the crisis of intellectual and moral leadership and the fragmentation of the liberal project into three tendencies: punitive neoliberalism, fear liberalism, and neo-Keynesianism. Acceleration of extremist action is a symptom of this period of posthegemonic liberalism (El-Ojeili and Taylor, 2020).

Variables such as unemployment, lack of education, self-doubt, loneliness, stress are defined as encouraging aversion to society and a tendency to extremism. Since the late 1990's, the extremism industry has begun to increase its presence caused by the anti-systemic dynamics of the alternative globalisation movement and the rise of right-wing nationalism, accelerating even more after the September 11, 2001, terrorist attacks. "Extremism" stands next to a number of other phenomena: protectionism, populism, utopianism, ideology, irrationality, bigotry (El-Ojeili and Taylor, 2020).

At the broadest level, political extremism is defined as a significant deviation in attitude and behaviour from basic legal and political norms and values within a social system (society or state) that seek to abolish and replace them (Beelmann *et al.*, 2017). The development-oriented model of radicalisation begins with the definition of extremism in the following ways: a significant deviation in attitudes and actions from specific fundamental, political, legal and humanitarian systems of norms and values. In addition, the main issue of definition is the values and goals that underlie views and actions, not the means, such as violence, used to achieve them (Beelmann, 2020).

Researchers (Doosje *et al.*, 2016) identified three phases of radicalisation. In phase 1, individual feelings may be influenced by the search for significance, uncertainty, and social factors such as globalisation. In phase 2, a person joins a radical group and accepts its ideology. Finally, in phase 3, the person commits violence against other groups. Another theory emphasises the motivational underpinnings of radicalisation, such as personal revenge or social discontent, arguing that they play an important role in explaining why people are involved in the process of radicalisation (Kruglanski *et al.*, 2019).

The main assumption from the point of view of development is that radicalisation and extremism can be described as the result of a number of (social, individual) determinants and transactional (interdependent) processes of ontogenetic development (Lerner, 2018). Interconnected but different processes of social development are central to radicalisation and extremism: problems of identity, prejudice, political or religious ideologies, antisocial attitudes and behaviour. These processes are caused by real social

or individual conflicts (such as the economic crisis) and are marked by constant intergroup processes (Beelmann, 2020). In addition, a significant role is played by the lack of proper and well-established communication between public authorities and radical representatives of ideological trends.

Based on the features most often mentioned in the existing definitions of right-wing extremism/radicalism, it can be noted that authoritarianism, anti-democracy and nationalism determine the properties of extremism/radicalism. In contrast, xenophobia, racism and populism are concomitant characteristics of the concept. Right-wing extremism/radicalism is an ideology that embraces authoritarianism, anti-democracy and nationalism (Carter, 2018).

Europe's left-wing movements have succeeded in addressing those most affected by austerity, with significant growth in Greece, Ireland, Portugal and Spain. The rise of right-wing parties correlated with the propaganda of populist Euroscepticism, combined with constant anti-immigration comments and opposition to multicultural integration. The terrorist attacks in Europe in 2015-2016 directly contributed to the development of support for these parties, in some cases advocating fascist rhetoric. The British Independence Party was one of the driving forces behind Britain's decision to leave the European Union, openly described as a right-wing populist party (Corbet and Larkin, 2019).

Given the significant relevance of this topic, the purpose of this study is to analyse political extremism as a phenomenon in modern democratic transformations and identify the main factors shaping the development of political extremism. The research provided for the following main objectives: identify key sources of political extremism; study the factors influencing the formation and development of political extremism; identify the main clusters of division of European countries on the basis of the formation of political stability/extremism; analyse the clusters identified in the study; suggest approaches that can curb the development of political extremism.

2. Methods

The research methodology involves determining the criteria by which countries will be grouped, the choice of research methods, the use of software. The analysis of the countries in the obtained clusters was conducted. To model the level of political stability of individual countries, it is proposed to choose criteria that allow a detailed analysis of the determinants of the formation of political stability/extremism: the number of extremist parties in the national parliaments of European countries; Elite Quality Index (EQx); the Freedom in the World Index; Political Stability and Absence of Violence Index, which is part of The Worldwide Governance Indicators (The Worldwide Governance Indicators (WGI)).

It should be noted that the data on extremist parties used in the study were based on information from the Timbro Authoritarian Populism Index (TAP) (2021), which provides an analysis of election data to improve knowledge and understanding of change among politicians, the media and the general public. The Elite Quality Index (EQx) provided a unique interpretation of national political economies and their medium- and long-term perspectives. EQx uses elite quality as an analytical framework designed to promote sustainable and comprehensive value creation and the transformation of the elite business model. Elites shape human and economic development, the fate of societies, the wealth of nations, as well as their rise and fall.

To maintain their position, elites use business models that accumulate wealth. Quality elites use value creation business models that give society more than they accept. Low-quality elites do the opposite and work with value models (Casas Klett and Cozzi, 2021). The Freedom in the World Report consists of numerical rankings that analyse the electoral process, political pluralism, government functioning, freedom of expression, association and organisation rights, the rule of law, personal autonomy and individual rights. Countries are assessed by 10 indicators of political rights and 15 indicators of civil liberties. Accordingly, a score of 0 means the lowest degree of freedom and 4 — the highest degree of freedom. Another indicator used is the World Governance Indicators (WGI) sub-indicator - political stability and the absence of violence/terrorism, which measures perceptions of the likelihood of political instability or politically motivated violence (Kaufmann *et al.*, 2010; World Bank, 2021).

The European countries on the ground of political stability/extremism will be grouped using a hierarchical clustering algorithm. The generated indicators, which have different dimensions and units of measurement, are reduced to a standardised form using the software environment STATISTICA, Version 10. The sample of countries provides for the inclusion on the ground of at least one extremist party. We identified 26 European countries on this ground. Standardisation is performed in accordance with the formula:

$$Z_{ij} = \frac{x_{ij} - x_i}{\sigma_i} \quad (1)$$

where x_{ij} — the value of the i^{th} feature for the j^{th} population;

x_i — the average level of the i^{th} feature;

σ_i — the standard deviation of the i^{th} feature.

The classification of European countries is carried out by a hierarchical method of clustering using Euclidean distance. Euclidean distance is calculated by the formula:

$$d_E(x, y) = \sqrt{\sum_i (x_i - y_i)^2} \quad (2)$$

where $x = (x_1, x_2, \dots, x_i)$, $y = (y_1, y_2, \dots, y_i)$ – vectors of the features of two observations.

3. Results

The data were used according to the methodology ss indicators that can characterise the factors of political extremism in European countries (Table 1).

Table 1. Initial data describing the factors of political extremism

Country	Number of extremist parties	EQx	Freedom in the World	WGI
Belgium	5	56.08	96	61.90
Bulgaria	4	51.60	78	66.19
Cyprus	1	56.26	94	63.33
Czech Republic	4	59.17	91	80.48
Denmark	5	63.43	97	83.81
Spain	10	57.30	90	59.05
Estonia	1	62.91	94	68.10
Finland	7	62.58	100	79.05
France	4	58.33	90	58.57
Germany	4	62.44	94	66.67
Greece	16	51.80	87	57.14
Hungary	3	55.61	69	71.43
Ireland	3	60.77	97	82.38
Italy	12	54.25	90	60.95
Latvia	2	54.17	89	60.00

Lithuania	2	57.85	90	75.24
Netherlands	6	64.54	98	75.71
Norway	6	63.50	100	92.38
Poland	1	55.15	82	64.29
Portugal	8	57.25	96	90.95
Romania	3	51.70	83	65.24
Serbia	5	48.20	64	45.24
Slovak Republic	2	53.41	90	72.38
Slovenia	2	57.18	95	73.81
Sweden	3	63.67	100	86.67
Switzerland	3	67.64	96	94.76

Source: Timbro Authoritarian Populism Index (2021), Casas Klett and Cozzi (2021), World Bank (2021).

As Table 2 shows, some parties that profess extremist ideology have considerable public support and have won seats in national parliaments (for example, in Belgium, Cyprus, the Czech Republic, Spain, Hungary, etc.). Besides, the countries analysed in the study have different levels of indicators that describe the quality of national elites, the level of freedom, political stability and the absence of violence.

Table 2. European extremist parties represented in national parliaments, 2015-2021

Country	Party name and abbreviation	Ideological direction	% in elections, year
Belgium	Partij van de Arbeid van België (PVDA)	Communism, left-wing extremism	8.6%, 2019
Bulgaria	Ataka (ATAKA)	Nationalism, right-wing extremism	0.5%, 2021
Cyprus	Ethniko Laiko Metopo (ELAM)	Ethno-nationalism, right-wing extremism	6.8%, 2021
Czech Republic	Komunistická Strana Čech a Moravy (KSCM)	Communism, left-wing extremism	7.8%, 2017
	Dělnická strana sociální spravedlnosti (DSSS)	Neo-nazism, right-wing extremism	0.2%, 2017

Denmark	Stram Kurs	Nationalism, right-wing extremism	8.7% 2019
Spain	Izquierda Unida (IU)	socialism, communism, left-wing extremism	12.8% 2019
	Partido Comunista de los Pueblos de España (PCPE)	Communism, left-wing extremism	0.1%, 2019
Estonia	Eesti Iseseisvuspartei (EIP)	Nationalism, right-wing extremism	0.2%, 2015
Finland	Finlands kommunistiska parti (SKP)	Communism, left-wing extremism	0.1%, 2019
France	Parti Communiste Français (PCF)	Communism, left-wing extremism	2.7%, 2017
Germany	Nationaldemokratische Partei Deutschlands (NPD)	neo-nazism, nationalism, right-wing extremism	0.4%, 2017
Greece	Chrysi Avgui (XA)	Nationalism, right-wing extremism	2.9% 2019
	Antikapitalistiki Aristeri Synergasia gia tin Anatropi (ANTARSYA)	Communism, left-wing extremism	0.9%, 2019
Hungary	Jobbik Magyarorszáért Moszgalom (JOBBIK)	Nationalism, right-wing extremism	19.1%, 2018
	Magyar Munkáspárt (MM)	Communism, left-wing extremism	0.3%, 2018
Ireland	Workers Party of Ireland (WP)	Communism, left-wing extremism	0.2%, 2016
Italy	CasaPound (CPI)	Neo-fascism, anti-semitism, right-wing extremism	0.9%, 2018
Norway	Rødt (R)	Communism, left-wing extremism	2.4%, 2017
Portugal	Partido Comunista Português (PCP)	Communism, left-wing extremism	6.3%, 2019
	Partido Nacional Renovador (PNR)	Right-wing extremism, ethno-nationalism, right-wing extremism	0.3%, 2019
Romania	Partidul România Mare (PRM)	Nationalism, right-wing extremism	0.6%, 2020

Serbia	Srpska Radikalna Stranka (SRS)	Nationalism, right-wing extremism	2.1%, 2020
	Srpska stranka Zavetnici (SSZ)	Right-wing extremism	1.4% 2020
Slovakia	Ludová Strana Naše Slovensko (LSNS)	Nationalism, neo-fascism, neo-nazism, right-wing extremism	8.0%, 2020
Slovenia	Naprej Slovenija (NPS)	Nationalism, right-wing extremism	0.2%, 2018
Sweden	Alternativ för Sverige (AFS)	Etno-nationalism, right-wing extremism	0.3%, 2018
Switzerland	Partei der Arbeit der Schweiz (PdA)	Communism, left-wing extremism	1%, 2019

Source: Nordsieck (2020), Parties and Elections in Europe (2019), Timbro Authoritarian Populism Index (2021).

One of the most effective methods has been chosen for clustering countries was the Ward's method, which minimises the sum of squares for any two clusters that can be formed at each step. A horizontal dendrogram was constructed to visualise the results of cluster analysis (Figure 1).

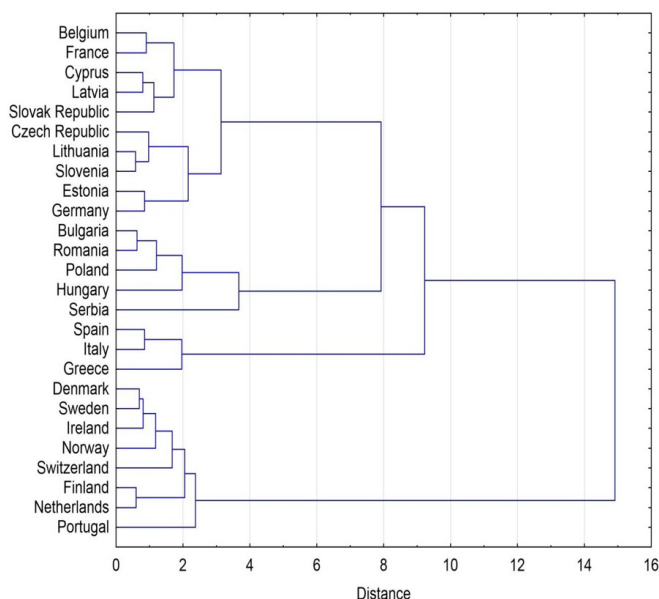


Figure 1: Dendrogram of clustering of European countries on the ground of political stability/extremism

Four groups of countries were obtained according to the results of cluster analysis (Table 3), which have certain similarities and differences.

Table 3. Groups of countries depending on the level of achievement of individual indicators

Clusters	Countries
1	Belgium, Czech Republic, Cyprus, Estonia, France, Germany, Latvia, Lithuania, Slovak Republic, Slovenia
2	Bulgaria, Hungary, Poland, Romania, Serbia
3	Greece, Italy, Spain
4	Denmark, Finland, Ireland, Netherlands, Norway, Portugal, Sweden, Switzerland

Regarding the specifics of certain clusters, it should be noted that Cluster 1 included countries that have average among the surveyed countries indicators of the index of freedom and the index of political stability and absence of violence. Cluster 2 consists of countries with low indicators of the freedom index and average values for other studied indicators. Cluster 3 includes the countries with the largest number of extremist parties and characterised by low and below average indicators in terms of the freedom index, the index of political stability and the absence of violence, and the quality index of national elites. Cluster 4 contains countries that have high indicators of the index of freedom, the index of political stability and absence of violence and the quality index of national elites, while having a higher average among the surveyed countries number of extremist parties.

4. Discussion

Modern society is often seen as degenerate, constantly in crisis, while conservative concepts are seen as idealised and desirable. This continues in structural discourses that portray modern political and economic systems as dysfunctional and depressing (Campion, 2019). The actions of political extremists create a hidden tension between democratic and liberal constitutional commitments. The reality of the democratic legal revolutions of extremists in liberal democracies today forces us to seek an answer as to the priority of democratic or liberal choice. In such circumstances, limited democracy provides a wider range of mechanisms to deter the threat of extremism to the constitution without undermining basic constitutional obligations (Schupmann, 2020).

If we focus on the methodological approaches used in the study, it should be noted that the use of only European countries as a basis for signs of political stability/extremism narrowed the representativeness of the analysis. At the same time, the use of 26 European countries has proved to be sufficient to demonstrate the heterogeneous range of extremist parties in parliaments. The results of the study showed that the low institutional development of indicators that characterise political stability, lack of violence, development of democratic freedoms and the quality of national elites leads to a significant increase in political extremism and its electoral supporters. The average values of the level of these indicators are formed by the moderate spread of political extremism. The results shown by the group of countries that are included in Cluster 4 and have high values of indicators of the development of freedom, political stability and quality of elites are interesting. At the same time, the countries included in this cluster have the above-average number of extremist parties.

The results of the study showed that the low institutional development of indicators that characterise of political stability, lack of violence, development of democratic freedoms and the quality of national elites leads to a significant increase in political extremism and its electoral supporters. The average values of the level of these indicators are formed by the moderate spread of political extremism. The results shown by the group of countries that are included in Cluster 4 and have high values of indicators of the development of freedom, political stability and quality of elites are interesting. At the same time, the countries included in this cluster have the above-average number of extremist parties. This result rather indicates the shortcomings of modern democratic approaches to freedom of expression. Various political directions (including extremist ideas) have the opportunity to freely express their own political preferences, which may counter the centrist orientation, gender approaches, European integration, and others. Democracy requires not only the restriction of the rights of the majority by minority rights, but also modern democracy protects individual freedom and provides effective guarantees of civil liberties against state power (Sartori, 2016). In addition, there is a claim that the historical experience of authoritarianism helps to explain the difference in the reactions of democracies to extremism (Moroska-Bonkiewicz and Bourne, 2020).

This data set, which relates to the political sphere, did not give a complete picture of the factors that may influence the formation of political extremism. A slowdown in economic growth causes a shift in political preferences to the right, while an increase in economic growth causes a shift in political preferences to the left. Brückner and Grüner (2020) proved that economic growth is an important determinant of right-wing extremism. Low GDP growth per capita increases support for far-right parties. Thus, the growth of right-wing extremism can occur even with a high level of material well-being. Empirical analysis shows a significant negative impact of economic

growth on the support of right-wing extremism, but no significant effect on the support of far-left parties. A possible explanation is that, unlike far-right parties, the main goal of far-left parties is to redistribute income from rich to poor.

It is important to strengthen the empirical framework to expand the list of countries used in the analysis provided the availability of data in open sources. After all, the involvement of countries with different economic development and political freedoms will have a more objective picture of the influence of certain democratic and economic factors on the political extremism.

These scientific approaches can be used to counter extremism by addressing issues such as the impact of democracy on extremist political parties; profiles of the use of the Internet as a means of detecting membership in extremist groups (Hale, 2012); simulating attitudes toward potential violent extremists (Kebbell and Porter, 2012).

Regarding the analysis of the study, it should be recognised that in recent years of crisis and austerity in Europe there has been a significant rise in extremist and nationalist parties that won the election and caused significant changes in the rules of the political game (Rooduijn and Akkerman, 2017). Although the distribution of votes for different ideologies in 1998 and 2018 (Figure 2) demonstrates a gradual decline in the ideas of political extremism, in fact popular dissatisfaction with elites, immigration and supranationalism fuels radical sentiment (Timbro Authoritarian Populism Index, 2021).

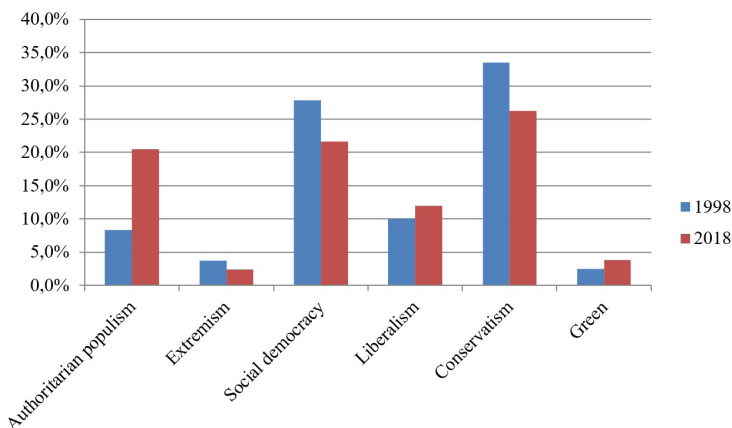


Figure 2. *Percentage of votes for different ideologies in 1998 and 2018 (Timbro Authoritarian Populism Index, 2021)*

The rise of hatred and violence requires a better understanding of the causes of political extremism and its subjects, which attracts the attention of researchers in various fields. Research on the propensity for political extremism is based on surveys and ethnographic research. The survey is conducted on both random and target samples to determine those whose responses fall on the extreme limits of the liberal-conservative spectrum (Kruglanski *et al.*, 2012, Van Prooijen *et al.*, 2015). The presented research allows us to look more broadly at the ground for the development of political extremism in terms of the maturity of individual institutions of a democratic society.

The study of political extremism and its consequences is closely related to the issues of state security and cybersecurity (Kruhlov *et al.*, 2019). The European approach to radicalisation, which seeks to legislate and soften broader societal processes of expression between communities and link them to the problem of security from violent extremism, requires huge volumes of security resources in the areas of monitoring and intervention. The experience of combating extremism and terrorism in the modern era is that such a policy is fraught with complications and controversy when it is perceived as the creation of “suspicious communities” and the separation of local communities under national ideas. Extremely authoritarian measures can significantly increase the long-term risk of lack of trust between certain communities in the state, making authoritarianism even more destructive of the basic principles of democracy and freedom (Richards, 2017).

The representative closeness between extremism, violence and terror increases the importance of such topics as security, deterrence, prejudice, protection of democratic institutions; political proposals aimed at re-education, deradicalisation; relevance of diagnosis of social and psychological factors in extremism (El-Ojeili and Taylor, 2020). As a rule, liberal democracies take various measures in response to political extremism. They range from extremely repressive measures, such as banning associations and parties, or criminalising offensive language; cooperation between the main parties to exclude extremists from the government; to more liberal, adaptive, and persuasive strategies (Downs, 2012).

In general, finding a rational balance between the implementation of democratic approaches to the development of ideologies, political activity and containment of destructive actions of certain ideological directions remains a rather difficult task for the state. But, given the research, it is possible to emphasise the importance of public policy aimed at ensuring balanced approaches to the development of democratic values, political pluralism, the formation of ideological trends that focus on various social and ideological groups, expanding communication through social and political dialogue, while strengthening certain aspects of security and law enforcement.

Conclusion

The study of the causes of political extremism is a very topical issue, as evidenced by literature review and conducted analysis. Significant consequences of political extremism for society and states include non-acceptance of democratic ideas, restriction of civil liberties, intensification of radical actions, increased number of terrorist acts. Democratic transformations, the development of pluralism, openness, tolerance, and moderation contributed to a wide range of public choices of close political ideologies. However, disagreement with certain areas of public policy, lack of sufficient communication, a separate view of the country's development has intensified the emergence of radical approaches to the political will of citizens. Ideological directions that profess authoritarian populism, conservatism and extremism are becoming widespread.

The analysis proves that the formation of political extremism is influenced by the level of quality of national elites, the development of fundamental rights and freedoms, the political stability and the absence of violence. The classification of European countries by the hierarchical clustering method divided the countries into 4 clusters according to the available indicators. It is determined that low indicators of political stability, lack of violence, development of democratic freedoms and quality of national elites increase the level of political extremism, which leads to increased support for it in national parliaments. The moderate level of political extremism corresponds to the average values of the level of the indicators used in the study. High indicators of the development of freedom, political stability and the quality of elites can produce a significant level of political extremism. This indicates the possibility of democratic expression of will, pluralism and tolerance of radical/extremist ideas, which differ significantly from democratic political views, environmental trends, tolerant gender approaches, European integration, and others. This result was based on a study of countries with a high level of economic development and democratic institutions. It will be appropriate to strengthen further analysis by including certain economic indicators that will demonstrate economic stability, income levels, attracting foreign investment. Further research may involve econometric models of the dependence of the level of political extremism on individual social and economic indicators of countries with different levels of development.

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Comparative analysis of the legislative support for law enforcement agencies in the post-soviet space and Europe

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Abstract

The aim of the study was to determine the most effective model for regulating law enforcement in Europe and the post-Soviet space, as well as to formulate recommendations for the unification and standardization of legislation in this area. The empirical background was statistics on crime rates, premeditated murders by country; provisions of legislation governing the law enforcement activities of 13 countries and international regulations. Methods of system approach, descriptive statistics, descriptive analysis, generalization and prognosis, system selection, comparative method was used. The activities of law enforcement agencies are aimed at ensuring public order, national security and the protection of human rights, freedoms, and interests. Each state has its own law enforcement system, which is clearly regulated. The main indicator of the effectiveness of law enforcement is the crime rate and the level of security in the country. It is concluded that the most effective is the law enforcement model with its fundamental principles of decentralization of law enforcement agencies.

Keywords: law enforcement; law enforcement agencies; law and order; national security; crime.

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Análisis comparativo del apoyo legislativo a los organismos encargados de hacer cumplir la ley en el espacio postsoviético y Europa

Resumen

El objetivo del estudio fue determinar el modelo más eficaz para regular la aplicación de la ley en Europa y el espacio postsoviético, así como formular recomendaciones para la unificación y estandarización de la legislación en esta área. El trasfondo empírico fueron estadísticas sobre tasas de criminalidad, asesinatos premeditados por país; disposiciones de la legislación que rigen las actividades de aplicación de la ley de 13 países y reglamentos internacionales. Se utilizaron métodos de enfoque de sistema, estadística descriptiva, análisis descriptivo, generalización y pronóstico, selección de sistema, método comparativo. Las actividades de los organismos encargados de hacer cumplir la ley tienen por objeto garantizar el orden público, la seguridad nacional y la protección de los derechos humanos, las libertades y los intereses. Cada estado tiene su propio sistema de aplicación de la ley, que está claramente regulado. El principal indicador de la eficacia de la aplicación de la ley es la tasa de delincuencia y el nivel de seguridad en el país. Se concluye que, el más eficaz es el modelo de aplicación de la ley con sus principios fundamentales de descentralización de los organismos encargados de hacer cumplir la ley.

Palabras clave: aplicación de la ley; organismos encargados de hacer cumplir la ley; orden público; seguridad nacional; delincuencia.

Introduction

The main objective of every democratic state governed by the rule of law is to ensure the protection of human rights and the rule of law in all spheres of public life. The main actors in fulfilling this objective at the state level are national law enforcement agencies (Svechnikov, 2016). The law enforcement is not an exclusively domestic, national activities, but is also provided at the international level. In particular, the EU has adopted a number of regulations that contain the main international standards of law enforcement in European countries - the European Security Strategy (Jahnz *et al.*, 2020), which is basis for other regulations (EU Internal Security Strategy 2015-2020, European Security Program 2015, Global Strategy for the European Union's Foreign and Security Policy 2016). There are also a number of EU law enforcement agencies, whose activities are also governed by the said regulations. The international law enforcement agencies and the legal framework governing their activities underscore the importance of effective legislative regulation of law enforcement activities.

In the context of current globalisation and universalisation of national legal systems, radical changes are taking place in the legislative regulation of law enforcement agencies at all levels. In particular, it concerns the strengthening of international cooperation in the activities of law enforcement agencies (Sallavaci, 2018), including intercontinental (between the EU and Australia) (Hufnagel, 2016); ensuring cross-border access of law enforcement agencies to information on evidence in certain categories of crimes (Warken *et al.*, 2020), as well as ensuring security and observance of rights during such access (Daskal, 2016).

These reforms in different countries do not follow the same path, choosing the most optimal way of reform for their national legislation. But this path is not always the most effective and not in all cases such theoretical legislative activities bring the expected results during the practical application of relevant regulations (Scholten and Luchtman, 2017). With regard to individual countries, it is noted that the current system of legal regulation does not fully meet the needs of practical activities in the field of protection of human rights and freedoms (Udaltsova, 2009).

The importance of legislative support for this type of activity of state internal affairs bodies is also confirmed by the fact that such support is provided at the international level as well. Scholars scrutinise the issue of EU law enforcement bodies (Scholten *et al.*, 2017), as the means of such support must be universal and meet modern requirements. Therefore, the national legislation of the EU is quite similar, including in the regulation of law enforcement.

Issues of legislative support of law enforcement are studied at different angles. In particular, the role of training modules for law enforcement officers and their importance are determined (Renzetti *et al.*, 2015); the problems of training and education of law enforcement officers are studied (Wainwright, 2017); proposals are made for the application of ethical codes of law enforcement agencies (Kozlovska and Kirilieva, 2020); the importance of automated systems and their development in local law enforcement is studied (Shormee, 2020). The problems of legal restrictions and current challenges for the police and law enforcement agencies in general are not left aside either (Vacca, 2019). Specialised activities of law enforcement agencies are also studied, for example, the development of law enforcement intelligence services (Gill, 2017); legal regulation of law enforcement agencies to combat economic crime (Nipialidi, 2020); activities to coordinate crime prevention by law enforcement agencies (Tologon, 2017), etc. In the context of the development of the information society, research on the impact of modern digital technologies and artificial intelligence on the regulation of law enforcement at the national and international levels is becoming especially topical (Nissan, 2017).

Quite a large number of studies deal with the analysis of certain issues of regulation of law enforcement in some European countries: the effectiveness of the training system of the National Police of Spain (Ramos Perez, 2017); the possibility of involving additional law enforcement agencies in the law enforcement system (on the example of Hungary) (László, 2017), etc. is investigated.

Instead, these issues related to the legislative support of law enforcement agencies in the post-Soviet space are much less studied. Legislation in various areas of regulation, including law enforcement, in these countries still remains far from EU standards and world practices. In particular, a number of works deal with the problems of law enforcement agencies in Ukraine from the standpoint of legal support of information and analytical activities of the National Police of Ukraine under the current conditions of European integration and globalization (Senyk, 2020). The research also analyses the system of law enforcement agencies of individual states, which is also important for determining the effectiveness of a legal model of legislative regulation of law enforcement (Beketov *et al.*, 2018).

Therefore, the issue of reforming the activities of law enforcement agencies, its legislative support and the development of the most effective ways to implement state policy in the field of law enforcement becomes particularly topical (Griffith, 2017). Given the above, the main problem is to establish the most effective legislative model for regulating law enforcement, as well as to identify the main current trends that need to be taken into account when reforming the legal regulation of law enforcement (Discover Policing, n.d.).

In view of the above, the aim of this study is to determine the most effective legislative model for regulating the activities of law enforcement agencies in individual European countries and the post-Soviet space through comparison, and to make recommendations for unification and standardisation of legislation in this area. The comparison of efficiency of law enforcement agencies and definition of the basic characteristics of models of legislative regulation of law enforcement will be carried out within the stated aim.

1. Methodology and methods

This study was carried out taking into account the practical objectives in stages relying on the logic of the study and presentation of the material. These stages included: search and selection of literature and electronic resources, as well as relevant regulations; analysis of the material presented in the selected sources and evaluation of the results of these studies; identification of urgent problems of legislative support of law enforcement

agencies in some countries; determining the aim of the article; drawing conclusions and practical recommendations for improving the efficiency of law enforcement agencies; outlining prospects for further research in this area.

This study involved global and regional statistics on the crime rates in general, as well as its quantitative indicators for certain categories of crimes (for example, the number of premeditated murders) by individual European countries and post-Soviet countries. Statistics on the ratio of the number of police officers to the population of the region, data on the most and least dangerous countries in the studied regions were also used. These data allow establishing the most effective model of legislative regulation of law enforcement.

The empirical background of the study consisted of national and international regulations governing the activities of law enforcement agencies. To analyse the provisions of national legislation governing the activities of law enforcement agencies in individual countries and at the international level, we reviewed the legislation governing law enforcement activities in 13 countries (Croatia, Ukraine, Norway, the Federal Republic of Germany, France, Poland, Great Britain, Spain, The Russian Federation, the Netherlands, the Republic of Kazakhstan, the Republic of Estonia, Belgium), as well as the regulatory framework of EU law enforcement and international regulations.

To achieve this aim, the following methods were used in this study: *systems approach* was used to study the legislative support of law enforcement at the national and international levels as a holistic system of interrelated regulations and identification of current models of law enforcement; *descriptive statistics*, which was used to select, process, analyse and summarise statistics on the effectiveness of law enforcement agencies in individual European countries and the post-Soviet space; *the comparative method* was used to compare the ways of legislative support of law enforcement in individual countries and the effectiveness of such bodies depending on the model of the law enforcement system; *descriptive analysis* was used to arrange, classify and summarise the most peculiar features of different models of law enforcement in individual countries and their legislative regulation; *system selection* was used to select the most typical legislative models of law enforcement in some European countries and the post-Soviet space; *generalisation and forecasting methods* were used to identify the most effective legislative model for regulating law enforcement activities and to develop proposals and recommendations for improving and unifying the regulation of law enforcement activities in Europe and the post-Soviet space.

2. Results

Law enforcement is the general name for the activities of bodies responsible for maintaining public order and ensuring the rule of law, in particular activities for the prevention, detection, investigation of crimes and detention of criminals (Office of Justice Programs, n.d.). The activities of these bodies within their functions are aimed primarily at ensuring law and order, national security at all levels, as well as protection of human rights, freedoms, and interests in society.

Each state has its own system of law enforcement agencies, which is clearly regulated by current national legislation. As a rule, these are special regulatory acts that define the system of law enforcement agencies, its principles, rights and responsibilities of law enforcement agencies, the scope of their activities, etc. (see Table 1).

Table 1. Legislation governing the activities of law enforcement agencies (by countries)

Country	Regulations
Great Britain	Police Act 1964, Greater London Authority Act 1999, Police and Magistrates' Courts Act 1994, Police Act 1996
Republic of Poland	Police Act 1990, Office of the Minister of the Interior Act 1996, County Self-Government Act 1998, Local Self-Government Act 1990, and Administration Division Act 2007
Republic of Estonia	Police and Border Guard Act 2009
Croatia	Police Act, Government Resolution on the Internal Organisation of the Ministry of Internal Affairs, and the Police Code 2000
France	Decree on the Personnel of the Operational Services of the French National Police 1968, Law on the Rights and Duties of Civil Servants 1983, Decree on Police 1986, Decree on the National Police of France, Law on Strengthening Security and Protection of Individual Freedom 1981, Law on the Modernisation of the French National Police 1985, Law on the Special Status of the Technical and Training Corps of the National Police 2004
Germany	Law on the Federal Criminal Police Office and Cooperation of the Federation and the Lands in Criminal Cases 1997, Federal Police Act 1994, Law on the Use of Direct Coercion in the Exercise of Public Power by Federal Officials 1961

Spain	The Constitution of Spain of December 29, 1978; Organic Laws of the Kingdom of Spain No. 2 of 13 March 1986 on Forces and Security Corps, No. 6 of 1 July 1985 on the Judiciary, No. 11 of 17 July 1991 on Disciplinary Regime in Civil Guard Units; Law of November 25, 1999 on the Staff Regulation of the Civil Guard Corps; Law on Criminal Conviction as amended by Organic Laws No. 14 of June 9, 1999 and No. 5 of January 13, 1999; Royal Decree No. 239 approved by the Council of Ministers on 18 April 2000, enacting the Law on the Rights and Freedoms of Foreigners and their Integration of 1 February 2000; Real Decree No. 769/87 on Regulation of Judicial Police; Real Decrees No. 84/87, 93/88, 84/89, 327/1999 (general legal norms for the functioning of the national police corps), No. 116/2000, 1257/1999, 1523/1999, 1115/1999, 483/1999, 367/1997, 1951/1995, 1562/1995, regulating various areas of activity of the Civil Guard; statutes of the autonomous regions, which contain the rules of law on police activities in the regions (for example, Law No. 10/94 on the Police of Catalonia); local police laws existing in each of the Autonomous Communities (for example, in Catalonia, Local Police Act No. 16/91; in Valencia —Local Police Act and the Local Police Coordination Act of the Autonomous Community of Valencia)
Ukraine	Law “On the National Police” 2015, “Instruction on the Procedure for Attestation of Police Officers” 2015, “On Organisation of Selection (Competition) and Promotion of Police Officers” 2015, “Instruction on Organization of Activities of Duty Units and Divisions of Internal Affairs of Ukraine Aimed at Protecting the Interests of Society and the State from Unlawful Encroachments” 2009, “Rules of Internal Procedure in Temporary Detention Facilities of Internal Affairs of Ukraine” 2008, “Regulations on the Procedure for Dealing with Citizens’ Appeals and the Organisation of their Personal Reception in the System of the Ministry of Internal Affairs of Ukraine” 2004, “Instruction on the Procedure for Maintaining a Single Record in the Police of Statements and Notifications of Criminal Offenses and Other Events” 2015, “On the Organisation of Response to Reports of Criminal Offenses, Other Offenses, Emergencies and Other Events and Providing Prompt Information in the Bodies and Departments of Internal Affairs of Ukraine” 2012; “On Measures to Comply with the Law in the Detention without the Decision of the Investigating Judge, the Court of Persons Suspected of Committing a Crime, and in the Selection of a Precautionary Measure against Suspects — Detention in the Course of Criminal Proceedings” 2013.
Russian Federation	Federal Law “On Police” 2011, Federal Law “On Service in Internal Affairs Bodies” 2011, Order “On Approval of the Rules for the Wearing of Uniforms, Insignia and Departmental Insignia by Employees of Internal Affairs Bodies of the Russian Federation” 2013
Norway	Police Act 1995
Netherlands	Police Act of the Kingdom of the Netherlands 1993
Republic of Kazakhstan	Law “On Internal Affairs of the Republic of Kazakhstan” 2014, Order “On Approval of the Police Officer Standard” 2020.
Belgium	Law “On Police Activity” 1992, Law “On Organisation of Integrated Police Service Structured on Two Levels” 1998

International regulations	Code of Conduct for Law Enforcement Officials 1979; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990; 1979 Police Declaration; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985; Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment 1988; Declaration on the Protection of All Persons from Enforced Disappearance 1992)
EU regulations	Europol Convention 1999, Recommendation to Member States in respect of Europol's Assistance to Joint Investigative Teams set up by Member States 2000, Recommendation to Member States in respect of Requests made by Europol to Initiate Criminal Investigations in Specific Cases 2000, Decision of the Council of the EU Setting up Eurojust with a view to Reinforcing the Fight against Serious Crime 2002, European Security Strategy, EU Internal Security Strategy 2015-2020, European Security Program 2015, Global Strategy for the EU's Foreign and Security Policy 2016

A clear indicator of the effectiveness of law enforcement agencies, as well as the system of its legislative regulation is the effectiveness of the practical application of the rules governing this activity. One of the indicators of the effectiveness is the crime rate in the country, including the number of premeditated murders (as a crime that is one of the most socially dangerous because it encroaches on the highest value of any rule of law — human life and health) (see Table 2).

Table 2. Crime rate by countries

Country	Crime rate	Premeditated murders	
		Rate (per 100,000 people)	Number (per 100,000 people)
Austria	25.23	0.97	86
Belgium	44.17	1.70	193
Great Britain	45.26	1.20	809
Greece	44.14	0.94	99
Georgia	22.62	2.22	89
Denmark	26.72	1.01	52
Spain	33.13	0.62	290
Italy	44.32	0.57	345
Latvia	37.21	4.36	84
Lithuania	33.84	4.57	128

Netherlands	27.22	0.59	100
Germany	35.42	0.95	788
Norway	33.35	0.47	25
Poland	29.32	0.73	272
Portugal	29.89	0.79	81
Republic of Azerbaijan	31.66	2.2	219
Republic of Belarus	60.27	2.39	226
Republic of Bulgaria	38.12	1.30	92
Republic of Armenia	23.35	1.69	50
Republic of Kazakhstan	54.02	5.00	915
Republic of Moldova	46.56	4.10	166
Republic of Uzbekistan	34.70	1.1	363
Russian Federation	40.13	8.21	11,964
Slovenia	21.79	0.48	10
Turkey	39.53	2.59	2133
Hungary	34.81	2.50	242
Ukraine	48.28	6.20	2,751
Finland	27.01	1.03	90
France	49.2	1.20	799
Czech Republic	25.31	0.60	66
Switzerland	21.35	0.59	50
Sweden	47.2	1.08	108

Source: United Nations Office on Drugs and Crime (n.d.)

Based on the crime rate, the safest and least safe countries to live in are identified. The level of safety of living in the country directly depends on the crime rate, which is a determining factor (see Table 3).

Table 3. Safety of living in countries

The safest countries	Safety index	The least safe countries	Safety index
Switzerland	78.65	Republic of Belarus	39.73
Slovenia	78.21	Republic of Kazakhstan	45.59
Georgia	77.38	France	50.8
Republic of Armenia	76.65	Ukraine	51.72
Austria	74.77	Sweden	52.8
Czech Republic	74.69	Republic of Moldova	53.44
Denmark	73.28	Great Britain	54.74
Finland	72.99	Italy	55.63
Netherlands	72.78	Belgium	55.83
Poland	70.68	Greece	55.86

Source: Numbeo (2021)

There are also differences in the number of police officers in relation to the population in different countries. But does this quantitative indicator affect the effectiveness of the right to protected activities in the field of security and protection of human rights? The answer to this question can be given by comparing the number of crimes committed (for example, the number of premeditated murders) and the number of law enforcement officers, reading the data presented in Table 4.

Table 4. Ratio of the number of police officers to premeditated murders (per 100,000 inhabitants)

Country	Number of police officers	Number of murders
Belgium	370.4	1.8
Spain	385.3	0.8
Italy	467.2	0.9
Portugal	454.2	1.1
Republic of Bulgaria	398.1	1.7
Republic of Kazakhstan	444.8	8.8
Russian Federation	547.3	9.7

Slovakia	394.0	1.8
Turkey	474.8	3.3
Ukraine	384.4	4.3
Czech Republic	393.8	0.8

Source: Volkov (2021).

As mentioned above, law enforcement agencies ensure security in society in all spheres of life, as well as take certain measures to combat crime. Therefore, indicators on the level of crime, including the number of premeditated murders, as well as the safety of living in a particular country determine the effectiveness of law enforcement, as well as the quality of legislation in this area and its practical application. But the number of law enforcement officers in relation to the population does not radically affect the crime rate, and, consequently, the quantitative indicator is not decisive for determining the effectiveness of law enforcement.

Such countries as Switzerland, Slovenia, Georgia, the Republic of Armenia, Austria, Denmark, Finland, the Czech Republic, the Netherlands, Poland have the most effective legislative regulation of law enforcement. A vast majority of EU countries have a legislative model for regulating law enforcement, which provides for the cooperation of law enforcement agencies with the population within stable territorial communities. The main task of the police is to resolve conflict situations and other problems that arise among members of a particular community, using restorative justice. Restorative justice is an approach in which all parties to a particular offense come together to collectively decide what to do with the consequences of the offense and what their impact may be on the future (Centre for Justice and Reconciliation, 2021).

That is, this approach to responding to illegal behaviour and committing crimes takes into account the balance of interests of the victim, the offender and the community (Institute of Peace and Understanding, n.d.). Accordingly, this practice can be considered the most effective way to resolve conflicts related to the commission of offenses, and one of the activities to combat crime, as there are positive social changes, and the crime rate is significantly reduced.

Switzerland has the most experience in implementing decentralised socially oriented law enforcement (of the countries under study, it has the lowest crime rate and the highest safety rate), where there is no single centralised law enforcement agency at all. However, despite decentralisation, co-operation between law enforcement and local government is clearly regulated by law, which is monitored by police commanders and city police sheriffs (Bilas, 2016).

In particular, Poland has begun the course for radical reform of law enforcement agencies in the early 90's of the 20th century. The new Law on the Police has significantly limited the scope of police activities, leaving it to fight crime and perform preventive functions in this area. One of the novelties was also the legislative regulation in the same law of cooperation of law enforcement officers with local governments. In addition, competitive recruitment was introduced, where preference was given to persons who had not previously served in law enforcement agencies; governing bodies have been completely restored. The main tasks of law enforcement reform also included the organisation of the education system for police officers of various specialisations (law enforcement, anti-terrorist units, units for combating economic, drug and transport crime). During the law enforcement reform in Poland, two forms of law enforcement agencies were identified: state paramilitary armed formations that perform tasks of law enforcement (police, border, hunting, national, transport protection); other police actors that do not belong to the militarised bodies of public administration (pharmaceutical, sanitary, veterinary inspection) (Karpiuk, 2015a, 2015b, 2015c).

As for Georgia, the reform of law enforcement in this country began with one of the first among the post-Soviet countries (as well as in the Baltic countries). This reform was launched in 2004, and about 90% of law enforcement officers (including all management) were fired, recruitment was based on competitive selection based on standards and evaluation forms developed in Europe. In general, the law enforcement system was reorganised from a punitive structure into a security-oriented service organisation. These changes were enshrined in the Law of Georgia "On Police" of 2013 (Law of Georgia «On Police», 2013).

As for the post-Soviet countries, the activity of law enforcement agencies in the vast majority of them is exclusively centralised state sphere, which is built on the principle of clear structuring, hierarchy, and its activities are guiding and manifested in the use of coercion (repression) in response to offenses. Within this model of legislative regulation of law enforcement, little attention is paid to the preventive side of law enforcement, and the issue of cooperation between the police and society is almost not considered. The system of law enforcement bodies in the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation, etc. is built on this principle. Given the above statistics, the crime rate in these countries is the highest among the studied countries, which indicates the ineffectiveness of this form of legal regulation of law enforcement in modern conditions.

Accordingly, the activities of these bodies in different countries have their own specifics, although there are some common features that allow us to identify the so-called models of law enforcement. Two models are distinguished in the theory on the basis of these features; both law

enforcement activities and their legislative regulation are carried out through those two models.

The most common are two models, which are built depending on legal family a country belongs to: continental (continental European) and Anglo-American (Anglo-Saxon). Both models assume that law enforcement agencies are a legally regulated institution of social security and response, authorised by the state to ensure respect for human rights and freedoms, but these functions are implemented in different ways. In the countries of the continental European legal family (Federal Republic of Germany, France, Italy and others) law enforcement is exclusively a state sphere, which ensures the protection of social interests of individuals, society and the state as a whole, as well as the use of coercion in response for an offense, it is characterised by clear subordination; the leading role belongs to legislative regulation. Instead, the Anglo-American model (Great Britain) provides for the possibility of implementing the law enforcement function not only by government agencies, but also by non-governmental law enforcement agencies, which indicates a certain decentralisation of law enforcement agencies; judicial practice plays an important role here.

In the current conditions of universalisation and strengthening of international relations, clear differences between the forms of legal support of public life of the countries of these legal families tend to disappear. Therefore, there is a combination of features of both legal families in the field of legislative regulation of law enforcement agencies both the countries with a continental European model of law enforcement, and with the Anglo-American one. Within the framework of state policy on security, law, and order, this is reflected in the fact that there is a gradual reform of the law enforcement system in accordance with modern requirements: departure from exclusively law enforcement activities related to coercion, and the organisation of law enforcement activities that will expand preventive (non-criminal, non-coercive) functions.

Particular attention is paid to the legislative support and organisation of municipal police activities based on the principle of decentralisation. The principle of decentralisation of the creation of municipal law enforcement agencies provides for the absence of departmental police formations, which are formed by local executive bodies (territorial communities), which act on behalf of this authority and are subordinated to it. The so-called local (communal) police are formed instead, its activities are regulated by law and consist of preventive and protective measures. The implementation of such functions is possible with the close cooperation of law enforcement agencies with the population, social services, governmental and non-governmental organisations, ensuring law enforcement, security, protection of human rights and freedoms, the use of means to prevent and combat crime. This task can be realised through the provision of advice

to the public, the development of proposals for the use of certain tools, the development of popular education programs and courses, which will provide an understanding of the essence and increase the effectiveness of local law enforcement. And communities here should become the main subject of realisation (along with law enforcement agencies).

Despite the fact that the functioning of the communal form of law enforcement is insufficiently studied, the basic principle of this activity (cooperation between police and citizens) has already proved its effectiveness, as it is aimed primarily at identifying the causes and conditions of crime and their elimination. Reforming law enforcement agencies taking into account this principle is becoming more widespread among European countries (Britain, France, Germany, etc.). There are six main models of the functions of the communal police (see Figure 1).

The new model of activity of the bodies of internal affairs provides for legislative consolidation of its principle: from retrospective-reactive, which consists in reaction to the already committed offence, to perspective, which will involve prevention of commission of such offenses. This, in turn, necessitates overcoming legal nihilism both among law enforcement agencies and among community residents, as well as the creation of a clear system of local self-government of territorial communities.

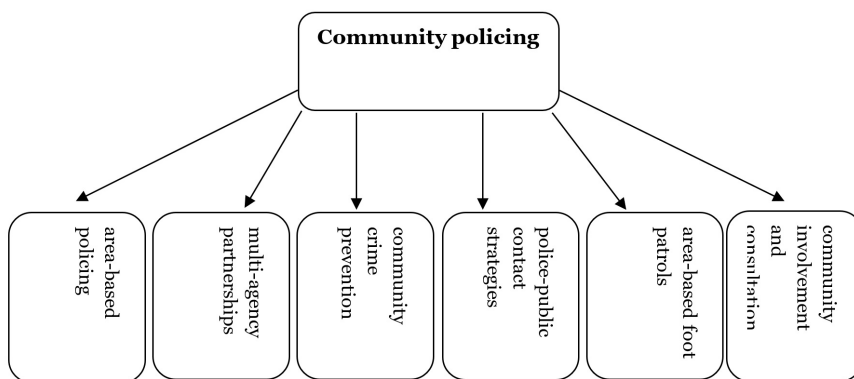


Figure 1. Models of communal police functions

Source: Bilas (2016).

Thus, the most effective is the model of law enforcement, where the main principles are the decentralisation of law enforcement; social orientation of policing, which consists in cooperation of law enforcement agencies with

citizens; promising nature of activities aimed at preventing offences. These principles should be enshrined in law to ensure implementing this model of law enforcement (see Figure 2).

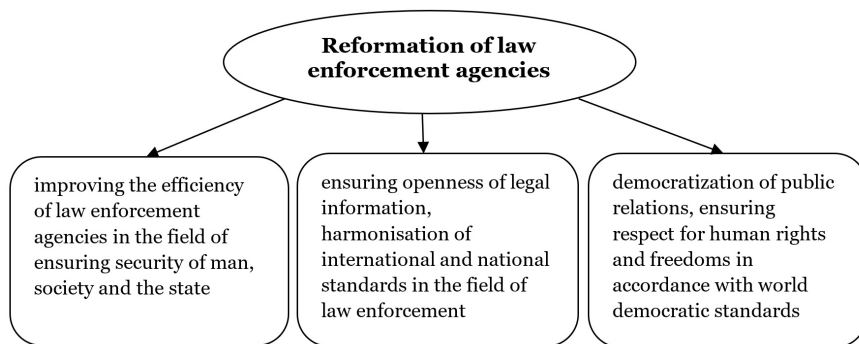


Figure 2. The purpose of law enforcement reform

Source: Bilas (2016)

But determining the most effective model of legal regulation of law enforcement is not enough, because the changes taking place in the world as a whole and in individual countries in particular require a new look at existing, even fairly effective models of law enforcement. It is necessary to take into account the current trends that have emerged in recent years in the further reform of the legislation on the regulation of law enforcement activities. These trends are manifested in the changes that occur in almost all spheres of public life — economics, politics, government, education, culture, etc. And it is the law enforcement agencies that must respond to these changes, because ensuring security at the appropriate level will be impossible without taking into account the latter.

In particular, the development of society in the context of informatisation, globalisation and human-centeredness requires government agencies, institutions and organisations to ensure law and order to adapt to new levels of transparency and universal access to information in all areas; the adoption and legislative support of national policies to promote better relations between the police and society; introduction and use of new technologies that will help increase the efficiency of policing, as well as establish close cooperation with the community; developing a deeper understanding of the relationship between the quality of education and the effectiveness of law enforcement (Fritsvold, n.d.a). Today, there are five main trends in the world that need to be taken into account when reforming (forming) the law enforcement system (see Figure 3).

Given the need for each state to respond immediately to the needs of society in the field of law and order, protection of human rights and freedoms, it is necessary to oblige legislators to include the necessary rules in existing legislation at the national level. A separate legal act can provide that, which will be of a recommendatory nature and will be valid for EU member states, as well as member states of other regions. This document may be entitled “Recommendations for the Legislative Regulation of Law Enforcement” and will include: principles of law enforcement at the national level (rule of law, legality, justice, human centrism, decentralisation); recommendations for the transition from an authoritarian to an inclusive leadership style in order to expand law enforcement opportunities; the procedure for creating socially oriented law enforcement agencies (expanding ties with citizens, creating specialised communities, developing partnerships between the police and society); gender quotas for law enforcement officers in order to attract more women and the importance of increasing the number of female police officers for certain categories of offenses; recommendations for advanced training of young law enforcement officers (providing opportunities for higher education, development of analytical, communication skills); a list of educational programmes that need to be developed under the current conditions of emergence and development of new types of crime (on knowledge of current legislation, on the use of new equipment to ensure effective combating of cybercrime); recommendations for providing law enforcement agencies with the necessary means, as well as the description of the latest tools and the latest technologies to increase the effectiveness of law enforcement activities.

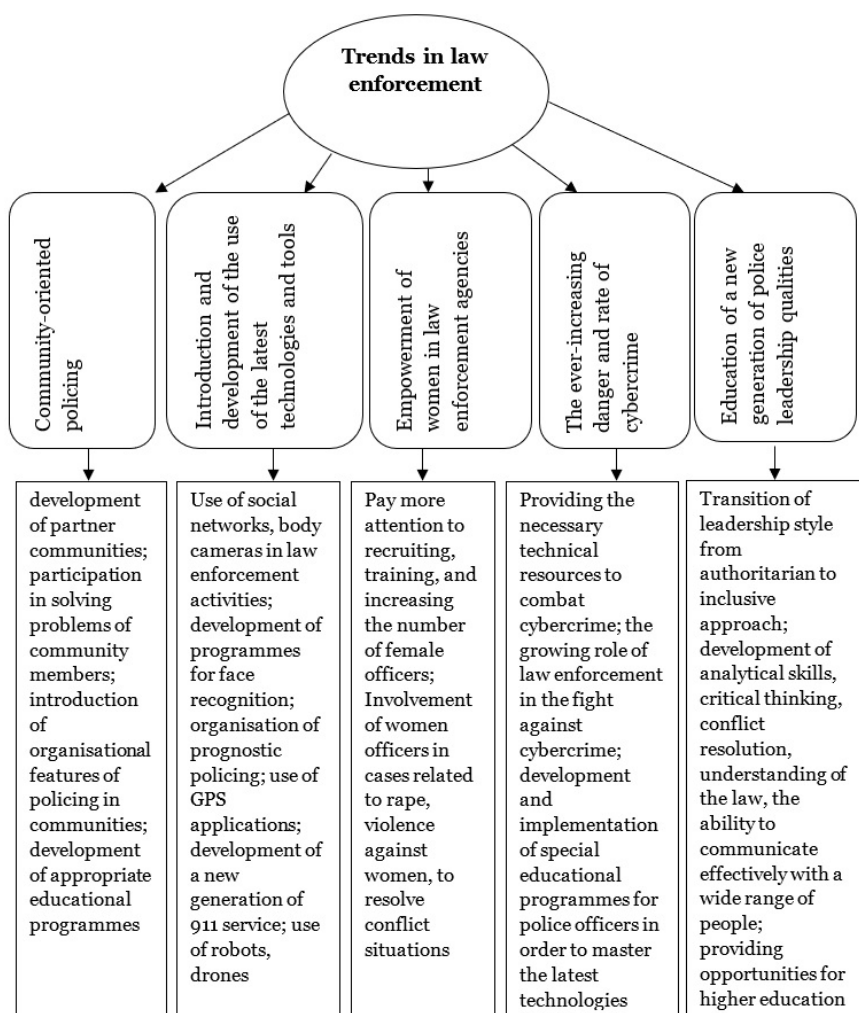


Figure 3. Current trends in law enforcement

Source: Fritsvold (n.d.a, n.d.b, n.d.c), University of San Diego (n.d.)

3. Discussion

Legislative regulation of law enforcement in modern conditions is not effective in all studied countries in Europe and the post-Soviet space. This

view is confirmed in the study of the essence of law enforcement, as well as the types and forms of performance of police functions (Svechnikov, 2016), as well as attention is paid in research on law enforcement reform in other regions of the world (Tomberlin, 2018). This is confirmed by the number of cases of human rights violations by law enforcement officers (for example, in Ukraine (Hladchuk, 2020), the Republic of Belarus (Zlobina, 2020) and in the world as a whole (Hall, 2020)), in particular under the current conditions of the ongoing pandemic (Amnesty International, Human Rights General, 2020) in many countries.

The most effective is the model of legislative regulation of law enforcement, which enshrines not only the establishment of decentralised and socially oriented law enforcement agencies, but also the use of modern technical means, especially in the context of globalisation and cooperation of law enforcement agencies in combating crime (Sallavaci, 2018). Modern digital technologies should be implemented in law enforcement, as this will increase its efficiency (Nissan, 2017). Therefore, it is difficult to agree with the view that modern technologies can limit the activities of law enforcement agencies or reduce its efficiency (Lum *et al.*, 2017). After all, modern software is able to provide effective prognostic (preventive) activities of the police in cooperation with the public (Shapiro, 2017).

The position that the organisation of law enforcement agencies requires the management of their activities based on the principle of justice, which is fundamental, is ambiguous (Wolfe *et al.*, 2018). It is impossible to single out among the principles of legislative regulation and practical implementation of law enforcement agencies, because all the principles of a democratic state governed by the rule of law, together with special principles must be observed in the complex: legality, rule of law, justice, decentralisation, human centrism.

Some studies also focus on the need to reform law enforcement in order to work closely with the police and society, which will also help reduce the number of offences committed by law enforcement agencies (Mummolo, 2018). Besides, given the results of this study, we agree that one of the main directions in law enforcement reform is to provide training for police officers, which will help overcome legal nihilism.

Conclusions

The study allows drawing a number of conclusions about the effectiveness of legislative models of law enforcement regulation. It is established that the main indicator of law enforcement efficiency is two interrelated indicators: the crime rate and the level of safety in the country. The most effective is the model of law enforcement with the main principles being

the decentralisation of law enforcement; social orientation of policing, which consists in cooperation of law enforcement agencies with citizens; promising nature of activities aimed at preventing offences. Enshrinement of these principles at the level of national and international legislation will provide an opportunity to understand the objectives of law enforcement to ensure law and order.

In order to unify and standardise the legislative regulation of law enforcement agencies at the international level, it is advisable to adopt a legal act “Recommendations on the Legislative Regulation of Law Enforcement Activities”, which will include the following provisions: principles of law enforcement; recommendations for the transition from an authoritarian to an inclusive leadership style; the procedure for creating socially oriented law enforcement agencies; gender quotas for law enforcement officers; recommendations for advanced training of young law enforcement officers; a list of educational programmes to be developed under the conditions of emergence and development of new types of crimes; recommendations for providing law enforcement agencies with the necessary means and a description of the latest tools and the latest technologies.

This study opens up the prospects for further development to improve national legislation and international regulations in the field of law enforcement in Europe and the post-Soviet space from the standpoint of harmonisation and unification of legislation in the studied area.

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Administrative-legal framework for the implementation of gender equality in the activities of the National police of Ukraine

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Abstract

From a documentary methodology close to legal hermeneutics, the article examines the problems of gender inequality; in particular, the study focuses on the problems of gender inequality in the Ukrainian National Police. The concepts and main stages of formation and development of gender policy in Ukraine are analyzed. The factors contributing to the emergence of gender inequality in the Ukrainian National Police have been studied. These include, firstly, the unequal position of women and men in society due to gender stereotypes. The article analyzes the components, characteristics, and functions of the mechanism for ensuring gender equality in the Ukrainian National Police. Particular attention is paid to the legal basis for ensuring gender equality in the activities of the Ukrainian National Police. To this end, the normative framework aimed at ensuring gender equality in the Ukrainian National Police was analyzed. It is concluded that, despite significant changes in the content of the laws to establish the principle of gender equality, there is still a long way to go to achieve effective equality.

Keywords: gender equality; gender stereotypes; mechanism to ensure gender equality; normative basis; human rights.

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Marco administrativo-legal para la implementación de la igualdad de género en las actividades de la Policía Nacional de Ucrania

Resumen

Desde una metodología documental próxima la hermenéutica jurídica, el artículo examina los problemas de desigualdad de género; en particular, el estudio se centra en los problemas de desigualdad de género en la Policía Nacional de Ucrania. Se analizan los conceptos y las principales etapas de formación y desarrollo de la política de género en Ucrania. Se han estudiado los factores que contribuyen al surgimiento de la desigualdad de género en la Policía Nacional de Ucrania. Estos incluyen, en primer lugar, la desigualdad de la posición de mujeres y hombres en la sociedad debido a los estereotipos de género. El artículo analiza los componentes, características y funciones del mecanismo para garantizar la igualdad de género en la Policía Nacional de Ucrania. Se presta especial atención a la base jurídica para garantizar la igualdad de género en las actividades de la Policía Nacional de Ucrania. Para ello, se analizó el marco normativo destinado a garantizar la igualdad de género en la Policía Nacional de Ucrania. Se concluye que, a pesar de cambios significativos en el contenido de las leyes para establecer el principio de igualdad de género, falta aún mucho camino por recorrer para el logro de una igualdad efectiva.

Palabras clave: igualdad de género; estereotipos de género; mecanismo para asegurar la igualdad de género; base normativa; derechos humanos.

Introduction

Equality of people is the primary source in ensuring the fair distribution and use of social gains and benefits, the formation of effective social relationships. The establishment of social equality is a condition for the development of an open state and civil society. One of the types of social equality is gender equality, which provides for the equal rights, freedoms and opportunities of women and men in all spheres of life.

At the present stage in Ukraine, as in any other country in the world, developing on a democratic basis, ensuring the principle of gender equality is one of the fundamental tasks of society and the state. The issue of ensuring the principle of gender equality has been relevant for a long time, but it has received a modern scientific assessment and new solutions since the middle of the last century (it is important to take into account the peculiarities of each country's development).

However, every country in the world to some extent still faces with gender asymmetry. This objectively prevents the full operation of public structures and the development of the private sphere. The lack of an appropriate mechanism to ensure the principle of gender equality deepens the problem of social injustice in society and, as a consequence, hinders sustainable human development. Today, ensuring gender equality is one of the priority issues on the way to the modern Ukrainian state.

The issue of ensuring the principle of gender equality and the formation of an appropriate national mechanism is caused by world political processes, Ukraine's international obligations, its European choice and other factors and has significant theoretical and practical importance for legal doctrine and state development.

The principle of gender parity should be implemented in the activities of the National Police of Ukraine as well. After all, according to the experience of European countries, where women make up 25-40% of the staff, women's service in the police has a positive potential and is effective: it improves the quality of staff selection, improves the socio-psychological climate in the team, improves efficiency and quality management decisions, as well as trust in the police. Women show a higher level of executive discipline and a lower level of aggression, they are more communicative in resolving family conflicts, and the work of women police officers is indispensable while dealing with victims of violence and adolescent offenders.

At the same time, the introduction of a gender-balanced approach in the ranks of the National Police of Ukraine, which is *de jure* free from systemic barriers to full participation in professional activities regardless of gender, in practice causes a number of problems for both women and men.

1. Formation and development of gender policy in Ukraine

Gender policy has become a widespread legal phenomenon in all democracies of the world after the establishment in 1946 of a special UN Commission to monitor the situation of women and promote the realization of their rights (Piren *et al.*, 2002). Since then and to this day, the world's democracies have worked hard to improve guarantees for the implementation of the principle of gender equality in their territories and at the international (regional, including European) level. Such states include Ukraine. Since 1991, a number of measures have been taken in Ukraine to develop gender policy.

In the course of long-term historical development of society and the state, various types of state policy, including types of state gender policy, have been developed and scientifically systematized. Thus, based on the

generalization of world experience, science and practice determine the types of such policies:

1. patriarchal policy of the state, the purpose and content of which is to focus on the main place and role of women in fulfilling the natural function of motherhood and housekeeping, removing her from the public sphere and restrictions on professional activities, recognition of women's dependence on power, property, and ideology, formed by men.
2. paternalistic policy of the state - the direction of state activity on women, the content of which is the proclamation and protection of rights and freedoms at the level of men, organized involvement of women in state forms of government and administration, creating a system of benefits and protection of motherhood and childhood, regulating women's participation in production, promoting women's image as equal to a man.
3. egalitarian state policy - purposeful activities of the state to create conditions and opportunities for women on a par with men, providing guarantees for their will, self-affirmation and self-realization, expression of personal strength of both sexes (Hrytsai, 2018).

The term "politics for women" was one of the first concepts to appear historically in the 1970s and 1980s, reflecting the actions of some European governments to combat discrimination against women in politics in the labor market. The basis of this policy was the principle of "positive discrimination" (Levchenko, 2002a). It should be noted that the term "politics for women" was used in the documents of various international organizations, mostly European. However, in Ukraine, both in the formal and informal spheres, the term "state policy towards women" or "policy towards women" was mainly used.

The term "policy towards women" covers the legal, political, economic, social measures and actions aimed at women as a socio-demographic group in society (Hrytsai, 2017); comprehensive targeted activities of the state for each woman, and issues of cooperation with the women's movement in general, which aims to eliminate all forms of discrimination against women in society, the formation of mechanisms that form the basis of women's human rights to improve the situation of women and society as a whole due to the disclosure of the potential of women (Levchenko, 2002b). The content of these definitions corresponds to the modern understanding of the role and importance of women in a democratic society.

In the late 1980s and early 1990s, various international organizations, some foreign states, finally asserted the position that it is necessary to pursue a policy to protect the rights of both women and men. This was caused by

a complex of reasons, including domestic - shorter life expectancy of men, more cases of alcoholism and suicide among men, etc., which led to the need for change, and more precisely in the expansion of public priorities, in connection with which there is such phenomenon as “equality policy” because women’s policies did not take into account the male factor, even when the issue of equality between women and men was raised.

The term “(state) policy of achieving equal rights and opportunities” can be considered in two aspects: as a synonym for the concept of “policy in the interests of equality” and as its component. In contrast to the concept of “equality policy”, the emphasis is on the legal and political, rather than the socio-cultural component. An important principle of public policy to achieve equal rights and opportunities (may be synonymous with “gender policy”) is the recognition of the admissibility of positive discrimination to overcome gender asymmetry (Levchenko, 2003).

“State policy to ensure equality between women and men” is based on the conceptual framework of a gender mainstreaming, which is formed in the documents of the Council of Europe in combination with traditional principles of support for women, as the latter has not lost its relevance given the real situation status in different spheres of life of Ukrainian society than men. In fact, this is a concretization of the term “policy of achieving equal rights and opportunities” (Hrytsiak, 2005).

Thus, despite significant changes in the form and content of the activities of the public, the state and international actors to establish the principle of gender equality, in recent decades in Ukraine and other countries research on the protection of women’s rights in various spheres of society should continue, especially in the domestic space. Equally important is the intensification of the study and analysis of problematic issues related to the guarantee of men’s rights. These areas of research on the rights and freedoms of women and men do not reject each other, but on the contrary, are part of the understanding of individual processes of social development at the national and international levels.

Summing up, it should be noted that today in every society that has chosen a democratic path of development, one of the priority tasks is to ensure the principle of gender equality and a purposeful path of all gender policy actors to this end. Implementation of the principle of gender equality involves systemic and multi-vector activities of both public authorities and civil society.

2. Gender inequality issue in the National Police of Ukraine

At this stage of development of public relations, the problem of gender equality deserves special attention. For Ukraine this issue is no less important because the development of a democratic legal and social state requires equal parity for all segments of the population, without distinguishing it on any grounds, including gender. Within the raised issues, we note that Ukraine is no exception, because in many spheres of public life there is discrimination on the grounds of sex. This situation indicates not only outdated thinking in society, but also imperfections in public administration, in particular at the level of gender policy.

The rapid transformation of social relations in the modern world is characterized by increasing the role of women in the formation of certain vital social spheres, as well as relations based on this phenomenon with the male part of society, the perception of women in certain circles and more.

The problem of gender equality is not a novelty for any world power, because it existed during the formation and development of social relations. The main problem of modern gender theory is the inequality of the position of women and men, because now the place and role of women in society is often defined by certain boundaries beyond which she cannot transcend, in particular, she is not allowed to go beyond boundaries indicated by public opinion, traditions, culture and more. The problem of gender equality for women is mainly present in professional activities and in family and domestic relations. Gender inequality is especially noticeable when choosing a profession, where considerable attention is paid to gender stereotypes, which cause difficulties not only for women but also for men.

Stereotype is an image, polar by the sign of evaluation, rigidly fixed, which does not imply doubt in its truth and encourages strict and unambiguous action (Leshanych, 2012). Established gender stereotypes shape certain social roles and statuses, forming patterns of behavior between women and men, where women are predominantly dependent on men.

A significant number of contradictions arise precisely because of the indication of a woman's role in society only as a mother, a wife, and so on. In addition, the economic independence of women should be taken into account, in particular the traditional view of women's economic dependence on men. A woman's inability to meet her needs on her own through professional development really makes her economically vulnerable and dependent. The reason for the inability of a woman's self-realization can also be considered her rejection as one that can meet the needs of society, for example, in a particular area of social activity (politics, where the leading role is played by men; law enforcement agencies, etc.).

In Ukrainian society, as well as in other countries, gender stratification is clearly visible, which is manifested even in the very gender discrimination. First, this applies to all levels of the management system, because here all decisions that determine the strategy and tactics of development are made. And equal representation of women and men is a prerequisite for effective performance. However, at the managerial level, for example among civil servants of 1-3 rank, women are an absolute minority - from 6 to 12%, while at the executive level of specialists, in the lower categories, their share in some areas reaches 82-88%. This means that women have no real influence on the decision-making process. This applies not only to the executive, but also to the representative, legislative power of different levels, where at the highest levels women's representation is limited to 8-10% (Kormych, 2013).

It should also be noted that according to the State Statistics Service of Ukraine, the average monthly salary of women is 26% lower than that of men. Women control only 5-10% of economic resources. In private business, women own 30% of small, 12.7% of medium and only 13% of large enterprises. Many professions and positions are inaccessible to women due to the existence of paternalistic legislation (Kovalchyuk *et al.*, 2017).

Considering the issue of feminization of certain professions, we note that one of the problems for women is the appointment of a police officer. Such stratification can be traced during the selection for training in specialized institutions of the Ministry of Internal Affairs, when a specific number of places for women and men is determined, i.e., a certain quantitative and gender boundary is drawn.

As for Ukraine, until 1999 the number of women in law enforcement was limited: for example, the so-called "female" quota for admission to educational institutions of the Ministry of Internal Affairs was 5-10%. As of 2016, the total number of women in the staff and units of the Ministry of Internal Affairs of Ukraine was 27,626 people, while male police officers - 105,266, i.e., there were only 20.7% of women in the police (Garkusha, 2019).

Recently, the situation has improved, but nevertheless the quantitative ratio of women and men in the system of the Ministry of Internal Affairs of Ukraine still remains indicative. Indicators are growing, but the problems of insufficient equality between women and men among employees of the Ministry of Internal Affairs remain. It is insufficient provision of equal treatment and equal career opportunities for women and men, unjustified refusals to hire women or frequent violations of men's social and labor rights, performance of tasks related to the risk to life and health (Plutagar, 2018).

Thus, considering a woman in society next to a man, i.e., through the prism of gender stereotypes, we note that not only in the Ukraine, but also

in other developed countries there is an unresolved and significant problem of gender stratification. Although equality is enshrined in law, at the same time, society cannot deviate from the guidelines that are manifested in the superiority of men over women, which is clearly seen in women's choice of profession, in particular, service in the National Police of Ukraine.

3. Legal bases for ensuring gender equality in the National Police of Ukraine

First of all, it should be noted that ensuring gender equality in the National Police of Ukraine is objectively possible provided that there is a real legal mechanism through which this principle will be implemented in public life through the activities of state and public institutions and supported by state guarantees.

In legal doctrine, the term “mechanism” is common, it is used to denote such categories as “mechanism of legal regulation”, “mechanism of public administration” and many others. In terms of the implementation of the principle of gender equality in the National Police of Ukraine, we propose to use the term “mechanism for gender equality”, and therefore it is necessary to define its concepts, elements and provide a general description.

Note that in legal doctrine the components of this mechanism are characterized by a certain variability, which allows us to distinguish two approaches. According to the first approach, the mechanism of ensuring gender equality is reduced to its institutional (organizational and legal) component. Thus, some scholars identify the state mechanism for promoting gender equality in Ukraine with its purely institutional component, and others consider the mechanism of gender equality as an orderly system of international, regional, and national organizational structures of state and public nature (Gerasimenko, 2004). O. Wenger (2009) understands the mechanism of gender equality as an institutional governmental and parliamentary structure that is created to promote the strengthening of the role of women and the full realization of women's rights, and K. Levchenko (2003) notes that it is a set of public authorities, international, non-governmental, research organizations that are in close cooperation. Note that this approach is too narrow and does not reflect the real content of the gender equality mechanism.

Representatives of the second approach believe that ensuring gender equality is carried out through several separate, independent mechanisms that act. Thus, A. Slatvytska (2010) identifies four mechanisms through which the state gender policy is implemented: international, regional, national state and non-state, and G. Daudova (2008) distinguishes organizational, legal, economic, and political mechanisms. T. Melnyk

(2010), analyzing foreign experience in ensuring gender equality, identifies more than fifteen forms of mechanisms that differ in their functionality, in particular: international, regional, national; institutional, organizational, financial; legal and non-legal; political, economic, social, cultural; theological, psychological, praxeological, etc. We believe that the selected forms of mechanisms do not constitute a single complex mechanism, and therefore we can distinguish in the mechanism of ensuring the principle of gender equality regulatory and organizational-legal (institutional) subsystems.

At the same time, we believe that such an approach leaves a very important issue unresolved: what kind of tools should be used for the implementation of the principle of gender equality in the activities of a certain subject of public administration (in our case - the National Police of Ukraine) and what should be the order of such implementation. The answer to this question can be given only in the context of the procedural activities of such an entity with an emphasis on the legal instruments of the mechanism of gender equality. That is why we propose the allocation of three components in the mechanism of gender equality: 1) regulatory; 2) institutional (organizational and legal); 3) procedural.

The term “mechanism for ensuring gender equality in the bodies of the National Police of Ukraine” we understand as a complex, structured, dynamic, complex system, through the normative-legal, institutional, and procedural component of which the principle of gender equality is purposefully ensured and implemented in the National Police of Ukraine. We can distinguish the following features of the mechanism for ensuring gender equality in the bodies of the National Police of Ukraine:

1. legal regulation (normative-legal regulation of the principle of gender equality is carried out through a system of normative-legal acts and other sources of law, as well as individual legal regulation (adoption of administrative acts) carried out in the process of administrative-procedural activity of National Police of Ukraine).
2. systematic, logical and functional content (all components of such a mechanism form a holistic system, its construction is logical and there are certain connections between the elements of the system).
3. dynamism and stability (the mechanism of ensuring the principle of gender equality is a dynamic phenomenon, one that is constantly evolving, transforming, improving and in constant motion, but at the same time it is characterized by long-term preservation of a certain quality and predictability).
4. purposefulness (the functioning of such a mechanism is focused on achieving a certain goal - the implementation of the fundamental legal principle of equality in society through the achievement of the

real state of gender equality in the activities of the National Police of Ukraine).

5. guarantee (the existence of general and special conditions and means that practically ensure its functioning, for example, gender quotas in order to ensure gender parity).
6. the procedural nature of the provision (gender equality is ensured within certain procedures - selection and recruitment procedures, promotion, termination of service).
7. permanent nature and efficiency - gender parity is ensured constantly in the process of the National Police of Ukraine (during recruitment, during the career of police officers, in case of termination of service), and the implementation of programs and projects to improve the status of women and men is constantly monitored and is corrected in case of inefficiency.

Functions of the mechanism for ensuring gender equality in the organization of the National Police of Ukraine are:

1. general (forecasting, planning, organization, coordination, etc.).
2. special (implementation of personnel selection procedures, formation of a reserve and appointment to management positions taking into account the principle of gender equality, organization of training on gender issues, etc.).
3. auxiliary (personnel, logistics, etc.).

An important prerequisite for gender change is the legal framework, as it officially establishes in society certain norms of behavior aimed at respecting the rights of women and men. Legislation both reflects traditional social views and determines their formation (Lazar, 2007).

The normative and legal component of the mechanism for ensuring the principle of gender equality is objectively reflected in the system of current legislation of Ukraine, which consists of: laws of Ukraine; bylaws; international normative legal acts and agreements, the binding nature of which has been approved by the Verkhovna Rada of Ukraine. Thus, in normative-legal regulation of maintenance of gender equality in activity of National police of Ukraine it is possible to allocate two levels: 1) national; 2) departmental.

The basic human rights, freedoms and responsibilities are enshrined in the Constitution of Ukraine. Among the fundamental principles of human legal status is the constitutional principle of equality, which provides:

1. equal constitutional rights and freedoms of citizens and equality of everyone before the law (Article 21).

2. prohibition of privileges or restrictions on the grounds of race, color, political, religious, and other beliefs, sex, ethnic and social origin, property status, place of residence, on linguistic or other grounds (Article 24).
3. gender equality (Article 24).

However, the declaration of the principle of equality in the Constitution of Ukraine does not ensure real gender equality in society.

The normative activity to ensure the principle of gender equality at the international level is carried out by the UN, the Council of Europe, the European Union, the OSCE and other international organizations, to which Ukraine has joined. The main international acts defining the standards of equality of people, their social value, regardless of gender, can be divided into general and special. Thus, the general ones include: the Universal Declaration of Human Rights of 1948 (United Nations, 1948), the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Council of Europe, 1950), the International Covenant on Civil and Political Rights of 1966 (United Nations, 1966), the Covenant on Socio-Economic and Cultural Rights of 1966 (United Nations, 1966) and others. Special standards include the Convention on the Political Rights of Women of 1953 (United Nations, 1953), the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (United Nations, 1979), the Charter of the United Nations of 1945 (United Nations, 1945), the Convention on Action against Trafficking in Human Beings and with the exploitation of prostitution by third parties since 1949 (United Nations, 1949), the Declaration on the Elimination of Discrimination against Women of 1967 (United Nations, 1967), UN Security Council Resolution No. 1325 (2000) "Women. Peace. Security" (United Nations, 2000), the Council of Europe's Gender Equality Strategy for 2018–2023 (Council of Europe, 2018) and others.

It should be noted that a real step towards the implementation of the state's commitments was the adoption of relevant laws and bylaws, which at the level of Ukrainian legislation enshrined ensuring the principle of gender equality as one of the priorities for effective public policy. Thus, the basic Law of Ukraine "On Ensuring Equal Rights and Opportunities for Women and Men" of September 8, 2005, enshrines the basic principles of gender equality, namely:

- the direction of the state policy on consolidation of equal rights and opportunities of women and men is defined.
- mandatory gender legal examination has been introduced.
- discrimination on the grounds of sex is prohibited.

- the system of subjects endowed with powers in the field of guaranteeing equal rights and opportunities for women and men is defined.
- principles of ensuring gender equality in specific areas are provided.
- established liability for violation of legislation on equal rights and opportunities for women and men (Verkhovna Rada of Ukraine, 2005).

Among national legislative acts we should mention The Law of Ukraine of September 6, 2012 “On Principles of Prevention and Counteraction to Discrimination” (Verkhovna Rada of Ukraine, 2012) and the Law of Ukraine of December 7, 2017 “On Prevention and Counteraction to Domestic Violence” (Verkhovna Rada of Ukraine, 2017) which play an equally important role in ensuring gender equality. Some important acts in this area would be also: National Action Plan for the Implementation of UN Security Council Resolution 1325 “Women. Peace. Security” for the period up to 2020, approved by the Order of the Cabinet of Ministers of Ukraine of February 24, 2016 (Cabinet of Ministers of Ukraine, 2016), the Concept of the state social program to ensure equal rights and opportunities for women and men for the period up to 2021, approved by the Order of the Cabinet of Ministers of Ukraine dated April 5, 2017 (Cabinet of Ministers of Ukraine, 2017) and directly the State Social Program to ensure equal rights and opportunities for women and men for the period up to 2021, approved by the Cabinet of Ministers dated April 11, 2018 (Cabinet of Ministers of Ukraine, 2018).

Among the bylaws of the national level, it is necessary to pay attention to the Resolution of the Cabinet of Ministers of Ukraine “On conducting gender legal examination” of April 12, 2006 (Cabinet of Ministers of Ukraine, 2006), the Instruction on conducting gender legal examination of May 12, 2006 (Ministry of Justice of Ukraine, 2006) and others.

At the departmental level of legal regulation, the central place is occupied by the Law of Ukraine of July 2, 2015 “On the National Police of Ukraine” (Verkhovna Rada of Ukraine, 2015), according to which citizens of Ukraine over the age of 18 who have completed general secondary education, regardless their race, skin color, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, who speak Ukrainian can become police officers.

Thus, it can be stated that the formation of the legal component of the mechanism of gender equality in the organization of the National Police of Ukraine is not a complex, structural, and linear process and is influenced by international standards in the field of human rights and gender parity. At the same time, declaring the principle of equality in the Constitution of Ukraine does not ensure real equality of rights and opportunities for

women and men in society, just as declaring gender equality in the National Police of Ukraine in a specialized law does not guarantee real equality of police officers regardless of gender. That is why we believe that the further formation of the legal framework for gender equality should be carried out with mandatory observance of European human rights standards, a combination of the principles of unity and differentiation, and the application of measures of positive discrimination and positive action.

As for the legal instruments, using which gender parity is ensured in this law enforcement body, we emphasize that the defining principles of any public entity are its tasks, powers and methods of activity enshrined at the level of the Constitution and laws of Ukraine. However, in the context of this study, these elements are not only and not so many elements of the legal status of these entities, as components of the mechanism of public functions or the mechanism of gender equality in organizing the National Police of Ukraine. Thanks to them that it is filled with a certain meaning, acquiring the necessary concretization.

Specific tools of public administration must be disclosed through the prism of the system of its institutional and functional characteristics. According to R. Melnyk, the instruments of public administration include regulations of public administration, administrative act and administrative agreement (Melnyk and Bevzenko, 2014). However, this list of tools can be expanded, as in the activities of public administration can also be used regulatory planning, organizational and technical, informative and other legal techniques, tools and methods (Gritsenko, 2015).

Taking into account the list of the main tools of public administration, such as regulations, administrative acts, administrative agreements, acts-plans, acts-actions (Galitsina, 2016) and their regime, service as well as protective dimensions, we believe that the tools to ensure gender equality in the organization of the National Police of Ukraine are:

- a) adoption of relevant acts-plans.
- b) gender legal expertise.
- c) gender quotas.
- d) gender budgeting and others.

The issue of acts-plans as tools of public administration is quite new to the domestic legal doctrine, and the act-plan itself can be defined as a written document adopted and approved by the authorized administrative body, which determines the sequence of measures by the executors, indicating the purpose, objectives, scope, methods, means and terms of their implementation (Prymachenko, 2013). The expediency of their use within the mechanism of gender equality in the National Police is due to the fact that the acts-plans allow to combine law enforcement and regulations,

providing standardization of the process of law enforcement, which creates conditions for the adoption of public administration of standard solutions in similar situations. This is especially true when making such decisions by public administration bodies, which occupy a lower link in the hierarchy of actors involved in the implementation of gender equality.

An example of acts-plans is the Action Plan for the implementation of the Strategy for the development of the system of the Ministry of Internal Affairs of Ukraine until 2020 (Cabinet of Ministers of Ukraine, 2019), which provides:

1. Development of capacities of the bodies of the Ministry of Internal Affairs system for effective implementation of gender policy, namely:
 - a) ensuring the functioning of the institute of gender advisers in the central governing bodies of the Ministry of Internal Affairs by appointing such advisers by orders of the Ministry of Internal Affairs, developing a program of training activities for gender advisers, and covering 100 percent of certain categories of police officers.
 - b) creation (determination) in the central governing bodies of the bodies of the Ministry of Internal Affairs of separate structural subdivisions for ensuring gender policy within the approved staff, 80% of which are staffed;
2. Creation of mechanisms to ensure equal conditions of access of women and men to service / work, promotion, or career advancement in the bodies of the system of the Ministry of Internal Affairs, namely:
 - a) analysis of the state of implementation of the principle of gender equality in the personnel policy of the Ministry of Internal Affairs, primarily during selection, recruitment / employment, promotion or career growth.
 - b) development of a methodology for assessing the gender impact of sectoral reforms.
 - c) ensuring equal conditions for women and men to have access to service / work, promotion or career advancement in the bodies of the Ministry of Internal Affairs (it is planned to reduce the gender imbalance during employment / work by 50% compared to 2017).
 - d) improvement of statistical reporting on staffing issues in terms of gender mainstreaming in accordance with the positions held.

3. Unification of requirements for physical fitness for candidates for service (employment) in the bodies of the Ministry of Internal Affairs in order to ensure gender equality, namely:
 - a) analysis of international experience on the level of physical fitness for law enforcement agencies.
 - b) normative regulation of the establishment of uniform requirements for the level of physical fitness for candidates for service in the system of the Ministry of Internal Affairs.
4. Establish mechanisms to ensure equal access for women and men to participate in working and advisory bodies, peacekeeping operations, civil-military cooperation, as well as combating gender-based offenses in the service, namely:
 - a) analysis of the state of ensuring equal conditions for women and men to participate in working and advisory bodies, peacekeeping operations, peace-building processes, etc.
 - b) ensuring equal conditions for access of women and men from among the staff of the Ministry of Internal Affairs to participate in working groups and commissions on reforming these authorities, as well as working groups, formed at the level of the Cabinet of Ministers of Ukraine, the Verkhovna Rada of Ukraine or interdepartmental levels, reducing the gender imbalance by 50 percent compared to 2017 and ensuring the inclusion of women in proportional representation in accordance with the recommendations of the Council of Europe;
 - c) ensuring equal access for women and men to participate in peacekeeping operations, peacebuilding, mediation, civil-military cooperation and conflict prevention;
 - d) development of a separate mechanism for dealing with complaints related to sexual harassment and gender-based offenses by colleagues.

The feasibility of introducing gender quotas has recently been discussed in legal doctrine in the context of guarantees for the implementation of the principle of gender equality in public administration. It was proposed to introduce quota procedures for the number of women and men during the formation of the commissions that will perform these functions (Maksimenko, 2009). The discussion was led about the allocation of a certain, scientifically sound number of jobs in the police, which can be provided only to females, and the establishment of quotas for the selection of women in the prosecutor's office at 30/70 or 40/60 was proposed (Leskina, 2013).

Let's define the essence of gender quotas. Thus, one of the means of implementing the principles of gender democracy is positive action. Positive action in its extreme form is positive discrimination, when increasing the representation of women (or other discriminated categories of citizens) is achieved by providing certain benefits or introducing quotas. This trend in the EU has intensified due to the signing of the Maastricht Treaty, the core of which is the establishment of the principle of social justice in the domestic policies of EU member states. Gender quotas are a political and legal way of smoothing the effects of gender discrimination in all spheres of society by providing a legitimate political platform for the articulation, representation, and realization of relevant social interests. In modern conditions, gender quotas are a kind of positive discrimination, i.e., a system of benefits, incentives, prohibitions, and compensations aimed at raising the social status of women (Haake, 2018).

Proponents of gender quotas argue that this mechanism should be seen as a temporary, transitional tool for training public opinion on the need for greater representation of women. There is a pattern that "gender quotas" in the political sphere are in fact "quotas for women." This is not a contradiction, as for most countries the problem of ensuring greater representation of women in government remains acute. Gender quotas were first applied in the political sphere. There is even such a well-established term as the "critical mass" of representation in parliament, i.e. the level recognized by international practice, which is at least 30% of each sex. It provides an opportunity to overcome gender asymmetry, to influence the formation and decision-making, because exactly 30% of supporters of a certain idea can change the situation in any team in their favor.

The Nordic countries, Sweden and Canada remain the world's leaders in addressing gender equality. For example, in Norway, more than 40% of all authorities and law enforcement agencies are women, and this is a consequence of the adoption of a law on a 40% gender quota in all public administration entities in the country. It is thanks to this law that 8 ministerial posts are held by women. The state has a social "equality program," and the government has a law enforcement officer in the context of implementing the program. In Norway, the so-called "soft quota" has become widespread, which requires mandatory participation in the competition for one seat of the representatives of the two sexes (Connolly *et al.*, 2020). Despite the method of so-called "quota" of women's representation in government, which exists recently in many countries (Argentina, India, Brazil, Dominican Republic, Scandinavian countries, Peru, Indonesia, etc.) (Ordóñez, 2020), this has only a fragmentary impact on the gender component of law enforcement officers and rather illustrates the direction of public policy in terms of improving the situation of women and the ability to protect their rights at the legislative level.

Conclusions

Despite significant changes in the form and content of the public, state, and international actors to establish the principle of gender equality, research on the protection of the rights of both women and men in various social spheres in Ukraine and other countries around the world should be held in the future. It requires ensuring the rights and freedoms of both women and men, because this approach is part of understanding certain processes of social development at the national and international levels.

Considering a woman in society alongside a man, through the prism of gender stereotypes, we note that not only in Ukraine but also in other developed countries there is an unresolved and significant problem of gender stratification. Although equality is enshrined in law, at the same time, society cannot deviate from the guidelines that are manifested in the superiority of men over women, which is clearly seen in women's choice of profession, including service in the National Police of Ukraine.

It is safe to say that ensuring gender equality in the National Police of Ukraine is a complex process characterized by its multifaceted nature. However, overcoming gender stereotypes in this area is extremely important because the main criteria in this case should be professionalism and competence.

The analysis of normative documents allows us to conclude that the introduction of gender equality in the National Police of Ukraine is an important area of activity. Nevertheless, the current state of gender equality needs to be improved to bring it in line with international standards.

One of the promising aspects of research in this area should be the development and implementation of effective mechanisms to ensure equal career opportunities for women and men in the National Police of Ukraine, considering the specifics of professional activity.

To ensure gender equality in the National Police, it is necessary to enshrine at the legislative level provisions for the mandatory establishment of special supervisory associations for the equal rights and opportunities of women and men in organizations, enterprises, institutions, including the National Police of Ukraine. Given that the problem of gender stratification is clearly visible in law enforcement, in order to implement the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, it is necessary to apply disciplinary responsibility to heads of National Police units restricting women's rights.

It is expedient to introduce gender quotas in the National Police of Ukraine as a component of the mechanism of compliance with the principle of gender equality in several areas: during recruitment to the National Police, appointment to management positions, inclusion of women police

officers in competition and certification commissions. At the same time, it should be noted that miscalculations in personnel policy due to excessive involvement in gender issues in the process of working with the staff of this law enforcement body may reduce the quality of the National Police of Ukraine and negatively affect the quality of their professional duties. That is why the issue of introducing a quota for the selection of women in law enforcement agencies should be treated quite carefully and reasonably.

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Shares as an object of civil law regulation

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Abstract

The objective of the article was to analyze the actions as an object of civil law regulation. The market contributes to the accumulation of capital and its transformation into investment resources for the financing of the productive and social spheres, which improves the general well-being of the population. Meanwhile, the legal nature of the shares has not yet been clearly defined in Russian law and there is, consequently, a dichotomy in the choice of ways to protect the owners of securities, including shares. For the development of the research, methods such as synthesis, theoretical analysis, abstraction, deduction, induction, classification, comparative law, refutation were used. Based on the legal acts that regulate the stock market, a comprehensive study of the problems of legal regulation of the rotation of shares is carried out, to determine the prospects for development and ways to improve the legal regulation of shares, as well as to look for ways to protect the rights of securities holders. Among the most significant results, the legal nature of the action was revealed, the meaning of categories such as: document, security and action was cleared, and the definition of action was formulated.

Keywords: securities document; security; cuota; undocumented participation; method of protection.

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Acciones como objeto de regulación de derecho civil

Resumen

El objetivo del artículo fue analizar las acciones como objeto de regulación de derecho civil. El mercado contribuye a la acumulación de capital y su transformación en recursos de inversión para el financiamiento de las esferas productiva y social, lo que mejora el bienestar general de la población. Mientras tanto, la naturaleza legal de las acciones aún no se ha definido claramente en la legislación rusa y existe, en consecuencia, una dicotomía en la elección de formas de proteger a los propietarios de valores, incluidas las acciones. Para el desarrollo de la investigación se utilizaron métodos como síntesis, análisis teórico, abstracción, deducción, inducción, clasificación, derecho comparado, refutación. A partir del examen de los actos jurídicos que regulan el mercado de valores se realiza un estudio integral de los problemas de regulación legal de la rotación de acciones, para determinar las perspectivas de desarrollo y las formas de mejorar la regulación legal de las acciones, así como buscar formas de proteger los derechos de los titulares de valores. Entre los resultados más significativos, se reveló la naturaleza legal de la acción, se clarificó el significado de categorías tales como: documento, seguridad y acción y se formuló la definición de acción.

Palabras Clave: documento de valores; seguridad; cuota; participación indocumentada; método de protección.

Introduction

There is a rather complex structure of objects of civil rights in various legal systems, and Russia is no exception, where the attention of researchers is drawn to the study of certain objects and rights to them, because there are significant differences in the ownership of corporal and incorporeal things, in the rights to objects that cannot belong to persons on the property right. This applies not only to the controversial construction of «right to right», the possibility for a person to be the owner of property rights, but also to be the owner of objects of the natural environment.

The concept of property in the legal doctrine is always associated with the possibility of individualizing property and transferring it to the exclusive right of ownership to a person, organization, or society. Therefore, space, celestial bodies, and atmospheric air are not considered by legal scholars as property that can be the object of property rights and other rights regulated by civil law. However, the possibilities of «legalizing» individual objects of nature will constantly expand with the development of science and technology.

In science, issues concerning property rights are debatable, in terms of their understanding as a subjective right or the object of the right itself. Therewith, they can act both as an element of the content of the legal relationship, and as its object. Therefore, the difficulty lies in the fact that often transactions are concluded concerning property rights that are the content of legal relations (for example, the right to lease). In other words, there is a substitution of concepts that determine their essential belonging to various elements of legal relations.

Attempts to present a document as an object of law in the doctrine are interesting. A well-known discussion about securities takes place not only in Russian but also in foreign doctrine. Without touching upon the issue of uncertified securities, we note that in any case, the boon means those rights that are certified by securities. It is for their sake that the person acquires them. Then there are relevant questions about what is the object – the rights themselves or the security?

The concept of the object of law is blurred with the emergence of such very specific objects as machine-place, exchange place, bioresources, human organs, etc. The attitude in the doctrine to human organs, anatomical materials, and tissues, which, as is known, can be acquired and used in one way or another (for transplantation and other medical or cosmetic purposes), is very ambiguous. The doctrine also raises the question of the attribution of human cells to the objects of civil rights (legal relations) and, consequently, the recognition of their legitimate turnover. If until recently such cells were considered exclusively an integral part of the human body, without which they perished, then the situation is gradually changing with the development of medical science, for example, during the collection, storage, and use of blood and its components (plasma, erythrocytes, platelets, etc.); withdrawal and use of stem cells. Currently, embryonic, reproductive, and somatic cells are widely used. Today, tissue is grown from the cell, for example, skin tissue, which is used for human skin grafting. Hence, in civil language, «the making of one thing into another thing» comes. Due to the demand (in medicine), they cannot but be considered a good, since they are often called upon to save a life, which in itself is the highest good.

It is possible to give the opposite example when there is a turnover of objects, but it is impossible to determine which one, for example, in the case of the so-called «acquisition of an athlete» by a sports club. Usually, they prefer to talk about the services provided by the athlete and the ability to assign him/her from one club to another. However, such a legal construction is far-fetched and is intended to avoid understanding the athlete (person) as an object, since he/she, being a person, is a subject, and not an object of the law. Thus, in these cases, the establishment of a valid object of law is very problematic.

It is also worth touching on such objects, which, based on objective, material positions, are too difficult to isolate from the surrounding equivalent objects. Conventionally, they are called «meaningless objects», an example of which is an apartment. Disputes about who owns the walls, floors, and, accordingly, ceilings in apartments located next to each other, and to what extent it is possible to assert the right of one person to these «contours» of the apartment, and where the right of another person to them begins. The answers to these questions also require special research.

Thus, the above proves not only the complexity of understanding the objects of rights, their various types but also makes it difficult to regulate them, which must be coordinated in a certain way, considering all aspects of intersectoral science.

1. Methods

In the course of the research, general scientific methods of cognition were used, including the principle of objectivity and consistency. Private scientific methods were used along with general scientific methods of cognition: theoretical analysis and synthesis, comparative law, technical and legal analysis, concretization, interpretation, deduction and induction, classification. The methodological basis of the study was the method of the theory of knowledge.

2. Results

Securities are independent objects of civil rights. Their emergence is associated with trade turnover when there was a need to facilitate and accelerate the turnover of certain types of binding rights.

For a long time, security has been primarily understood as a document in the doctrine that acquires significance, not in itself, but because it embodies certain rights (Agarkov, 1994). However, under the influence of scientific and technological progress, a paper document, which is necessary for the circulation of civil rights at the initial stage, fades into the background, giving way to a document as digital information, which today is a more convenient tool for the digital economy. Russian legislation classifies securities as things (The Civil Code of the Russian Federation, 1994).

In addition, securities, in particular shares, were considered as movable things. F. Shershenevich (2003) pointed out that the share expresses the right to participate in the enterprise, it is always mobility, so the rules on the turnover of movable things should apply to the share. The share is the most common type of securities in the modern world, but the epistemological

essence of the share caused earlier and today causes controversial points in the doctrine of law, which can be seen even from the lexicology of one word— «Action» of French origin means security, and «Actio» of Latin origin means an order, permission, appointment.

Security and a share are related to each other as general and particular. A share is security without a specific validity period, which is limited only by the life of the company itself. The appearance of the share is directly related to the creation and operation of the joint-stock company.

In Russia, the first joint-stock companies, and therefore the first securities issued by them, appeared in the second half of the 18th century, that is, much later than in most of the United States and Western European countries. Historians claim that the first corporation in Russia was created in 1757 when the Russian Constantinople Company was established, but the first share was issued only in 1827 (Borzykh, 2005). The rapid development of the joint-stock form of management in Russia occurred only in the 19th century and is due to the development of capitalist relations. By this time, scientific works began to appear justifying the advantages of the joint-stock organizational and legal form. In addition, according to M.V. Chernozhukov (2001), the foundation of joint-stock companies was facilitated by the reduction of interest rates on deposits by state credit institutions, which caused an outflow of capital from the credit sector to the sphere of corporate securities (shares).

The development of joint-stock forms of management in Russia did not last long, until 1917. The command and administrative principles became the fundamental principle in the economy in the young Soviet state. In this connection, joint-stock companies were reorganized into state-owned enterprises in the late 20s and early 30s, and, unfortunately, such an organizational and legal form had not been used for a long time on the territory of the Soviet Union. A new stage in the development of the joint-stock business in Russia began in the late 90s of the last century.

The emergence of the first shares in the Soviet Union is associated with the adoption of the Resolution of the Council of Ministers of the USSR of October 15, 1988, No. 1195 «On the issue of securities by enterprises and organizations», in paragraph 1 of which it was fixed that

(...) enterprises and organizations transferred to full economic accounting and self-financing following the Law of the USSR on State Enterprise (Association), can issue two types of shares: 1) shares of the labor collective distributed among the members of their collective; 2) shares of enterprises (organizations) distributed among other enterprises and organizations, voluntary societies, banks, as well as cooperative enterprises and organizations (Resolution of the Council of Ministers of the USSR, 1988: 56).

Shares of enterprises could also be issued by commercial banks. However, the above-mentioned resolution was limited only to listing the types of shares and did not contain a definition of the term «share». This definition was later fixed by the Resolution of the Council of Ministers of the USSR (June 19, 1990) No. 590 «On Approval of the Regulations on Joint-Stock Companies and Limited Liability Companies and the Regulations on Securities». In paragraph 31 of the Regulations on Joint-Stock Companies and Limited Liability Companies, it was noted that a share is security and secures a triad of rights, i.e., a share is security confirming: the right of a shareholder to participate in the management of the company, in its profits and the distribution of the remaining assets in the event of the company's liquidation. The disadvantage of the above-mentioned resolutions was that they provided for the possibility of issuing shares not only by joint-stock companies but also by other enterprises and organizations, including cooperatives, which does not correspond to the semantic essence of the share.

A more correct definition of the share was given later in the law «On the Securities Market» (Federal Law of the Russian Federation, 1996). It was noted in part 1 of Article 4 of the law, that a share is a security without a fixed circulation period, certifying equity participation in the authorized fund of a joint-stock company, which confirms membership in a joint-stock company and the right to participate in its management, entitles its owner to receive part of the profit in the form of a dividend, as well as to participate in the distribution of property in the event of liquidation of a joint-stock company. Although such a definition consolidated the classical triad of rights to shares (the right to receive dividends, to participate in the management of the joint-stock company, and to part of the property remaining after its liquidation), the main drawback was that the legislator clearly distinguished the right of membership from the triad of rights, which contradicts the civil law doctrine, according to which the right of membership is just a set of rights for a share.

This raises two relevant questions: what the legal nature of a share as a special type of security is, and what is the ratio of a share to security. The theory of securities, including shares, has been developed by civilized doctrine for several centuries. A. Shershenevich (2003) rightly argued that the very concept of securities is not clarified either in life, or in science, or legislation.

The official definition of the term «security» is fixed in part 1 of Article 142 of the Civil Code of the Russian Federation, according to which «Securities are documents which meet the requirements established by law and certify the rights under the law of obligations and other rights which may be exercised or assigned only upon the show of such documents (paper securities). Also, the following are deemed securities: the rights under the

law of obligations and other rights which are stated in the decision on the issue or in another document of the person that has issued the securities following the provisions of a law and which may be exercised and assigned only if the rules for keeping a record of these rights according to Article 149 of the present Code are observed (paperless securities).

It should be noted that such regulation of the registration of rights and turnover of non-documentary securities is more perfect than that which was in force before the adoption of amendments to the Civil Code of the Russian Federation, where it was noted that «security is a document certifying, in compliance with the established form and mandatory details, property rights, the exercise or transfer of which is possible only upon its presentation. With the transfer of a security, all the rights certified by it are transferred in the aggregate» (Federal Law of the Russian Federation, 2013). However, it seems to us that the new definition of security has some drawbacks. Namely, the legislator indicates that a security is a document certifying a monetary or another property right.

This disposition makes the definition of security too narrow and does not fully cover the content of the share. This conclusion follows from the analysis of the concept of a share, which is contained in Article 2 of the Law of April 22, 1996, No. 39-FZ «On the Securities Market», which states that a share is «issue security that secures the rights of its owner (shareholder) to receive part of the profit of a joint-stock company in the form of dividends, to participate in the management of a joint-stock company and to part of the property remaining after its liquidation.

As a result of the conducted research, it should be concluded that the share grants its owner not only property rights but also several non-property rights. Therewith, with the undeveloped stock market in Russia, the interests of shareholders are usually not aimed at making a profit from shares at the expense of the stock exchange speculation but are reduced only to the ability to influence the work of the bodies of the joint-stock company. Therefore, it can be concluded that the non-property rights of the shareholder become the main ones. A.S. Shvydenko (2006) also points to the unsuccessful wording of the legally enshrined term «share», since from his analysis it is impossible to unequivocally assert what the property and non-property rights to the share are certified by.

According to the current positive law of Russia, a share should be considered both a unit of measurement of the authorized capital of a joint-stock company and a document that has a close legal relationship with the right (property and non-property) enshrined in it. Such a dichotomy of the essence of the share is rather a disadvantage of the legislative technique than its advantage.

A share as a type of security belongs to equity securities and it is characterized by all the features inherent in equity securities, but there are also exceptional features. Following part 1 of Article 25 of the law on joint-stock companies, all shares of one enterprise must have the same nominal value, and other equity securities must have an equal number of rights only within one issue. In addition, the share is corporate security, since it provides a set of rights to the owner: the right of membership in the company, from which

(...) both property rights (the right to participate in profits and, upon the termination of the company, to share in the liquidation balance) and non-property rights of the shareholder (the right to participate in the general meeting, active and passive voting rights to hold positions in the company, the right to get acquainted with accounting and reporting data and other documentation of the joint-stock company) (Krashennnikov, 1995: 54).

There is a pluralism of opinions in the Russian scientific literature on the definition of the main characteristics of securities, including shares. S.A. Mikhaltsov (2006) draws attention to the fact that a number of the features cited by scholars do not express the legal nature of the share, but only make it possible to reveal the economic essence of securities more deeply. Indeed, such characteristics as the «marketability» of the share or «liquidity» (Galanov *et al.*, 2017) do not in any way affect their legal regulation, since regardless of whether the share is liquid or not, it is subject to the same legal norms.

In this connection, it is necessary to analyze only those features of the share as a type of security that express its legal nature, with the acquisition of which the share becomes a full-fledged object of civil turnover. The peculiarity of the share is that it is the largest among all securities that carry regulatory functions in the system of social reproduction. It is the share that maximizes the flow of capital into promising and steadily developing sectors of the economy from withering industries.

Such a construction as non-documentary security is used in the Russian scientific literature when disclosing the question of the civil nature of a share. This justifies the need to conduct a legal analysis of the essence of the security as an «undocumented one».

The analysis has shown that researchers currently lack a unified approach to understanding the legal nature of undocumented securities.

Thus V.A. Belov (2001: 14) pointed out that “securities as objects of civil rights can only be understood as documents, but not the subjective civil rights enshrined in them». D.V. Murzin (2001) noted that the form of the «issue» can be considered another institution of civil law that does not coincide with securities. E.A. Sukhanov (1997) wrote that the undocumented form (in the form of a record in a computer) is not a security, but a method

of fixation, it is not even securities, but an electronic form of accounting for the owners of capital, who have pre-defined rights and corresponding obligations towards the user of this capital. E. Vazhinskii (2007) noted that non-documentary securities are not securities in the traditional sense as objects of property law. In the doctrine, researchers believe that securities and uncertified securities are institutions that have a different legal nature, and therefore should have different legal regimes.

Thus, in the first place, the form of the document is taken out when analyzing the legal nature of securities. According to the presented concept, securities can only be documentary, and non-documentary ones go beyond the scope of the securities institute.

The fallacy of such judgments lies in the fact that the authors of such a concept unreasonably restrict the material medium of information, indicating that it can only be paper. Such a restriction of the form of securities is erroneous with the development of digital technologies. This conclusion also follows from the analysis of the current legislation. In particular, the law «On Information, Informatization and Information Protection» (Federal Law of the Russian Federation, 2006), does not associate the term «document» only with paper.

As for the point of view of the representatives of the non-documentary concept, they define security as (Shevchenko, 2004):

1. An incorporeal thing that is devoid of a material substratum and is a binding contract law that is regulated by the rules of real law. Therefore, the document recedes into the background before the phenomenon of security, which is something external to the essence of security.
2. Securities are considered as a set of property rights.

When analyzing the two concepts, it should be concluded that the non-documentary concept has advantages over the documentary one, since it pedals an attempt to develop a common understanding of securities, in which documentary and non-documentary securities are completely identified. As K.B. Koraev (2019: 302) points out, security is «a special kind of thing, which is understood as an incorporeal object that grants its owner certain property and non-property rights». Despite the attractiveness of this definition, it should be noted that the legal construction of «incorporeal objects» is inappropriate. Since, according to E.S. Demushkina (1999: 43), «this concept aims to justify new phenomena in life with the help of classical norms and does this for already known instruments – classical documentary securities, which are considered as real rights». It is hardly possible to apply the construction of «incorporeal things» to objects that by their characteristics do not relate to things in their usual sense, for example, electricity, information, and so on. The disadvantage of this approach is

that it does not consider the dualistic nature inherent in all securities, which is understood as an indissoluble link between the document and the right certified by it. Since, as D.D. Borzykh notes, after the loss of the material shell (i.e., paper), undocumented security remains an ideal shell, that is understood as security... the ideal shell is just an external manifestation of the structure of interrelated rights that are contained in undocumented security.

The presence of an ideal shell, which is also characteristic of non-documentary securities, makes it possible to establish proprietary rights to such security and transfer it without any danger since any rights will not pass to the buyer (Borzykh, 2005). In this case, it is important to conclude that the undocumented nature of the securities is compensated by a documented record of an authorized person in a special simple or computerized register of rights. Thus, the difference lies only in the method of fixing the rights certified by securities.

Uncertified securities in the form of shares are the most common, and there is an opinion that it was the share that became «the basis for the emergence of a special institution of securities in modern conditions» (Butina, 2006: 67). Undocumented securities are the result of the evolution of the securities institution and have long been an element of everyday legal life.

Undocumented securities emerged as a result of the evolution of the securities institute. As A.V. Shulga rightly points out:

This is a stage of modification of documentary (classical) securities, caused by the need to accelerate the turnover of these objects of civil rights, since «the development of industry and economy, the influence of scientific and technological progress and competition have led to the modernization» of the concept of property, its unusual expansion and, accordingly, to the legal recognition of new types of property, a multiplicity of its varieties (2008: 35).

A share or any other security replaces the certifiable rights, not in all respects, but only in terms of turnover. Uncertified securities, in particular, shares in comparison with documentary ones have several advantages, which, according to K. Fradkin (2007), consist in increasing the circulating capacity of non-documentary securities in comparison with documentary ones, since non-documentary shares are more convenient for active modern civil circulation, in contrast to their documentary predecessors, because today there are well-developed communication systems that make it possible to carry out transactions with shares, being in any city where there is a branch of the registrar, which maintains the register of securities of the corresponding issuer.

In addition, the economic costs associated with the cost of both material resources and the time required to issue a significant number of

certificates that are protected from forgery are reduced. The advantages of non-documentary securities should also include the fact that there is no risk of loss or damage to the security certificate, as is possible with the documentary form. N.N. Kalashnikova (2005) also notes the convenience of storing such shares, since the volumes of the paper and electronic archives do not correlate with each other.

The Russian legislator was categorical about the possibility of the issuer choosing the form of securities, namely shares. Since the introduction of amendments to Article 16 of the law «On the Securities Market», registered equity securities (which are also shares) may be issued only in non-documentary form, except in cases provided for by federal law. Thus, with the entry into force of these changes in Russia, the process of dematerialization of securities, which began in 1990, was completed.

Despite the obvious advantages of non-documentary securities, the question of how to protect the rights of the owners of such securities is quite controversial today. There are different points of view on this issue in the doctrine. Some researchers note the need for the use of mandatory legal methods of protection (Filippova, 1998; Zherugov, 2008). Others consider it possible to use proprietary methods of protection (the use of a vindication claim).

Finally, representatives of the third concept consider it necessary, given the special legal nature of undocumented securities, to develop new (special) ways to protect the rights of the owners of these securities (Mollerius, 2005). In this case, this suggests the possibility of applying both binding legal means (a claim for damages or invalidation of the transaction, but it should be noted that the recognition of the transaction as invalid, according to which the transfer of rights to securities occurred, does not mean the restoration of the rights of their owner, since the invalidity of the first transaction does not entail the invalidity of the following transactions, and the securities after them (the following transactions) can also pass to third parties), and material legal (vindication claim), based on the dualistic nature of securities.

According to E.A. Kharitonov (2006: 82), the term «obligatory means of protecting property rights» has some inaccuracy, since civil legislation provides for the possibility of protecting property rights from illegal actions of subjects of not only civil, but also public law (for example, when a legal act of a public authority is declared invalid), and therefore it is more logical to use the term «personal protective equipment». In this connection, it seems to us that the material-legal methods of protection are more effective since they provide an opportunity to claim securities from any person.

In the doctrine, there is an opinion that it is impossible to apply a vindication claim since undocumented securities are not individually

defined things, and they do not have characteristics that would provide an opportunity to implement their individualization, and, consequently, vindication. In particular, V. Dobrovolskii (2005) notes that the legislation of the Russian Federation does not provide for the possibility of identifying shares of one issue (with one number) on any other grounds than the issue number, and therefore they are not subject to vindication. However, it seems to us that this statement is controversial. Therefore, sometimes, taking into account the specifics of uncertified securities as objects of civil rights, the concept is not «vindication claim», but a claim of vindication nature is used in judicial practice. Therewith, in the absence of a judicial precedent, Russian law enforcement practice cannot boast of stability in this regard and, as we have already indicated, the rights of securities holders cannot be limited depending on whether the security is corporal or incorporeal (Svirin *et al.*, 2021).

The peculiarity of the claim, which has a vindication character, is that when it is used, there is no actual seizure of the thing from the defendant. Such a claim can be satisfied if certain conditions are met, namely:

1. possession of the right of ownership or other property right concerning the subject of the dispute on the part of the plaintiff.
2. individualization of the subject of the dispute.
3. the disputed property must be in the illegal possession of the defendant.
4. the defendant is an unscrupulous acquirer, or some grounds allow claiming property from a bona fide acquirer.

Concerning non-documentary securities, their individualization is fully preserved only when the securities are credited to the account of the first owner. With their further circulation, that is, when switching from «account to account», this identity is lost, because the shares within the same issue do not differ from each other. This scheme of switching «from account to account» is used for illegal deprivation of ownership of non-documentary securities, by creating a bona fide acquirer. In this connection, G. Osipov (2007: 157) points out that, in addition to individualizing the generic thing, to bring a claim, it is necessary to establish «the way of things (proof that the lost generic things in a certain amount passed from one owner to another, sequentially from the copyright holder to the defendant». Given the legal nature of generic things, this is quite difficult to do, and sometimes even impossible.

To prevent this, the scientific literature has repeatedly noted the need to assign each non-documentary security an ordinal number. In this connection, A. A. Kukushkin (2007) concludes that to ensure proper protection of owners of undocumented and immobile shares, it is necessary

to assign a certain identification number directly to each share, and not to the entire issue of shares.

Having studied the legally fixed and theoretically developed provisions concerning the legal nature of a share as a special type of securities, the author's definition of the term «share» is proposed – as registered security without a certain circulation period, certifying the same corporate rights of its owner (shareholder) within a single issue relative to the person who assumes the corresponding obligations (issuer), which exist exclusively in an undocumented form.

Conclusion

As a result of the study, the following conclusions should be drawn:

1. A share belongs to equity securities, but in comparison with other equity securities, shares of the same company must confer the same rights to their owners within the same issue
2. A share is the only corporate security since it is the only one that grants its owner a unique set of rights and reflects one of the main characteristics of a corporation – management and participation in management.
3. There is no fundamental difference in the legal nature of the documentary and non-documentary form of the share, since all the «non-documentary» nature of the security, in particular the share, is compensated by a sufficiently documented record in a special register of rights certified by the security.
4. Shares, like any other undocumented securities, should be understood as *res incorporales* «incorporeal things» since undocumented shares exist in the form of an electronic digital code that is tangible to the human senses. Therefore, for the recognition of an electronic record as security (share), it does not matter whether it is a document. Such a share is the security (an incorporeal thing) through the direct recognition of this by the legislator.
5. A share can be considered as a unit of measurement of corporate rights. The stake in the equity capital and the share are related as a genus and a species. A share is a type of stake and at the same time security. A share is a stake in respect of which the law recognizes the property, quality of a security. However, such a particle has «evolved» concerning security, which opens up additional opportunities for its turnover, increases the mobility of its circulation.

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6 The full name of the authors was not added because in the original sources there were only the initials of the name, based on the APA style.

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Modern Criminal-Legal Problems of the Fight Against Corruption in Russia

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Abstract

The fight against corruption is one of the priorities of the State policy of the Russian Federation. There are reasons to note that it is advisable to analyze the regional details of law enforcement activities to counter corruption-related crimes through the legal and organizational ways of implementing the state's law enforcement function. In the article the main objective is to analyze criminal law issues related to the fight against systemic corruption in Russia. In the early 90s of the twentieth century, the country replaced communist ideology with market ideology. To fulfill the objective of the study, the dialectical method of cognition of social and legal phenomena and concepts is used in their development and interdependence. He concludes that human values and moral principles have changed. There have been discussions about systemic corruption in Russia for decades. Endless conversations about corruption have become a convenient screen not only for incompetent officials. Popular with the people, the «disembarkation» of high-ranking officials creates a semblance of «movement,» although no real action is taken.

Keywords: corruption; human rights; freedoms; the rule of law; criminal liability.

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Problemas jurídicos penales modernos de la lucha contra la corrupción en Rusia

Resumen

La lucha contra la corrupción es una de las prioridades de la política estatal de la Federación de Rusia. Hay motivos para señalar que es aconsejable analizar los detalles regionales de las actividades de aplicación de la ley para contrarrestar los delitos relacionados con la corrupción a través de las formas legales y organizativas de implementar la función de aplicación de la ley del estado. En el artículo el objetivo principal es analizar cuestiones de derecho penal relacionadas con la lucha contra la corrupción sistémica en Rusia. A principios de los 90 del siglo XX, el país reemplazó la ideología comunista por la ideología del mercado. Para cumplir con el objetivo del estudio se utiliza el método dialéctico de cognición de los fenómenos y conceptos sociales y jurídicos en su desarrollo e interdependencia. Se concluye que los valores humanos y los principios morales han cambiado. Ha habido discusiones sobre la corrupción sistémica en Rusia durante décadas. Las conversaciones interminables sobre la corrupción se han convertido en una pantalla conveniente no solo para los funcionarios incompetentes. Popular entre la gente, el «desembarco» de funcionarios de alto rango crea una apariencia de «movimiento», aunque no se toman medidas reales.

Palabras Clave: corrupción; derechos humanos; libertades, estado de derecho; responsabilidad penal

Introduction

The state should never forget that the proper performance of its external tasks and functions also determines the internal situation in the country, the ability to fulfill, among other things, its social obligations (Shestak, 2020).

The detection and investigation of corruption-related crimes is an urgent problem of modern legal science, since the increase in corruption in various forms of its manifestation is a great threat to the constitutional rights and freedoms of citizens and the national security of Russia. It is necessary to note the general strategic goals and tasks facing the domestic law enforcement system. The main document establishing 16 such goals is the Decree of the President of the Russian Federation of 31.12.2015 No. 683 "On the National Security Strategy of the Russian Federation", which defines the key threats to the state and society in the conditions of modern globalization processes (Decree of the President of the Russian Federation, No. 683 of 31.12.2015). Overcoming the negative activities of corrupt

organizations to attract new participants is possible if state religious educational institutions are created, the general legal culture of society is increased, and intolerance to such phenomena is increased.

The amount of money that was withdrawn by corrupt officials from Russia, but then they managed to return it, is small compared to how much actually goes abroad to offshore zones. How can the state return the stolen money from the country's budget?

Experts from the FATF (group for the development of financial measures to combat money laundering) believe that Russia should actively engage in asset recovery. The damage from bribes, stolen funds from the budget, income hidden from taxes, money from drug trafficking and fraud reaches 220 billion rubles a year. A third of all criminal income is generated by embezzlement from the budget. From 2014 to 2018, about 318.5 billion rubles were seized from criminals. And only 1.5 % of this amount was confiscated from those who laundered money.

FATF offers Russia to allow law enforcement officers to withdraw illegal money directly from bank accounts. We hope that the list of property suitable for confiscation will be expanded. This is part of the National Anti-Corruption Plan for 2018-2020 (Anisimov *et al.*, 2019). In 2019, about 9 billion rubles were confiscated. As for the money in bank accounts abroad, the problem is not so much in the Russian legislation, but in the international one. To withdraw money from an account outside the jurisdiction of the Russian Federation, according to the laws of Russia, is quite problematic.

1. Method

Methodological basis of this study is the dialectical method of cognition of social and legal phenomena and concepts in their development and interdependence. In the process, general-purpose and scientific methods of scientific knowledge are used as well, historical and legal, systemic, structural-functional, comparative legal, statistical, sociological, specifically the formal-logical, logical-legal and others. The legal framework and information base includes the research of international legal instruments, scientific sources, investigative and judicial practices to ensure the rights and lawful interests of individuals in the pre-trial proceedings.

2. Results

2020 was a record year for the scale of corruption in Russia. Crimes are often committed openly, both in the capital and in the regions. As a result of the intervention of the Prosecutor General's Office of the Russian Federation,

876 officials were dismissed due to loss of confidence. 9.2 thousand criminal cases on corruption crimes were sent to the courts, 8 thousand of which were convicted. The 12 billion rubles returned to the state in 2019 is very small against the background of the real scale of embezzlement and bribery. The courts of the Rostov region in 2019 considered 216 criminal cases (in 2018, 196 cases), which is 1.6 % of all cases. In 2019, two acquittals were issued in cases of corruption (Shestak, 2020; Melnikov, 2020).

Over the past three years, the number of corruption-related crimes has been increasing at a small pace (from 28.3 thousand to 29.4 thousand). In their structure, the facts of bribery account for less than half of the detected crimes (13.7 thousand), compared to last year's value, their number increased by 5 %. Every third fact is a minor bribery (-2.7 %, 4.9 thousand). The three regions with the largest number of the latter included the Republic of Bashkortostan (195), the Stavropol Territory (174) and Moscow (173) (Yavlinsky and Braguinsky, 1994).

The Accounting Chamber of the Russian Federation found that in the execution of the budget of 2019, the volume of violations amounted to 400 billion rubles. The Accounting Chamber of the Russian Federation estimated the amount of theft from the federal budget of Russia. In criminal cases, this is from two to three billion rubles a year, usually even less.

According to the scale of corruption, Russia is in 137th place, between Kenya and Uganda. There has been talk of corruption in Russia for decades. They were conducted before the revolution of 1917. And yet the country has had periods of both stagnation and growth. Endless talk about corruption has become a convenient screen not only for incompetent officials. Do the popular "landings" of high-ranking officials create the appearance of a "movement"? Is there no systemic corruption in the country?

The former colonel of the Ministry of Internal Affairs of the Russian Federation Dmitry Zakharchenko was sentenced to 12.5 years in a high-security penal colony. He was found guilty of receiving a large-scale bribe and obstruction of justice (Burnham, 2000). He was also awarded a fine of almost 118 million rubles, deprived of state awards, the rank of colonel and the right to hold senior positions in state bodies for two years. In total, in the case in favor of the state budget, currency and property worth 9 billion rubles were seized.

In November 2019, the head of the personnel service of the Ministry of Internal Affairs of Russia in Moscow, Panov, was arrested. Investigative measures were initiated in the framework of a criminal case on the sale of positions. With the filing of the specified police officer, official positions were traded (Definition of the Constitutional Court of the Russian Federation of July 02, 2013).

A comparative analysis of crime statistics, outlined by the framework of threats to state and public security, shows a clear unevenness of the criminal situation in the country and identifies the regions with the most unfavorable state. In the implementation of law enforcement activities of the state, it is necessary to consider the ethnic, migration, religious, socio-cultural aspects of human rights violations, threats to the security of society and the state by offenders.

As noted by G. Yavlinsky (Yavlinsky and Braguinsky, 1994), the transformation of mass protest actions, including the fact of systemic corruption, from an instrument of democratic politics into an independent phenomenon that claims to replace politics, has now acquired a global scale: these are mass protests in the United States and Hong Kong, the “yellow vest” movement in France, and many other social upheavals in the world over the past ten years. This applies not only to those countries where corrupt dictatorships destroy or profane democratic institutions, effectively pushing the disaffected into the streets. We are already talking about a much broader problem — the growing awareness of the social impasse, the “loss of the future”, which, in fact, forms the protest movement. However, instead of clear demands and a reform program, the protesters, as a rule, either put forward initiatives like reducing police funding (“Defund the Police” in the United States), or do not offer anything at all. And to satisfy the protesters’ need for action (“we must do something!”), actions are organized that can be described as “activism instead of politics”. As a result, the current protests are losing out to the civil movement of the second half of the XX century precisely by the lack of its own political component. This allows politicians who are situationally opposed to the current government to use the fruits of protest.

Meanwhile, conversations about the self-generation of a new quality through technology are becoming tools of those in power to disorganize real opposition politics and behind-the-scenes manipulations, the purpose of which is to divert attention from the substantive agenda and program of action. It should be noted that, despite the mass protests, the struggle for civil rights, against administrative arbitrariness, corruption and authoritarianism today does not bring significant positive results. Objectively, the situation is only getting worse.

The legal position of the Constitutional Court of the Russian Federation, set out in one of its definitions, is of great importance. Its essence boils down to the fact that the duty of the legislator to formulate legal prescriptions with a sufficient degree of accuracy that allows the citizen to conform to their behavior — both prohibited and permitted, does not exclude the use of evaluative or generally accepted concepts (categories) (Definition of the Constitutional Court of the Russian Federation of July 02, 2013).

There are grounds to analyze the law enforcement practice in the field of anti-corruption. Since 1998, more than 90 legal acts have been adopted, half of which are federal laws.

}To date, according to the presidential decree of April 2013, a person who has reported to law enforcement or other government agencies about the facts of corruption that have become known to him, disciplinary measures are applied only after the consideration of the relevant issue at a meeting of the commission on compliance with the requirements for official conduct, a prosecutor can participate in it.

Among those who complain about corruption among their subordinates and management, primarily want to remain anonymous, the adoption of the bill would change the perception of people. The State Duma of the Russian Federation, in turn, rejected a government bill to protect people who have reported corruption. Earlier, on December 5, 2018, the Government of the Russian Federation submitted to the State Duma a package of draft laws aimed at comprehensive improvement of anti – corruption legislation- some of their provisions address the issues of the draft law, which was proposed to be rejected. Later, the Government of the Russian Federation in its letter of May 22, 2019, asked to withdraw this bill from consideration (Shestak, 2020).

The bill, prepared by the Ministry of the Russian Federation and the government submitted to the state Duma in October 2017 (adopted in the first reading in December 2017), contained measures of protection by a state of people who “notified the employer, the Prosecutor or state authorities about corruption offences committed in state agencies, local governments or organizations.” The bill introduced a separate article in the anti-Corruption law on the rights and protection of persons who have notified of corruption offenses. It provided protection against unjustified dismissal for two years from the date of registration of the notification of a corruption offense and allowed the dismissal of the notifier only after a meeting of the commissions on compliance with the requirements for official conduct or other collegial bodies – the prosecutor was necessarily invited to them. In the case of a person’s participation in criminal proceedings, the measures provided for by the laws on State protection could be used. The draft law ensured the confidentiality of the information contained in the person’s application, and the possibility of receiving free legal assistance.

Measures to protect the State of applicants for corruption are not determined by the legislation of the country. The rejected bill did not introduce confidentiality of information about the applicant, free legal assistance, complicated procedure for dismissal and criminal prosecution after a statement of corruption, in contrast to the rejected bill, where these rules exist. The decree of the President of the Russian Federation contains a provision on the protection of civil servants who reported corruption, but there are no such rules for municipal employees or ordinary citizens.

The Ministry of Justice of the Russian Federation is preparing amendments to the current law that gives prosecutors the right to apply to the court with a demand to withdraw real estate, cars and securities belonging to officials from the state, if the legality of their acquisition is not proven, and the cost exceeds the official family income for three years. This procedure does not apply to funds – for example, to an undeclared bank account by an official. In court, of course, the official will have the opportunity to prove that the money was obtained legally, received, for example, as an inheritance, borrowed. But in fact, it will be more difficult to do this than before: you will have to submit loan or gift agreements and other documents to the court.

The criminal article providing for the confiscation of property (Konina, 2020.) does not meet the requirements of the time. It only works in cases of crimes related to human trafficking, bribery, murder, or the use of slave labor. In 2019, the head of the Investigative Committee of Russia Alexander Bastrykin has proposed to change article 44 of the criminal code to apply it for the confiscation of property of corrupt officials and more efficient to pay damages to the state (Burnham, 2000).

The Constitutional Court of the Russian Federation has allowed the seizure of property from anyone who does not prove the legality of its acquisition. The Constitutional Court of Russia has confirmed the legality of the confiscation of property not only from corrupt officials and their relatives, but also from friends or acquaintances of the accused. This is stated in the court's rulings on the complaints of the former Colonel of the Ministry of Internal Affairs Dmitry Zakharchenko, convicted of bribery, and his relatives. According to the applicants, withdrawal from friends and relatives Zakharchenko property at 9 billion roubles was illegal because the Prosecutor General's office has not provided direct evidence that the property was purchased with illegal profits of the former strongman. But the court found contradictions in the norms, allowing to withdraw in favor of the state property if it is purchased with the income, the validity of which has not been confirmed by anyone, not just officials and members of their families specified in the law on control over expenses of state employees. In fact, the Constitutional Court of the Russian Federation has put an end to the dispute, and now the property of any person can be turned into state income, if he does not prove the legality of its origin. To prove the lawful origin of the property will have to court with help from the IRS on form 2-NDFL.

3. Discussion

On the one hand, representatives of the authorities say that they welcome the fight against corruption, on the other hand, they toughen the punishment for the facts of reporting this phenomenon by the population. Thus, according to Part 2 of Article 128.1 of the Criminal Code of the Russian Federation (Burnham, 2000), slander may be contained in a public speech, a publicly displayed work, the mass media, or committed publicly using information and telecommunications networks, including the Internet, or in relation to several persons, including those who are not individually identified.

We see that in Part 2 of Article 128.1 of the Criminal Code of the Russian Federation in 2020 (Burnham, 2000; Nikolaevna, 2020), two new qualifying signs of slander were introduced, namely, slander committed publicly using the “Internet”, as well as slander against several persons, including individually undetermined ones. In addition, the list of possible penalties for committing crimes provided for by the qualified elements of Article 128.1 of the Criminal Code of the Russian Federation has been supplemented. Part 3-Part 5 of Article 128.1 of the Criminal Code also introduces new types of punishments (forced labor, arrest and imprisonment).

In addition, Part 4 of Article 128.1 of the Criminal Code of the Russian Federation separately highlights the slander that a person suffers from a disease that poses a danger to others (Burnham, 2000; Nikolaevna, 2020). Recall that the list of such diseases approved by the Government of the Russian Federation in 2020 included coronavirus infection (2019-nCoV). For the commission of this act, the maximum penalty is provided in the form of imprisonment for up to 4 years, which refers this act to the category of moderate severity, whereas previously slander, including with qualifying signs, was classified as a minor crime (Melnikov, 2020).

In 2020, during the discussion of the bill at a meeting of the State Duma, the deputy from the LDPR Dmitry Pyanykh drew attention to the fact that the Internet often sounds harsh criticism of the authorities in committing corruption, including against government officials. He assured that the bill is aimed at protecting the constitutional rights of citizens.

The explanatory note to the bill then stated: “Due to the rapid development of information technologies, information and telecommunications networks, including the Internet, are becoming increasingly important as a source of information. Most of the sites on the Internet are not mass media, since they are not registered as such in the prescribed manner. At the same time, these sites often have an audience that significantly exceeds the coverage of traditional mass media.” As we can see, in 2021, the responsibility for other qualifying criteria will also be tightened.

On the one hand, it was possible to bring to justice for defamation on the Internet before, but in the second part only if the Internet resource is registered as a mass media. If there was no such registration, the slanderer could be involved in the first part. In other words, they did not introduce liability for defamation on the Internet but tightened it. They were taken out of the cases of private prosecution (i.e., when only at the request of the victim is initiated) in the cases of public prosecution. Now it can be brought in fact, even if the “slandered” has no claims.

A fundamentally new point: “... as well as in relation to several persons, including those who are individually undetermined.” Previously, slander is an individually directed action. For example, a post on the Internet that the mayor, for example, Ivanov, is a corrupt official. This is slander. Because he is not a corrupt official. Well, or not slander, if a corrupt official. The phrase “all the authorities of the city are corrupt” could not be slander in principle, since the wording of Article 128.1 of the Criminal Code of the Russian Federation implied the focus of slander on a specific person. The amendments will make it possible to prosecute for defamation against an indefinite number of persons. And for attacks, for example, on the administration, it will be possible to be held accountable. From a procedural point of view—and who will be recognized as victims? Libel is a crime against the individual, and a victim is needed. And who will they be if, for example, slander is imputed in the form of “all the power of the city – embezzlers”? Let’s say that a criminal case was opened, and in fact. Will there be “unspecified victims”, such as city administration officials? But this is a crime against the individual, the main object is the honor and dignity of the individual. And what now – the honor and dignity of many individuals? Will they offer everyone who wants their “slandered” group to register as victims? In fact, it is too early to draw any global conclusions, there are no criminal cases against “commentators” of the same network resources registered as mass media yet. The norm of libel in relation to an indefinite circle of persons is very interesting and can be very difficult to prove.

At the same time, slander is still understood as the dissemination of deliberately false defamatory information. The most important thing in the new formulation is not clear how to establish falsity, i.e., inconsistency with reality. If the circle of persons to whom the information relates is not defined, then suddenly for the next person who has already been considered and defined, this information will be relevant to reality, i.e., not false? Many scientists and practitioners were waiting for the court practice to decide that the attacker, to avoid responsibility, gave his slander only the appearance of an opinion, although it was a statement of fact. No such examples have been established. As it was established that at one time a lawsuit was filed against Rospotrebnadzor G. G. Onishchenko for the fact that the latter at a press conference said that all collectors violate the law. The court refused the claim, because G. G. Onishchenko obviously does not

know all the collectors personally, and therefore it was his opinion. It turns out that if such a situation occurs after the entry into force of the new law on libel, it is very likely not civil, but criminal liability?

Conscientious error regarding the authenticity of information excludes liability under Article 128.1 of the Criminal Code of the Russian Federation (Burnham, 2000). Libel, coupled with the accusation of a person in the commission of a sexual crime or a serious or particularly serious crime, should be distinguished from deliberately false denunciation, responsibility for which comes under Article 306 of the Criminal Code. At obviously false denunciation the intention of the persons directed on attraction of the victim to criminal liability (guilty expresses the will to involve the victim in criminal responsibility in the manner prescribed by law), and the slander – on humiliation of its honour and dignity.

The Presidium of the Supreme Court of the Russian Federation approved a new review on April 30, 2020. A person who distributes a single deliberately false information, for example, text information of a formally extremist orientation, in WhatsApp or other messengers can be brought to justice under Article 207.1 of the Criminal Code of the Russian Federation (Burnham, 2000; Nikolaevna, 2020). We are not talking, for example, about information messengers about upcoming crimes that need to be immediately responded to. This explanation is of particular interest if we take into account the provisions of the Constitution of the Russian Federation (Burnham, 2000), according to which everyone is guaranteed the secrecy of correspondence, the absence of signs of publicity, and the receipt of information by a court decision. Based on the explanations of the Supreme Court, law enforcement officers can conclude that the personal correspondence of two persons can be public. This interpretation of the provisions of Article 207.1 of the Criminal Code of the Russian Federation may be questioned by individual citizens and challenged in the Constitutional Court of the Russian Federation. Human and civil rights and freedoms must be reliably protected (Burnham, 2000; Nikolaevna, 2020).

Conclusion

The RAHXiGS analytical report on the current state and trends in the development of the state civil service provided data on why citizens refuse to help the state in the fight against corruption: most said that they consider corruption a positive phenomenon, some considered it useless, dangerous for themselves and because they feared for the lives of their relatives and friends. This is the value-cultural level of corruption, the vital values of the country's citizens, officials, and public consciousness. In the early 90s of the 20th century, we were replaced by the communist ideology of consumption, making money. Human values and moral principles have changed.

A culture of respect and tolerance for other cultures, religions and races must be developed in society. The objective reason is that the Russian Federation is historically characterized by the diversity of the nationalities and cultures of the peoples living in it.

Insufficient mechanisms of interaction of state bodies with various organizations and associations. There is a lack of a clear own ideological policy (it is considered that the state ideology is prohibited by the Constitution of the Russian Federation). This leads, among other things, to the partial replacement of the State's function in this area by the activities of various illegal organizations. It is necessary to pay more attention to the "information impact" on the facts of corruption in a society that implements a strategy of relying on public opinion in one form or another.

Thus, crimes against the freedom, honor and dignity of the individual should be understood as acts that directly infringe on the human freedom, personal inviolability, as well as on honor and dignity as benefits belonging to each person from birth, enshrined in the Constitution of the Russian Federation.

Conflict of interest

The author confirms that the data do not contain any conflict of interest.

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The concept of crime detection in Russian law

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Abstract

The article examines the problem of determining the essence of the concept of “crime detection” in Russian law. For this purpose, the method of literature review was used and during the study the authors analyzed the normative legal acts of the Russian Federation, such as: the constitution of the Russian Federation, the Criminal Code of the Federation, the Code of Criminal Procedure and the Federal Law «on Operational Search Activity», the Federal Law «on police forces», interdepartmental and departmental normative legal acts of the Ministry of Internal Affairs of Russia, among others, to determine the precise moment of detection of the crime phenomenon. Moreover, the article proposes to clarify the definition of the term “crime detection”. It is concluded that it is advisable to distinguish the concepts of «crime detection» and other related concepts in practice and theory to avoid confusion.

Keywords: operational search activity; criminalistics; criminal law; criminal procedure; internal affairs bodies.

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El concepto de detección de delitos en la legislación rusa

Resumen

El artículo examina el problema de determinar la esencia del concepto de “detección de delitos” en la legislación rusa. Para ello se utilizaron el método de revisión de la literatura y durante el estudio los autores analizaron los actos jurídicos normativos de la Federación de Rusia, como: la constitución de la Federación de Rusia, el Código penal de la Federación, el Código de Procedimiento Penal y la Ley Federal “sobre la Actividad de Búsqueda Operativa”, la Ley Federal “sobre los cuerpos policiales”, actos jurídicos normativos interdepartamentales y departamentales del Ministerio del Interior de Rusia, entre otros, para determinar el momento preciso de la detección del fenómeno delito. Por lo demás, en el artículo se propone clarificar la definición del término “detección de delitos”. Se concluye que es aconsejable distinguir los conceptos de “detección de delitos” y otros conceptos afines en la práctica y en la teoría para evitar confusiones.

Palabras Clave: actividad de búsqueda operativa; criminalística; derecho penal; procedimiento criminal; órganos de asuntos internos.

Introduction

In the practice of operational divisions of the internal affairs bodies of the Russian Federation, the concept of “crime detection” is one of the key ones (Thi Lan Hong *et al.*, 2020). It is inextricably linked to the correct definition of criteria for assigning crimes to the categories of solved and unsolved, maintaining statistical reporting of the detection of crimes for a certain period, solving problems when comparing the results of the activities of various internal affairs agencies, their services, and divisions, as well as individual operational employees (Ivanov *et al.*, 2020a; 2020b; Anyushina *et al.*, 2021).

Understanding the essence of the term “crime detection” is extremely important in the scientific aspect. Understanding the essence of “operational investigative activity”, determining the relationship between the concepts of “crime detection” and “investigation”, distinguishing “crime detection” from “searching” etc. in turn, these concepts are the basis for the development of general theories of operational investigative activity and criminology, as well as private methods for identifying, preventing, suppressing, and disclosing certain types of crimes.

The theories of operational investigative activity, criminalistics, criminal procedure, and criminology contain numerous points of view about the concept of “crime detection”, which are very different in their content and often exclude each other.

In our opinion, the lack of unity in views here is due to the complexity of the problem and the different approaches of individual authors to its solution, with differences in criteria and logical grounds for formulating definitions.

The subject of discussion is usually:

- essence of crime detection as a social phenomenon.
- the scope of this concept.
- the moment when the crime can be considered solved.
- correlation of crime detection with criminal prosecution of a person (Pushkarev *et al.*, 2019).

All these issues are closely related to each other and depend on each other.

1. The analysis of normative acts

In our opinion, it is advisable to start considering the essence of the concept of “crime detection” by analyzing the normative legal acts of the Russian Federation. The Constitution of the Russian Federation (1993) in the Articles 20, 47, 48, 49, 50, 52, 63, 93, 98, 125 contains the word “crime”, but the concept of “crime detection” in the Constitution is missing.

Federal Law No. 144-FZ “on Operational Search Activity” (August 12, 1995) in Article 2, defines the tasks and distinguishes: the identification, prevention, suppression, and detection of crimes, as well as the identification and identification of persons who are preparing, committing, or have committed.

At the same time, the meaning of the term “crime detection” in this normative legal act is absent. The Federal Law No. 3-FZ “on the Police” (2011), in Article 2, which sets out the main areas of police activity, declares one of them: identification and of crime, investigation of criminal cases without revealing the content of this word.

The Criminal Procedure Code of the Russian Federation 174-FZ (December 18, 2001) in Article 5, which lists the main concepts used in the Code, does not contain the term “detection of crimes”. However, hereinafter referred to the Code, the concept of “crime detection” still occurs. In Article 317.1 Part 2, 317.5 Part 1, Item 1.2, 317.6, Part 2, Item 1, 317.7, Part 4, Item 1.2 of the Criminal Procedure Code of the Russian Federation, where we are talking about a special procedure for making a court decision at the conclusion of the pre-trial agreement on cooperation. This concept is present, but also is not revealed its essence.

The Criminal Code of the Russian Federation No. 63-FZ (June 13, 1996) establishes the concept of “crime” in article 14, but does not tell us about its detection, does not explain what “crime detection” is. In the text of the criminal Law, we meet this concept, in particular, in Item “i”, Part 1 of Article 61 “Circumstances mitigating punishment”, Part 1 of Article 64 “Appointment of more soft punishment, than it is provided for this crime”, Part 1 of Article 75 “Exemption from criminal liability in connection with active repentance”. In the notes to Articles 110.2, 127.1, 178, 184, 200.5, 204, 204.1, 204.2, 205.3, 210, 212, 228, 228.3, 291, 291.1, 291.2, 322.2, 322.3 of the criminal Code the term “crime detection” exists and it is mostly about the active contribution to solving the crime by the person who committed the crime for which there is a in one of the listed articles of the special part of the criminal Code. However, the essence of the concept in question is not disclosed.

Having studied the texts of the listed normative legal acts, we have not found a definition of the concept of “crime detection” anywhere. However, clarification of this concept, as we noted earlier is extremely important for the theory and practice of operational and investigative activities.

There is the Interdepartmental order “on Unified Accounting of Crimes” (Interdepartmental order No. 39/1070/1021/253/780/353/399, 2005). The order regulates the current system of registration and accounting of the crimes in the police, but also does not contain the concept of “detected crime”, but Paragraph 2.11 of this order gives the concept of an “unsolved crime”:

“Unsolved crime” is a crime, the criminal proceedings of which have been suspended under Paragraphs 1, 2 and 3 of Part 1 of Article 208 of the Criminal Procedure Code of the Russian Federation”.

In Section IV, “Registration of Persons Who Committed Crimes” of the same Order, in Paragraph 41, the reasons for registering the person who committed the crime are listed. These reasons are:

Indictment (act):

- a conviction in a private prosecution case that has entered into legal force.
- a decision to refuse to institute criminal proceedings (on non-rehabilitating grounds).
- decision to terminate a criminal case or criminal prosecution (on non-rehabilitative grounds).

The Order of the Ministry of internal Affairs of Russia No. 356 “About the Position statement about Appointment and Payment of Police Remuneration for Assistance in Solving Crimes and Apprehending

Offenders” (June 6, 2018) in Article 11, establishes that “the remuneration is paid to the citizen in case of a citizen initiative presenting them reliable information during the placement of ads on the official website of the Ministry of internal Affairs of Russia in the network “Internet”, which led to the detection of crimes and the detention of those who committed them”.

Article 12 stipulates that a decision on payment of remuneration is made after the arrest of persons for whom a reward has been declared, as well as after the indictment of persons whose involvement in crimes has been established by the information provided, or after one of the following decisions has been made in a criminal case against the named persons:

1. On the termination of criminal case and (or) criminal prosecution on the basis provided for in Paragraphs 3 and 4 of Part one of Article 24 of the Criminal Procedure Code of the Russian Federation.
2. On the termination of a criminal case and (or) criminal prosecution on the basis provided for in Paragraph 3 of Part one of Article 27 of the Criminal Procedure Code of the Russian Federation”.

Thus, based on the analysis of interdepartmental and departmental normative legal acts, we must assume that in the practice of law enforcement agencies, the crime will be considered detected when the authorized official takes into account the person who committed it in the relevant information Center of the Ministry of internal Affairs, making the necessary card form No. 2 (annex to the said Interdepartmental Order) for one of the listed reasons.

The dictionary of the Russian Language interprets the word “detection” as “discover, make known, explain (something secret, unknown, etc.)” (Ozhegov, 1981).

2. Opinion of scientists

Understanding the essence of the concept of “crime detection” is impossible without considering the opinions of scientists in the field of law.

It should be noted that the question of when the crime can be considered detected is debatable. Some authors consider that the detection of crime is an establishment of a circle of circumstances to be proved in case; others associate this concept with the establishment by proving the time, place, method of committing a criminal act, the person who committed it, and other circumstances relating to the crime; some lawyers believe that the crime was solved with the establishment and exposing the criminal and bringing him to justice; there is also an opinion that the crime can be considered fully disclosed with the entry of the court verdict into force or after the decision to terminate the criminal case is made.

There are other points of view. Such a spread of opinions about the essence of the concept of “crime detection” indicates that this category is not sufficiently developed theoretically.

R.S. Belkin expressed the most complete and comprehensive opinion on this issue in his textbook “Course of criminology”. In his opinion there are the following positions:

1. “Crime detection” — is the concept of operational search means the offender has been found. Everything else rather characterizes the stage of crime’s investigation but not its detection, because it has already been solved (the offender has been found).
2. “Crime detection” — is the establishment of data about the crime and the perpetrator of its commission in such a volume that allows to bring charges. The moment of detection is linked to the moment when the charge is ordered.
3. “Crime detection” - is the establishment of all proof subject’s circumstances, which are the basis for completing the preliminary investigation and drawing up an indictment.
4. “Crime detection” - is the entire process of proceeding in a case that ends with a court sentence’s entry into force: a crime is disclosed for when the case verdict has entered into legal force (Belkin, 2001: 275).

The opinion of A.Yu. Shumilov deserves attention. In his comments to the federal law

On operative-search activities” he defines “crime detection” as “the activities authorized by the law of the subject (operative, etc.), aimed at obtaining data that may lead a reasonable operational version about commission of a specific crime by a specific person, after excluding all other versions will be checked and rejected” (Shumilov, 2003: 18).

As noted earlier, scientists in law have different approaches to the “crime detection” definition especially if they represent different sciences (operational investigative activities, criminology, criminal law, criminal procedure). Therefore, it is difficult to formulate a general concept for all lawyers comparing their approaches.

Thus, if make direct sense of part 1 of article 49 of the Constitution (The Constitution of the Russian Federation adopted by popular vote December 12.1993), which guarantees that “everyone charged with a criminal offence will be presumed innocent until his guilt is proved as provided by federal law and established by a legally effective court decision”, we can conclude completeness “crime detection” the sentence comes into legal force.

Solving crimes, which consists in identifying the person who committed the crime, in detaining him, processing, and proving his guilt, as well as in ensuring the trial of a criminal case until the court's verdict enters into force are most fully reflect law enforcement agencies' activities (Tatunts and Ponamareva, 2021).

However, this approach is not fully applicable for practical divisions of internal affairs bodies' activities. Thus, in practice and when the accused person took an active part when applying the criminal law rules that we announced earlier and related to the mitigation of punishment or release from punishment, we would have to wait for the sentence to enter into force in a criminal case. The terms of criminal proceedings must be reasonable (Article 6.1 of the "Criminal Procedure Code of the Russian Federation" (December 18, 2001)), which clearly will not be facilitated by waiting for the entry of the sentence into legal force.

In addition, this interpretation of the "crime detection" will not allow to quickly and accurately compile and analyze statistics in practice. Such statistics is necessary for rapid action to counter a specific type of crime in a particular area or the Russian federation subject, will not allow the territorial bodies' heads of internal affairs to identify problem areas and respond quickly respond to them.

Conclusion

We offer to leave the term "Crime detection" in theory of law, because, as we have shown earlier, it mostly complies sense and spirit of Part 1 of Article 49 of the Constitution. For practitioners of law enforcement, it would be better to use the phrase "establishment and detention of person (s) who committed the crime". By the way this phrase already applies in mentioned the Interdepartmental order "On Unified Accounting of Crimes" (General Prosecutors office of Russia, the Ministry of Internal Affairs of Russia, the Ministry of Emergency Situations of Russia, the Ministry of Justice of Russia, the Federal Security Service of Russia, the Ministry of Economic Development of Russia, the Federal Drug Control Service of Russia, 2005).

We understand that such a proposal would entail the need for changes in such basic normative legal acts in the field of combating crime, such as penal code, criminal procedure code and the law "On Operational Search Activities", but it must be done in order to avoid confusion and improve enforcement.

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Problem of lawyer protection: comparative legal analysis

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Abstract

This article is dedicated to the analysis of a preponderant institution of Civil Society in Russia such as the Bar Association, consequently, its role in the implementation of the state function of providing qualified legal assistance is examined. In addition, it addresses the criminal defense mechanism of the Russian legal profession. To achieve the objective of the study, several general scientific techniques, and methods of scientific knowledge (analysis, synthesis, deduction, induction, systemic-structural, formal-logical approaches) and specific scientific methods were launched: historical-legal, formal-legal, comparative-legal, and interpretative are employed. Based on the results obtained, it can be concluded that the legal profession, being an institution of civil society, remains vulnerable in the legal sense in its interaction with law enforcement agencies. At the same time, by illegally interfering in promotion, public officials go unpunished. There is still no criminal liability for unlawful interference in the activities of a lawyer. It therefore proposes to introduce specific amendments to the criminal legislation governing this matter of general interest.

Keywords: lawyers in Russia; criminal liability; legal activities; comparative analysis; problems of the protection of lawyers.

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Problema de la protección de los abogados: análisis jurídico comparado

Resumen

Este artículo está dedicado al análisis de una institución preponderante de la sociedad civil de Rusia como lo es Colegio de Abogados, en consecuencia, se examina su papel en la implementación de la función estatal de brindar asistencia legal calificada. Además, aborda el mecanismo de defensa penal de la profesión jurídica rusa. Para lograr el objetivo del estudio, se pusieron en marcha varias técnicas científicas generales y métodos de conocimiento científico (análisis, síntesis, deducción, inducción, enfoques sistémicos-estructurales, formal-lógicos) y métodos científicos específicos: histórico-legal, formal-legal, comparativo-legal e interpretativo se emplean. Con base en los resultados obtenidos, se puede concluir que la abogacía, al ser una institución de la sociedad civil, sigue siendo vulnerable en el sentido jurídico en su interacción con los organismos encargados de hacer cumplir la ley. Al mismo tiempo, al interferir ilegalmente en la promoción, los funcionarios públicos quedan impunes. Aún no existe responsabilidad penal por injerencia ilegal en las actividades de un abogado. Por lo tanto, se propone introducir enmiendas específicas a la legislación penal que regula esta materia de interés general.

Palabras clave: abogados en Rusia; responsabilidad criminal; actividades legales; análisis comparado; problemas de la protección de los abogados.

Introduction

The Constitution of the Russian Federation establishes that Russia is a legal state. In this regard, one of the main functions of the Russian state, as a public-law entity, as well as its duty at the same time, is the protection of human and civil rights and freedoms. This provision is enshrined in the article 2 of the Constitution of the Russian Federation. At the same time, in order to implement and fulfill this obligation, the Constitution of the Russian Federation establishes that everyone is guaranteed the right to receive qualified legal assistance (The constitution of the Russian federation, 1993). This legal provision directly means that it is the state that is obliged to realize the specified right of a person and a citizen. The Constitutional Court of the Russian Federation came to a similar conclusion in its Decision of 05.02.2004 No. 25-O "On the complaint of citizen Valentina Onoprievna Ivkina on violation of her constitutional rights by part of the first art. 45 and art.405 of the Criminal Procedure Code of the Russian Federation", which states that "The provision contained in art. 48 (part 1) of the Constitution

of the Russian Federation that everyone is guaranteed to receive qualified legal assistance means the constitutional obligation of the state to provide everyone who wishes with a sufficiently high level of any type of legal assistance provided ..." (Determination of the Constitutional Court of the Russian Federation of 05.02.2004 No. 25-O). In modern Russia this obligation does not belong to any of the state bodies, that is, in fact, none of them, which is in essence a representative of the state, is not empowered to implement this obligation. But this situation does not mean at all that the named duty is in no way fulfilled by our state.

The Russian Federation has delegated the implementation of this responsibility to such an institution of civil society as the Bar. At the same time, based on a systematic analysis of the provisions of art. 48 of the Constitution of the Russian Federation and art. 1 of the Federal Law of 31.05.2002 No. 63-FZ "On advocacy and the legal profession in the Russian Federation", it can be unambiguously concluded that the state actually equates such concepts as "qualified legal assistance" and "advocacy". At the same time, this assistance is in no way legal assistance provided by employees of legal services of legal entities, employees of state authorities and local governments, participants and employees of organizations providing legal services, as well as individual entrepreneurs, notaries, patent attorneys, etc. (Federal Law of May 31, 2002, No. 63-FZ "On advocacy and the legal profession in the Russian Federation").

Thus, the Russian state, having delegated to the Bar Association its responsibility to provide qualified legal assistance, has established a kind of monopoly, which is connected with the fact that it is the Bar Association that is capable of competently providing this assistance. This monopoly is more clearly manifested in criminal proceedings, since under the current criminal procedural legislation, only a lawyer has the right to act as a defender of a suspect (accused) (The Criminal Procedure Code of the Russian Federation of 12/18/2001 No. 174-FZ, 2001). In addition, the state imperatively established that the legal profession is an institution of civil society and is not part of the system of state authorities and local self-government (Federal Law of May 31, 2002, No. 63-FZ "On advocacy and the legal profession in the Russian Federation"). A similar perception and attitude towards the legal profession can be traced in a number of foreign countries including the United States (Parsons, 1966).

In connection with the issues mentioned above, it can be concluded that the Russian Federation has assigned its duty to provide citizens with qualified legal assistance to the Bar, thereby endowing it with a public law function. At the same time, it is assumed that having done this, the state should create a working mechanism to protect the institution of the legal profession and ensure the real observance of the professional rights of lawyers, and not just establish declarative norms. After all, a lawyer

carries out his activities by exercising his professional rights, which must be protected by the state. A similar situation is observed in the United States of America where the institution of the Bar is endowed with serious social guarantees and protection from the state (Hall, 2004).

1. Methodology

The methodological basis of the research is based on the use of various general scientific techniques and methods of scientific knowledge (analysis, synthesis, deduction, induction, system-structural, formal-logical approaches), as well as specific scientific methods - historical-legal, formal-legal, comparative-legal, and interpretive.

2. Results and Discussion

Let us consider the security of a lawyer and his professional powers on the example of criminal procedural legal relations when he acts as a defender in the framework of criminal proceedings.

The current constitution stipulates those legal proceedings are carried out on the basis of competitiveness and equality of the parties. This provision is supplemented and developed in the criminal procedural legislation, according to which criminal proceedings are carried out on the basis of the adversarial nature of the parties; the prosecution and defense parties are equal before the court. The above provisions have repeatedly been the subject of consideration by the Constitutional Court of the Russian Federation. So, according to the Decision of the Constitutional Court of the Russian Federation of 04.11.2004 No. 430-O “On the complaint of citizen Olga Vasilievna Starovoitova about violation of her constitutional rights by paragraph 1 of part two of art. 42, part 8 of art. 162 and part two of art. 198 of the Criminal Procedure Code of the Russian Federation” it follows that the parties to the prosecution and defense are provided with equal procedural opportunities to defend their rights and legitimate interests (Determination of the Constitutional Court of the Russian Federation of 04.11.2004 No. 430-O).

First, let us analyze how the state protects its direct “representatives” from the prosecution side which include the prosecutor, the investigator and the person conducting the inquiry. Thus, the current legislation establishes criminal liability for interference in any form in the activities of a prosecutor, investigator, or interrogator, in order to obstruct a comprehensive, complete and objective investigation of the case (art. 294 of the Criminal Code of the Russian Federation) (The Criminal Code of the

Russian Federation of 13.06.1996 No. 63-FZ). These provisions mean only one thing, that no one has the right to interfere, as well as in any other way to influence the legitimate activities of these subjects of the charge. A similar opinion is expressed in foreign literature (Adler *et al.*, 1994).

A reasonable question arises: how does the state protect the legal, professional activities of lawyers? Unfortunately, at present, there is no administrative or criminal liability in this regard, that is, a lawyer, namely his professional activity, in fact remains unprotected against illegal actions of anyone including law enforcement officers. The lack of real protection of the professional activities of lawyers, as equal participants in the trial, can be traced in a number of CIS countries. This statement is supported by statistics compiled by the Federal Chamber of Lawyers. So, for the period from April 2017 to April 2019, 1,281 violations of the professional rights of lawyers were registered in the chambers of law: in 2017 692 violations were taken into account, in 2018 - 589. The number of lawyers' chambers in which the professional rights of lawyers were not violated, increased from 26 in 2017 to 40 in 2018. 2 lawyers died from criminal encroachments in 2017. In the same year, 21 lawyers were injured as a result of violence. In two years, health was inflicted on 3 family members of lawyers, 8 cases of damage to the property of lawyers and their family members were committed.

The number of encroachments on attorney secrecy has increased. Illegal summons of lawyers for interrogation in 2017 amounted to 168 cases, in 2018 - 223 cases, the number of illegal searches in the living (office) premises of lawyers increased from 34 in 2017 to 40 in 2018. To higher law enforcement agencies and the courts, lawyers sent 2231 complaints about violations of their professional rights in 2017, of which 568 complaints (25.5%) were found justified. In 2018, lawyers filed 3,212 complaints, of which 97 (3%) were deemed substantiated (Report on the activities of the Council of the Federal Chamber of Lawyers of the Russian Federation for the period from April 2017 to April 2019, 2019). At the same time, the fact of recognizing the actions of law enforcement officials as illegal, in fact, does not in any way affect the latter, and therefore there is no restoration of the violated professional rights of lawyers.

The statistics reasonably confirm the position that the professional activity of a lawyer in criminal proceedings does not have adequate protection from the state. Although in this legal proceeding, as it mentioned above, they are equal participants on an equal basis with the prosecutor, the investigator and the person conducting the inquiry. In this regard, these persons should have equal guarantees of inviolability and personal safety in the exercise of their rights and performance of their professional duties. By itself, obstruction of the professional activity of a lawyer infringes not only on the rights of a particular lawyer and indirectly on the rights of his client, but also directly on the interests of justice, on the constitutional right

to qualified legal assistance (Official site for posting information on the preparation of draft regulatory legal acts by federal executive authorities and the results of their public discussion). A similar position is reflected in the American Bar Association's Model Code of Professional Responsibility for Lawyers.

The discussion about the need to introduce a criminal law mechanism for protecting the professional activities of a lawyer has been going on for a long time. This is due to the really existing problem of violation of attorney secrecy, the inviolability of the private and professional life of lawyers, and criminal attempts on their life and health.

For example, in neighboring Ukraine, its Criminal Code contains art. 397, according to which it is prohibited to impede in any form the implementation of the lawful activities of a defense lawyer or representative of a person to provide legal assistance or to violate the guarantees of their activities and professional secrecy established by law (The Crimean Code of Ukraine, 2001). The above-mentioned corpus delicti by its legal structure is formal, that is, when committing illegal actions, there should not necessarily be any socially dangerous consequences (Bronze, 2016).

In Russia, various options were proposed for the implementation of the above mechanism, one of which is currently reflected in the draft federal law "On Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation (in terms of establishing additional guarantees for the implementation of the adversarial principle)", information about which is posted on the official Internet portal - the Federal portal of draft regulatory legal acts (Official site for posting information on the preparation of draft regulatory legal acts by federal executive authorities and the results of their public discussion).

The specified draft federal law is posted on the Internet portal 09/01/2020. At present, public discussions have already taken place regarding the text of the draft normative legal act, an independent anti-corruption expert examination, and now the formation of the final version of the text is being completed with the aim of its subsequent submission to the State Duma of the Federal Assembly of the Russian Federation.

Let us analyze the proposed changes. Thus, it is proposed to supplement the Criminal Code of the Russian Federation with art. 294.1, which bears the following title "Obstruction of the legal activities of a lawyer." According to this provision, it is prohibited to interfere in any form in the legal activities of a lawyer in order to impede the exercise of his professional powers, provided for by the legislation on advocacy and the legal profession, if this act entailed causing significant harm to the rights and legitimate interests of citizens or organizations or interests of society or the state protected by law (Turanin *et al.*, 2020).

Thus, it clearly follows from the disposition of the article that this *corpus delicti* is material, that is, for an act to become criminal, the onset of socially dangerous consequences is necessary in the form of “causing substantial harm to the rights and legitimate interests of citizens or organizations or the interests of society or the state protected by law.” This provision is seen as not entirely fair and contrary to the principle of competition and equality of the parties. For example, the same *corpus delicti* provided for by part 1, 2 art. 294 of the Criminal Code of the Russian Federation, are inherently formal and do not require any consequences (Burnham, 2000). This means that the state *a priori* protects the professional activities of the court, prosecutor, investigator, and interrogator, regardless of whether there have been any consequences from unlawful interference in it or not.

A similar path was once followed by the legislator of the Republic of Kazakhstan, introducing in the Criminal Code a ban on:

Obstruction of the legal activities of lawyers and other persons to protect the rights, freedoms and legitimate interests of a person and citizen in criminal proceedings, as well as the provision of legal assistance to individuals and legal entities, or other violation of the independence and independence of such activities, if these acts have caused significant harm to the rights, freedoms or legitimate interests of a person and citizen, the rights or legitimate interests of legal entities, the interests of society or the state protected by law” (The Criminal Code of the Republic of Kazakhstan, 2014: art. 83).

It is clear from the above norm that obstruction of the lawyers’ legal activities will become a criminal offense if it has caused significant harm.

Based on the proposed norm of the above-mentioned law, it follows that, although the institution of the Bar was brought closer to the fact that in fact a lawyer will become a more equal participant in the process, there is still a certain “but” that cannot be agreed with, and it is since the proposed *corpus delicti* are going to be made material. At the same time, it should be agreed that it is necessary to introduce an independent article in the Criminal Code of the Russian Federation for illegal interference in advocacy, as proposed by the bill (Burnham, 2000). However, the sanction for committing this crime, based on the principle of equality and adversarial nature of the parties, should still be equivalent to the sanction for unlawful interference in the professional activities of the prosecutor, investigator, or interrogator.

Conclusions

As a result of the theoretical and legal analysis of the institution of the legal profession and the state’s criminal protection of the professional activities of lawyers, the following conclusions can be drawn. Firstly, at present, the legal profession, being an institution of civil society, still

remains vulnerable in the legal sense in interaction with law enforcement agencies. At the same time, by unlawfully interfering with advocacy, civil servants actually remain unpunished. There is still no criminal liability for illegal interference in the activities of a lawyer.

Secondly, before submitting the final bill to the State Duma of the Federal Assembly of the Russian Federation, it is necessary to correct the disposition of the proposed art. 2941 of the Criminal Code of the Russian Federation, making it a formal *corpus delicti* and excluding the following wording from it: “if this act entailed causing significant harm to the rights and legitimate interests of citizens or organizations, or the interests of society or the state protected by law”. In addition, the sanctions proposed by art. 2941 of the Criminal Code of the Russian Federation, in accordance with the principle of equality and adversarial nature of the parties, should be similar to the sanctions contained in part 2 of art. 294 of the Criminal Code of the Russian Federation (Burnham, 2000). Thus, the right status of the prosecution and the defense will really equalize.

It is also necessary to develop and supplement the specified article with additional parts, in which acts committed by a group of persons by prior conspiracy, by a person using his official position, as well as with the use of violence, should be provided as independent offenses. Provide for a more severe punishment for the indicated compositions, until and including real imprisonment.

Conflict of Interest

The authors confirm that the information provided in the article does not contain a conflict of interest.

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Prevention of crimes against the environment: the experience of Ukraine

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Abstract

General social measures for the prevention of crimes against the environment, which include general processes of economic development, science, technology, which create the possibility and increase the effectiveness of special criminological measures and, in contrast, do not directly affect but indirectly the criminogenic environment, eliminating or neutralizing the common, most significant and common causes of behavior criminal in the field of ecology. The article analyzes Ukraine's experience in the field of preventing crimes against the environment. It also analyzes the measures taken in the country aimed at the prevention of environmental crimes. A documentary methodology close to content analysis was used. It is concluded that liability for environmental crimes is an important component of the legal provision of environmental management, the restoration of ecological objects and the protection of the environment. Legislation on criminal liability for violation of the right to use a natural object was developed within the framework of the general legal rules on liability for violation of environmental legislation.

Keywords: ecological crime; crimes against the environment; ecological safety; environmental protection; experience of Ukraine.

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Prevención de delitos contra el medio ambiente: la experiencia de Ucrania

Resumen

Las medidas sociales generales para la prevención de delitos contra el medio ambiente, que incluyen procesos generales de desarrollo económico, ciencia, tecnología, que crean la posibilidad y aumentan la eficacia de medidas criminológicas especiales y, en contraste, no afectan directa sino indirectamente el medio ambiente criminogénico, eliminando o neutralizando las causas comunes, más significativas y comunes del comportamiento criminal en el campo de la ecología. El artículo analiza la experiencia de Ucrania en el campo de la prevención de delitos contra el medio ambiente. También se analizan las medidas tomadas en el país encaminadas a la prevención de delitos ambientales. Se hizo uso de una metodología documental próxima al análisis de contenido. Se concluye que, la responsabilidad por delitos ambientales es un componente importante de la disposición legal de la gestión ambiental, la restauración de objetos ecológicos y la protección del medio ambiente. La legislación sobre responsabilidad penal por violación del derecho a utilizar un objeto natural se elaboró en el marco de las normas jurídicas generales sobre responsabilidad por violación de la legislación ambiental.

Palabras clave: delitos ecológicos; delitos contra el medio ambiente; seguridad ecológica; protección del medio ambiente; experiencia de Ucrania.

Introduction

Nature forms the external environment that surrounds human. It is a set of conditions that form the natural basis, the sphere of existence of mankind, while being the source of human life, well-being and prosperity. The interaction of society with nature has always been and remains the most important condition for human existence. Everything that we produce and consume is created through the use of natural resources. Therefore, the role of nature in people's lives is constantly growing. It is no coincidence that its protection is a requirement fixed at the level of the Constitution of Ukraine.

Despite the measures taken, the severity of environmental safety has not decreased. Today it is almost impossible to name such phenomena and environmental processes that have not been affected by human activities. Since the emergence of mankind, nature provides a favorable environment for its existence. However, gradually such negative phenomena as the depletion of natural resources, environmental pollution, disruption of ecological ties in ecosystems, has been creating ecological crises and other

catastrophic phenomena. One of the examples of such phenomena is the Chernobyl catastrophe, as a result of which the living of people in large areas not only of Ukraine but also of other countries, in particular, in some areas of the Republic of Belarus and Russian Federation, became impossible.

Along with economic, biological, technical, and other areas of environmental development, legal issues arise and develop in the environmental field, i.e., in the field of ecology. At the state level, regulations are adopted that establish requirements on the rational use of natural resources, environmental protection from pollution and are aimed at protecting the life and health of the population from dangerous natural phenomena, i.e., to ensure environmental safety for humans and the environment. Thus, a system of homogeneous legal norms and legal institutions is gradually being formed.

Crimes against the environment belong to the category of criminal encroachments, the social danger of which, as a rule, is not confirmed by official statistics, but is based mainly on such objective indicators that cannot be ignored or hidden (environmental degradation, ecosystem destruction, pollution environment), and authoritative expert assessments.

Environmental protection is an important function of our state. Therefore, in the Special Part of the Criminal Code of Ukraine there is a special section devoted to environmental protection. This section is entitled «Crimes against the environment» and establishes liability for the most dangerous offenses in the field of environment. Also, some general social measures are taken in Ukraine to prevent environmental crimes.

1. General social measures to prevent crimes against the environment

The task of protecting the environment from criminal encroachment can be achieved in two main ways:

1. criminal-repressive direction – the application of state coercion to the offender (punishment, correction, and re-education).
2. criminological, i.e., prevention of violation of criminal law on environmental protection and the creation of appropriate conditions that would exclude the commission of crimes of an environmental nature (prevention of environmental crime).

The social value of preventing crimes against the environment includes not only reducing the scope of criminal law, but also reducing the cost of environmental crime, i.e., reducing its harmful effects. Given the extremely high degree of public danger of crimes against the environment, the

impossibility of eliminating in many cases the consequences of criminal encroachments on the environment (environmental pollution, destruction of flora and fauna, disease, death), in our opinion, their prevention should be the priority.

Starting any theoretical research, it is necessary to first turn to the conceptual apparatus, with which you can reveal the phenomena being studied. Considering the terms used in the scientific literature to define this area of social activity, it should be noted that among criminologists there is no consensus on the use of the terms «fight against crime», «crime prevention», «impact on crime», «crime control» and other similar expressions. In our opinion, we should agree with the authors (Martsev and Maksimov, 1989), who consider the use of the term «fight against crime» not entirely successful, because it is hardly possible to «overcome», i.e., eradicate, destroy crime in general. With regard to the use of the term «prevention of crime», some scholars note, that it is hardly appropriate to apply it to a phenomenon that actually exists and is inherent in any society. In this regard, it is worth noting that the term “crime prevention” does not seem quite correct: it is impossible to prevent crime (unlike specific crimes), it can be limited, reduced. It is possible to prevent not the existing phenomenon - crime, but its specific manifestations in the conditions of place, time, etc. (Ismailov, 1990).

However, taking into account the positions of other scholars, as well as the consolidation of the term “crime prevention” in legislation, in particular Part 1 of Art. 1 of the Criminal Code of Ukraine, we consider it appropriate to use this term in our study. In the criminological literature, this concept is considered as an activity aimed at preventing the implementation of criminal intent of a particular person before the encroachment at the stages of detection of intent or preparation for crime (Pavlenko, 2005).

Considering preventive activities in the field of environmental protection, we can identify the following specific features:

1. Complexity, which finds its expression in two forms:

- a plurality of subjects of prevention, namely environmental, controlling, judicial and law enforcement agencies, whose coordinated activities are aimed at protecting the environment. In the conditions of building the rule of law in Ukraine, its protection presupposes strict fulfillment of obligations by all subjects of ecological relations and strict observance of their rights.
- a variety of measures aimed at achieving the goals of crime prevention against the environment.

2. The close correlation between the regional and national aspects of this activity, as attempts to control environmental crime in a particular region can only be limited and temporary: the environmental crisis in some areas of the country will inevitably affect the environment of other regions.
3. Significant opportunities for successful implementation of measures of a general social nature to prevent crimes against the environment.

Traditionally, in the criminological literature, preventive activity is considered as a complex concept that includes:

- national measures of social, ideological, cultural, and educational order, legislative, legal nature, which combine methods of persuasion and coercion in the fight against crime.
- activities of state bodies and public organizations related to identifying the causes and conditions of crimes and the application of measures to eliminate them, disclosure, investigation, trial of crimes, punishment of criminals, their correction and re-education; as well as the implementation of other measures due to the circumstances of the commission of specific crimes (Hetman and Kostytsky, 2012).

Some authors believe it is inappropriate to consider social measures as one of the types of crime prevention since economy, education, culture is not aimed at overcoming crime, and although overcoming the economic and spiritual crisis will help control crime, socio-economic and cultural development go far beyond criminology, and solving these problems cannot be seen as a kind of targeted crime prevention (Walters, 2010).

These general social measures to prevent crimes, in particular against the environment, are not aimed directly at eradicating the causes of environmental offenses (including crimes), nevertheless, they contribute to solving this problem by creating conditions that reduce or neutralize the impact of criminogenic factors and thus lay the foundations and form the possibility of special criminological prevention, determining its content and the rate of reduction of the number of crimes against the environment.

General social measures to prevent crimes against the environment include general processes of economic development, science, and technology, which create the possibility and increase the effectiveness of special criminological measures, and in contrast not directly but indirectly affect the criminogenic environment, eliminating or neutralizing general, the most significant and common causes of criminal behavior in the field of ecology (Avanesov, 1980).

In reality, general social prevention of crimes against the environment is a complex system, the content of which forms a set of different elements,

consisting of blocks that characterize the relevant areas of preventive activities in the field of ecology. In our opinion, depending on the nature and direction of the measures, the following blocks should be distinguished: moral and educational measures; informational measures; economic measures; technical measures; social measures; legal measures.

The group of measures of moral and educational nature are aimed at improving the environmental awareness of society as a whole and individual citizens through environmental education, environmental and legal advocacy, raising the moral and cultural level, as they determine the lawful behavior of people in various spheres of society.

The importance of environmental education is difficult to overestimate because environmental moral norms, learned from childhood, subconsciously determine human behavior, its attitude to nature. They create an invaluable baggage that allows people to navigate in difficult situations of choosing a course of action, when moral norms compensate for ignorance of the law. Environmental and legal norms are more effective if they are based on moral norms and belong to the system of internal regulators of behavior (Pogorelova, 1993).

The tasks of environmental and legal education and advocacy include acquaintance with the norms establishing responsibility for ecological offenses; clarification of the procedure for exercising legal liability; ensuring internal and external consent of people with legal means of coercion; belief in the need to prevent environmental offenses; increasing the social activity of citizens and their intolerance to these offenses (Konovalova and Matusovsky, 1994).

Environmental propaganda, which includes the publication of popular science magazines, exhibitions, posters, environmental festivals and competitions, excursions, despite the large amount of material used (including in the media), is not effective enough. This is due not only to the difficulties in obtaining environmental information, but also to the fact that global development concepts are poorly linked to the values and economic motivations of a particular person (compliance with environmental requirements should be not only prestigious but also cost-effective).

Surveys show that often environmental values do not occupy a proper place in the value orientations of an individual citizen (Vershok, 2003).

Environmental education contributes to raising the level of general education and culture, forming the necessary social base to ensure environmentally safe, sustainable development of the country, and should be considered as one of the priorities of public policy in the field of environmental protection and education. It must solve the problem of training educated young people who are able to make conscious decisions in areas of life where the problems of the individual, society and the environment are combined.

Environmental and legal education is an integral part of general education and is an independent element in improving public perceptions of environmental legislation and, in contrast to legal advocacy, provides for the following features: availability of a special educational program; permanent composition of students; the presence of a set of pedagogical tools, control over the knowledge of students.

In the legal literature, professional environmental and legal education, and non-professional education (Karakash *et al.*, 2001) are considered separately.

In the structure of non-professional environmental and legal education, the most important is the environmental and legal education of minors, the main tasks of which should include the following aspects: understanding the interdependence of all natural phenomena; belief in the inadmissibility of impunity for the release into the environment of polluting materials, both natural and artificial; the inevitability of liability for actions harmful to nature; awareness of the leading role in the economy of the concept of waste-free production and the complexity of the use of natural resources; awareness of the need to actively combat encroachments on the environment.

According to scholars, it is the legal education of minors that is a priority in terms of general crime prevention (Karakash *et al.*, 2001).

The professional component of environmental and legal education is one of the main factors determining the effectiveness of environmental activities.

After all, the application by law enforcement officials who perform their duties in the field of environmental protection of legal norms establishing liability for environmental encroachment requires a thorough knowledge of national and international environmental law, to which the relevant provisions of criminal and administrative law refer. These realities place high demands on the training of environmental lawyers, necessitate the introduction of new courses and special courses for students specializing in forestry, agriculture, land, natural resources, recreational law. An urgent problem is to improve the environmental education of professionals who are already working and whose activities are related to the impact on the environment.

According to Article 7 of the Law “On Environmental Protection” (Verkhovna Rada of Ukraine, 1991), the increase of ecological culture of society and professional training of specialists are provided by general compulsory comprehensive education and upbringing in the field of environmental protection, including in preschool institutions, in system of general secondary, vocational, and higher education, advanced training and retraining. Ecological knowledge is a mandatory qualification requirement for all officials whose activities are related to the use of natural resources and

lead to the impact on the state of the environment. Art. 9 of the mentioned law enshrines the right of citizens to receive environmental education.

Significant attention is paid to the improvement and dissemination of environmental and legal education in the “Main directions of state policy of Ukraine in the field of environmental protection, use of natural resources and environmental safety” (Verkhovna Rada, 1998). This resolution provides for the expansion of the system of environmental legal institutions, development of new curricula, improvement of methods of teaching environmental law and special courses in environmental law disciplines in modern conditions, creation of the Scientific Center of Environmental Law and Legislation for comprehensive environmental law research.

There is a link between environmental legislation, on the one hand, and the actual behavior provided for or prohibited by these regulations, on the other hand. This factor is environmental legal awareness. In our opinion, it is the ecological legal awareness of citizens, i.e., the system of spiritual reflection of legal reality in the field of ecology, which is a relatively independent element of general social prevention of environmental crime, ultimately determines its effectiveness.

The level of individual environmental legal awareness depends on the individual, his or her values, needs and interests. Various structures can be the means of forming ecological legal consciousness - television, radio, editorial offices of magazines and newspapers, other mass media, literary works, lectures, seminars, etc. It should be noted that the process of forming environmental awareness as a factor that stimulates the activity of citizens in assisting law enforcement agencies in combating environmental crime, should be carried out in close cooperation of its elements - environmental law education and advocacy (Karakash *et al.*, 2001).

When considering the structure of environmental legal awareness, there are three levels that differ in the nature and depth of reflection of reality - everyday (real), professional (systematized) and theoretical (scientific).

Professional environmental legal awareness, i.e., the idea of environmental law, which is formed in jurists, employees of environmental and law enforcement agencies, based on knowledge and practical experience of environmental legislation, in our opinion, largely determines the effectiveness of prevention of environmental offenses and crimes.

Particular attention should be paid to the formation of environmental awareness among law enforcement officers performing their duties in the field of environmental protection. The attitude of some police officers, prosecutors and courts to the case of environmental protection as secondary, common cases of unreasonable refusal to initiate criminal proceedings for encroachment on the environment or termination of already initiated cases on the grounds of insignificance of acts objects of nature and undoubtedly,

significantly reduces the effectiveness of law enforcement and preventive activities in the field of ecology (Kornyakova, 2000).

Information components of environmental crime prevention are an important factor in optimizing the state's environmental protection and improving the ecological culture of society and include measures to collect, process, evaluate information on the state of the environment, availability, prevalence, quality of natural resources (monitoring systems, natural resources), determination of ecological capacity and reproductive capacity of the environment, forecasting of changes in its condition. In addition, the information base for the prevention of environmental crime should create the necessary understanding: on the nature, intensity, prevalence, and development of determinants of environmental crime; dynamics and tendency of ecological offenses and crimes, their prevalence in the region, at the enterprises, in establishments and the organizations; means of influencing them, law enforcement practice in the field of environmental protection.

An important source of environmental information, including at the regional level, is the data of monitoring of the environment and individual natural objects. The monitoring system eliminates many factors that contribute to criminal pollution, improves the control over the behavior of officials and other persons performing duties in enterprises whose activities are associated with man-made environmental impact. Ukraine has a well-developed regulatory framework for monitoring, which emphasizes the importance of this activity for the country.

An important factor in optimizing the state's environmental protection and improving the ecological culture of society is environmental information, which can provide different levels of ecological knowledge, different depth, thoroughness depending on individual psychological characteristics, age, life experience, professional affiliation, social and moral position of the individual. Impartial knowledge leads to the formation and development of only a distorted ecological consciousness.

Solving the problems of effective environmental protection depends primarily on improving the economic situation in the country and appropriate funding for environmental protection. Considering the economic and financial component of general social prevention of crimes against the environment, it should be noted that the legal norms governing the economic mechanism of environmental protection were introduced by the Law of Ukraine "On Environmental Protection", and later were available in legislation on land, subsoil, forests, water, atmospheric air, fauna.

According to Section 10 of the Law of Ukraine "On Environmental Protection", economic measures must provide for: the relationship of economic activity of enterprises with the rational use of natural resources

on the basis of economic levers; identification of sources of funding for environmental protection measures; setting limits on the use of natural resources; setting standards for fees and payments for the use of natural resources; providing enterprises with tax, credit and other benefits in the implementation of low-waste, energy and resource-saving technologies; compensation for damages caused by violations of environmental legislation.

Economic development is directly related to the state of people's well-being, the growth of which will reduce the severity of social problems (Nekit, 2021).

The introduction of ecological and economic levers of the economic mechanism of nature management creates incentives for the rational use of natural resources, as well as additional sources of funding for environmental activities.

In Ukraine the basic elements of the economic mechanism of nature management and nature protection activity are developed and legally established. The most important of them are: the fee for pollution of the natural environment, the system of fees for the special use of natural resources, compensation for damages caused by violations of environmental legislation, etc.

Promising in this regard is the development of environmental entrepreneurship, the main directions of which in developed countries are the production of a wide range of equipment for air, gas and water purification, resource conservation, collection, processing and disposal of waste, pollution control (Oleksenko *et al.*, 2021). This also includes the production of natural food, environmentally friendly furniture, car engines, household chemicals, harmless paints and more. Many companies are engaged in the development and implementation of environmentally friendly technologies in all areas of industrial production, treatment of contaminated soil, reservoirs and groundwater, landscaping and afforestation, restoration of terrestrial and aquatic ecosystems. Other commercial entities make good money on the collection, sorting and processing of production and consumption waste.

The financial component of the economic mechanism of nature management and environmental activities is based on the system of budget planning and provides for the use of appropriate tools for both revenues and expenditures of the State budget. Analysis of the implementation of programs and measures approved by the Cabinet of Ministers of Ukraine, by central executive bodies, regional and local administrations, shows that due to the unsatisfactory state of funding, the vast majority of them are not implemented (National Institute for Strategic Studies, 2013).

To eliminate the shortcomings of the system of financing environmental activities, it is advisable, in our opinion, to apply the following measures: purposeful activity of law enforcement bodies to prevent cases of misuse of funds from the Environmental Protection Fund of Ukraine; the establishment of an independent Environmental Fund, the use of which would be controlled by representatives of various sectors of society - the executive, business, producers and the public; introduction of material incentives for greening of production activities of enterprises.

Technical measures to prevent crimes against the environment are carried out in order to move to more modern technological processes that ensure waste reduction and their maximum utilization, creation and operation of high-efficiency treatment facilities (Kovaleva, 2015).

Precautionary measures of a social nature are the development and implementation of regional social programs aimed at solving the most acute problems of depressed areas, primarily on employment, job creation, improving the efficiency of employment services, organization of proper control over the implementation of such programs.

2. General legal ways to prevent crimes against the environment

One of the central components of general social prevention of crimes against the environment is the law, which acts as an effective regulator of environmental relations in society and ensures the interests of the individual and social justice in the field of ecology.

It is known that the very publication of a normative act, the existence of a criminal law prohibition can regulate the behavior of people and is marked by a warning, restraining property. The general preventive property of criminal law is not directly manifested in the restrictions on the rights of citizens, but is a factor that affects their consciousness, will and emotions, i.e. it is perceived subjectively and restrains the negative manifestations of the person. The effectiveness of this influence largely depends on the effectiveness of the application of criminal law. Today, the statement that has been repeatedly expressed in the legal literature that the deterrent effect of criminal law largely depends not on the severity of punishment, but on the inevitability of liability based on legal practice (Polischuk, 2002).

Modern criminological science shows a close connection between the preventive function of criminal law and a similar function of law enforcement practice (Martsev and Maksimov, 1989). In fact, the boundary between them is quite conditional and, in our opinion, these phenomena are interdependent. Both the deterrent effect of criminal legislation on environmental protection and the practice of its application by criminal

justice bodies are part of the state policy in the field of combating crime, including environmental crime.

Considering the conditions for improving the effectiveness of the preventive effect of criminal law in the field of environmental protection, there are two main areas:

1. improvement of legislation in this area.
2. activities to acquaint the public with the rules establishing liability for environmental offenses.

Considering the first direction, it should be noted that the improvement of legislation governing various aspects of combating criminal encroachment on the environment should, in our opinion, include primarily the improvement of criminal and environmental legislation, which are the main means of implementing criminal policy in the field of environmental protection. natural environment.

The improvement of criminal legislation in this area is crucial. It is the criminal law that contains a list of socially dangerous encroachments on the environment and defines them as crimes, as well as establishes sanctions that contain a criminal threat that deters many people from committing a crime. Improvement of criminal legislation in the field of environmental protection should be understood as optimization of the Special Part of criminal legislation, i.e., such changes in its content, which will create the most favorable conditions for improving the effectiveness of preventive measures governing criminal law against environmental crime. In addition, a number of articles of the General Part of the Criminal Code of Ukraine have a preventive effect. Thus, the rules defining the concept of self-defense (Article 36 of the Criminal Code), detention of a person who committed a crime (Article 38 of the Criminal Code), extreme necessity (Article 39 of the Criminal Code), encourage citizens to actively resist and stop criminal acts.

It is expedient to dwell on the peculiarities of the preventive effect of criminal law, depending on the type of their disposition. Almost all the dispositions of the articles in the section "Crimes against the Environment" are blanket, which causes a relatively small preventive and educational effect of the articles in this section, as many of the regulations they refer to are unknown to the majority of the population. Of course, this does not apply to articles that provide for a special subject of crime, because people who perform a certain job professionally must be well aware of the relevant rules and regulations governing this type of activity.

In the current Criminal Code of Ukraine, the legislator did not provide for administrative prejudice for crimes against the environment, only naming their consequences, some of which - environmental pollution, negative impact on human health, significant damage, other serious

consequences, are evaluative categories and are set taking into account specific circumstances of the case, also based on the relevant environmental regulations. Undoubtedly, it is completely impossible and inexpedient to abandon blanket dispositions.

It is necessary to make the criminal law in the field of environmental protection clearer and more accessible to the general public. In our opinion, this can be done by improving public perceptions of legislation and codifying environmental legislation.

Considering the educational and preventive impact of criminal law on citizens, scholars note that most people find support in their own legal consciousness, others receive information that influences the motivation of actions, some refuse temptation, and those, who ignore the ban, are punished by the court. Studies in this area have shown that the dominant role in the promotion of legal knowledge, including environmental, today belongs to the media (Dovgan, 2015). It should also be noted that in periodicals and television programs more attention is paid to the practice of criminal law, giving them a sensational, detective nature. It is possible to correct the distorted perception of readers and viewers about the effect of criminal law by forming a holistic view of criminal law, which is difficult to do without explaining the relevant criminal law with the comment of a specialist. Of course, this is possible only on the pages of specialized legal publications and television programs.

3. Special criminological measures to prevent crimes against the environment

Special criminological measures to prevent crimes against the environment are systematic activities aimed at preventing the commission of individual crimes and crime prevention in general.

According to the Law of Ukraine "On Environmental Protection" (Articles 10, 16), the responsibilities for conducting environmental measures are assigned to all state bodies and public organizations.

Special criminological prevention is purposefully carried out by state bodies and public organizations, which, among other functions, are specially designed to prevent environmental and other related offenses. The implementation of this activity requires the use of special methods and tools, as well as special professional knowledge of environmental and legal nature.

Considering the system of subjects of special criminological prevention of crimes against the environment, depending on the content of functions, it is possible, in our opinion, to distinguish four groups of subjects: judicial, law enforcement, controlling and public.

The peculiarity of law enforcement activities of judicial bodies in the field of ecology, in particular courts of general jurisdiction and commercial courts, is that, firstly, they contribute to the proper resolution of cases, and secondly, affect law enforcement activities in general. Moreover, the circle of persons affected by the practice of courts is much wider than the circle of those in respect of whom a court decision has been rendered.

The precautionary role of courts of general jurisdiction is primarily to take administrative or criminal penalties against violators of environmental laws. Consideration of cases on environmental offenses requires from court employee's special knowledge and some experience in the application of environmental law (Kotelevets, 2002).

Courts assume unjustified concessions to criminals when sentencing is imposed, as a result of which bringing violators to justice and sentencing them for violating environmental legislation does not fully fulfill its punitive and preventive function.

In view of this, the proposals expressed in the scientific literature on the formation of specialized environmental courts are quite relevant. The IX UN Congress on Crime Prevention, held in Cairo, recommended that the participants of the forum study the possibility of establishing specialized environmental courts or panels of courts, forming a list of jurors in cases related to environmental protection.

Given the special status of the courts, which is the autonomy of the judiciary and the independence of judges, it would be inappropriate to talk about the coordination of courts with other subjects of preventive activity. But interaction with them can take place, in our opinion, in the following forms: mutual information on the state of crime and convictions for crimes against the environment; use of information from judicial statistics and materials of judicial practice in the development of precautionary measures; analysis of the effectiveness of measures to eliminate the causes and conditions identified during the trial of criminal cases of this category; holding joint seminars and conferences on environmental issues; participation of relevant specialists in the training of law enforcement and regulatory authorities; preparation and sending to the relevant authorities of certificates, information letters.

It should be noted that the precondition for the implementation of these measures at both the national and regional levels is, in our opinion, the analysis of judicial practice. In the regions of the Ukrainian Black Sea coast, where crimes related to illegal fishing, animal or other water extractive industries are widespread, the lack of generalizations of case law in this category is a shortcoming that reduces the effectiveness of preventive activities in this area.

In the legal literature, different views are expressed on the understanding of the concept of “law enforcement agencies” (Kotelevets, 2002). Based on the definition of law enforcement agencies as functioning in society and the state institutions and organizations, whose main task is to ensure the rule of law, fight crime and other offenses, in our opinion, law enforcement agencies in the field of environmental protection should include prosecutors, in particular, Specialized Environmental the Prosecutor’s Office, the National Police of Ukraine, the Security Service of Ukraine and customs authorities, border guards. These bodies, as well as courts of general jurisdiction, are part of the bodies of criminal justice, i.e., state institutions established to combat crime through the application of criminal laws and special criminological prevention of crimes.

The National Police of Ukraine plays a significant role in preventing crimes against the environment. Analysis of the provisions of the Law of Ukraine “On the National Police” (Verkhovna Rada, 2015) shows that the implementation of legal activities by the police on environmental protection is: detection and termination of offenses, carrying out proceedings in cases with them; bringing violators of environmental legislation to justice, and thus ensuring the implementation of nature users of their affairs, performance of duties, removal of obstacles that may interfere with this; strengthening the rule of law in this area through prevention of violations of environmental legislation (identification of causes and conditions that contribute to the commission of offenses, taking measures within their competence to eliminate them, participation in the legal education of the population); delivery, in cases and in the manner prescribed by law, and detention of persons who have committed offenses in the field of protection of natural resources and use of natural resources.

Based on this, it should be noted that the set of measures carried out by the National Police of Ukraine is quite meaningful and developed, which has a positive effect on reducing the level of offenses in the field of environmental protection.

Given the fact that crimes against the environment pose a direct and real threat to the national security of the state and society, the security authorities within their competence are also responsible for detecting, preventing, and stopping acts that affect the environmental interests of society and are social and environmental hazard. According to intelligence analysts, the quality of the environment, the rational use of biological and mineral natural resources is becoming factors of national security. Deterioration of the ecological situation begins to progress and becomes a negative factor in the processes of socio-economic development. There is an indirect and, in some cases, a direct link between environmental crises and the development of economic, social, interethnic, and territorial conflicts based on them. In the future, a long-term relationship between environmental

degradation, depletion of natural resources and uncontrolled migration processes, escalation of large-scale violence, and an increase in the number of environmental offenses is predicted.

Security forces must be focused on combating biological and technological terrorism. Biological terrorism is understood as a type of special terrorism that uses various biological objects - microorganisms, viruses, pathogens of mass infections, biological products, advances in genetic engineering, cloning, etc. - in order to cause epidemics, epizootics, dramatically weaken the body human, to change the psycho-emotional sphere of his personality. In turn, technological terrorism is understood as the use of nuclear, chemical, bacteriological weapons or its components, nuclear, radioactive, highly toxic chemicals, pathogens or capture, decommissioning of nuclear, chemical and other objects of increased hazards, life support systems of cities and industrial centers in order to achieve political, selfish and other goals (Tislenko, 2012).

It should be noted that although these crimes are not normatively related to environmental, but represent an increased environmental risk. Closely related to this is the preventive activities of security agencies to identify the preconditions for emergencies, illicit trafficking in potentially dangerous substances and materials.

Together with the customs control authorities, the security authorities implement a set of measures to block the channels of penetration into the domestic market of Ukraine from abroad dangerous to human life and health household goods, environmentally harmful industries, technologies and materials, export of strategic raw materials, as well as landfilling of hazardous waste in Ukraine. According to experts, in the field of illegal waste movement there are organized criminal structures with the participation of citizens of the former USSR, Central and Eastern Europe (Balyuk, 1997).

The preventive activity of the border guards is primarily to stop the poaching of foreign fishing vessels.

The preventive activity of the bodies of the State Emergency Service of Ukraine is to eliminate emergencies in order to ensure public safety and negative impact on the environment. The state fire supervision bodies of the State Emergency Service of Ukraine supervise industrial facilities in order to maintain a high level of their fire safety. Performing a protective function to protect forests from fires, the state fire supervision authorities ensure fire safety of logging facilities and other enterprises and organizations that perform work or carry out other activities in forests. The situation is complicated by the spread of the facts of intentional burning of forests for selfish purposes.

Implementation of environmental control is a statutory activity of state bodies and specialized formations of public environmental organizations,

aimed at monitoring and verifying compliance by legal entities and individuals with the requirements of environmental legislation, as well as the application of measures to prevent environmental offenses.

Environmental control bodies, which, unlike judicial and law enforcement agencies, perform environmental protection functions directly within the natural environment and for which the protection of the environment (or its individual objects) is the main function, have the greatest preventive capabilities.

This group of subjects of prevention of crimes against the environment should include: Ministry of Ecology and Natural Resources of Ukraine, State Agency of Forest Resources of Ukraine, State Agency of Land Resources of Ukraine, State Agency of Water Resources of Ukraine, State Sanitary and Epidemiological Service of Ukraine, State Agency of Fisheries of Ukraine, Ministry of Agrarian Policy and Food of Ukraine.

Among this group of subjects of prevention of crimes against the environment, the Ministry of Environment occupies a central place. As a specially authorized central executive body for environmental protection, environmental safety and hydrometeorological activities, the Ministry carries out its preventive activities by monitoring all activities of enterprises, institutions and organizations, as well as compliance with the protection and use of natural resources through administrative and legal methods aimed at ensuring compliance with environmental and legal requirements in the planning, location of productive forces, construction and operation of enterprises and other economic facilities.

In particular, the administrative influence on the subjects of environmental relations is carried out by: determination of conditions and granting of permission for special nature use; establishment of ecological restrictions on production activities (approval for enterprises of standards of maximum permissible emissions (discharges) of pollutants, etc.); establishment of nature protection and sanitary protection zones; control over compliance with environmental and legal requirements; restriction or cessation of production activities that become a threat to human health and the environment; application of administrative fines to violators of environmental legislation.

Unlike the Ministry of Environment, the protective functions of other regulatory bodies in the field of environmental protection are limited to one of the areas - compliance with legislation on protection and use of forests, land, subsoil, water, fauna, flora, air, nature reserves, sanitation, and epidemiological well-being of the population, etc.

Preventive activity of the bodies of the State Agency of Forest Resources of Ukraine is carried out in three main directions:

1. protection of forests from fires.
2. protection of forest strips and forests from illegal logging and damage.
3. protection of fauna of Ukraine.

Bodies of the State Agency of Land Resources of Ukraine exercise state control over the use and protection of land. The number of crimes related to pollution, damage, and misuse of land (Articles 239 and 254 of the Criminal Code of Ukraine) has a steady upward trend. The dynamics of bringing the perpetrators to justice for administrative offenses in the field of land protection, the objective side of which, except for the consequences specified in the provisions of Articles 239, 254 of the Criminal Code of Ukraine, is similar to this criminal law.

Bodies of the State Agency of Water Resources of Ukraine in accordance with paragraph 12 of Art. 16 of the Water Code of Ukraine exercise control over compliance with the modes of operation of reservoirs and water management systems, surface water quality and economic activity on the lands of the water fund of Ukraine.

State Sanitary and Epidemiological Service of Ukraine in accordance with Art. 39 of the Law of Ukraine "On Ensuring Sanitary and Epidemiological Welfare of the Population" supervises the implementation of state policy on disease prevention, monitoring the implementation of programs related to the prevention of harmful effects of environmental factors on public health and supervision of sanitary legislation (Verkhovna Rada of Ukraine, 1994).

The essence of preventive activities of regulatory authorities in the field of environmental protection is to inspect controlled objects in order to identify violations of environmental legislation, draw up acts on the results of inspections, apply precautionary measures to violators and bring perpetrators to justice (Hetman, 1999).

An important role in the prevention of crimes and other offenses related to encroachments on fishery resources is played by fishery protection bodies that are part of the State Agency of Fisheries of Ukraine.

Characterizing the current state of fisheries in Ukraine, it should be noted the growing number of poachers, frequent violations of fishing rules and unauthorized fishing, the considerable scope of the shadow business and more. The rapid growth of the number of fishing organizations complicates the control of fishing and increases the anthropogenic pressure on the fauna of reservoirs. One of the directions of nature protection activity of fish protection bodies is counteraction to concealment from the account of the actual volumes of the caught fish and sea products by fishing and other commercial enterprises.

The effective implementation of fishery protection measures is hampered by the unsatisfactory technical condition of the fleet and other vehicles of the state fish inspections, which are not updated due to insufficient funding. As rightly noted in the scientific literature and periodicals, without close cooperation with law enforcement agencies and NGOs, it is impossible to conduct large-scale fisheries, which are carried out not only on water bodies, but also on highways and local markets. Poaching of valuable fish species in the Azov-Black Sea basin, with criminal groups with the assistance of corrupt officials of state control structures, should be combated especially uncompromisingly (Chernik and Gerashchenko, 2005).

Independent public organizations, movements and parties advocating for the preservation of the environment (for clean air and water, against the nuclear threat, etc.) are playing an increasingly active role in solving important problems of Ukraine's environmental security and preventing crimes and other offenses against the environment.

An important social factor that draws the attention of the general public to security issues is the activity of numerous informal social movements and groups at the local and regional levels.

As a rule, public activities are of a recommendatory nature and are implemented in the following forms: organizational (submission of proposals to the relevant state bodies); environmental information (holding pickets, speeches in the media, environmental propaganda publishing activities); controlling (inspections of the fund's environmental objects, examinations); legislative (introduction of new bills, additions or changes to existing ones for consideration of the subjects of legislative initiative) (Tymchuk, 2016).

According to experts from the National Institute for Strategic Studies, Ukraine still lacks an effective mechanism for cooperation between NGOs, movements, parties and the government in addressing environmental security issues, which significantly reduces the effectiveness of civic initiatives. In addition, as the analysis of their program documents showed, the degree of processing and quality of program applications leave much to be desired. They do not depend on the political orientation of the parties. The measures proposed there are well developed, brought to the list of laws that need to be adopted and the development of which the parties (movements) are going to do. However, most often the constructive part of the program looks like a list of individual theses of a fairly general nature. Virtually none of them answer the question: how to solve complex environmental problems.

Conclusions

Liability for environmental crimes is an important component of the legal provision of environmental management, restoration of ecological objects and environmental protection. Legislation on criminal liability for violation of the right to use a natural object was developed within the framework of general legal norms on liability for violation of environmental legislation.

Specific features of crimes against the environment allow to consider them as an independent group of crimes, which was realized with the adoption of the current Criminal Code of Ukraine. This, as well as the position of the public concerned about the state of the environment, the number of regulations and bodies that must apply them, are optimistic. In fact, there is rather sad situation due to the presence of large-scale environmental crime in Ukraine. The effectiveness of the fight against it lies not only in the perfection, balance of criminal law, but also in the activities of environmental authorities.

The impact on criminogenic factors that determine the existence of environmental crime should be systemic, and the activities of all bodies involved should be coordinated. Only under such conditions can the processes that give rise to crimes and other offenses in the field of environmental protection become controlled and managed. Understanding this, we propose to create and implement a system of environmental justice, which would provide for comprehensive cooperation of governmental and non-governmental institutions and organizations to identify the factors that give rise to crimes against the environment, their effective prevention and adequate response.

It is obvious that the creation of a system of environmental justice in the country is a complex and long process that requires addressing a number of issues of legislative, organizational, personnel and financial support.

The need for active public participation in environmental prevention activities is obvious. The solution of many problems related to environmental protection is impossible without the appropriate attitude to these issues of public opinion and a radical active position of the broadest sections of the population. The concept of "public participation" is one of the clear signs of democratization of society. Public participation in environmental activities is of particular importance and is a necessary condition for ensuring the effectiveness of environmental policy.

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Comparative analysis of the essence of abuse of power in international legal sciences and Ukraine

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Abstract

The purpose of the research is to develop a comparative analysis of the essence of the abuse of the occupational (official) position within the framework of the science of criminal law. It is indicated that criminal liability for the abuse of the occupational (official) position in the performance of his duties has been established for certain specific offences under the Special Part of the Criminal Code of Ukraine. To achieve the stated objective and solve the stipulated tasks, general and special scientific methods were used, in particular, the structural system to analyze crime in the field of official activities and prevent it as a theoretical problem and holistic phenomenon throughout the process. The results obtained allow us to conclude that, in most countries of continental Europe there is a simplification of the qualification of the actions committed by an

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official in a single article, however, there is a clear link with the consequences caused in the form of pecuniary damage, which allows the prosecution to build much faster a causal component of the actions of a person within a single legal criminal corpus and pass evidence to the court.

Keywords: abuse of power; corruption; criminal responsibility; criminal analysis; international experience.

Análisis comparativo de la esencia del abuso de poder en ciencias jurídicas internacionales y Ucrania

Resumen

El propósito de la investigación es desarrollar un análisis comparativo de la esencia del abuso de la posición ocupacional (oficial) en el marco de la ciencia del derecho pena. Todo indica que, se ha establecido que la responsabilidad penal por el abuso del cargo ocupacional (oficial) en el desempeño de sus funciones se produce por ciertos delitos específicos en virtud de la Parte Especial del Código Penal de Ucrania. Para lograr el objetivo planteado y resolver las tareas estipuladas, se utilizaron métodos científicos generales y especiales, en particular, el sistema-estructural para analizar la delincuencia en el ámbito de las actividades oficiales y prevenirla como un problema teórico y fenómeno holístico a lo largo de todo el proceso. Los resultados obtenidos permiten concluir que, en la mayoría de los países de Europa continental hay una simplificación de la calificación de las acciones cometidas por un funcionario en un solo artículo, sin embargo, existe un vínculo claro con las consecuencias causadas en forma de daño pecuniario, lo que permite a la fiscalía construir mucho más rápido un componente causal de las acciones de una persona dentro de un solo corpus delictivo legal y pasar pruebas al tribunal.

Palabras clave: abuso de poder; corrupción; responsabilidad criminal; análisis penal; experiencia internacional.

Introduction

Normative prescriptions on the application of criminal liability to officials are not a legislative novelty, as they have undergone quite a long phase of development and continuous improvement in the national legislation. Indeed, in this context, the Criminal Code of Ukraine has undergone significant changes in recent years, and it is reasonable to argue that the concept of responsibility of officials should be thoroughly

rethought; the established approaches to the issues of qualification of such acts, establishing the limits of responsibility for their commission and so on should be reviewed.

In the current context of the spread of corruption-related crimes, among which the abuse of power or official position occupies a special place, the problem of developing and implementing an effective mechanism to combat these criminal phenomena has become very crucial and urgent. The creation of such a mechanism presupposes the introduction of an effective system of counteraction to such crimes, reform of criminal and criminal procedural legislation, the possibility of applying urgent measures aimed at improving investigative and judicial practice.

Currently, the issue of criminal liability for crimes in the sphere of official activity is relevant and debatable. Liability for corruption and similar crimes should be detailed and logical, so the articles of the code, which provide for liability in the field of official activities, require a comprehensive, impartial analysis for compliance with the fundamental principles of criminal law. This requires a comparative analysis of the essence of abuse of occupational (official) position in foreign and domestic criminal law science.

1. Literature review

Tiutiuhin V.I. notes that the obligatory feature of the crime of most of the acts provided for in Section XVII of the Special Part of the Criminal Code is the subject of the crime under Articles 368, 368-2, 368-3, 368-4, 369, 369-2 of the Criminal Code is an illegal benefit. The objective side of the crimes in question is characterized by the fact that some of them (Articles 364, 364-1, 365-2, 367 of the Criminal Code) can be committed either by acts or omissions; others (Articles 365, 366, 368, 368-2, 368-3, 368-4, 369, 369-2, 370 of the Criminal Code) can be committed only by active behavior - action (Law of Ukraine, 2001). An obligatory feature of the objective side of the vast majority of the crimes under consideration is the presence of a direct connection between the act of a person and his official activity or activity related to the provision of public services (Chernetskaya and Shilingov, 2009).

Such an act is always: a) due to the official position of the subject or his official powers or powers to provide public services and b) is committed against the interests of the service or legal entity of private law or against the interests in the satisfaction and protection of which the person is endowed authority to provide public services during the performance of certain professional activities. It is worth drawing attention to the fact that the law expressly states that in the case of an offense committed by an official of a legal entity of public law (Articles 364, 365, 368, 369-2 of the Criminal

Code), such connection is manifested in the use by the subject of his or her official position, while in the case of its commission by an official of a private law entity or a public service provider (Articles 364-1, 365-2, 368-3 of the Criminal Code), the subject uses only his own (granted by law) official powers or authority to provide public services (Tatsiy, 2014).

Criticizing the corpus delicti provided for in Article 364 of the Criminal Code of Ukraine, M.I. Havronyuk notes that most criminal codes in European countries, except for the CIS states, do not provide for liability for abuse of power or official position and for exceeding power or official authority (Havronyuk, 2011).

2. Material and methods

The methodological basis of the study are philosophical, general, and special scientific methods.

In order to achieve the set goal and solve the stipulated tasks, general scientific and special methods were used, in particular, *system-structural* - to analyze crime in the field of official activities and to prevent it as a holistic theoretical and applied problem throughout the work; *formal-logical* - in order to provide criminal law and criminological characteristics of abuse of power or official position committed by civil servants; *comparative* - to identify the features of preventing abuse of power or official position committed by civil servants in Ukraine and foreign countries, as well as to assess the possibilities of implementing foreign experience in domestic law enforcement practice; *modeling* - when formulating conclusions to the sections and general assessments, as well as proposals for improving criminological prevention and practice of its application.

3. Results and discussion

In the criminal law of foreign countries, the rules that provide for criminal liability for abuse of power or official position, as well as for excess of power and official authority differ. This can be concluded by analyzing the articles of the Criminal Codes of foreign countries, which provide for criminal liability for crimes related to abuse or abuse of power or official authority.

The Criminal Codes of the following foreign countries were taken for comparison: the French Republic, the Republic of Latvia, the Republic of Lithuania, Georgia, the Republic of Estonia, the Italian Republic, Hungary, Croatia, the Swiss Confederation, and the Federal Republic of Germany.

The Criminal Code of the French Republic, which has been in force since 1994, devotes a significant number of articles to abuse of office. Their analysis shows that they can be divided into three groups:

- abuse of power, encroaching on the order of management (Articles 432-1 to 432-3);
- abuse of power committed against private persons (Articles 432-4 to 432-9);
- breach of official duties (Articles 432-10 to 432-16).

Thus, Article 432-1 of the Criminal Code of the French Republic provides for liability for acts committed by any person, who has public authority and exercises his powers to take measures aimed at obstructing the implementation of the law (Law of the French Republic, 1992).

The Latvian Criminal Code in Chapter XXIV of the Criminal Code of Latvia “Crimes committed in the structure of the public service”, as well as in Ukrainian legislation, provides for the liability of a public official, both for abuse of official authority (Article 317) and for abuse of occupational position (Article 318). The subject of this crime is a public servant, who has committed intentional actions that clearly exceeds the limits of rights and powers given to public officials by law, if these actions have caused significant harm to the state, administrative order and protected human interests (Law of the Republic of Latvia, 1998).

Article 316 of the Latvian Criminal Code sets out the following definition, representatives of state power are recognized as state officials, as well as any person who permanently or temporarily performs the duties of a public office or self-government and has the right to make decisions binding upon other persons or exercise supervision, control, inquiry, or punishment functions, or to dispose of property or financial resources of the state. In addition, the Latvian Criminal Code (Article 325) separately provides for the liability of civil servants for violating the restrictions imposed on a public official (entrepreneurial activity, combination of positions, receiving remuneration or exercising authority in a situation of conflict of interest), whereas in Ukrainian law the said offenses are not criminal and refer to administrative offenses related to corruption, responsibility for which is set out in Chapter 13-A of the Code of Ukraine on Administrative Offenses (Articles 172-4 to 172-9-2).

In the Criminal Code of the Republic of Lithuania, in contrast to the Latvian Criminal Code, liability for crimes in the sphere of official activity (for the subject of the crime) is set out very briefly and is provided for in only 3 articles of Chapter XXXIII of the Code:

- bribery (Article 225).
- abuse (Article 228).
- failure to perform official duties (Article 229).

Separately, Article 230 provides for the concept of a subject of abuse of power, defining a civil servant or a person of equivalent status who is employed in the civil service in accordance with the Law on Civil Service (Law of the Republic of Lithuania, 2000).

These persons include politicians, officials working in state or municipal institutions or institutions, law enforcement agencies, courts, persons supervising and auditing state institutions, persons acting as government representatives or holding administrative positions, as well as official candidates for such positions (Leheza *et al.*, 2021).

Article 333 of the Criminal Code of Georgia provides for liability for excess of official authority (Law of Georgia, 1999). The subjects of this crime are officials, persons equal to them, vested with official authority, as well as persons holding public and political positions, whose actions resulted in violation of rights of natural or legal entities, lawful interests of society and state. It should be noted that the note to Article 332 of the Criminal Code of Georgia provides an exhaustive list of persons who are subject to the crime envisaged by Article 333 of the aforementioned Criminal Code. In particular, such persons include officials, persons equal to them, vested with official authority, employees of legal persons of public law (except for political and religious associations) exercising public legal powers, private performers, as well as all other persons who exercise public legal powers in accordance with the legislation of Georgia.

Thus, the Criminal Codes of the French Republic, the Republic of Estonia, the Republic of Lithuania, Hungary, Croatia, and Switzerland do not separately identify the offense of “Exceeding authority or official powers”; the relevant acts are qualified as abuse of office.

An interesting example of comparative analysis in terms of criminal liability for official crimes is the Criminal Code of Germany, a systematic collection of criminal laws, introduced in 1871 (Law of the Federal Republic of Germany, 1871). When formulating the dispositions of the articles (paragraphs) of the Special Part, the German legislator, in contrast to the techniques of the Criminal Code of Ukraine, does not proceed from the theory of punishment of the act, but from the theory of punishment of the figure. Thus, the disposition of each article begins with the words “one who <...>” or “an official who <...>” (Leheza *et al.*, 2020).

The German Criminal Code does not contain a classic understanding of the concept of “abuse of occupational position” or “illicit enrichment”, so there are no paragraphs (articles) that would directly provide for liability

for these acts. However, in the German Criminal Code, there is a similar provision under economic crimes, which provides for liability for bribery in business and reads as follows: “Whoever, as an officer or authorized person of a commercial enterprise in business dealings demands, agrees to accept or accepts a benefit for himself or a third person for what he would dishonestly prefer to others in the acquisition of competing goods or services shall be liable to imprisonment for up to three years or a fine” (§ 299) (Liutikov *et al.*, 2021).

In addition, the German legislator has distinguished between two separate types of the subjective side of the civil servant during the receipt of an undue advantage, namely the receipt of an advantage (Section 331) and venality (receipt of a bribe) (§ 332). A qualifying feature of paragraph 332 is the receipt by a civil servant of an appropriate benefit or service for what he has done or would do in the future and thereby violate or would violate his official duties, while paragraph 331 provides for liability simply for the performance of his duties without specific action in favor of the beneficiary.

Section 335 of the German Criminal Code also establishes liability for failure to perform an official act. The legislator notes that non-performance of an action is equated to the performance of an official action or a judicial action within the meaning of § § 331-335. Given that the subjective side of the criminal offense in this article is so broad and does not contain information on the possible forms of guilt of the subject in the form of direct or indirect intent or negligence, this gives us grounds to believe that depending on the actual circumstances of the event, the prosecution and the court at their discretion interpret the degree of guilt and the interest of the subject not to perform official duties. Thus, German Criminal Law does not have such concepts as “official negligence”, “abuse of power” and “abuse of occupational position” (Leheza *et al.*, 2021).

Conclusion

In view of the above, it can be concluded that in most countries of continental Europe there is a simplification of the qualification of actions committed by an official under one article. However, there is a clear link to the caused consequences in the form of pecuniary damage, which allows the prosecution much faster to build a causal component of a person's actions within a single statutory corpus delicti and pass evidence to the court, which, when sentencing by analyzing all the evidence provided by the prosecution and the defense, will come to the conclusion about the level of public danger and the damage caused to the public interest, which led to such acts.

In the criminal law of foreign countries, there is practically no difference between abuse of power or official position and excess of power or official authority. This distinction is more characteristic of the criminal law of post-Soviet countries and is mainly related to the mass violation of the constitutional rights of citizens by law enforcement officials during the pre-trial investigation, in connection with which the legislator introduced a separate rule in the form of a law enforcement officer.

In our opinion, in the domestic criminal legislation the list of criminal acts is prescribed quite qualitatively and meticulously, however, there are cases when the direct link of the current version of Article 364 of the Criminal Code of Ukraine to the amount of material damage does not allow involving an official in committing a number of illegal acts contrary to the interests of the service, in the interests of third parties, as not always the damage can be calculated (for example, illegal transfer of subsoil for use), and the negative effects of decisions can occur over a long period of time.

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Gestión del riesgo de desastres en la conciencia ambiental de estudiantes policiales

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Resumen

La investigación tuvo como objetivo establecer la incidencia de la gestión del riesgo de desastres en la conciencia ambiental de los estudiantes del Centro de Formación Policial de Oficiales - Perú. El enfoque fue cuantitativo, de tipo sustantiva y con diseño no experimental de corte transaccional. Para este estudio la población contó con 1309 estudiantes del Centro de Formación Policial. La muestra estuvo conformada por 186 estudiantes extraídos mediante un muestreo no probabilístico intencionado. La técnica empleada fue la encuesta y los instrumentos fueron los cuestionarios, con escala dicotómica y Likert. Se llegó a la conclusión de que la gestión del riesgo de desastres incide significativamente en la conciencia ambiental de los estudiantes del Centro de Formación Policial de Oficiales del Perú, 2020. Puesto que la razón de verosimilitud es significativa ($p < 0,05$); ajustándose bien a la data (Desviación con $p < 0,05$); y explica el 53.4% de la variable dependiente conciencia ambiental. Asimismo, existe incidencia significativa de la variable gestión del riesgo de desastres en las dimensiones de la variable dependiente; cognitiva, afectiva, activa y conativa. En las dimensiones mencionadas el valor de significancia fue menor al $p < 0,05$.

Palabras claves: Gestión de riesgo; desastre; conciencia ambiental; estudiantes de policía en Perú.

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Disaster Risk Management in the Environmental Awareness of Police Students

Abstract

The objective of the research was to establish the incidence of disaster risk management on the environmental awareness of students of the police training center for officers - Peru. The approach was quantitative, substantive, and non-experimental, transactional design. For this study, the population had 1309 students from the police training center. The sample consisted of 186 students drawn through an intentional non-probability sampling. The technique used was the survey and the instruments were questionnaires, with a dichotomous and Likert scale, it was validated through expert judgment and its reliability determined by Kuder Richardson - 20 and Cronbach's Alpha and in terms of inferential statistics it was used, ordinal logistic regression. It was concluded that disaster risk management significantly affects the environmental awareness of students from the police training center for officers of Peru, 2020. Since the likelihood ratio is significant ($p < 0.05$); adjusting well to the data (Deviation with $p < 0.05$); and it explains 53.4% of the dependent variable environmental awareness. Likewise, there is a significant incidence of the disaster risk management variable in the dimensions of the dependent variable; cognitive, affective, active, and conative. In the dimensions, the significance value was less than $p < 0.05$.

Keywords: Disaster risk management, environmental awareness, police students.

Introducción

En la actualidad, el desastre constituye un reto a considerar por las sociedades; en los últimos períodos, los impactos concebidos por la intensidad de los eventos naturales cobraron un aumento en relación con los fenómenos hidrometeorológicos (Zapa *et al.*, 2017). En tal sentido, la gestión del riesgo en el ámbito internacional viene implicando una serie de acciones en el entorno político, económico, natural y social; por lo que, insta a la reflexión a las autoridades, instituciones e investigadores a profundizar estudios sobre el argumento del riesgo al desastre, que ha generado avances relevantes sobre las razones que lo conciben, que contribuirá que se adopten medidas para prevenir y/o minimizar riesgos ante futuros fenómenos naturales (Quesada y Caderón, 2018).

Considerando la gestión del riesgo de desastre una herramienta trascendental, resulta significativo estar al tanto de las amenazas, vulnerabilidad y el riesgo; el primero como la posibilidad que un fenómeno

natural impacte negativamente en la sociedad; el segundo es el grado de pérdida y daños que resulten del fenómeno natural; finalmente, el riesgo como la integración constante de la amenaza y vulnerabilidad. Para determinar el riesgo, es vital conocer el nivel de la vulnerabilidad en la sociedad, ello permitirá intervenir de manera real y coherente a fin de disminuir dicha vulnerabilidad (Rojas y Martínez, 2011).

En el contexto nacional, según Gabriel (2016) la gestión de riesgo es complejo y debe obtenerse desde una óptica social enmarcado en los diferentes niveles geopolíticos. Asimismo, debe partir de una articulación entre el hombre y su sociedad, la cual permite conocer su realidad geográfica y la ocurrencia de los fenómenos naturales y antropológicos para la búsqueda del desarrollo sostenible. También Febles (como se citó en Arriola, 2017) detalla que la conciencia ambiental es una acumulación de experiencias, sapiencias y prácticas que el ser humano utiliza cotidianamente en su relación con su entorno ambiental; incluyéndose también, conocimiento, sensibilización, actitudes, conductas y percepciones humanas que se articulan de manera integral.

La investigación se realizó en el Centro de Formación Policial que tiene por misión formar Oficiales PNP con nivel superior e impartir saberes humanísticos y de ciencia policial, así como desarrollar habilidades y destrezas necesarias para desempeñarse en el campo de la función policial. El problema general del estudio se centra en el desconocimiento de los estudiantes sobre la gestión del riesgo de desastre. En tal sentido, no desarrollan el dominio de los procesos para identificar, evitar y minimizar los riesgos en su entorno ni la capacidad de respuesta cuando se produzca un evento catastrófico. En consecuencia, los educandos del Centro de Formación Policial de Oficiales no despliegan una interacción correcta con su medio ambiente.

La importancia de la investigación radica en la muestra, siendo significativa por las características de los estudiantes que se están formando para ser policías en el Perú. Existen escasos antecedentes referentes a la muestra utilizada que, a su vez, se sustenta en el estudio de Narváez *et al.*, (2009) respecto a la gestión del riesgo de desastre (GRD) desde el enfoque por procesos donde se argumentan dos perspectivas fundamentales para encaminar los procesos de la GRD, la generación del riesgo y las diversas formas de intervenirlos. De la misma forma, se sustenta el estudio de la conciencia ambiental en el aporte de Holahan (como se citó en Cayón y Pernalet, 2011) en la teoría de la psicología, en su artículo de la conciencia ambiental (CA), el cual argumenta principalmente que el hombre y su entorno se relacionan permanentemente.

1. Literatura de investigación

Delimitando los argumentos de la investigación, se presentan enfoques relacionados que precisan las nociones y la importancia. La gestión del riesgo de desastre desde un enfoque por procesos está fundamentada en la investigación de autores como Narváez *et al.*, (2009) quienes argumentaron dos perspectivas fundamentales en los procesos: la primera, se sostiene en la generación del riesgo, entendida como los probables sucesos físicos que presenta el entorno generados por la dinámica de la naturaleza donde las acciones realizadas por el individuo generan un proceso de transformación en amenazas reales para la sociedad y la segunda, se sustenta en las diversas formas de intervenirlo. En ese sentido la GRD, considera operaciones precisas para enfrentar el proceso del riesgo de desastre. En consecuencia, se planifican seis procesos vitales de intervención: Crear habilidades cognitivas respecto al riesgo, advertir los próximos riesgos, minimizar el riesgo actual, organizar la respuesta, la capacidad de respuesta y rehabilitación; y finalmente, las acciones de recuperación y reconstrucción.

Ocampo y Santa Catarina (2019) indicaron que el cambio se produjo en la década de 1990 cuando aparece un enfoque distinto y sobresale el obtener conocimiento del riesgo. El enfoque requiere de un compromiso sistémico, de esa forma se ha obtenido la mirada hacia la gestión del riesgo de desastre, apoyado por cuatro paradigmas no fijos: a) Gestión Prospectiva, donde se toman las acciones que originan la disminución del riesgo de desastre; por lo tanto, se busca impedir la generación de riesgos futuros es decir, estudiar el riesgo próximo e insertar mecanismos para manejar la inseguridad y la definición de contextos alternativos; en ese sentido se consideran los posibles cambios en las amenazas y la vulnerabilidad; b) Gestión Correctiva, que busca la protección de medidas sujetadas a la organización del desarrollo que genere la disminución del riesgo de desastre actual, vale decir, la reducción de los riesgos existentes y sus factores que lo componen; c) Gestión Reactiva, en este modelo el riesgo de desastre no es absoluto; por lo que, existirán riesgos excedentes que deben ser atendidos y que periódicamente se convertirán en desastres. Para tal fin, se consideran las medidas de reducción que toman acciones para hacer frente una vez que se desborde; y, d) Gestión Compensatoria, que busca la adopción y combinación de diferentes herramientas económicas para hacer frente a los posibles desastres.

De igual modo, López-Bravo y Montoya (2013) puntualizaron el riesgo como una circunstancia permisible al desastre, presentándose como la probabilidad que existan pérdidas y perjuicios como resultado de la articulación de amenazas y vulnerabilidades. Asimismo, la amenaza se presenta como el peligro existente en un tiempo y espacio determinado de un fenómeno natural o antrópico. Además, puede originar un impacto negativo en las personas, la economía, los servicios básicos y el espacio

físico, es decir, resaltan la vulnerabilidad como la exposición a una amenaza, respecto a un individuo o toda la población. En tal sentido, la población puede ser afectada y sufrir alguna pérdida y posteriormente encontrar problemas en su recuperación. Por ello, el desastre se denomina la última instancia del proceso, en otras palabras, cuando se desencadenó el evento peligroso; por lo que, se precisa que el desastre es la acumulación de circunstancias de riesgo que existen en la población.

Por su parte, Álvarez-Gordillo *et al.*, (2008) explicaron que el riesgo se enfoca en el estudio de diferentes prototipos de fenómenos; de esa manera permite organizar, reducir y prevenir el desastre. También, se determina la amenaza como la posible ocurrencia de un fenómeno de cualquier índole, resaltando características de intensidad, tiempo de exposición y escenario determinado. Además, exponen la vulnerabilidad, la misma que hace referencia a la tendencia física, social y producción que tiene una población al ser impactada por los fenómenos, ya sea de carácter natural o antrópico, dado que el desastre se define como los efectos producidos por los fenómenos naturales en una determinada población.

Sosteniendo un pensamiento dinámico, completo y proactivo Ulloa (2011) puntualizó que la gestión del riesgo de desastre comprende elementos, medidas e instrumentos que favorecen intervenir de manera correcta y oportuna sobre la vulnerabilidad de las poblaciones; en ese sentido, incorpora procesos respecto al riesgo a fin de identificar, evitar y responder ante futuros desastres. Por otra parte, Lavell (2010) definió que la gestión del riesgo de desastre se sostiene a través de la identificación del riesgo; este último entendido como, las posibles pérdidas y daños en el tiempo. Además, el riesgo es consecuencia de un proceso social, donde una determinada población genera situaciones de exposición y vulnerabilidades en el medio ambiente; por lo tanto, se requiere de un proceso de gestión del desarrollo territorial con el objetivo de disminuir el riesgo. Además, Keipi *et al.*, (2005) explicaron que la gestión del riesgo de desastre es un acumulado de fases, se delimita a través de acciones que permiten identificar, estudiar y medir las posibles pérdidas, así como las consecuencias de los desastres. Del mismo modo, se prevé las operaciones en forma anticipada a fin de valorar las causas del desastre.

En esa misma línea, la Ley No. 29664, en el marco del régimen de gestión del riesgo de desastre, sostuvo que el proceso social tiene por finalidad la prevención, disminución e inspección constante de los elementos del riesgo de desastre sobre la localidad, es decir una correcta organización y atención ante futuros sucesos de desastres, priorizando las estrategias políticas articuladas a temas económicos, de seguridad, ambientales y de defensa nacional de forma sustentable. Además, la gestión del riesgo de desastre se cimenta sobre estudios científicos, al igual que los registros de información, prevaleciendo los lineamientos, las estrategias y las acciones en los niveles

geopolíticos, priorizando la vida de los seres humanos y la protección del patrimonio público y privado (Congreso de la República del Perú, 2011). Por último, la institución encargada de la defensa civil, respecto a la gestión del riesgo de desastre, precisó que es un conjunto de decisiones de carácter administrativo, organizacional y sapiencias estratégicas elaborado por las sociedades, con la finalidad de minimizar el impacto de las amenazas en el contexto natural, ambiental y tecnológico. Asimismo, las acciones realizadas, tanto en lo estructural y no estructural, coadyuvan para prevenir el impacto de los desastres (INDECI, 2006).

Por su parte, Barrios *et al.*, (2018) deliberaron que la gestión del riesgo de desastre se realiza en tres fases de formas articuladas: i) conocimiento del riesgo, fase inicial en la cual resalta la identificación y análisis de las futuras amenazas, el estudio de la vulnerabilidad y la identificación del riesgo; ii) disminución del riesgo, fase donde se interviene las posibles amenazas; así como, las vulnerabilidades; y, iii) control del desastre, fase que hace referencia a la formulación y aplicación de instrumentos que contribuyen al control del evento negativo.

Por tanto, se considera importante la gestión del riesgo de desastre que, según Cortés-Fonnegra (2018) se centra fundamentalmente en reducir e impedir los daños y pérdidas de las personas; así como también, considerar los medios de subsistencia. En tal sentido, se busca salvaguardar la seguridad del espacio físico, la calidad de vida de la ciudadanía y las poblaciones en riesgo. Por otro lado, Ávila-Toscano *et al.*, (2016) sostuvieron que la GRD resulta importante porque se centra en la realidad planificadamente y que, como resultado de la innovación contribuye con una mirada prospectiva y provisoria que hace factible el desarrollo sostenible superando el inmediatez enmarcado en la atención y control de los desastres.

Según la variable presentada, de acuerdo a Ulloa (2011) se precisa cuatro dimensiones enmarcadas sobre la gestión del riesgo de desastre: la primera dimensión, la estimación del riesgo, fase primordial que consiste en identificar y apreciar el riesgo teniéndose por tanto, una posición integral de la exposición del riesgo de una población para obtener una importante valoración de la información actual y metodológica para identificar las vulnerabilidades, amenazas y capacidades, de esa forma valorar la posibilidad de ocurrencia de fenómenos desfavorables (desastres); la segunda dimensión, prevención y disminución del riesgo, fase en la que se realizan acciones que tienen por finalidad impedir que se generen próximos riesgos en la población y reducir las vulnerabilidades y riesgos latentes respecto a la gestión de la sostenibilidad; la tercera dimensión, preparación, respuesta y rehabilitación, consiste en actividades que se ejecutan a fin de presentar una inmejorable contestación ante un desastre para garantizar conveniente y oportunamente la atención de personas víctimas del fenómeno, como también, la rehabilitación de los servicios

esenciales (luz, agua, gas, entre otros) y con ello, garantizar la sostenibilidad en las zonas vulneradas por el desastre; finalmente, la cuarta dimensión, reconstrucción, fase en la que se realizan actividades para garantizar el desarrollo sostenible en las áreas afectadas para reducir con antelación el riesgo, asimismo se certifica la recuperación social, económica y física de la poblaciones afectadas.

Delimitando los argumentos de la investigación, se presenta una teoría y enfoque relacionado detallando las nociones e importancia en función a la conciencia ambiental de acuerdo con la teoría de la psicología ambiental. En torno a este punto, Holahan (como se citó en Cayón y Pernalet, 2011) expusieron que la psicología ambiental estudia la interacción entre el entorno, conducta y experiencia del ser humano. En consecuencia, se afirma que los hombres inciden en el entorno ambiental en el que se desarrollan y viceversa. Ante lo mencionado se considera algunos tipos significativos: i) Enfoque adaptativo, resalta los diversos procesos psicológicos, de ese modo las personas tienden a adaptarse a las exigencias del entorno físico. Se entiende como procesos psicológicos a las formas en que el ser humano enfrenta su entorno en base a sus conocimientos, experiencias y respuesta al inconveniente, esta última se sostiene en las emociones y regulación de límites pedagógicos. ii) Participación interdisciplinaria, se precisa que desde su aparición la psicología ambiental cautivó la intervención de los investigadores y los científicos, asimismo de los expertos interdisciplinarios, incluyeron a la sociología, geografía, planificación, arquitectura y exaltando la psicología, iii) Orientación aplicada, se enfoca en la solución de los inconvenientes prácticos, asimismo participa en la formulación de nuevas teorías, por lo tanto, se busca el equilibrio entre estas dos inclinaciones, en ese sentido los diversos psicólogos ambientales proponen la investigación acción, estudio que se respalda por Lewin (1973) como una guía para acomodar las necesidades prácticas y teóricas, respecto a la psicología ambiental.

De acuerdo con Américo (citado en Arriola, 2017) existen dos modelos de enfoques, en razón a la naturaleza y la sociedad como un vínculo permanente, es decir tenemos un enfoque ecocéntrico y antropocéntrico, el primero hace referencia a una visión ambientalista y el segundo sitúa al hombre como el centro de todas las cosas. En tal sentido, se podría afirmar que las personas antropocéntricas aprecian la naturaleza, ya que contribuyen a una mejor existencia de los hombres y que las personas ecocéntricas aprecian el ambiente natural por sí mismo. En consecuencia, este enfoque tiene una doble consideración de las creencias acerca de la interrelación del hombre con la naturaleza, es decir, se piensa que el ambiente está al servicio del hombre y que tiene un valor específico, motivo por el cual el hombre se considera un elemento más de la naturaleza.

Desde la óptica de Gomera (2008) en su estudio científico, precisó que la conciencia ambiental es la articulación constante que existe entre el individuo y su medio ambiente, para ello el individuo se sustenta a través de sus experiencias, sapiencias y praxis. Asimismo, Acebal y Brero (2005) especificaron que la conciencia ambiental se utiliza desde sus rudimentos, de esa forma se detalla el conjunto de creencias, actitudes, normas y valores congruentes con su ambiente y es el resultado de constantes estudios sobre la educación ambiental. Todo indica que, la conciencia ambiental es el nivel de inquietud de los inconvenientes ambientales para generar iniciativas de solución e indicar la voluntad para contribuir por sí mismo a la solución. Por otro lado, Carabais (citado en Ramírez y Gutiérrez, 2018) sustentó que, en cuanto a la conciencia ambiental, se planteó el reto de acertar una satisfacción personal más que de reforzamiento social, por ejemplo, renunciar a su comodidad de automóvil por el transporte público, acción que permitirá reducir el grado de contaminación. Por último, Hernández y Mendoza (2018) explicó que la conciencia ambiental tiene una correspondencia contigua a la conducta ambiental tradicional de la persona en la sociedad y también del egresado de educación superior en su centro de trabajo.

Empleando las palabras de Arriola (2018) la educación ambiental, es la herramienta más directa para llegar a concientizar a toda la ciudadanía respecto a la conservación del medio ambiente, con la finalidad de obtener y sostener una calidad de vida en las generaciones presentes y futuras. Asimismo, Moscoso y Garzón (2017) consideraron que la educación ambiental es un instrumento importante para apreciar el proceso para el progreso de una población sostenible. También se define como un proceso constante y dinámico, en ese sentido busca promover las sociedades, así como transformar sus realidades, sosteniéndose en el reconocimiento de las actitudes, experiencias, valores, habilidades y destrezas. Por último, la ley No. 28611, respecto al ambiente y que tiene una estrecha relación con la política nacional sobre la educación ambiental, define la legislación como el proceso educativo sistémico, orientado a la existencia del ser humano que busca obtener en el individuo y la sociedad, los conocimientos, actitudes, valores y experiencias necesarias que amplíen la manera correcta de actuar en el ambiente, con la finalidad de aportar el desarrollo del país (Congreso de la República del Perú, 2005).

De acuerdo con Ordoñez et al. (2018) resulta importante conocer en la actualidad una herramienta social como la educación ambiental porque permite a los seres humanos obtener un grado de conocimiento de su entorno habitado, el cual permitirá reducir la posibilidad de la ocurrencia de un desastre y afrontar adecuadamente los futuros fenómenos naturales a los cuales son vulnerables.

Por su parte, Gomera (2008) señaló cuatro dimensiones de la conciencia ambiental: la cognitiva, que resalta la doctrina y que se define como el nivel de indagación y noción en materias congruentes al entorno ambiental; la afectiva, en la que sobresalen las emociones y se delimita como la apreciación del entorno ambiental, las creencias y los sentimientos en temas ambientales; la conativa, en la que prevalece las actitudes y donde se precisa que mediante lineamientos se adopten acciones conducentes al mantenimiento óptimo de recursos naturales y la proporción del ecosistema para presentar acciones proactivas, a fin de participar y contribuir con las mejoras; y, la activa, que predomina claramente la conducta, es decir desarrolla acciones con responsabilidad, respecto a las prácticas y actuaciones en el ambiente, ya sea de forma individual o asociada, a pesar de situaciones adversas.

Del mismo modo Laso *et al.*, (2019) especificaron dimensiones sobre la conciencia ambiental: la dimensión cognitiva, que reflexiona sobre las ideas que se obtienen en un período y zona determinada, el cual permite a un individuo compenetrarse con su sociedad, ya sea por su legado ambiental y cultural; la dimensión afectiva, que se enmarca en las emociones, esta dimensión no se presenta como un inconveniente por solucionar, por el contrario surge como un medio de subsistencia con el cual se puede desplegar un sentido de pertenencia, respecto a las actitudes morales; la dimensión conativa, que se centra en las actitudes que sobrepasa la moral social, tal como resolver complicaciones existentes o mejora de proyectos ambientales y de esa manera lograr la integración de la reflexión y la acción; y, por último, la dimensión activa, que determina la realización de las praxis y conductas ambientales de forma responsable, específicamente, las conductas intachables que relacionan al individuo con sus acciones, de forma individual o grupal.

2. Metodología

El estudio se sustentó en la investigación de tipo sustantiva, encaminada a expresar, detallar y pronosticar el contexto actual. En ese sentido, responde sustancialmente a los problemas, por lo tanto, busca leyes y principios de carácter integral que permitan planificar una teoría científica. (Sánchez y Reyes, 2017). Asimismo, el estudio se orienta a un nivel de investigación explicativa, de esa manera descubre los elementos causales que lograron influir en el acontecimiento de un fenómeno.

Cabe mencionar que el estudio presentó un diseño no experimental, en vista que no requiere el manejo de la variable independiente, su finalidad es estudiar la variable en su contexto original. (Hernández y Mendoza 2018). También, la investigación es de corte transeccional, es decir, se logra a través

de la recaudación de datos y el estudio de la incidencia en determinadas variables, relacionado a un periodo determinado. Así también, se considera correlacional causal, el cual establece la relación causa efecto entre las variables en un periodo fijo.

La población en la investigación estuvo conformada por mil trescientos nueve (1309) estudiantes del Centro de Formación Policial de Oficiales del Perú. En consecuencia, la muestra se enmarca en ciento ochenta y seis (186) estudiantes del Centro de Formación de Oficiales., utilizando un muestreo no probabilístico. La técnica de la investigación fue la encuesta y los instrumentos fueron los cuestionarios que, para la gestión del riesgo de desastres se utilizó a Ulloa (2011) y para la conciencia ambiental a Gomera (2008). A fin de determinar la confiabilidad de las variables, utilizando los coeficientes de fiabilidad de Kuder - Richardson ($Kr - 20$) para la variable independiente y el alfa de Cronbach para la variable dependiente; obteniendo así, resultados de alta confiabilidad.

Resultados

Tabla 1. Ajuste del modelo y Pseudo R cuadrado que explica la incidencia de la gestión del riesgo de desastres en la conciencia ambiental

Modelo	Logaritmo de la verosimilitud - 2	Chi-cuadrado	gl	Sig.	Pseudo R cuadrado
Solo intersección	238,700				Cox y Snell ,473
Final	119,643	119,058	8	,000	Nagelkerke ,534
					McFadden ,296

Función de enlace: Logit

En la tabla 1, la prueba de contraste de la razón de verosimilitud determina que el modelo logístico tiene significancia ($\chi^2=119,058$; $p<0,05$). Ello representa que la gestión del riesgo de desastre incide en la conciencia ambiental. También, el valor de Pseudo R cuadrado a través de Nagelkerke (0,534) precisa que el modelo formulado expone el 53.4% de la variable conciencia ambiental.

Tabla 2. Estimación de los parámetros del modelo que explica la incidencia de la gestión del riesgo de desastres en la conciencia ambiental

		Estimación	Desv. Error	Wald	gl	Sig.	Intervalo de confianza al 95%	
							Límite inferior	Límite superior
Umbral	[Conamb = 1]	-3,363	,798	17,770	1	,000	-4,927	-1,800
	[Conamb = 2]	-,403	,743	,294	1	,587	-1,860	1,054
	[Est_ries=1]	1,055	,613	2,960	1	,085	-,147	2,257
	[Est_ries=2]	-,247	,569	,188	1	,665	-1,362	,869
	[Est_ries=3]	0 ^a	.	.	0	.	.	.
Ubicación	[Pre_dis=1]	-3,650	,888	16,880	1	,000	-5,392	-1,909
	[Pre_dis=2]	-,724	,823	,774	1	,379	-2,337	,889
	[Pre_dis=3]	0 ^a	.	.	0	.	.	.
	[Prep_res_re=1]	1,861	,607	9,396	1	,002	,671	3,051
	[Prep_res_re=2]	1,272	,567	5,028	1	,025	,160	2,383
	[Prep_res_re=3]	0 ^a	.	.	0	.	.	.
	[Recons=1]	-1,500	,722	4,320	1	,038	-2,914	-,085
	[Recons=2]	-,481	,730	,434	1	,510	-1,912	,950
	[Recons=3]	0 ^a	.	.	0	.	.	.
Función de enlace: Logit.								
a. Este parámetro está establecido en cero porque es redundante.								

La tabla 2 precisa que la prevención y disminución del riesgo (Wald=16,880) y posee $p=0,000 < 0,05$ y anuncia mejor la conciencia ambiental de los estudiantes del centro de formación policial de oficiales del Perú.

Tabla 3. Ajuste del modelo y Pseudo R cuadrado que explica la incidencia de la gestión del riesgo de desastres en la dimensión cognitiva

Modelo	Logaritmo de la verosimilitud - 2	Chi-cuadrado	Gl	Sig.	Pseudo R cuadrado
Solo intersección	230,909				Cox y Snell ,367
Final	145,931	84,978	8	,000	Nagelkerke ,418 McFadden ,217

Función de enlace: Logit

En la tabla 3, la prueba de contraste de la razón de verosimilitud determina que el modelo logístico tiene significancia ($\chi^2=84,978$; $p<0,05$). Ello representa que la gestión del riesgo de desastre incide en la dimensión cognitiva. También, el valor de Pseudo R cuadrado a través de Nagelkerke (0,418) precisa que el modelo formulado expone el 41.8% de la dimensión cognitiva.

Tabla 4. Estimación de los parámetros del modelo que explica la incidencia de la gestión del riesgo de desastres en la dimensión cognitiva

		Estimación	Desv. Error	Wald	gl	Sig.	Intervalo de confianza al 95%	
							Límite inferior	Límite superior
Umbral	[Cog = 1]	-2,299	,725	10,050	1	,002	-3,720	-,877
	[Cog = 2]	,490	,694	,498	1	,480	-,870	1,850
	[Est_ries=1]	,804	,586	1,880	1	,170	-,345	1,953
	[Est_ries=2]	,028	,547	,003	1	,960	-1,044	1,099
	[Est_ries=3]	0 ^a	.	.	0	.	.	.
Ubicación	[Pre_dis=1]	-2,463	,814	9,159	1	,002	-4,059	-,868
	[Pre_dis=2]	-,349	,758	,212	1	,645	-1,835	1,137
	[Pre_dis=3]	0 ^a	.	.	0	.	.	.
	[Prep_res_re=1]	1,593	,581	7,504	1	,006	,453	2,732

[Prep_res_re=2]	1,143	,541	4,456	1	,035	,082	2,204
[Prep_res_re=3]	0 ^a	.	.	0	.	.	.
[Recons=1]	-1,595	,685	5,415	1	,020	-2,938	-,252
[Recons=2]	-,506	,682	,551	1	,458	-1,842	,830
[Recons=3]	0 ^a	.	.	0	.	.	.

Función de enlace: Logit.

a. Este parámetro está establecido en cero porque es redundante.

La tabla 4 precisa que la prevención y disminución del riesgo (Wald=9,159) y posee $p=0,002<0,05$ y anuncia mejor la dimensión cognitiva de la conciencia ambiental de los estudiantes del centro de formación policial de oficiales del Perú.

Tabla 5. Ajuste del modelo y Pseudo R cuadrado que explica la incidencia de la gestión del riesgo de desastres en la dimensión afectiva

Modelo	Logaritmo de la verosimilitud - 2	Chi-cuadrado	gl	Sig.	Pseudo R cuadrado
Solo intersección	223,728				Cox y Snell ,403
Final	127,922	95,806	8	,000	Nagelkerke ,457 McFadden ,243

Función de enlace: Logit.

En la tabla 5, la prueba de contraste de la razón de verosimilitud determina que el modelo logístico tiene significancia ($\chi^2=95,806$; $p<0,05$); Ello representa que la gestión del riesgo de desastre incide en la dimensión afectiva. También, el valor de Pseudo R cuadrado a través de Nagelkerke (0,457), precisa que el modelo formulado expone el 45.7% de la dimensión afectiva.

Tabla 6. Estimación de los parámetros del modelo que explica la incidencia de la gestión del riesgo de desastres en la dimensión afectiva

		Estimación	Desv. Error	Wald	Gl	Sig.	Intervalo de confianza al 95%	
							Límite inferior	Límite superior
Umbral	[Afect = 1]	-2,767	,900	9,456	1	,002	-4,531	-1,003
	[Afect = 2]	-1,230	,879	1,957	1	,162	-2,952	,493
	[Est_ries=1]	1,206	,633	3,631	1	,057	-,035	2,447
	[Est_ries=2]	,340	,580	,344	1	,558	-,797	1,478
	[Est_ries=3]	0 ^a	.	.	0	.	.	.
	[Pre_dis=1]	-3,998	1,015	15,523	1	,000	-5,988	-2,009
Ubicación	[Pre_dis=2]	-1,559	,967	2,602	1	,107	-3,453	,335
	[Pre_dis=3]	0 ^a	.	.	0	.	.	.
	[Prep_res_re=1]	1,942	,622	9,752	1	,002	,723	3,162
	[Prep_res_re=2]	1,090	,575	3,602	1	,058	-,036	2,217
	[Prep_res_re=3]	0 ^a	.	.	0	.	.	.
	[Recons=1]	-,745	,753	,981	1	,322	-2,220	,730
	[Recons=2]	,200	,782	,065	1	,798	-1,333	1,733
	[Recons=3]	0 ^a	.	.	0	.	.	.
Función de enlace: Logit.								
a. Este parámetro está establecido en cero porque es redundante.								

La tabla 6 precisa que la prevención y disminución del riesgo (Wald=15,523) y posee $p=0,000<0,05$ y anuncia mejor la dimensión afectiva de la conciencia ambiental de los estudiantes del centro de formación policial de oficiales del Perú.

Tabla 7. Ajuste del modelo y Pseudo R cuadrado que explica la incidencia de la gestión del riesgo de desastres en la dimensión conativa

Modelo	Logaritmo de la verosimilitud - 2	Chi-cuadrado	gl	Sig.	Pseudo R cuadrado
Solo intersección	220,307				Cox y Snell ,360
Final	137,232	83,075	8	,000	Nagelkerke ,406 McFadden ,205

Función de enlace: Logit.

En la tabla 7, la prueba de contraste de la razón de verosimilitud determina que el modelo logístico tiene significancia ($\chi^2=83,075$; $p<0,05$); Ello representa que la gestión del riesgo de desastre incide en la dimensión conativa. También, el valor de Pseudo R cuadrado a través de Nagelkerke (0,406) precisa que el modelo formulado expone el 40.6% de la dimensión conativa.

Tabla 8. Estimación de los parámetros del modelo que explica la incidencia de la gestión del riesgo de desastre en la dimensión conativa.

		Estimación	Desv. Error	Wald	gl	Sig.	Intervalo de confianza al 95%	
							Límite inferior	Límite superior
Umbral	[Cona = 1]	-2,454	,731	11,260	1	,001	-3,888	-1,021
	[Cona = 2]	-,268	,702	,146	1	,702	-1,644	1,107
	[Est_ries=1]	,555	,582	,908	1	,341	-,586	1,695
	[Est_ries=2]	-,126	,546	,053	1	,817	-1,197	,944
	[Est_ries=3]	0 ^a	.	.	0	.	.	.
Ubicación	[Pre_dis=1]	-2,753	,817	11,352	1	,001	-4,354	-1,151
	[Pre_dis=2]	-,584	,767	,580	1	,446	-2,087	,919
	[Pre_dis=3]	0 ^a	.	.	0	.	.	.
	[Prep_res_re=1]	1,801	,579	9,672	1	,002	,666	2,935
	[Prep_res_re=2]	,773	,538	2,070	1	,150	-,280	1,827

[Prep_res_re=3]	0 ^a	.	.	0	.	.	.
[Recons=1]	-1,459	,684	4,553	1	,033	-2,799	-,119
[Recons=2]	-,480	,686	,490	1	,484	-1,824	,864
[Recons=3]	0 ^a	.	.	0	.	.	.

Función de enlace: Logit.

a. Este parámetro está establecido en cero porque es redundante.

La tabla 8, precisa que la prevención y disminución del riesgo (Wald=11,352) y posee $p=0,001<0,05$ y anuncia mejor la dimensión conativa de la conciencia ambiental de los estudiantes del centro de formación policial de oficiales del Perú.

Tabla 9. Ajuste del modelo y Pseudo R cuadrado que explica la incidencia de gestión del riesgo de desastres en la dimensión activa

Modelo	Logaritmo de la verosimilitud - 2	Chi-cuadrado	gl	Sig.	Pseudo R cuadrado
Solo intersección	226,710				Cox y Snell ,423
Final	124,535	102,175	8	,000	Nagelkerke ,477 McFadden ,253

Función de enlace: Logit.

En la tabla 9, la prueba de contraste de la razón de verosimilitud determina que el modelo logístico tiene significancia ($\chi^2=102,175$; $p<0,05$); Ello representa que la gestión del riesgo de desastre incide en la dimensión activa. También valor de Pseudo R cuadrado a través de Nagelkerke (0,477) precisa que el modelo propuesto expone el 47.7% de la dimensión activa.

Tabla 10. Estimación de los parámetros del modelo que explica la incidencia de gestión del riesgo de desastres en la dimensión activa

		Estimación	Desv. Error	Wald	gl	Sig.	Intervalo de confi- anza al 95%	
							Límite inferior	Límite superior
Umbral	[Acti = 1]	-2,223	,719	9,557	1	,002	-3,632	-,814
	[Acti = 2]	,368	,689	,285	1	,593	-,982	1,717
Ubicación	[Est_ries=1]	1,917	,611	9,836	1	,002	,719	3,115
	[Est_ries=2]	,247	,553	,199	1	,656	-,838	1,331
	[Est_ries=3]	0 ^a	.	.	0	.	.	.
	[Pre_dis=1]	-2,634	,817	10,382	1	,001	-4,236	-1,032
	[Pre_dis=2]	-,067	,759	,008	1	,929	-1,555	1,421
	[Pre_dis=3]	0 ^a	.	.	0	.	.	.
	[Prep_res_re=1]	,968	,587	2,715	1	,099	-,183	2,118
	[Prep_res_re=2]	1,026	,542	3,575	1	,059	-,038	2,089
	[Prep_res_re=3]	0 ^a	.	.	0	.	.	.
	[Recons=1]	-1,514	,693	4,769	1	,029	-2,873	-,155
	[Recons=2]	-,631	,689	,838	1	,360	-1,981	,720
	[Recons=3]	0 ^a	.	.	0	.	.	.
Función de enlace: Logit.								
a. Este parámetro está establecido en cero porque es redundante.								

La tabla 10 precisa que la prevención y disminución del riesgo (Wald=10,382) y posee $p=0,001 < 0,05$ y anuncia mejor la dimensión activa de la conciencia ambiental de los estudiantes del centro de formación policial de oficiales del Perú.

Discusión

Luego de haber obtenido los resultados, se procedió a la discusión de la hipótesis general y las hipótesis específicas, presentando el siguiente detalle:

De acuerdo con la hipótesis general se encontró el siguiente efecto, la gestión del riesgo de desastre posee una incidencia significativa en la conciencia ambiental de estudiantes del centro de formación policial de

oficiales del Perú; con Desviación con $p < 0,05$ y expone el 53.4% de la variable conciencia ambiental. Por lo tanto, se evidencia que el estudiante del centro de formación policial, al desplegar la temática de gestión del riesgo de desastre, coadyuvó a mejorar su relación interpersonal con su entorno ambiental. En ese sentido, Reyes (2018) coincide con los resultados de la investigación donde concluye que los talleres sobre gestión de riesgo incidieron de forma sostenida, práctica y significativa en el conocimiento de prevención de los universitarios. Asimismo, Dejo y Parodi (2016) concluyeron que, a través del currículo de estudio como tema fundamental dentro de cada curso, pueda integrarse la gestión del riesgo de desastre en la organización académica. Además, se presentaron estrategias para mejorar la educación superior, en ese sentido se promueve tópicos de gestión del riesgo de desastre en la población empresarial del país.

Del mismo modo, Abad *et al.*, (2017) concluyeron que los universitarios de la facultad de medicina presentaron un grado cognitivo previo moderado frente a los desastres naturales, respecto a lo actitudinal y práctico se presentó un grado reducido. Además, Minto-Coy y Rao (2016) se asociaron con las deducciones del estudio, donde determinan que la intención del estudio es facilitar, así como dirigir la articulación sobre la gestión del riesgo de desastre en centros de formación superior, tiene la finalidad de ampliar el nivel de conciencia y comprender sobre la complicación de los programas afines a la gestión del riesgo de desastre sobre negocios y administración. En consecuencia, se determina que la vía principal para mejorar este contexto es a través de centros de estudios profesionales, los mismos que fomentan la creación de la ideología y la experiencia.

De este modo, Villasana *et al.*, (2016) coinciden con los resultados presentados en el estudio científico, en el cual concluyeron que, siendo un país susceptible a los peligros naturales, es crucial para la educación mexicana tomar una participación proactiva en la construcción de la formación preventiva y gestión del riesgo de desastre; así como también, desarrollar la conciencia de los futuros trabajadores. En ese orden de ideas los resultados se alinean a la teoría presentada por Ulloa (2011) en donde determina que la gestión del riesgo de desastre comprende una serie de elementos, medidas e instrumentos que favorecen a intervenir de forma acertada sobre la vulnerabilidad de las poblaciones; en tal sentido, incorpora procesos respecto al riesgo a fin de identificar, evitar y contrarrestar eventos naturales o antropológicos.

En resumen, el investigador manifiesta que, al obtener el dominio de esta herramienta de gestión, los estudiantes podrán valorar las causas del riesgo, es decir, conseguirán apreciar las amenazas y vulnerabilidades. Por lo tanto, ostentan la capacidad de relacionarse de forma correcta con su entorno físico, esto a través de su conocimiento, vivencias y valores; en otras palabras, permitirán salir airosos de los inconvenientes que se presenten en su entorno.

De acuerdo con Vásquez *et al.*, (2019) los estudiantes presentan bajo nivel actitudinal, procedimental y cognitivo de conciencia ambiental, por lo tanto, es importante dominar temas ambientales que coadyuven a superar la problemática que envuelve a toda la población universitaria, en tal sentido las acciones con impacto negativo afectan al mundo. Estos resultados se alinean con la teoría presentada por Gomera (2008) que indica que la conciencia ambiental es la articulación constante que existe entre el individuo y su entorno ambiental donde el ser humano se respalda en sus experiencias, conocimientos y praxis.

En síntesis, el autor exterioriza que desarrollar la dimensión cognitiva a través de la doctrina en los estudiantes del Centro de Formación Policial permitirá obtener conocimientos sobre el entorno ambiental y también los inconvenientes que se puedan presentar en su medio ambiente. Por lo tanto, al tener las sapiencias suficientes, podrán advertir de próximos problemas de índole ambiental en su centro de estudio, institución y sociedad. Por último, hay que precisar que es vital que los estudiantes lleven una formación ambiental, ya que esto conducirá a una concientización.

Por consiguiente, la gestión del riesgo de desastres posee una incidencia significativa en la dimensión afectiva de estudiantes del Centro de Formación Policial de Oficiales; con desviación con $p < 0,05$ y expone el 45.7% de la dimensión afectiva. En ese sentido, se establece la incidencia que permite a los estudiantes del Centro de Formación Policial, determinar la importancia e interés de los problemas ambientales de su centro de estudio. Al mismo tiempo, Cayón y Pernalet (2011) coinciden con los resultados donde afinaron que los sentimientos y afectos de los educandos hacia el entorno ambiental integran el componente afectivo; en tal sentido, el nivel moderado muestra desacuerdos significativos con un mejor balance en el público y en el nivel mencionado los establecimientos públicos investigados tienden a inmiscuirse en una tendencia que viene en aumento.

Por consiguiente, esto permite una mayor correspondencia entre sus afectos y sentimientos. Asimismo, Quintana (2017) concluye que una apropiada concientización ambiental en los alumnos con orientación de conservación ambiental nos conduce a la apropiación de la biodiversidad, creando nuevos conocimientos que articulan a los educandos con el espacio físico, mencionada sapiencia conllevó al progreso de los estudiantes, enmarcados en el área afectiva, creativa, así como social. En conclusión, el investigador manifiesta que es trascendental que los estudiantes del Centro de Formación Policial desplieguen la dimensión afectiva a través de las emociones, en vista que permitirá generar el respeto, la satisfacción y la protección hacia el medio ambiente. Por consiguiente, los educandos determinarán la importancia, el interés en solucionar los inconvenientes de carácter ambiental que presenten y contribuirán a contrarrestar la problemática ambiental que azota nuestro planeta.

De igual manera, Olaguez *et al.*, (2017) presentan resultados congruentes donde determinan que la percepción de los universitarios evidencia un interés considerable, respecto a la participación para generar estrategias y acciones que promuevan la formación ambiental. En tal sentido, fueron el impulso a planes de reciclaje; los adelantos de temas ambientales a través de festividades, eventos, reuniones, programas de autogestión de recursos económicos, por ejemplo, papel artesanal, deforestación, reciclaje y producción de abono. Por último, Cayón y Pernalet (2011) concluyeron que, en relación al componente conductual, el indicador de actitud ambiental muestra desacuerdos significativos entre los centros de educación públicos y privados con mayor énfasis en los centros de educación públicos, el cual permite una tendencia a la acción, que, al mezclarse con un escenario activador específico, responde a una conducta. En la opinión del investigador, es importante el impulso de la dimensión conativa a través de sus conductas, además es vital promocionar acciones de carácter proambiental que permitan la protección del ecosistema, en tal sentido, los estudiantes al desarrollar esta dimensión estarán en la capacidad de generar y/o promover proyectos que contribuyan al cuidado del medio ambiente.

Conclusión

Se concluye que la gestión de riesgo es un aspecto necesario para trabajar en una institución para evitar tragedias ante un desastre, así como, la necesidad de realizar simulacros para que los colaboradores reconozcan las áreas de seguridad y sean responsables ante cualquier situación de emergencia. La posibilidad de desastres se conceptualiza como una técnica social cuyo propósito restante es la prevención. La gestión del riesgo de desastres incide significativamente en la conciencia ambiental de estudiantes del Centro de Formación Policial de Oficiales del Perú. Puesto que, la razón de verosimilitud es significativa ($p < 0,05$); ajustándose bien a la data (Desviación con $p < 0,05$); y explica el 53.4% de la variable conciencia ambiental. Por lo tanto, se evidencia que el estudiante del Centro de Formación Policial de Oficiales, al desplegar la temática de gestión del riesgo de desastre, coadyuvará a mejorar su relación interpersonal con su entorno ambiental.

Asimismo, la gestión del riesgo de desastres incide significativamente en la dimensión cognitiva de estudiantes del Centro de Formación Policial de Oficiales del Perú. Puesto que la razón de verosimilitud es significativa ($p < 0,05$); ajustándose bien a la data (Desviación con $p < 0,05$); y explica el 41.8% de la dimensión cognitiva. En tal sentido, la incidencia generada por la GRD en la dimensión cognitiva, permite al estudiante del centro de formación policial conocer la realidad geográfica, la ocurrencia de fenómenos naturales y problemas de índole ambiental.

Los planes de contingencia son una herramienta necesaria para los centros de formación y en toda organización, que sirve para orientar a los responsables del centro de estudio policial en el desarrollo de las acciones a tomar en las ocurrencias de desastres y garantizar la seguridad de los estudiantes de formación policial. Considerando la gestión del riesgo de desastres como una herramienta social valiosa, se recomienda al jefe del área de asuntos académico e investigación del Centro de Formación Policial de Oficiales, se inserte en la mencionada temática en la malla curricular de los estudiantes, con la finalidad que obtengan conocimientos para prevenir y/o disminuir riesgos ante futuros fenómenos naturales o antropológicos; por consiguiente, los estudiantes presentarán mejoras en su interacción con el entorno ambiental.

Por último, teniendo en cuenta la perspectiva ambiental, se recomienda al jefe del área de asuntos académicos e investigación, se programen conferencias especializadas sobre la temática resaltada, a fin de que los estudiantes del Centro de Formación Policial de Oficiales obtengan el nivel y conocimiento en temas del medio ambiente, ello permitirá tener un panorama cognitivo, así como información de los fenómenos e inconvenientes ambientales.

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Detection and Extraction of Electronic Information During Investigative (Search) Actions Under Ukrainian Legislation

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Abstract

The article provides a comprehensive study of the features of detection and seizure of electronic information during investigative (search) actions under the laws of Ukraine. The methodological basis of the scientific article is the complex application of general scientific and special methods of scientific knowledge in their relationship, selected considering the purpose and objectives of the study, its object and subject. It is noted that the following information, which is contained in the form of electronic-digital mappings, can be obtained during investigative (search) actions, covert investigative (search) actions, as well as during temporary access to things and documents as a measure of criminal proceedings. It is established that the process of reviewing electronic documents in general corresponds to the generally accepted algorithm of actions: search and detection of documents; visual inspection of the external state without changing the conditions of perception; fixation; detection of handprints; detection of traces of changes in the original content; preparation for packaging; packaging. It is substantiated that the involvement of a computer technician in the investigation, search, other

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procedural actions, aimed at solving the problems of contextual information retrieval, detection of electronic document management programs, viewing the history of visits to Internet browsers.

Keywords: digital research; criminal proceedings; electronic information; tests; investigative actions (search).

Detección y extracción de información electrónica durante las acciones de investigación (búsqueda) bajo la legislación ucraniana

Resumen

El artículo proporciona un estudio exhaustivo de las características de detección e incautación de información electrónica durante las acciones de investigación de conformidad con las leyes de Ucrania. La base metodológica del artículo fue la combinación compleja de métodos científicos generales y métodos especiales de conocimiento científico en su relación, seleccionados teniendo en cuenta la finalidad y objetivo del estudio, su objeto y tema. Se observa que la siguiente información, que está contenida en forma de mapeos electrónico-digitales, se puede obtener durante acciones de investigación, acciones de investigación encubiertas, así como durante el acceso temporal a cosas y documentos como medida de procesos penales. Se establece que el proceso de revisión de documentos electrónicos en general corresponde al algoritmo de acciones generalmente aceptado: búsqueda y detección de documentos; inspección visual del estado externo sin cambiar las condiciones de percepción; fijación; detección de huellas de manos; detección de rastros de cambios en el contenido original; preparación para envasado; embalaje. Se concluye que la implicación de un técnico informático es importante en la investigación, búsqueda y otras actuaciones procesales, encaminadas a solucionar los problemas de recuperación de información contextual, detección de programas de gestión documental electrónica y visualización del historial de visitas.

Palabras clave: investigación digital; proceso penal; información electrónica; pruebas; acciones de investigación (allanamiento).

Introduction

The development and introduction of modern information technologies in all spheres of public life and economy in Ukraine makes it possible to use

them, in particular, for selfish and other reasons. Information technology also provides new opportunities for criminal activity, the computer «provides» both new types of crimes and new ways of committing the usual illegal acts. Combating crimes committed with the use of information technology is a new challenge for law enforcement (Bolhov *et al.*, 2015). The use of telecommunications networks makes it possible to commit a crime without leaving home, office, without leaving the borders of their country, or simultaneously from the territory of several states. There is no form of control over information that opens unlimited opportunities for access to and use by criminals. This determines the transnational, organized, group nature of many cybercrimes (Husarov, 2013).

It should be noted the international importance of cybercrime, the level of which is directly dependent on the level of development and implementation of modern information technology. There is a consolidation of IT criminals into groups with their subsequent consolidation into criminal groups, criminal organizations that operate on a permanent basis - «professional cybercrime». There is also a rapid establishment and strengthening of links between criminal groups, which allows for the rapid exchange of information, the exchange of techniques and methods of committing crimes, methods of transferring electronic funds in cash, etc. (Shapochka, 2014). However, not only crimes in the field of use of computers, systems and computer networks and telecommunication networks, but also many «traditional» socially dangerous acts leave behind electronic traces in computer networks, on magnetic or optical media, monitor screens. As a result, there is a practical problem with the use of these traces during the pre-trial investigation (Muradov, 2013).

The investigation of cybercrime is also complicated by certain features: latency; the possibility of destruction or alteration of computer information that is evidence of a crime; the occurrence of a problem during the inspection of computer systems, removal and examination of traces stored in the memory of technical devices, in the electromagnetic field, on computer media; short-term storage of information that can act as evidence on the servers of companies - operators of telecommunications networks, etc. (Burbelo, 2013). That is why the challenge of modernity, which faced forensic theory and practice, is the need to clarify the forensic and procedural features of detection and recording of electronic trace information during the investigation of criminal offenses under the laws of Ukraine.

1. Methodology of the study

The methodology of the article is based on general and special methods of scientific knowledge, the use of which is determined by the purpose, object,

and subject of research (Vasylevych, 2021). General scientific methods are presented in the work mainly by methods of formal and dialectical logic (analysis and synthesis, methods of induction and deduction, ascent from concrete to abstract and from abstract to concrete, system-structural method, and others).

The appeal to the dialectical method provided consideration of the requirements and methods of detecting and preserving this type of material evidence in criminal proceedings, such as electronic information, from the standpoint of the integrity of the phenomenon and the interconnectedness of its individual elements. The formal-logical method was used in defining the basic legal concepts and categories that make up the content of a scientific article, to interpret the concepts of «sources of evidence», «electronic evidence», «review», to identify major problems that arise when collecting and extracting electronic trace information. The system-structural method provided an opportunity to develop the structure of the procedural mechanism for detecting and retrieving electronic sources of evidence and to characterize the procedure for their storage by separating its elements.

The analysis of the norms of the current criminal procedural legislation and the practice of its application, the interpretation of the provisions of the relevant normative legal acts and materials of judicial practice was carried out using formal-dogmatic and hermeneutic methods. The method of theoretical and legal modeling allowed substantiating the proposals aimed at improving the procedural order of collection and procedural consolidation of electronic evidence in criminal proceedings. The article uses a methodological system built on the vertical principle, which includes the following levels: philosophical, general, special-scientific, specific-scientific. The normative and legal basis of the dissertation research is the Constitution of Ukraine, acts of national criminal procedural legislation.

2. Analysis of recent research

Various aspects of the selected issues in the criminal process are the subject of research in the works of scientists of the modern period, among which it is appropriate to note V.V. Bilous (2012), V.V. Biryukov (2007), V.M. Bolhov, N.M. Hadion, O.Z. Hladun (2015) A.G. Volevodz (2001), A.V. Kovalenko (2017), B.B. Teplitsky (2019), Yu.Yu. Orlov, S.S. Cherniavskiy (Cherniavskiy, 2017) and others.

Despite the significant number of scientific papers and increased interest in the problems of evidentiary law in criminal proceedings, many issues related to electronic evidence in the criminal process of Ukraine, both doctrinal and purely applied, remain controversial or partially resolved. In

addition, the vast majority of research is based on previous legislation. At the same time, the potential for the use of electronic traces in the activities of investigative bodies for the search and identification of persons, crime prevention, etc., remains unacceptably low^(Bilous, 2012).

The purpose of the article is a comprehensive theoretical and applied study of certain criminal procedural and forensic features of detection and seizure of electronic information during investigative (search) actions under Ukrainian law, development of proposals and recommendations of organizational, tactical, and legislative nature aimed at improving the use of digital sources of evidence in criminal proceedings.

3. Results and discussion

The urgent and most important tasks of investigators and operatives are to search, record, remove and provide the expert intact material objects - computer information carriers, which acquire the status of objects of expert research, and the correct definition of forensic computer and technical tasks Expertise (Teplitskyi, 2019):

During the pre-trial investigation, both material traces (fingerprints, micro-objects, etc.) and electronic ones (visits to relevant sites, user correspondence archive, management of electronic payment systems accounts, geolocation, etc.) can be detected, which contribute to the formation of a full evidence base and expose not only its user, but also other persons involved in the commission of a criminal offense. Electronic media, if it meets the definition of "evidence" (Article 98 of the Criminal Procedure Code of Ukraine, for example, if it is a material object), may be obtained by the prosecution, seized, taken under control by the prosecution in a certain procedural order, inspected, photographed, described, copied, attached to criminal proceedings, returned to the owner, saved, lost or destroyed, etc. (Zakharko, 2019).

Evidence obtained in the course of an investigation must meet the requirements of reliability, appropriateness and admissibility. The specified requirements are put forward both to the form of the received information, and their maintenance. These requirements also apply to electronic evidence. In order to properly document information from digital sources, it is needed to take into account the functional features of the technologies with which they were created, stored, transmitted, and so on.

Consolidation of electronic evidence obtained as a result of the Criminal Procedure Code, investigative or covert investigative (search) actions is carried out in compliance with several requirements for form and content. The first group of requirements provides for the procedural design of

relevant protocols, the involvement, if necessary, of specialists and witnesses, taking measures to properly preserve digital media important for the criminal process. The second group of requirements is put forward to the content of information, its qualitative and quantitative component. In the latter case, special attention should be paid to the completeness of the information obtained, so that they can be further presented both in court and submitted for examination by an expert (Vinakov, 2017).

Working with electronic trace information is a complex procedure that often requires special knowledge, and its result will depend on how quickly and efficiently the capture, storage and retrieval of trace information contained in electronic information systems or their parts, mobile terminals of communication systems information and telecommunication systems or parts thereof. Such actions must be performed with some systematization, starting with the inspection of the scene, electronic equipment, sources of external memory and ending with the extraction of data from electronic storage of information relevant to criminal proceedings.

Electronic traces and their media must be removed, recorded, and executed in accordance with the requirements of current criminal procedure legislation. It is extremely important to find out the procedural order of detection, seizure and storage of such information, given the possibility of its use in criminal proceedings (Marinin, 2015). Therefore, during the pre-trial investigation, they must be provided unchanged to ensure the possibility of examination. To search for electronic information, you need to use methods and tools that do not modify the first extracted information on the source of external memory.

From the analysis of the content of Art. 93 of the Criminal Procedure Code of Ukraine, it follows those electronic reflections, as evidence, can be collected by conducting investigative (search) actions and covert investigative (search) actions, conducting other procedural actions. In particular, electronic reflections can be detected during a search, inspection, as well as during temporary access to things and documents as a measure to ensure criminal proceedings. For example, temporary access to electronic information systems or parts thereof, mobile terminals of communication systems is carried out by removing a copy of the information contained in such electronic information systems or their parts, mobile terminals of communication systems, without removing them. Thus Art. 159 of the Criminal Procedure Code of Ukraine it is established that such temporary access is possible only on the basis of the decision of the investigating judge. This norm can be interpreted as a means of ensuring the possibility of using copies of electronic reflections as sources of evidence in criminal proceedings.

In Part 2 of Art. 99 of the Criminal Procedure Code of Ukraine states that the materials, which recorded factual data on illegal actions of individuals

and groups of persons, can be collected by operational units in compliance with the Law of Ukraine «On operational and investigative activities» (Criminal Procedural Code Of Ukraine, 2012). These materials are mostly formed in the form of operational documents, as well as electronic displays (photographs, phonograms and videograms in modern digital format) and can be used in criminal proceedings as evidence, to be the objects of forensic computer science.

Trace information, which is contained in the form of electronic-digital mappings, can also be obtained during such covert investigative (search) actions as audio, video surveillance of a person, removal of information from transport telecommunications networks, removal of information from electronic information systems, location electronic means, surveillance of a person, thing or place, monitoring of bank accounts, audio, video surveillance of the place, control over the commission of a crime. In such cases, electronic-digital traces are issued as an appendix to the protocol of the relevant investigative (search) action (Criminal Procedural Code Of Ukraine, 2012).

Part 2 of Art. 93 of the Criminal Procedure Code of Ukraine contains an indication of another way of collecting electronic mappings: they may be required from public authorities, local governments, officials and individuals, enterprises, institutions, and organizations. Businesses that play a key role in ensuring the circulation of electronic images and have the technical capacity to store them are Internet service providers (ISPs) and mobile operators. Imperfect legal regulation of their relations with investigative bodies leads to numerous misunderstandings, unjustified seizures by investigators of network computer equipment from providers, which leads to violations of Internet users' rights and inadmissibility of evidence obtained by the court, as well as reluctance of (Cherniavskyi *et al.*, 2017).

Therefore, the issue of qualified collection of evidence in criminal proceedings committed with the use of electronic media (computer units, servers, laptops, mobile communications, memory cards, etc.) requires proper legislative regulation of the relevant procedural powers of the pre-trial authority's investigation.

Thus, one of the draft Laws of Ukraine "On Amendments to Certain Legislative Acts Concerning the Implementation of the Provisions of the Convention on Cybercrime and Improving the Effectiveness of the Fight against Cybercrime" proposed, *inter alia*, to amend the Criminal Procedure Code of Ukraine. authorities to carry out urgent storage of information, which will significantly increase the effectiveness of monitoring and prevention of viral attacks; opportunities in exceptional emergencies to provide temporary access to information held by telecommunications operators and providers, until the decision of the investigating judge, the

court; opportunities during the search to legally gain access to computer systems that are physically located outside the place of the search, to overcome logical protection systems, to obtain information about the peculiarities of the functioning of computer systems and the security measures applied to them; improving the procedure for conducting covert investigative (search) actions during the pre-trial investigation of crimes under Section XVI of the Criminal Code of Ukraine.

Any information transmitted through information and telecommunication systems is stored on special technical media (servers) and in a special form (log file). Internet service providers and other entities involved in the process of information and telecommunication data transfer and in the actual possession of the servers have the opportunity to extract the necessary log files, certify their content and provide them at the request of authorized participants in criminal proceedings. This method of gathering evidence, including electronic, is used in the investigation of criminal offenses by conducting appropriate covert investigative (investigative) actions.

Note that, in general, server owners are quite inactive in cooperating with law enforcement or ignoring requests, appealing against the lack of technical storage capacity. It should also be noted that modern messengers «WhatsApp» and «Viber» contain end-to-end encryption, which technically makes it impossible to decrypt correspondence for the company that owns the messenger, and all correspondence is under the control of users. It turns out that law enforcement agencies will not be able to obtain information about subscribers' correspondence in the traditional ways.

Vulnerability «of an electronic document necessitates the creation of special rules for recording electronic information, ways to store and attach them to the materials of criminal proceedings. In particular, at the level of traditional rules for handling documents, it is necessary to take into account the technical features of the collection, storage and use of information (Khyzhnyak, 2017).

During the search and inspection of the premises, local electronic reflections, which contain information relevant to criminal proceedings, may be detected: 1) in the searched (inspected) premises, on the ground: on an autonomous electronic medium (flash drive, autonomous electronic drive), on a specialized device (smartphone, digital camera, digital voice recorder, etc.) or on a memory device of a desktop computer (laptop); 2) on the Internet outside the searched (inspected) premises, terrain, namely on a remote server, the content of which is accessed from a computer located in the specified premises (Cherniavskiy *et al.*, 2017).

Any actions with electronic documents must be carried out in the manner prescribed by law by authorized persons using certified service equipment,

using licensed software. Use of uncertified hardware or unlicensed software may distort information obtained from an electronic document due to hardware and / or software failures and errors.

The process of reviewing electronic documents generally corresponds to the generally accepted algorithm of actions performed by the investigator during the review of ordinary documents. This set of actions should consist of the following: 1) search and detection of documents; 2) visual inspection of the external state without changing the conditions of perception; 3) fixation by photography; 4) fixation in the protocol of the corresponding investigative (search) action (all actions of officials, a condition of the document and the revealed traces are fixed); 5) detection of handprints (on a physical medium of an electronic document); 6) detection of traces of changes in the original content; 7) preparation for packaging; 8) packing (Biryukov, 2007).

In our opinion, the inspection of objects, including electronic media (computer units, servers, laptops, memory cards), should be carried out at the place of their detection, usually during the inspection, with the participation of a specialist. It is the investigator who draws up a report on their detection, which records their individual characteristics (Vinitsky, 2009). Its main tasks when detecting and removing documents on computer media are: 1) to properly remove computer media and peripherals (if any) and record it in the protocol; 2) properly package all elements of the hardware and software complex and media; 3) send them for expert examination in the laboratory; 4) ensure the integrity of information and prevent its destruction or damage at all stages of work with it (Osyka, 2005).

It should be emphasized that the specific objects of search depend on the type of crime under investigation, the method of its commission, as well as the properties of the document and, accordingly, search and seizure. For example, the objects of search in the investigation of illegal actions with bank payment cards will be: a) blanks, stolen or manufactured cards;

b) computer information carriers with card details, software for generating card numbers, hacking databases, copying and recording card numbers; c) equipment for making cards or making changes to them (embossing machines, thermal printers, laminating machines, etc.); d) scanners; e) digital cameras; e) material for making cards (plastic, foil, magnetic film); g) mobile phones; g) maps or diagrams of settlements with ATM locations marked on them; h) pieces of paper with inscriptions, which may be passwords and access codes to e-mail and other information resources, etc. (Osyka, 2005).

When applying such a measure to ensure criminal proceedings as temporary access to things and documents (163 of the Criminal Procedure Code of Ukraine), electronic media may be inspected and their contents

copied. Also, the investigating judge, the court in the decision to grant temporary access to things and documents may order the possibility of seizure of things and documents, if the party to the criminal proceedings proves sufficient grounds to believe that without such seizure there is a real threat of alteration or destruction of things or documents. or such seizure is necessary to achieve the purpose of gaining access to things and documents (paragraph 7 of Article 163 of the Criminal Procedure Code of Ukraine).

As a rule, if the electronic digital information is stored on servers or hard drives of enterprises, institutions, organizations, you should make a bitwise copy of the media, because the seizure of property of these legal entities can lead to negative consequences. Identical copy of electronic information on technical media must be reproduced using special equipment, after which the physical media themselves are returned to the owners. Subsequently, the copied trace information may be submitted for examination in the event of a forensic computer forensic examination in criminal proceedings. It is also worth noting that a similar algorithm of action should be followed in case of need for forensic computer examination.

Given the peculiarities of the physical form of information contained on electronic media, the procedural rules governing the peculiarities of the formation of evidence on the basis of such information should ensure its preservation throughout criminal proceedings, including in cases where electronic media for certain reasons remains with the rightful owners.

It should also be emphasized that the features of the review of electronic trace information depending on the physical characteristics of the media that contains it. Given the specifics of each of these media, the features of detection and storage of information they contain, as well as the subject of the study, we will limit them to:

- electronic documents placed on a physical storage medium (external physical storage media of a computer) (hard disk - HDD, SDD; disk media - CD, DVD, Blue-Ray-disks, floppy disks; USB-disks); storage device, random access memory of peripheral devices (for example, a printer in the memory of which are documents in the «print queue»), random access memory, etc. (Volevodz, 2001); flash memory cards (SD, micro SD, etc. (Kovalenko, 2017);
- electronic documents located in the memory of cellular means.
- publications contained on the Internet.
- electronic documents placed in «cloud» storage services.

Prior to the physical inspection of the computer, the investigator must install the technical devices and technologies used at the facility to protect the information. This is established both by interviewing the persons responsible for the security of the facility and by studying the technical

documentation for the protection of information at the facility. The following circumstances are clarified:

1. whether the room in which the computer is located is blocked by an electronic access system or burglar alarm, and what technical means are used for this purpose.
2. whether special means for destruction of information in case of attempt of unauthorized access to it are installed in the computer; find out the location of the organization that installed this system.
3. whether the password (additional device - electronic key) is necessary for access to the information which is in the computer, or its separate parts, rules of its use.
4. whether the computers are connected (included) to the local network of the institution, organization, enterprise (firm), association, what is the scheme of the local network, the basic rules of its safe use (Examination Of Computer Equipment And Software Products Or Computer Technical Examination, 2019)?

If the computer is connected to the Internet, it is necessary to withdraw contracts from the head of the enterprise (firm) where the inspection will be conducted, immediately contact the network administrator - provider of the node to which the institution is connected (enterprise, organization), and organize by means of its extraction and storage of the electronic information belonging to the given enterprise or received to its address. In this case, it is appropriate to quickly determine whether the owner stores all its data in external storage, and if so, the information on local machines may not be detected and it is necessary to find out access to external storage.

5. the persons responsible for the backup and storage of protocols shall find out the location of the relevant documents and copies on magnetic media and take measures to remove and store them (Examination Of Computer Equipment And Software Products Or Computer Technical Examination, 2019);

During the physical examination it is necessary: to order the employees of the firm (enterprise) to move away from the computer means and place them in the room so that the possibility of using any means of communication is excluded. In the process of inspection do not accept help from employees of the firm (enterprise); to remove from the staff pagers, electronic notebooks, laptops, individual devices for disabling the car alarm, etc.; capture information on the screens of working computers by taking photos (detailed shooting); turn off the power of the mini-subscriber telephone service and seal it (if any); Draw a diagram of the connection of external cables to computer devices and mark the cables for proper reconnection in the future; to isolate computers from any communication from the outside: modem, local computer network, radio communication; The most effective

way to disconnect all computer equipment from power sources (including uninterruptible power supplies) (Examination Of Computer Equipment And Software Products Or Computer Technical Examination, 2019).

The specialist promptly performs actions in accordance with the plan developed in conjunction with the investigator. The external inspection identifies specific circumstances related to the computer, the data of which are entered in the inspection report of the computer: the presence of the system unit, monitor, keyboard, printer, modem, uninterruptible power supply, speakers, etc., peripherals and multimedia devices.

According to the location of the parts of the devices on the front panel of the system unit, the specialist determines their types (storage devices, disk drives), as well as types of credit card readers, smart or chip cards, etc. Special attention should be paid to devices unknown to him. The location of the connectors on the back of the system unit determines the presence and types of built-in devices, network card, modem (whether it was connected to a telephone or other communication line), the presence of serial and parallel ports, whether they were connected to external communication lines (Examination Of Computer Equipment And Software Products Or Computer Technical Examination, 2019).

The protocol must provide a diagram of the connection of cables to the computer system. Disconnected cables must be marked to reconnect during the examination of computer hardware and software. The computer system unit, printer, detected floppy disks, magnetic tapes, and other computer storage media (such as printouts) are packaged and removed. Packaging of objects must prevent both accesses to objects and their damage during storage or transportation (Examination Of Computer Equipment And Software Products Or Computer Technical Examination, 2019).

Coordinated actions of the investigator and the specialist during the inspection and removal of material evidence from the scene will avoid irreversible loss of information contained on computer media.

Removal of electronic media from various sources of external memory during investigative (search) actions does not require the involvement of a specialist to examine and remove them. The Criminal Procedure Code of Ukraine does not require this either. However, it should be noted that in some cases, due to the peculiarities of the objects themselves, which are important in criminal proceedings, they can be found only by a specialist in a particular field. In the cases studied, it is best to use the help of a computer and software specialist.

In our opinion, such cases should include: copying information from electronic media to another electronic medium; establishing the presence of communication between computer equipment and telecommunication channels according to the schemes: «computer computer», «computer

server», etc.; the need to disconnect the local network from technical devices; the need to search the server itself, as it stores most of the computer information in its memory and manages the workstations of the local network.

The participation of a specialist in the seizure of electronic media and in investigative (search) actions, because of which such information is seized, will eliminate doubts about the authenticity of the evidence and is a guarantee of protection of the rights of participants in the process. It is fair to say that there is no such thing as a universal computer expert. It is possible to involve people with the following specialties as a computer expert: a) computer science and information technology; b) engineer for technical protection of information; c) computer engineering; d) systems engineering; e) software engineering; f) network technologies and system administration; g) computer systems analytics. Therefore, when going to the scene, it is important to find out what technology and what operating system you will have to deal with (Honcharenko, 2014).

Naturally, the growth of the level and intensity of the use of special knowledge leads to an increase in the requirements for the qualification of a specialist. Qualitative and full-fledged carrying out of investigative (search) actions with use of computer knowledge of the expert promotes establishment of specificity of the committed criminal offense, and also its timely detection, disclosure and investigation.

Therefore, when conducting an investigative inspection, search, and other procedural actions related to the seizure of various electronic media, investigators and other staff must carefully plan organizational and tactical actions, taking into account knowledge of the specifics of working with electronic media. First of all, you need to establish - this is the type of operating system. Not all computer systems are equally common, and there may be some problems. A Windows operating system specialist may not have the necessary knowledge to operate a machine with another operating system, such as UNIX, Linux, OS / 2, MacOS, and others. But, despite some difficulties, the specialist must determine whether he can personally work with this operating system or should involve another specialist in this field. In the latter case, actions with the equipment of the persons involved must be carefully recorded (Honcharenko, 2014).

Given the importance of forensic computer and technical examination of objects provided for research, we consider it appropriate to focus on the technical features of the extraction and storage of electronic trace information found during the investigative (search) actions.

There are two ways to obtain electronic trace information: 1) seizure of all detected means of computer and other equipment with further study of the information contained therein; 2) examination of all information

on electronic media directly during the inspection or search (if there are sufficient grounds). The latter option involves further copying of information of interest to criminal proceedings and (or) removal of magnetic media with such information.

Actions with electronic trace information have a certain algorithm. For example, when removing electronic equipment, you need to identify all possible sources of external memory both inside the electronic device and remotely connected via local area networks, using the capabilities of wireless information technology. There are cases when removing the system unit, operational staff did not take into account that the hard disk can be connected remotely with data transmission via radio, and sent for examination this unit without a hard disk drive, which was connected to the computer by radio and was in a car parked near the building (Kuvychkov, 2016).

The seizure of all computer equipment speeds up the investigation process, makes it possible to direct all efforts to search for other material traces related to the criminal offense (documents, technical means, etc.); reduces the psychological burden on citizens; does not require the involvement of a highly qualified specialist in the field of computer technology to directly participate in the search, as the competent seizure of computer equipment is quite accessible to a specialist «middle hand».

The undoubted advantages of this approach include the ability to further study in more detail, involving the necessary specialists, all the information available in computer memory. This virtually eliminates the possibility of omitting even professionally hidden information. However, on the other hand, in some cases there are purely technical difficulties in removing all computer equipment (integration into various networks, the possibility of losing information when disconnected, etc.) or such removal is simply impractical. It should also be borne in mind that the failure of computer banking systems and a number of enterprises can lead to a complete disruption of their work and significant material damage, which threatens their claims. Therefore, it is sometimes recommended to use another method: to extract information from computer equipment directly during the inspection or search. And here you cannot do without electronic copying of information using a laptop, flash drive, etc.

When conducting an investigative (search) operation related to the seizure of electronic media, the investigator must clearly know the specifics of the seizure and packaging of these objects to exclude any manipulation of the objects during their transportation. Therefore, at the preparatory stage of the investigative review, search, the investigator must take into account which electronic media will be the object of investigative (search) action. After all, during the inspection, the procedural person may encounter a personal computer, system units, cellular communications equipment,

video recorders and other computer equipment, as well as other objects, such as hard drives disguised as other objects, a non-standard form of flash drives with a USB input in the form of toys, jewelry, keychain.

Detection, fixation, removal, preservation, and research of any object are aimed at careful conduct of each stage. As practice shows, there are many cases of violation or poor performance of one of these stages of work with objects. This is usually the removal and storage of trace information, the completeness and quality of which is ensured by the packaging of the detected objects. The result of expert research depends on how correctly and competently the detected information carrier will be packed (Zinnurov, 2018).

When packed in a cardboard box, the areas that have access to the internal contents are pasted. In the absence of packages or boxes, the system units may be covered with sheets of paper to prevent access to the on / off / reset buttons, power connectors, and screws that secure the side and top walls to the chassis. In practice, forensic inspectors are faced with non-compliance with the rules of packaging system units: as a rule, it is a sheet of paper with the inscription, glued with transparent adhesive tape «tape» to the top cover. Such packaging does not meet the requirements of regulations and provides free access to all connectors and on / off / reset buttons.

The main requirement for the packaging of electronic media is to exclude access to information on the media and the possibility of making changes to the contents of the memory of the media after its removal. Thus, when a mobile phone is detected, experts recommend removing the object together with the network cable of the phone, packing it in cardboard boxes, using appropriate software and hardware to exclude any manipulation of the phone, namely, intentional, or unintentional turning on / off the phone change information in the memory of mobile devices (Zinnurov, 2018).

After a thorough inspection of computer equipment, a description of the software and hardware components of computers is made. The following software products can be used to describe computers: AIDA64, Everest. It is also possible to use the built-in utility «system information», for which in the program window «run» (start is performed by pressing the key win + r) type msinfo32 and press the Enter button. Information about the hardware and software components of computers is recorded in the inspection report of computer equipment and certified by two witnesses. It is advisable to keep the computer description document with the removed equipment. The case must be sealed. The seal is certified by the person initiating the seizure and the signatures of witnesses. Seal at the junction of the main body of the computer and the side removable covers. You must also seal the front of the computer (Zakharko, 2019).

The magnetic media on which the information is to be copied must be prepared (make sure that there is no information on it). Media should be stored in special packaging or wrapped in clean paper (do not use ordinary plastic bags). Keep in mind that information can be corrupted by humidity, temperature, or electrostatic (magnetic) fields (Zakharko, 2019).

Care should be taken when transporting computer equipment, as information on the hard disk may be damaged during transportation. Transport and special packaging should be prepared for the transportation of large computer systems. When removing and transporting computers, do not place them on top of each other or place any other objects on them. In addition, in the course of procedural actions, the objects of which are computer equipment, system units of personal computers, the investigator must clarify with the rightful owner, whether there is password protection on the media, if so, indicate it in the inspection report (search) and put this information in the packaging of the object, as the lack of this information will increase the duration of the expert study. It has specific features and packaging of these objects. The safest way is to pack the items in a plastic bag or box. The neck of the package is sewn with thread, the thread node is pasted with a tag with an explanatory inscription (Zinnurov, 2018).

DVRs as electronic media should be removed completely, without removing the hard disk drive due to the peculiarities of video recording. If you have to remove the storage device without a video recorder, then in this case it is necessary to display in the explanatory labels on the package the full name of the video recorder with markings.

When removing stationary DVRs, you should not remove the storage device from them, as DVRs use their file system to record and store video information. In addition, the drive removed from the DVR and then reinstalled may be reinitialized by the DVR and data may be lost. You also need to remove the power supplies of the DVRs.

When removing the server, you must completely remove the system unit, as the drives in the server can be combined in a RAID array of different configurations. The RAID settings are in most cases stored in the memory of the RAID controller, which is located inside the system unit. Extraction of some drives will lead to the fact that the expert will not know the configuration of the RAID-array and the study of information will be impossible or extremely difficult (Periakina, 2019).

When removing the cellular device, pay attention to its condition. If the phone is switched on, the best way to isolate it is to activate «offline mode» or «airplane» mode. Turning off the phone may activate security features (such as the SIM card PIN and / or security codes) that will be needed to access the device, making it impossible to perform an examination. If you have activated security features (for example, a «graphic key»), you should

immediately ask the phone owner about the unlocking algorithm. You should pay attention to the date and time indicated on the phone screen if it is turned on and compare them with the current time and date at the time of inspection, fixing discrepancies.

When extracting data from mobile applications, specialized software must be used as a source of electronic evidence. Examples of such applications are EnCase, Smartphone Examiner, MOBILedit, Forensic, Mobile Phone Examiner Plus and others. These tools are designed for law enforcement and information security professionals to collect evidence from mobile devices, they allow you to physically retrieve logical data from devices, get an image of the operating system, including the file system. After the analysis of mobile devices, it is possible to transfer the collected information to a specialized program FTK (Forensic Toolkit) for further study, for example, to recover deleted files. This integration also allows you to correlate the evidence collected on mobile devices with the evidence collected on computers (Sergeev, 2016).

The procedure for extracting evidence from mobile devices differs from the extraction of information from personal computers in that mobile electronic devices, compared to personal computers, have narrower tasks, excellent processor architecture, operating system, etc. In this regard, the methods and features of procedural actions must be individual, depending on the technical characteristics of the source of evidence (Sammons, 2015).

The British Association of Police Chiefs has developed guidelines for removing evidence from mobile devices (GOOD PRACTICE AND ADVICE GUIDE FOR MANAGERS OF E-CRIME INVESTIGATION, 2011). According to the proposed recommendations, during the procedural actions it is necessary to isolate the device from the mobile connection by turning off the device or thanks to special devices that muffle the connection, all the necessary procedures should be performed in a specially equipped room. The device must be fully charged in order to prevent the loss of information during procedural actions. You should take into account the feature of RAM (RAM) of the device, which requires uninterruptible power supply to store data, as opposed to non-volatile (ROM) memory. In order to preserve important information, the specialist must strictly follow the rules, do not allow software updates, as this may lead to data destruction. Along with the data of the applications on the mobile device, you must also request information stored on the servers of the application developers and the data of the Internet provider (Sergeev, 2016).

Modern smartphones, especially iPhones, often sync with a computer or laptop. Accordingly, it would be advisable to seize the owner of the smartphone computer or laptop. An alternative to removing your computer or laptop may be to check for Apple software on that device. Do not remove memory cards, SIM cards, or other hardware in your phone. The

packaging of a remote computer or storage device must, above all, ensure information integrity, i.e., exclude the possibility of connecting power cables or peripherals. The best option for packaging is to place the removed computer in its entirety in a plastic bag.

When describing computer devices that are seized and inspected, the information should be provided to the extent that will allow unambiguous identification of the seized device. In most cases, it is enough to specify the make, model, individual serial number of the device. If for some reason the mentioned information is not available, other individual features should be indicated: size, color, shape, etc. It is desirable to carry out the fixation not only procedurally, reflecting the seizure of electronic media in the protocol of the investigative (search) action, but also forensic, photographing the object of seizure (Periakina, 2019).

Conclusions

Thus, it should be summarized that electronic documents are an important source of evidence and guidance in criminal proceedings. Depending on whether such documents are placed on physical media, in the public domain on the Internet, or in cloud storage services, a specific procedure of their investigative review and preliminary investigation should be followed for further use in criminal proceedings, in particular in court proceedings. computer technical examination.

The following information, which is contained in the form of electronic-digital mappings, can be obtained during such investigative (search) actions as inspection and search, during temporary access to things and documents as a measure of criminal proceedings, as well as such covert investigators (search) actions: audio, video control of the person, removal of information from transport telecommunication networks, removal of information from electronic information systems, establishment of location of electronic means, supervision of the person, thing or place, monitoring of bank accounts, audio, video control of the place, control over commission crime.

In such cases, electronic-digital traces are issued as an appendix to the protocol of the relevant investigative (search) action.

The process of reviewing electronic documents generally corresponds to the generally accepted algorithm of actions: search and detection of documents; visual inspection of the external state without changing the conditions of perception; fixation by means of photography; fixation in the protocol of the corresponding investigative (search) action (all actions of officials, a condition of the document and the revealed traces are fixed);

detection of handprints (on a physical medium of an electronic document); detection of traces of changes in the original content; preparation for packaging; packaging. During the search and inspection of the premises, local electronic reflections, which contain information relevant to criminal proceedings, may be detected: in the searched (inspected) premises, on the ground (on an autonomous electronic medium, on a specialized device or on a memory device desktop computer); on the Internet outside the searched (inspected) room, area, namely on a remote server, the content of which is accessed from a computer located in the specified room.

Involvement in the investigation, search, other procedural actions, a specialist in the field of computer technology, who has knowledge of how to detect and extract relevant electronic-digital trace information, aimed at solving problems of contextual information retrieval, electronic document management programs, view the history of visits to Internet browsers (browsers), etc. In his activity, the specialist can use such tools as analysis of registry files, service files of applications, virtualization systems and complexes of recovery and analysis of remote data, the use of software and hardware, and so on. The use of this tool, although it requires much more time, it certainly has a positive effect on the effectiveness of detecting forensic information.

All actions with electronic documents must be carried out in the manner prescribed by law by authorized persons with the help of certified office equipment, using licensed software. When describing the computer tools that are seized and inspected, the information should be provided to the extent that will allow unambiguous identification of the seized tool. It is necessary to indicate such individual features as: size, color, shape, etc. Fixation should be carried out not only procedurally, reflecting the seizure of electronic media in the protocol of the investigative (search) action, but also forensic, photographing the object of seizure.

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Combating corruption in the educational sphere: Ukrainian experience

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Abstract

Based on expert estimates, 17% of corrupt practices are committed in this area, and the authors identify the leading causes of corruption in the educational sphere. The objective is the non-recognition of teachers and lecturers as subjects of criminal corruption offenses, low level of the labor expense, inventory, and logistics management discrepancy in educational institutions of different groups with modern educational methods. Subjective reasons include the mutual “benefit” of corrupt practices to all participants in the educational process; disenchantment with the profession due to burnout; certain aspects of mentality; the sense of impunity for blackmailing offenses and receiving gifts. Regarding scientific research methods, their branched complex and multilevel structure are proposed: philosophical, empirical research, methods of theoretical cognition: general logical methods, specific scientific methods. The principal means to combat corruption in the educational sphere is preventive increasing the level of labor expense in the academic sphere; improving the inventory and logistics management of the educational institutions at all levels and regions; avoiding the mutual “benefit” to all participants in the educational

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process and anti-corruption means (criminalization for all teaching and research-pedagogical staff for the commission of the criminal offense).

Keywords: corruption; education; right to education; corruption offences; anti-corruption management.

Lucha contra la corrupción en el ámbito educativo: experiencia ucraniana

Resumen

Se identifican las principales causas de la corrupción en el ámbito educativo. El objetivo es el reconocimiento de docentes y conferencistas como posibles sujetos de delitos de corrupción; bajo nivel de gasto laboral; una discrepancia de gestión de inventarios y logística en instituciones educativas de diferentes niveles con métodos educativos modernos. Las razones subjetivas incluyen el “beneficio” mutuo de las prácticas corruptas para todos los participantes en el proceso educativo; desencanto con la profesión debido al agotamiento; aspectos especiales de la mentalidad; la sensación de impunidad por los delitos de chantaje y la recepción de obsequios. En cuanto a los métodos de investigación empelados hay en la investigación una estructura ramificada compleja y multinivel: filosófica, empírica, métodos de cognición teórica: métodos lógicos generales y **métodos científicos específicos**. Se concluye que, el principal medio para combatir la corrupción en el ámbito educativo es el preventivo aumentando el nivel de gasto laboral en el ámbito educativo; mejorar el inventario y la gestión logística de las instituciones educativas en todos los niveles y regiones; evitando el “beneficio” mutuo a todos los participantes en el proceso educativo y los medios anticorrupción (penalización de todo el personal docente e investigador-pedagógico por la comisión del delito).

Palabras clave: corrupción; educación; derecho a la educación; delitos de corrupción; gestión anticorrupción.

Introduction

Education is the basis of any society's development (Kulish *et al.*, 2016). Education is the pinnacle event of facts, experiences, and thoughts acquired throughout life. Education is the act or process of specific educational or skills attainment for a profession, degree, level, or type of education. The role and value of the right to education are so vital that it is enshrined at the national and the international level. So, following Art. 26 of the Universal

Declaration of Human Rights, adopted and proclaimed in General Assembly resolution 217 A (III) of 10 December 1948, everyone has the right to education. Education should be free, at least in terms of elementary and general education. Elementary education must be compulsory (Universal Declaration of Human Rights, 1948).

A logical continuation of the legalization of the right to education was its enshrinement in the International Covenant on Economic, Social, and Cultural Rights. This international document defines the content of everyone's right to education and outlines measures for its full implementation. The Covenant obliges States parties to take the following necessary steps: 1) phase-in of free general education; 2) promotion of general education by those who have not received elementary education; 3) franchise development of schools at all levels, creating a satisfactory system of scholarships and continuous improvement of the material conditions of the teaching staff. Such itemization at the level of the international legal document of obligatory measures has a positive value for ensuring access to education in each member state (Melnychuk, 2015: 182).

The inclusion of the right to education became a "cornerstone" during the adoption by the Council of Europe of the Convention for the Protection of Human Rights and Fundamental Freedoms. This right was enshrined in the Protocol to the Convention. The form of enshrining this right is quite distinctive, as it differs from that usually used in international United Nations instruments. The right to education is proclaimed negatively: "No one can be denied the right to education" (European Convention on Human Rights, 1950).

1. Methods

The selection of the correct methodology is one of the essential elements of success in implementing scientific research. Regarding the methods of scientific research, their branched complex and multilevel structure are proposed. First of all, we used philosophical methods: analytical, phenomenological, hermeneutic, and dialectical. There are three levels in the construction of general scientific methods. The first is the methods of empirical research (descriptive, historical, abstraction, comparison, generalization). The second level is represented by the forms of theoretical cognition: ascent from the abstract to the concrete and hypothetical deductive. The third level of general scientific methods is available logical methods (system analysis; analysis and generalization; modeling; system-structural method; abstract-logical and extrapolation). The last type of method that we have used is specific scientific methods. In particular, formal-legal, comparative, statistical, questionnaire).

2. Results and Discussion

The importance of the right to education is confirmed by the fact that in most countries it is enshrined not just at the legislative but at the constitutional level. Per Art. 53 of the Constitution of Ukraine, everyone has the right to education. The State ensures accessible and free pre-school, complete general secondary, vocational, and higher education in state and communal educational establishments; the development of pre-school, complete general secondary, extra-curricular, vocational, higher, and post-graduate education, various forms of instruction; the provision of state scholarships and privileges to pupils and students. Citizens have the right to obtain free higher education in state and communal educational establishments on a competitive basis (Constitution of Ukraine, 1996). The specified formulation of legislation of Art. 53 of the Basic Law qualified for ambiguous understanding and forced 50 people's deputies to apply for its interpretation to the Constitutional Court of Ukraine.

The latter in its decision in the case № 1-4 / 2004 of March 4, 2004, № 5-RP / 2004 gave guidance on that the availability of education as a constitutional guarantee of the right to education is based on the principles of equality specified in the article 24 of the Constitution of Ukraine. It means that no one can be denied the right to education, and the state must create opportunities for the implementation of this right; free education as a constitutional guarantee of the realization of the right to education means the possibility of obtaining education in state and municipal educational institutions without paying in any form for educational services defined by law level, content, scope and within those types of education, free of charge provided by Part 3 Art. 53 of the Constitution of Ukraine. Depending on Part 2, Article 3. 53 of the Constitution of Ukraine, according to which complete general secondary education is mandatory and free of charge, the costs of ensuring the educational process in state and municipal secondary schools are fully carried out on a legal framework out of corresponding budget resources.

Free higher education means that a citizen has the right to obtain it per the standards of higher education without paying in state and municipal educational institutions on a competitive basis within the scope of training for public needs (public order) (Judgment of the Constitutional Court of Ukraine in case № 1-4 / 2004 of 4 March 2004 № 5-RP / 2004, 2004).

Common to the Basic Law of Ukraine and the constitutions of most European countries is the establishment of a certain standard of education, mainly the obligation to obtain a certain level of education, as well as the prohibition of discrimination in the educational process on any of the grounds (Pushkina, 2007). For example, in Art. 38 of the Constitution of Armenia also enshrines the right of everyone to education, which in cases

established by law may be free (Constitution of the Republic of Armenia, 1995). According to Art. 27 of Georgia's Constitution, everyone has the right to receive education and choose its form. And elementary and primary education is compulsory (Constitution of Georgia, 1995).

The approach of the Polish legislator to the restatement of the right to education is quite interesting because of Part 2 of Art. 33 of the Polish Constitution stipulates that women and men have equal rights to education (Constitution of Poland, 1997). According to Art. 76 of the Danish Constitution, all school-aged children have the right to receive free elementary education. Parents or conservators who self-educate their children or conservatives per the standards of general elementary education may not be forced to send their children or conservatives to elementary schools (Constitution of the Kingdom of Denmark, 1953).

Meanwhile, corruption distorts access to and implementation of this right. According to experts, 17% of corrupt practices are committed in this area. In general, it is the second most corrupt sphere of public life (The state of corruption in Ukraine according to the population, business, and experts, 2020). We are convinced that such statistics are impressive. The damage is being caused to one of the most critical areas in which the nation's consciousness, culture, and education are taking place. Enforcement of the right to education is a supposition for a person's ability to enjoy many other rights. However, in societies where corruption is widespread, there is a high risk that the entire education system will be distorted. Children and young adults are often exposed to corruption in schools and universities, and classroom corruption is particularly harmful because it normalizes the acceptance of corruption at an early age. When this happens, the central role of the education sector - to teach ethical values and behavior - becomes impossible. Instead, education contributes to the fact that corruption is becoming the norm at all levels of society. Social trust is being destroyed, and the development of countries' stories is being sabotaged (Kirya, 2019).

In addition to acquiring corruption skills, the negative consequence of corruption in education is acquiring an illiterate specialist (doctor, teacher, engineer, lawyer, etc.) when it comes to higher education. Thus, the development of society and the state in the absence of competent, qualified, young professionals have somewhat illusory prospects (Damm, 2016). N. Bukharina proposes to term the corruption in the educational sphere a dangerous socio-legal phenomenon that occurs in public, municipal, and private educational organizations and consists in the direct or indirect appropriation of corporate or official opportunities, status in personal or group interests to obtain benefits, material, and intangible (Bukharina, 2016).

Corruption in the educational sphere is a type of corruption, but at the same time, it has particular aspects. We propose to differentiate such

manifestations by levels of education into corruption in preschool, school, and higher education. A detailed analysis of the expression of each group is essential. Thus, when educating children in preschool institutions, parents are often faced with the lack of vacancies in a particular preschool institution and the need to pay improper advantage for “movement” in the take-a-number system. Then corrupt practices are manifested throughout the child’s education in such an institution and mainly consist of the need to pay for constant repairs and the requirements of specific groups or the whole institution. Moreover, the situation is complicated by the need to “pay” for the child’s acceptance and constant gifts for nursery teachers and the preschool administration.

The next level of education is school one. The role of school education in the process of acculturation of the younger generation can hardly be overestimated. But, unfortunately, this to some extent applies to the education of young people in favor of corruption. Undoubtedly, in Ukraine, to overcome this corruption manifestation, there is a system of electronic submission of documents to a particular school or educative complex. Besides, children should be admitted to a specific institution by territorial affiliation and only based on a lottery and other potential students. At the same time, each technology can be bypassed if you bribe the director or make him a valuable gift.

In general, a gift to teachers or school administration is a separate manifestation of corruption. According to statistics, during the survey, 822 senior pupils and 314 parents, 32.1% of pupils (every third), and 22% of adults confirmed the facts of fundraising for gifts to teachers. There must be a big difference between a natural gift and a gift paid by parents to teachers. After all, the meaning of the gift is strained – a free-of-charge basis and self-forgetfulness. Instead, grantors have another goal – to ensure the teacher’s adherence to their child (Bubnov, 2014).

The gift to the teacher ceases to be symbolic, congratulatory, and becomes frankly selfish. After all, modern schoolchildren began to present household appliances and expensive utensils more often. In addition to the answer options provided in the questionnaire, respondents also mentioned paintings and jewelry, interior items, clothing and bedding, housework, and dachas. Unfortunately, the widespread practice of such gifts to secondary school teachers teaches each new generation of citizens to bribe. The lessons of refundable relationships received in secondary school; her pupils then carry into adulthood. According to an inquest of 684 people, more than half (53.9%) of young people aged 16 to 30 are morally ready to offer an improper advantage, and almost 45% – accept it. These results from the negative acculturation of the younger generation in the family and school (Bubnov, 2014).

Also, there is a tendency to donate funds for “school renovation”, “charitable contributions” for academic achievement. We want to note that charitable contributions are not prohibited, but there is a particular process of law for their payment. Firstly, the parents cannot demand them. After all, donating money to charitable foundations is a voluntary matter, and any request from the administration of the educational institution for such payment is illegal. To donate or not to donate is an individual decision of each parent.

Secondly, per the Procedure for receiving charitable (voluntary) contributions and donations from legal entities and individuals by budgetary institutions and establishments of education, health care, social protection, culture, science, sports, and physical education for the needs of their financing dated August 4, 2000, № 1222 (Procedure for receiving charitable (voluntary) contributions and donations from legal entities and individuals by budgetary institutions and establishments of education, health care, social protection, culture, science, sports and physical education for the needs of their financing, 2000) employees of educational institutions do not have the right to take money from parents personally. Thirdly, charitable funds are spent in areas designated by philanthropists, i.e., parents. If they do not specify the directions of spending, the head of the educational institution can do it by allocating charitable funds to the priority needs related to the main activity.

And most importantly: philanthropists have the right to receive a report on the application of their funds. Parents can even indicate in the receipt the purpose of the money transferred to the kindergarten – for example, “Funds for repairing the floor of a children’s preschool institution ...”. Such a receipt, if necessary, will allow you to complain about the inappropriate use of funds (Kostina, 2015).

School experience of corrupt practices, most commonly, is significantly supplemented during studying in the higher educational establishment. It should be constituted that the corruption risks during the admission to the higher educational establishment have decreased considerably with the implementation of the external independent evaluation system, which can be called an effective anti-corruption mechanism. At the same time, the emphasis on corruption shifted directly to the educative process today 74.6% of respondents at universities have experienced crime, of which 23.3% - during the defense of qualifying papers, 22.9 % - when agreeing on early delivery of the examination period or vice versa its withdrawal, 11.5% - when obtaining permission to retake a particular subject. Hazardous is the growing trend of corruption practices in the faculties where future legal professionals are prepared (66.3% of law students participated in corrupt practices) (Corruption in education: threats to the strategic development of Ukrainian society, 2019).

A student who receives an exam grade for money, not for knowledge, involuntarily concludes that knowledge has no value. It reduces the motivation to study and generates neglect of professional's activities, both one's own and others. If I bought a diploma, why not do it to others? If I'm not an expert, where are the guarantees that other people are? A sane person at the age of 17-20 is always an idealist – this is a feature of a youthful worldview – and lecturers who demand improper advantage cause student's contempt and cynical attitude, which often applies to the educational establishment, all lecturers, and even the whole education system. "Buying" grades and diplomas form the idea that money can buy anything (Erikenov, 2018). Thus, the atmosphere of corruption in the higher education system leads to a decrease in professional training, not most minor, to the devaluation of morality and ethics. Moreover, this, in turn, leads to the decomposition of society.

The current Law of Ukraine "On Higher Education" distinguishes three levels of higher education: the first (bachelor's), second (master's), and third (educational-scientific / educational-creative) (Law of Ukraine "On Higher Education, 2014). Considering this, corruption in the defense of a Ph.D. thesis should be attributed not to scientific but to educational corruption.

The academic degree is prestigious for the owner because traditionally, the owners of the academic degree were sought-after in universities and research institutes. Today the situation has changed. The new privileged class: politicians, government bureaucrats, and businesspersons, seeks to acquire all honorable distinctions, both verbal and documented. To supply a demand for academic degrees, dissertations are offered for sale. Our society pays a much higher price for the existence of fictitious degrees and not actual dissertations than those who buy these degrees. False degrees, directly and indirectly, reduce the efficiency of a socially-oriented economy and harm the educational sphere and society as a whole (Osipyan, 2010). At the same time, corruption at the third level of higher education is manifested not only by the purchase of dissertations but also by postgraduate studies.

After all, there are many cases when the extortion of improper advantage begins with admission to doctoral studies. Thus, some higher educational establishments require funds for the "development of postgraduate training program" or for the development of the department or appreciation for approving the topic of the future inaugural dissertation. When the inaugural thesis is ready, the candidate for a degree must "give a bribe" to many people on the eve of the defense. Submission of the inaugural dissertation to the specialized academic council requires the applicant to pay for the "development of the council", but for some reason not in domestic currency, but in dollars and not through the box office, but in envelopes. The council chairman – from 300 to 1000 dollars, and the secretary of the specialized scientific council – from 150 to 800 dollars. Reviewers and

opponents are not forgotten during the defense. If they are not paid, they are fed, accommodated in hotels, paid for taxi rides, and given small gifts. Almost 100% of higher educational establishments practice setting tables for candidates for members of one-time councils in cafes, restaurants, less often in canteens or departments of educational institutions (Hutsula, 2020).

One of the reasons for this approach to the conferment of scientific degrees is the insignificant role played by the personal responsibility of the dissertation advisor and opponents in deciding on the conferment of scientific degrees. The reputation and career of none of them have suffered at any time in the history of modern Ukrainian science. Therefore, the sense of impunity determines the continuation of youth education in such conditions (Corruption Risk Rating of Institutions Awarding Degrees in Economics, 2015). Of course, postgraduate degree seekers who have undergone such procedures will want to return the money spent, and secondly, will implement this model of work with their Ph.D. students. Both the first and the second factors will lead to a new circle of corrupt relations.

Also, corruption in the educational sphere is bribery during the accreditation process. An educational institution that has been accredited by providing an improver advantage to the representatives of the expert group will graduate specialists with a lack of knowledge. By committing such abuses, higher educational establishments dupe the public and commit a criminal offense within the same institution, which will select future students on a fair and objective basis (Harold *et al.*, 2001).

Having revealed the main manifestations of corruption in the educational sphere, we would like to analyze the causes of its occurrence. Scientific sources suggest different approaches to outlining the cause of corruption in this area. I. Goyuk considers them low salaries of teachers and lecturers, insufficient level of public control, low level of culture, insufficient punishment for corruption, mental peculiarities, underdevelopment of civil society, low economic level, etc. (Goyuk, 2016).

Instead, A. Kovtun provides a more extensive list of causes of corruption in the educational sphere. The scientist calls them the following: 1) equivocation of anti-corruption legislation, the emergence of a discussion on the possibility of applying the concept of “office holder” to pedagogical and scientific-pedagogical workers; 2) insufficient remuneration that does not correspond to the level of knowledge and competence of teachers and lecturers; 3) obsolescence of material and technical base, especially in rural areas; 4) reduction of the education value, when the purpose of obtaining a diploma does not involve obtaining the relevant knowledge; 5) lack of desire of students and pupils to study; 6) not the formation, but sometimes the deformation of the legal culture of the young generation and their parents; 7) lack of good faith of individual teachers and lecturers who directly or

vilely demand improper advantage; 8) lack of effective mechanisms to prevent corruption in educational institutions; 9) a sense of impunity for corrupt practices (Kovtun, 2015).

K. Babenko more systematically identifies the causes of corruption in education by identifying groups of such causes. The first group is represented by objective reasons: low wages, desire to enter a specific specialty or educational program, equivocation, and conflict of anti-corruption legislation. The second group is subjective reasons: professional burnout of teachers and lecturers; lack of respectful attitude on students and pupils; natural latency of corruption practices. The third group includes objective and subjective reasons: the person working out the corruption costs incurred in connection with the employment of a teacher; lack of proper social guarantees for education workers (Babenko, 2015).

After critically analyzing the positions of scientists, we believe that the causes of corruption in the educational sphere are as following: objective and subjective. To the objective, we propose to include: 1) non-recognition of teachers and lecturers as subjects of criminal corruption offenses; 2) low wages; 3) inconsistency of material and technical base in preschool education institutions, schools, and higher educational establishments with modern educational methods and technologies. Subjective reasons, in our opinion, are 1) the mutual "benefit: of corruption practices to both teachers, lecturers, and parents of kindergartens, pupils and students; 2) frustration in the profession due to burnout; 3) features of the mentality; 4) sense of impunity for extortion and receiving improper advantage and gifts.

Identifying the cause of corruption in the educational sphere consistently necessitates implementing specific countermeasures, which should be divided into measures to prevent and combat. As to prevention measures, the first of them should be increasing the salaries of educators, teachers, and lecturers. First, we would like to emphasize that education is designed to guide the study of culture, shape behavior in adulthood, and guide learners to the ultimate role in society. In the most primitive cultures, they are often not limited to formal learning. Still, the whole environment and all activities are often seen as schools and occupations, and many adults or even all adults act as teachers. However, as society becomes more complex, the amount of knowledge passed from one generation to the next becomes greater than anyone can know. Therefore more selective and effective means of transmitting culture must be developed. The result is formal education – a preschool, school, university, and a specialist who will present particular educational material in an accessible, objective, thorough and scientific way (Graham, 1999). Thus, given the importance of the social role of the specialist in the field of education, his level of remuneration should be equivalent.

At the same time, in Ukraine, the maximum salary for a teacher (teacher of the highest category) is about 230 Euros. The compensation depends on the position and surcharges for the degree and academic degree and status for a research and teaching staff. For example, a Ph.D. is also about 240 Euros (Salaries of Teachers in General Secondary Education Institutions Will Increase During 2021, 2020). Instead, a person working in education in Slovakia usually earns about 2,310 Euros a month. The salary ranges from 1110 Euros (lowest average) to 4220 Euros (highest standard, actual maximum salary higher). This is the average monthly salary, including housing, transportation, and other benefits. Wages depend on the field of teaching and education. A person working as a teacher in Germany usually earns about 2,830 Euros a month. The salary ranges from 1,300 Euros (lowest) to 4,500 Euros (highest). As for a teacher's salary in the higher educational establishment in Germany, it is approximately 4,500 Euros (Average Teacher Salary in Germany 2020, 2020). Thus, the level of remuneration of pedagogical and scientific-pedagogical workers in Ukraine is catastrophic, especially considering the importance of their work for the education of the new generation. That is why we are convinced of the importance of raising the level of wages of education workers to improve their living standards, and therefore, reduce the level of corruption.

To implement this precautionary measure, per paragraph 6 of Article 61 of the Final Provisions of the Law of Ukraine "On Education" and Art. 36 of the Law of Ukraine "On scientific and scientific-technical activities" the Cabinet of Ministers of Ukraine adopted a resolution of the Cabinet of Ministers of July 10, 2019, № 822 "On remuneration of pedagogical, scientific-pedagogical and scientific employees of the educational and scientific institution". It provides a gradual (until 2023) increase of the lowest salary of these categories of employees to the level of 4 subsistence minimums for non-disabled persons, as provided by the above legislation. However, due to a lack of funding to implement this resolution in the state and local budgets, it was suspended until January 1, 2022. The Ministry of Education and Science is exceptionally interested in implementing this resolution, as it complies with legislation and raises social standards and state guarantees of living standards of educators (Issue of Raising Social Standards For Education – One of The Priorities, 2020). At the same time, we would like to note that, as a rule, legislative attempts to record the level of wage growth in the legislation are unsuccessful, as was the case with the salaries of judges and prosecutors. The state budget deficit always postpones the increase in wages. At the same time, we are convinced that the described material improvement would reduce grassroots and situational corruption in the educational sphere.

The following precautionary measure to reduce corruption in the educational sphere is to improve the material and technical base. Undoubtedly, the development of education systems is impossible without

proper investment in the material and technical command of preschool, general and higher education establishments. After all, it is the financing of the improvement of material and technological conditions that directly determines the development of creative abilities, professionalism, and the increase of the social status of each individual. It also affects the reproduction of the intellectual and spiritual potential of society. Thus, there is a contradiction when, on the one hand, there is a need to increase the level of material and technical equipment of educational institutions. Still, it requires broad public support for educational policy, restoration of responsibility, and active role of the state in this area, deep and comprehensive modernization of education with the allocation of the necessary resources.

Development work on the material equipment should include: computing of educational establishments, regardless of location, and the implementation of information technology (multimedia equipment, smart boards, etc.); creation of a subject-development environment with the use of modern educational technologies and didactic materials; scientific organization of work of teachers and heads of structural divisions, new developments allowing to make work of the teacher and educational process more effective; reduction of firebricks, emergencies, injuries; improving the sanitary and epidemiological well-being of educational establishments; spending optimization for the creation of security systems (Improvement of Material and Technical Base, 2016).

Federal expenditure is the most critical source of funding for education. And the good news is that national expenditure on education, as a percentage ratio of total national expenditure, increased from 16.7% in 2018 to 17.3% in 2020. However, additional funding is still needed. Only 8 countries spend more than 20% of federal expenditure on education. Some countries, such as Pakistan, Guinea, the Central African Republic, and Georgia, generally spend less than 10% on education. Also, in Ukraine, there is a tendency to reduce the cost of financing preschool education and direct most of the costs of reforming general education and creating a new school (Domestic and External Financing for Education, 2014).

The current situation with the budgetary financing of the educational sphere does not allow to be limited exclusively to public or local funds to ensure the practical improvement of the material and technical base of educational establishments. Providing commercial services somewhat simplifies this process for higher educational establishments, and the rest of educational institutions are forced to apply for charitable contributions. Finding the balance between public and private funding for education has become a key challenge in reforming the education system in many countries. In some countries, the share of non-government sources in the financing of educational institutions is in Japan – 57%; in the USA – 52 %; in Canada – 39 %; in the UK – 38% (Hesse, 2013: 15).

To ensure transparency in the financing of educational establishments in different countries, new methods are being implemented. For example, in South Africa, a five-tier system has been developed to increase funding for schools for the poorest. Several measures have been taken to ensure that funding reaches the schools to which it is directly assigned, such as implementing objective, informative, and targeted scoreboards. This system plays an essential role in ensuring more significant equity in education by demonstrating lower school fees for children from the most impoverished families in South Africa, thus giving them access to education.

In Brazil, the establishment of school food councils has reduced the risk of food misappropriation and food fraud, which have been a severe problem in the past. This result has been achieved by establishing a process of continuous monitoring of programs and strict accountability on a regular legal basis.

In the Indian state of Rajasthan, 28% of schools have information boards available for public control. They are usually located on the school building and provide essential information related to its day-to-day operation: the panel displays all financial flows, the presence of teachers, and so on. These boards, available for public inspection, are now considered an essential element of general monitoring. It also hosts public hearings, during which people can report corruption practices or ask officials to take appropriate action (ETICO – Fighting Corruption in Education, 2020).

We believe that to improve the material and technical base in educational establishments, it is necessary to: reform the approach to the distribution of funds in education; develop new legislation that would effectively control the spending of funds received as charitable contributions.

The third precautionary measure involves eliminating the mutual benefit of the corruption component during the educational process. To this end, we believe it is essential to envisage a specific mechanism that educational establishments can use to reduce corruption and reform the perception that they are corrupt. This is a code of deportment for teachers and research and teaching staff, administrative staff, and students; declarations of integrity on publicly available websites, university “courts” hearing misconduct cases, and annual reports informing the public about changes in the number of detected cases of corruption practices. Conveyors of knowledge need to know clearly what actions can be interpreted as corrupt. For example, the Code of Deportment must decipher the legitimacy and set limits on accepting gifts. Implementing such mechanisms could be a prerequisite for educational establishments in countries that expect their diplomas to be declared equivalent to those of European educational institutions or rely on international partners’ support (Yukhachev, 2008: 112).

Also, to eliminate the declarative of the proposed measures, it is necessary to provide for the mandatory dismissal of an employee who has become the subject of a corruption offense, based on paragraph 3 of Part 1 of Art. 41 of the Labor Code of Ukraine, namely: the commission of an employee who performs educational functions, and immoral misdemeanor, incompatible with the continuation of this work (Labor Code of Ukraine, 1971). Thus, corruption will be perceived as a corrupt, anti-social phenomenon, and mutual interest in it will disappear.

We also believe that it is possible to overcome the mutual benefit of corruption through public control over educational activities, primarily by parents, public organizations, academic control bodies (Nikulina, 2017).

The fourth precautionary measure is the prevention of educators' burnout. In modern society, many socio-economic changes affect people's performance of their professional activities and attitude. The difference in a person's attitude to his professional activity is especially noticeable if his rating in society falls. As a result, mental and emotional stress increases, and disturbances related to workplace stress appear more often (Kharlanova, 2015: 95). Psychologists describe burnout as a state of chronic stress that leads to physical and emotional exhaustion, cynicism, alienation, and feelings of inefficiency and lack of achievement.

Pedagogical and scientific-pedagogical workers, as a rule, have high successes, like to work hard, and are always looking for ways to improve. These traits are commendable but can mean that teachers fall victim to perfectionism and do not leave enough time to rest and recuperate. K. Onstad argues that we live in a "cult of over fatigue", and being a go-getter is often noted as a virtue when it should not be. Quite often, lecturers forget that they are more than their job. Although learning becomes part of their personality, it is still essential to nurture other parts of the character that require attention and care (Tapp, 2012).

A significant part of teacher's burnout professionally in 5-10 years. This situation is due to high demands on work and lack of satisfaction with the results of their activities (Arvidsson *et al.*, 2019). The latter is because getting a job in preschool, general or secondary education, a person wants to share their knowledge, but often this knowledge is not needed by pupils and students who know that they can get good grades without them, through the same corruption component.

Prevention of burnout involves positive perception and self-perception; development of social intelligence; participation in various public organizations; search for friends of other professions; reading not only professional literature; attempts to think positively and rationally.

Regarding measures to combat corruption in the educational sphere, our priority is to implement administrative and criminal liability for all research

and teaching staff, not just officials. After all, the current situation does not provide for almost any, except for disciplinary liability, for example, for a teacher at school, which requires illegal benefits from parents to improve the child's performance. Also, the legislation does not contain any value restrictions on the value of gifts for educators, teachers, and lecturers. Implementing administrative and criminal liability for corruption and corruption-related offenses for specific categories of persons will overcome feelings of impunity and set an example for others. And, therefore, the preventive function of criminal law will be performed appropriately.

Conclusions

Summing up, we would like to note that corruption in the educational sphere is a dangerous socio-legal phenomenon that occurs in public, municipal, and private educational establishments and consists in the direct or indirect use of the position of official or official position, status in personal or group interests. to obtain benefits, advantages of tangible and intangible nature.

Corruption in education has specific manifestations in preschool, school, and higher education. It is determined that the causes of corruption in education are objective and subjective. Objectives include 1) non-recognition of teachers as subjects of criminal corruption offenses; 2) low wages; 3) inconsistency of material and technical base in preschool education institutions, schools, and higher educational establishments with modern educational methods and technologies. Subjective reasons should be recognized: 1) mutual "profitability" of corruption practices to both teachers and parents of kindergartens, pupils, and students; 2) frustration in the profession due to burnout; 3) features of the mentality; 4) sense of impunity for extortion and receiving improper advantage and gifts.

The main measures to combat corruption in education are prevention measures (increasing the level of payment of education workers; improving the material and technical base of educational establishments at all levels and in all areas; eliminating the mutual benefit of corruption for parents, students, and education workers); prevention of burnout of employees in the field of education) and measures to combat criminal liability for all pedagogical and scientific-pedagogical workers for criminal offenses in the area of official activities and professional activities related to the provision of public services and administrative offenses. Finally, we would like to emphasize that to eradicate corruption in a particular area, it is necessary to implement reforms at all levels, not in words but in deeds, to eliminate the causes of corruption, not its consequences.

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Psicopolítica y Gobernanza en el Perú

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Resumen

Se considera importante replantear la psicopolítica, el papel que ejerce a nivel mundial y cómo afecta la gobernanza del Perú. Si antes se usaba para fines científicos y en disciplinas como sociología, educación, psicología, entre otras, hoy por hoy, trascendió a lo político y los fines se han revertido. El presente estudio se propuso analizar cómo se ejerce la psicopolítica en la gobernanza peruana del siglo XXI. Se realizó un análisis cualitativo mediante el método inductivo; para la recolección de datos, se utilizó la técnica de la observación, revisión documentaria y bibliográfica. Se analizó tres categorías: biopoder, psicotecnología y corrupción en la gobernanza; para la validación de los datos, se empleó la triangulación. Se llegó a la conclusión de que la psicopolítica es mal utilizada para aumentar la corrupción y normalizarla; en otras palabras, la gobernanza se ve obstaculizada por la corrupción, por eso, no ejerce interacción con la población y sociedad civil organizada en democracia participativa, porque cada vez está más desprendida de la política con escasa o nula participación ciudadana.

Palabras clave: Psicopolítica; gobernanza; biopoder; corrupción; psicotecnología.

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Psychopolitics and Governance in Peru

Abstract

It is considered important to rethink psychopolitics, the role it plays at the global level and how it affects the governance of Peru. If before it was used for scientific purposes and in disciplines such as sociology, education, psychology, among others, today, it transcended the political and the purposes have been reversed. The present study set out to analyze how psychopolitics is exercised in the Peruvian governance of the XXI century. A qualitative analysis was performed using the inductive method; For data collection, the technique of observation, documentary and bibliographic review was used. Three categories were analyzed: biopower, psychotechnology, and corruption in governance; For data validation, triangulation was used. It was concluded that psychopolitics is misused to increase corruption and normalize it; In other words, governance is hampered by corruption, therefore, it does not interact with the population and civil society organized in participatory democracy, because they are increasingly detached from politics with little or no citizen participation.

Keywords: Psychopolitics; governance; biopower; corruption; psychotechnology

Introducción

La sociedad actual se encuentra doblemente vulnerable: por un lado, la pandemia covid-19, la cual obligó a la población a un confinamiento forzado, así como al uso de la tecnología, al trabajo remoto, mercado en línea, clases virtuales, etc. Por otro lado, la psicopolítica que se está viendo afectada por la gobernanza en el siglo XXI. El avance explosivo de la ciencia y la tecnología ha traído progreso y desarrollo en varios campos; sin embargo, Benevides (2018) analizó la conexión entre las prácticas de los gobiernos neoliberales y cómo ejercen sumisión, control político, económico, social, incluso lo personal se ve afectado por los procesos capitalistas contemporáneos, puesto que se ejerce la psicopolítica y lo biopolítico para el sometimiento individual y político.

Un estudio en Reino Unido acerca de la creación de sujetos automáticos, bienestar corporativo y seguimiento individual pone en evidencia cómo ha aumentado la utilidad de los dispositivos para los promotores de la atención médica y, sobre todo, para los que buscan cambiar conductas en la población dado que la felicidad, el bienestar y la salud benefician a las personas; la psicotecnología implica el uso de dispositivos de seguimiento automático como forma de bienestar colaborativo para reconstruir individuos automáticos y reactivos (Till, 2019). Por ejemplo, en Rusia, se

viene aplicando la psicotecnología en la salud para afrontar el estrés desde la socio-psicología.

Moyado (2011) planteaba una reforma que debiera ser aplicada en los gobiernos latinoamericanos de los últimos 20 años. Hoy por hoy, el Perú está insertado en una gobernanza global que se encuentra en la línea de desarrollo mundial interconectado y globalizado; presenta una población de 7.5 millones aproximadamente, la economía se ha multiplicado por 7 y, si se sigue en ese camino, se debe garantizar la sostenibilidad; sin embargo, el país se encuentra con problemas económicos, ambientales y sociales debido al desarrollo capitalista (Gill, 2020).

La mala política genera corrupción; esta crece y se fortalece, en especial, en países en vías de desarrollo. En América Latina, se intensifica la corrupción como una categoría que emerge seductoramente y, cada vez, se empodera en políticos, funcionarios y entidades públicas. Se formuló un reporte sobre la corrupción en el cual se demostró cómo la corrupción está afectando la democracia y de qué manera la mayoría de los políticos, que representan a sociedades latinas, se han visto envueltos en actos corruptos; por tal motivo, casi el 50% de los latinoamericanos no creen que existan políticos honestos. Muchos expresidentes latinoamericanos estuvieron involucrados en delitos de corrupción, terminaron presos, generando desasosiego y escepticismo en la sociedad. En El Salvador, a Francisco Flores (1999-2004) solo la muerte lo liberó de la prisión; Mauricio Funes (2009-2015) fue asilado en Nicaragua; Álvaro Arzú (1996-2000), acusado por la Comisión Internacional contra la Impunidad en Guatemala (Ramos y Álvarez, 2019).

Por otro lado, en Chile, Gutiérrez (2020) efectuó un estudio para evidenciar los mecanismos empleados por el Estado; se propuso evidenciar el uso que hacen del biopoder y cómo este ha exacerbado las manifestaciones ciudadanas. En Argentina, Barzola (2019) analizó el conflicto social que surgió frente a una empresa multinacional con el fin de comprender cómo se ejerció las dinámicas del poder, las cuales implicaron el biopoder sobre los cuerpos humanos y la naturaleza.

Diario Gestión (2019) señaló que el Perú está dentro de los tres primeros países que se perciben como los más corruptos de América Latina con un 30%, luego de Venezuela (un 50% que ha pagado soborno) y México (34%). La presente investigación es relevante teóricamente porque será la base para otros estudios, desde el análisis de las teorías existentes sobre la psicopolítica a través del biopoder y la psicotecnología, así como mantener la reflexión y como estas llevan por el camino de la corrupción degenerando y desestabilizando la gobernanza. Asimismo, permitirá entender y comprender a la psicopolítica como un mejor instrumento o camino idóneo en la gobernanza. Para lograrlo, se utilizó el análisis cualitativo y la triangulación para la validación de los datos obtenidos. Se estudiaron tres subcategorías: biopoder, psicotecnología y corrupción.

Por lo mencionado, surge la pregunta ¿Por qué es importante analizar la psicopolítica en la gobernanza? Es importante conocer el uso que se está dando a la psicopolítica en la gobernanza del Perú y del mundo. Con este trabajo, se pretende responder a la pregunta ¿Cómo se ejerce la psicopolítica en la gobernanza peruana?, ¿por qué se utiliza el biopoder como forma de sometimiento de lo físico? y ¿Cómo se pretende conocer los mecanismos de psicopolítica que se ejerce en la gobernanza del Perú?

1. Planteamiento del problema

Byung-Chul (2014) indicó que la psicopolítica “es un medio de dominación del capitalismo neoliberal con que se somete a los individuos. La psique se sitúa de esta manera en el centro de la estrategia de dominación” (p.25). El autor desarrolló la psicopolítica por el camino de las nuevas técnicas del capitalismo neoliberal donde el poder opresor pasa a ser un poder seductor, donde el sujeto sometido no es consciente de su sometimiento, donde la libertad es una falacia ejercida por el sistema explotador, este psicopoder hace creerse libre al sujeto. A través del Big Data y un Big Brother digital, se apoderan de los datos y de los comportamientos de las personas para condicionarlas a un nivel pre-reflexivo. Según Byung-Chul (2016), la psicopolítica incide en las interacciones sociales, entretenimiento, dataísmo, incremento de productividad, el acceso a la información, rastreo y control en tiempo real.

Bustos *et al.*, (2019) refieren que la gobernanza implica nuevas formas de interacción política y organización social; también se emplea el término para referirse a las nuevas formas horizontales de cooperación, coordinación en un aspecto más crítico (Jordan, 2008). Es crucial señalar que la gobernanza es considerada como un paradigma gubernamental que trata de cambiar el viejo gobierno institucional democrático reformulando la relación entre el Estado, la sociedad y el mercado impuesto por la globalización (Rosas-Ferrusca *et al.*, 2012).

Las principales teorías consideradas para argumentar el estudio fueron cuatro: la teoría psicopolítica, la teoría de la nueva gobernanza, la teoría burocrática y la teoría de la gerencia pública.

- (a) La teoría psicopolítica muestra el cambio de paradigma; Byung-Chul (2014) indica que el control mental se adueña de sociedades enteras en este siglo llamado “el panóptico digital” donde el biopoder es reemplazado por el psicopoder, el cual recibe ayuda de la vigilancia digital que se encarga de la lectura de pensamientos para controlarlos mediante dispositivos tecnológicos. Las teorías humanas, lingüística y hasta la sociológica quedaron atrás (Keynes, 1973, citado por: Ros, 2012).

- (b) La teoría de la gobernanza surge a finales del siglo XX; consiste en la interacción entre los agentes del Estado y lo social en el diseño de las políticas públicas (Ramírez, 2013). En la gobernanza moderna, el Estado y la sociedad cooperan entre sí; en Europa, ya lo vienen haciendo; sin embargo, se ha exhortado a desarrollarlo en los países latinoamericanos (Gorrochategui, 2019). Asimismo, Rosas-Ferrusca *et al.*, (2012), en su estudio sobre los tipos de gobernanzas, analizaron tres puntos:
1. la gobernanza multinivel surge como reacción a la complejidad, se extiende entre lo público y lo privado.
 2. la gobernanza democrática en la que el Estado se preocupa por el beneficio común, los nuevos políticos son vistos como gerentes públicos y están inmersos en la búsqueda del buen gobierno y;
 3. la gobernanza territorial es limitada por la complejidad de los aspectos públicos y hay mucha fragmentación político-administrativa.
- (a) La teoría burocrática weberiana se caracterizó por el principio de la racionalidad y se define por la importancia que le otorga al bien público; es impersonal, gratuita y universal; no obstante, esta teoría es criticada por la resistencia al cambio.
- (b) La teoría de la gerencia pública se instaure en lo empresarial; la nueva administración pública se preocupa por los valores y el sector privado, así como la evaluación individual y colectiva se trabaja bajo productividad, bonos y objetivos cifrados. Frente a estas dos últimas teorías, surge la teoría neoweberiana que es la fusión entre ambas tomando lo mejor de cada una y descartando lo malo (Larrouqué, 2018).

Dentro de las subcategorías de psicopolítica se consideraron tres: el biopoder, la psicotecnología y la corrupción como una categoría emergente. (1) el biopoder sobresale como un poder que se centra en la vida donde importa la productividad vital, donde la escuela, el cuartel, el taller son espacios para la disciplina del cuerpo individual; la demografía y la geografía humana permiten el control de la población (Foucault 1976-1978, citado por: Ortiz de Landázuri, 2017). En la actualidad, el neoliberalismo se ocupa tanto de lo biológico, somático y corporal como de la psique a través de las redes sociales y el neuromarketing, los cuales se han apoderado no solo de los cuerpos o vida humana; sino de las mentes creando adicciones, etc., (Byung-Chul, 2014). Por eso, cada vez más, los ciudadanos se alejan de la participación en la política, economía y educación.

(2) La psicotecnología, también conocida como filosofía de la psicología, implica la manipulación de otros seres humanos utilizando técnicas modernas. Según Ardila (2002), la tecnología social ha sido estudiada por los psicólogos; no obstante, los tecnólogos sociales insisten en que su disciplina se relaciona con la ingeniería, la física puesto que trata de solucionar problemas prácticos.

Al analizar cómo la psicopolítica afecta en la gobernanza, nos encontramos con una nueva categoría emergente como es (3) la corrupción que, según Sandoval (2016), implica poder, impunidad y voz ciudadana dado que tanto los prejuicios generados en la gestión pública como lo tecnocrático de la corrupción ya son inadecuados. Ninguno enfoca el problema en sí como son la impunidad y la dominación. Infirió que la corrupción es un problema de estructura y dominación política. Se colige que seguirá aumentando la corrupción mientras los mismos políticos sigan cambiando normas, leyes y reglamentos.

2. Método

El tipo de investigación fue cualitativo, porque lleva a percibir y adentrarse en los estudios de las categorías de psicopolítica en la gobernanza peruana; permite interpretar la realidad desde la subjetividad, principios metodológicos de cómo interpretar el mundo y su relación con los actores sociales (Bernal, 2016). Estos actores en la investigación son el Gobierno, los ciudadanos y la relación entre ellos. Fue cualitativo porque es un campo de estudio en sí mismo, donde la realidad social es el producto de un proceso interactivo en el que los miembros intercambian y participan en la construcción de la realidad (Bonilla-Castro y Rodríguez, 2005).

Para el recojo de información, se recurrió a revisión de documentos del Ministerio de Justicia (Minjus), así como del análisis de la corrupción en América Latina: agenda política, judicialización e internacionalización de la lucha contra la corrupción, libros de Byung-Chul (2014 y 2016) de psicopolítica y neoliberalismo, revistas científicas, documentos y periódicos. Al respecto, Galeano (2003) señaló que el sentido de la exploración documental es constituir un referente teórico que guíe el trabajo investigativo, la interpretación y el análisis. La revisión inicial de la documentación permitió analizar la realidad estudiada facilitando la comprensión de los escenarios por estudiar, así como la elaboración y formulación de los problemas.

En cuanto al escenario de estudio, se tomó los gobiernos de los expresidentes de los últimos 20 años: de Alberto Fujimori, Alejandro Toledo, Alan García, Ollanta Humala, Kuczynski y Vizcarra, desde el 1990 hasta el 2020, respectivamente. En la investigación cualitativa, el muestreo

es continuo porque está expuesto a las dinámicas que se deriva de los hallazgos de la investigación; es secuencial, conducido, no se elige al azar ni con fórmulas matemáticas (Galeano, 2003).

Se utilizó la técnica de sistematización porque permitió la codificación como proceso de características y la clasificación de datos, permitiendo diferenciar para la categoría psicopolítica el análisis de (a) biopoder y (b) psicotecnología, como fenómeno emergente surge la corrupción y la categoría gobernanza. Se realizó la triangulación; al respecto, Bonilla-Castro y Rodríguez (2005) afirman que es la contrastación y comparación de las fuentes, datos, investigadores y técnicas.

3. Análisis y discusión de resultados

Para responder la pregunta ¿cómo se ejerce psicopolítica en la gobernanza peruana? Se debe analizar el objetivo de la presente investigación, el cual es analizar cómo se ejerce psicopolítica en la gobernanza peruana.

Primero que la psicopolítica es un instrumento que interviene negativamente en la gobernanza; al respecto, Gomes y Vargas (2019) reflexionaron sobre la violencia psicopolítica que se ejerce a través del capitalismo (consumismo); está más cerca de la anulación de la existencia. Los investigadores señalaron que va más allá de lo económico e implica componentes subjetivos, además de que no les importa las atrocidades que están ocasionando en los temas éticos y políticos. Estudios de Alzate y Romo (2014) sobre el enfoque de la gobernanza y su recepción en el marco gubernativo actual de las sociedades latinoamericanas demostraron que las sociedades se han vuelto más conflictivas y que los medios de comunicación masiva, a veces, desinforman las decisiones políticas. Keltner *et al.*, (2003) entendieron el poder que usan los políticos como la capacidad relativa donde el individuo modifica el estado de otras personas a través de la negación o provisión de recursos.

Si se ejerce psicopolítica desde el biopoder y la psicotecnología, la corrupción sería el primer obstáculo de gobernanza porque, si los ciudadanos están por mucho tiempo seducidos, manipulados y entretenidos en la producción y explotación de su yo, se bloquea la conexión entre el Estado y el ciudadano. En esa línea, Rau (2010) señaló que la psicopolítica pertenece al régimen neoliberal como forma de gobierno biopolítico, de dominio físico y de control mental por las instituciones y organizaciones; el crítico entiende que este dominio es a nivel emocional más que cognitivo.

Por último, el Perú es un país muy golpeado por la violencia psicopolítica ejercida durante años por la corrupción que ha permitido que se empodere en todas las altas esferas públicas peruanas; según Proetica (2018), señaló, en

la X Encuesta Nacional de Percepciones de Corrupción, que el expresidente Alan García es percibido por los ciudadanos como el más corrupto de la historia en estos últimos 20 años con el 35% de encuestados; Alberto Fujimori tiene el 23%; Ollanta Humala, el 22% y Alejandro Toledo, el 15%; sin embargo, llama la atención que los ciudadanos conocen el problema de la corrupción, pero la aceptan dado que se escucha esta frase común: “roba, pero hace obra”. En este problema de la corrupción, es importante señalar que la participación de los ciudadanos es de espectadores, evadiendo de alguna manera la responsabilidad de participar juntamente con las autoridades en la solución de los problemas prioritarios, que es contemplada en la nueva gobernanza como un mecanismo de participación ciudadana para evitar o minimizar la corrupción (Aguilar, 2009). Una encuesta sobre la actitud de los ciudadanos frente a la corrupción evidenció que el 78% consideró que denunciar un acto de corrupción es peligroso; el 62% dijo que denunciar actos de corrupción es complicado, de trámite largo y engorroso; y el 60% manifestó que no vale la pena denunciar, porque es igual y no pasa nada (Ministerio de Justicia y Derechos Humanos, 2018).

Tabla 1. Análisis del uso del biopoder y psicotecnología desde la psicopolítica

Periodo	Biopoder	Ejemplo	Psicotecnología	Ejemplo
Periodo desde Alberto Fujimori (1990 hasta 2020)	Cambios en la legislación laboral: Informalidad, creación de nuevos puestos de empleo, flexibilización laboral, desprotección laboral y Desmejoramiento en la negociación colectiva	8 de cada 10 empleos son informales, ascendiendo hasta setiembre del 2020 a 75.2% en informalidad. (INEI,2020) Casos Minería, Agricultura, Industria y otros	Respuesta del estado para combatir el crimen organizado, Corrupción 60% y segundo la delincuencia (41.8%)	Manipulación de los medios de comunicación, prensa, televisiva, sobornos, Tráfico de influencias, conflictos sociales y otros

Fuente: Elaboración de los investigadores; datos estadísticos tomados del Instituto Nacional de Estadística e Informática (2020) y del Informe Técnico sobre Percepción Ciudadana sobre la gobernabilidad (INEI, 2020).

La psicopolítica ha existido desde hace mucho tiempo en otros campos de la ciencia; sin embargo, en estos últimos años, se ha enraizado en la política; en la tabla 1, se observa cómo desde el biopoder (controla lo físico) se acrecienta la informalidad y la explotación laboral, así como desde la psicotecnología (corrupción política), el crimen organizado, liderando la corrupción con 60.6% y la delincuencia con 41.8%; además la población

vincula todo ello con el poder político (Instituto de Estadística e Informática, 2020).

Biopoder en la corrupción

Se ejerce dominio desde la explotación laboral, así como control y manipulación sobre lo corporal o biopolítico; al respecto, Borgeaud-Garciandía y Lautier (2014) analizaron la personalización de la relación de dominación laboral: las obreras de las máquinas y las empleadas domésticas en América Latina, disfrazándose de paternalismo y generosidad sometiéndose y dejándose explotar por temor al desempleo. En el Perú, la explotación laboral y la informalidad se imponen como consecuencia de la mala gobernanza. Asimismo, Rodríguez (2011) llevó a cabo un análisis de los cambios que se produjeron desde los años 90, cambios significativos en la regulación de las interacciones laborales como los cambios de legislación laboral que inclusive tuvo 16 observaciones por la OIT por graves violaciones a normas internacionales que se inició en el gobierno fujimorista.

Un ejemplo claro son las contrataciones de terceros o locadores que realizan las instituciones del Estado en el año 99 pues había 66 inspectores de los cuales cuatro eran funcionarios y los otros 64 locadores de servicio; lo paradójico es que eran los encargados de luchar contra el fraude laboral y eran los mismo que estaban contratados fraudulentamente. Las secuelas para todo el país fueron el aumento de la informalidad, flexibilización laboral, desprotección a los empleados y otros problemas que perduran en la actualidad. Por otro lado, Ortiz-Arellano (2019) investigó sobre la administración pública, biopolítica y el arte de gobernar. Su objetivo fue analizar cómo la administración pública, a través de todos sus recursos en los escenarios de hacedor y ejecutor de políticas públicas, convirtió todo su actuar en un arte para modificar y ejercer en salud, educación, desarrollo social y regulaciones de la vida. Concluyó que la biopolítica y la gubernamentalidad son herramientas en la administración pública y esto le da acciones de aparato burocrático y las políticas públicas que de ella emanan colocando su dominio incluso por encima de los políticos profesionales.

En el Perú, la indiferencia de los ciudadanos en la política durante décadas logró que la corrupción se establezca con normalidad desde los años 1750 hasta la actualidad; no obstante, se fortaleció en estos últimos 30 años, según Quiroz (2019) quien cuantificó que los costos indirectos y directos de la corrupción del Estado peruano en el siglo XX equivalen a 3.3 por ciento del producto bruto interno (PBI). ¿Por qué la nueva gobernanza se aleja de resolver problemas de la sociedad? Se aleja porque en esa interacción en la que se encuentra el Estado y la población encontramos a una población adormecida por la manipulación y explotación de este sistema perverso.

Psicotecnología en corrupción

La psicotecnología surgió a inicios del presente siglo con la psicología. Era una ciencia básica de laboratorio de la piscotecnología aplicada a la educación, justicia, industria, sociedad y práctica clínica; aparece impartiendo conocimiento sobre la conducta y los procesos psicológicos, luego se suma el rigor científico. El pensamiento organizado es una psicotecnología que pensó hacer más felices y eficientes a las personas, además de que todos colaboran entre sí; aunque existe la posibilidad de que se crea que algunos de los problemas sean involuntarios o intencionados como los que ejercen más poder y los que se benefician con ese accionar como, por ejemplo, la corrupción política. ¿Podríamos pensar ingenuamente que esto podría cambiar? Definitivamente, es una utopía (Campitelli, 2006).

Según la Defensoría del Pueblo (2017), en el mapa de la corrupción en el Perú, entre el 2016 y el 2018, se encuentran expresidentes, exgobernadores, alcaldes y funcionarios con casos de corrupción en trámite en un 67%. En el caso de colusión, Lima y Ancash reportan el mayor número de casos con el 14% (Diario Gestión, 2019). Del mismo modo, existen alcaldes con presuntos delitos de organización criminal, sicariato, tráfico de terrenos, cobro indebido, usurpación agravada y otros. Exalcaldes de Villa María del triunfo, San Bartolo, Callao (región y provincia), Bellavista, Santa Rosa, La Victoria, Cuispes, Pisuquia, Punta Negra, Chiclayo y Tacna (provincia), Olmos, Huancavelica (alcalde de la provincia de Churcampá), Ayacucho (alcalde provincial de Vilcashuamán), entre otros distritos (Diario El Comercio, 2020).

Al analizar la psicopolítica y la gobernanza peruana en el siglo XXI, se infiere que ambas van en el mismo camino. La primera vista como un medio o instrumento usado por el biopoder y la psicotecnología desde políticos de turno como son expresidentes, ministros, congresistas, alcaldes, gobernadores y otros, quienes aprovecharon la idiosincrasia para cambiar leyes, normas a cambio de favor o de intereses individuales y/o políticas internacionales aprovechando esos medios para abusar del poder y cometer actos de corrupción en perjuicios del ciudadano y del Estado.

Mientras tanto, la ciudadanía está atiborrada y sumergida en los medios de comunicación que desinforman. Como son los casos de los expresidentes de los últimos 30 años que abarcaron desde el gobierno de Alberto Fujimori, Alejandro Toledo y todos sus gobiernos, Alan García, Ollanta Humala, Pedro Pablo Kuczynski y Martín Vizcarra; desde 1990 hasta 2020, ejercieron cambios de acuerdo a los tratados del libre comercio y siguieron las políticas neoliberales en favor de organismos internacionales, dejando de lado los intereses comunes del pueblo como es el caso de la explotación laboral que se vive desde los últimos ocho años en el Perú, puesto que presentó un 75% de informalidad en el trimestre finalizado, según el

Instituto Nacional de Estadística e Informática (Carranza, 2020); además se aprovechó la tecnología para fines de manipulación y desinformación a través de los medios de comunicación escrita, oral y televisiva como los “programas chatarra”, redes sociales sin filtro ni protección al menor, manipulación y control de los medios de comunicación por políticos de turno y otros. Según Byung-Chul (2016), la psicopolítica fue usada más en Rusia, luego se fue expandiendo por el mundo como una forma moderna de mantener viejas prácticas.

En el Perú, el estudio de Pérez (2019) trató sobre delitos de corrupción de funcionarios y servidores públicos en la región La Libertad desde el 2011 hasta el 2016. Tuvo como objetivo conocer si existe una corrupción con datos estadísticos alarmantes o era simple percepción del pueblo. El investigador reveló un informe sobre la corrupción ejercida en dicha región desde los años en mención con la finalidad de fortalecer la institucionalidad democrática mediante la generación de información para una mejor ejecución de buenas prácticas en toma de decisiones a favor del interés público. Así mismo, encontramos un estudio que analiza la implementación del programa *Compliance gubernamental* en los sectores que están expuestos a prácticas corruptas de la administración pública durante la atención de la pandemia (Madrid y Palomino, 2020).

Por otro lado, en México, Gómez (2016) analizó la corrupción gubernamental entre los años 1920-1934; el autor reúne la corrupción entre los presidentes Álvaro, Obregón y Plutarco; con esto evidencia que la corrupción está en varios sectores y depende del Estado, producto de la dominación militar revolucionaria, las relaciones, clientes y amistades de los mencionados. Asimismo, Carreón (2019) efectuó un análisis comparativo sobre el presupuesto que reciben las instituciones públicas mexicanas, la eficiencia gubernamental y la corrupción; los resultados arrojaron, en el 2015, que la corrupción se ubicaba en el segundo puesto con el 50.9% en Chihuahua, 17.62% en la Ciudad de México, 16.17% en Durango y en Baja California con un 14,13%, inclusive se encontró que, donde había una mejor rendición de cuentas, la tasa de corrupción era más alta.

La psicopolítica y la gobernanza se encuentran empañadas y obstaculizadas por el fenómeno de la corrupción que no permite una buena interconexión entre el Estado y el pueblo. El primero se torna más individualista y sin participación ciudadana; el segundo busca fomentarla a través de la cooperatividad, de esta manera, mejorar las relaciones entre el Estado y el pueblo. Los políticos ya no piensan en el interés público y la población va perdiendo el interés por lo político. Tal es el caso de los eventos políticos del 2018 luego de que renunciara Pedro pablo Kuczynski (PPK) y los casos de Lava Jato en los que se detuvieron a expresidentes incluyendo al mismo PPK (Ponce de León y García, 2019) donde la negociación entre funcionarios y partidos políticos están por doquier usando los medios de

comunicación, el soborno, el chantaje y el tráfico de influencias para fines utilitaristas e individualistas antes de pensar en los intereses públicos.

La psicotecnología en la corrupción fue una forma de manipulación ejercida por los expresidentes del Perú; se consideró tres tipos de psicotecnología: a) la de naturaleza material que tiene su base en la bioquímica y física; b) la de naturaleza virtual que se basa en la programación informática y c) la de carácter social intangible que puede tener una base psicomecánica (Portillo, 2012). En esa línea, se tomará el tercer tipo que es la de carácter social intangible porque, desde hace muchos años, se ha instaurado el crimen organizado desde las altas esferas políticas y ha aumentado la inseguridad ciudadana porque el Estado no supera los desafíos que se necesitan para combatirlo (Vizcarra *et al.*, 2020).

Por otro lado, Carranza (2020) analizó el gobierno de Vizcarra y cómo impulsó las reformas institucionales a través de referéndum; es decir, Vizcarra informó mediante los medios su posición al pueblo de que no estaba de acuerdo con la bicameralidad; pero sí con la conformación del órgano de designación de jueces y fiscales, con el financiamiento de organizaciones políticas y con la no reelección de congresistas; frente a ello, respaldó una fuerte inversión en campaña de difusión y encuestas donde ganó. Aquí podemos inferir cómo forzó el referéndum y los resultados de este para beneficio exclusivo de una posición política.

Conclusiones

Se llegó a las siguientes conclusiones:

- La psicopolítica es empleada como una herramienta de seducción para beneficio único de los políticos, así como para ejercer el control y sometimiento que no permite participar a ciudadanos y sociedad civil organizada; es decir, no se piensa en el bien o interés común; por todo ello, la ciudadanía se muestra menos involucrada con lo cívico. Los expresidentes condenados por corrupción y abuso de poder, durante los últimos 17 años, ejercieron la psicopolítica desde los medios de comunicación tales como la televisión, la prensa; además hubo sobreproducción de normas y disposiciones legales para beneficio propio. En consecuencia, en el contexto de pandemia covid-19, los sistemas básicos han colapsados como son salud, educación, seguridad y otros ineficientes desfasados que no cumplen los objetivos de proporcionar servicios de calidad.
- No se puede hablar de gobernanza cuando la participación ciudadana se encuentra anulada, seducida y entretenida en los medios de comunicación chatarra sin filtros que utilizan los personajes

políticos para llegar al poder en épocas electorales (democracia representativa) luego, una vez que lo logran, se olvidan de todas las promesas electorales (democracia participativa).

- Se puede inferir que la psicopolítica a través del biopoder y la psicotecnología han llevado a fortalecer y enraizar la corrupción y esto ha desencadenado que no se ejerza una gobernanza eficaz. El avance de la tecnología debiera favorecer el progreso y desarrollo en la gestión pública, aunque no siempre es así.

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Supporting System of the National Security System of Ukraine: Legal Regulation

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Abstract

The purpose of the investigation is to determine the components of Ukraine's national security support system and the nature of its implementation in the context of current events in the country. As the main content of the investigation, it has carried out a comprehensive analysis of the state of national security in Ukraine, its system, main tasks, and structural elements. In addition, it has examined the state of realization of Ukraine's national security in the context of modern developments in the state. Methodologically, the documentary research technique was used since the main sources of the study were documentary. The basis is the dialectical method of knowledge of the facts of social reality, on which comparative formal and legal approaches are largely based. The main organs that guarantee the national security of the state include the country's Armed Forces and all state power structures who have as their main task assigned by the state: to guarantee the highest possible level of protection of the nation together with its strategic interests.

Keywords: state security; national security; national security elements; national security support system; legal basis of national security in Ukraine.

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Sistema de apoyo del sistema nacional de seguridad de Ucrania: Reglamento legal

Resumen

El propósito de la investigación es determinar los componentes del sistema de apoyo de la seguridad nacional de Ucrania y la naturaleza de su implementación en el contexto de los eventos actuales en el país. A modo de contenido principal de la investigación, se ha realizado un análisis exhaustivo del estado de la seguridad nacional en Ucrania, su sistema, tareas principales y elementos estructurales. Además, se ha examinado el estado de realización de la seguridad nacional de Ucrania en el contexto de los acontecimientos modernos en el estado. En lo metodológico se hizo uso de la técnica de investigación documental ya que las principales fuentes del estudio fueron documentales. La base es el método dialéctico de conocimiento de los hechos de la realidad social, en el que se sustentan en gran medida los enfoques legales formales y legales comparados. En las conclusiones cabe señalar que los principales órganos que garantizan la seguridad nacional del estado incluyen a las Fuerzas Armadas del país y a todas las estructuras de poder estatales que tienen como tarea principal asignada por el estado: garantizar el más alto nivel posible de protección de la nación junto a sus intereses estratégicos.

Palabras clave: seguridad del estado; seguridad nacional; elementos de seguridad nacional; sistema de apoyo a la seguridad nacional; bases legales de la seguridad nacional en Ucrania.

Introduction

Ukraine's progressive development in today's conditions depends primarily on the implementation of effective policies in the field of protection of national interests and territorial integrity. Thus, the security of the state is of great importance, which makes it possible to prevent and neutralize any threats to the destruction of the interests of citizens, their property, as well as life and health. The meaning of the concept of "national security" is determined by the historical and sociopolitical conditions of the state in which it is originated, operates and develops. It should be emphasized that the understanding of the essence of national security differs among different segments of the population. In particular, it is mainly associated with the activities of special services or identified with the defense of the state.

1. Literature review

Analysis of publications that have begun to explain the problem has been carried out. The issue of the national security and its understanding is in the purview of such scholars as Liutikov, Kondratiev, V. Lipkan, H. Sytnyk, etc. However, despite the large number of scientific papers that investigate various aspects of national security of Ukraine, we can say that in the context of recent events in our country and since the adoption of the new Law of Ukraine “On National Security of Ukraine”, today there are no fundamental theoretical and legal studies of the state of national security, its system, main tasks and structural elements.

2. Material & methods

The methodological basis of the study is philosophical, general, and special scientific methods. Thus, the system-structural method made it possible to formulate the main elements of legal regulation to Ukrainian national security system. Further, the application of the comparative and legal method was useful in analyzing the differences between national and international law of Ukrainian national security system.

The use of methods of analysis, synthesis, systemic and structural-functional methods allowed to study the main components of the system of public administration in the field of national security of Ukraine, their connections and at the same time to analyze the administrative-legal category “national security system” as a single whole, to formulate the concept of “public administration in the sphere of national security of Ukraine”, to analyze its nature and essence. The application of the structural-functional method contributed to a comprehensive study of administrative and legal relations that arise and are carried out in the process of protecting national interests and guaranteeing the security of individuals, society, and the state in Ukraine against external and internal threats in all spheres of life.

The comparative legal method was used in the process of studying and theoretically substantiating different models of public administration. The statistical method contributed to determining the main trends in the development of public administration in the sphere of national security of Ukraine in different conditions. The formal-legal method was applied to analyze the practice of public administration in the sphere of national security of Ukraine, etc. An integrated approach has contributed to a comprehensive consideration of national security as a category of administrative law, the study of its essence and content.

3. Results and discussion

The analysis of the domestic scientific literature makes it possible to distinguish different approaches to understanding the concept of national security. From the UN documents follows the approach according to which, national security is understood as the security of the state in all spheres of life of the people, as the sole bearer of sovereignty and source of state power (Leheza *et al.*, 2021).

For example, V.A. Lipkan understands national security as a set of officially adopted views on goals and state strategy in the field of ensuring the security of individuals, society, and the state against external and internal threats of political, economic, social, military, man-made, ecological, informational and other kinds, taking into account the available resources and capabilities (Lipkan *et al.*, 2006).

Ya.Yu. Kondratiev defines that national security is the ability of a nation to meet the needs necessary for its self-preservation, self-reproduction and self-improvement with minimal risk of damage to the basic values of its current state (Kondratiev and Lipkan, 2003).

M.O. Kosolapov affirms that security is a stability that can be maintained over the long term, a state of reasonable dynamic protection against the most significant of the actual threats and dangers, as well as the ability to recognize such challenges and take timely measures to their neutralization (Kosolapov, 1992).

It should be noted that it is traditionally believed that the basis of the national security of any country at any time is the preservation of the state within the borders in which it exists at this historical moment. Therefore, the threat to state “integrity” is supposedly a universal and non-ideological characteristic. This threat is especially evident during the war, as a result of which the latter is always a reason for national consolidation (i.e. emotional experience of unity beyond all social and class divisions) and national mobilization (Andrieieva, 2009).

Consequently, it can be confirmed that there are indeed many different approaches to understanding national security, all of which differ to a certain extent, but we can state that we are talking about a whole complex of political, economic, social, health, military and legal measures aimed at ensuring the normal functioning of the nation and eliminating possible threats to the state (Leheza *et al.*, 2021).

The problem of national security is related to political stability. If national security is a permanent system of protection of the interests of citizens of the country and the state in all spheres of society (from economy and defense to the daily security of citizens), then political stability is a state of society directly affected by the current national security system. If we consider

the national security of the country as a system of preserving the interests of the country as a whole to ensure its strategic development, it implies a certain balance between controlling resource flows and the implementation of decisions at all levels of executive power. In addition, this requires the effective functioning of all branches of state power (Sytnyk, 2012a).

It is well known that the main objects of national security are citizens, their constitutional rights and freedoms, as well as their lives and health. Based on this, the main task of every state governed by the rule of law and democracy, which recognizes the human being as the supreme social value, is to ensure proper conditions for human existence, preservation of health, honour, dignity, the right to self-determination and, of course, private property (Leheza *et al.*, 2021).

National security in Ukraine is seen as a state of protection through the implementation of an effective state policy of vital interests in accordance with national and international law in various spheres of public life (Prymachenko *et al.*, 2021).

In addition, the protection of individual and citizen, society and the state is also ensured by its relevant activities, which reduce or avert probable threats and increase the protective, mobilizing functions in times of danger. At the heart of this activity is the assertion and realization of the national interest of the country, a global, comprehensive integrated interest, the implementation of which allows the realization of vital private, group and public interests of the vast majority of citizens. Thus, national security is a kind of synthesis of interests and needs of all social actors (Smolianiuk, 2017).

As regards the threats in question, they can arise in various spheres of life. They are of a subjective and objective nature. Everything that man has created with his own hands can be a threat to his existence. Rapid scientific and technological progress, globalization, modernization, the constant growth of human needs have also given rise to negative consequences. Examples of new threats include transport accidents, catastrophes, explosions at nuclear power plants and chemical plants, the improvement of weapons of mass destruction, the destruction of the Earth's ozone layer, global warming, etc. There are many classifications of threats to national and international security based on various criteria. Most scholars distinguish according to the nature of threats: political, military, economic, social, cultural, environmental, and ideological (Pylypenko, 2014).

For example, speaking of Ukraine today, the current threats to the national security of our state include aggressive actions of the Russian Federation to deplete the Ukrainian economy and undermine social and political stability in order to destroy the Ukrainian state and seize its territory; inefficiency of the national security and defense system of

Ukraine, corruption and inefficient public administration system, economic crisis, depletion of financial resources, lower living standards, threats to energy security, threats to information security, threats to cybersecurity and security of information resources, threats to the security of critical infrastructure, threats to environmental security, etc (Pryimachenko *et al.*, 2021).

In addition, as an example, it is worth mentioning the events in Syria related to the conflict in this country, mass refugee flows, exacerbation of terrorism in Europe, the deteriorating humanitarian situation on the periphery of the EU, neighboring countries, growing internal tensions in some European countries and the strengthening of nationalist, extremist parties and movements - all this clearly illustrates the trends in the development of transnational threats to modern states (Yuskiv, 2016).

As already mentioned, national security is ensured by realizing the priority of national interests, timely action and based on the principles of a democratic state governed by the rule of law.

Any state and Ukraine is no exception, is not able to simultaneously cover the whole range of problematic issues in the field of national security and begin to solve them. There are quite obvious limitations on the means and resources that are available, the means of their application. Hence, it follows the need to identify priority national interests and goals, which should be clarified in the process of developing national security policy. That is why, under any circumstances, national security policy should primarily be aimed at ensuring the geopolitical interests of Ukraine, its independence, political stability, and progressive socio-economic development. In the field of domestic policy, the main prerequisite for achieving the protection of national interests should be the unification of the nation to solve spiritual, cultural, and material problems based on general stability and harmony in the state, nonviolent resolution of internal social conflicts, and external - planning and implementation of foreign policy actions from the point of view of ensuring national interests (Sytnyk, 2010).

In every developed foreign country, national security, due to its multi-component nature, requires an effective system to ensure it. One of the primary tasks is to ensure national security through actions aimed at protecting and realizing national values and interests, in the context of which the question of the need for a certain strategy is raised.

France, for example, has a national security strategy that includes five main functions to be provided by the defense and security forces: knowledge and warnings; prevention, deterrence, protection, and intervention. Knowledge and warnings are a new strategic function. The French believe that knowledge is the first line of defense in an unstable world. Knowledge guarantees their traditional autonomy in decision-making and provides an opportunity for France to take the strategic initiative within both NATO

and the EU. In addition, France identifies four priorities in protecting Europeans: strengthening cooperation in the fight against terrorism and organized crime; improving European defense capabilities; coordinating defense agencies against cyber attacks; and providing a reliable supply of energy and strategic raw materials. In order to combat them in France in 2008 a new body, the Defense and National Security Council, was created for the first time (Sytnyk, 2012b).

Thus, if there is a strategy of national security, the system of national security is created by the state, an appropriate system of both state and non-state institutions, using theoretical and methodological, normative and legal, information and analytical, organizational and managerial, intelligence principles are designed to solve problems of national security in a certain way defined by the legislation. The main elements of the national security system, respectively, are its subjects and objects. In order to ensure its integrity, it is also important to have direct and feedback links between them, interaction with the political organization of the state as a whole, the influence of internal and external environment (Reznikova, 2015).

The structures of the national security system include, inter alia, state authorities and their powers, legislative support (the regulatory framework for the activities of these authorities) non-governmental organizations and their regulations. As for the first structures, they should deal with national security in a systematic way, using the entire powerful potential of our state, while the second - non-governmental organizations - belong to civil society. It should be noted that with the weakness and fragmentation of civil society, it is difficult to believe that the network of these institutions is able to ensure the interests of the citizen at the state level.

It is worth noting that the system of ensuring national security is not just a set of interacting structures, but also a certain process of formation of the legal field and political decision-making in the sphere of ensuring national security. The structure of the system to ensure national security should include a subsystem, the main function of which is not only the development and adoption of state-management decisions on the implementation of national security policy, but also the formation of the legal field of the said policy. This function is performed by the system of state management of national security, which is a subsystem of the national security system (Sytnyk, 2012b).

Conclusion

Thus, the system of national security has its components, which include: protection of state sovereignty and territorial integrity; guaranteeing the constitutional order; creating conditions for political and economic independence; ensuring public order; fight against crime, etc.

It is clear that all these actions are carried out by authorized bodies, which in accordance with their competence implement various state programs, regulations, directives and international treaties, as well as the rules of domestic law. It should be noted that the main bodies that ensure the national security of the state include, first of all, the Armed Forces of the countries and all power structures of the state. All of them have the main task assigned to them by the state - to ensure a high level of protection of national interests, in the context of which appropriate conditions are created for the stable development of each individual, society and state. It should be emphasized that the condition for the effectiveness of this policy is the priority of non-violent ways to protect national interests and values.

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Legal regulation of illegal influence on the results of official sports competitions: criminal aspect and international experience

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Abstract

The purpose of the research is devoted to the criminological description and explanation of the state of illegal influence on the results of official sports competitions in Ukraine. A reading of the high level of latency of crimes according to article 369-3 of the Criminal Code of Ukraine, evidence that it is at least 99% of its real level. The structure of match manipulation was revealed and analyzed according to the type of sport, the method of illegal influence on the results of official sports competitions, as well as the subjects of bribery. The characteristic of the corresponding structural units is given. Methodologically, the basis of the research is the dialectical method that serves to interpret social and legal phenomena through documentary sources. It is concluded that the most intense criminal match-fixing is practiced in sports such as football, futsal, basketball, and volleyball. Among the ways to encourage athletes to commit illegal acts, bribery predominates (75%). At about the same level in terms of prevalence with small fluctuations in specific weight are structurally found ways to influence athletes such as incitement (10%) and conspiracy (8%).

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Keywords: sports; official sporting events; influence on results; corruption; bribery.

Regulación legal de la influencia ilegal en los resultados de las competiciones deportivas oficiales: aspecto penal y experiencia internacional

Resumen

El propósito de la investigación está dedicado a la descripción criminológica y la explicación del estado de influencia ilegal en los resultados de las competiciones deportivas oficiales en Ucrania. Una lectura del alto nivel de latencia de los delitos según el artículo 369-3 del Código Penal de Ucrania, evidencia que es al menos el 99% de su nivel real. La estructura de la manipulación de partidos fue revelada y analizada según el tipo de deporte, el método de influencia ilegal en los resultados de las competiciones deportivas oficiales, así como los sujetos de soborno. Se da la característica de las correspondientes unidades estructurales. Metodológicamente la base de la investigación es el método dialéctico que sirve para interpretar fenómenos sociales y jurídicos mediante fuentes documentales. Se concluye que el amaño de partidos delictivo más intenso se practica en deportes como el fútbol, el fútbol sala, el baloncesto y el voleibol. Entre las formas de incentivar a los deportistas a cometer actos ilícitos, predomina el soborno (75%). Aproximadamente al mismo nivel en términos de prevalencia con pequeñas fluctuaciones en el peso específico se encuentran estructuralmente formas de influir en los atletas como la incitación (10%) y la conspiración (8%).

Palabras clave: deportes; eventos deportivos oficiales; influencia en los resultados; corrupción; soborno.

Introduction

The only special legal norm that provides for criminal liability for illegal, in fact corrupt influence (although according to the note to Article 45 of the Criminal Code of Ukraine this is not the case, but in the criminological sense and meaning is fully embedded in the understanding of the essence and manifestations of corruption, and especially in the light of the provisions of the Law of Ukraine “On Prevention of the Influence of Corruption Offenses on the Results of Official Sports Competitions”) on the results of official sports competitions is Art. 369-3 of the Criminal Code of Ukraine, which

provides for liability for the so-called match-fixing - the organization of sports competitions with a predetermined result. The criminal law was supplemented by it on 03/11/2015, and it definitely is grounded; all the necessary grounds were and are available and the basic principles of criminalization of relevant socially dangerous acts. Therefore, it is worth talking about the four-year period of socially demanded effect of this norm, but at the same time the results of its application are very modest. Domestic sport has not been properly cleansed of the destructive and harmful effects of match-fixing. This phenomenon remains largely latent, but at the same time large-scale. Identification, description, and explanation of the main indicators of the prevalence of crimes under Art. 369-3 of the Criminal Code of Ukraine is, therefore, an important condition for improving the effectiveness of law enforcement and criminal prevention practice.

1. Literature review

Modern sport needs private legal mechanisms of regulation, because they provide the best way to protect the rights of individuals and legal entities — participants in relations in the field of sports (Tkalych *et al.*, 2020). Law, as a unique social phenomenon, arises with the emergence of the state, because an indispensable attribute of any legal norm is the possibility of using state coercion in case of noncompliance with its instructions (Tkalych *et al.*, 2020). As social relations in the field of sports became more complicated, there was an increasing need for their proper legal regulation (Kharytonov *et al.*, 2021).

2. Material and methods

The methodological basis of the study are philosophical, general, and special scientific methods. Thus, the system-structural method made it possible to formulate the main elements of legal regulation to combat corruption in sports in their combination and interaction.

Further, the application of the comparative-legal method was useful in analyzing the differences between national and international law in the fight against corruption, in particular in sports. The formal-legal method has proved its effectiveness in studying the content of legal norms in the aspect of combating sports corruption.

Moreover, the method of analysis is reflected in the study of manifestations of sports corruption and legal regulation, which is responsible for combating such manifestations. The method of synthesis was used to find the best ways to develop anti-corruption legislation, to formulate conclusions on the subject of research.

What is more, the method of deduction has proved itself in the study of the specifics of anti-corruption norms as a reflection of the general principles of the legal systems of foreign countries.

Finally, the method of induction provided a generalization of the research topic based on scientific developments, in particular, empirical data on the prevalence of corruption in sports and law enforcement of anti-corruption legislation.

Concerning the elaboration of the problem in scientific sources and other literature, it should be noted at once that most of the research in this area of knowledge is primarily articles in the media based on the results of journalistic investigations. Therefore, it has become common practice to use them when quoting in scientific papers.

3. Results and discussion

During 2015-2019 and 6 months of 2020, only 6 cases of criminal influence on the results of official sports competitions were registered. Of these, 2 - in 2016, 3 - in 2019 and 1 - in January - June 2020. In two of these six proceedings, the pre-trial investigation was suspended in accordance with Art. 280 of the Criminal Procedure Code of Ukraine: one at a time - in connection with the illness of the suspect and in connection with the failure to establish the location of the suspect. It should also be emphasized that no verdict has been passed in these proceedings. Therefore, investigative and judicial statistics on this category of crimes are not representative, but indicative, in understanding the symptomatic miscalculations in the reformist progress of law enforcement.

Even a cursory content analysis of media reports reveals a wide prevalence of crimes under Art. 369-3 of the Criminal Code of Ukraine. Here are just a few examples.

According to the statement of the chairman of the committee on ethics and fair play of the Football Federation of Ukraine (now - the Football Association of Ukraine) F. Baranka, the football club "Sumy" systematically engaged in two types of match-fixing - bribery of referees or opponents. After that, they bet on their victory. In fact, it was an investment. When "Sumy" won, and the rate brought income. But when they didn't pay the referees and gave in, they played against themselves "in the office". That is, "Sumy" earned both on their victories and on their defeats (Baranka, 2019). In the situation with Sumy, bets were made both in Ukraine and abroad. But in most cases, this happened in Asian bookmakers markets. If we talk about the scale of earnings on these transactions, then according to the most modest estimates, it is about 10 million euros (Baranka, 2019). In one and a half years, the club has played 30 contract matches (Baranka, 2019).

This, as in many other cases, is about the use of match-fixing not as an end in itself, ie in the context of achieving the desired tournament result, gaining appropriate points, but as a tool of so-called betting - further enrichment by means of sports betting. Large-scale corruption schemes with the organization of contractual football matches were revealed by law enforcement agencies in June 2019. Hence, according to official reports the National Police recorded 50 cases of contract football matches.

A large-scale special operation aimed at identifying persons involved in the organization of “ordered” football matches lasted more than a year. The illegal activities of five criminal groups and 35 football clubs have been documented. Police conducted 40 searches in 10 regions of Ukraine: Kyiv, Dnipropetrovsk, Donetsk, Zaporizhia, Odesa, Sumy, Lviv, Kharkiv, Mykolaiv and Chernihiv (Sokurenko, 2019).

The investigation has identified individuals involved in corrupt schemes of “custom” football matches, ranging from the top division of the Premier League to junior teams. This is the first case in Ukraine when not only players of football clubs, but also organizers will be brought to justice. Investigative actions are carried out by the organizers of contract matches, former and current football players, as well as other persons involved in criminal schemes. The pre-trial investigation is conducted under Part 4 of Art. 368-3 (bribery of a person providing public services) and Part 1 of Art. 369-3 (illegal influence on the results of official sports competitions) of the Criminal Code of Ukraine (Sokurenko, 2019).

There are many such examples. That is, in reality, the level of criminal match-fixing in one form or another is much higher than the statistical 6 crimes over four and a half years. We should talk about the ultra-high level of latency, which according to our research reaches more than 99%. The real level of crimes under Art. 369-3 of the Criminal Code of Ukraine, only in the professional segment of big football annually fluctuates at 150-200. If we add to this figure the cases of illegal influence on the results of official competitions in other sports (especially in futsal, basketball, volleyball, rugby), the level of crime under investigation will be at least 300 crimes per year (Leheza *et al.*, 2021).

It should be noted that over the past 10-15 years there has been a change in the subject and mechanism of the corruption agreement under the scheme of match-fixing in combination with betting, sports betting. This is due to the variety of possible sports results for which bookmaker bets are accepted. For example, popular betting lots now are specific periods of playing time when a goal is scored / conceded in football, as well as receiving a red card by a specific player at a certain time, assigning a penalty, etc. It is worth pointing out the exceptional profitability of betting during the ongoing match, usually during its break. For example, the bet on the number of goals conceded in a football match, the total final score with

a zero score in the first half will have the highest coefficient. In this regard, in the Ukrainian football championship we can observe some atypical matches, when in the unsuccessful first game segment the second becomes rich in goals scored. Both individual players and whole teams, coaches and club owners are interested in this (Leheza *et al.*, 2020).

For example, in 2016, during the match of the First League teams between Mariupol's Illichivets and Girnyk-Sport from Horyshny Plavny, the hosts, losing 0: 1 after the first half, won 3: 1. All would be nothing if during the meeting in different offices for the victory of the Azovs did not bet on the amount of £ 218 thousand. During the internal investigation, the shadow fell on two Girnyk players - defenders Serhii Herashchenkov and Oleksandr Hrabar. Both were tested on a lie detector. Herashchenkov denied the guilt, but the polygraph revealed that he was lying. At the same time, Hrabar confessed to the crime, but did not reveal the customers. The materials of this case were transferred to the National Police (Verbytsky, 2017).

In total, our survey of 360 professional athletes in big football (150 persons), basketball (50 persons), volleyball (50 persons) of Ukrainian clubs, as well as rowing (70 persons), powerlifting (40 persons) gives the opportunity to form a criminological structure of illegal influence on the results of official sports competitions by the criterion of the method of influence directly on athletes.

Thus, as can be seen, bribery predominates among the ways to encourage athletes to commit illegal acts. We think this is a very telling circumstance, which further emphasizes the problem of commercialization of sports. And this is not just a purely Ukrainian problem. As H.Yu. Boryduhova rightly points out, in the global analysis of the problems of bribery in sports, people most often agree to manipulate money - out of greed, or, for example, athletes who are not paid for months, or club officials, if the club has financial problems, etc. The benefits, depending on the country, sport, level of competition and league, range from \$ 200. up to 300-700 thousand dollars. (See SAS 2009 / A / 1920 FC Pobeda, Alexander Zabrchanets, Nikolche Zdravetski v. UEFA, SAS 2011 / A / 2362 Mohammad Asif v. International Cricket Council, etc.)

At the same time, the situation in Ukraine has its own specifics. It is not a secret that professional sports clubs, including in our country, are not only a matter for the soul, but also business projects. It is very good when these motives, patriotism-cheering and making money are organically combined without distorting each other. However, unfortunately, the realities of today's Ukrainian sports are such that a considerable problem for any football or basketball club, other sports organizations is to reach at least "zero", self-sufficiency, minimum liquidity and the profitability. Therefore, the desire to make money in sports is often combined with

the use of illegal mechanisms. To understand their essence, we believe that the analytical scheme of anomie in R. Merton's concept is quite suitable. It is known to the general public of the scientific community, which frees us from the need for a more detailed argumentation of its provisions in the projection on the plane of the subject of this study.

Instead, we also emphasize the fact that approximately at the same level of prevalence with a small fluctuation in the proportion of structurally located such ways of influencing athletes as incitement (10%), conspiracy (8%) and coercion (7 %). And if the first two - express directly non-commercial, unselfish, but self-actualizing, consolidating-group motivation of athletes who voluntarily, consciously and on their own choose illegal mechanisms to achieve certain sports results in competitions, the third way, coercion, expresses its violent nature. As a rule, players are threatened with: a) termination of the contract unilaterally on discrediting grounds (70%); b) termination of game practice, transfer to reserve teams, to the reserve (20%); c) disclosure of information about his previous illegal activities in the field of sports (10%).

It should be noted that professional athletes are not the only recipients of illegal influence, in particular, bribery, which can determine the results of official sports competitions. Our research reveals such a criminological structure of match-fixing on the basis of the recipient's illegality.

The main efforts of the subjects of illegal influence on the results of official sports competitions on bribery are directed directly at the athletes. In total, the share of such influence is 78% with a slight predominance of bribery of several athletes (players) of one team (40%) over bribery of an individual player (38%).

In the case of big football (namely in this sport, given its popularity, the illegal influence on the results of official sports competitions prevails), bribing an individual player is mostly aimed at the defender (defender or midfielder) in terms of playing. This is the easiest way to influence the outcome of the competition, because almost any violation of the rules of the game in the penalty area leads to the appointment of a penalty, which most likely ends with a "goal". In this case, as a rule, it is difficult to detect the intent of violations of the rules of the game by the defender due to the dynamic and contact nature of this kind of sport itself.

In second place in the ranking there is bribery of members of the coaching staff (10%). More often than one of the assistant head coaches and less often the head coach himself. In the future, through the coaching staff there is an indirect influence on the players with the use of other, non-monetary levers of influence on the players, the structural construction of the team game, etc.

It is interesting to note that the share of bribery of judges is relatively insignificant (5%). This is due to close control over their activities, the spread of the use of technical means of control over the course and results of the competition, which minimizes the role of judicial discretion and the possibility of significant impact on the results of sports competitions. Moreover, the respondents we interviewed from among both professional athletes, coaches, and experts of the refereeing corps of the football Premier League and the First League show a tendency to the predominance of attempts to bribe additional referees of the refereeing team (in particular, linemen). in big football) over bribery of the main referees.

The share of bribes (and their attempts) of sports club owners (5%) is also relatively small. These are usually small sports clubs that are experiencing acute financial problems and do not claim high tournament seats. Most of these clubs are representatives of the first, second and lower leagues of playing kinds of sports.

The least common (no more than 2% of cases) is bribery of support staff: medical workers, physiotherapists (to extend the healing period, recovery of the injured athlete). Experts also pointed to cases where athletes in the team were poisoned by water, and they performed below their capabilities without knowing it - the main role was played by the team manager (Bordyugova, 2015).

The most criminally affected sport in the context of the level and intensity of the spread of illegal influence on the results of official sports competitions is football (big football), which accounts for approximately 85% of these crimes. Approximately 5% - for basketball and mini-football (futsal), 2% - volleyball, 1% - rugby, the remaining 2% in total other kinds of sports.

The geography of match-fixing has no criminological significance, as the nature of the relevant crimes eliminates their territorial specification. The determination complex of illegal influence on the results of official sports competitions does not have a pronounced connection of either general or group or specific factors to a certain administrative-territorial location (Leheza *et al.*, 2020).

It is necessary to point out separately the prevalence of the practice of material incentives by representatives (owners, managers) of one sports club of athletes from another in competitions with the third team for additional motivation for activity, dedication. The investigative practice follows the way that in the legal assessment of the victorious actions the corpus delicti provided for in Art. 396-3 of the Criminal Code of Ukraine is not found. There is no unanimity in science on this issue. A number of scholars, for example, do not take a position on the falsity of this law enforcement practice and insist on the need to qualify such “incentives”

as illegal influence on the results of official sports competitions through bribery (Semenyuk, 2017).

Others, to whom we join, claim the absence of *corpus delicti* in these actions and the correctness of investigative practices. Thus, K.P. Zadoia notes that under the responsibility according to Art. 369-3 of the Criminal Code of Ukraine does not cover the practice of material incentives for athletes from another sports club for achieving a certain positive result during sports competitions with a third competitor (rival). Such cases cannot be qualified under Part 1 of Art. 369-3 of the Criminal Code of Ukraine, as such material incentives cannot be considered aimed at incorrect change of the course of competitions or their result (Zadoya, 2015).

Indeed, this is a kind of bonus (albeit advance), which can not affect the manifestation of additional, not due to the existing sports conditions of the athlete qualities, intentional violations of the rules of the game or refraining from performing, improper performance of its game function (or other sports function). It is also not about the interests of the service or the authority of a subject of sports relations, because the athlete, in contrast to similar cases of “stimulation” of the official, does not act in the interests of those who provide material benefits or in the interests of any -which third person, not due to the previously established under the sports contract relations of a particular athlete, i.e. him and his club (Sokurenko, 2019).

4. International experience of illegal influence on the results of official sports competitions

As part of our study, we will try to compare the criminal laws of these countries in order to identify general, common, different, and unique aspects in the criminal law of Ukraine and foreign countries on liability for illegal influence on the results of official sports competitions. It should be noted that our study will be conducted according to criteria such as *corpus delicti* and sanction. We believe that this is how it is possible to obtain certain information about the areas of improvement of Art. 369-3 of the Criminal Code of Ukraine and the expediency or in expediency of such changes.

The first criminal law to which our attention will be paid will be the Criminal Code of the Republic of Azerbaijan. Thus, Chapter 24 “Crimes in the Sphere of Economic Activity” of the Criminal Code of the Republic of Azerbaijan (Criminal Code of the Republic of Azerbaijan, 1999) in Art. 192-2 provides for liability for manipulation of sports competitions.

The obvious difference between the Criminal Code of the Republic of Azerbaijan is the placement of Art. 192-2, which provides for criminal liability for manipulation of sports competitions, in the chapter “Crimes

in the sphere of economic activity” in contrast to Ukraine, where Art. 369-3 is placed in the section “Crimes in the field of official and professional activities related to the provision of public services” of the Criminal Code of Ukraine, which in turn determines the different generic object of the studied criminal law.

The subject of the crime, as in Art. 369-3 of the Criminal Code of Ukraine, can be both material and non-material.

Among the ways to commit a crime in Art. 192-2 of the Criminal Code of the Republic of Azerbaijan, the legislator singles out an offer, promise, transfer, demand, receipt, acceptance of an offer or assurance, use of violence or threat of violence, threat of dissemination of compromising information or threat of destruction of property. We can see that the list of ways to commit a crime is much wider than in Art. 369-3 of the Criminal Code of Ukraine.

The subject of the crime can be both general and special. The crime is committed only intentionally.

Considering the punishment, we consider that imprisonment for a term of three to six years, provided for in Part 1 of Art. 192-2 of the Criminal Code of the Republic of Azerbaijan, is too harsh. We consider the provisions of the Criminal Code of the Republic of Azerbaijan to be positive, except for those similar to Art. 369-3 of the Criminal Code of Ukraine types of punishment, deprivation of the right to hold certain positions or engage in certain activities (Criminal Code of the Republic of Azerbaijan, 1999).

Also, in our opinion, it is a positive decision of the legislator to envisage such qualifying features in the commission of a crime as manipulation of sports competitions by an organized group or a criminal association (criminal organization).

The note of the researched article deserves special attention. First, it should be noted that in Part 1 of the note reveals the definition of “manipulation of sports competitions.” Thus, it means an act (action or omission) aimed at intentionally changing the course or outcome of sports competitions in order to obtain an illegal advantage in favor of the person or other persons. Let us recall that all explanations on the application of Art. 369-3 of the Criminal Code of Ukraine are placed in the Law of Ukraine “On Prevention of Corruption Offenses on the Results of Official Sports Competitions” of 03/11/2015 № 743-VIII (Law Of Ukraine, 2001).

Secondly, the possibility of exemption from criminal liability of a person who voluntarily reported a crime to the relevant state body or committed it through threats is considered positive.

Doing so, the Azerbaijani legislator allows the criminal to come to his senses, rehabilitate himself and take the path of correction. After all, the

regulation of social relations through criminal law is primarily aimed at recognizing human rights and freedoms as the highest social value.

Third, it is interesting to address the issue of bringing an official to justice. Thus, the official who committed the act provided for in Art. 192-2.2 of the Criminal Code of the Republic of Azerbaijan, in connection with the performance of their official duties (powers), is prosecuted under Art. 311 "Receiving a bribe (passive bribery)".

With this step, the legislator was able to place Art. 192-2 of the Criminal Code of the Republic of Azerbaijan in the chapter "Crimes in the sphere of economic activity" (Criminal Code of the Republic of Azerbaijan, 1999).

The Criminal Code of the Republic of Armenia provides for criminal liability in a slightly different way. Thus, in Chapter 22 "Crimes against economic activity", Art. 201 prescribes criminal liability for bribery of participants and organizers of professional sports competitions and spectacular commercial competitions (Criminal Code of Armenia. Legislationline, 2003).

From the title of the article we can understand that it provides for criminal liability only for bribing participants and organizers of professional sports competitions and spectacular commercial competitions. Other ways of committing a crime have escaped the attention of the legislator (Leheza *et al.*, 2021).

On the negative side of Art. 201 of the Criminal Code of the Republic of Armenia, we note the non-alternative sanction under Part 2 (only imprisonment for a term not exceeding five years).

On the positive side, we note the increased sanction for the qualified corpus delicti under Part 2 of Art. 201 (committed by a group of persons by prior conspiracy or an organized group), as well as a broad alternative to punishment for committing a crime under Part 3 of Art. 201 (Criminal Code of Armenia. Legislationline, 2003).

The legislature of the Republic of Georgia places criminal liability for bribery of participants or organizations in professional sports competitions or commercial entertainment competitions in Chapter 26 entitled "Crimes against business or other economic activity" (Article 203) (Criminal Code of Georgia, 1999).

Under the protection of this criminal law are only professional sports competitions, as in Art. 201 of the Criminal Code of the Republic of Armenia, which limits the scope of Art. 203 of the Criminal Code of the Republic of Georgia in contrast to Art. 192-2 of the Criminal Code of the Republic of Azerbaijan, where all sports competitions are protected by criminal law.

Only active and passive bribery are criminalized. There is a criminal liability for qualified (re-qualified) and especially qualified (committed by an organized group) *corpus delicti*.

A positive asset of the Criminal Code of Georgia is also the possibility of exemption from criminal liability, provided for in the note to Art. 203, as well as in the Criminal Code of the Republic of Azerbaijan. Thus, persons who have voluntarily declared to the authorities the transfer to any of the persons specified in Part 1 of Art. 203, money, securities or other property or the provision of property services (Criminal Code of Georgia, 1999).

Conclusion

As a result of our research, a very high level of latency of crimes under Art. 369-3 of the Criminal Code of Ukraine, which is not less than 99% of their actual volume has been found. It has been established that the latter reaches about 300 crimes each year. The most intense criminal match-fixing is played in such sports as football, futsal, basketball and volleyball. Among the ways to stimulate athletes to illegal actions, bribery prevails (75%). Approximately at the same level in terms of prevalence with small fluctuations in specific weight are structurally located such ways of influencing athletes as incitement (10%), conspiracy (8%) and coercion (7%).

In general, illegal influence on the results of official sports competitions on bribery is directed directly at athletes. In total, the share of such influence is 78% with a slight predominance of a sub-bunch of several athletes (players) of one team (40%) over the bribe of an individual player (38%). In second place in terms of ranking there is bribery of members of the coaching staff (10%). Then there is bribery of judges (5%), owners of sports clubs (5%), support staff of clubs (2%). Thus, the analysis of the legislation of some post-Soviet countries in the field of criminal liability for illegal influence on the results of official sports competitions made it possible to claim that the Criminal Code of Azerbaijan, the Criminal Code of the Republic of Armenia and the Criminal Code of the Republic of Georgia related to the economy. The Penitentiary Code of the Republic of Estonia does not provide for a special rule that would impose criminal liability for unlawful influence on the results of official sports competitions.

In Art. 201 of the Criminal Code of the Republic of Armenia and Art. 203 of the Criminal Code of the Republic of Georgia criminalized illegal influence on professional sports competitions, which, as in Art. 369-3 of the Criminal Code of Ukraine, limits the scope of such rules. The legislator of the Republic of Azerbaijan followed the best path, providing in Art. 192-2 criminal liability for manipulation of sports competitions in general. In

addition to illegal influence on professional sports competitions in Armenia and Georgia, illegal influence on spectacular commercial competitions is criminalized. At present, we believe that the criminalization of illegal influence on spectacular commercial competitions in Ukraine will not meet the principles of social conditionality.

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Judicial reforms in Ukraine: polishing procedures and their systemic role

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Abstract

Using a documentary methodology close to the dialectical method, the objective of the article is to analyze the judicial reforms in Ukraine. Citizen belief in peace, justice and strong institutions is a challenge not only for Eastern Europe, where trust in state bodies has always been low. Meanwhile, the ongoing reforms of the judiciary aim to achieve a significant result using specific methods such as: the purging of judges. After the so-called “revolution of dignity” forceful discussions began on the purification process in Ukraine. For the first time, this question was raised in the early 90s of the last century. Unfortunately, the relevant legislative projects did not even reach the congress of Ukraine. It is concluded that Ukraine is currently experiencing its third attempt to initiate a judicial purge process. Unlike the first two, the third is apparently more productive. This is since a special law was passed, and the “government purification” procedure was started. finally, questions such as what is lustration and in what types does it manifest itself are discussed? How is this phenomenon related to the processes of systemic transformation?

Keywords: judicial power; illustration of judges; judicial independence; reforms of the judiciary; citizen fight against corruption.

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Reformas judiciales en Ucrania: procedimientos de lustración y su papel sistémico

Resumen

Mediante una metodología documental próxima al método dialéctico, el objetivo del artículo es analizar las reformas judiciales en Ucrania. La creencia ciudadana sobre la paz, la justicia y las instituciones sólidas es un desafío no solo para Europa del Este, donde la confianza en los organismos estatales siempre fue baja. Mientras tanto, las reformas en curso del poder judicial tienen como objetivo lograr un resultado significativo mediante el uso de métodos específicos como: la depuración de los jueces. Después de la llamada “revolución de la dignidad” se iniciaron discusiones contundentes sobre el proceso de depuración en Ucrania. Por primera vez, esta cuestión se planteó a principios de los años 90 del siglo pasado. Desafortunadamente, los proyectos legislativos relevantes ni siquiera llegaron al congreso de Ucrania. Se concluye que Ucrania vive actualmente su tercer intento de iniciar un proceso de depuración judicial. A diferencia de los dos primeros, el tercero es aparentemente más productivo. Esto se debe al hecho de que se aprobó una ley especial y se inició el procedimiento de “purificación del gobierno”. finalmente se discuten preguntas como ¿qué es la lustración y en qué tipos se manifiesta? ¿cómo se relaciona este fenómeno con los procesos de transformación sistémica?

Palabras clave: poder judicial; lustración de jueces; independencia judicial; reformas del poder judicial; lucha ciudadana contra la corrupción.

Introduction

The issue of judges' lustration has become cluttered with myths and prejudices regarding lustration generally, in the context of the Ukrainian events of recent years. Thus, the 'vagueness' and uncertainty of the concept, a certain mythologization and even demonization of the procedure and consequences of lustration in Ukraine determine the relevance of the current investigation.

Considering the aforementioned reasons, the legal framework for lustration had been drafted and adopted by Ukrainian parliament in 2014, when the Law 'On Restoring Trust into Judicial Power in Ukraine' № 1188-VII was adopted on 8 April 2014, launched two tools of the judiciary control. One of the peculiarities of the Law 'On Restoring Trust into Judicial Power in Ukraine' was a distinct delineation of conduct by a judge, regarded as illegal, listed in article 3. Such judicial rulings, enacted in the time period from November 2013 until February 2014, could become potential objects of screening: Rulings

banning peaceful demonstrations and gatherings; Rulings detaining activists or finding them guilty based on their political or social activities; Rulings detaining or accusing guilty of activists of the ‘Euromaidan’ for actions, committed in the course of the protests; Rulings imputing administrative sanctions upon activists of the ‘Euromaidan’ for actions committed in the course of the protests; Rulings granting permissions on conducting open or secret investigative actions against activists of the ‘Euromaidan’ on pretrial stages of criminal proceedings; Rulings related to the election to the Verkhovna Rada of the seventh convocation that had been allegedly considered vague or unjust; Rulings upon revision of which the UCTHR had found violations of human rights, reportedly admitted by the judge.

Due to those reasons the overall results of vetting, started by the Commission, can be described as a measure, meeting the urging social expectations, but still needing its finalization by the competent judicial authorities.

The law ‘On Purification of Government’ № 1682-VII was adopted on 16 October 2014 and, according to international expert Agnieszka Piasecka, provided four major instruments of lustration of state servants. First, all the public officials, who had maintained significant posts in state agencies during the rule of Yanukovich government, should be dismissed from their offices and similar posts for a term from 5 up to 10 years. The second instrument was the assessment of all the revenues and financial obligations of all public officials (Kondratova and Korotenko, 2020). The third point of purification was the disclosure and dismissal from public offices of former KGB agents and former Communist Party of the Ukrainian SSR leading functionaries. Finally, the judges, holding posts in judicial system, should undergo deep integrity checks (Piasecka, 2015).

1. Notion of Lustration

One of the widespread term for this process is vetting, defined as ‘the process of performing a background check on someone before offering the employment, conferring an award, or doing factchecking prior to making any decision.’ As U.S. Department of State defines those two terms, ‘*Lustration* is a policy put in place by post-conflict or post-authoritarian governments to remove from public institutions personnel, who have been implicated in activities that call into questions their integrity and professionalism, such as human rights violations or abuses, violations of international humanitarian law, or related crimes, as a way to build confidence in the public sector’ while ‘*Vetting* is the process by which a lustration policy is put into effect.’

The modern interpretation of this concept is as follows: ‘lustration (from the Latin “*Lustratio*” – purification through sacrifices) can be understood

as the process of purification the authorities from the old personnel, the prohibition for the functionaries of the previous government from holding posts in the state apparatus, from election to representative bodies, from serving as judges, and sometimes even from exercising the profession of a teacher, etc' (Kostiuchenko, 2019)

Such a delineation seems very appropriate, as in most academic sources both terms are used as synonyms.

According to the Parliamentary Assembly of the Council of Europe No. 1096 (1996) 'On Measures to Dismantle Communist Totalitarian Systems' the independence of the lustration commission should be safeguarded, while European standards of judicial independence contain a perception, according to which 'in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of the office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers, within which at least one half of those who sit, are judges elected by their peers following methods guaranteeing the widest representation of the judiciary' (para. 1.3 of the European charter on the statute for judges).

The Venice Commission in the aforementioned Opinion expressed a concern that the Ministry of Justice and the Temporary Specialized Commission of Vetting of Judges of the General Jurisdiction Courts are not providing the necessary guarantees of procedural independence (para. 87-95). In this opinion, the High Council of Justice (2017) was unlightened as a body who 'may not be bound by this proposal and should assess itself the substance of each case' (para. 95).

In our view, some loopholes of the vetting procedures can be found; however, the Commission was comprised of the majority of judges and final decisions in all cases concerning judges are undertaken by the High Council of Justice, which holds all relevant instruments when disciplining judges. This can definitely be concluded from provisions of the Law.

2. The Procedural safeguards for lustrated judges

The controversial issue of vetting the judiciary covers procedural safeguards for lustrated judges. In the case *Rasmussen v. Poland* the Court 'reiterated that, if a State adopts lustration measures, it must ensure that the persons affected thereby enjoy all the procedural guarantees of the Convention' (para. 50). As Venice Commission noted in its Opinion on lustration measures in Albania on the question of the constitutional and legal guarantees of judges and prosecutors, these guarantees consisting reasons for termination of their mandate, and in procedures for these terminations,

which should be the constituent elements of the state's constitutional status replacing the procedures with less protective ones.

From this angle some aspects of lustration of judges in Ukraine have been challenged by experts (Zaharov, 2014). It is necessary to point out that European authors have put forward similar doubts on the legitimacy of lustration procedures in the Czech Republic, Hungary, and Poland, claiming that lustration in those countries: (a) condemns the acts / facts that have taken place in the past; (b) provide for the establishment of collective guilt; (c) are discriminating concerning a certain category of persons (Choi and David, 2012).

It should be noted that the Venice Commission stands for implementing basic safeguards of the due process of law in the lustration procedure, emphasizing:

The following four key-criteria summarize the essence of the standards pertaining to lustration procedures: (a) guilt must be proven in each individual case; (b) the right of defense, the presumption of innocence and the right to appeal to a court must be guaranteed; (c) the different functions and aims on the one hand of lustration, namely the protection of the newly emerged democracy, and on the other hand of criminal law, i.e. punishing people proven guilty, have to be observed; (d) lustration has to meet strict limits of time in both the period of its enforcement and the period to be screened (European Commission For Democracy Through Law, 2014: 14).

European standards of due disciplinary procedures are applicable to existing Ukrainian regulations, in particular the rights of a judge: to be promptly informed of the complaints filed against him/her; to have knowledge of all the evidence, collected against him/her; to be heard (orally and in writing) by the disciplinary authority at all levels of the disciplinary proceedings and to be present there; to legal assistance; to appeal an unfavorable disciplinary decision (Federco, 2012).

In spite of the fact, that preliminary proceedings in the Temporary Specialized Commission of Vetting of Judges of General Jurisdiction Courts or Ministry of Justice do not maintain the whole list of procedural guarantees of the due disciplinary proceedings, all of the decisions of those agencies on lustration of judges, are subject to additional obligatory revision by the High Council of Justice, as this body is exclusively entitled by the Constitution to rendering decisions on dismissing judges in disciplinary procedures (Borkowski and Sovgyria, 2019).

Ukrainian legislation envisages significant safeguards of the rights of a judge to a fair trial in the disciplinary proceedings which verify the imposition of all the lustration sanctions by the High Council of Justice (Izarova, 2018). Those guarantees are provided by articles 48 and 49 of the Law 'On High Council of Judges' and include:

- the publicity of disciplinary proceedings, accompanied by minor exclusions.
- the obligation of the officials of the High Council of Justice to research all the relevant evidence.
- the right of a judge to make up detailed explanations in the course of the investigation, present his/her arguments personally during the hearing in the High Council of Justice and provide all the appropriate evidence to defend himself/herself.
- the right of a judge to be informed about the hearings of his/her case in the High Council of Justice and to review the evidence, collected against him/her.
- the right of a judge to have a representative in the disciplinary proceedings.
- the right to appeal the decision of the High Council of Judges in the Supreme Court of Ukraine.

Finalizing the issue of procedural guarantees for judges, we can refer to the recent events in Poland, where several judges of the Supreme Court were forced to resign on adoption of a special law, that had come in force on 3 July 2018. The new law changed the initial age of resignation of judges (from 70 to 65 years) and allowed the President to arbitrarily remove or reassign part of judges of the Supreme Court. To remain in positions, the judges were obliged to file a petition to the President and provide a valid health certificate.

The term of a judge's position could have been extended by 3 years, while the criteria for the President's decision was quite vague; a mechanism to appeal this decision wasn't envisaged by the aforementioned legislation. In our opinion, this was an example of a direct discrimination of judges by their age, prohibited by the UN Basic Principles on the Independence of the Judiciary, as well as a severe breach of basic safeguards of judicial tenure, outlawed by the same document.

In an EU-country, an attempt to dismiss judges of the Supreme Court regardless of basic guarantees of the due process of law, developed by the European Court of Human Rights, cannot be tolerated. Therefore, several institutions of the European Union have immediately, upon adoption of the relevant law in Poland, come up with official statements, criticizing those initiatives and calling on the Polish authorities to amend the Law (BBC NEWS, 2018).

In October 2018, the European Court of Justice suspend that the provisions of national legislation concerning the lowering of the retirement age of the Supreme Court Judges. On 19 November 2019, the Court decided

that there are doubts concerning the independence of a new Polish judicial chamber that monitors and potentially punishes other judges (AP NEWS, 2019). However, the determination of the whether the new Disciplinary Chamber is independent of the influence from the nation's legislative and executive powers was left to highest Polish court. It could be thus concluded that the main EU Court stood up for standards of judicial independence in Poland, granting to the national sovereignty key issues of organization of judiciary at the local level.

In the case *Rasmussen v. Poland* the applicant lost the entitlement to a special retirement pension due to her status as a 'retired judge' according to the Lustration Act 1997' (para. 72), but the Court decided, that this loss is a result of a false lustration declaration submission, which was not count by an interference with the property rights of the applicant under Article 1 of Protocol No. 1. (76).

3. Is lustration a type of responsibility?

National traditions of legal theory (Abramovych, 2015) as well as the Constitutional Court of Ukraine, presume that any liability measure cannot be established retroactively. According to the ruling of the Constitutional Court of Ukraine, delivered on 13 May 1997, 'laws are applicable only to those relations that arose after the law or other normative legal act had come into force. The consolidation of this principle at the constitutional level serves as a guarantee of the stability of social relations, including relations between the state and its citizens, providing citizens with confidence that their current status would not be aggravated by the adoption of a new law or other normative legal act (that would alter the current state – authors).'

The same refers to judges, if we consider lustration as a type of responsibility; when the 'Euromaidan' protests took place, judges did not know that their decisions, delivered in relation to these events, would be subjected to review. On the other hand, the circumstance of an acute social conflict cannot excuse a judge from ignoring such constitutional values as the rule of law, fair justice, basic human rights and neglecting his/her major duty to maintain a balance of public and private interests and accurately apply procedural codes (Izarova, 2019). Therefore, the lustration restrictions that were launched upon judges, 'within the application of all of the existing disciplinary proceedings and the procedure of dismissing a judge for breaches of the judicial oath,' are not contrary to the rule of law principle 'as a democratic state is entitled to require civil servants to be loyal to the constitutional principles on which it is founded.'

For this reason, from the political perspective, lustration provides for the 'cleansing' operations performed by new government from the

regime-connected politicians, who are not allowed to work in government bodies, conduct court proceedings, be elected to representative bodies of government, etc. It is not necessarily carried out in a clear legal framework, since it performs the function of ideological confrontation between the old and the new governing elites. Therefore, lustration laws do not relate to the sphere of criminal law, but are aimed at restructuring the bureaucratic apparatus of the State as well as at dismissing from official posts people who have contributed to the establishment of an undemocratic regime.

However, the legal foundations of lustration are equally important. According to the second concept of lustration, distinguished by I.A. Bezklubyi and I.V. Kochkodan, lustration restrictions are inherently sanctions, an element of the mechanism of a person's responsibility for certain actions. It is obvious that the process of lustration encompasses the mechanisms of various types of responsibility (primarily legal liability), since sanctions – lustration restrictions – are legal in character (Bezklubyi and Kochkodan, 2019). This approach, according to legal thinkers, provides for a number of requirements, the failure to comply with which calls into question the legitimacy of the lustration measures. Thus, an act for which sanctions in the form of restrictions are applied to an individual shall violate the legal rules existing at the time of conduct, since the law establishing liability shall not be retroactive in effect. In addition, lustration restrictions must comply with all principles of legal liability, particularly with the principle of individual liability. We accept the notion that the legal responsibility is one of the features of lustration measures. However, we do not consider the principle of legality as a dominating aspect in legal liability, and the obligation arising from it to comply with the relevant criteria and requirements, as the shortcoming of the aforesaid approach to lustration conceptualization.

The German professor S. Karstedt also considers lustration as the mechanism of an individual's punishment, having identified two of its elements or 'two types of public procedure': first is the criminal prosecution of elite representatives and government officials, who constituted the highest leadership in the system of public administration of the previous regime. Secondly, it is a procedure for mass investigations with regard to those who worked closely with members of the party or employees of public entities (for example, police, security services) of middle or lower ranking positions in the certain bureaucratic hierarchy.

Close attention should be paid to the approach suggested by V. V. Knysh, according to whom lustration is defined as 'a modern, special form of constitutional legal responsibility.' In the author's opinion, lustration (purification of government), in addition to its direct function also has the nature of a preventive (protective) form of responsibility designed to prevent the creation of corrupt power in the future (Knysh, 2014)

Conclusions

Grounds of responsibility, provided by the Law 'On Restoring Trust into Judicial Power in Ukraine' № 1188-VII, and the Law 'On purification of Government' №1682-VII, were politically aggravated, while the basic criteria of assessment of judges' acts was applied on a temporary basis, referring exclusively to decisions, delivered in the course of the 'Euromaidan' protests or during the Presidency of Victor Yanukovych.

Moreover, the juxtaposition of legal acts regulating lustration procedures reveals a duplication of grounds in this type of sanctions that could possibly result in double jeopardy of a judge, directly prohibited by the Article of 61 of the Constitution of Ukraine.⁴ Such a concept is quite doubtful in terms of formulating grounds of legal liability of judges, that thesis being acknowledged by the Venice Commission. In such a case, if a judge is being charged under two coinciding procedures, sanctions can be cancelled by national courts or European Court of Human Rights.

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Transformations of the organizational and legal mechanism of the Ukrainian state policy in tourism and hospitality

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Abstract

The purpose of the work is to analyze the transformation and efficiency of the organizational and legal mechanism of Ukraine's state policy in the field of tourism and hospitality. Methods of grouping, modeling, and forecasting, methods of theorization and historical formalization, as well as methods of analysis, comparison, sampling, and description of the system were used to substantiate scientific principles and approaches for the development of organizational and legal mechanisms of Ukrainian state policy in the field of tourism and hospitality. In addition, the study identifies the conceptual foundations of the organizational and legal mechanism of Ukraine's state policy in the field of tourism and hospitality, which corroborates the importance of updating national legislation, its unification with international, including European, improving the Tourism and Resorts Strategy of Ukraine. As contributions of the research and outline the objectives and priority measures of the state policy in the field of tourism and hospitality, the strategic tasks of the state policy in this area are formulated, namely: to ensure progress towards the formation of a unique tourist space with other countries of the Commonwealth of Independent States (CIS).

Keywords: tourism; hospitality; state policy; organizational and legal mechanism; tourism development strategy.

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Transformaciones del mecanismo organizacional y jurídico de la política estatal de Ucrania en el ámbito del turismo y la hospitalidad

Resumen

El propósito del trabajo es analizar la transformación y eficiencia del mecanismo organizativo y legal de la política estatal de Ucrania en el campo del turismo y la hostelería. Se utilizaron métodos de agrupación, modelado y pronóstico, métodos de teorización y formalización histórica, así como métodos de análisis, comparación, muestreo y descripción del sistema para fundamentar los principios y enfoques científicos para el desarrollo de mecanismos organizativos y legales de la política estatal de Ucrania en el campo del turismo y la hostelería. Además, el estudio identifica los fundamentos conceptuales del mecanismo organizativo y legal de la política estatal de Ucrania en el campo del turismo y la hostelería, lo que corrobora la importancia de actualizar la legislación nacional, su unificación con la internacional, incluida la europea, mejorando la Estrategia de Turismo y Resorts de Ucrania. Como aportes de la investigación se delinean los objetivos y medidas prioritarios de la política estatal en el ámbito del turismo y la hostelería, se formulan las tareas estratégicas de la política estatal en este ámbito, a saber: asegurar el avance hacia la conformación de un espacio turístico único con otros países de la mancomunidad de Estados Independientes (CEI).

Palabras clave: turismo; hotelería; política de estado; mecanismo organizativo y legal; estrategia de desarrollo del turismo.

Introduction

It is well known that the tourism industry around the world suffers losses on a global scale as a result of measures to counteract the ID-COV19 pandemic and the uncertainty of further developments: 96% of tourist destinations have been subjected to restrictions. According to various data in 2020 international tourist revenues fell by 58-78% compared to the previous year. According to the experts estimate that the recovery of demand to the level of 2019 will last at least two years, while at the same time airlines will have to increase the travel cost by an average of 43-54%. Domestic tourism also suffered significant losses: in particular, the losses of the tourism industry in Ukraine are estimated at more than 150 million dollars. The late start of the resort and recreational season as a result of the restrictive measures has caused a cumulative effect that has had a negative impact on the leisure and travel industry, and related industries - the hotel and restaurant business, transport (passenger transport), retail,

entertainment industry and cultural institutions activity. Also, there is a drop in Ukraine's tourist attractiveness due to the long military conflict in the East of Ukraine, the annexation of the Crimean peninsula, the low level of quality tourist infrastructure, the lack of a coordinated marketing promotion strategy of the Ukrainian national tourist product in the world markets.

It is clear that adequate responses to such challenges are impossible at the local or sectoral level. Ways out of the crisis should be sought at the level of national and supranational political institutions, formulating political decisions that can keep the balance, and producing adequate mechanisms of state and interstate regulation, especially in those spheres of social life that are most affected by the situation, thus threatening overall stability. Despite this, the problems of reforming public policy in the socio-humanitarian sphere, with tourism as an important component, improving the management of social and humanitarian development, strengthening the social partnership role (Timoshenko, 2020) are actualized.

It is not accidental to choose tourism and hospitality as a subject field for research: they belong to those socio-cultural practices which obviously integrate global transformation processes of modern society - as the famous philosopher B. Markov noted at the beginning of this century, tourism itself can be qualified as «a form of globalization» (Markov, 2003: 188). The tourism phenomenon absorbs qualitative characteristics of modern global society: mobility, emphasizing consumer priorities, virtualization, visualization, informatization, and so on. Taking into account the scale and influence of the tourism phenomenon, there is no way to ignore its instrumental potential, including for ideology: the ability to introduce into the public consciousness and public practice the basic social policy ideas, to take a direct part in the project of building the equal opportunities society, etc., - in fact, tourism and hospitality in the newest global space act as conductors of social cohesion ideology (Oleksenko *et al.*, 2017). So, despite the fact that tourism and hospitality are a holistic phenomenon - cultural, social, economic, political, etc. - and a significant factor in the formation of the global socio-cultural space (Bortnykov *et al.*, 2021), they can be considered among the priority areas of political and economic efforts on the part of state and supranational institutions in the context of the crisis recovery tasks.

1. Objectives

Therefore, the purpose of the proposed study is to analyze the transformation and effectiveness of the organizational and legal mechanism of Ukrainian state policy in tourism and hospitality.

2. Materials and methods

In order to substantiate the scientific foundations and approaches to the development of the organizational and legal mechanism of Ukrainian state policy in tourism and hospitality sphere, there were used methods of grouping, modeling and forecasting. To determine the organizational and legal mechanism components of the state tourism policy, as well as the genesis of the mechanisms formation in Ukraine, there were used the theorizing and historical formalization methods. In order to study foreign public policy practices in the tourism sphere from the position of determining the perspective directions of their consideration in Ukraine the methods of system analysis, comparison, sampling and description were used.

3. Results and discussion

3.1. Ukrainian state policy in the tourism and hospitality sphere

Before we proceed directly to the analysis of Ukrainian state policy in the tourism and hospitality sphere and its organizational and legal mechanism in the studied sphere, let us make the necessary clarifications in the wording we have chosen for its designation - «the tourism and hospitality sphere». Being aware that in modern socio-economic conditions of Ukraine, hospitality is positioned mainly as an independent industry that provides a person with non-material production services and satisfaction of social needs, gradually separating into a separate national economy sphere, within the proposed study, however, we will consider it through the prism of tourism - as a separate tourism sector, especially important for the development of inbound and domestic tourism - and only in that part of it, which is designed to meet the needs of accommodation and catering for tourists (cf.: delimitation of hospitality for tourists and hospitality for the population – (Dishkantuk, 2016: 92)). In addition, it is worth considering the fact that in foreign sources (previously very popular in the post-Soviet space works of L. Wagen, J. R. Walker, etc.) it is necessary to consider the fact that the hospitality industry is considered in the international literature. Hospitality industry is considered as a combination of hotel and tourism business, as a separate tourism industry sector, which provides tourist accommodation, as well as related sectors of trade, catering, entertainment industry, etc. (Wagen, 2001; Woker, 2012).

Another argument in favor of our chosen formulation - despite the insistence on positioning hospitality as a separate economic sector, the issues of its institutionalization is still open (there is no scientific definition of this sphere as a scientific category and its interrelation with other

national economy sectors, does not allow to determine the priority areas of hospitality management, providing it with the necessary resources, etc. (Dishkantyuk, 2016: 86)), and then the public policy problems in this sphere and public management of the hospitality industry still remain almost outside of scientific research, and the lack of a systemic vision of the hospitality industry development does not allow for effective government regulation of the national economy sphere (Dishkantyuk, 2016: 87). After all, in practice we most often observe a combination of hotel and restaurant services with the tourism enterprises services in the general course of tourist business development. Despite this, in the proposed study, talking about Ukrainian state policy in the tourism and hospitality sector, we will take into account the hospitality industry only in the part where the sphere development is based on the institutional basis for state regulation of the tourist sphere.

State policy in tourism and hospitality is the influence of the state on the activities of economic entities and market conditions to ensure proper conditions for the market mechanism functioning, implementation of state socio-economic priorities and elaboration of unified industry development concept (Melnichenko *et al.*, 2017). In addition, it is a complex organizational process that includes the elaboration procedure of state policy on tourism and hospitality development, justification of its goals, objectives, main directions, selection of tools and production methods. This policy is set in motion by the appropriate organizational and legal public policy mechanisms (Oleksenko *et al.*, 2013; Timoshenko, 2020).

Organizational and legal mechanism analysis of state policy in the Ukrainian tourism sphere gives reason to believe that in the next 5-6 years it will develop under the strategic directions defined by the Government. Strategy, as it is known, is a generalizing plan of certain activities, covering a long period, a way to achieve a complex goal. The strategy is considered as a long-term, consistent, constructive, rational, supported by ideology, resistant to uncertainty of environmental conditions, accompanied by constant analysis and monitoring in the process of its implementation and aimed at achieving success in the end. The strategy tends to move from abstraction to specificity in the form of concretized plans and is an effective tool for the stable functioning of the state in general and the regions in particular. In Ukraine since 2015, the Strategy of Sustainable Development of Ukraine (Strategy, 2015), the action of which is calculated for the period until 2020. In 2019, the Decree of the President of Ukraine № 722 / 2019 on the goals of sustainable development of Ukraine for the period until 2030 (Presidential Decree, 2019), which noted that the goals of sustainable development of Ukraine until 2030. are benchmarks for the draft forecast and program documents, draft regulations to ensure a balance of economic, social and environmental dimensions of sustainable development of Ukraine (Presidential Decree, 2019).

Despite this, we consider it necessary to outline the Tourism and Resorts development strategy for the period up to 2026r. (Strategy, 2017), approved by the Government of Ukraine in 2017. (Order of the Cabinet of Ministers of Ukraine, 2017) from the position of its compliance with the requirements of time and society (Rybalchenko, 2020a; 2020b). Ukrainian tourism and resorts development strategy for the period up to 2026. Determines the necessity of entrepreneurship development (activation) in the specified sphere. Its peculiarity lies in the fact that it is carried out within two planes: state and market. In this lies the dichotomy of tourist sphere development, as the state implements its function «from the top down», and the enterprise, on the contrary, is repelled from the needs of the consumer. To subordinate the realization of functions to the interests of the consumer is the key task of the management programs of tourist business enterprises. Development of the tourism sphere state policy system should be streamlined within a single multi-sectoral body, whose primary tasks should go out to develop regulations that streamline the institutions activities of various ownership forms and departmental affiliation, ensure the implementation of tourist and recreational functions in the state and regions (Pomaza-Ponomarenko, 2015).

Tourism and resorts development strategy contains definitions of the main strategic objectives of tourism development, taking into account the current state and trends in the development of Ukraine. In our opinion, the urgent task for Ukraine is to harmonize the conflicting order of adoption of the Strategy for the development of tourism and resorts in Ukraine, concerns the long-term planning of such development. In Ukraine, this type of planning, particularly in the tourism sector, is carried out for a period of more than 5 years, but no more than 10 years, certifying its short-termism. However, the world experience shows the advantages of another widespread planning practice - medium-term planning of tourist sphere development, assumes its achievement and retention at the proper level for not less than 10 years (Kotler *et al.*, 2008). Despite this, we can offer a more systematic approach to the implementation of tourism planning in Ukraine, that is, taking into account the positive foreign experience in this area, covering compliance with such principles of public administration: consistency, science, innovation, strategic and the like. According to these principles, the development of the tourism sector should take place with the maximum definition and consideration of factors, risks, challenges and threats to the development of tourism, as well as changing conditions of its external institutional environment (Apaza-Panca *et al.*, 2020)

Based on the above, we believe that it is necessary to prepare appropriate amendments to the Law of Ukraine «On Tourism» (Law of Ukraine, 1995), as well as the Strategy for Development of Tourism and Resorts of Ukraine (until 2026.) (Strategy, 2017). We believe that the Law of Ukraine «On Tourism» should contain an appropriate section «Planning the

development of the tourism sector» and contain a reference to ensure the long and medium term planning in this area. The strategy should form the basis for its development in the long and medium term. In continuation, we note that the implementation of this requirement is also not possible by taking into account the principles of time management. Consequently, it is important to define in the Law of Ukraine «On Tourism» a clear rule on the timing of the adopted strategy in this area, and prevail in this medium- and long-term strategies for the development of the tourist sector.

3.2. Organizational and legal support for state policy in the tourism sphere in the CIS countries and the prospects for the formation of a unified tourist space

In our opinion, a promising and, what is important, strategic direction in the development of tourism sphere is to ensure progressive movement towards the formation of a single tourist space, which is possible within the framework of transboundary cooperation. It provides for active joint activities, in particular the subjects-participants of Euroregions, among which, on the one hand, there are regions of Ukraine, having a common border with the region of another country (for details see: Diganova, 2019). In addition, the potential is the formation of a common tourist space with the participation of member countries of the Commonwealth of Independent States (CIS).

Assessing the organizational and legal support of the state policy in the tourism sphere in the CIS countries, it should be noted that the formation process of a unified organizational and legal support, design and implementation of tourism activities in the CIS countries has developed consistently and experienced certain peaks, largely overlapping with changes in the life cycle of domestic tourism product and key destinations of the Commonwealth countries. Fig. 1 shows the evolution of the main normative act regulating the recreation and tourism sphere in the CIS countries during the existence of this association, starting from 1993. and up to the present time. Let us consider each of the above-mentioned stages in more detail in terms of the main legislative initiatives for the formation of a unified tourism space for the CIS countries.

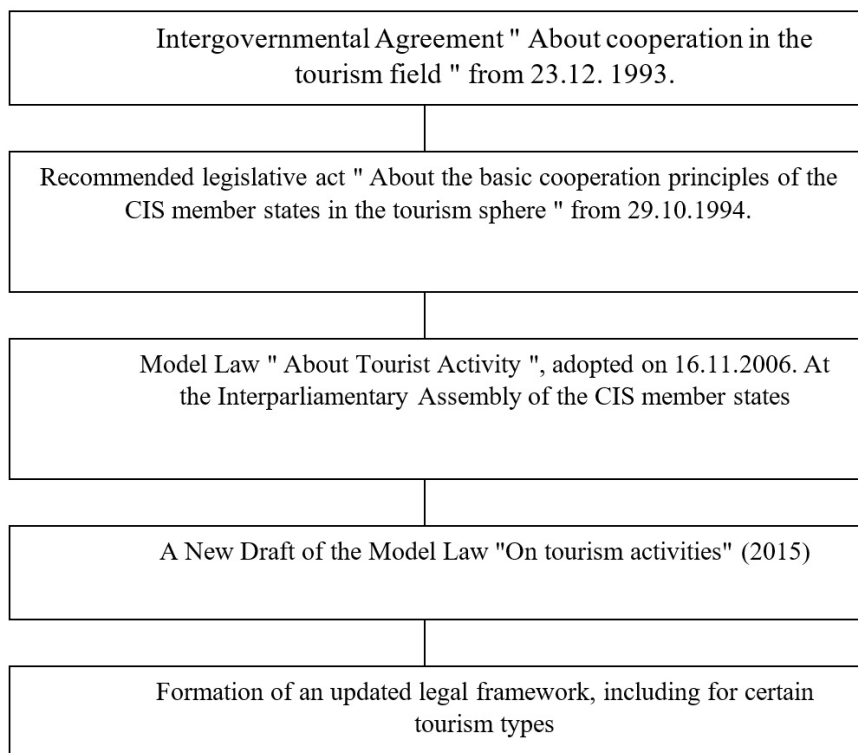


Fig. 1. The main stages in the establishment of organizational and legal support for the tourism sector development in the CIS. Source: compiled on the basis of (Law of Ukraine, 2000; Chan Thuy Vang, 2016).

The first attempt to unify the organizational and legal provision of the CIS countries' tourism sphere should be recognized the Intergovernmental Agreement «On Cooperation in the Tourism Sphere» of 23.12.1993 (Agreement, 1993), which was based on the principles of the Manila Declaration on World Tourism (1980, Philippines) and the Hague Declaration on Tourism (1989, The Netherlands). It is appropriate to say that this deal is a certain declaration of intent, which proclaims a course for the formation of a unified tourism space and a common service market. At the same time, this intergovernmental legislative act does not contain specific forms and mechanisms for implementing the general goal, does not define the specifics of tourism and recreational potential of the CIS

countries, does not provide recommendations on possible financing sources for proposed joint projects in the tourism sector. All this contributed to the further transformation of the considered normative act from a declarative to a more specific legal document, which creates a functional basis for the development of the CIS single tourist market.

The legislative act «On the basic cooperation principles of the CIS member states in the field of tourism,» adopted by the Interparliamentary Assembly of the CIS member states on October 29, 1994 (Recommendatory legislative act, 1994), contained a number of important legal and regulatory aspects, which include the following:

- formation of a unified approach to defining the key categories, which can be used to characterize and regulate the tourism services market in the future. These might include the concept of «tourist», «tour», «tourism resources», etc.
- definition of specific competencies of the Commonwealth member states, which include «state property management in the tourism sphere, funding of public administration and supervision of tourist rights, definition of the procedure for granting privileges to certain categories of tourists», etc.
- characterization of the tourists' rights and obligations, with a separate regulation of foreign nationals' situation.
- development of methodological guidelines for the tourism activities certification and use voucher as a policy tool in the tourism sector, which is an individual or group document issued by a tourism organization, is a form of contract between the supplier and the consumer of tourist services and confirms their payment.

The normative act under consideration had a recommendatory character, existed for 12 years and was transformed, on the basis of a collegial decision of the Interparliamentary Assembly of the CIS member states (Decision NO. 27-15, 2006), into the Model Law on Tourist Activity» (Decision NO. 27-15, 2006). In comparison with the previous legal document, this legislative act has a number of indisputable advantages, which include:

- concretization of basic definitions and expansion of the necessary terms list; thus, the model law mentions such relatively new for that time socio-economic categories as «tourism registry», «timeshare», «promotion of tourism industry entities' services», «tourist voucher», etc.
- characterization of the main types and varieties of tourism, including such categories as «international tourism», «domestic tourism», «ecological tourism», «sustainable tourism development» (as a concept of such development), etc. were introduced in the rulemaking, etc.

- significant attention to the issues related to the state regulation of activities in the tourism sphere, which is caused by a return to the position of the defining role of the state as a key regulator in the development and stimulation of economic growth of tourist destinations;
- the established unified methodological basis for the characterization and classification of tourism resources.
- analyzed issues related to the creation and development of tourist and recreational areas as separate organizational and economic formations, with the help of which it is possible to accelerate the renewal of infrastructure of tourist destinations and ensure sustainable demand for appropriate resources (Decision NO. 27-15, 2006).

In general, it is quite a large document and compared with previous versions, contains 17 chapters, including 67 articles. It is worth noting that over time there was a need to update the legal norms in accordance with the demands of modern society, and such an attempt was made in 2015. During this period was created a new draft version of the model law, which aims to update the current trends in tourism activities, including issues related to the tourists' safety, with the need for permanent financing of tour operators and travel agents, increasing the responsibility of tourist business entities and so on. Considering this and taking into account the changing socio-economic and socio-political situation in most CIS countries, there was a need for law-making activities on the formation and implementation of uniform legal norms, which would be as much as possible consistent with the strategic development trajectories of the member countries of the association.

In our opinion, it is necessary to pay attention of parliamentarians of the Inter-Parliamentary Assembly of the CIS member states to finalize or create a new model law, as well as to develop and adopt specialized normative acts which regulate tourism activities and certain tourism types, primarily medical and therapeutic, which is especially relevant in connection with the expanding capacity and demand of the overall tourism market. Undoubtedly, such rulemaking activity will contribute to updating the domestic legislation in the tourist sphere (Kulagina *et al.*, 2009: 27-32).

3.3. Development Prospects of Organizational and Legal Mechanism of State Policy of Tourism in Ukraine

Normative activities to update the CIS modular legislation in the field of tourism will contribute to the improvement of the domestic regulatory framework in this area, namely: The Law of Ukraine «On Tourism» and the Tourism and Resorts Development Strategy (Fig. 2). Moreover, one of the

objectives of the CIS modular legislation in the tourism sphere is to help in the development of national legislation of the CIS member states in this area.

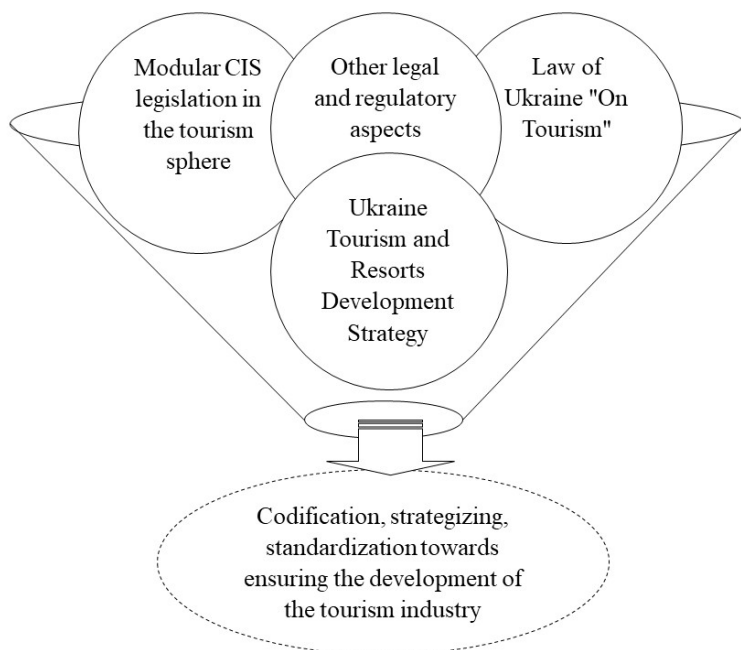


Fig. 2. Development prospects of the organizational and legal mechanism of the state policy of the tourism sphere in Ukraine.
Source: author's elaboration.

Ensuring the development of tourism in Ukraine requires a balanced system of its monitoring. Analysis of the Tourism and Resorts Development Strategy of Ukraine contains a forecast assessment of its condition for the period up to 2026. Among the indicators of development the following are defined:

1. the number of foreign tourists entering Ukraine, million people.
2. the number of subjects of tourist activity, thousand pcs.
3. the volume of revenues to local budgets from the payment of tourist fees, mln.
4. the volume of revenues to the consolidated budget (taxes and fees) from the activities of tourist entities, billion, UAH.

5. the number of jobs in tourism, thousand people.
6. the number of domestic tourists, thousand people.
7. the number of excursionists, thousand people.

At the same time, these indicators of development of the tourism sector of Ukraine requires clarification, taking into account the accumulated foreign practice of assessing the state of such sphere, in particular UNWTO. Moreover, the Strategy under consideration specifies the requirement to take into account the UNWTO recommendations and to improve the domestic system of statistical accounting, and then the methodological approaches to the assessment of the tourism sector. On this basis, we justify the need to assess the state of functioning and development of the tourism sector of Ukraine not only from the position of determining the dynamics of the relevant market, but also by such indicators:

- The volume of services of tourist sector (mln. UAH) AND the share in GDP (%);
- the volume of tourism services (mln. UAH) AND their share in GDP (%);
- the number of employees in the tourism sector (thousand PE.) AND the share of employees in the national economy (%);
- the number of those employed in the tourism sector (thousand P.M.) AND the share of those employed in the national economy (%);
- the volume of exports of tourist services (mln. UAH) AND the share in total exports (%);
- index of the level of development of tourist functions (beds / per 100 inhabitants) (Rybalchenko, 2019; Pomaz-Ponomarenko *et al.*, 2020).

Therefore, the main goal of Ukraine is to implement regulations, in particular the Strategy for the Development of Tourism and Resorts to achieve the following indicators:

- Improving the competitiveness of the domestic tourist product can be produced at the national and regional levels;
- improving the standard of living and quality of life of the Ukrainian, which requires ensuring economic growth of the state as a whole, its social and environmental security, improving the quality of services in the tourism sector (Oleksenko *et al.*, 2021)
- Creating new jobs and expanding opportunities for self-employment in the tourism sector by providing them with state support for the development of small and medium-sized businesses;

- Create a modern tourist information infrastructure, as well as disseminating information about the tourist resources of Ukraine in the international information space.

Conclusion

The conceptual foundations for the development of organizational and legal mechanism of public policy of Ukraine in tourism and hospitality, which justified the importance of updating national legislation, its unification with international, in particular the European, the improvement of the Development Strategy of Tourism and Resorts of Ukraine (for the period up to 2026). In this case the priority goals and measures of state policy in the tourism and hospitality sphere are outlined. Also formed the strategic objectives of state policy in the tourism sector, namely: ensuring progressive movement towards the formation of a single tourist space with other countries of the Commonwealth of Independent States (CIS).

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Stratagems of political and legal development of Ukraine: problems of actualization and scientific comprehension

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Abstract

The aim of the article is to consider the priority areas of state policy and outline initiatives that are of strategic importance to Ukraine. The research topic is state programs (strategic initiatives) in the field of education and science, security and defense, information that will provide the opportunity to lay the foundation for positive changes in society. The study applies methods of scientific knowledge such as the dialectical method, the monographic method, the methods of analysis and synthesis, the system and structural method, the grouping and classification method, the abstract and logical method. The reasons, factors and processes that led to Ukraine's prolonged stay under the influence of oligarchic capital are investigated. In addition, they consider the prerequisites for the preservation of elites that hinder the democratic development of the Ukrainian state. It is concluded that the introduction of democratic institutions in post-totalitarian countries requires, first of all, a concentration of efforts in the fields of education and science, information policy, national security and defense.

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Keywords: deoligarquization; civil society; political and legal development strategy; formation of the State; political development.

Estrategias de desarrollo político y jurídico de Ucrania: problemas de actualización y comprensión científica

Resumen

El objetivo del artículo es considerar las áreas prioritarias de la política estatal y esbozar las iniciativas que son de importancia estratégica para Ucrania. El tema de investigación son los programas estatales (iniciativas estratégicas) en el campo de la educación y la ciencia, la seguridad y la defensa, información que brindará la oportunidad de sentar las bases para cambios positivos en la sociedad. El estudio aplica métodos de conocimiento científico como el método dialéctico, el método monográfico, los métodos de análisis y síntesis, el método de sistema y estructural, el método de agrupación y clasificación, el método abstracto y lógico. Se investigan las razones, factores y procesos que llevaron a la estancia prolongada de Ucrania bajo la influencia del capital oligárquico. Además, se consideran los requisitos previos para la conservación de las élites que obstaculizan el desarrollo democrático del estado ucraniano. Se concluye que, la introducción de instituciones democráticas en los países post-totalitarios requiere, en primer lugar, una concentración de esfuerzos en los campos de la educación y la ciencia, la política de la información, la seguridad y defensa nacional.

Palabras clave: desoligarquización; sociedad civil; estrategia de desarrollo político y legal; formación del Estado; desarrollo político.

Introduction

Globalization and crisis challenges have been particularly acute for Ukraine in recent years and coincided with a turning point in the formation of national Statehood and its main political institutions. Today, our country is being tested for strength, and its leading political forces, government and citizens must show the will to independence, the ability to overcome internal divisions and contradictions, the desire and ability to actively and creatively integrate into a dynamically developing world.

The course of reforms performed in all spheres of life of the State and society is the adequate and the only possible response to the challenges of today. The new modernization strategy as a priority of political reform envisages first of all the creation of a modern, competitive Ukrainian State, the defining characteristics of which are the rule of law and developed legal culture, balanced representative democracy, strong self-government, disciplined and mobile state management.

Modernization of political institutions and changes in the political consciousness of citizens are necessary to optimize management processes in the country, improve economic life, attract investment and transition to an innovative model of social development.

Sadly, the change of elites is one of the most pressing problems on our way to positive changes. Domestic elites are closely associated with oligarchs, some of who have very serious influence on the Verkhovna Rada of Ukraine, state agencies, ministries, political parties. The main shortcomings of our country – corruption, lack of rules, monopolization of specific sectors of the economy – are all ideal conditions for oligarchic business, which is associated with political power.

Thus, the purpose of the article is to outline the spheres that are of strategic importance for Ukraine, and propose several generalized initiatives to overcome the crisis, which affects our country nowadays.

1. Methodology

In order to achieve the goal of the Article, the following general and special methods of scientific knowledge are used.

Dialectical method is applied for the comprehensive examination of the problem under consideration and its main aspects.

Monographic method helps in the study of scientific works of scholars, who examined the features of the elite, including political one.

The methods of analysis and synthesis, as well as system and structural method make it possible to identify the factors that hinder the democratic development of the Ukraine.

The method of grouping and classification is applied for the definition of the key areas that need to be developed in order to ensure the sovereignty and subjectivity of our State. The same method is used for identifying the main problems in these areas.

Abstract and logical method is helpful in formulating the relevant conclusions and suggestions.

2. Literature Review

Considering the processes of elite change, it is worth noting that this problem was studied by a number of scientists. For example Pareto (Welty, 2016: 53-54) stressed on the structural heterogeneity of the elite itself. Thus, he highlighted those “who directly or indirectly play a prominent role in the management of society and constitute the ruling elite and the rest of this class, which forms the non-governing elite”. He considers the latter counter-elite – a group of people with elite features but a number of restrictions on access to governance, including social (innate) status and a number of other barriers in society to its lower classes. At the same time this group has a great desire to replace the existing elite.

Mosca (1995) reveals this category as a number of people occupying high positions in accordance with the level of their influence and socio-political power. In his scientific work he was trying to comprehensively study the issue of social inequality, stressing on the common feature for all social systems – the existence of a separate layer that realizes the influence and control of others; “the emergence of people causes society. The existence of society requires the creation of a State. Accordingly, the State will have a minority governing and majority governed by the minority”.

According to Michels (1994: 91), “there can be no political class in any developed and civilized society. The social majority will be forced to recognize its power and accept the idea of the emergence and influence of the oligarchy”. Michels is the author of one of the laws of political life – the “iron law of the oligarchy”. It is that any democratic system for the formation of stability is forced to create a bureaucratic structure or elect leaders who acquire significant powers. The result is the usurpation of power by leaders or the bureaucracy, leading to the transformation of democracy into an oligarchy.

Lasswell (2005) provides rather wide interpretation of leading elite: these are people who occupy key positions in government; persons who previously occupied them and remained loyal to the regime; individuals who do not belong to formalized government institutions, but have a significant influence on decision-making in them; oppositionists with political weight; family members of government officials.

Another position of scholars on the relationship between elected democracy and the elitism of power is relevant for modern Ukrainian realities. Thus, Dai and Ziegler (1984:154) point out that the ruling elite have real powers in the State, but its support (or lack thereof) by citizens determines both the results of the election process and the duration and effectiveness of these powers. In particular, the authors point out that “It is the political actions of the elite that mainly shape their understanding and attitude to politics and not vice versa”.

Karabushchenko *et al.*, (2018) prove that the elite should always have its own idea, otherwise its existence would be meaningless. Only an anthropological elitology can find and define this idea, because each elite is a group of individuals endowed with some elite qualities, or the ones imitating them.

3. Results and Discussion

Risks of Oligarchic Rule. Under certain circumstances, the public demand for the deelitization of oligarchs may be transformed into another mass protest. In Ukraine, for thirty years of independence, no conditions have been established for professional implementation of educators, scientists, doctors, journalists, engineers, *etc.* All so-called non-profit professions are in deep decline. Market relations have gradually transformed into market thinking – a liberal economy transforms society into a market environment. Nevertheless, it is obvious that either health, politics, friendship, or family relationships cannot be market-based per definition. The only criterion for a person's success is the size of his (her) fortune. If wealthy, then successful (and *vice versa*), and besides, for most people it does not matter how this affluence is accumulated. Therefore, there is still a high tolerance for corruption – perhaps the only way to grow rich rapidly and get recognized; and to join the corrupt rent, one must become an official and / or a politician. Such “values” have become firmly established in public consciousness and education. Hence, oligarchic rule harms not only economic development, but also destroys the system of value orientations of society. As a result of the introduction of European values of democracy and commonwealth against the background of a deep axiological crisis, it becomes a difficult problem to solve.

The simultaneous implementation of State programs (strategic initiatives) in the field of education and science, security and defense, information policy will provide an opportunity to lay the foundation for subsequent changes, renewal of domestic elites and the formation of a mature civil society capable of protecting national identities. Without investments in education and science, without a targeted information policy, it is impossible to get rid of the mutual stigmatization of the West and East, right and left forces, the privatization of patriotism by individual political parties and the pragmatic use of national ideas for political dividends.

Let us consider each of the directions and try to outline the initiatives that are of strategic importance for the Ukrainian state. Education and science, national security and defense, and information policy are directly related to the formation of human capital, the intellectual potential of the State. Thereby, the relevant ministries and departments cannot, by

definition, work in the 'fire brigade' mode, their every short-sighted step can negatively affect in the future both the subjectivity of the Ukrainian state and its size, defense capability, and sovereignty.

Problems in Education and Science. Restoration of Ukraine's intellectual potential is possible through the introduction of effective and deliberate changes in the system of education and science. Educational initiatives should be divided into three conditional levels: preschool education, secondary education, and university programs. The academic environment requires special attention: in addition to the restoration of scientific schools, it is necessary, on the basis of a comprehensive expert analysis (including the situation in the country as well as comparative studies of foreign experience in supporting and motivating scientists and scientific schools), to form a system of government research orders (primarily social and humanitarian, where the effect is not always obvious, but fateful, since it lays the foundations of sovereignty, security, and national consolidation).

Preschool education should be considered in the light of a number of current challenges facing humanity today: growing employment rates, digitalization of all spheres of public life, declining demographics, the destruction of the institution of family, the loss of a culture of upbringing, and so forth. The state should establish favorable conditions for the further birth and education of future citizens of Ukraine (taxpayers, military servants, law enforcement officers, doctors, teachers, engineers). This requires a significant increase in the level of services and accessibility of children's medicine / preschool education, and a strengthening of the role of the state in children's upbringing. Kindergartens should become centers of primary social life cognition, where there is a room for both the individual and for social relations. Self-awareness and the practice of applying a common "we", where everyone has their own view of certain phenomena, but is able to interact with other individuals, be a leader and be capable to cooperate with people, to obey and persuade - the way to a holistic civil society and a strong state formation. For this reason, kindergarten is the first step towards a mature citizenship, a center of civic culture and patriotic education. Folk, religious, national holidays and the most important dates in the history of Ukraine, state symbols, history and geography of the country should take an honorable place in the program of preschool education.

Aesthetic education should be a binding element of secondary (school) education, along with the conventional subjects. Playing musical instruments, visual arts, theater, chess, team sports contribute to the harmonious development of young Ukrainians, capable of creative thinking and beauty creation – and in life, in human relations - prevent aggressive moods and attitudes, which, unfortunately, we observe in schoolchildren today (bullying, suicide, *etc.*). Interschool debates among high school

students on topical public issues contribute to the interest of school graduates in social processes and the preparation of future voters for the implementation of civil rights and obligations.

Knowledge of a foreign language (preferably not one) should provide fluency and communication, the ability not only to use gadgets, but also to write essays, read and analyze foreign literature in the original, participate in international school competitions, make reports to foreign audiences, and the like. Digital and media literacy have long been at the forefront of the school curriculum. After all, modern children are becoming increasingly vulnerable to the challenges of an Internet-based society.

Returning to a 10-year term of secondary education will allow avoiding not only a demographic crisis in the future, but also preventing a GDP deficit in the years to come. Currently, the state has extended the stay of children under parental care for at least 5 years (12 instead of 10 years - school, 6 instead of 5 - university, 4 instead of 2 - postgraduate study, which for some reason is deemed to be a level of education, not scientific activity), which will soon respond to social imbalance, the lack of taxes and fees, the leveling of the institution of family, retirement age increase, and so forth.

Taking into account the loss of children's interest in the processes of cognition, it is worth revising the concept of school education and reducing the number of classes to 12 students, allowing teachers to work better and assess the level of knowledge of students. Basic subjects should provide an appropriate level of knowledge so that there is no need to re-study history at the university, and reproach students for not knowing Ukrainian or a foreign language. And such conditions require not a reduction in the number of schools (as is happening now), but the construction of new, more comfortable classrooms, theater studios, sports arenas, and the like. If the state requires talented and motivated citizens, then now it is necessary to attend to establishing favorable conditions for the education of an intellectually powerful nation.

Tertiary education should also contain elements of civic education. Participation in student and interuniversity debates, conferences, public reports, and team competitions on professional skills will involve young citizens in social processes and will contribute to the formation of a mature civil society. Those disciplines of the social and humanitarian complex that do not repeat the school curriculum should be studied in universities, - political science, sociology, social psychology, jurisprudence, foreign language (in connection with the future profession with relevant skills - translation of foreign texts on the relevant subject, political and legal culture, personnel management, management of organizations, *etc.*). In the meantime, the proportion of disciplines taught in parallel and simultaneously in the state and foreign languages should be increased.

Involving students in research activities will ensure the selection and continuous replenishment of scientific personnel and a highly competitive scientific environment. In general, the transition from individual to mass education has negatively affected the quality of the latter (*Barrett 2003; Huzyk 2004; Ryzhov 1991*). Therefore, it is necessary to pay more attention not to the usual sale of seats in the classroom (training under pricey contracts), but to select the most capable and talented applicants capable of mastering academic disciplines. Accordingly, it is necessary to step away from the monopoly of external independent evaluation and allow universities to conduct competitive examinations of applicants.

Special attention should be paid to the professional selection and training of special services / law enforcement officers. In the early 2000s, as a result of the destructive policies of the government, access to these professional environments was granted to casual, unmotivated cadets who entered special education institutions with the aim of further monetizing their positions and professional powers. A significant number of entrants were enrolled 'at request', not at the call of heart. It was during this period that specialized higher education became widely available to oligarchic capital. Shadow entrepreneurs, traders and corrupt officials were well-aware of the importance of integrating 'their people' into the law enforcement system. Since then, the situation in the field of national security has only deteriorated, the students of that time now hold the positions of heads of departments, divisions in law enforcement agencies and courts. Consequently, such cadres are interested in inhibiting any changes and reforms, refusal of self-purification, and sabotage of orders of the state leadership.

The intellectual potential of human capital is the main wealth of any state. The scientific community is called to increase it, accumulate knowledge, and apply research results for the benefit of the state. Unlike technological means of imitating human activity, scientific knowledge should become the basis for social processes management, information security and defense, foreign and domestic policy, upbringing, education, and implementation of values and guidelines.

Effective public administration requires scientific, qualified, informational, expert, and legal support. Making important decisions requires careful investigation of the relevant processes and possible consequences. The value of modern science lies in the ability to foresee, predict, and explain the causes of the occurrence of certain phenomena and patterns.

Development of scientific potential is impossible without restoration of illegally lost by virtue of 'grief reforms' (bureaucratization and corruption of the attestation system of scientific personnel, lack of a scientist's academic freedom due as a result of coercion to "join" to fake expensive publications in "certain" scientometric databases, creation of absolutely

superfluous structures in the system of secondary and higher education for 'quality assurance', *etc.*) and establishment of scientific schools, revival of traditions, without providing state orders for research institutes, without involving the scientific community in finding ways to solve urgent social problems, analyzing and jointly generating state-important and socially significant decisions.

Science is the intellectual power of the state that provides the ability to solve the most complex problems. The level of science directly affects the level of education, politics, economics, medicine, sports, literature, technological progress and even language. Not everyone is able to engage in scientific activity, just like not everyone is able to achieve significant results in sports or art. Therefore, for most ordinary citizens, the academic world is something detached from reality, incomprehensible, and not valuable. But statesmen (who consider themselves the elite) are obliged to realize the importance and value of scientific knowledge, which ensures the strength and sovereignty of the state, its sustainable development, and prospects in a globalized world.

Who is Currently Shaping the Ideological Agenda in Ukraine?

The information policy of the state is now almost entirely dependent on the media holdings owners, which in our country, with the light hand of Boris Nemtsov, are called "oligarchs". The Ukrainian oligarchy is not just big capital and not business in the usual sense, it is a combination of monopolies in strategic sectors of the economy, media, and politics. Oligarchs are the puppeteers of the overwhelming majority of political forces. Media resources and significant corruption capital provide an opportunity to influence strategic government decisions, appoint loyal people to key government positions, promote or discredit certain political actors as a result of information campaigns in order to form in the public consciousness of likes / dislikes towards certain politicians, officials, public figures or organizations.

Deelitization of oligarchs, or de-oligarchization of Ukrainian politics and economy, is complicated by the influence of the latter on the editorial policy of the information market subjects. Oligarchic capital invests considerable funds in media business to protect monopolized assets - the main sources of enrichment. Media is an umbrella under which the beneficiaries of Ukrainian corruption hide from the law and public condemnation. Wherefore, the first step towards the de-elitization of oligarchs is to deprive the latter of influence on the editorial policy of the controlled media. The implementation of these measures requires not only the political will of the state leadership and public awareness of the pressing need for these actions, but also the synchronous work of all relevant state institutions.

The unification and consolidation of the population, divided according to the external historical and political vector of the development of

Ukraine, should become an obligatory task of the state information policy. It is necessary to determine the factors influencing the segmentation and polarization of the population, to level their influence and at the same time to generate and actively implement new messages aimed at forming a single national information field in all spheres of life of the average Ukrainian.

The state at all levels should ensure the formation, direct and control the implementation of information policy eligible to ensure the growth and education of young elites capable of protecting national interests and the coming to power of political actors with state ideas and values. Under such conditions, the historical heroes of Ukrainian politics, who, by the forces of modern domestic political elites and foreign centers of influence, divide the country into different opposing camps, will have to give way to new historical figures and events that can become a unifying factor.

The formation and implementation of national information policy is designed to overcome the anti-state polarization of society. Part of the predominantly artificially polarized Ukrainian society, in contrast to the political polarization of its closest neighbors (Poland, Romania, Hungary, Russia, *etc.*), does not identify itself with the sovereign Ukrainian republic in which they live. Destructive propaganda and political agitation forms in such a part of the Ukrainian population a desire to create their own state formations, associate themselves with another state or nostalgic for Ukraine as a part of the Soviet Union.

The situation in Ukraine requires a change in the perception of the political elite of the role and objectives of information activities of the state from pro-oligarchic to state, which provides not only protection of economic and political interests of individual financial and industrial groups, but also, above all, safeguards Ukraine as an independent self-sufficient subject of foreign policy processes. This requires a transformation of the paradigm of state information policy implementation from sacrificial, defensive, to offensive, which involves not only repelling information attacks and responding to identified information threats, but establishing a single mechanism for protecting and promoting national interests in external and internal information spheres.

Since the Russian Federation's aggression, Ukraine has begun to take its first active steps to counter the hybrid war, which was actually lost in Donbass and Crimea in 2014 - accumulated resources and Ukraine, though not systematically, began to organize broadcasting of television and radio channels in the temporarily occupied territories. However, until now, despite the lessons of recent history, at the state level there is no active systematic offensive work to counter information propaganda and the influence of foreign states along the entire perimeter of Ukraine's territory. Ukrainian media should protect the minds of the population of border regions, just as the State Border Guard Service protects our physical borders. Today there

is a disappointing picture in the western regions of Ukraine - broadcasting of electronic media in Hungary, Poland and Romania is widespread. At the same time, the coverage of Ukrainian terrestrial media not only does not extend to the border regions of neighboring countries, but also has large gaps in the territory of Ukraine, which in 2019 increased further with the transition from terrestrial analogue to terrestrial digital television broadcasting (Boiko, 2021). One of the main reasons for the decrease in the coverage of the television signal is the control of the national operator of digital broadcasting LLC "Zeonbud", which is a monopoly, a number of domestic oligarchs who pursue their own political goals, acting contrary to the interests of Ukraine, sometimes taking the position of the aggressor state (Zaxid.net, 2019).

The state of regional media deserves special attention, especially during the crisis caused by the global pandemic of 2020. Most of the regional media, almost the only source of local news for the population of the older age group (by the way, the most electorally active), has undergone significant financial difficulties and is on the verge of survival. Some of them have already ceased to function, creating an information vacuum in some regions, which can potentially be filled with an information product unfriendly to Ukraine. In such a situation, state support for the print media is needed, which will not only protect the minds of Ukrainians from hostile messages at the local level, but also establish favorable conditions for the viability local elites, which are largely independent of oligarchic capital. For instance, during 2020, a number of developed countries, realizing new potential threats, in various forms supported both journalistic activities and, in particular, the print media (Canada, Great Britain, *etc.*) (Nikitushyn, 2020).

The situation with the lack of opportunities for the local population to watch regional TV channels with pro-Ukrainian news content in the occupied territories of Donbass requires a state reaction, which encourages residents of these territories to look for alternatives on TV channels controlled by the aggressor state.

Deoligarchization Roadmap. Let us consider a number of initiatives that, in our opinion, will lead to a loss of oligarchic capital's interest in media-business. The political capitalization of the media is shaped by political talk shows, political advertising / campaigning, and meanings that are laid down by editorial offices when reporting news and journalistic investigations. How one or another politician looks on TV determines his / her ratings and popularity among voters. No media outlet is able to reach such a large audience as television. Accordingly, the main tools of political influence are political talk shows, political advertising, and campaigning (especially during election campaigns). By depriving private TV channels of the right to political promotion, the state will force private media sector, which is still controlled by oligarchs, to gradually focus on disseminating information

and entertainment content, and the only acceptable form of political agitation - political debate - should be conducted on public broadcasting sites, which are still absent in Ukraine (the legal form of ownership “UA: Public Broadcasting” indicates that the so-called Public Television is de facto state-owned, not public - JSC “National Public Television and Radio Company of Ukraine”, registered on February 20, 1995, form of ownership: state; founder: the state represented by the Cabinet of Ministers of Ukraine). Thus, one of the preconditions for deoligarchization of the information environment should be the establishment of a truly public broadcasting, which would be financed exclusively by TV viewers and advertisers, and the state’s participation would be limited only to collecting the “television tax” and transferring funds to public broadcaster. Concurrently, it is important to restore independent sources of media funding: to allow print and broadcast media to advertise alcohol and tobacco products.

Since the ban on advertising of these products, the level of tobacco and alcohol consumption has increased several times instead of the expected decline. Blind adherence to EU advertising regulation standards has led to deep crisis in the media industry. The young state, trying to comply with democratic canons, to demonstrate loyalty to Western standards, was forced to ban advertising of these products in the media. In the meantime, developed countries such as Germany, Japan, the Netherlands, etc., assessing the proportionality of the social consequences of tobacco and alcohol advertising and the loss of the main source of media income, and with it the independence of their editorial policy, refused to impose such restrictions, explaining their position by the public expediency of ensuring the independence of the media from financial-industrial groups or political parties.

These states not only preserved the culture of print media, but also prevented the reduction in the number of publications by ensuring economic freedom and equality of the media business with other market participants. By adopting restrictive legal constructions, the Ukrainian authorities provoked a crisis in the print media market, most of which ceased to exist, and some were forced to join oligarchic media holdings, losing not only independence but also the principles of professional journalistic ethics. At the same time, there were no restrictions on the advertising of sugar and sugar-containing foods, although the harm to the human body from their consumption is not less. The legislator also does not limit the production of meat with the use of killer preservatives, which have an extremely negative effect on human health. This approach to advertising regulation is populist and destructive. Biased adherence to EU standards puts domestic markets in an unfair, uncompetitive position. The current state of the economy of Ukraine does not allow the introduction of restrictions relevant to countries with a highly developed economy, and the consequences media oligarchization are more shocking for society than the advertising of

tobacco and alcohol in newspapers. The experience of the economic crisis of 1998-1999 showed that the media, which the reader trusts, are able to cope with financial difficulties on their own, if tools for selling advertising are not artificially limited.

The next precondition for freeing the information space from the manipulative whims of the oligarchs should be a ban on financing the media from abroad: no offshore companies or foreign loans, foreign owners, or investors. Sources of media funding should be transparent and domestic, at least for the period of external aggression / annexation / occupation of Ukrainian territories. As long as the country is at war, neglecting information security requirements is criminal.

Particular attention should be paid to the establishment of etheric quotas for educational, children's and social content by changing licensing conditions. At the same time, the state can order the creation of appropriate programs on broadcast channels, and media outlets will receive an additional source of oligarchs-independent funding.

Post-revolutionary changes in legislation on cinematography, television, and radio broadcasting in 2014-2015 pushed the oligarchs to look for new ways to continue cooperation with economic entities of the aggressor state. There appeared such concepts as joint (Russian-Ukrainian) production, the Russians began to create part of the content directly in Ukraine and also to continue to sell low-quality audiovisual products to domestic TV channels, full of nostalgia for the Soviet period. It is necessary to revise the regulatory regulation of economic activity with business entities of the Russian Federation. Barter, cooperation, collaboration, sale, or purchase of content from Russia should be strictly prohibited.

The same applies to any contacts between officials of our state and representatives of the Russian authorities, that are used by the latter to strengthen the position of influence in the domestic political and legal system. The ban should be in effect until the complete de-occupation of Donbass and the Autonomous Republic of Crimea. Therefore, appropriate changes should be made to the Art. 111 of the Criminal Code of Ukraine (Law Ukraine 2001). As noted in the National Security Strategy of Ukraine (President of Ukraine. 2020), State sovereignty, territorial integrity, democratic constitutional order and other vital national interests should also be protected from non-military threats from the Russian Federation and other states, including attempts to provoke internal conflicts.

National security and defense agencies have been the target of the Kremlin's intelligence operations for many years. The reformatting of the apparatus, the formation of information transparency of the authorities and the elimination of complete corruption require the restoration of the efficiency of the special services and the law enforcement system. Public

confidence in law enforcement institutions is measured by the level of protection of citizens and general security in the country. “Do not steal, do not lie and ensure equal opportunities for all” - the implementation of these demands of Ukrainian citizens to the government requires immediate removal of obstacles on the way to restoring the effectiveness of domestic intelligence services.

It is the Security Service of Ukraine that should become the institution that will launch an attack on the subjects of political corruption, detect and disclose the facts of betrayal of national interests, and contribute to the formation of the principles of integrity of public authorities.

With regards to law enforcement agencies: there is a need to establish local municipal police and introduce democratic procedures for appointment to senior positions in law enforcement and judicial bodies. The election of the local police chief, prosecutor and judges will help restore public confidence in the state, strengthen the accountability of officials to electorate and lay the foundation for the formation of a competent, effective government.

The aforementioned initiatives will contribute to the renewal of government institutions, effective protection of the population, values, interests, resources, and sovereignty of the Ukrainian state.

Conclusion

The introduction of democratic institutions in post-totalitarian countries requires, first of all, a concentration of efforts in the fields of education and science, information policy and national security and defense. Without the introduction of transparent and effective mechanisms for the functioning of these institutions, one should not hope for the inclusiveness of politics and the economy, democratization, and the spread of European values of equality and freedom. The latter are directly dependent on the quality of the state and the maturity of civil society, capable of forming an effective state apparatus and democratic control of government.

For almost 30 years of independence, the Ukrainian republic has managed to overcome a number of obstacles on the way to independence, freedom, and self-determination, but these steps are critically insufficient to become a full-fledged member of the European community.

Hence, today, it is extremely important for the ruling elites to realize the need to restore and develop the intellectual potential of Ukraine, its human capital, to implement a state information policy designed to unite Ukrainians around the achievement of the common good and to restore the viability of special services and law enforcement agencies. These are the levers on which the government and society can rely to achieve strategic

goals in overcoming the consequences of the shameful communist past and the complete de-oligarchization of domestic politics and economy.

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Smuggling or violation of customs rules: actual questions of application of administrative and criminal liability

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Abstract

The article deals with the peculiarities of the application of legal liability for commercial contraband in accordance with the current legislation of Ukraine. In particular, the authors of the article investigate the feasibility of criminalization of the smuggling of a wide range of goods, and not only withdrawn from the circulation of things and forests, as recorded in the Criminal Code of Ukraine at this moment. In addition to a thorough analysis of the current legislation of Ukraine, the authors carried out a comparative analysis of Ukrainian legislation with the legislation of foreign countries, which helped to objectively assess the state of the studied issues in Ukraine. The methodology of the study includes general scientific methods, among which the methods of analysis and synthesis should be noted, as well as special-legal methods, among which it is necessary to distinguish system-functional, and comparative methods. As a result of the study, the authors concluded that the criminalization of commercial smuggling (in connection with additional corruption risks and an increase in law enforcement agencies) is inappropriate. Thus, it is proposed to leave the current legislation of

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Ukraine in the investigational sphere in the current state and do not make any changes to it.

Keywords: smuggling; crime; offense; customs rules; criminalization.

Contrabando o violación de las normas aduaneras: temas de actualidad de responsabilidad administrativa y penal

Resumen

El artículo trata sobre las peculiaridades de la aplicación de la responsabilidad legal por el contrabando comercial de acuerdo con la legislación vigente de Ucrania. En particular, los autores del artículo investigan la viabilidad de tipificar como delito el contrabando de una amplia gama de bienes, y no solo los retirados de la circulación de cosas y bosques, como consta en el Código Penal de Ucrania en este momento. Además de un análisis exhaustivo de la legislación actual de Ucrania, los autores llevaron a cabo un análisis comparativo de la legislación ucraniana con la legislación de otros países, lo que ayudó a evaluar objetivamente el estado de las cuestiones estudiadas en Ucrania. La metodología del estudio incluye métodos científicos generales. Como resultado del estudio, los autores concluyeron que la tipificación como delito del contrabando comercial (en relación con riesgos adicionales de corrupción y un aumento de los organismos encargados de hacer cumplir la ley) es inapropiada. Por lo tanto, se propone dejar la legislación actual de Ucrania en la esfera de investigación en el estado actual y no realizar ningún cambio en ella.

Palabras clave: contrabando; delito; infracción; normas aduaneras; criminalización.

Introduction

The issue of application of legal liability for movement through the customs border of goods in violation of the current customs legislation has acquired a special relevance in Ukraine (in connection with the submission to the Verkhovna Rada of Ukraine of Draft Law No. 5420 dated April 4, 2021 “On Amendments to the Criminal Code of Ukraine and Criminal Procedural Code of Ukraine on the criminalization of smuggling of goods and excisable goods, as well as an inaccurate declaration of goods”). The specified document proposes to criminalize the acts for which administrative responsibility is foreseen. It is about the smuggling of goods, smuggling of

excisable goods in significant, large amounts, or previously committed by a conventional person, according to a prior conspiracy using power, an official position, or an organized group, as well as a special relapse and repetition; Inaccurate declaration of goods in significant, large, especially large amounts, or committed by a prior conspiracy with a customs authority, or assistance in any form an official of the customs authority to commit such acts with the use of power or official position, as well as special recurrence and repetition.

The subject matter of the article is particularly relevant in view of the wide discussion in the domestic society regarding the need for the criminalization of smuggling, which began in connection with the submission to the Verkhovna Rada of Ukraine of the draft law on the criminalization of smuggling. The said draft law not only expanded the objective side of the crime with smuggling but also proposed to consider smuggling even preparation for the actual exercise of the illegal act. These proposals are controversial and require additional scientific comprehension. The draft law also proposes to clarify the composition of the existing articles on the smuggling of narcotic drugs (Article 201 of the Criminal Code of Ukraine (Law No. 2341-III, 2001)) and for the smuggling of timber (Article 201-1 of the Criminal Code of Ukraine (Law No. 2341-III, 2001)), recognizing a qualifying feature of “moving actions” instead of “moving”.

Interestingly, the actions mentioned in the draft law were previously considered crimes and contained in the Criminal Code of Ukraine, but in 2011 were decriminalized. As of this time, smuggling is considered to be moved through the customs border of Ukraine of cultural values, poisonous, potent, explosives, radioactive materials, weapons, and ammunition (except smooth-bodied hunting weapons and combat supplies to it), as well as special technical means of non-read information.

All other acts are considered to be offenses, namely – violations of customs rules, and the persons who commit them are subject to administrative responsibility. So, is it appropriate for the criminalization of commercial smuggling in modern conditions in Ukraine?

1. Theoretical Framework or Literature Review

As to the state of development of problems associated with smuggling, there are quite a large number of authors both in Ukraine (Kuryliuk, & Khalymon, 2020; Kulish, Chumak, Chernysh, Khan, & Havrik, 2020) and in the world in general are engaged in these issues. However, if there are more relevant issues of commercial smuggling or wood smuggling, then for other countries more urgent can be problems of smuggling of narcotic drugs, excisable goods or, even people.

Thus, Kemp and Galemba (2020) studied the theoretical and practical problems of smuggling are investigated at the fundamental level. The authors conclude that smuggling is a complex phenomenon. In particular, the transportation of certain goods across the border may be legal in one country and a crime in another. At the same time, illegal cross-border trade is not always immoral, and legal trade is not always moral. However, developed countries are trying to shape global trade policy based on the principles of humanism and democracy. Global trade policy is formed through the conclusion of trade agreements, the introduction of international financial norms or trade regimes.

Moreover, Icduygu and Toktas (2020) in the article “Human Smuggling and Trafficking” explore the problem of smuggling of human resources across the borders of several countries in the Middle East. The article thoroughly considered the latest trends in such smuggling, the principles of formation and functioning of organized criminal groups engaged in such smuggling, as well as the peculiarities of illegal crossing of the border with illegal migrants and refugees, are investigated.

Grodetsky (2021) examines the advantages and disadvantages of a new draft law on the criminalization of smuggling in Ukraine. The article carefully analyzes the current and future legislation of Ukraine in the study area. The author of the article concludes that criminalization of smuggling is necessary, but notes that the draft law on amendments to existing legislation needs to be finalized.

Further, Mir Akmam and Yuslan (2019) consider the features of crimes related to smuggling, in Indonesia. The article concludes that the legislation of this country should be improved to reduce smuggling flows and replenish the country's budget.

Finally, Shustrova and Bohatyrova (2021) examine the current legislation of Ukraine on smuggling and offers their vision for its improvement. Among other things, the article suggests criminalizing the smuggling of valuable and rare species of animals and plants and endangered animals and plants, microbiological or other biological agents or toxins, transplants or human tissues, etc., and certain types of smuggling in the field of transport of goods and materials.

Despite the large number of scientific and journalistic studies on the qualification of smuggling, the purpose of further work should be a deeper analysis of the consequences of criminalization of smuggling for the domestic economy.

2. Methodology

The methodology of the study includes general scientific methods, among which the methods of analysis and synthesis should be noted, as well as special-legal methods, among which it is necessary to distinguish system-functional, formal-logical, and comparative methods.

So, the method of analysis (as a method of studying an object in a set of components of its components) allowed to carefully examine the signs of smuggling, as an administrative offense and as a criminal offense, that is – a crime. In particular, this method allowed to analyze the elements of the confiscation composition to which the subjects belong to the subjects, the subject, the subjective side, and the objective side of the offense.

Further, the method of synthesis (as opposed to the method of analysis of knowledge of objective reality) lets to combine different scientific approaches to solving the problem of criminalization of smuggling and to conclude that it is inexpedient to criminalize economic (commodity) smuggling, which should remain an administrative offense.

The system-functional method (as a method of studying social phenomena and processes in the form of structurally dismembered integrity, where each element of the structure has a specific functional purpose) allowed to study the current state of affairs in the movement of goods across the state border of Ukraine and to conclude due to the inability of domestic law enforcement agencies to qualitatively investigate a large array of crimes in the area under investigation, which could lead to increased corruption risks and the complete collapse of customs in Ukraine.

The formal logical method permitted to thoroughly investigate the domestic administrative and criminal legislation aimed at regulating the studied relations.

Finally, the comparative method provided a careful analysis of foreign experience in classifying offenses as smuggling and the application of administrative and criminal liability to violators of customs regulations.

3. Results and Discussion

To draw objective conclusions about the feasibility of criminalizing smuggling in Ukraine, we should first thoroughly analyze the current legislation in the field.

Thus, at the moment, commodity smuggling is recognized as an administrative offense, namely – a violation of customs regulations.

The composition of the violation includes signs that characterize the external act of behavior of the person, its direction, consequences, signs that characterize the offender, and his mental attitude to the offense.

Signs of violation of customs rules are grouped into four groups (elements) that characterize:

- object of violation of customs rules;
- the objective side of the violation of customs rules;
- subject of a violation of customs rules;
- the subjective side of the violation of customs rules.

All these elements of the violation of customs regulations are inextricably linked. The presence of these elements is mandatory for the qualification of a specific act as a violation of customs regulations. If at least one of them is missing or does not meet the properties provided by the relevant provision of the Customs Code, this act is not a violation of customs regulations.

The object of violations of customs rules is public relations, which are protected by law and which as a result of the encroachment is or may be harmed, as well as what the encroachment is aimed at.

The objective side of violations of customs rules is a set of legally prescribed features that characterize the external manifestation of the act that encroaches on the objects of legal protection, and the objective conditions of this encroachment.

Citizens who have reached the age of 16 (at the time of committing such an offense) may be subject to administrative liability for violation of customs rules, and officials of these enterprises may be subject to violations of customs rules by enterprises.

The subjective side of violations of customs rules is characterized by the mental attitude of the person to commit the offense:

- guilt – the mental attitude of a person to the act or omission provided by the Customs Code of Ukraine (Law No. 4495-VI, 2012), and their consequences, expressed in the form of intent or negligence;
- motive – the inner motivation of the person who created the psychological preconditions for the commission of the offense, and;
- goal – the consequence that a person seeks to achieve by committing an offense.

Administrative liability for violations provided for by the Customs Code arises if these offenses do not entail criminal liability. Prosecution for violation of customs rules does not release these persons from the obligation to pay duties and other taxes and fees.

The following penalties may be imposed for violation of customs regulations:

- warning;
- fine, and;
- confiscation of goods.

Among all types of penalties, warnings and fines are used only as the main type of penalty, and confiscation can be used as the main and additional. It should be noted that the application of an additional type of penalty without the main is not allowed. Therefore, if confiscation is an additional type of penalty and the fine is the main one (and if the fine is not applied within two months from the date of violation of customs rules, and, in case of a continuing offense, within two months from the date of its detection or one month from the date of closing the criminal case), if the act constitutes an administrative offense – then confiscation as an additional type of penalty in this case also can not be applied.

Smuggling is the movement across the customs border of Ukraine outside customs control or with concealment from customs control of cultural property, poisonous, potent, explosives, radioactive materials, weapons, and ammunition (except for smooth-bore hunting weapons and ammunition), and specialized equipment covert receipt of information. The mechanism for classifying actions that fall under the definition of “smuggling”.

According to Article 201 of the Criminal Code of Ukraine, the importation of contraband is punishable by imprisonment for a term of three to seven years with confiscation of contraband. If smuggling is imported by prior conspiracy by a group of persons or a person previously convicted of a crime, or an official using official position, - shall be punishable by imprisonment for a term of five to twelve years with confiscation of contraband and confiscation of property.

In 2018, the domestic legislator supplemented the Criminal Code of Ukraine (Law No. 2341-III, 2001) with Article 201-1, which also provides for criminal liability for forest smuggling.

In addition, Article 305 of the Criminal Code (Law No. 2341-III, 2001) also qualifies the movement across the customs border of Ukraine out of customs control or with concealment from customs control of narcotic drugs, psychotropic substances, their analogues or precursors, or falsified drugs also qualifies as smuggling.

It should be remarked that the most common violations related to the movement of goods across the customs border are:

- violations caused by the deliberately incorrect determination of the quantity, quality, or customs value of goods (many companies underestimate the quantitative, qualitative, and cost indicators of goods to reduce the number of customs duties);
- violations related to the dishonest issuance of certificates of goods to obtain customs preferences that apply to goods from certain countries;
- fictitious transit (violations related to the norm of Ukrainian legislation, according to which the transit of goods through the territory of Ukraine goods are exempt from import duties; in practice, a large number of goods declared as transit and exempt from customs duties remain in Ukraine for sale).

Interestingly, in 2011 the decriminalization of smuggling was explained by the need to bring Ukrainian legislation in line with European standards. In addition, the decriminalization of smuggling was explained by the need to optimize budget expenditures.

In particular, the pre-trial investigation in criminal cases of smuggling of goods involved significant budget funds, which was associated with paid storage of material evidence, expert research, and other procedural actions. The requirements of the criminal procedure legislation stipulated the conduct of a long pre-trial investigation, necessary to gather the evidence base, identify the perpetrators of the crime, their location, etc. In this case, the goods (recognized as material evidence) were stored in the case file and could not be transferred to state revenue until the cases are resolved by the courts. In addition, the analysis of the jurisprudence of smuggling cases shows that the vast majority of persons convicted of smuggling were not sentenced to actual imprisonment, judges decided to release them from serving a sentence with probation and a fine. Partial decriminalization of the analyzed acts led to the fact that moving across the customs border outside customs control or with concealment from customs control of goods, regardless of their value or category began to qualify as a violation of customs rules under Art. 351 (“Actions aimed at moving goods, vehicles across the customs border of Ukraine outside customs control”) and Art. 352 “Actions aimed at moving goods across the customs border of Ukraine with concealment from customs control” of the Customs Code of Ukraine (Law No. 4495-VI, 2012).

The attribution of minor smuggling to administrative offenses is in line with European practice, in particular, the provisions of the Geneva Convention on the Contract for the International Carriage of Goods by Road (United Nations, 1956) and the Kyoto Convention on the Simplification and Harmonization of Customs Procedures (United Nations, 2002), which were signed by Ukraine.

In particular, following paragraphs 20 and 21 of Special Annex H, Section 1 of the International Convention on the Simplification and Harmonization of Customs Procedures, if a customs offense is found to be insignificant during customs clearance to be given the opportunity of administrative settlement of this offense by the customs authority that detected it.

In general, EU recommendations for partner countries in the field of customs are set out in EU (Customs Blueprints (European Commission, 1998)) by defining certain standards:

- comprehensive and stable system of customs legislation;
- customs cooperation mechanism with national and international law enforcement agencies;
- introduction of the latest information technologies at customs;
- simplification of customs procedures;
- customs risk identification mechanism, and;
- efficiency of customs audit and post-audit as forms of customs control.

Admittedly, attitudes towards smuggling have changed in Europe in recent years.

On 5 July 2017, the European Union approved Directive № 2017/1371 of the European Parliament and of the Council, which provided that by July 2019 all EU Member States were to establish, inter alia, a minimum criminal penalty for crimes committed by individuals who harm to the EU's financial interests: 4 years' imprisonment in case of significant damage or significant gain or other punishment that is not a criminal sanction if the damage / benefit was less than € 10,000. Some member states have had criminal penalties for smuggling before.

For example, in Poland, the Criminal Finance Code (Law No. 930, 1999) (as amended in 1999) provides a fine or imprisonment for smuggling. The threshold after which an administrative violation becomes criminal is 10,500 zlotys (about 2.37 thousand euros). The fine can reach 20 million zlotys (about 4.5 million euros). In Germany, "illegal import, export, and transit of goods" is a tax crime. The penalty for this crime can be a fine of 10,500 to 250,000 euros or up to 5 years in prison. Large-scale smuggling can lead to 10 years in prison (2000 Tax Code) (International Renaissance Foundation, 2020).

In different EU countries, the limit of the value of goods, from which criminal liability arises, differs significantly. For example, in Slovakia, this figure is 300 euros, and in Portugal, it is more than 50 thousand euros (Sarapinas, 2020).

At the same time, it is quite difficult to objectively determine which system is more effective – with a lower or higher “threshold” of criminal liability.

How has the reduction in the level of criminal liability affected the dynamics of offenses? For example, in Lithuania, from 2019, the minimum limit of criminal liability for smuggling goods has decreased from 10 thousand euros to 6 thousand. This means that according to the current legislation of Lithuania, smuggling of goods up to 6 thousand euros is an administrative offense, from 6 to 10 thousand euros – a crime of medium gravity, more than 10 thousand euros – belongs to the category of serious crimes. Initially, a forecast was made and, it was assumed that after the legislative changes, all administrative offenses, worth from 6 to 10 thousand euros, in a similar percentage will be in the future.

But the allegations have not been confirmed, and after lowering the criminal liability threshold, a significant proportion of such smuggling cases have decreased. At the same time, the smuggling of goods worth up to 6,000 euros, which fall under administrative liability, has increased. This is a very clear example that despite the possibility of making more money, the alternative to criminal liability is scary and good prevention (Sarapinas, 2020).

Thus, it is obvious that neither in Ukraine nor in European countries at present there is no unity of understanding of further directions of development of the institution of smuggling.

While changes to the current Criminal Code of Ukraine have not yet been made, the three main options for criminalization are being most actively discussed:

1. To criminalize the illegal movement across the customs border of any goods committed in significant quantities, establishing a minimum amount of such smuggling, over which the criminal liability begins.

The sanction for such acts is imprisonment of the person (persons) concerned and may additionally provide for a fine, confiscation of the subject of smuggling, all property, etc. Critics of this position believe that the establishment of certain minimum amounts of smuggling will contribute to the abuse of law enforcement agencies in estimating such volumes, increase bribes at all stages of investigations of such cases, and fragmentation of parties by potential smugglers to avoid punishment.

Proponents, on the other hand, believe that the introduction of criminal liability should help reduce the number of such crimes and will have an educational impact on the perpetrators.

In their view, increasing accountability will help reduce smuggling, and offenders will be punished fairly for their illegal actions.

2. Criminalize the illegal movement of only excisable goods (tobacco and alcohol products, fuel) with the establishment of minimum volumes, over which criminal liability begins. The position of the supporters of this idea coincides with the previous one, but the peculiarity is that they recognize the greater public danger of smuggling of excisable goods both given the amount of payments to the budget and taking into account the specifics of excisable products. In addition to supporters, this idea has opponents who consider such actions only a partial solution to the problem. Because the definition of smuggling, in this case, does not include other popular goods, such as household appliances, electronics, perfumes, clothing, the illegal movement of which across the border is common in Ukraine. According to them, criminalizing the illegal movement of only excisable goods will reduce the effectiveness of the fight against smuggling.
3. Criminalize the illegal movement of goods across the customs border, committed in large quantities, establishing criminal liability in the form of financial sanctions and other types of a punishment without imprisonment. Such sanctions, in addition to fines and seizure of the subject of smuggling, maybe the seizure of a vehicle used for smuggling, confiscation of property, etc. Alternative punishments for this crime may include community service, house arrest, and even a travel ban. The latter type of punishment can be a significant restriction for many and, at the same time, not as severe as imprisonment. Notably when it comes to the central professional activity. Simultaneously, some of the listed sanctions can be applied for minor crimes that fall under criminal punishment.

Apparently, the authors of the draft law (submitted to the Verkhovna Rada of Ukraine) have chosen the first option to solve the problem.

However, this draft law not only expands the objective side of the act but radically changes the structure of the whole crime.

The legislator proposes to postpone the completion of crimes from the moment of actual movement of goods across the customs border of Ukraine (leaving the customs control zone) to the moment of active behavior in the movement, i.e. during the stay in the customs control zone.

Today, the law considers a crime of smuggling (Articles 201 and 201-1 of the Criminal Code of Ukraine) to be completed when the goods have been moved outside the customs control zone, but at the time of its stay there and detection of signs of this offense, the law refers to attempted crime. This was emphasized in more detail in the almost canonical resolution of the Plenum of the Supreme Court of Ukraine of June 3, 2005, No. 8 on smuggling issues. There, the attempt was described as the detection of signs of an offense during a customs inspection, re-inspection, etc. at a time when the goods have not yet been moved.

In the proposed version of the articles, the attempted crime is moved in time technologically to the stage before the movement of goods in the customs control zone for customs clearance, when the signs of a criminal offense are almost not detected. And the completed crime occurs at the time of detection of indications of a criminal offense during the movement of goods in the customs control zone or outside the customs control zones.

Secondly, the fight against smuggling is complemented by the fight against the inaccurate declaration of goods, which, in fact, can be considered as a kind of smuggling, as the inclusion in the customs declaration of wrong information about the goods is its concealment from customs control.

Third, the legislator establishes the amount of damage from which criminal liability arises, without any logic, because virtually the same criminal offenses related to tax evasion have completely different amounts of damage to classify such an offense as criminal. For example, the amount of unpaid taxes, which begins criminal liability (a significant amount) under Article 212 of the Criminal Code of Ukraine (Law No. 2341-III, 2001), is 3405000.00 UAH, but under the proposed Article 2014 of the Criminal Code of Ukraine – 147550.00 UAH. Moreover, the objective aspects of a criminal offense under both articles are almost similar – evasion of taxes and fees. The authorities proposed an even more striking disproportion in Article 2012 of the Criminal Code of Ukraine, according to which criminal liability for moving goods with concealment from customs control or outside customs control begins with the amount of UAH 113,500.00, which averages UAH 36,320.00 in taxes.

In addition, further attention should be focused on the impact of the pandemic (caused by Covid-19 (Kharytonov *et al.*, 2020) on changing smuggling schemes, and new opportunities for violation of customs regulations.

Conclusions

In our opinion, the current legislation of Ukraine currently adequately regulates relations related to smuggling. In particular, smuggling is an administrative offense, which is justified given the economic nature of this offense. Accordingly, it is more expedient to bring the violator to administrative responsibility with the payment of a fine, per the amount of smuggling. The decriminalization of smuggling at one time relieved law enforcement agencies, which frankly could not cope with the large number of criminal proceedings related to smuggling. In addition, the corruption risks associated with the investigation of relevant crimes have been significantly reduced. Last but not least, the decriminalization of punishment took place following the recommendations of the European Union and under

European approaches to regulating these relations. However, this year the Ukrainian parliament is considering a draft law on the criminalization of smuggling, as it is believed that this measure will help fill the budget. Let us disagree with the authors of the bill and investigate the state of the issues under study before the decriminalization of smuggling in 2011. If the criminalization of smuggling cannot be avoided, we hope that the crime will not include any goods, but only certain groups of goods. In this case, the principal punishment for this offense should be fine.

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Linguistic approaches and modern communication technologies in political discourses in Europe and the USA (contrastive aspect)

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Abstract

In this study, we analyze the political discourse of the United States and Europe in terms of linguistic approaches. Among the methods we use are systemic, structural, functional, content analysis, discourse analysis and thesaurus method. Its application took place within the theory of discourse. The study found that the main difference between the political discourses of Europe and the United States are the forms and means of communication, the formats of their distribution and the massive indicators of inclusion of the population (recipient of political discourse) in the communicative interaction. The difference is also the centralization and the levels at which the discourse develops. For example, the focus of political rhetoric on the institution of the U.S. presidency makes the presidential speech a reflection of public opinion. This is not typical of European countries, as pluralism of opinion is widespread there, communication takes place at local, regional, national, and supranational level. In addition, the European identity is in the process of being deeded. However, both discourses have in common the commitment to the values of democracy, but they manifest themselves differently.

Keywords: political discourse; political communication; communication technologies; linguistic approaches; comparative politics.

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Enfoques lingüísticos y tecnologías modernas de la comunicación en los discursos políticos en Europa y EE. UU (Aspecto comparativo)

Resumen

En este estudio, analizamos el discurso político de Estados Unidos y Europa en términos de enfoques lingüísticos. Entre los métodos que utilizamos se encuentran el sistémico, estructural, funcional, análisis de contenido, análisis del discurso y método de tesaurus. Su aplicación tuvo lugar dentro de la teoría del discurso. El estudio encontró que la principal diferencia entre los discursos políticos de Europa y Estados Unidos son las formas y medios de comunicación, los formatos de su distribución y los indicadores masivos de inclusión de la población (receptora del discurso político) en la interacción comunicativa. La diferencia es también la centralización y los niveles en los que se desarrolla el discurso. Por ejemplo, el enfoque de la retórica política en la institución de la presidencia de Estados Unidos hace que el discurso presidencial sea un reflejo de la opinión pública. Esto no es típico de los países europeos, ya que el pluralismo de opinión está muy extendido allí, la comunicación tiene lugar a nivel local, regional, nacional y supranacional. Además, la identidad europea está en proceso de formación. Sin embargo, ambos discursos tienen en común el compromiso con los valores de la democracia, pero se manifiestan de manera diferente.

Palabras clave: discurso político; comunicación política; tecnologías de la comunicación; enfoques lingüísticos; política comparada.

Introduction

Language exists and influences us from two positions. First, it is a social entity and at the same time contributes to social organization. It performs a number of functions. In particular, among them: identification, aesthetic function, nominative, cultural, etc. Political discourse analysis today is a promising area of research. The very concept of discourse has Latin origins (from latin *discursus* - "conversation", "talk"). Today, it refers to any phenomenon of speech reality that has features, functions, and structure (Pavlutska, 2008). In turn, such a field of research as text linguistics analyzes language in its practical dimension based on the laws inherent in any text (Ozadovska, 2004).

Berger & Luckmann (1967), Dreher (2016) were among the first to talk about the possibility of language structures to influence the formation of power structures. They analyzed the extent to which what we call the real

world can be socially constructed and what factors influence it. In particular, they point to the possibility of social mobilization under the influence of political factors with the use of communication technologies.

In this study, we attempted to analyze the political discourses of the United States and Europe as the world's leading democratic leaders based on linguistic approaches and the use of modern communication technologies.

1. Theoretical Framework or Literature Review

Many publications in domestic (Arbeláez-Campillo *et al.*, 2020; Sarani and Dehshiri, 2019) and foreign journals are devoted to the issues of discourse in general and political discourse in particular. The definition of discourse, according to van Dijk (2006a), has become widespread in academia. Consequently, discourse should be understood as a text in context – suitable data for empirical analysis (critical discourse analysis). According to Fairclough (1995), discourse is a broader concept than the text, because it covers the circumstances of speech, the intentions of the speaker, the expectations of the addressee / recipient / client, their relationship with the addressee; includes environment, context, style of speech.

As van Dijk (2006b) points out, political elites are aware of the methods and means of struggle used in political discourse and are ready to defend their positions by tarnishing the reputation of their opponents. In his view, the characterization of discourse as political requires the presence of such parties as politicians and recipients (van Dijk, 1997). Interesting, from his point of view, is the position, according to which it is not necessary to use an incomplete informative picture and figurative, veiled expressions to convince the public of an already legitimized policy strategy. At the same time, the legitimization of controversial views is most often carried out through hints, omissions, and sometimes even double-meaning jokes (van Dijk, 2006a). Fairclough (1995) points out that for such hidden intentions to become part of political discourse, they must acquire ideological features. The ideology, in this case, is the social reality that exists in the minds of a group of people who share common ideals, values, and, most importantly, beliefs (van Dijk, 1998). According to van Dijk (1993), political discourse is a reflection of the social reality in which the concepts of power and dominance prevail. To establish this connection, political actors can use the polarization “we” against “them” to emphasize their strengths and weaknesses opponents.

In her work, Kovaleva (2020) conducted a study of the views of Ukrainian and foreign linguists on the concept, typology, types, functions of political discourse. Accordingly, it is possible to give the following precedents regarding the definition of political discourse from the point of view of different researchers. For example, Serazhim (2002) points out that political

discourse is a text conditioned by a situation of political communication. A similar definition was proposed by Arutyunova (1990), who believes that immersion in communication is a discourse. According to Kondratenko (2007), political discourse should be understood as a communicative act of interaction between participants in political communication. From the point of view of Sheigal (2000), discourse is a sign formation that in the real dimension has verbal and nonverbal features of expression, and in the virtual has extralinguistic. Kryvyi (2001) notes that political discourse is a coherent text expressed through verbal and nonverbal means, immersed in an extralinguistic environment. Moreover, Vashchuk (2007) adds that it also has its pragmatic expression or orientation. Slavova (2012) guides the factors of traditionalism and established practice of discourse in politics and public communication. Kasiyan (2014) agrees with it and adds that political discourse should be considered as a socio-political phenomenon. According to Kovaleva herself (2020), political discourse is a communicative event, the components of which are the text (in written or oral form), the social context, and the addressee. Extralinguistic features play a significant role in the nature of political discourse. For example, the status of the speaker, the situation of the speech, style, means of communication, time and place of the event, purpose, and goals of communication, expectations of the audience, etc. Technology allows political discourse to manifest itself directly or indirectly, at the time of communication (public speaking, face-to-face communication with voters) or on television, video, audio, etc. The use of social networks in political discourse (conducting polls, posts, reposts, links, likes, etc.) has made it more widespread and efficient.

1. Methodology

We applied a systematic method to demonstrate the interaction of communicative elements such as verbal, nonverbal, and extralinguistic factors and their importance in shaping the concept of discourse in general and political discourse in particular. Its use can be found in sections on political discourse in the United States and Europe, specifically in places where elements of political discourse are discussed.

Moreover, we used the structural method to show the construction of discourse. For example, it is explained that political discourse consists of the addressee, speech (written or oral text), the context in which it is immersed, ways and means of communicative interaction (communicative act), other factors of extralinguistic nature.

Further, the authors practiced the functional method to demonstrate the role of political discourse in public communication, the role of mass media in shaping and maintaining political discourse, the functions of

political discourse, such as power struggles, information, communication with voters, ideological function, value orientation, agitation (propaganda), image function, etc.

Besides, discourse analysis and content analysis are utilized to analyze quantitative characteristics, language tools, linguistic techniques in political discourse, in particular, the 46th President of the United States – Joseph Biden.

The researchers managed the thesaurus method to focus on definitions of linguistic units. For example, its use can be seen in the sections devoted to researchers' views on the concept of discourse, political discourse, and on the role of metaphors and their use in political discourse.

The methods we used for the research were applied in the framework of discourse theory.

2. Results and Discussion

The limits of the study. What is political discourse?

The author of the theory of discourse is considered to be Benveniste (1966, 1971). From his point of view, discourse should be understood not only as impersonal, objectively existing linguistic material, but also as a communicative situation where there is a speaker and the addressee, and communication itself is carried out through active actions of the speaker using linguistic means. Discourse can also be seen as an act of communication in the course of its interaction with the context. In a narrow sense, discourse focuses on the analysis of linguistic communication.

The lens of research on political discourse includes texts of speeches, interviews, statements of politicians, political experts, programs of political parties, publications in the media, materials of specialized political science publications. Political discourse belongs to the institutional form of communication (Sheigal, 2004). It is status-oriented and is divided into representatives of institutions and clients. The client of political communication is a mass "consumer". Political discourse is not isolated and is intertwined with other types of discourses, such as legal, scientific, artistic, etc. Peculiarities of political discourse that form its structure are institutionality, the predominance of values over facts, semantic uncertainty, ideological polysemy, fideism, and esotericism (Akinchyts, 2007). According to some researchers, political discourse tends to authoritarianism and distancing itself from the masses (Sheigal, 2004). However, current research on populism in politics shows that the main element of communication between such politicians is the formation of the

image of “their man”, closeness to the people, and, conversely, distancing and criticism of government institutions and professional politicians with experience in government (Protsenko, 2018). Political discourse is the object of study in various fields of knowledge. For example, political science is interested in the influence of discourse on the political process, philologists are interested in it as a living text. A popular area of research is political philology, which explores the relationship of discourse with the concepts of power, influence, authority. Sheigal (2004) notes that it is not easy to unambiguously distinguish political discourse from others because there are points of intersection with other types. For example, if a political figure creates a publication in the media or writes a scientific monograph, the question of the limits of discourse arises (Akinchyts, 2007). In this sense, categorization can be carried out based on the direction of speech or by meeting the criteria inherent in political discourse. For example, when it comes to values, national identification, etc. In addition, there is a view that political discourse covers all ways of communication of political figures, that is, if the party to the communicative act is a politician, it is likely to speak of political discourse because politics is always public (Akinchyts, 2007).

The history of oral political discourse has been studied since ancient Greek times (Averintsev, 1996). A significant element of it was oratory: clarity of speech, relevance to the topic, the importance of time and place, the perfection of form, persuasiveness, and naturalness. The oral form of discourse is personal. Behind this is the individuality of the speaker, as well as the specific language tools he uses. These can be both verbal, nonverbal, and extralinguistic techniques. The main feature of written political discourse is the formal reproduction, fixation on material media.

Political discourse is a kind of argumentative practice (Akinchyts, 2007). The main difference from other such practices is the appeal of political discourse to the values of recipients / clients. Propaganda stands out in a special kind of belief in political discourse as a means of manipulating people’s minds with various kinds of information and language (Sharapanovska, 2016). Appeal to the addressee’s value orientation is used through concepts such as equality, justice, freedom, democracy, etc. In this case, the evaluation characteristic can be both positive and have negative connotations, depending on the goal set by the speaker.

The purpose of argumentation in political discourse is the formation of the value orientation of the addressees (Akinchyts, 2007). Usually, persuasion is achieved through the comparison of antonymous units. Most often, politicians can hear comparisons of the achievements of their administration and their predecessors. In addition, a frequent technique is the use of comparative vocabulary in the context of record achievements: “one of the first”, “has no analogs in the world”, “for the first time in history”, etc.

Features of political discourse of the United States

The United States is characterized by the stability of democratic institutions. At one time, Fomenko (1998) noted that in the formation of political discourse in the United States, the activities of public administration, speeches of presidents, communication with society are carefully thought out, their goal is to create a positive image of the state, strengthen faith in democracy and democratic institutions. The media play a significant role in this. The researcher described social factors as conscious, synchronous, microsocial, and positive. Extralinguistic factors such as ideology, propaganda, mass communication, the feminist movement, and the struggle of ethnic minorities for their rights are also important in American political discourse (ibid). It is also characterized by the expansion of terminology due to derivatives of word-forming bases or established phrases. The formation of nouns, adjectives, and verbs based on the names of politicians is common. For example, "Reaganomics", "Bushism", "Trumpism", etc.

The axiological nature of American political discourse is shaped by value tokens. They elicit a positive cognitive response in recipients. Public communication needs to adhere to political correctness. For example, ethno-social discourse on minorities and women requires special adherence to ethical standards. Political correctness, as noted by Morris (2001), refers to intentional correction of speech to avoid ambiguous and negative reactions of recipients. Speech techniques that are most often used by public figures to suggest recipients are repetition, contrast and opposition, metaphorization, creating a positive evaluation perspective to cover their own activities and negative - for the activities of opponents (Fomenko, 1998). Presidential discourse is formed on the basis of one's own achievements. The use of personal pronouns such as "we", "they", "our", etc., is a means of creating an appropriate cognitive effect in the minds of recipients of political discourse (Proctor, Lily, & Su, 2011). In turn, this can serve as a basis for consolidation with some social groups in opposition to others. The issue of consolidation in political discourse becomes especially relevant during elections. During this period, a politician needs to demonstrate identification with a group of people whose interests he seeks to defend. At the same time, it is advantageous for both candidates, who usually find themselves in a race for office, to clearly distinguish between them, separate political programs with their own characteristics, so that voters can clearly distinguish the policies of one candidate from another and choose their own.

B Metaphors play an essential role in the communication of public figures and their potential voters (Musolff, 2004). For communication to be successful and metaphors to be clear to their recipients, it is necessary that there is a correspondence between what the addressee wanted to say and the consciousness, knowledge, experience of the recipients. Ideally, if

communication between them is successful, the aspirations and expectations of the politician and his support groups are exactly the same. Metaphors, in public discourse, can be analyzed using the methods of content analysis, intent analysis, semantic and stylistic methods. For example, in his speech on November 8, 2020, then President-elect Biden used the metaphors of unity, equality, and freedom for US citizens (Rahayu, Suastini, & Jayantini, 2021; Siregar, 2021). Later, in his inaugural address, the President used metaphors for the unity and reconstruction of America. For example, the metaphor of the United States as a guide to freedom of speech for the whole world was heard. Repetitions are also used: “much to do, much to heal, much to restore”, паралелізм: “listen to one another again, hear one another, see one another. Show respect to one another” (Biden, 2021).

Most often, in his speech, Joe Biden used the pronouns we, our, us to emphasize unity with the American people, thus speaking on his behalf and in his honor. Words such as unity, one nation, together, join forces, all Americans were used to support this idea. According to some researchers, this speech served more to express their own ideological position than to convey the message (Masalova, 2021). The speeches of American presidents usually include 11 topics, including political succession, the role of the President as a defender of the Constitution, national unity, support for the people, civic duty, the American mission, God, basic policy principles, cooperation with Congress. Joe Biden's inaugural speech performs a persuasive (persuasive) function, carefully selecting vocabulary and influencing the emotional and value spheres of the recipients' consciousness (Ananko, 2021; Masalova, 2021).

The institution of the US presidency tends to be the embodiment of public opinion in the country. The President is expected to respond to current and future challenges.

Legitimization (from the Latin “legitimus” - legitimate) is a component of any political discourse. It comes from the Latin “lex / legis”, i.e., law / agreement. The semantics of “justification” is used concerning legitimization outside of legal jargon. For example, if in political discourse we use the semantic construction “if they do one thing, then there will be responsibility - and it will be fair”, then there is a legitimization of the use of coercion under certain initial conditions based on values, in this case - on the principle justice and the inevitability of punishment. Examples from personal experience can also be used as a method of legitimization. For example, “I have been convinced by my own experience”, “my life experience tells me”, “I know it because I was there”, “at my age”, “I have witnessed it”, etc. A separate category of research on political discourse in the United States is the legitimization of racism, for example, when accusing a victim of discrimination based on skin color or ethnicity (Reyes, 2011).

A crucial aspect of the public activities of political figures in the United States is the issue of representation. The formation of political discourse in this aspect is through the creation of an appropriate image, which is a reflection of the interests of the audience on the one hand and the desire to meet these requirements on the part of the political actor. Thus, these two vectors meet and are embodied in its image, through which units of information are transmitted, which are certain messages for the audience. For example, recent discourse analysis shows that the main messages of US President Joe Biden's 46th President are are slogans of American reconstruction ("build back better"), consolidation, reunification ("together"), and recovery ("heal") (Ananko, 2021; Masalova, 2021; Siregar, 2021).

Communication on Twitter is mostly asynchronous, which means that political discourse can sometimes get carried away by discussing a tweet or other post a long time ago. For example, this is typical of the election period, when controversial tweets of political opponents become a tool to combat them (Kruikemeier, 2014; Masroor, Khan, Aib, & Ali, 2019). The use of political discourse analysis in social networks is a promising area of research for new forms of communication between public administration and the general public ("mass reader") (Bouvier, 2015).

The main thing for American politicians on Twitter is to form a clear and concise message, respond quickly to news, productive feedback from voters, attract as many supporters as possible, spread their influence, and maintain an attractive image (Enli & Skogerbø, 2013; Hwang, 2013; Schneiker, 2019).

Political discourse in European countries

When it comes to the political discourse of the European Union, several problems arise. For example, how to form public communication when we are dealing with a supranational entity that has long since ceased to be a regional economic partnership organization? The problem of forming a single European identity is even deeper because the EU consists of countries with different cultures, economies, and national components. The question arises, how should political discourse be formed for communication to contribute to the goals of European integration and be successful? To whom should lexical devices be addressed? Which of them should be applied and find an emotional and value response in the EU?

It is no secret that discourse theory develops based on linguistics, which uses the achievements of cognitive sciences. In this sense, cognitive-discourse analysis can be applied to the political discourse of European countries (Shcholokova, 2014). The study of concepts encoded in language makes it possible to study them using the tools of cognitive linguistics

(Maslova, 2008). In this regard, it is possible to identify key concepts in the political discourse of European countries. These include: regionalization, supranationality, intergovernmentalism, Europeanization, European identity, etc. (Shcholokova, 2014). Shcholokova (2014) uses terms such as deepening and widening concerning the European integration public debate.

Thus, the researcher points out the importance of dialogue for the further development of the political movement and institutional processes in Europe. A feature of the political discourse of European countries is the different approach to European integration dialogue. Its characteristic is fluidity. This means that, depending on the conditions of the socio-economic and historical development of a particular European country, the mood in the context of European integration dialogue depends. For example, when Euroscepticism prevails in one part of Europe, the other makes every effort to overcome obstacles to European integration (Leconte, 2010). The unifying factor is that both countries are in the framework of a public European integration debate.

The political discourse of Europe is characterized by significant decentralization. At first glance, this could be called fragmentation, but the positive aspect of regional and local differences is the common European values that unite different European cultures. In addition, the supranational nature of the EU guarantees a common framework of legal regulation that brings together diverse points of view under one roof. Thus, in the context of pluralism of opinion, it is appropriate to talk about decentralization as a feature of the political discourse of European countries.

The semantic oppositions encountered by participants in the political discourse of European countries include such concepts as: independence – complex interdependency; cooperation – rivalry; the principle of unanimity – the principle of majority; state sovereignty – supranationalism; elitism – democracy; national kinship – cultural diversity; European identity – national identity; consolidation of the Union – enlargement of the Union (Smolyakov, 2010).

Vectors for the development of interaction between the national and supranational political discourse of European countries can be divided into integration and disintegration. They correspond to the concepts of Europeanization and nationalization (domestication) (Shcholokova, 2014). According to Strezhneva (2005), Europeanization should be understood as the process of creating, disseminating, and institutionalizing formal and informal rules, procedures, political paradigms, styles, common norms, and beliefs, which are first enshrined in decision-making at the EU level and then translated into national political discourse.

Regarding the formation of the political discourse of European countries by the media, the concepts of framing are used, i.e., the formation of the agenda, a specific or a specific agenda. The main issue in this sense is the possibility of forming a pan-European media as opposed to successfully operating in the national communicative space. Indicative in this respect is the coverage of the activities of EU structures and institutions by national media. In this aspect, the discourse analysis helps to highlight the features of European integration sentiments, which are broadcast by the media concerning the above structures and institutions.

Conclusions

The political discourse can be divided into its participants, such as the addressee, verbal, nonverbal, and extralinguistic components of the expression. Political discourse is institutional, consisting of subdiscourses. The media and mass communications (in particular, social networks and messengers) play a significant role in the formation and functioning of political discourse. Under the influence of this, the boundaries of political discourse are constantly moving towards other types of discourse. Political discourse is rhetorical, emotional, manipulative, dynamic, ritual, value-oriented. Its typology is influenced by the purpose and form of communication, the figures of the addressee, the sphere of functioning, the type of communicative interaction. Political discourse, in the narrow sense, comes from political institutions. It is broadly related to political issues and may come from non-professionals. The central function of political discourse is the power struggle, to which its derivative roles such as information (communication), unification, agitation (propaganda, advertising), etc. are subordinated.

The differences between the political discourses of Europe and the United States are the influence of the democratic traditions and institutions of each country, the means and ways of supporting the discourse. The institution of the US presidency has a great influence on the formation of political discourse. The President himself reflects public opinion in the country on several issues. He has hopes to address current and future challenges, adjusting political discourse. In contrast, decentralization and pluralism of decision-makers prevail in Europe. This is also reflected in the different levels of discourse: supranational (pan-European) and national. This approach does not apply to American political discourse because it already has a clear American identity. Democratic values are a unifying factor in American and European political discourses. Ways and means of supporting discourses are the same, but, due to demographic, sociological, and other reasons, popular social networks in the United States have a greater impact on political discourse than in Europe. On the European continent, social

networks tend to play an informative role in political discourse, while in the United States it is a full-fledged and massive platform for political communication, agitation, self-promotion, and debate. The goals and objectives of political actors are common to Europe and the United States and are to gain and / or retain power, spread their authority, and effectively manage and communicate (effective feedback) with citizens.

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Portrait descriptions in poetry and prose of England of the XVI-XIX centuries: from Shakespeare to Byron (the influence of trends of the past on the present)

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Abstract

The description of the portrait of a literary character plays an important role in creating the overall image of the character. The urgency of the study is due to the anthropocentric direction of linguistic studies since reflection and interpretation of the existing world and descriptions of portraits play an important role in this. In this sense, it is necessary to analyze the use of linguistic units in the description of portraits of characters from English fiction and poetry in the sixteenth-nineteenth centuries and to know the influence of past trends in the present. During the study several general scientific methods were used: analogy, generalization, observation, comparison, experiment, analysis, and the historical method. The study analyzed portrait descriptions in English poetry and prose from the sixteenth and nineteenth centuries and found that writers used a variety of symbols to capture the author's intentions in characters. Often, the authors used somatic vocabulary to represent the appearance of the characters, the less used lexical units of

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the general characteristics of the portrayal of the characters and the least to represent the appearance of the characters used the kinetic vocabulary.

Keywords: English fiction; description of portraits; kinetic vocabulary; somatic vocabulary; poetry and prose.

Descripciones de retratos en poesía y prosa de Inglaterra de los siglos XVI-XIX: de Shakespeare a Byron (influencia de las tendencias del pasado en el presente)

Resumen

La descripción del retrato de un personaje literario juega un papel importante en la creación de la imagen general del personaje. La urgencia del estudio se debe a la dirección antropocéntrica de los estudios lingüísticos, toda vez que la reflexión y la interpretación del mundo existente y las descripciones de los retratos juegan un papel importante en esto. En este sentido, es necesario analizar el uso de unidades lingüísticas en la descripción de retratos de personajes de la ficción y la poesía inglesas en los siglos XVI-XIX y conocer la influencia de las tendencias pasadas en el presente. Durante el estudio se utilizaron varios métodos científicos generales: analogía, generalización, observación, comparación, experimento, análisis y el método histórico. El estudio analizó descripciones de retratos en poesía y prosa inglesas de los siglos XVI y XIX y descubrió que los escritores usaban una variedad de símbolos para plasmar las intenciones del autor en los personajes. A menudo, los autores utilizaron vocabulario somático para representar la apariencia de los personajes, las unidades léxicas menos utilizadas de las características generales del retrato de los personajes y las menos para representar la apariencia de los personajes utilizaron el vocabulario cinético.

Palabras clave: ficción inglesa; descripción de retratos; vocabulario cinético; vocabulario somático; poesía y prosa.

Introduction

A major paradigm in modern linguistics is the anthropocentric paradigm, which explores man in language and language in man. This fact contributes to the increasing interest in the portrait description of man, the use of which is of great importance for various fields of science and art. Both in literature and in painting, one of the most difficult tasks is the study and transmission of portrait description by artistic means. That is why such a term as "portrait description" is used.

In general, the features of descriptions of the character's appearance, age, body parts, attire, gestures, physique, actions, and facial expressions, perceived through visual perception in works of art in poetry and prose of authors of different eras and periods, have repeatedly been the subject of detailed study by linguists. However, the linguistic features of portrait descriptions in poetry and prose of the 16th-19th centuries have not yet been the subject of linguists' attention. Nevertheless, in the works of William Shakespeare, Edmund Spenser, Christopher Marlowe, George Byron, and in general in the prose works of the 16th-19th centuries, the portrait description is an essential compositional part of the work, to which much attention is paid. Widespread and less common descriptions of the appearance of heroes and their clothing are rich in various linguistic and stylistic means: comparisons, epithets, metaphors, etc.

However, analyzing the use of language units in portrait images, it was found that the existing systematization does not fully reflect the variety of tokens used to depict the appearance of the characters. In addition, the portrait images reflect quite narrowly the picture that the author sought to convey.

Given this fact, it is crucial to interpret the features of the use of portrait descriptions in poetry and prose of England in the 16-19 century and to assess the impact of such descriptions on contemporary literature.

The work aims to analyze portrait descriptions in poetry and prose of the 16th-19th centuries and the influence of tendencies of the past on the present. The subject of the study are social relations, namely social relations, in which portrait descriptions were created in the poetry and prose of England in the 16th-19th centuries and their influence of tendencies of the past on the present.

1. Theoretical Framework or Literature Review

Portrait images in fiction have been studied by domestic scholars, but a comprehensive analysis of portrait images in poetry and prose of the 16th-19th centuries has not been conducted.

Among the scientists who studied portrait descriptions and images can be distinguished: Abdulina (2014), Alekseev (1960), Bashkatova (2003), Belekhova (2002), Horishna (2013), Grizhak (2014), Gut (2012), Esin (2000), Ivasheva (1974), Zagorodnya (2013), Kukharensky (2004), Maletina (2004), Ometsinska (2007), Pavlychko (1989), Prokopchuk (2000), Razuvaeva (2008), Semenchuk (1993), Selezneva (2001), Starikova (1988), and Yurkina (1988).

In her research, Abdulina (2014) paid attention to the portrait as a more important means of forming a holistic image in the work of N. Musin. Thus, the author noted that for the most part, the reader perceives information precisely through the images that arise in his imagination and that are actually formed through verbal transmission.

Alekseev (1960) analyzed English literature in retrospect and noted how under the influence of various historical events, the economic situation in the country, etc. portrait images were formed in the poetry and prose of England.

Moreover, Bashkatova (2003) investigated the linguistic features of portrait descriptions in the intertextual aspect. Thus, the researcher summarized various conceptual areas of the theory of intertextuality, information about the history of studying the portrait from the standpoint of linguistics, and also analyzed the linguistic features of the implementation of the category of intertextuality in the portrait of the character.

Further, Belekhova (2002) analyzed the verbal poetic image in the historical-typological perspective. The author's work clarified the relationship between the era and the portrait images created in this era.

Additionally, Horishna (2013) analyzed in detail the portrait in the novels by Fitzgerald "Gentle Night" and "The Great Gatsby". The subject of Ivasheva's (1974) research was an English realistic novel of the 19th century in its modern sound. Ivasheva (1974) analyzed a large number of works and noted the similarity of images of modern works and poetry of the 19th century. Pavlychko (1989), in his works, analyzed the life and work of Byron, including paying attention to the descriptions in the works of the author. In her work, Selezneva (2001) explained, in more detail, the linguistic means and cognitive models of describing the appearance of characters in English-language fiction, namely, in the materials of works by English authors of the 19th century.

Besides, Grizhak (2014) interpreted the linguistic features of portrait descriptions in English fiction of the 16th century. The author noted that the portrait description of a literary character is an essential component of any work of art, as it plays an influential role in creating its holistic image. After analyzing the linguistic features of descriptions of the appearance of characters in English fiction of the 16th century, the author found that writers used a variety of tokens, embodying the author's intentions in the presented characters. In particular, the authors of the studied works of art often used somatic vocabulary to depict the appearance of the heroes. Lexical units of the general portrait characteristic of the characters were used a little less. What is more, Vestial group of words ranks third in the number of uses and includes not only descriptions of clothing and its elements, but also accessories and other details of the portrait characteristics. As the author

noted, the least number of times to depict the appearance of the characters used kinetic vocabulary.

Guth's (2012) work became the basis for the study, as the author analyzed the unconnected comparative constructions in Ukrainian and English. Prokopchuk (2000) explored the category of comparison and its expression in the structure of a simple sentence, but Kukharenko (2004) drew attention to the peculiarities of the interpretation of the text and its interpretation. Zagorodnya (2013) noted the peculiarities of image reproduction and drew attention to the fact that often during translation there is often a problem of correct interpretation of comparisons and comparative structures in Ukrainian. Maletina (2004) in detail the linguistic and stylistic features of the portrait as a genre of artistic discourse. At the same time, Ometsinska (2007) gave definitions of portrait description as a component of artistic discourse and analyzed its structure. With the help of Esin's (2000) research, it was found out what principles and techniques should be followed when analyzing a literary work. Razuvaeva (2008) explored the types of comparative constructions in the literary text from the standpoint of their perception by the recipient. In this context, the researcher noted that the author's style and use of language tools play a significant role. Furthermore, Semenchuk (1993) and Yurkina (1998) analyzed the portrait in poetry and prose as a special kind of art and paid much attention to the study of techniques and means of depicting portrait images and descriptions in fiction.

The results of the research will also be useful in teaching literature in educational institutions of different levels of accreditation. Regarding the peculiarities of teaching literature, the works of the following researchers were studied: Halian, I., Halian, O., Gusak, Bokshan, and Popovych (2020), Sheikhzadeh and Bejarzehi (2018).

But despite a large number of works on portrait images, the topic of portrait descriptions in the poetry and prose of England of the 16th-19th centuries and their influence on modern trends remains incompletely studied; in the context of the above requires research on this issue and doctrinal study.

1. Methodology

During the writing of the article, such scientific methods were used as an analogy, generalization, observation, comparison experiment, analysis, and historical method.

Thus, using the method of observation created a general description of portrait descriptions in poetry and prose, an overview of current trends in this area, which further led to conclusions about the influence of portrait images in poetry and prose of England on contemporary works.

Applying the method of analysis, an analysis of trends in the development of images in the fiction of England, found that despite the long development of fiction, detailed descriptions of the characters remain relevant, as well as the use of comparison and hyperbole.

Based on the use of types of portrait descriptions, their role in the formation of modern literary art was highlighted. It is also worth noting that the application of such a method as synthesis, at different stages of the study, introduced the general features of the object under study and helped to understand its essence.

The method of comparison was utilized to highlight the features of portrait descriptions in poetry and prose of England in the 16th-19th centuries, which in turn allowed to make generalizations about the influence of English literature's "past" on the present.

Besides, the method of generalization helped to identify the main modern trends in literature and to draw conclusions on the relationship between portrait images in English literature of the 16th-19th centuries and portrait images in modern literature.

Further, the method of analogy made it potential to establish the relationship of equivalence between the two systems under consideration on some grounds. The literature of the past and the present has become such systems.

In addition, a method such as an experiment was employed. This method allowed us to predict the next stages of change of portrait descriptions, taking into account the current stage of development of social relations and technological progress.

2. Results and Discussion

Before analyzing the features of the influence of portrait descriptions in poetry and prose of England in the 16th-19th centuries on the present, it is necessary to analyze the general provisions on portrait descriptions in fiction.

In general, information about the heroes of a work of art, materialized through verbal transmission, on the one hand, objectifies the conceptual model of the world, on the other, - has an intentional, purposeful nature. Combining these factors is the key to creating the image of the hero.

The term "portrait" is used in both broad and narrow meanings. In foreign literary studies, the concept of a portrait is not separated from the concept of character. This concept is considered more narrowly in domestic stylistics, linguistic stylistics, linguistics of the text.

In the national sense, the portrait in literature is a means of characterization, typification, and individualization of characters. Having as the main subject of the artistic image interaction with the environment, the writers describe the changes in the appearance of the characters in specific situations, in the relationship between them. Close attention to the portraits of the characters is based on the general pattern, according to which the internal mental states of people are reflected in facial expressions (expressive movements of facial muscles), pantomime (expressive movements of the whole body), speech dynamics (intonation, tempo, timbre), breathing, etc., which helps in the process of communication to better understand each other's inner world. In addition, a person's clothing often indicates his aesthetic tastes, traits, property status, occupation. Therefore, writers record both the appearance of the characters and their inner state, trying to interpret the correspondence or discrepancy between their so-called external and internal portraits. The portrait, in contrast to the landscape, determines the social affiliation of the character, and is part of the temporal continuum of the text, because the costume reflects the epoch, the time of year, and the time of day.

Therefore, it can be argued that the portrait description includes:

1. image of appearance: face, hair, physique, etc.
2. description of facial expressions, voice, and dynamics of breathing, pantomime, and manners.
3. clothing and accessories (Asalevich, 2003).

Having analyzed many images in English literature, it is worth noting a large number of comparisons in poetry and prose.

Comparison – partial assimilation of two objects – is one of the language categories. Comparison, in general, is a comparison of two objects that have any common feature for both of them, in order to more vividly and clearly characterize one of them. In the course of this mental operation, hierarchical connections are built between the judgments that are formed, and the information is selected in such a way as to distinguish one object from another, to specify its features.

Comparisons serve as a starting point for the generation of any statements that form a system of figurative means and are embodied in two ways – by pointing to the phenomena of similarity with the involvement of purely lexical means, or by using certain syntactic units.

Comparisons used in portrait images are classified according to some criteria:

1. By authorship: individual-author and traditional (national). The latter gives the speech a great emotional expressiveness that

comes from the author. In contrast to the individual, traditional comparisons are included as stable phrases in the vocabulary of the language and actively function in the colloquial speech of the people. Traditional comparisons are those whose image is not re-created, but only reproduced and used in this particular sense by the entire language team. The specificity of individual-author comparisons is concentrated in a contextually limited fragment of the work, which is ensured by the presence of the author and his characteristic stylistic features. In the future, the author points to a fairly conditional boundary between individual-author and traditional comparison, as often comparisons in the context of the author's work of art have deep roots in folk.

2. By measure of comparison, there are: incomplete, expanded, expanded. They are determined by the volume of the components of the module and the standard.
3. According to the logical relations between the concepts connected in contrast, real and imaginary comparisons are distinguished.
4. The central function is to distinguish between objective and subjective comparisons.
5. In the presence or absence of a base of comparison – positive and negative.

Therefore, it can be claimed that the art form has its components (portrait characteristics, description of the landscape, description of psychological states) in the structure of the artistic text, which provides for the emergence of comparisons. Often comparisons are found in the speech of the characters, complementing the speech portrait of the hero.

The analysis of poetry and prose of England of the 16th-19th centuries allowed to allocate depending on the object of comparison of 7 basic groups (Table 1):

Table 1. The comparison group of poetry and prose of England of the 16th-19th centuries (by the authors of the article).

No.	Comparison group
1.	comparisons with celebrities (politicians, actors, artists, etc.);
2.	Comparison with literary, fairy-tale heroes, mythical characters;
3.	comparisons with animals (zoochemical);
4.	comparisons with the plant world - floral comparisons;

5.	comparison with natural phenomena and elements;
6.	comparisons which include a group of names of persons by age, profession, nationality, status, and other characteristics;
7.	comparison with artifacts, household items.

Source: own elaboration.

Thus, the portrait is one of the means of individualization of the character. In addition to the external physical characteristics of the character, the portrait includes information about the hair, clothes, manners, accessories, that is, what reflects the tastes, passions, habits - the individuality of the hero in their comparison and generalization.

The portrait images used in the poetry and prose of England in the 16th and 19th centuries had a significant influence on further literary works and the development of fiction in general.

In the prose works of the 16th century, the portrait description is an important compositional part of the artistic narrative, to which the authors of the works paid a lot of attention. Common and less common descriptions of the appearance of heroes and their clothing are rich in various linguistic and stylistic means: comparisons, epithets, metaphors, and others. Describing the appearance of the characters, the authors mostly depicted their faces and parts, hair, arms, body. Most attention is paid to the description of the characters' clothes, jewelry, etc. Kinetic vocabulary, namely the image of facial expressions, poses and gestures, was not often used by the authors in describing the appearance of the characters. The most commonly used language units in this group of words to denote portrait characteristics are the tokens "fair" and "beauty", which were used in Gascon's novel, respectively, 8 and 2 times, in Lily's works 11 and 9 times, and Sydney's novel "beauty" occurred 17 times, and "fair" - 10.

However, it should be remarked that each writer has his own individual authorial preferences when depicting images and descriptions. In particular, many authors tend to use comparisons that are expressed in a lexical way, as the use of noun comparisons in the form of the instrumental case. For some authors, the individual feature is objective, accurate, dry, naturalistic comparative inversions.

Conclusions

Portrait description includes images of appearance (face, hair, physique, etc.); description of facial expressions, voice and dynamics of breathing, pantomime, and manners; clothes and accessories.

Comparison is a powerful means of visual representation of reality in English literature. By selecting linguistic ways of making comparisons, composing comparisons in texts, the authors achieve a certain emotional-expressive effect, express their own point of view on events that occur and are described.

The most productive way of the grammatical design of comparative constructions is in the poetry and prose of England of 16-19 centuries became a syntactic way, and the most used forms: comparative inflection, contracted comparative, a noun in the instrumental case, which is synonymous with the usual comparative inflection. The second place is occupied by the group of comparisons formed by a lexical way (utilizing words with the semantics of comparison: similar, similar, similar, similar, reminds, like, in comparison, etc.).

Methods and ways of depicting portrait descriptions are still used in a modified form. Thus, descriptions of the 16th century with their expressiveness, fullness, and splendor are still found today, but there are also descriptions where the character is reproduced sparingly and incompletely. Regarding further research, it is necessary to examine the features of the image of appearance in the English works of the 16th-19th centuries and highlight the linguistic features of portrait descriptions of the appearance of the characters.

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Smart contracts in the context of digitalization: the legal realities of world experience

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Abstract

The development of digital technologies is forcing lawyers to analyze phenomena that have recently looked fantastic. This means that a phenomenon like smart contracts has ceased to be a theoretical idea of improving commodity monetary transactions and now needs a legal justification. In this article, we have analyzed smart contracts in terms of their belonging to digital technologies and the legal field, that is, how they can be equated with legal agreements, if they are their analogues, what application can it find given the legislation in the field of civil (contractual) law. The purpose of our study was to establish a link between smart contracts and their legal regulation, with the feature of smart contract implementation perspectives. The methodology used are systemic and formal-legal methods, as well as methods of analysis and synthesis. The results found highlight that a smart contract is a computer code that is entered into a blockchain network to execute a transaction, the usual expression of which is an agreement between the parties. From a legal point of view, smart contracts are only a part of ordinary agreements (contracts) under the practice of international and national law.

Keywords: smart contracts; digitization; digital technologies; blockchain; digital assets.

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Contratos inteligentes en el contexto de la digitalización: las realidades legales de la experiencia mundial

Resumen

El desarrollo de las tecnologías digitales está obligando a los abogados a analizar fenómenos que recientemente se han visto fantásticos. Esto significa que un fenómeno como los contratos inteligentes ha dejado de ser una idea teórica de mejorar las transacciones monetarias de productos básicos y ahora necesita una justificación legal. En este artículo, hemos analizado los contratos inteligentes en términos de su pertenencia a las tecnologías digitales y al campo legal, es decir, cómo se pueden equiparar a los acuerdos legales, si son sus análogos, qué aplicación puede encontrar dada la legislación en el campo del derecho civil (contractual). El propósito de nuestro estudio fue establecer un vínculo entre los contratos inteligentes y su regulación legal, con la característica de perspectivas de implementación de contratos inteligentes. La metodología utilizada son métodos sistémicos y formal-legales, así como métodos de análisis y síntesis. Los resultados encontrados destacan que un contrato inteligente es un código de computadora que se ingresa en una red blockchain para ejecutar una transacción, cuya expresión habitual es un acuerdo entre las partes. Desde un punto de vista legal, los contratos inteligentes son solo una parte de los acuerdos ordinarios (contratos) bajo la práctica del derecho internacional y nacional.

Palabras clave: contratos inteligentes; digitalización; tecnologías digitales; blockchain; activos digitales.

Introduction

In modern conditions, along with digitalization, there is a need to consider how it affects various areas of human life. One of them, and not the last, is jurisprudence. The use of such technology as blockchain and cryptocurrency circulation promotes the emergence of new forms of commodity-money exchange, which increases the speed, efficiency, and convenience of such operations.

But the legal status of these processes is not always defined at the legislative level. In addition, there are questions of a purely theoretical nature, for example, regarding the nature of smart-contracts, which are of particular interest to researchers in the field of contract law.

Are smart-contracts analogous to regular deals?

How can this technology be applied in real life?

Will it be available to ordinary citizens?

What does a lawyer need to know to master smart-contracts?

And aren't they just one type of performance guarantee and not a separate type (or form) of contract? These issues are relevant to legal science, so, in this article, we tried to understand what are smart-contracts as a form of legal interaction from a technical and legal point of view, what are their advantages, disadvantages, and prospects.

The purpose of our study is to analyze what are smart contracts as a form of legal interaction from a technical and legal point of view, what are their advantages, disadvantages, and prospects for application.

1. Theoretical Framework or Literature Review

Both domestic and foreign scientists were interested in the problem of legal support and practical application of smart contracts. Thus, Clack *et al.*, (2016) define smart-contracts as automated and effective agreements that can be executed on their own or with the addition of a human input factor. Their enforceability is guaranteed by the automation or legal status of the parties to the agreement. In their article, the authors consider how it is possible to standardize smart-contracts from a legal point of view.

Moreover, Kolvart *et al.*, (2016) believe that smart-contracts are not legal contracts but can become so if they meet the criteria that apply to contracts under contract law. From this point of view, smart-contracts are technical means, namely software code, which can be packed with certain contractual terms, but not always - the legal contract as a whole. In their publication, the authors also analyzed how smart-contracts are related to the smart-property phenomenon and what legal framework can be applied to smart-contracting.

Furthermore, Raskin (2017), in his study, proposes to divide smart-contracts into weak and strong. This means that weak agreements can be invalidated or amended by a court. Strong smart-contracts mean that the court cannot influence their execution, because it does not make sense, because they are concluded and executed at one time, so the result coincides with the conclusion of the agreement. In this case, the court cannot do anything and cannot influence the situation in any way, because everything has already happened. The author notes that special smart regulation requires strong smart-contracts because there is a need to protect the rights and interests of individuals and legal entities when concluding such agreements. The author also investigated what place can be allocated for smart-contracts in the contract law system.

The nature and the potential of smart contract were described by Levi and Lipton (2018). They stated that smart contracts” is a term used to describe computer code that automatically executes all or parts of an agreement and is stored on a blockchain-based platform. Finally, Zheng (2020), in their article, demonstrated the advantages of smart-contracts over conventional contracts. In addition, they analyzed the interaction of blockchain and smart-contracts, showed in simple words, what is a smart-contract, what is its scope and prospects for its implementation in everyday life. For example, for the world of finance and the Internet of Things, smart-contracts can significantly improve transactions and speed up work processes. It also compares blockchain platforms, analyzes the challenges and obstacles in the implementation of smart-contracts in everyday life.

Many scholars have paid attention to contractual obligations (Perezhniak *et al.*, 2021; Voloshyna *et al.*, 2019), but the topic of smart contracts is still little studied.

2. Methodology

We applied the system method to show the place of smart-contracts, firstly, in the information technology system (their connection with the blockchain), and secondly, to show their role in legal regulation, and more precisely – the perspective they have about contract law, business, etc. In this sense, we have considered smart-contracts as a new element in the interaction of the parties to the contractual process, its disadvantages, and advantages as a phenomenon of a more extensive system, in particular, information technology and contract law. It is advisable to start considering smart-contracts from the point of view of them as part of the digital technology system, which we did in the first half of the study. In the second half of the publication, you can find the legal implications of the implementation of smart-contracts as legal agreements.

We handled a formal legal method to demonstrate the structure and content of a smart-contract from a legal point of view. For example, like any legal contract, a smart-contract must be characterized by the following parts such as the subject of the contract, the parties, the essential terms. We detail this concept in the second half of the article on the legal features of smart-contracts. In addition, the current legal framework that can be implemented to smart-contracts, in particular, on the example of Ukrainian legislation in the field of civil law.

Methods of analysis and synthesis are utilized to define concepts, their main features, and characteristics, to characterize the studied phenomena, such as blockchain, tools for concluding smart-contracts, cryptocurrency exchange, etc. Synthesis is used to generalize and draw conclusions about the results of the study.

3. Results and Discussion

3.1. Background of smart-contracts

The idea of smart-contracts was first voiced by Nick Szabo in the 90s of the 20th century. The main thought was that the use of such contracts does not require the trust of the parties, while the efficiency of their implementation is at a high level. In his work, Szabo (1996) compared smart-contracts with a vending machine, which, receiving money, gives out the goods – thus a simple operation of execution of the contract of sale. His next publication extended the understanding of the execution of such contracts to various types of property (Szabo, 1997). The execution of smart-contracts was conditioned by digital technologies.

In today's world, when we say smart-contract, the blockchain should be mentioned. Blockchain is a decentralized database divided into sequences – blocks in which information is transmitted that is difficult to break, process, and easily trace its origin (Nofer *et al.*, 2017). Indeed, these technologies are interactive, or rather: a smart-contract is software or source code involved in a blockchain environment (Buterin, 2013). In the blockchain network, smart-contracts work as follows. The output parameters are entered into the blockchain, its algorithm processes this information, at the output, we get a change in the status of the smart-contract or a new blockchain transaction. Thus, smart-contracts are first and foremost digital computing technology.

The most widespread smart-contracts are based on the blockchain Ethereum, which uses the programming language Solidity, which operates on the basis of EVM (Ethereum Virtual Machine) (De Filippi *et al.*, 2021). On the Ethereum platform, smart-contracts work as follows. After entering the blockchain, they are assigned an address. To use a smart-contract, the parties make a transaction at this address - this is how the smart-contract code is executed. The Ethereum blockchain is the environment, the network in which this occurs (Buterin, 2013). Execution of a smart-contract is carried out independently, decentralized, with a guarantee of performance (Buterin, 2013; De Filippi and Mauro, 2014; Chen, 2017; Voshmgir, 2017). However, it is remarked that writing software code for smart-contracts can be extremely difficult, and its verification may require a special approach (Bhargavan *et al.*, 2016).

Compared to conventional contracts, smart-contracts have the following advantages (Zheng, 2020):

1. Security. Reduction of risk, unauthorized interference of third parties in the execution of the contract in the blockchain network.
2. Cost-effectiveness. The use of smart-contracts reduces administrative

and other costs because the smart-contract is introduced and executed in a decentralized manner.

3. Efficiency. Smart-contracts can increase the efficiency of business processes. Because they have a standard form, the customer's agreement to receive the goods triggers the execution of a smart-contract instantly, it happens quickly in the blockchain network.

Today, smart-contracts have not yet become widespread and are used only among IT professionals, people, who are directly involved in blockchain technology, cryptocurrency mining, etc. However, large corporations and government agencies are interested in smart-contracts, as they can greatly facilitate and standardize their work.

Smart-contracts are of particular interest to the world of finance, which is interested in the application of innovative banking technologies, as well as in securing valuable data (Hamledari and Fischer, 2021). At the same time, smart-contracts penetrate other areas of human life. For example, they are used in construction and infrastructure. The subjects of capital construction contracts use smart-contracts to make payments and other deductions to ensure the construction of mattering infrastructure facilities. Other researchers confirm these findings. In particular, the introduction of smart-contracts should have a positive impact on the production and supply chain, the competitiveness of the enterprise, according to the employees of the construction sector (Badi *et al.*, 2021).

The prospect of using smart-contracts is in the field of online auctions such as eBay. The use of software code can increase the credibility of transactions, make them fast, improve their tracking. You can use smart-contracts based on the Ethereum blockchain.

3.2. What is a smart-contract?

A smart-contract is a program code used in a blockchain environment, or source code, from which the program code of a smart-contract for a blockchain was collected (De Filippi *et al.*, 2021). If its necessary conditions are met, the smart-contract code is executed by the miners of the basic blockchain network. Execution of a smart-contract is initiated through a blockchain transaction and results in a change in its status.

Smart-contracts are often confused with other technologies. For example, smart-contracts are not a script that runs in a blockchain environment and can be modified at the request of the script author. The smart-contract is executed by the blockchain technology itself and all changes made to it can be tracked and noticed. It is also noteworthy that the parties agree to transfer the execution of the smart-contract to the trust of the blockchain, and not to the program itself (De Filippi and Hassan, 2018).

Smart-contracts are also not quite similar to classic contracts because they are written in legal language that can be applied in everyday life. In contrast, smart-contracts are a technical, or even mathematical, representation of ordinary contracts because the language in which they are written is programmatic or source code that is strictly formalized and has a mathematically balanced structure. In this aspect, smart-contracts look stricter than regular contracts. They do not have the flexibility of linguistic techniques that can be contained in a regular contract (Levy, 2017). In this regard, Sklaroff (2017) emphasizes that some terms of regular contracts (such as bona fide obligations) cannot be reflected to the same extent in smart-contracts, as the latter are expressed in other language means. Such inflexibility of smart-contracts is, at the same time, their advantage because the parties can be sure that no discrepancies can be allowed (De Filippi *et al.*, 2021).

The limits of the application of smart-contracts also have their own characteristics (Egberts, 2017; Mik, 2017). For example, if a smart-contract requires the involvement of a third party, such as the state, or certain administrative procedures such as a certificate of ownership, land registration in the land cadaster, obtaining licenses, certificates, etc., smart-contracts cannot guarantee the success of transactions involving a third party that is not part of the actual blockchain technology (e.g., administrative, or institutional power) in which the smart-contract is executed. For example, a smart-contract can be used to secure the transfer of ownership of land, but only the fact of such transfer or payment (for example, in the form of a sale or gift agreement). Simultaneously, the smart-contract cannot cover all stages of this process that require the legalization of the status of the new owner as a property owner. In this sense, Hulicki (2017) draws an analogy with the vending machine: it implements the contract of sale only of specific objects of the material world contained in it.

Accordingly, a blockchain-based smart-contract also implements a contract through transactions in the blockchain network. Another disadvantage is that once a smart-contract is launched, its execution is not so easy to stop if something similar has not been programmed in it from the beginning (De Filippi *et al.*, 2021). From this point of view, the termination of a classical contract looks easier. Again, this is a manifestation of a special language in which smart-contracts are written (programming language). Other disadvantages of smart-contracts related to their implementation in everyday life, for example, the formation of the appropriate staff of qualified IT specialists in blockchain technology, programmers, the creation of appropriate logistics infrastructure, etc. (Osmolovskaya, 2018).

Misconception is to believe smart-contract is always a self-executing program (Zhou *et al.*, 2019). For example, if the third party tasked with monitoring the implementation of the smart-contract, as well as maintaining

the necessary third-party data on related transactions (e.g., registration of ownership, obtaining a license, etc.), does not keep the necessary data as a third party, the use of the smart-contract may not happen. Such a third party, whose participation is required in the implementation of a smart-contract, is called “oracle” (Egberts, 2017; Guadamuz, 2019; Mühlberger, 2020). Not only a theoretical problem is the situation in which blockchain miners can agree among themselves to interfere in the work of the network, and thus interrupt the normal execution of the smart-contract. Reijers (2018) cite the example of the decentralized investment fund The DAO, which was created using a smart-contract in the blockchain network Ethereum in 2016. This fund managed to raise \$ 150 million in less than a month. However, taking advantage of the lack of software code for the smart-contract on which the fund was based, the attackers managed to take advantage of this and extract more than \$ 60 million from the fund (De Filippi *et al.*, 2021).

3.3. Smart-contract as a legal agreement

Smart-contracts are a topic of discussion in the legal environment (Ferreira, 2021). This is since in the current legislation of many countries there are obstacles to the introduction of this technology in everyday life. However, according to Ferreira (2021), they can be overcome and, therefore, allow contract law to evolve into a more technological and innovative legal phenomenon, and allow ordinary participants in legal proceedings to enjoy all its benefits such as speed, security, and convenience.

Like other agreements, a smart-contract can be broken down into components and standard terms. Its signatories are the parties to the agreement. The contract is signed with an electronic signature. The subject of the contract is its content. Its conditions are written as a mathematical algorithm. A smart-contract is not only a contract but also a guarantee of its fulfillment. Among the features of smart-contracts: autonomy, decentralization, confidentiality, security of execution and data, resource savings, convenience, accuracy, and standardization.

Smart-contracts are a digital software (mathematical algorithm) variant of classic contracts. At a time when classical written contracts are characterized by flexibility and variability due to the use of ordinary language in which they are written (thus multiplying the variability of their use and execution), smart-contracts are not flexible because they are designed to accurately perform the task, for example, purchase and sale, transfer of the object for rent, etc.

The use of smart-contracts is promising for performing legally simple transactions such as purchase and sale, other types of transfer of ownership to individuals or legal entities in cases where it is necessary to provide a secure transaction for a significant amount of money. That is, in a situation

where under a regular contract, the transaction still has a large number of risks due to the variability of the usual language of the contract and further potentially exhausting and costly litigation, it will be easier to enter into an agreement and execute it in the form of a smart-contract. In this sense, the prospect of using smart-contracts can be found in such areas as:

1. buying and selling real estate, vehicles.
2. supply of goods and raw materials.
3. intellectual property.
4. credit, loan;
5. rent.
6. Leasing.
7. financing.
8. Insurance.
9. Franchising.
10. corporate relations.
11. tenders, and;
12. IoT (Internet of Things).

Previously, it was considered that to enter into an agreement in the form of a smart contract you need to be an experienced programmer in the field of IT-technologies, specifically – blockchain and cryptocurrency. Therefore, the ideal option for legal professionals is to have both legal and the above technical skills. Also, to conclude a smart-contract will most likely have to involve an IT specialist (Myronets and Sukhanov, 2020). However, in practice, it is enough to trust the blockchain platform and the instructions that it offers when concluding a smart-contract to make a transaction. In this sense, the role of intermediaries and even lawyers in the future in concluding smart-contracts is questioned, as their participation is no longer necessary (Boyko, 2018).

In the coming years, the number of smart contracts concluded in sports may increase many times over. Smart contracts are concluded using blockchain technology, respectively, the human factor is completely excluded (Kharytonov *et al.*, 2020). In this regard, such contracts are protected cryptographically, and to violate such a contract in connection with any manipulation of the text or signatures, it is almost impossible. Smart contracts will be the main innovative breakthrough in sports in the near future (Kharytonov *et al.*, 2021; Tkalych *et al.*, 2020; Kolomoiets *et al.*, 2021).

It is worth noting that the following proposals were made to improve the legal regulation of smart contracts. For example, the proposal to supplement Art. 636-1 of the Civil Code of Ukraine (Law No. 435-IV, 2003) content, according to which the smart contract is concluded in electronic form, takes effect from the compilation of the code and its placement in the blockchain network, and the identification of the parties is their electronic digital signatures, plus standard protocols for smart contracts (Veres, 2020). Opinions were also expressed on amendments to the Laws of Ukraine “On Electronic Commerce”, “On Electronic Trust Services” (Pryamitsyn and Kovalik, 2021).

From the point of view of the Civil Code of Ukraine (Law No. 435-IV, 2003) (paragraph 1 of Article 202), a smart contract is a transaction, i.e., an action aimed at acquiring, changing, or terminating civil rights and obligations (Boyko, 2018). There is a point of view according to which such transactions concern small households. From a legal point of view, it is optimal to use smart contracts in the sphere of insurance, for the corporate acquisition of property, to pay for the delivery of goods or services. Promisingly use smart contracts for the exchange of stocks, bonds, options, as well as for microfinance services. It is noteworthy that the currency used to pay for smart contracts is often digital. However, in Ukraine, for example, the regulatory framework for the use of cryptocurrency has not yet been developed, as the concept of cryptocurrency is already found in court decisions (usually in criminal cases of misappropriation of digital assets).

For a contract to be legally binding, it must meet the essential conditions that normally apply to it. According to item 1 of Art. 638 of the Civil Code of Ukraine (Law No. 435-IV, 2003), the contract is concluded if the parties have duly agreed on all material terms. The real intentions of individuals are expressed in the form of a contract and its essential terms. If it is not proven in court that the smart contract reflects the real intentions of the parties, such an agreement will likely be declared invalid. Accordingly, the contract in the form of a smart contract must meet the conditions specified in Art. 203 of the Civil Code (Law No. 435-IV, 2003) on the requirements for the validity of the transaction. For example, contracts for the transfer of ownership or lease of real estate, land are characterized by stages that must be complied with by law for such a transfer to take place (e.g., notarization, registration of ownership, etc.).

The transfer of such objects to ownership does not in itself entail legal consequences and changes in legal status. For smart contracts, this means that their architecture must be complicated by additional variables. If this does not happen, then from the point of view of legal technique, such transactions will be incomplete, as they do not reflect the full intentions of the parties and do not fully complete the necessary “cycle” of procedures for the transaction. This means that conventional contracts with less effort can

describe a larger range of variability. In this sense, the ability to cover more consequences and “branches”, “scenarios”, conditions are the advantage of classic contracts over smart contracts (Boyko, 2018). Accordingly, from a legal point of view, smart contracts can be considered, which are only part of a broader set of agreements that require additional action, for example, by third parties (notarization, state registration) as a type of security under paragraph 2. Art. 546 of the Civil code of Ukraine (Law No. 435-IV, 2003), as it guarantees a particular transaction within the limits of the classical contract.

Foreign law confirms that for a smart contract to be legally binding, it must meet the requirements of the law on the conclusion of agreements. For example, Section 9(1) of the Estonian Law of Obligations Act (ELOA) (Law 81/487/2001, 2001) states that only an agreement concluded based on a proposal of one party and the consent of the counterparty, or by other means of a declaration of such mutual consent by both parties to the emergence of mutual rights and obligations. The United Nations Convention on Contracts for the International Sale of Goods (United Nations, 1980) (CISG) provides similar considerations for the conclusion of contracts (Art. 14-24). This is in line with the regulation of contracts under UNIDROIT (INTERNATIONAL INSTITUTE FOR UNIFICATION OF PRIVATE LAW, 2010) Principles of International Commercial Contracts (PICC) (Art 2.1.1), Principles of European Contract Law (TRANS-LEX, 2002) (Art. 2:101), and Draft Common Frame of Reference (TRANS-LEX, 2009) (Art. II 4:101) (Kolvar *et al.*, 2016).

The traditional view of concluding a contract in many countries implies that the offer to enter into a contract comes from the offeror and is accepted by the acceptor. At the same time, the bidder reveals in a sufficiently clear form that he seeks to become a party to the obligation on the proposed terms. If the original terms are not accepted by the acceptor, he may offer to enter into a contract on modified terms. This will mean that the parties have exchanged places, and the conclusion of an amended contract is a counter-offer (counter-proposal), i.e., a new contract is already implied, because its terms are different. But this is a traditional view, where there is a bidder, acceptor, offer, its acceptance, respectively, the formation of obligations under the conditions specified in the contract. The development of e-commerce offers new forms of contracting, which have their characteristics, and this should be taken into account, including using the available legal framework in the field of contract law. But which of its provisions apply to smart contracts?

For example, Article 2: 103 of the PECL provides that the parties may agree on other conditions necessary for the conclusion of the contract, such as a fixed price or the terms of the contract. In this case, they agree on the essential terms of the contract. In this case, the formation of additional

conditions – is a counter-offer from one party to another. According to PICC Article 2.1.13, a party to an agreement may insist on the acceptance of all the details of the agreement, and until the time it insists that the agreement cannot be concluded before all or a specific part has been agreed upon, it is justified. The party to the contract has the right to insist on the approval of all terms of the contract (Kolvarť *et al.*, 2016). With regard to smart contracts, this means that if they are part of a broader agreement but are not specifically mentioned in it, they may not have legal force, as the parties have not agreed in sufficient and clear form on their use. For example, if the parties have agreed on a contract for the supply of goods, stipulated terms, subject of the contract and price, and the party pays for these goods in a non-contractual way – through a blockchain platform using cryptocurrency, such a smart contract cannot have legal force. Simultaneously, if the parties directly in the contract provided for such a possibility of payment as the main or alternative, then the smart contract is legally binding as part of the contract.

ELOA, PICC, PECL, and DCFR are quite flexible in defining the conditions that must be specified in the contract for it to take legal effect and certainty. In fact, they do not contain such references, except that the contract (more precisely, the offer) must be sufficiently defined. This means that for a contract to be executed in a manner sufficiently legally binding, its interpretation may be applied under the legal field (legislation) in which it was concluded (Kolvarť *et al.*, 2016). In the sense of smart contracts, this does not mean their automatic invalidity but rather serves as a guarantee that if the terms of such an agreement meet the legal requirements for transactions, such a smart contract can be equated to a legally binding contract.

The intentions of the parties in concluding the contract can be determined objectively by their actions and deeds. This is important in interpreting the contract. Nevertheless, the clarity and clarity of the terms set out in the contract contribute to the easy interpretation and legality, the certainty of the contract.

It should be perceived that the provisions of the DCFR and PICC may apply to contracts that use an automated contracting process. If the parties have agreed to enter into an agreement on a digital platform without a physical presence at the time of conclusion, this does not preclude the legality of the agreement.

Following the requirements of Article 2.1.1 of the PICC and Article II – 4: 101 DCFR, the idea of intent, which can be determined by the actions, deeds, conduct of the parties, is necessary for the interpretation of contracts, the time of which cannot be determined unambiguously. Accordingly, if the conduct of the parties is sufficient to demonstrate consent, the contract may be considered concluded even despite the impossibility to determine the time of its conclusion (Kolvarť *et al.*, 2016).

Further, we note that following Art. 2.101 (2) PECL and Art. 1.2 The PICC agreement may not be concluded or confirmed in writing. This means that it can be concluded and later confirmed by any means, such as e-mail, witnesses, Skype conversations, and so on.

A critical caveat is that data security may be compromised due to the development of cryptographic tools in the future (Mosca, 2018; Denning, 2019). This means that what is now a strength of smart contracts and blockchain, namely data security, contract enforcement, and liability, may be hit by the development of quantum computers, which benefit from more efficient cryptographic solutions. Hence, quantum computers are more likely to be able to crack modern encrypted codes and cryptographic tools than any ordinary or even advanced computer can at present (Mosca, 2016). According to Mosca, the main cryptographic security tools with a probability of 1 to 7 chances will be broken by 2026 and with a 50% probability – by 2031. Thus, increased security of smart contracts and blockchain may be a temporary phenomenon.

It is now difficult to say whether there are programs designed specifically for lawyers that allow you to create or translate ordinary paper contracts into a smart contract format. In the long run, the creation of software and hardware that will allow users to compile computer code to create the programs they need conveniently and affordably can influence the spread of smart contracts in the lives of ordinary citizens without much effort spent on computer programming languages (Boyko, 2018). Thus, smart contracts can become tools of everyday life, rather than a futuristic exotic for legal professionals of the classic (paper) model.

Conclusions

The study confirmed that a smart contract is a computer code applied in a blockchain environment. Its advantages at the moment are convenience, safety, speed. At the same time, smart contracts can be considered from a legal point of view as part of a normal contract in the sense of a performance guarantee. In order for a smart contract to be legally equivalent to a regular contract, which is legally binding, it must meet the criteria set out in civil law, in particular, the rules for concluding agreements (validity of transactions). Analysis of the practice of domestic and foreign legislation in this aspect shows that smart contracts have the prospect of application in various spheres of life, but for this, they should comply with the law, which is not always optimal for smart contracts. It follows that the adoption of laws and regulations specifically related to smart contracts is still ahead, as well as testing their endurance with new technologies, in particular in the field of quantum cryptography.

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Application of Innovative Technologies for Detection and Investigation of Evidence in Criminal Proceedings

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Abstract

The main objective of the study was to demonstrate the hypothesis that the use of an infrared spectroscopy method for the investigation of objects of examination allows to obtain important and reliable data that can be used in criminal proceedings. The authors explain that knowledge of the possibilities and procedures for using new methods of scientific research is necessary not only for experts, but also for other participants in criminal proceedings who evaluate the evidence. Through the documentary method focused on specialized literature on the subject, special sources of literature on the application of the IR spectroscopy method for the investigation of individual objects and the analysis of possibilities and establishment of the great importance of its use in judicial practice in general were reviewed. It is concluded that, studies show that the use of infrared spectroscopy can not only increase the level of scientific and technical support of legal medical practice, but also improves the quality of expert research and therefore increases confidence in the accuracy and reliability of conclusions made by an expert.

Keywords: infrared spectroscopy; forensic examination; preparation of muster; to theorem of research; evaluation of the conclusion.

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Uso de técnicas innovadoras para la revelación e investigación de pruebas en un procedimiento criminal

Resumen

El objetivo principal del estudio fue demostrar la hipótesis de que el uso de un método de la espectroscopia infrarroja para la investigación de objetos de examen permite obtener datos importantes y confiables que pueden ser utilizados en procedimientos penales. Los autores explican que el conocimiento de las posibilidades y procedimientos para utilizar nuevos métodos de investigaciones científica es necesario no solo para los expertos, sino también para otros participantes en el procedimiento penal que evalúan la evidencia. Mediante el método documental enfocado en literatura especializada en el tema se revisaron fuentes especiales de literatura sobre la aplicación del método de espectroscopia IR para la investigación de objetos individuales y el análisis de posibilidades y establecimiento de la gran importancia de su uso en la práctica judicial en general. Se concluye que, los estudios muestran que el uso de la espectroscopia infrarroja no solo puede aumentar el nivel de apoyo científico y técnico de la práctica médico legal, sino que también mejora la calidad de las investigaciones expertas y, por lo tanto, aumenta la confianza en la exactitud y confiabilidad de las conclusiones hechas por un experto.

Palabras clave: espectroscopia infrarroja; examen forense; preparación de muestras; algoritmo de la investigación; valoración de la conclusión.

Introduction

The appointment and conduct of forensic examinations in criminal proceeding is important for the collection and verification of the evidence by the side of the prosecution and by the side of the defense, and the evaluation of their results by the court is often key to making a lawful and correct court decision. The character and properties of many objects of examination necessitate the use of the various physical and other scientific methods for its research. The use by forensic experts of high-precision modern equipment and devices, the application of the innovative technologies and the latest scientifically sound methods of research makes it possible to obtain complete, accurate, reasonable, and illustrative results, which can be in the basis of expert conclusion.

At the same time, the knowledge modern possibilities of expert researches and methodic, which can be used for its carrying out by the investigator, prosecutor, lawyer, of the main rules and procedure of the obtaining and preparing various objects as samples of examination enables

the procedural person, who asks about an examination, to appoint it in a timely manner, properly prepare objects and evaluate the results that has been obtained by the expert. All this affects the completeness, objectivity and impartiality of the pre-trial investigation and trial of the materials of the criminal proceedings, and ultimately is aimed at ensuring of the compliance with the fundamental rights and interests of the individual. Unfortunately, in some cases, experts do not apply the latest methods and methodic of research on their own initiative, and investigators and the side of defense, without relevant information, do not indicate the need for their application.

In other cases, the procedural person who evaluates the conclusion of the expert has no knowledge about the possibilities of certain or other scientific methods and therefore unable to properly assess the conclusion of expert. All this is directly related to the use of the expert in the study of a number of the physical evidence and other objects of the latest methods of the infrared spectrometry. The information about the possibilities and tasks of such methods of the research is of undeniable benefit to both the expert and the procedural persons, who turn to him for help in gathering and evaluating of evidences.

1. Materials and methods

The review of special literature sources on the issues of the application of the method of IR-spectroscopy for the research of individual objects and analysis of the opportunities and establishing the importance of its use in the forensic practice.

2. General provisions of the use of method of infrared spectrometry for the research of several objects

The essence of the method of the infrared spectrometry.

Today, it is difficult to imagine conducting a pre-trial investigation into most criminal proceedings without using help of the specialists in various fields of knowledge, science, technology, or crafts in it by the investigator, the prosecutor, and often the side of the defense. The relevant procedural persons apply to forensic experts, involving them for holding examination for the receiving assistance in collecting and evaluating already collected evidences. The documents, weapon and other instruments of crime, various traces and other material objects, for the research of which requires the application of the full range of advanced achievements of scientific and technological progress most often become the objects of forensic examination.

In the current practice of pre-trial investigation, the latest scientific and technical means are widely applied, the capabilities of which are constantly expanded, new are created and existing methods of detection and research of various objects are improved, which become material evidences in criminal proceedings. In many cases, for a qualitative and complete research of samples, the experts need to use complex but quite effective scientific methods. Namely, such is the method of the infrared spectroscopy (IR-spectroscopy) as one of the most effective modern methods, which is applied for expert analysis and identification of various objects and substances. The infrared spectroscopy is the section of the spectroscopy that studies the interaction of the infrared radiation with different substances. As one from the physical methods of the researches, it is used in the different areas of the science, technic, production and in each of them this term is given a different meaning, and the study itself and different meanings are given for its results.

The method of infrared spectroscopy (IR-spectroscopy) is one of the methods of the analysis that is based on the recording infrared spectra of the absorption substance. The absorption by the substance in the area of the infrared radiation occurs due to the oscillation of atoms in molecules and has the form of a spectrum, where its own wavelength corresponds to every oscillation. Namely, the identification of substances and connections by their spectral data is based on these properties of the IR-spectra. The sets of bands in the IR-spectrum have the same specific characteristic of substances as human fingerprints. The substance can be identified by these spectra, if its spectrum of oscillation has been already known. The measurement of the intensity of the bands in the spectrum makes it possible to apply the quantitative analysis, to study the chemical equilibrium and the kinetics of chemical reactions, to control the course of technological processes, etc. The active development of different designs of spectral devices for their industrial application has begun from the end of the last century (Kolesnyk and Sapoletova, 2011).

In the pre-trial investigation of the criminal offences this method is applied for the deciphering the structure of different substances, the study and establishment of structure and content of which is important for the correct solution of the tasks of criminal proceedings. One of the tasks of the IR-spectroscopy is the quantitative determination of the values, which characterize the absorption by a certain substance of monochromatic radiation of light waves of different lengths. These values can be used both for the quantitative characterization of a certain substance and for quantitative its determination in solution or in a mixture with other substances. The results of such researches are important not only for the establishment of involvement of a certain person in committing certain actions, but also can effect on the legal qualification of the action, for example, during the investigation of crimes in the field of illicit trafficking of the narcotic drugs, the falsification and the counterfeiting of medicinal preparations, etc.

The new opportunities of the application of the method of IR-spectroscopy for solving a wide range of tasks in the forensic examination research of different objects appear with the development of the science and technic. The determination of content and form of substance by its IR-spectrum by the expert is based on the relationship of the characteristic absorption bands that are recorded in the IR-spectrum, with features of the structure of molecules of a substance that absorbs the light. The totality of all bands of the absorption, which creates the spectrum of this substance, unambiguously determines its individuality, and therefore individualizes the substance itself. The study of IR-spectrum gives opportunity to determine the most important analytical bands of the absorption, which can be used for the evaluation of the quantitative content of substance, to establish the availability of the polymorphism, to consider the nature of the impact on the IR-spectrum of the individual substitutes, as well as of another structural changes in the molecule of the substance.

The method of IR-spectroscopy is applied on the practice in conducting the expert research of objects of different nature and origin. This method is most often used for solving such tasks of the pre-trial investigation.

1. For the research of narcotic drugs, psychotropic, potent, and toxic substances and precursors (Kolesnyk and Hora, 2017; Litvin, 2009). In the examination of such objects of the IR-spectroscopy, one of the urgent tasks of the investigation is solved – the identification of the content of mixture that contains substances whose circulation is prohibited or restricted by law. To do this, it is necessary to identify each of the components of the mixture, which usually consists of the active substance and the filler. When researching the components of the filler, which for the most part cannot be identified by other expert methods, for example the chromatographic, IR-microscope that is combined with an IR-spectrometer is applied.
2. For the research of cosmetics, medicines, several substances of unknown nature (Hora, 2016; Maksutina *et al.*, 1984). During the examination of the specified objects, this method is used both individually and in the complex with X-ray fluorescence method of the analysis, the gas chromatography, the gas chromatography with the mass spectrometric detection or the high-performance liquid chromatography. In the case of analysis of substances of unknown nature, preferable the IR-spectroscopy is used, because in this case a minimum of consumables is required and a wide circle of substances can be identified organic and many inorganic compounds.
3. For the research of the paint and varnish materials and products from them (Tarutina and Pozdniakova, 1986). Microscopic layers of the paint and varnish materials on carrier objects are among the most common objects of examination of materials, substances and

products in the forensic practice. During the pre-trial investigation of many criminal proceedings, for example, about the traffic accidents, it is necessary to establish the affiliation of a significantly small number of layers of the paint and varnish coverages to the content of the paint and varnish coverage of specific cars or other vehicles of the painted structures and other objects that are inspected and with which the vehicle has had or may have contact.

The complexity of such studies is related to the analysis of micro quantities of the researched objects, as well as with many layers and multi-component of each of the layers of paint and varnish coverage. For the research of paint and varnish coverings and objects with the traces containing them, it is necessary to apply a complex of various methods, the most informative of which is the IR-spectroscopy. This method provides the ability to set the type of the main component of paint and varnish materials, the filler, and sometimes the composition of the pigments that is used in the paint. The special devices are used for this purpose – IR- Fourier spectrometers and the special devices that allow to obtain the necessary information in the study of micro particles and microscopic layers.

4. For the establishment the affiliation of substances and traces of substances, as well as gas mixtures to explosives (Kolesnyk and Hora, 2017; Examinations in the legal proceeding of Ukraine: scientific-train manual, 2015). A comprehensive research of explosives and products of explosive involves the application of a wide range of analytical methods, each of which aims to solve individual tasks to establish certain features or properties of the researched substance. The most common methods are morphological research methods, X-ray diffraction (X-ray phase) and X-ray fluorescence analysis, of molecular spectroscopy in the infrared region of the spectrum, etc.
5. For the research of toners in the strokes of the printed documents, the pastes for the ballpoint pens, the colorant markers, etc. (Examinations in the legal proceeding of Ukraine: scientific-train manual, 2015; Barannikova, 2017). The research of substance of toners and other colorants is quite common task that is performed during the technical research of the documents. It is known that such substances have a multicomponent composition that is formed from a polymer base and a large number of inorganic components. As a result, the analysis of the polymeric component of the substance is extremely difficult or impossible. In addition, today there is a tendency to the unify the quality composition of the polymer part of most toners, and therefore there is a need for their quantitative analysis. The use of the quantitative method of the IR-Fourier spectroscopy allows the overcoming these difficulties.

In addition, IR-spectroscopy is an effective method of analysis in case of examination of synthetic glue, plasticizers, fillers, and other polymers that are used to produce documents. The objects of such researches may be printed texts that are made on the printers, the copiers or the multifunction devices for the printing. In such cases, it is important to obtain information about the chemical composition of the toner in the strokes of the text of the document.

Using an IR-microscope and a special prefix to it, the method of IR-spectroscopy can be used to hold the research of fibers to establish their group affiliation and the implementation of the identification. In addition, the described method gives the chance to investigate the structures of crystals, to carry out examination of precious stones of an organogenic origin (the amber, the pearls, etc.).

3. The main tasks of the using the method of IR-spectroscopy

The research of the IR-spectra of the substances makes it possible to identify them by the characteristic spectral characteristics (by the position, the shape, and the intensity of absorption bands), as well as, in the case of necessary, to determine their quantitative content in the researched samples. The principle of this method lies in the registration with the help of the spectrophotometric devices of absorption intensity by the molecules of electromagnetic radiation in the infrared region of the spectrum. The recorded and saved image of the spectrum serves as a visual illustrative material for the conclusion, which is understandable even not to the professionals.

The registration of the IR-spectrum by means of dispersion or the IR-Fourier spectrometer and the comparing it with the database allows to get the reliable result. Such spectrometers belong to the type of the multi-channel devices, which allows a significant reduction in the energy costs. At present, the base of IR-spectra of certain classes of compounds has been created and is available to the experts, who allow automatically to compare the spectrum of an unknown substance with already known ones, therefore, to detect and to identify this substance. The value of the results that are obtained with IR-Fourier spectrometer is that it is a method of the direct registration of the bands of the absorption the reflection of which is strictly individual and is characteristic only for this sample.

The main goal of the specified method is that the IR-spectroscopy along with many other instrumental methods allows the most unambiguous interpretation of the results, which are received during the expert study in the judicial process. The advantages of the method of the IR-spectroscopy with conversion using both classical and IR- Fourier spectrographs are

the high resolution of devices, the wide area of registration of a spectrum and the small time for its registration, possibility of registration of weak signals, the constructive presence in the device or possibility of connection of the electronic computer for the work management and the fixing of the necessary results. In many cases, only the IR-spectrum can be used to infer the properties of the object that is analyzed

The significant advantages of the application of this method are that:

- the IR-spectroscopy is used in the research of various substances, most often due to its versatility, the possibilities of the direct and independent identification a number of important functional groups and structural fragments in small quantities of the test substance in any aggregate state and without any significant restrictions on the physicochemical properties of the sample.
 - in the process of measurements, especially during the application of modern high-performance console and devices, there is no destruction and loss of the test sample as material evidence in the criminal proceedings.
 - the wide application of this method is due to high enough sensitivity, accuracy, speed, and for the holding complete analysis by the method of IR-spectroscopy, the expert must spend less time and a minimum of the consumable items.
 - the result of the analysis is understood for all participants in the process that satisfies the requirements, which are required for scientific research methods during forensic examinations.
 - the application of the IR-spectroscopy will give the opportunity significantly to reduce the time and cost of holding of examinations.

4. The conditions of application of the method of IR-spectroscopy by the court expert

The modern equipment provides the court expert with the widest possible possibilities for the analysis of all samples as objects of the expert research, however, qualitative analysis of samples is related to the quality of preliminary preparation of the sample. That is why the efforts of developers of devices for the IR-spectrometry and methodological support for working with them are aimed at minimizing the preparatory stage, providing the possibility of the holding of rapid analysis of the samples, which is especially relevant for use in the course of holding of operational and investigative measures and covert investigative (search) actions. The general rule of the

application the method of IR-spectroscopy is that any corrections during the study must be applied very carefully, always preserving the original spectrum.

Because of processing of samples, it is impossible to break the unique for each substance ratio of intensity of absorption bands and their form, care must be taken not to inadvertently destroy the absorption peaks that are inherent in the test substance. It is also necessary to take into account that all search algorithms are constructed in such a way that the factor of coincidence is influenced first of all by peaks of the greatest intensity and area, that's why, in the finding it is expedient to divide the spectrum under analysis into sub bands depending on the amplitude and width of the peaks, and then compare the obtained results (Ezevskaya and Bublikova, 2006; Tanasevich, 2012)

For the researcher and the procedural persons who involved the expert, the expected results from the process of the application of this method are that it will facilitate this.

In the case of improving the base of instruments, software, and the emergence of more high-precision IR-spectrometers, it is possible to use this method to explore new objects. The use of this method in the application of 'non-classical' for IR- Fourier spectroscopy of the far wave and near wave regions of the spectrum is promising, in addition, both in qualitative and quantitative analysis, in the study of samples of pharmaceutical products during the holding forensic, forensic pharmacological examinations, as well as for the research of petroleum products in soils, water, other environments and natural deposits during the implementation of the forensic environmental examination etc. (Rudniev *et al.*, 2013).

The research in the near wave region of the IR-spectrum will allow the use of this method for remote detection of particles of the explosive substance in the air, on the surface of the soil or on individual objects, which creates conditions for safe work of the specialist with the explosive objects during the inspection of the scene or the holding of expert examination. The application of quantitative analysis by the method of IR-spectroscopy will give opportunity significantly to reduce the time of the holding of the difficult examinations, and the provision of analysis of near and far wave areas will allow to more accurately determine the chemical composition of the studied objects, therefore it will reduce the number of probable conclusions and conclusions in the form of 'it is not possible to establish' in relation to the categorical conclusions of the expert.

5. The algorithm of application of the method of IR-spectroscopy

The general conditions for the holding of structural analysis of any substances on their IR-spectra is the need of the receiving of the high-quality spectrograms, which accurately transmit the position and contour of the absorption bands, do not have distortions caused by incorrect choice of spectrum capture conditions and unreliable condition of the applied equipment.

The samples that are researched, may be in a liquid, solid, gaseous aggregate state. They can be organic or inorganic, however, it should be borne in mind that inorganic substances sometimes do not give the clear expressed spectra. Due to the fact that the physical state of the sample can strongly affect the IR-spectrum, in each case of the holding of research it is necessary to determine the hierarchy (the sequence) of methods, which will be used in the holding of research. The sequence of application of the methods of research is determined by the types of samples and methods of their preparation (Kolesnyk and Sapoletova, 2011; Tanasevich, 2012).

The application of the methodic in such sequence can be chosen for the liquid sample: 1) the solution; 2) the undiluted liquid in a thin cuvette, if the liquid is insoluble; 3) the liquid that is compressed between the salt plates, the so-called 'the liquid film', 'the crushed drop'.

Such a sequence is desirable to be used for the powders, bulk, and solid samples: 1) the solution; 2) suspension in the Vaseline oil; 3) the tablets with KBr.

6. The algorithm for holding of the research of samples of the liquid compounds

The samples in the form of oil or other liquid are applied with a film on plates of transparent material (for example, KBr, NaCl). The thickness of the absorption layer is usually set from 0,005 to 0,1 mm.

The infrared spectra can be measured for the solutions. Since there are no solvents that are transparent to the whole part of the spectrum, the IR-spectra of the solutions are usually taken only for narrow zones. The measurements are performed in special hermetically sealed cuvettes, which have the form of plates that are fixed in a metal form. The influence of air, which may interfere with the holding of measurements, is eliminated by vacuum treatment of the device or purging it with the Nitrogen.

7. The algorithm for holding of the research of solid substance

1. A sample of the test substance for analysis must be pre-dried without the use of high temperatures and prepared in an inert atmosphere in an amount of from 0,5 to 3 mg.
2. The exemption of the substance and preparation of a sample of the test for research is carried out in a special box.
3. The preparation of solid samples for the registration of their infrared spectra is carried out in two ways.
 - A) The suspension method is the grinding of the sample to a micronized state (the particle size 2-7 mkm) and the preparation of a suspension in an immersion liquid with a refractive index that is close to the sample. In addition, as the matrix, Vaseline oil that is fluorinated or a chlorinated oil is usually used. The resulting translucent paste is applied with a spatula on a window that is made of optical material in the form of a thin uniform film.
 - B) The compression of tablets with alkali metal halides can be considered as the main and universal way of the preparation of tests. It consists in thorough mixing in a mortar of the crushed sample with pre-dried from moisture powder KBr (the potassium bromide) and the next pressing the resulting mixture in a press mold. The result is a clear or semi-transparent tablet as a sample of the test for the research. The note: drying of potassium bromide should be carried out at a temperature of $\approx 600^{\circ}\text{C}$ for at least 6 hours and store it in an inert atmosphere. The method of compression of tablets with KBr and researched samples should be carried out for those samples that are insoluble in conventional solvents, are amorphous or have a stable crystalline structure and do not contain ions that are exchangeable.

8. The algorithm for holding of the research of gases

In most cases, there are no problems with the preparation of gaseous samples of the substance. However, it should be noted in mind that for aggressive gases and liquid vapors it is necessary to use cuvettes that are made of special inert materials, as other materials can contaminate the researched samples.

The pressure in the cuvettes is brought to atmospheric by the dry nitrogen, which increases the sensitivity to the number of components and

allows holding accurate quantitative measurements. In several cases, for example, for the study of a polluted atmosphere, etc., high sensitivity is important and then use gas cuvettes with a large length of the optical way. The residual amounts of harmful, toxic fumes, gaseous explosive mixtures are adsorbed on the wood charcoal in adsorption tubes and are treated with a solvent for identification by the IR-spectrum.

These are the main possibilities and the most common in the practice of forensic examination are cases of using the method of IR-spectroscopy for the research of individual objects during the committing of criminal proceedings for the collection by the investigator, the prosecutor, the side of defense and the evaluation of collected evidence by the court.

Conclusions

The innovations as the introduction of the new ideas, of new methodic in the forensic research, the introduction them into the practice of the work of expert institutions and departments is capable of not only improve the level of scientific and technical support of expert and forensic practice, but also contributes to improves the quality of expert research, raises the level of confidence in the correctness and validity of the conclusions that has been made by the expert. The ample opportunities for the research of many objects of forensic examination has the use of the method of the IR-spectrometry as a modern and advanced method of physical researches of various traces, substances, objects as objects of organic and inorganic origin, even in the very small quantities. The knowledge of the investigator and the court of their nature, essence and composition often becomes an important element of evidence in the criminal proceedings. Not only experts as specialists, but also investigators, prosecutors, judges, lawyers as procedural persons should know about the possibilities and procedure of the using such a method, by whose hands justice is administered and on which the observance of the rights of participants in the proceedings during its committing.

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Political Communications of the UK Government as an Institutional System

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Abstract

This study examines the problem of characterizing the political communications system in Britain as a socio-political phenomenon. In the XX-XXI centuries, the intense growth of knowledge has shaped the socio-cultural and political activity of the population. Political communication becomes a separate area from human activity. In modern conditions, political communication is a set of processes, the source of which should be power. There are many processes in species diversity. Political communications in modern conditions have acquired the status of a social institution. The article attempts to present the institutional status of the phenomenon of political communication as a structure of three main components. First, the state as a governing body, represented by three powers: legislative, executive, and judicial. Secondly, society, which acts as the recipient of the initiatives of state power, or which has a positive attitude towards state policy or, negative and opposes, or has an attitude of waiting to see what happens. At the same time, there are groups in society that tend to actively intervene in politics. The third element of the political communication system is the media.

Keyword: media; political communication; can; society; institutional system.

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Comunicaciones políticas del Gobierno del Reino Unido como sistema institucional

Resumen

Este estudio examina el problema de caracterizar el sistema de comunicaciones políticas en Gran Bretaña como un fenómeno sociopolítico. En los siglos XX-XXI, el intenso crecimiento del conocimiento ha moldeado la actividad sociocultural y política de la población. La comunicación política se convierte en un área separada de la actividad humana. En las condiciones modernas, la comunicación política es un conjunto de procesos, cuya fuente debería ser el poder. Hay muchos procesos en la diversidad de especies. Las comunicaciones políticas en las condiciones modernas han adquirido el estatus de una institución social. El artículo intenta presentar el estatus institucional del fenómeno de la comunicación política como una estructura de tres componentes principales. Primero, el estado como órgano de gobierno, representado por tres poderes: legislativo, ejecutivo y judicial. En segundo lugar, la sociedad, que actúa como destinataria de las iniciativas del poder estatal, o que tiene una actitud positiva hacia la política del estado o, negativa y se opone, o tiene una actitud de esperar para ver qué pasa. Al mismo tiempo, hay grupos de la sociedad que tienden a intervenir activamente en política. El tercer elemento del sistema de comunicación política son los medios de comunicación.

Palabras clave: medios de comunicación; comunicación política; poder; sociedad; sistema institucional.

Introduction

The authors proceed from the judgment that Great Britain is a classic, historically verified model of interaction between public authority and society. The study of the British experience of political communications is of interest from the point of view of the formation of a systematic diversity of social ties in the modern world. The purpose of this study is to characterize the political communications system of Great Britain as a socio-political phenomenon.

At the same time, there are groups in society that are inclined to actively intervene in politics, such as, for example, political parties and which, expressing 'feedback', are active participants in political communications. According to the content of information issued by the media in the aspect of socio-political relations, they can be schematically divided into pro-state, opposition and the so-called 'yellow press', which can play on both fields, depending on the customer.

1. Literature Review

The power of the printed word at the beginning of the 20th century was justified by V.I. Lenin, who gave the political newspaper, as a channel of communication between the government and society, the role of educating this society, a collective agitator and organizer of society and a tool to attract political allies. It is noteworthy that without the existence of a political newspaper, he considered it impossible to concentrate all the elements of political discontent and protest (Williams, 2014).

As we know from Russian experience, the printed word managed to organize the population of a huge country into decisive and fundamental changes in the political system. Modern media represent a more powerful social force than it was in the recent historical past. The diversification of the media into print media (newspapers, magazines), radio, television, the Internet, admittedly, has turned them into the so-called 'fourth power' in terms of their impact on society and the state. Being a part of public life formed by a social institution, the media not only reflects public opinion, but also shapes it, including in the field of state power, in political circles. In conditions of wide literacy and social activity of the population of the countries of the world, information transmitted by the media is quickly disseminated in society, having a strong impact on the communicants.

As political and communicative forms of interaction between the state and society in modern society, such as referenda, polls, and election campaigns have become widespread. All the structural elements of political communications that I have mentioned above together constitute a socio-political and historical-cultural institution that has some specifics in individual countries. Let us turn to the sketch of the institutional system of political communications of the UK government.

The institutional system of political communications in modern Britain is a combination of interactions between state, party, socio-political institutions. All of them, to one degree or another, express and represent the interests of various segments of society, from socially significant group to private. The leading instrument for the realization of public interests is the state. By maximally concentrating power and resources in their hands, the state distributes values and encourages the population to compulsory implementation of their decisions.

Modern English society as a structural unit of the system of political, in particular, and intercultural communications in general, according to the materials of the BBC Russian service, the source has been divided into seven different classes (instead of three, as it was in the 20th century) (2013). The basis for dividing the population into classes has become the parameters that are most relevant, in our opinion, reflecting the realities of modern life in general: economic (income, savings, real estate), social (connections and social circle) and cultural (interests and ways of spending time).

The seven social varieties are included in the new model of social classes - from the elite to the so-called 'precariat' (the most socially vulnerable segment of the population that does not have stable sources of income and social guarantees). Despite the changes in the social-class structure of modern Britain, it should be noted that in the aspect of vertical social mobility, English society remains very conservative. This is confirmed by the results of research by the BBC service, which analyzed a number of evidence and cited an extract from the report of the Organization for Economic Co-operation for 2010: "Great Britain really occupies one of the last places in terms of some social mobility: for example, the prospects for a child getting higher education and paying well are largely determined by the property status of his parents" (Komleva, 2015: 65).

In our opinion, the relatively low social mobility of the population of England, characterizes the specifics of its intro-social communications. One of the key elements of the institutional structure of political communications of the UK government is the media. It is they who serve as a link between state power and society in the dissemination of information, the formation of public opinion. For example, television 'is considered part of the national culture, and no one is ashamed of it (Votmer, 2006; Jebrilet *al.*, 2013). According to Rubtsova and Devdariani (2019), British television is still a strong link in shaping public opinion, including about Russia.

2. Methods

This study is qualitative in nature and has used mostly secondary data collected from different sources including literary books, book chapters, academic journals, newspaper articles, and websites. The purpose of our study is to analyze the classical model of British political relations in the interaction of government and society. The authors set the task of studying the British experience of political communications, which are of interest from the point of view of the formation of a systemic diversity of social ties in the modern world. Both theoretical and applied methods were used for the research.

Comprehension of the problems posed in the study is based on methodological principles historicism, scientific nature, objectivity, as well as sociality, integrity, and fundamentality, including study of the historical process of socio-cultural, political communications in the aggregate of facts and sources in their logical and chronological sequence. The use of this technique made it possible to carry out a systematic, concrete-historical analysis of the development of scientific thought in combination with the institutional status of the phenomenon of political communication through obtaining reliable scientific results.

Firstly, the state participates in political communications as a governing body, represented by three branches of government: legislative, executive, and judicial. In the structure of political communications, i give him priority place, since i consider it as a source of state-power activity, an ideologist (laws, orders, etc.). Secondly, in the structure of political communications, i include a society that acts as an addressee of state - power initiatives. Being heterogeneous in its structure, society either has a positive attitude to public policy, or a negative attitude and puts forward opposition. The third element of the political communications system is the media.

As the vast majority of British scholars note, by the end of the twentieth century, the influence of mass media on the very structure of the establishment and its relationship with the rest of society has become key. Let us single out several channels of the indicated influence:

1. Currently, the media establishment has entered the British establishment. These are popular presenters of television news, editors of major national newspapers, members of the professional community of political journalists - the Lobby, or the Commonwealth of Journalists of the Parliament Hall, the first parliamentary-government pool in history. Although it has existed in British journalism since 1884, it was only in the 21st century that it began to be perceived as part of an influential layer. Owners of media concerns should also be included in this category, although their influence on public consciousness is not direct, but is mediated by the media themselves and political figures with whom media tycoons are affiliated in order to prevent the adoption of antitrust laws in the media sphere. The story of BAP, the British-American Project born in the bowels of the White House in the early 1980s, speaks more about the level of influence of the media person within the establishment more eloquently than others.
2. A new way has been formed for recruiting the elite: through the media. It was the press and television that created within the establishment a new group - media celebrities, or celebs ('celebrities'). The establishment included not only parts of the political and economic elite along with journalists, but also sports stars, show business, mass culture and 'ordinary people' turning into celebrities due to extraordinary (sensational) events in their lives.
3. There was a redistribution of influence within the establishment depending on the interest of the media. One vivid example is Princess Diana, whose participation in the events was more authoritative and influential and attracted much more attention than the participation of her husband. The same can be said about the House of Commons, where active backbenchers (parliamentarians from the back benches, that is, not holding important posts) can today receive

more attention and are more often quoted than even the Shadow Cabinet; - Some elite groups left the establishment: scientists, military, judges. Today, their influence on public opinion can be called twice indirect - through the influence on the establishment and the subsequent influence of the establishment on the media.

4. The formation and entry into the establishment of media figures (media persons with mediated personalities) - for example, leaders of public organizations and trade unions, which in the minds of the layman 'detach' from their organizations and begin to function as independent information figures.
5. The new quality of the establishment has become dominant - its media, that is, dependence on the media and constant adaptation to their needs. As we shall see, this is the whole work of the establishment with public information (Wolfsfeld, 2011). Thus, at the end of the twentieth century, the life and preservation of leadership positions for the British establishment depended largely on access to (and control over) the media, and through them, on the management of public opinion. Considering the new qualities of the British establishment in the last quarter of the twentieth century, i note that it consists of the following significant strata:
 - Active political establishment: king / queen, leaders of parties (including regional) and parliamentary factions, party activists in parliament and localities, members of the British Parliament and regional assemblies (especially heads of parliamentary commissions and committees), members of the government, mayors of major cities, union leaders, families, and advisers to political leaders. The political establishment, by virtue of real power and the overall image of the 'leader of the nation' imposed on it, personifies the establishment as a whole and has the greatest resource of pressure on the communication space.
 - Economic establishment: owners and top management of large businesses (both British and foreign residents with interests in the country's economy), financial analysts, financial information consultants, prominent economic journalists, and owners of the financial press.
 - Media elite: media owners, leading journalists, editors of national and large regional media, the journalistic lobby.
 - Celebrities from the world of sports, show business, science, culture, the royal family, and the media-covered part of the class aristocracy, as well as ordinary citizens who are currently in the focus of media coverage. As already mentioned,

the survival of the establishment in its established form and composition critically depends on the state of public consciousness and public opinion about it. Under these conditions, communication based on proactively and a strategic approach to it becomes a key factor for the survival of the establishment.

Conclusions

Speaking about the institutional status of political communications of the UK government and its role in the system of intercultural social ties, the following conclusions should be made:

1. The Institute for Political Communications of the Government of Great Britain consists of classical elements, namely: the state-power elite, which actively uses the media in their combined diversity in promoting political ideas. Institutional status is proved by the systemic interconnectedness and interdependence of the structural elements that make up political communication.
2. The British establishment in the post-modern era is a collection of representatives of not only the aristocratic elite, elected representatives of the regions, but also prominent figures of the media, which, of course, significantly reduces the status of media independence.
3. In the process of building political communications in Great Britain, the institution of the monarchy plays a prominent role, supported by the conservative worldview of most Britons. The principle of the ascriptive Ness of royal power actually means the formality of royal power. At the same time, in the institutional status of political communications, the British monarchy plays the role of a stabilizer of public sentiment.
4. The relatively low social mobility of the population of England, in my opinion, characterizes such a feature of intro-social interactions between society and the state as adherence to traditions, which largely determines the cultural status of British society in the global space.
5. The media in the UK's political communications system reflect typical attitudes of the population, representing a system of pro-state, opposition, and neutral-expectant information blocks.

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The Attitude of Iran's Criminal Policy Towards the Observance of the Culprit's Right to Silence in the Trials

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Abstract

The primary concern of justice department law enforcement as the arms of the criminal justice system is the rapid discovery of the crime. This article seeks to investigate the attitude of Iran's criminal policy or, more specifically, Iran's criminal policy towards the observance of the right to remain silent in trials. In line with this, the problem of the study translates into the question: what are the results of the observance of the right to silence of the accused in the different stages of the criminal process? Utilizing the documentary investigation method, issues related to the right of the accused to remain silent in Iran's criminal proceedings at the stage of discovery of the crime, the initial investigation stage, and the trial stage in Iran's laws on criminal procedures were investigated seminally. Among the main conclusions is that Iran's trial system, which was in line with the inquisitorial trial system, changed its procedures with the passage of the law on criminal trial procedures in 2013 and was influenced by the effect of international human rights regulations.

Keywords: judicial proceedings; criminal policy in Iran; the right to silence; political attitude towards the accused; human rights.

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La actitud de la política criminal de Irán hacia la observancia del derecho de los culpables al silencio en los juicios

Resumen

La principal preocupación de los agentes del orden del departamento de justicia como brazos del sistema de justicia penal es el rápido descubrimiento del delito. El presente artículo busca investigar la actitud de la política criminal de Irán o, más específicamente, la política penal de Irán hacia la observancia del derecho a guardar silencio en los juicios. En línea con esto, el problema del estudio se traduce en la pregunta: ¿cuáles son los resultados de la observancia del derecho al silencio de los imputados en las distintas etapas del proceso penal? Utilizando el método de investigación documental, los temas relacionados con el derecho del imputado a guardar silencio en el proceso penal de Irán en la etapa de descubrimiento del delito, la etapa de investigación inicial y la etapa de juicio en las leyes sobre los procedimientos penales de Irán fueron investigados seminalmente. Entre las principales conclusiones se destaca que el sistema de juicios de Irán, que estaba en la misma línea con el sistema de juicios inquisitivos, cambió sus procedimientos con la aprobación de la ley sobre los procedimientos de juicio penal en 2013 y fue influenciado por el efecto de las regulaciones internacionales en materia de derechos humanos.

Palabras clave: procedimiento judicial; política penal en Irán; derecho al silencio; actitud política ante los imputados; derechos humanos.

Introduction

Right to silence is the culprit's right of defense, i.e., his or her ability of refraining from providing answers to the questions posed by the formal authorities in case of their being later usable against him or her in the course of the penal lawsuits. Considering the meaning, the right to silence has been described as one of the examples of human rights (Hocking and Manville, 2001) in such a way that the judges from the European court of human rights introduced it in Murray case with the England's government being a party thereof in 1999 as an international criterion which is in the heart of such a concept as fair trial which is per se the subject of article 6 of the European convention on human rights (Gordon and Ward, 2000).

The researchers know the foresaid right which, as said by some, dates back in England to medieval centuries (Rao, 2002) as being a sort of privilege against self-incrimination under the presumption of innocence (Hocking and Manville, 2001) meaning that since the principle is the

culprit's innocence and it is the suing authority that should prove his or her criminality, the culprit is not required to offer answers to the questions that may attribute accusations to him or her (Haji Deh Abadi and Akrami Sarab, 2010).

In the laws of Iran and according to article 197 of the law on the criminal trial procedures, passed in 2013, it has been stipulated that "the culprit can keep silent in which case his or her refrainment from providing answers or signing assertions should be inserted in the minute" so the culprit's right to silence during the investigation has been implicitly accepted by the legislator and the judicial authority and the justice department's law enforcement officers are obliged to observe this right so the culprit should not be forced to answer the questions raised by the police or the investigators for they are solely directed at justification of his or her criminality because this helps the judicial authority fulfill his or her duty, to with the very justification of a crime's occurrence and its attribution to a person. This right should be announced to the culprit in the first place. Many of the rights in the penal trial procedures such as the temporary arrest, being subjected to passage of rime, writ of mortgage and the existence of specialized authorities have proponents and opponents and each of them has a reasoning of a type behind it (Akhundi, 2002).

In the penal laws of Iran and as a guarantee for the culprit's defense right, the constitutional principles, especially the act 38, granted a formal and legal aspect to the right to silence. After the glorious victory of Islamic Revolution of Iran, this trend caused part of the human right topics to be mentioned firstly in the constitution of the Islamic Republic of Iran and then, in the other regulations in respect to the members of nations and the necessity of their observance was underlined. Amongst these rights is the culprits' defense right as mentioned in acts 30, 37 and 38 of the Islamic Republic of Iran's constitution so that the culprits can take measures in line with the repelling of the accusation directed at them. It is worth mentioning that many of the experts of the penal law have offered reasonable and sophisticated notions to justify the right of silence. In the end, although the right to silence has been neglected in the laws on the penal trial procedures due to the absence of an explicit legal text, there are numerous works by experts and scholars of penal sciences and criminology that significantly document this claim (Rahmdel, 2006).

The present article seeks investigating the attitude of Iran's criminal policy or put differently, Iran's penal policy regarding the observance of right to silence in the trials. In line with this, the study's problem is that what are the outcomes of observing culprit's right to silence in various stages of the criminal trial?

1. Research Literature

In research termed: “Comparative study of the culprit’s right to silence in the laws of Iran and Iraq” (Ardabili, 2006: 13) concluded that the right to silence is one of the best rights and it means that a culprit can keep silent and refrain from the questions s/he is asked and that this privilege is of a lot of benefits to the culprits. It has also been stated that this right has been accepted in all the trial systems, including the accusatory, inquisitive, and mixed as well as in the two legal systems of Iran and Iraq. The most important criticism that can be directed at the Iranian legislator in this regard, as stated in the foresaid article, is that the culprits may be personally judged by the legal authorities in case of keeping silent; non-necessity of making the culprit understand this right, absence of legal mandate in this regard, non-clearness of the judicial system’s duty in regard of the culprit’s rights are some of the disadvantages. On the contrary, in the laws of Iraq, the right to silence is a more appropriately adopted mechanism but the Iraqi legislator can be criticized in this regard that he has excluded the enforcement of this right in various cases for which there are not proper justifications.

In an article named “culprit’s silence in the penal trials”, (Mo’zzenzadegan, 1998) expresses that the culprits enjoy the right to silence in the legal systems of England and the US and that this right is especially enforced by the police in its preliminary investigations and treatments of the culprits; the police clearly announces this right to the culprit and s/he is given this right and perfect freedom to provide an answer or not in all the trial stages; it is generally held that the culprit’s silence should not end with his or her sustaining of a loss of any type.

In research called “investigating right to silence from the perspective of the penal laws of Iran and England” (Sandevis and Richard, 2000: 115) concluded that the right to silence should be considered as one distinct example of the culprit’s defense right. Resorting to such an instrument, the culprit can keep silent against the accusation and the judicial authorities, as well, cannot take the culprits’ silence as a piece of evidence indicating their criminality. The culprits’ defense rights that are proposed and supported as integral part of the fair trial in the regional and international documents of the human right as well as in the domestic regulations include a set of privileges that “the culprits should enjoy in a fair trial so as to be able to defend themselves against the claims posited contradictory to the presumption of their innocence under free and human conditions”. Investigators should ask questions about the allegations and these questions should be relevant, clear, useful, and away from any sort of induction and enticement. Resort to deceit, conspiracy, encouragement, and subornation of the culprits is by all means prohibited and considered as abuse to the culprits’ rights and violation of their human veneration.

In an article titled "silence", (Ashuri, 2017) has dealt with such a subject as silence in the laws on the penal trial procedures and civil trial procedures and concluded that the result of the silence is different in the laws on the penal trial procedures from that in the laws on the civil trial procedures and that the silence occasionally causes the abortion of an individual's rights in the civil trial procedures' laws and it inter alia ends with the non-objection to the issued sentence and non-requesting for the appeal hence the loss of the convict within the specified legal respite; it has also been stated that the convicts lose these rights due to their keeping of silent.

In a book entitled "the right to silence in the transnational criminal trials from the perspective of comparative laws" (Dehghani, 2018: 29), emphasizes on the just effectiveness and use of international cooperation for obtaining confession or evidence in the case of the suspect or culprit's silence. In this book, the police's supervision, the option of the investigations' administrative assessment, hidden surveillance and use of silence as a testimony to the guiltiness have been analyzed and the researcher deals with the methods existent in the domestic regulations about the culprit's silence in the trials therein.

2. Methodology

The study method is descriptive-analytical considering the nature of the study's subject, goals and information gathering; use has been made herein of the library resources.

Right to Silence as One of the Culprits' Rights in the Penal Process of Iran.

Right to silence is one of the defense rights of the culprit. This right has been authenticated in the regulations of the most of the countries. The culprit's silence in various stages of indictment, investigation, trial, and sentence issuance is amongst the distinct examples of his or her defense rights. The right to silence is amongst the guarantees of the culprits' defense rights and it is of a great importance in the early stages of investigation and trial. In the light of this right, the culprits can keep silent and refrain from answering the questions asked by the investigatory and trial authorities and the indicting authority and the judicial police are obliged from the very beginning to declare this right to the culprits as mentioned in many of the penal systems. Right to silence is one of the most controversial defense rights always accompanied by some ambiguities. Due to the same reason, some questions can be asked in this regard:

1. Does the culprit have the right to avoid answering to the questions raised by the qualified authorities in the course of investigation,

prosecution or trial? Can this right be concluded as a sort of culprit's denial of the accusation?

2. What method has been adopted by our country's legislator regarding the observance of this right? In the judicial system of our country, silence is the culprit's right and the resort to methods like threatening or deceit and conspiracy or coercion and compelling for forcing him or her to answer has been prohibited (Ardabili, 2006) (article 197 of the law on the penal trial procedures, passed in 2013).

In line with this, the third paragraph of article 169 of the international treaty on the civil-political rights, as well, explicitly expresses that: "The culprit cannot be forced to confess to his or her own criminality or bring testimony against him or her own self".

Forcing an individual to confess to his or her own criminality comes about when the culprit is subjected to enticement, threat and encouraging promises or torture or annoyance and confirms the attributed accusation and introduces him or her own self as the doer of the claimed crime. Coercing an individual to bring testimony against him or her own self also happens when the culprit is compelled subject to the effect of the aforementioned factors to present proofs and offer assertions agreeing with the courts or the private plaintiff's claim (Yekrangi, 2018).

Although the right to silence has been indirectly predicted in Iran, the investigating judges are not obliged to announce the right to silence to the culprits. However, it is necessary for the culprit's right to silence to be respected by the justice department's law enforcement officers as the vanguards of the prosecution. Before initializing the prosecution, the police should make the culprit, or the suspect understand this right (Hashemi, 2004). As for the culprit's right to silence in the early investigation stages, Iran's constitution is not so much explicit. The culprit should know that he can refrain from answering to the questions and that his or her silence cannot be followed by penal consequences for him or her. This right is the defense tool of the culprit under the conditions of a lawyer's absence (for the culprit is not familiar with the regulations and s/he may be enticed or be inflicted with delusion and speaks paradoxically). It is only the presence of the lawyer that can justify speaking for the culprit.

The third chapter of Islamic Republic of Iran's constitution includes acts guaranteeing the rights of the country's citizens, including the culprits and others. In this chapter, acts like 32, 35, 36, 37, 38 and 39 have been predicted and they are related to the culprits' defense rights. The significations of these acts have also been stated in articles 26 and 129 of the law on the trial procedures of the general and Inqilab courts regarding the penal affairs. Corresponding to the act 32 of the constitution, "nobody can be arrested unless as specified in the law. In case of the apprehension,

the accusation subject should be mentioned, and the proofs should be immediately declared to the culprit in a written format and the initial file should be referred within twenty four hours to the judicial authorities and the trial should be held in the fastest possible time. The violator of this act is punished in accordance with the law. Thus, according to act 32 of the constitution:

1. The culprit's investigation and prosecution should be within the framework of the accusation's subject.
2. The declaration of accusation and prosecution should be done along with the providing of written proofs. For example, if an individual is summoned to the court for an alleged accusation, s/he is not obliged to provide answer to any questions and s/he has to seminally ask what am I accused of; then, s/he should deny all the questions not related to the accusation subject and s/he can do so by saying that this question is irrelevant to the accusation and I prefer not to answer it.
3. The mere proposition of the accusation does not suffice rather it is necessary for the accusation to be written in the prosecution paper and the culprit should also provide written answer thereto. Thus, the culprit can avoid providing answers to the oral questions.
4. The mere mentioning of the accusation in a piece of paper is not enough and the law has explicitly mentioned that the accusation should be done along with the providing of proofs. Despite the results obtained from the investigation of the constitutional acts, it appears that there is no evidence signifying the implicit assertion of the right to silence in the act 32 of the constitution. Thus, the constitution has not authenticated any right regarding the culprit's ability of keeping silent in the stage of the preliminary investigations.

Iran's constitution realizes the full-scale supply of the individuals, men and women, with their specified rights and creation of fair judicial security for everyone as one of the general duties of the government and it has also stipulated guarantees for the revitalization and continuation of them. One of the most important branches of these rights is the culprits' right of defending themselves in rejecting the claims and incorrect accusations in the judicial authorities. In other words, the right to defense is the right by which an individual can reject and deny the criminal behavior, or the legal claims attributed to him or her based on the complaints by other individuals or the qualified disciplinary and judicial authorities by all possible means (Mo'zzenzadegan, 1998).

To actualize fair trial, there is a need for the enforcement of several acts and regulations in the five stages of the trial procedures, i.e., crime discovery, suing, preliminary investigations, trial, and sentence enforcement.

Culprits' Right to Silence in the Crime Discovery Stage as Stated in the Law on Iran's Penal Trial Procedures

Crime discovery includes interventions made after being informed about the crime occurrence for the protection of the extant effects and proofs, culprit's apprehension, and prevention of his or her escape as well as collecting the information related to the perpetrated transgression. This is done under the supervision of the judicial authority by the justice department's law enforcement officers. In this stage, the culprit has the following rights and privileges safeguarding him or her against the police's abuse:

- Summoning or apprehending the culprit by means of a writ of summoning or subpoena; the summoning or arresting of a culprit is essentially feasible by sending a writ of apprehension or summon following its being ordered by the judicial authority. The duties and options of the police in the crime discovery stage differ considering the dividing of the crimes into tangibles and intangibles. Based on the contents and insertions of the penal trial procedures' law, the police officers have the right to engage in tangible crimes and take measures in line with the protection of the crime's traces as well as parallel to the prevention of the culprit's flee hence his or her apprehension; they are obliged to bring the culprit to the judicial authority within 24 hours (Hashemi, 2004).
- Prohibition of arbitrary pursuit and apprehension: corresponding to act 32 of the constitution, "nobody can be arrested unless as specified and ruled in the law". The individuals apprehended in contradiction to the related regulations that are the legal mandates of the penal laws by the justice department's law enforcement officers can complain; s/he can also sue the individuals who have prevented him or her from bringing his or her complaint to a qualified judicial authority.
- The principle of the crimes-punishments proportionality: individuals can be sued for the perpetrations for which corrective measures and punishments and legal mandates have been stipulated in the laws. In line with safeguarding the individuals' life and properties and fame, justice makes it necessary not to consider any action as a crime unless it has been previously introduced as a crime for which a punishment is found specified. According to act 169 of Islamic Republic of Iran's constitution, no doing or not doing of an action is considered as a crime based on a law enacted afterwards; the act 38 of the constitution, as well, stipulates that "issuing a sentence for punishing a convict and its enforcement should be done only through a qualified court and by the force of law".

- Veneration of the individuals' inherent honor: the culprits have the right to be treated in respect to their inherent honor. In act 39, the constitution stipulates that defamation and blemishing of the prestige and honor of the individuals who have been arrested, detained, imprisoned or banished by the rule of law is prohibited, disregarding its type, and entails punishment (Hashemi, 2004).
- Declaration of the accusation: every culprit should be informed about the penal nature of his or her crime before the initiation of the investigations so that s/he can prepare his or her means of proper defense. This right is termed briefing about the alleged accusation and it has to be mentioned in the subpoena and, as soon as attending a police station, the culprit is informed about his or her accusation. The act 32 has the following stipulation in this regard: "the subject of the accusation should be immediately declared along with the proofs to the culprit in written form".

Culprits' Right to Silence in the Stage of the Preliminary Investigations as Mentioned in Iran's Law on Penal Trial Procedures

Interrogation of a culprit in the investigation stage is of a particular importance but it is not a proof for ignoring the culprit's right to silence and the judicial authority and/or the police cannot coerce the culprit to provide answers to their questions. As stipulated in article 197 of the law on penal trial procedures, "culprits can keep silent"; as it is seen, use has been made therein of the term "can" and this article clearly expresses that the culprits have the right to keep silent when asked questions.

In this stage, which is the most important trial stage, the foundation of a penal file is laid:

1. Collecting of proofs for and against the culprit
2. Taking necessary measures for preventing the culprits' escape and hiding through the issuance of the proportionate writs of freedom restriction
3. Assertion of ideas about the perpetrated crime with the format of one of such inductions as suing, temporary arrest, or criminality and, contrarily, ceasing of suing or cancellation of the criminality (Madani, 1990).

Of course, the principles related to the summoning or apprehension of the culprits and so forth that were mentioned before should be also observed in this stage:

1. The culprits' right of being accompanied by a lawyer; the culprits should have the right to appear before the investigating authority along with a lawyer. The investigations should be carried out in the presence of the lawyer, and they should not be assumed confidential. In completely exceptional cases that the investigator finds the acquisition of a part of explanations as being necessary in the absence of the lawyer, the permit for doing so should be acquired from a qualified court after the enactment by the prosecuting attorney. This is aborted in the first appropriate opportunity (Shirazi, 2013).
2. Providing enough chance for defense: defense is amongst the most natural individual rights; thus, during the preliminary investigation and trial and before the issuance of a sentence, the culprit should be given enough time for procuring his or her defense means. In case of the culprit's apprehension, s/he is provided with the possibility of preparing documents and proofs and conversation with the witness and s/he is given enough time in the court for rejecting the alleged accusations and his or her right of reinvestigation and appeal is guaranteed and there should be not so long time between the crime occurrence's date and performing of trial and issuing of a sentence rather there should be a reasonable and proper interval.
3. The regulations governing the proof collection: the immunity of the culprit's private life is amongst the important issues that should be carefully taken into consideration by the judicial authorities and justice department's law enforcement officers because the smallest compromise in collecting proofs and discovering crime causes the wastage of the culprits' essential rights and freedoms. Nowadays, sciences like dactyloscopy, identification of the weapons, genetic identification and use of computer for the identification of the culprits have become so evolved and advanced that they create a high coefficient of confidence in the area of the fast and exact discovery of the crime. It has to be noted that the necessity of observing the culprits' defense rights in the cross-section of crime discovery makes it required not to use the unprincipled and nonhuman technological and scientific advancements. In fact, the borderline of the application of crime discovery-aiding sciences and technologies is the observance of the culprits' rights and freedoms (Shirazi, 2013).

The Culprits' Right to Silence in the Trial Stage as Mentioned in Iran's Law on the Penal Trial Procedures

The fourth stage is the trial and the process of investigating the crime in a court. As a source investigating the general public's petitions, the justice department should put on the mask of the angel of justice in the position

of trying the cases and issuing the sentences and use all its power to actualize the justice. It is evident that the accomplishment of this objective necessitates the observance of formalities without which it is not possible to actualize trials based on fair scales (Akhundi, 2002). The conditions of establishing fair trial are as explicated below:

Reasonable trial: the trial should be immediate and without delay. In this stage, the disruption stemming from the crime by a culprit and inflicting the society is tried. In the court and after inquiring the culprit's identity, a plea is declared against him or her at first so that s/he understands the intended accusation. In this stage, the accusations proposed in the early investigation stage will be only tried.

The trial conditions, as well, are the holding of an independent, legal and unbiased court, court's openness to general public, presence of the jury at least for the political and the press crimes, culprit's being accompanied by a lawyer and his or her enjoyment of a translator, if needed, and establishment of certain trial procedures specific to the children and adolescents due to their special conditions and keeping the trial in match with the criminological teachings. The followings are but some of these:

Based on the act 32 of the Islamic Republic of Iran's constitution, "the preliminary file should be sent to a qualified judicial authority within 24 hours and the ground should be afterwards set for the trial as soon as possible".

Legal court: the trial should be done in a court determined by the force of the constitution, or the other regulations of the country and it is held with the presence of public. The private courts are amongst the cases contradictory to the human rights. The court should be completely impartial, and it has to be not influenced by any factor even the governing atmosphere. The judge should be independent and immune of the administrative, financial, and political collusions and s/he should think about nothing but the enforcement of justice, fairness and law which is also demanded by the society.

In Iran's legal system and according to act 156 of the Islamic Republic of Iran's constitution, "the judicature is an independent faculty supporting the individual and social rights and responsible for the actualization of justice". Therefore, in performing their duty of trial and actualizing the citizens' rights, the judges should not be put under pressure and influence of the other governing faculties because the general organs, especially the executive branch, may resort to the public expedencies and resist the sentences issued by the judicial organ. The principle of the faculties' separation which has been mentioned in act 57 of the Islamic Republic of Iran's constitution safeguards this intention. Furthermore, the principle "job security of the judges", as well, is amongst the solutions with the possession of which the judges can try the cases and issue the documented and well-justified

sentences without any concern. The act 164 has the following stipulation in this regard⁴.

Besides, corresponding to act 116 of the Islamic Republic of Iran's constitution, "the courts' sentences should be well-documented and based on the legal articles and principles".

Holding of open trial sessions: this is one of the important guarantees in line with the actualization of the judicial security meaning that the people should be able to attend the trial sessions so that the performance of the judicial system can be directly supervised by the general public's thoughts and it can stay immune of inclination towards deviation. The historical experiences have also been expressive of the idea that the serial judgments in the courts lead to the divestment of the individual's rights (Naserzadeh, 2013).

The Effects of the Culprit's Silence in Various Stages of Trial from the Perspective of Iran's Criminal Laws

The acceptance of innocence as an independent principle in the criminal laws of Iran and, also, as one of the basics of the culprits' right to silence, as was mentioned above, causes the load of justifying the proofs to be placed on the shoulder of the plaintiff or the prosecuting attorney and the culprits are accordingly exempted from offering proofs indicating their innocence because any response in this regard can be considered as a sort of confession hence be followed by the outcomes thereof. This is why the culprit has the right to keep silent against the questions asked by the judicial authority. The other effect of the culprit's silence is the creation of an obligation for the investigating authority in line with the declaration of this right to the culprit as it has also been pointed out in article 52 of the law on criminal trial procedures, approved in 2013; there is also predicted a legal mandate for it in article 63 of the same law.

1. The Effects of Silence in the Stage of Being Under Surveillance:

In the period of surveillance as one of the most important legal provisions, the person accused of a crime's perpetration is deprived of his or her freedom and s/he is placed before the society and its representatives. The necessity of creating balance between the society's power and the culprit is the allocation of privileges and rights to the culprit so that s/he

4 Act 164 of Islamic Republic of Iran's constitution: "a judge cannot be temporarily or permanently deposed from his or her position without first being tried and justifying his or her crime or violation that can cause his or deposition; his or her place of service or his or her rank cannot be changed unless it is ruled by the society's expediencies or the decision by the head of judicature following consultation with the head of the country's supreme court and the attorney general. The periodical translocation of the judges is carried out corresponding to the general criteria determined in the law".

can be fairly tried. Although the period of surveillance was not lawful as mentioned in the 1999's law on the penal trial procedures, evolutions were brought about in the 2013's law on the penal trial procedures as a result of which the culprits' rights, especially the right to silence, was taken into account (Haidari, 2015).

According to articles 47 and 49 of the law on the penal trial procedures, passed in 2013, the law enforcers are obliged to declare the specifications and the reasons of a person's being put under surveillance by any possible means to the local court within one hour after doing so. In the period that the culprit is under surveillance, the law enforcers should act in match with the rules and regulations even if s/he prefers to keep silent and silence cannot bar the police's performing of its duties. Based on article 47 of the law on penal trial procedures, the law enforcers are obliged to declare the whereabouts of a culprit who has been put under surveillance outside the workhours to the judge on duty at most within one hours. The preservation of the culprit's rights in the period of surveillance has been predicted in the law. For example, a culprit cannot be placed under surveillance for more than 24 hours. The enforcement of this right and the others is suspended on the idea that even if the surveillance happens beyond the workhours, the judicial authority should be informed thereof. The abovementioned necessities have led in England to the prediction of a detention officer's supervision. The supervision officer is an impartial supervisor in the police's investigations. His or her non-intervention in the gathering of a file guarantees his or her impartiality. The foresaid officer supervises on the proper behaviors of the police officers and the person under surveillance and the period of surveillance according to articles 36 and 37 of the law on police and the penal proofs, passed in 1984.

2. The Effects of the Culprit's Silence in the Trial Stage:

In the trial stage, the silence should not be considered as a proof or evidence indicating the culprit's criminality. The courts' judges are obliged to evaluate the proofs offered by the suing authority and, in case of their sufficiency and satisfaction of their conscience regarding the culprit's actual perpetration of the crimes being investigated, they should ignore their silence and announce their conviction otherwise they can declare innocence based on the principle "presumption of innocence".

In England, defense in trial stage due to the culprit's prior silence was a method for reaching an unfavorable reasoning; of course, this reasoning resulted in concluding that the culprit is neither guilty nor not guilty something between criminality and non-criminality. However, this silence guided the judge and the jury towards confirming the culprit's not being guilty. This became later on known as Weissentsteiner Act according to which the supreme court could find a better functional approach by which the attorneys could more logically prove the crimes.

If the culprits prefer to keep silent in the trial stage, the judge can guide the jury towards a deduction or another. Due to the same reason, it is better for the culprit to break the silence for defending his or her own innocence so that his or her silence cannot end in an opposite deduction. This happens only when the culprits cannot offer evidence and the proofs gathered by the prosecuting attorney cause the justification of the crime. Now, an unfavorable conclusion can be reached from the silence of the culprits in the trial stage. Of course, two legal thinkers have objected to this performance and asserted that silence cannot be denied and the right to silence in the trial stage has also been authenticated by them and the jury, as they say, cannot shut their eyes to the outcomes of the enforcement of the right to silence.

In the trial stage and according to the culprits' right to silence, it is not possible to require them to provide answers about the accusations. This silence cannot be considered as a proof indicating the culprits' criminality and, quite opposite to what some say (Ashuri, 2017), it cannot be even a piece of evidence along with the other proofs rather the doubts should be always interpreted in favor of the culprits.

3. Interpretation of the Doubts in Favor of the Culprits:

Corresponding to article 11 of the global human right declaration, every person accused of criminality would be considered innocent until his or her criminality is legally verified during a general lawsuit wherein s/he has been provided with all the necessary guarantees for defending him or herself. Paragraph 2 of the article 14 in the international civil-political treaty, as well, has predicted similar phrases. The act 37 of the constitution stipulates that "the principle is innocence, and nobody is realized as a criminal from the perspective of law unless his or her crime is proved in a qualified court". In the article 4 of the law on the criminal trial procedures, passed in 2013, as well, the emphasis is on the presumption of innocence.

In all of the abovementioned cases, the doubts are interpreted in favor of the culprits because the conviction sentence should be issued based on sure proofs. It is here that the most important effect of the culprit's silence comes about.

4. Proof Evaluation:

In the stage of trying the penal affairs, the judicial authority is not solely relying on the parties' proofs in the issuance of a sentence rather he acts in line with acquiring other proofs meaning that, in case of the culprit's silence, the court pays attention to other proofs and performs all the investigations or interventions necessary for the discovery of the truth (Aal-e-Kajbaf and Akhtari, 2014).

The important point latent in the right to silence is that the culprit who clearly seeks dodging and keeping silent may have a lot of reasons for not offering documents and evidence to the court. One of these reasons might be the culprit's communication problems such as when s/he stammers or is dumb or s/he might be not dominant in a given language. Of course, such problems can be existent in both of the stages (after the trial and in the preliminary stage and during the trial). This can cause prejudgments in the police's investigations and interrogations⁵.

5. Effects of Silence After a Decisive Sentence is Reached:

Based on article 474 of the criminal trial procedures' law, passed in 2013, the courts' decisive sentences, including those that have been enforced or not enforced, can be extraordinarily objected in the country's supreme court through sending a retrial request. The convict can at any time demand the resumption of trial and object to the decisive penal sentence in cases that the legislator has specified in this same article. Considering the aforementioned conditions under which the retrial can be demanded, it is seen that the culprit's silence is not one of them and it is not to be at least used as a piece of well-documented evidence by the court. The culprits' silence should not be considered as being within the inclusion circle of the abovementioned article.

The culprit's silence in expressing his or her identity and his or her avoidance of answering the questions about the quality of the crime that might be also attributable to a person with another identity and the judicial authorities' and the law enforces' lack of access to his or her real identity can be amongst the reasons encouraging the head of judicature to recognize the decisive sentence issued by the judicial authorities in the silence of culprit in the course of trial as being against the canon and, prescribing the retrial, send the file for more investigation into one of the special divisions of the court. However, if the convict withdraws from this right and keeps silent, it seems to have no legal effect unless his or her silence is considered as being equal to his or her absence and, according to article 474, his or her spouse can be his or her legal heiress and executor and the country's attorney general may realize that the sentence enforcer should have proposed retrial (Dehghani, 2018).

Conclusion

The observance of the culprit's right to silence in all of the various stages of trial causes the protection of the human veneration and prestige. The individual who is still a suspect and his or her criminality is yet to be proved

5 Confessions have to be voluntarily made RV Aubrey (1990) 79A Gvim R 100

should be considered innocent in the light of the principle of innocence and his insolence, torture and punishment should be avoided. There is no doubt that if use can be made of the legal and fair methods for justifying the crimes, there would be no need for threatening, coercion and occasionally torture. Use can be made also of the scientific methods with advanced technologies meanwhile performing the legal actions and the culprit can be allowed to securely and comfortably take the course and the objective can be accomplished according to the predicted interventions and mechanisms.

The culprit's right to silence has been more taken into consideration in the domestic laws of Iran, particularly the law on the penal trial procedures, passed in 2013. However, it is not considered the way it is taken into account by the international documents and this is one of the challenging topics of the penal laws because the observance of the right to silence entails informing the suspects and culprits of their right which has to be declared to them before interrogation.

In order to preserve order and society's rights and protect the culprits' rights, the legislator should bring about balance and it is here that the support of culprit has been declared as one of the legislative policies in the introduction to the penal trial procedures' law. In this regard, positive evolutions have been considered in the authentication of the culprits' rights and a substantial part of this important issue has been placed in the preliminary investigation stage on the shoulder of the justice department's law enforcers. Since the justice department's law enforcing officers are the first actors in the penal process and they directly engage with the tangible crimes from the very beginning of the formation of a penal file, enhancement of their legal knowledge and their passing of specialized courses are undeniably necessary. One of the other mechanisms for the operationalization of the culprits' silence can be realized as the elevation of the prosecutors and law enforcing officers' levels of knowledge. On the other hand, the granting of unlimited authorities to the justice department's law enforcing officers can pave the way for the threatening of the right to silence. Thus, it is necessary to predict certain scales for the range of the law enforcing officers' authorities and this is one of the most important and most effective mechanisms for preventing any sort of contingent misuse hence guaranteeing the culprits' right to silence.

In line with this, the enactment of the penal trial procedures' law on 23rd of February, 2013, should be considered as the peak point of the legislator's attention to the principles of fair trial. In a definition of the penal trial procedures, the first article of the abovementioned law has emphasized on the observance of the culprits' defense rights as the primary foundation of fair trial. In article 5 of the law on the penal trial procedures, attentions have been paid to the informing of the culprit about the alleged accusation as well as the proofs thereof and also their right of access to the lawyer.

The culprits' right to silence has been underlined in article 197 as one of the other principles considered in this law. In fact, the prediction of the important points of the preservation of the culprits' rights in the first articles of the new law on the penal trial procedures and the emphasis on their enforcement are indicative of this reality that the legislator has placed the safeguarding of these principles and remaining adherence to them and their observance on top of his goals and programs with the hope that the principles of fair trial are used as models of work by the enforcers of the penal justice (judicial authorities and the law enforcing officers).

In other words, having adopted such an approach, the legislator has taken effective steps in line with the preservation and observance of the culprits' right of silence and he has dealt with clearly reducing the authorities of the justice department's law enforcers and increasing the culprits' rights, including requiring to the acceptance of a lawyer, as well as bringing about evolutions related to the culprits' right to silence in the stages of investigation by the law enforcing officers. In this way, Iran's trial system that was in the same direction with the inquisitive trial system enacted the law on the penal trial procedures in 2013 to make a shift in its processes following which it started being influenced by the international attitudes and regulations and the paying of attention to the culprits' rights and guaranteeing of the culprits' defense right were steps taken towards the corroboration of the adversarial aspect in the stage of the preliminary investigations and this is indicative of the idea that steps have been taken towards the accusatory system. It is known that the goal of the accusatory system is mostly observance of the individual freedoms and protection of citizenship rights and the paying of attention to this important goal is admirable.

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Seizure of property: development of legislation and improvement of law enforcement practice

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Abstract

Questionable questions are studied on the annulment of the measure of procedural coercion applied in the form of seizure of property in the event of termination of a criminal proceeding (criminal prosecution) with voluntary compensation for damages caused by a crime. The authors propose to specify the cases in which it is possible to cancel the seizure of property, that is, in case of expiration of the period of detention imposed on the property established by the court, or refusal of extension, as well as in cases of termination of the criminal case (criminal proceedings) and the refusal of the plaintiff of the declared civil claim. Attention is also given to the issues of seizure of property to compensate for moral damage caused by a crime. Based on the results of the consideration of this issue, it is concluded that the use of a measure of procedural coercion in the form of a seizure of property is possible not only for the purpose of compensating for property damage but also to create legal guarantees. Guarantee compensation for moral damage caused by a crime, as specific additions to the current criminal procedure law in Russia are justified.

Keywords: criminal proceedings; material evidence; confiscation of property; procedural guarantees; measures of procedural coercion.

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Incautación de bienes: desarrollo de legislación y mejora de la práctica de aplicación de la ley

Resumen

Se estudian cuestiones discutibles sobre la anulación de la medida de coacción procesal aplicada en forma de embargo de bienes en los supuestos de terminación de un proceso penal (persecución penal) con indemnización voluntaria por los daños ocasionados por un delito. Los autores proponen especificar los casos en los que es posible cancelar la incautación de bienes, es decir, en caso de expiración del plazo de detención impuesto sobre los bienes establecido por el tribunal, o denegación de prórroga, así como en los casos de terminación de la causa penal (proceso penal) y la negativa del demandante de la demanda civil declarada. También se presta atención a las cuestiones de la incautación de bienes para compensar el daño moral causado por un delito. Con base en los resultados de la consideración de este tema, se llega a la conclusión de que el uso de una medida de coerción procesal en forma de embargo de propiedad es posible no solo con el propósito de indemnizar por daños a la propiedad sino también para crear garantías legales. Garantizar una indemnización por el daño moral causado por un delito, ya que se justifican adiciones específicas a la actual ley procesal penal en Rusia.

Palabras Clave: procedimientos criminales; evidencia material; confiscación de propiedad; garantías procesales; medidas de coacción procesal.

Introduction

Multifaceted and consistent activities aimed at ensuring compensation for the harm caused by the crime are carried out constantly and systematically at all stages of the preliminary investigation. Currently, the importance of the activities of the preliminary investigation bodies in this process is significantly increasing, since it is in pre-trial proceedings that there are significant opportunities to establish the actual amount of harm caused by a crime and the production of a complex, both organizational measures and procedural actions aimed at ensuring the claims of persons, victims of crimes and compensation for harm.

An effective procedural way of securing a civil claim in criminal proceedings is the use of such a preventive measure of procedural compulsion as the seizure of property.

Monitoring of problematic issues arising both in theory and in law enforcement practice has shown the timeliness and relevance of studying

the grounds for the application and cancellation of procedural coercion measures in the form of seizure of property.

The seizure of property is a measure of procedural compulsion applied, as follows from Art. 115 of the Criminal Procedure Code of the Russian Federation (hereinafter referred to as the Code of Criminal Procedure of the Russian Federation), for the following purposes:

1. ensuring the execution of the sentence in terms of a civil claim for compensation for property and compensation for moral damage caused by a crime.
2. ensuring the execution of the sentence in terms of the collection of a fine and other property penalties.
3. ensuring the execution of the sentence in terms of the possible confiscation of property obtained by criminal means, specified in paragraphs. “A”, “b” Part 1 of Art. 104.1 of the Criminal Code of the Russian Federation (in criminal cases on crimes under investigation by investigators of the internal affairs bodies, for example, provided for in paragraph “g” of part 2 of article 111 of the Criminal Code of the Russian Federation, articles 186, 241 of the Criminal Code of the Russian Federation).
4. ensuring the execution of the sentence in terms of the possible confiscation of tools, equipment or other means of committing a crime (clause “d”, part 1 of article 104.1 of the Criminal Code of the Russian Federation).

The basis for the application of this measure of procedural coercion is the availability of sufficient and reliable data that the suspect (accused) can hide or subject to alienation, destruction of property that could potentially become the subject of arrest.

Directly to ensure the satisfaction of the claims of the victim (civil plaintiff), the investigator, the inquirer may apply to the court with a petition to seize the property of the accused or persons who are legally liable for their actions, or other persons who have property acquired by criminal means ...

At the same time, imposing, in order to ensure the execution of a sentence in terms of a civil lawsuit, arrest of the property of a person who is legally financially liable to a civil plaintiff, involves the involvement of this person as a civil defendant in a criminal case in accordance with Art. 54 of the Criminal Procedure Code of the Russian Federation. It is not allowed to seize the property of such a person if, by virtue of an agreement or law, it should bear material responsibility for the failure of the suspect (accused) to fulfill his obligations arising from grounds other than causing harm.

Of practical importance is the sequence of seizure of property, provided for in Part 3 of Art. 69, art. 94 of the Federal Law "On Enforcement Proceedings":

Stage I - cash and other valuables in rubles, including those on accounts (except for loan, collateral, nominal, trading and clearing accounts), in deposits or in custody in banks and other credit institutions.

Stage II - funds in foreign currency, including those on accounts (except for ship, pledge, nominal, trading and clearing accounts), in deposits or in custody in banks and other credit institutions.

III stage - precious metals (gold, silver, platinum, palladium), including those in accounts, in deposits or in storage in banks and other credit institutions (can be in the form of ingots, commemorative and investment coins, as well as impersonal metal accounts);

IV - other movable property (things - objects of the material world);

V - real estate (for example, residential and non-residential premises, construction in progress, land plots, aircraft, and sea vessels, including small vessels, subject to state registration).

The above sequence of seizure of property is applied only when seizure is imposed to secure: a civil claim, as well as a court verdict in terms of collecting a fine and other property penalties.

Priority does not apply in the case of confiscation of property obtained because of the commission of a crime, as well as funds, equipment and instruments of the commission of a crime.

1. Materials and methods

The basis of the research methodology was the dialectical method. Thus, in the course of the conducted research, the validity of the cancellation of the applied measure of procedural coercion in the form of seizure of property in cases of termination of a criminal case (criminal prosecution) with voluntary compensation for damage caused by a crime was proved.

The method of analysis made it possible to study individual parts of the object of research, and in particular, to identify existing problems of applying and canceling the measure of procedural coercion in the form of seizure of property.

The method of the systematic approach allowed us to consider the procedural order when canceling the measure of procedural coercion in the form of seizure of property in cases of termination of a criminal case (criminal prosecution) with voluntary compensation for damage caused by

a crime. The comparative legal method allowed us to study the domestic and international legislation regulating the procedural order for revoking the measure of procedural coercion in the form of seizure of property, as well as to identify similarities and differences.

Via the use of methods of analysis and synthesis, the statistical indicators of the cancellation of the seizure of property in cases of termination of a criminal case (criminal prosecution) with voluntary compensation for damage caused by a crime are studied and analyzed.

Using the concrete sociological method of research, the real results of empirical research are obtained, their analysis, systematization, and generalization are carried out. The use of the formal legal method allowed us to characterize the existing situation associated with a number of problems that arise in the practical sphere of the activities of state bodies and officials, during the application and cancellation of the measure of procedural coercion in the form of seizure of property.

As a result of the application of this methodology, methods have been developed for the subsequent modernization of the application and cancellation of the measure of procedural coercion in the form of seizure of property.

2. Result analysis

The seizure of property is a measure of procedural coercion applied, as follows from Article 115 of the Criminal Procedure Code of the Russian Federation (hereinafter referred to as the Code of Criminal Procedure of the Russian Federation), for the following purposes:

1. ensuring the execution of a sentence in terms of a civil claim for compensation for property and compensation for moral damage caused by a crime.
2. ensuring the execution of the sentence in terms of collecting fines and other property penalties.
3. ensuring the execution of the sentence in terms of possible confiscation of property obtained by criminal means, specified in paragraphs "a", "b" of Part 1 of Article 104.1 of the Criminal Code of the Russian Federation (in criminal cases of crimes under investigation by investigators of internal affairs bodies, for example, provided for in paragraphs "d" of Part 2 of Article 111 of the Criminal Code of the Russian Federation, Articles 186, 241 of the Criminal Code of the Russian Federation);

4. ensuring the execution of the sentence in terms of possible confiscation of tools, equipment, or other means of committing a crime (item “d” of Part 1 of Article 104.1 of the Criminal Code of the Russian Federation).

At the same time, the following goals require special explanation: 1) the purpose of ensuring the execution of the sentence in terms of collecting other property penalties; 2) the purpose of securing the sentence in terms of possible confiscation of property (Ukhanova, 2017; Rekunkov and Orlova, 1981).

Other property penalties include:

- monetary penalty that may be imposed by the court on the guarantor in case of violation by the suspect (accused) of the preventive measure provided for in Article 103 of the Code of Criminal Procedure of the Russian Federation, as well as on the person who was placed under the supervision of a minor, in case of violation by the latter of the preventive measure provided for in Article 105 of the Code of Criminal Procedure of the Russian Federation.
- procedural costs (Part 2 of Article 131 of the Code of Criminal Procedure of the Russian Federation), according to Paragraph 13 of Part 1 of Article 299 of the Code of Criminal Procedure of the Russian Federation.

In regard to securing a sentence in terms of possible confiscation of property, it should be clarified that according to Article 104.3 of the Criminal Code of the Russian Federation, for compensation for damage caused by a crime, the court may levy a penalty on the property subject to confiscation according to Article 104.1 of the Criminal Code of the Russian Federation (obtained as a result of the commission of a crime, as well as tools, equipment or means of committing a crime).

In this regard, the arrest may be imposed on property obtained as a result of the commission of a crime, as well as on tools, equipment, and means of committing a crime, which are subject to confiscation, according to paragraph “a”, “b”, “d” of Part 1 of Article 104.1 of the Criminal Code of the Russian Federation. Subsequently (at the judicial stages), a civil claim can be satisfied at the expense of this property, so special attention should be paid to the seizure of property for the purpose of its confiscation.

Tools, equipment, or other means of committing a crime belonging to the suspect (accused) can also be arrested, especially since with their direct help, the person was able to achieve the set criminal goal and cause this or that type of harm.

It should also be clarified that in cases where the investigator has established property subject to confiscation, the seizure of property can

be carried out in cases that do not tolerate delay, in accordance with the procedure provided for in Part 5 of Article 165 of the Criminal Procedure Code of the Russian Federation (except for non-cash funds, securities and precious metals held in accounts or deposits with banks and other credit organizations, in respect of which the arrest is made only by a court decision, according to the Federal Law “On Banks and Banking Activities”) (Pushkarev *et al.*, 2020).

Of practical importance is the order of seizure of property, provided for in Part 3 of Article 69, Article 94 of the Federal Law “On Enforcement Proceedings”:

Stage I – cash and other valuables in rubles, including those held in accounts (except for loan, collateral, nominal, trading, and clearing accounts), in deposits or in custody with banks and other credit organizations.

Stage II – funds in foreign currency, including those held in accounts (except for court, collateral, nominal, trading, and clearing accounts), in deposits or in custody with banks and other credit organizations.

Stage III – precious metals (gold, silver, platinum, palladium), including those held in accounts, deposits or in storage in banks and other credit organizations (can be in the form of bullion, commemorative, and investment coins, as well as depersonalized metal accounts).

Stage IV – other movable property (things – objects of the material world).

Stage V – immovable property (for example, residential and non-residential premises, objects of unfinished construction, land plots, aircraft, and sea vessels, including small vessels subject to state registration).

The above-mentioned order of seizure of property is applied only in the case of seizure for the purpose of securing: a civil claim, as well as a court verdict regarding the recovery of fines and other property penalties.

Priority does not apply in the case of confiscation of property obtained as a result of the commission of a crime, as well as funds, equipment, and instruments of the commission of a crime.

It seems appropriate to further clarify that one of the objectives of this study is the need to study the issues of ensuring compensation for damage caused by a crime. At the same time, the procedural order for the cancellation of the seizure of property, due to the termination of a criminal case (criminal prosecution) with voluntary compensation to the suspects (accused) for the damage caused, is also of scientific interest.

It is proved that in the framework of pre-trial proceedings in criminal cases, the investigator, the inquirer must explain to the suspect (accused) the positive consequences associated with compensation for the harm caused to them or other compensation for it.

In cases where if the suspect (accused) voluntarily compensated or otherwise made amends for the harm caused by the crime, then their actions will be evaluated not only personally by the victim, but also within the framework of the current law, namely:

- firstly, the fact of compensation for damage creates grounds for exemption from criminal liability and termination of a criminal case (criminal prosecution) in accordance with Articles 75, 76, 761, 762 of the Criminal Code of the Russian Federation, Articles 25, 251, 28, 281 of the Criminal Code of the Russian Federation (Pushkarev *et al.*, 2021).
- secondly, the fact of compensation or other indemnification for the property damage caused is a circumstance that mitigates the punishment of the suspect (accused).

It should be noted that this type of activity of the investigator, the inquirer has a positive effect on the decision of the suspect (accused) on voluntary compensation for property damage, which is most often expressed in the form of restoration of damaged property, provision of new property to replace the destroyed (stolen), payment of compensation in monetary terms. At the same time, the desire or refusal of the suspect to compensate for the harm caused by him, the investigator, the inquirer must necessarily record in their testimony when drawing up the protocol of the interrogation.

The relevance of the issue under consideration is also confirmed by the experience of practical activity. So, in the Investigative Department at the Department of Internal Affairs of the Pskov region, in order to ensure compensation for property damage caused to the state, the property was seized – a car owned by A., accused of committing a crime under Part 1 of Article 198 of the Criminal Code of the Russian Federation. During the preliminary investigation, the accused partially compensated for the property damage caused by him to the State. By the time of the end of the preliminary investigation, the accused fully compensated for the damage caused, repented of what he had done, and in this regard, the arrest on the property was canceled by the court. The criminal prosecution against the accused was terminated by the investigator in accordance with Article 28 of the Criminal Procedure Code of the Russian Federation in connection with active repentance on the basis of Article 75 of the Criminal Code of the Russian Federation.

The experience of the post-Soviet countries allows us to conclude that the seizure of property is canceled in the event of a decision to terminate a criminal case (Article 254 of the Code of Criminal Procedure of the Republic of Azerbaijan and Article 295 of the Code of Criminal Procedure of the Republic of Uzbekistan). Moreover, such grounds for termination of a criminal case as a reconciliation of the parties in the case of voluntary compensation for harm are also present in the criminal procedure laws of these Republics (Article 39.1.9 of the Criminal Procedure Code of the Republic of Azerbaijan and Article 84 of the Criminal Procedure Code of the Republic of Uzbekistan).

The Russian legislator constructed the rule on the possibility of revoking the seizure of property more broadly, stating in Part 9 of Article 115 of the Criminal Procedure Code of the Russian Federation that the seizure of property is canceled in cases where there is no need to apply this measure of procedural coercion. This interpretation, in our opinion, does not detail specific cases when an investigator or inquirer may decide to cancel the seizure of property. In this connection, the first sentence of part nine of Article 115 of the Criminal Procedure Code of the Russian Federation, should be worded as follows: “The seizure of property is canceled on the basis of a decision, a determination of the person or body in which the criminal case is being conducted, when the application of this measure is no longer necessary, in the event of the expiration of the term of the arrest imposed on the property, or refusal to extend it, as well as in cases of termination of the criminal case and refusal of the plaintiff from the declared civil claim”.

Regarding the cancellation of the seizure of property in cases of refusal of the civil plaintiff from the claim, this clarification seems logical and justified, since the seizure of property is one of the ways to secure a civil claim. In this connection, the fact of refusal of the declared civil claim established during the preliminary investigation automatically eliminates the need for further action of the specified measure of procedural coercion.

Continuing to investigate further the issues of seizure of property, the authors note that another unresolved issue at present is the controversy over the possibility and necessity of applying this measure of procedural coercion in order to compensate for non-pecuniary damage.

In this connection, the historical retrospect presented by V. Sluchevsky (1913) shows that:

Any person whose interests and rights depend on the recognition of the fact of a crime committed, can be allowed to participate in the case as a civil plaintiff and that even moral damage can serve as the basis for this claim... (1913: 135).

Later, in the Soviet criminal process, during the period of the birth of the institution of seizure of property, the opinion also prevailed that its use is possible only to compensate for property damage. This is also evidenced by

some positions of process scientists of that era. In particular, as noted at the time, for the seizure of property, it is required that in a criminal case there is sufficient evidence that as a result of the crime, the victim was caused one or another type of harm (Bozhiev, 1989; Mariupolskiy, 1970).

Today, a similar position is defended by many authors (Belyatskin, 1996; Gritsenko, 2005; Krivoshchekov and Buldakova, 2014; Yutkina and Rostovshchikova, 2012). It seems appropriate to support the position of the authors who advocate the possibility of seizure of property in order to compensate for non-pecuniary damage. As an additional argument, we note that in order to compensate for non-pecuniary damage, as well as other types of it, a statement of a civil claim, its justification and subsequent consideration are required. All this requires the application of interim measures, one of which (almost the most important) is exactly what the seizure of property is.

From a literal understanding of the provisions of the current criminal procedure law, it follows that Part 1 of Article 44 of the Criminal Procedure Code of the Russian Federation allows the inclusion of compensation for non-pecuniary damage in claims since the seizure of property can also be carried out in order to ensure the execution of a sentence in this part. Since the amount of compensation is most often set arbitrarily by the civil plaintiff (for example, an evaluation criterion), when applying this coercive measure, one should focus on the number of penalties based on judicial practice in cases of a similar category.

Moreover, it should be especially noted that we are talking here about causing moral harm, meaning, of course, harm to business reputation, since the arguments about a unified approach to these concepts in the framework of criminal proceedings were formulated by us earlier (Ivanov and Krupenin, 2008; Ivanov, 2015).

Thus, the seizure of property should be imposed not only for the purpose of compensation for property damage but also to create legal guarantees to ensure compensation for non-pecuniary damage caused by a crime.

Conclusions

Knowledge of the procedural conditions of the procedure for seizing property, as well as the timely application of this measure of procedural coercion will create the necessary prerequisites for the real provision of compensation for property damage caused by a crime.

The seizure of property as a measure of procedural coercion is of a preventive and, at the same time, security nature, which consists in suppressing the intent of the suspect (accused) aimed at concealing, selling

or other legal alienation of property, funds, securities, and other valuables in order to avoid seizure the specified objects to ensure compensation for property damage caused by the crime.

In order to increase the efficiency of solving the problems of identifying property, which can be seized by the courts in order to secure a civil claim, other property penalties or possible confiscation in criminal cases, it seems expedient to further improve law enforcement practice and norms of criminal and criminal procedural legislation. In particular, taking into account the emerging investigative and judicial practice, it is possible to introduce into Part 3 of Art. 1041 of the Criminal Code of the Russian Federation, amendments that provide for the possibility of confiscation of property owned by the relatives of the accused (suspect) or other persons who have been seized by the court, if it is proved that it was acquired with funds, the appearance of which is due to criminal activity, regardless of whether they are aware whether they are about the presence of a causal relationship between the acquired property and the fact of the crime.

The actual basis for the seizure of property is a set of evidence indicating that a crime has inflicted certain harm or the possibility of applying property penalties. From the literal understanding of the provisions of the current criminal procedure law, it follows that Part 1 of Art. 44 of the Code of Criminal Procedure of the Russian Federation allows the inclusion of compensation for moral damage in claims, since the seizure of property can be carried out in order to ensure the execution of the sentence in this part. Since the amount of compensation is most often set by the civil plaintiff arbitrarily (for example, an assessment criterion), then when applying this coercive measure, one should focus on the number of penalties based on judicial practice in cases of a similar category.

The conclusion was argued and proved that the seizure of property can be imposed not only in order to compensate for property damage, but also to create legal guarantees for ensuring compensation for moral damage caused by a crime. Based on this, the authors propose to amend Art. 1601 of the Code of Criminal Procedure of the Russian Federation, stating it as follows: "Having established that the committed crime caused property and moral damage, the investigator, the interrogating officer are obliged to take measures to establish the property of the suspect, the accused or persons who, in accordance with the legislation of the Russian Federation, are responsible for the harm caused the suspect, the accused, the cost of which ensures compensation for the property and moral damage caused, and for the seizure of this property".

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Influence of legal principles on justice

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Abstract

The objective of the article was to determine the essence and legal implementation in Russia of principles such as: independence of the judiciary, relative truth, contradictory nature, legal certainty of judicial acts and discretion. In the countries of the Roman-Germanic legal order, it is no coincidence that legal principles are of great scientific and applied importance. The presence of a certain system of procedural principles makes it possible to assess the existence of justice in the country, the stability of a judicial decision and the fairness of judicial acts. Thus, the principles of the law directly affect the level of legality in each state. Currently, some procedural principles give rise to a discussion in Russian doctrine about their essence and content. The topic is presented from the point of view of general scientific methods (systems analysis, structural and functional, historical), the method of theoretical analysis, specific scientific methods (comparative jurisprudence, technical and legal analysis, concretization, interpretation). The theoretical basis was cognitive theory. It is concluded that the principle of the independence of the judiciary is not fully operational in the Russian Federation.

Keywords: principle of independence of the judiciary; principle of relative truth; adversariality; principle of legal certainty for judicial acts; principle of judicial discretion.

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Influencia de los principios legales en la justicia

Resumen

El objetivo del artículo fue determinar la esencia y la implementación legal en Rusia de principios tales como: independencia del poder judicial, verdad relativa, naturaleza contradictoria, certeza jurídica de los actos y discreción judiciales. En los países del ordenamiento jurídico romano-germánico, no es casualidad que los principios jurídicos sean de gran importancia científica y aplicada. La presencia de un determinado sistema de principios procesales permite evaluar la existencia de justicia en el país, la estabilidad de una decisión judicial y la equidad de los actos judiciales. Así, los principios de la ley afectan directamente el nivel de legalidad en cada estado. Actualmente, algunos principios de procedimiento dan lugar a una discusión en la doctrina rusa sobre su esencia y contenido. El tema se expone desde el punto de vista de los métodos científicos generales (análisis de sistemas, estructural y funcional, histórico), el método de análisis teórico, los métodos científicos específicos (jurisprudencia comparada, análisis técnico y jurídico, concretización, interpretación). La base teórica fue la teoría cognitiva. Se concluye que el principio de la independencia del poder judicial no es plenamente operativo en la Federación de Rusia.

Palabras Clave: principio de independencia del poder judicial; principio de verdad relativa; adversarialidad; principio de seguridad jurídica de los actos judiciales; principio de discrecionalidad judicial.

Introduction

The principles of law are the subject of research not only in the general theory of law but also in sectoral legal sciences. The concept of “principle” has a theoretical meaning of Latin origin, meaning “foundation”, “beginning”. The principles of each branch of law constitute the quintessence, reveal its essence, are a criterion that individualizes the branch within the legal system.

In modern legal doctrine, great emphasis is placed on studying the principles of both common law and civil procedural law, since the latter directly affect the administration of justice. The importance of legal principles in procedural law can hardly be overestimated. First, these principles act as guarantees for the delivery of a lawful, justified and fair court decision. The principles of civil procedure are the principles of rational legal proceedings, are predetermined by the very essence of the adversary proceedings, cannot be replaced by any other guidelines without distorting the essence and objectives of the process (criminal or civil law).

Having emerged based on the scientific views on the role and significance of the judiciary, the principles become important prerequisites for the further development and improvement of civil procedural legislation. At the same time, the composition of the principles of one branch of law is not an amorphous, unchangeable category. In the course of its development, epochs, constitutions, and the goals of the state change. Therefore, at each specific stage of development, adjustments are made to the composition of the principles. For example, after the 1864 reform, the principle of concentration of evidence was enshrined in the Russian civil procedure. At present, such a principle does not exist in the judicial process in Russia, despite the scientific judgments on the need to enshrine it.

1. Methods

During the study, we used general scientific methods of cognition, including the principles of objectivity and the systematic approach. Along with the general scientific methods of cognition, one applied the specific scientific methods: theoretical analysis, comparative jurisprudence, technical and legal analysis, concretization, interpretation and the historical cognition method. The methodological basis of the study is the method of the cognitive theory.

2. Results

Civil procedural principles are the normatively established fundamental principles of civil procedural law that determine the structure of the process, its nature and methods of carrying out legal proceedings in civil cases. The principles of law aggregate the views of the legislator on the nature and content of modern legal proceedings, permeate all civil procedural institutions and determine the structure of the civil procedure which ensures the delivery of lawful and justified decisions. Thanks to the principles of law, it is possible to conclude whether there is justice in a particular state.

Since the principles are some basic guidelines for lawmaking and law enforcement agencies, at present it is impossible to imagine the administration of justice without the principles of humanism, fairness, legality and democracy. The principles of civil procedural law give the latter some structural completeness, aggregate concentrate the legislator's views on the nature and content of legal regulation of legal proceedings in civil cases, and seem to represent the structural basis of the branch of law. The scholar G.L. Osokina (2006) rightly believes that the principle is at the same time the idea that was formed as a result of scientific, professional and

mass (everyday) notion of the ideal model of the branch of law, comparing the principle with a “working tool” for regulating public relations.

The principle of the independence of the judiciary has a long history. Thus, before the 1864 judicial reform in Russia, the court could not start the trial without a precise and clear law, and if there was no such law, then the court was obliged to turn to the governor, who reported this to the Governing Senate. The interpretation of the Senate was also applied in case of contradictions in legislation. The decisions of the court on state matters were subject to confirmation by the governor. Thus, the court did not have full autonomy in administering justice. Only after 1864, as a result of judicial reform, the court in Russia acquired the status of an independent state institution and became independent of the executive and legislative branches.

In modern Russia, this principle is enshrined in the Constitution of the Russian Federation and means that in administering justice, judges are independent, subject only to the Constitution and federal law (Part 1 of Art. 120 of the Constitution). The independence of the judiciary is the most important principle of justice. Justice can only be administered by an independent court.

Judges should try and resolve civil cases in conditions when outside influence is impossible. Any interference in the activities of judges in the administration of justice should not only be prohibited in the form of a declaration, but, most importantly, the state should establish a mechanism for implementing this principle. In Russia, the independence of the judiciary is enshrined in a number of constitutional norms (Art. 120–124 of the Constitution of the Russian Federation), specified in the norms of legislation on the judicial system of the Russian Federation. At the same time, over the past 30 years, not three but four branches of power have developed in Russia, and the fourth power, the presidential one, dominates the other three including the judiciary. Moreover, the amendments to the Constitution of the Russian Federation (adopted in 2020) actually neutralized the principle of the independence of the judiciary. Granting the President of the Russian Federation from 2020 the right to remove any judge from office, up to the judge of the Constitutional Court of the Russian Federation, puts all judges in the Russian Federation under the control of the presidential power, and this is a direct violation of the principle of independence of the judiciary.

The positive law of Russia establishes that any outside influence on judges, interference in their activities by any state bodies, local authorities and other bodies, organizations, officials or citizens is unacceptable and is punishable according to administrative and criminal legislation. Judgments about the factual circumstances of the case, the reliability of the evidence, the rights and obligations of the parties should be the convictions of the

judges themselves, and not external judgments imposed on them by other persons. As indicated in the literature, in civil law processes, when one of the parties in the court is a state body, in 80 percent of cases the decision will be made in favor of the state (Svirin and Shestov, 2020).

In 2013, Art.8 of the Civil Procedure Code was supplemented with a new part 4, which states that information about extra-procedural appeals from some subjects to judges must be made public and brought to the attention of the participants in the process by posting on the official website of the court. However, such information by itself is not considered as a basis for challenging a judge.

Therefore, despite the system of guarantees for the independence of the judiciary enshrined in the law, there is currently an unsolved problem of the independence of the judiciary from the presidential power in Russia. Moreover, in literature, one is promoting the opinion of some researchers about establishing responsibility for scandalizing justice, because according to the authors of the publications, unfounded criticism of the court causes contempt of the court and infringes on judicial independence (Momotov *et al.*, 2019). If one accepts the expressed opinion as true, then in Russia it will probably be impossible to criticize the court in the media at all, since the wording “unfounded criticism” which is open to interpretation will deprive one of the very possibility of expressing one’s opinion about the court.

The principle of relative truth is still controversial in the doctrine. After 1917, the principle of “objective truth” was promoted in the Russian civil procedure, which followed from the Marxist-Leninist dialectics and the principle of procedural activity of the court.

At the same time, the term “truth” is a philosophical category. In philosophy, truth is understood as the equivalence of the content of knowledge with its subject. Philosophers distinguish the following types of truths: ontological, objective, logical, absolute, relative, and formal.

What is objective truth and can it be achieved in court? Objective truth consists in comprehending the essential characteristics of an object. A true judgment is a judgment which correctly reflects objective reality. However, truth, having objective content, is nevertheless subjective in form, and therefore, it is relative to the form and, thus, cannot be objective *a priori*.

In different countries, both in doctrine and in jurisprudence, there are different approaches to the truth that must be established in court. Thus, in common law countries, the court establishes relative truth. In the countries of the Romano-Germanic legal system, approaches to establishing the truth in court vary. In Israel and in many Arab countries, the judge must necessarily reach the truth in the case, even if the parties did not present sufficient evidence, if the truth is not reached, then the decision does not comply with religious principles.

In any case, the process of establishing the truth is associated with the knowledge of the factual circumstances of the case. The process of cognition in court includes not only the establishment of facts with which the parties associate the emergence, change or termination of their rights and obligations but also a legal assessment of the facts established by the court. The dispute between the parties in litigation commonly comes down to the establishment or denial of facts that have legal significance in the case. The court establishes the facts based on the evidence presented to the court. Consequently, the truth in civil proceedings should be understood as the judge's correct judgment on the factual circumstances of the case based on the evidence presented to the court. Moreover, the court must give a legal assessment to the investigated circumstances. A legal assessment of actual circumstances is subjective in form or relative to the form of the knowledge entrusted.

The legislation on civil proceedings provides for a list of evidence with the help of which factual circumstances are established, the procedure for their presentation and calling, and the rules for assessing evidence. In the interests of achieving the truth, the duty of the court to guide the civil process is established as its guarantee.

In ancient Rome, there was a formula: *Err are humanum Est* (and judges are people too). The judges base their decisions only on the evidence provided by the litigants. The court is not entitled to collect evidence in favor of any party. Consequently, the truth comprehended by the court is not objective, but relative (relative to the evidence presented by the parties).

The question of the truth in court is currently the subject of debate. The principle of objective truth is opposed to the principle of formal or relative truth.

The principle of objective truth was enshrined in the Soviet civil procedure. Thus, A.F. Kleinman (1954) wrote that this principle is an expression of Lenin's theory of cognition in the process of implementing socialist justice. The scholar K.S. Yudel'son (1956) also noted that the achievement of objective truth in the civil process was due to the leading role of the dictatorship of the working class, the alliance of the working class with the peasantry, the absence of antagonistic classes and class struggle. With the adoption of the Civil Procedure Code in 2002 in Russia, the court was deprived of the initiative in collecting evidence but only partially, since a certain amount of initiative remained with the court when the court collects evidence on its own initiative (for example, appoints an expert examination). This ambivalent position of the legislator gave rise to conflicting judgments in doctrine about the truth that should be reached in court.

We believe that the principle of information reliability plays a serious role in the development of the principle of relative truth. The reliability of information as a principle of information law and legal requirements is enshrined in Clause 6 of Art. 3 of the Federal Law “On Information, Information Technologies and Information Protection”. Today one can talk about this principle as an interdisciplinary one (Svirin *et al.*, 2021). At the same time, the legislator does not directly determine what the reliability of information is, the reliability criteria are not established, and it is also not determined whether it is possible to establish reliability criteria in relation to a particular area, and at what level it is possible to disclose information reliability criteria.

The civil procedure legislation of the Russian Federation, like other procedural branches, establishes reliability as one of the requirements for evidence. Thus, part 3 of Art. 67 of the Civil Procedure Code of the Russian Federation establishes that “the court shall assess the referability, admissibility and authenticity of each piece of proof separately” (Bespalov, 2020). At the same time, it is not legally disclosed, which implies the determination of the reliability, which particular truth should be established. Whether or not the court has doubts about the reliability of the evidence is a key factor, which indicates the relativity of the truth established during the assessment of evidence in the process.

The principle of relative truth is closely related to the principle of adversariality.

The study of the history of the Russian judicial process allows one to conclude that already in the ancient Russian state, the judicial process was based on the principle of adversariality. For example, according to Russian Pravda or Pskov Judicial Charter (first half of the 15th century), the parties had the key roles in the trial. In this regard, V.O. Klyuchevsky (1908: 256) wrote, “The court appears to be an indifferent spectator or passive chairman rather than the head of the case”. However, in the 1497 Sudebnik, the process already combined both the adversarial principle and the investigative principle. Only in 1864, the adversarial principle was again implemented in the Russian civil procedure, and the investigative principle was rejected, which was quite a natural phenomenon, since, according to E.V. Vaskovsky (1914: 155):

The investigative principle forces the court to abandon the role of a calm contemplator of the combat of the parties and intervene in the procedural struggle, and such interference is harmful and dangerous. Helping one side, the court risks losing its composure, impartiality, objectivity and becoming an assistant to one of the parties. The adversarial principle opens up scope for the independence of the litigants and encourages them to show personal initiative and energy.

The reformers of law in the 19th century (notably, M.M. Speransky) defended the idea of an adversarial process. Moreover, the discussions

around adversariality were of applied importance. It is not enough to simply textually enshrine adversariality in a normative act. One had to give this principle certain substance, only then the principle would become a working tool in law enforcement, and especially in judicial practice. Therefore, legal scholars in the 19th century tried to give adversariality a certain amount of transparency. In 1919, T. Yablochkov (1919: 2) wrote, “...the wording and theoretical development of the doctrine of the “adversariality” of the civil procedure has already celebrated its centenary”. However, the researchers failed to reach a meaningful consensus.

By that time, the essence of adversariality had been developed by German lawyers. In the code of the Prussian trial (dated July 6, 1793), the concept of adversariality was enshrined which meant a competition of independent subjects of the process before a judge. German scholars have formulated the main features that characterize adversariality:

- *nemo iudex sine actore.*
- *nemo invitus ad agendum cogitur.*
- *ne procedat iudex ex officio.*
- *ne cat iudex ultra petita, iudex secundum allegata et probate judicare debet.*
- *non secundum conscientiam, iudici fit probation.*

These features later determined the emergence of the principle of “passivity of the court and the exclusive activity of the parties to the process” in the foreign doctrine. By the way, this principle began to be used in practical jurisprudence already in the 18th century.

After 1917, during the Soviet period of Russian history, the adversarial principle was enshrined textually in the procedural code, however, in essence and content, the principle should have been called the principle of the “active role of the court”. Moreover, the principle of adversariality in its essence was often equated to the disposition principle. In view of this, T. Yablochkov (1919: 11) noted, “Although lawyers opposed the adversarial principle to the disposition principle from the outside, but this difference does not go further than the outside. All of them declare the adversarial principle to be the reverse side of the disposition principle”.

According to the existing legislation in the Soviet period, the adversarial principle was seemingly neutralized by the principle of objective truth, when the court was obliged, not being limited by the evidence presented by the parties, to take all measures provided by law to establish the actual circumstances of the case, i.e. the court was obliged to collect evidence on its own initiative. Therefore, it can be said that in the Soviet period there was a principle of quasi-adversariality, a discrepancy between the textual

consolidation and the semantic content of the adversariality. Therefore, the content of this principle is of great importance, the boundaries beyond which it would be possible to assert that the adversarial principle is violated or, on the contrary, not violated.

After 2002, in the doctrine of civil procedure, the concept prevailed according to which a certain role is assigned to the court in the interests of ensuring the legality in the implementation of the adversarial principle. Therefore, there is currently no “pure” adversariality in Russian civil proceedings where the court would play a passive role in the process, and the process would be reduced to a “free play of the litigants”.

The court determines what circumstances are relevant to the case and which of the parties should prove them. The court has the right to invite the participants in the case to submit additional evidence, checks the relevance of the evidence presented to the case under consideration, finally establishes the content of the issues on which an expert opinion is required, can appoint an expert examination on its own initiative if it is impossible to correctly resolve the case without the expert opinion.

According to some researchers (for example, D.Ya. Maleshin), the Civil Procedure Code of Russia establishes a kind of combination of initiative of the parties and the activity of the court. Therefore, there seems to be a principle of limited adversariality in place (Maleshin, 2011). However, in science there are different perspectives on this issue. Some scholars insist on the need to strengthen the role of the court in collecting evidence, while others, on the contrary, defend the pure principle of adversariality.

According to Yu.F. Besspalov (2020), the adversarial principle applies only to the persons participating in the case, and the court manages the process, fixes the limits of such leadership. Since the court always manages the entire process (and not only in the implementation of adversariality), it can be assumed that the court is excluded from the adversarial principle, and therefore does not have the right to demand any evidence.

It seems to us that the process should be built on the principle of pure adversariality, and the intervention of the court is permissible insofar as it does not contradict the postulates of the parties' independence and procedural economy. This rule should apply only in the civil law process. In administrative proceedings, the court should not be deprived of the opportunity, on its own initiative, to send letters rogatory and requests to obtain evidence, since the litigants in an administrative dispute are not equal subjects.

Adversariality in civil procedure should have the following features:

1. The court should not go beyond the requirements of the parties.
2. The court should not seek and take into account facts and evidence that are not presented to the court by the parties.

3. The parties are given the right to compete before the court regarding the merits of their case.
4. The adversary nature allows the court to come to a conviction about the right of the litigants to the degree of certainty that is necessary for an error-free solution of the case.
5. The adversarial principle is also based on the obligation of the court to properly notify the persons involved in the case about the time and place of the trial. If any person was not properly notified about the process, he was not able to present evidence to substantiate his claims or objections, and therefore, in this case, the adversarial principle was violated. Thus, the content of the adversarial principle is: proper notification of the persons participating in the case about the time and place of the process; representation to all participants in the process to freely give explanations, present evidence, and file petitions for the demand for evidence.

The adversarial principle is also based on the obligation of the court to properly notify the persons involved in the case about the time and place of the trial. If any person was not properly notified about the trial, the person was not able to present evidence to substantiate their claims or objections, and therefore, in this case, the adversarial principle was violated. Thus, the content of the adversarial principle is proper notification of the case participants about the time and place of the trial; enabling all participants to freely give explanations, present evidence, and file petitions for the discovery of evidence.

The European Court of Human Rights (1993) under one of the aspects of the adversarial principle understands the rule according to which “every party to civil proceedings should have the opportunity to present his case to the court in circumstances which do not place him at a substantial disadvantage vis-à-vis the opposing party”. However, the cited judicial norm itself, in turn, has some uncertainty, since the norm deals with a reasonable opportunity to present one’s version. In this case, we also cannot outline reasonable boundaries of the adversarial principle since the boundaries depend on the judicial discretion and, therefore, are implicit.

The principle of legal certainty in the Russian doctrine is the least developed. Proceduralists practically do not attach importance to the principle of legal certainty in their works, which, in our opinion, undeservedly remains outside the boundaries of scientific research in the doctrine of law. Meanwhile, it is quite obvious that this principle is inherent in all procedural branches of law, which makes the principle intersectoral. The content of the principle of legal certainty is quite extensive.

On the one hand, the content of the above principle is enshrined in paragraph 9 of Art. 391-9 of the Civil Procedure Code of the Russian

Federation. The importance of this principle in the trial is noted in the Resolution of the Supreme Arbitration Court of the Russian Federation dated 20 Nov. 2012 No. 2013/12 in which the highest judicial body noted that the recognition of the prejudicial significance of a court decision, being aimed at ensuring the stability and binding nature of the court decision, excluding a possible conflict judicial acts, assumes that the facts established by the court during the trial of one case, pending their refutation, are accepted by another court in another case, if the facts are important for the resolution of the case. Thus, prejudicialness serves as a means of maintaining the consistency of judicial acts and ensures the operation of the principle of legal certainty (Supreme Arbitration (Commercial) Court of the Russian Federation, 2012).

We believe that the principle of legal certainty means that a court decision must comply with the uniformity of court practice which is formed in the decisions of the country's highest court. Thus, the decisions of the Plenum of the Supreme Court of the Russian Federation set out the legal positions of the highest court, fill gaps in law, and contain comments on the practice of applying a particular norm of positive law. For example, the Supreme Court of the Russian Federation, in its Resolution No. 8 dated 31 Oct. 1995, as amended on 6 Feb. 2007, formulated a legal position that if the applicable law or other normative act of the constituent entity of the Russian Federation contradicts the federal law adopted on issues that are under the jurisdiction of Russia, or the joint jurisdiction of the Russian Federation and the subject of the Russian Federation, then, based on the provisions of part 5 of Art. 76 of the Constitution of the Russian Federation, the court must make a decision in accordance with federal law. If there are contradictions between the act of the subject of the Russian Federation and the Russian Federation, adopted on issues related to the jurisdiction of the subject, the act of the subject of the Russian Federation shall be applied (Supreme Court of the Russian Federation, 1995).

The principle of legal certainty has a very broad substantive aspect but researchers have not yet developed a uniform opinion. The scholar Yu.S. Taranets (2018) reduces the essence of the principle of legal certainty to clarity and non-inconsistency of normative legal acts. O. A. Egorova and Yu.F. Bepalov understand the content of the principle of legal certainty as the compliance of judicial acts of Russian courts with the positions of the European Court of Human Rights. However, this point of view is not indisputable and contradicts both the legal positions of the Supreme Court of the Russian Federation and the European Court of Human Rights.

For example, the Resolution of the Plenum of the Supreme Court dated 27 Jul. 2013 No. 21 "On the application by courts of general jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950 and the Protocols thereto" indicates that

if the court's decision was executed at the time when the judgment of the European Court became final, in which it was established that when making this decision the provisions of the Convention or the Protocols thereto were violated, the cancellation of such a decision on a new circumstance in connection with the said judgment of the European Court prevails over the principle of legal certainty. From the above context, it is clear that the legal positions of the European Court are not included in the content of the principle of legal certainty. We believe that the principle of legal certainty should be considered only in conjunction with the legal positions of the highest court of Russia and with the legal positions of the Constitutional Court of Russia.

A completely different interpretation of the principle of legal certainty is given by the European Court of Human Rights which defines it as (*res judicata*) the inadmissibility of reconsideration of a once resolved case, the impossibility of either party to demand a final judgment only for a second hearing and to receive another court decision. The reconsideration should not be seen as a disguised appeal in the presence of two perspectives on the case. Moreover, the higher court has the right to reconsider the case only to correct an error. In view of this, S.I. Knyazkin (2020: 322) notes, "...legal certainty is associated with the finality of a judicial act. And the criterion for the finality of a judicial act is its coming into legal force". However, it is difficult to agree with such a concept since the court's decision comes into legal force after the appeal, and in Russia there are still three verification instances (two cassation courts and judicial supervision) after that. Therefore, such a large number of verifying instances of court decisions in Russia undoubtedly violates the principle of legal certainty of a judicial act.

The principle of judicial discretion, like the principle of legal certainty, is a subject of discussion in the doctrine.

The question of the possibility of judicial discretion attracted the attention of researchers as early as the 19th century and provoked intense discussions among scholars of jurisprudence. At the beginning of the 20th century, in European countries, researchers substantiated the idea of "free choice of law", the essence of which boiled down to expanding judicial discretion. However, to date, the issue of the limits of judicial discretion has not been resolved either in Russia or in other European countries.

The legal term "discretion" is quite often found in normative legal acts regulating private and public legal relations in the form of direct or indirect consolidation. The norms of civil law stipulate that the subjects of civil legal relations exercise their powers by their own will, in their interest and, at their discretion, i.e. the legislator identifies discretion as an element of the legal personality of a person in substantive law.

Discretion from the point of view of the Russian language is the freedom to choose something, therefore, due to the disposition in private law, discretion exists objectively, organically woven into the legal instruments of private law. Moreover, discretion is an integral part of the existence of private legal relations. Therefore, in private substantive law, discretion is used quite often and this is primarily due to the fact that in private legal relations there are many evaluative categories. In this sense, the positivist understanding of law for private relations is narrow and needs to be overcome with the help of such an instrument as discretion.

Since the discretion used by the subjects of law for the emergence, change or termination of legal relations is an evaluative category, this often provokes a legal conflict between them, which is subsequently transferred to the court for resolution, which should also launch the mechanism of discretion but only the judicial one. According to M.N. Ilyushina (2018), judicial practice, within the framework of judicial discretion, tries to streamline the use of evaluative categories as much as possible, which, in fact, is aimed at the stability of civil turnover. However, it is difficult to agree with this conclusion since if at first in the substantive law the parties act at their own discretion, then the judge decides the issue at their own discretion, then a relevant question arises: where is the law here? What should be used to predict a court decision, what are the limits of such discretion?

Naturally, judicial discretion is derived from and follows discretion in private law. Meanwhile, the legal natures of discretion in private law and in procedural law are different. In civil procedural law, this refers the discretion of a judge when making a decision, and some researchers raise this mechanism to the rank of a principle of procedural law. I.A. Pokrovskii (1998) rightly pointed out that discretion is the right to more freely interpret, complete and even correct the law in accordance with the requirements of justice and the dictates of the judicial conscience. However, such a formula of discretion can only be applied if judicial acts are recognized as a source of law, otherwise it will lead to chaos and unpredictability in the delivery of judicial verdicts.

In fact, in the Russian process, judicial discretion is the discretionary power of the court when the court is granted the right of discretion, i.e. choice of judicial opinion. However, this should not mean that the court can act as the court pleases. The court is obliged to use the right granted to it in accordance with the purpose of justice, subject to the limits of discretion. The principle of discretion gives the court freedom, but the freedom must be limited by the framework, i.e. must have a limit.

We believe that judicial discretion is a principle of procedural law, despite the fact that it is not textually enshrined in procedural norms, but the principle has a semantic meaning and follows from many articles of

the procedural law. As it is known, there are two ways to consolidate the principles of law: textual and semantic. The principle of judicial discretion was enshrined in semantic form in the procedural codes of the RSFSR of 1922 and 1964, where it was stated that the court made a decision based on its socialist sense of justice. Thus, already in the Soviet period, the principle of judicial discretion was enshrined in Russian procedural law.

In civil law as well as in other private branches of law, in contrast to public law, discretionary action applies to any person exercising their powers by their own will and in accordance with their interests. Judicial discretion applies only to the court which has the right to varying opinions on certain issues. At the same time, the uncertainty of the content and essence of “discretion” in the norms of positive law and the vagueness of its limits lead to the fact that discretion in private law then tries to make up for the court in the framework of the civil process also by including the mechanism of judicial discretion. However, as pointed out by D.B. Abushenko (2015), the inability to resolve this issue guided by legal means leads to numerous discussions and recommendations in the academic literature. In view of this, the judicial discretion should be limited by strict framework (limits). Unfortunately, such limits are not established in the norms of positive law, therefore, judges, based on their own subjective limits of discretion, often give different interpretations of the same norm of law, actually changing its meaning and content.

The limits of judicial discretion are extremely complex, and not unequivocally defined in the doctrine. Thus, V.I. Chernyshev pointed out that the primary role in resolving this issue belonged to the formation of legal consciousness and legal culture. Judges should not be “officials in justice”, and the activities of the court should not undermine faith in justice or generate legal nihilism in the minds of people (Chernyshev, 2005: 218). It is important that the judicial discretion does not turn into arbitrariness. The guarantee of inadmissibility of judicial arbitrariness, it would seem, is the norms of law that form the boundaries of judicial discretion. However, in this case, we know that many norms of private law contain disposition principles, are vague and full of uncertainty. In view of this, V.A. Vaipan (2020: 6) writes,

If doubts arise about the correctness of the perception of norms due to the ambiguity, uncertainty of their provisions, the identification of systemic contradictions in law, etc., it becomes necessary to interpret legal prescriptions based on their objective goals and content, identify the true meaning of the norms to prevent socially unfair actions (inaction) in the process of their implementation.

Since judicial discretion borders on judicial arbitrariness, the attitude to this principle of law is not unambiguous, from complete rejection to its full approval. Such a diversification of opinions occurs due to the peculiarities of the understanding of law and the different attitudes of researchers to

legal phenomena, due to which the term discretion can take on different meanings.

In jurisprudence, there are two movements in terms of judicial discretion. According to some researchers (I.A. Pokrovskii, G.F. Shershenevich, etc.), there can be no judicial discretion since the latter does not comply with the law and is arbitrary. Therefore, the interpretation of the law by the judge should be only explanatory, nothing can be added or subtracted. A judge must strictly follow the dictates of the law, being an executor of the law, and judicial practice cannot be a source of law. According to another point of view, it is not possible to completely exclude judicial discretion, and in some cases discretion is even useful. In foreign literature, judicial discretion is also compared with freedom in decision-making (Garner and Black, 2009).

In English law, there is a term “abuse of discretion” when the court did not exercise its right to judicial discretion and did not make an informed decision. The imperfection of the law, its incompleteness, the impossibility of foreseeing everything in advance on the part of the legislator create fertile ground for judicial discretion. As S.A. Muromtsev (1877: 15) points out, “The presence of gaps is objective, in this case the court together with jurisprudence creates independent norms that govern vital interests”. S.A. Muromtsev (1877: 43) proceeds to say that a judge, in addition to interpreting, criticizing and developing positive law, is also engaged in independent creativity, based on science and judicial practice. H. Hart (1994) adheres to the same position, emphasizing that judges need discretion to fill in dangerous gaps. According to L.N. Berg (2007), judicial discretion is applied at all stages of law enforcement, from clarifying the factual circumstances of the case to drawing up a decision.

It seems to us that in order not to reduce the discretion to arbitrariness, it must be assessed using the legal method, based on the general, objective and constant essence of law. However, it should be noted that since any activity has an element of arbitrariness, then in this case it is not impossible. It is clear that judicial discretion can correct the shortcomings of legal regulation and be aimed at protecting the violated right. Therefore, judicial discretion should be considered not as an end but as a means of achieving the goal of legal proceedings.

Conclusion

As a result of the study, the following conclusions were made:

1. The principle of the independence of the judiciary is not fully operational in the Russian Federation. According to the Russian Constitution, not three but four powers have developed and are

operating. The judiciary is separate from the executive and legislative branches but is controlled by the presidential power.

2. In modern civil proceedings in Russia, in contrast to the Soviet civil procedure, by virtue of the adversarial principle, the court establishes not an objective truth but a relative one. The truth established in the judicial process is relative since the court receives information and draws conclusions on the basis of the evidence presented to the court by the parties, i.e. the truth is related to the ability of the parties to convince the court that they are right.
3. The civil law process must be based on the principle of pure adversariality. The court should be deprived of the initiative to collect evidence. The intervention of the court is permissible only if assistance is provided to the parties to the extent that it does not contradict the postulates of procedural independence and activity of the parties. This rule should apply only in the civil law process. In administrative proceedings, the court should not be deprived of the opportunity, on its own initiative, to send letters rogatory and requests to obtain evidence, since the litigants in an administrative dispute are not equal subjects.
4. The essence of the principle of legal certainty lies in the fact that a court decision must comply with the uniformity of judicial practice which is formed in the acts of the highest judicial body of the country. This principle is currently not valid in the Russian Federation, which leads to conflicting decisions in similar cases even in the same court in the Russian Federation.
5. The principle of judicial discretion is not enshrined in the procedural law of Russia. At the same time, “discretion” as a legal mechanism is quite often used in private law. In the procedural doctrine, there are discussions about the implementation of this principle in the judicial process. The consolidation of this principle has both positive and negative sides. On the one hand, the court, using judicial discretion, fills in the gaps in the law which makes it possible to administer justice. On the other hand, judicial discretion determines judicial arbitrariness. Therefore, before introducing this principle into the process, it is necessary to formulate its limits which the court will not have the right to cross.

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Counter-majoritarian mechanisms in local self-government: a view from Russia

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Abstract

Through a documentary methodology, the article analyzes the main theoretical, practical, and problematic legal issues related to the functioning of the counter-majority mechanisms existing in the Russian local self-government system. The study proposes a set of legal measures aimed at improving the content of existing counter-majoritarian legal structures and seeks at the same time to introduce new ones to bring Russian municipal legislation into place to bring Russian municipal legislation into place. It is concluded that the thesis of the system of tyranny of the majority (majority democracy) at the local level cannot be recognized as a democratic and stable legal structure for the application of local self-government. Around the world, there is a fairly long process of replacing the concept of majority democracy with the concept of participatory democracy that involves the interaction of all population groups and the search for compromises between different social communities, through a balance of respect and recognition of memories of all kinds.

Keywords: local self-government; counter-majority mechanisms; counter-majoritarian legal constructions; participatory democracy; Russian experience of local government.

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Mecanismos contramayoritarios en el autogobierno local: una mirada desde Rusia

Resumen

Mediante una metodología documental el artículo analiza las principales cuestiones legales teóricas, prácticas y problemáticas relacionadas con el funcionamiento de los mecanismos contramayoritarios existentes en el sistema de autogobierno local ruso. El estudio propone un conjunto de medidas legales destinadas a mejorar el contenido de las estructuras jurídicas contramayoritarias existentes y busca al mismo tiempo introducir nuevas para adecuar la legislación municipal rusa a las principales tendencias mundiales en la protección de los derechos de las minorías municipales. Se concluye que, la tesis del sistema de la tiranía de la mayoría (democracia mayoritaria) a nivel local no puede reconocerse como una estructura jurídica democrática y estable para la aplicación del autogobierno local. En todo el mundo, hay un proceso bastante largo de sustitución del concepto de democracia mayoritaria por el concepto de democracia participativa que implica la interacción de todos los grupos de población y la búsqueda de compromisos entre diferentes comunidades sociales, mediante un equilibrio de respeto y reconocimiento a las memorias de toda índole.

Palabras Clave: autogobierno local; mecanismos contramayoritarios; construcciones legales contramayoritarias; democracia participativa; experiencia rusa de gobierno local.

It's enough to lose the election,
 to understand: the majority is not always right.
 Andrew Mackenzie

Introduction

The analysis of the complex of events that had been taking place in the world recently allows concluding that the existing unified global community has passed into a stage of instability and serious transformations, the results of which are quite difficult to predict. Concerning the system of Russian local self-government, it is not difficult to predict the fact that the economic difficulties that are inevitable during the transformation period will objectively cause an increase in protest activity of the population due to the naturally escalating problems with solving local issues that complicate the lives of residents of municipalities daily.

Therewith, the modern institution of Russian local self-government (as a democratic institution) is objectively programmed to prioritize the interests

of the majority of residents over the interests of the territorial residents of local communities. The main forms of implementation of local self-government by the population and participation of the population in the implementation of local self-government are focused on the legitimization of the interests of the majority, most of which are majoritarian (local referendums, municipal elections, voting on the recall of a deputy, citizens' gatherings, public hearings, public discussions, meetings and conferences of citizens, citizens' polls).

However, as the practice of local self-government shows, in the current information age, when solving issues of local significance, serious problems arise related to adequate legal protection of the protest consolidated and formalized will of the population of local territorial communities on issues of compaction development, changes in the number of floors of buildings, changes in the purpose of land, placement of environmentally dirty objects, support for the implementation of industrial and commercial projects, deforestation of municipal forests... Quite often, such projects, which are positively assessed by the majority of the population of the municipality due to the prospects of their implementation from the standpoint of common municipal interests, cause an unambiguously negative consolidated reaction of residents of local territorial communities, whose interests will be infringed to some extent in the event of the implementation of relevant projects entailing the deterioration of the local environmental and the economic situation, a decrease in the comfort of living conditions and several other locally significant circumstances.

This problem conceptually follows from the general democratic attitude, which assumes the priority of the interests of the majority concerning the minority. However, concerning the system of local self-government, which assumes the priority of finding consensus among all residents of the municipality, the lack of effective counter-majoritarian municipal legal institutions is puzzling, and, accordingly, this topic is of undoubted scientific interest.

1. Methods

Based on the analysis of the theoretical foundations and the existing experience of practical implementation of legal structures that regulate counter-majoritarian mechanisms in local self-government in Russia, this study attempts (using dialectical, logical, historical, formal-legal methods of scientific knowledge using reference, value, system, functional and informational approaches) to analyze the main problematic legal aspects of the implementation of counter-majoritarian mechanisms in Russian local self-government and to suggest promising directions for improving the content of the legal structures under consideration.

2. Theory and practice of implementing counter-majoritarian mechanisms in local self-government in Russia

The issue of the legal consequences of the contradiction between the will of local communities and the expression of the will of the majority of the local population has not until now been the subject of close attention of theorists of municipal law. However, concerning the general constitutional and legal issues, the «counter-majoritarian difficulty» is a well-researched political and legal plot, which was first described by A. Bickel (1986), a professor of law at the Yale Law School, and subsequently studied in sufficient detail by such Russian and foreign scholars like I.A. Alebastrova (2018), A. Arutyunyan (2008), N. V. Varlamova, N.B. Pakholenko (1997), S.M. Popova, S.M. Shakhrai (2019), K. Ragnarsson (2019), J. McGarry, B. O'Leary, R. Simeon (2008).

Therewith, it is important to note the fact that, within the framework of the constitutional problem concerning counter-majoritarian mechanisms, the emphasis is on protecting the interests of ethnic and cultural minorities, and not the interests of local territorial communities (houses, streets, neighborhoods) that remain in the minority when making public decisions. In our understanding, when considering the content of municipal counter-majoritarian mechanisms, it is important to understand and take into account these specifics.

When analyzing the content of counter-majoritarian municipal mechanisms, it is important to emphasize that their essence is precisely the protection of the rights and legitimate interests of local territorial communities, and their organizational guarantees should include elements of the municipal mechanism for the exercise of public power that can resist the decisions of institutions formed by the majority of the local population and designed to reflect their interests.

Therewith, the understanding of counter-majoritarian municipal mechanisms solely as tools for protecting the rights of local territorial communities, which enable them to resist the repressive decisions of the democratic majority of municipalities, in our understanding, narrows the significance of these mechanisms. Their purpose should also be to promote the development of consolidating principles in municipalities, the coordination of interests, the search for compromises to smooth out the emerging conflicts of interests of local territorial communities and the majority of the population of municipalities.

Analyzing the legal aspects of counter-majoritarian municipal mechanisms, one should also take into account the fact that they can receive their legal consolidation in the relevant municipal legal institutions, which contain separate counter-majoritarian elements in their content. Therein,

it should be noted that there are no specialized counter-majoritarian municipal legal institutions aimed exclusively at protecting the interests of local territorial communities in the current Russian municipal legislation.

Meanwhile, to date, within the framework of a municipal legal matter, several municipal legal institutions can be distinguished, having in their content separate counter-majoritarian elements that can legitimately adjust both the process itself in the interests of local territorial communities and the result of decision-making directly by the majority of the population of municipalities or indirectly by their representatives.

1. The legal institution of public hearings provided for in Article 28 of the Federal Law No. 131-FZ of June 10, 2003 «On General Principles of the Organization of Local Self-Government in the Russian Federation» allows (when conducting this municipal public procedure in buildings located in the territorial proximity of disputed objects) providing conditions for the preferential presence of representatives of the relevant local territorial community, the expression and formalization of their consolidated will for its subsequent consideration by the relevant local representative body.
2. The legal structure of the institute of public discussions provided for in Article 24 of Federal Law No. 212-FL of July 21, 2014 «On the Foundations of Public Control in the Russian Federation» and paragraph 5 of Article 28 of Federal Law No. 131-FZ of October 6, 2003 «On the General Principles Of Organizing Local Self-Government in the Russian Federation», the legal structure of the institution of public discussions also creates certain conditions for the preferential participation in it of representatives of the relevant local territorial communities, the rights, and legitimate interests of which are affected or may affect the discussed decision. This procedure facilitates the clear expression and formalization of their consolidated opinion to ensure that its content is more fully and adequately taken into account by the relevant municipal authorities and officials.
3. The legal structure of the institution of the Head of a municipality, as the sole highest official of a municipality elected at municipal elections, either by the representative body of the municipality from its composition or by the representative body of the municipality from among the candidates submitted by the competition commission based on the results of the competition, contains counter-majoritarian elements, clearly manifested in its ability (provided for in part 13 of Article 35 of the Federal Law of 06.10.2003 No. 131-FZ «On General Principles of the Organization of Local Self-Government in the Russian Federation») to reject a normative legal act adopted by the representative body of the municipality.

Also, special attention should be paid to the fact that the very procedure for electing the Head of a municipality, which provides for competitive election as one of the options, indicates the desire of the legislator to introduce elements into the content of this legal institution that ensures (along with the level of professionalism) the possibility of carrying out certain counter-majoritarian actions by the Head of the municipality.

4. The existing legal structure of the institution of a deputy of a local representative body, which declares the responsibility of a municipal deputy to the voters, but practically excludes the possibility of his/her recall (Solovev and Titova, 2020), contains a certain counter-majoritarian content, which allows the elected representatives of the majority of the population of the electoral district, if necessary, to carry out actions aimed solely at protecting the interests of local territorial communities that are in the minority on certain issues.

Also, special attention should be paid to the fact that the deputies of the local representative body are representatives of a part of the territory of the municipality, and in the event of a discrepancy between the interests of the population of the entire municipality and its part from which the deputy is elected, this legal figure, representing the interests of its voters (remaining in the minority), acquires a purely counter-majoritarian content in its activities.

5. Among the legal institutions that have counter-majoritarian elements in their content, which make it possible to systematically protect the interests of local territorial communities by legal means, it is also possible to distinguish the institutions of local branches of public associations and political parties, as legal structures by definition focused on defending certain group interests, among which the interests of local territorial communities may well be included.
6. A specific legal institution with a pronounced counter-majoritarian content is the legal institution of judicial appeal of municipal legal acts, provided for in Part 2 of Article 46 of the Constitution of the Russian Federation. Within the framework of this legal procedure, the sole will of an appointed rather than an elected judge, aimed at protecting the legitimate interests of local territorial communities violated by decisions of the majority (or their representatives), may have a purely counter-majority character, implying that a judge cancels a municipal legal act in the interests of a minority of the local population, adopted by the direct expression of the will of citizens or by democratically elected bodies and officials of local self-government, representing the majority of the local population.

3. A set of legal measures aimed at developing counter-majoritarian mechanisms in local self-government in Russia

To avoid the potential for the establishment of a majority dictatorship in the modern Russian system of local self-government, in our understanding it is necessary to introduce into its composition a group of specific legal institutions that have a purely counter-majoritarian content, providing more effective protection of the rights and interests of local territorial communities within the framework of specially stipulated legal procedures. In our understanding, we can offer the following legal constructions as such counter-majoritarian legal institutions.

Firstly, to clarify the prevailing opinion of local territorial communities on issues that cause widespread protest sentiments in them, it makes sense to introduce in Article 28 of the Federal Law of October 6, 2003, No. 131-FZ «On General Principles of the Organization of Local Self-Government in the Russian Federation» norms defining the procedure for holding local public hearings, which are public hearings held exclusively to clarify the prevailing opinion of residents living in a certain part of the territory of a municipality.

Secondly, if there is a negative opinion of local territorial communities on high-profile local issues expressed as a result of local public hearings, it seems appropriate to provide for the mandatory adoption of a formalized decision based on the results of general municipal public hearings held following Article 28 of Federal Law No. 131-FZ of October 6, 2003, adopted by a qualified majority (2/3) of the number of participants in the relevant public hearings.

Thirdly, to establish legal mechanisms that reliably guarantee the protection of the rights and legitimate interests of residents of local territorial communities, it makes sense to provide for an overqualified quorum (3/4 of the established number of the deputy corps) in Art. 35 FL dated October 6, 2003. No. 131-FZ for making decisions by the local representative body on issues in respect of which there is a negative decision based on the results of local public hearings and there is no formalized positive decision based on the results of general municipal public hearings.

Fourthly, the establishment of norms in Article 35 of the Federal Law No. 131-FZ of October 6, 2003, which enshrine the right of a deputy of a local representative body to make decisions on objects located on the territory of his/her electoral district, in the presence of qualified support of residents of the relevant territory, expressed by the results of local public hearings (3/4 of the number of participants in local public hearings), will undoubtedly contribute to the solution of the issue of creating mechanisms for protecting the rights and legitimate interests of residents of local territorial communities.

Fifthly, it is also quite a cardinal measure in the issue of protecting the rights and legitimate interests of residents of local territorial communities can be the consolidation in the Federal Law of October 6, 2003, No. 131-FZ of a legal structure regulating the exercise of the right of a suspensive veto on the decision of a local representative body by a group of residents in the number of 15 percent of residents of the municipality who made the corresponding decision by electronic voting.

Conclusion

In conclusion, we would like to emphasize the thesis that the system of the tyranny of the majority (majority democracy) at the local level cannot be recognized as a democratic and stable legal structure for the implementation of local self-government. Throughout the world, there is a rather long process of replacing the concept of majority democracy with the concept of participatory democracy (Linz and Stepan, 1996; Susan *et al.*, 2012), which involves the interaction of all population groups and the search for compromises between different social communities. This circumstance determines the urgency of developing theoretical constructions and modeling practical mechanisms aimed at introducing a group of counter-majoritarian institutions into the system of Russian local self-government that can legitimately correct the majority decisions taken in a legitimate democratic procedure in the interests of local territorial communities.

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The Comparison of Examples of Deviation from Jurisdiction in the Criminal Procedures of Iran and France

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Abstract

In criminal proceedings, in special circumstances, exceptions have been provided for to deviate from the competences of the judicial authorities, and the present study aims to compare these cases in Iranian and French criminal procedure. As for intrinsic jurisdiction, the findings indicate that in Iranian criminal procedure deviation from intrinsic jurisdiction is permitted in cases such as issuing a collective verdict and observing the rules of multiple crimes. In French criminal procedure, deviation from the inherent jurisdiction is possible in limited cases and only within the framework of a referral. Moreover, as regards the rule of diversion from local jurisdiction, the fact that, without exception, that rule cannot lead to favourable judicial review of criminal cases is common to both criminal proceedings. Indeed, the need to establish exceptions and violations of this rule in order to increase the efficiency of the judiciary is inevitable. Moreover, in both Iranian and French criminal proceedings, the basis for determining personal jurisdiction is the perpetrator, so that the criminal procedure has placed the investigation of certain persons under the jurisdiction of a specific authority.

Keywords: criminal proceedings; intrinsic jurisdiction; local jurisdiction; personal jurisdiction; comparative law.

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Comparación de ejemplos de desviación de la jurisdicción en los procedimientos penales de Irán y Francia

Resumen

En el procedimiento penal, en circunstancias especiales, se han previsto excepciones para desviarse de las competencias de las autoridades judiciales, y el presente estudio tiene por objetivo comparar estos casos en el procedimiento penal iraní y francés. En cuanto a la jurisdicción intrínseca, los hallazgos indican que en el procedimiento penal iraní se permite la desviación de la jurisdicción intrínseca en casos como emitir un veredicto colectivo y observar las reglas de múltiples delitos. En el procedimiento penal francés, la desviación de la jurisdicción inherente es posible en casos limitados y solo en el marco de una remisión. Además, en cuanto a la regla de desvío de la jurisdicción local, el hecho de que, sin excepción alguna, dicha regla no puede conducir a una revisión judicial favorable de los casos penales, es común a ambos procesos penales. De hecho, la necesidad de establecer excepciones y violaciones de esta regla para aumentar la eficiencia del poder judicial es inevitable. Además, tanto en el procedimiento penal iraní como en el francés, la base para determinar la jurisdicción personal es el autor, de modo que el procedimiento penal ha colocado la investigación de determinadas personas bajo la jurisdicción de una autoridad específica.

Palabras clave: procedimiento penal; jurisdicción intrínseca; jurisdicción local; jurisdicción personal; derecho comparado.

Introduction

The Code of Criminal Procedure is an element of the ideal of justice, legalism and order in societies, guarantees individual rights and freedoms and provides social security in various fields. The Judicial Development Plan proposed by the Judiciary paved the way for fundamental changes in the country's judicial system, which in the light of the revival of the judiciary, the development of a comprehensive law in accordance with the needs of society Criminal matters approved in 1999 became necessary. The Code of Criminal Procedure, approved on 2013-7-3, has been integrated as an appropriate response to this important need based on criminal policies, and an attempt has been made to lay the foundation of criminal justice in the foundation of the country's legal framework.

In the new law of criminal procedure, the jurisdiction of criminal courts has witnessed changes and amendments in an appropriate and effective manner, the most important of which in the trial phase of the most

important amendments to the jurisdiction of criminal courts one and two, which operated in the Judicial Organization of Iran from 1982 to 1993. They were re-established and replaced the provincial, general and criminal courts with a slight change. (Mir Mohammad, 2002).

On the other hand, the Revolutionary Courts, which had previously followed the dangerous method of unifying judges in dealing with important crimes, some of which resulted in the death of the perpetrator, were required to have a system of multiple judges within their jurisdiction to deal with some crimes.. The juvenile court, the existence of which is an undeniable necessity for the prosecution of this group of persons, was not only preserved, but also changed its position from a specialized court, which was a sub-branch of the general court, to a special court.

One of the important issues in the Code of Criminal Procedure is the jurisdiction of the judicial authorities. When a crime is committed, it must be determined from all the criminal courts which one has the special jurisdiction to judge the perpetrator's behavior. Jurisdiction in legal terms is the ability and obligation that judicial authorities have in dealing with lawsuits under the law, and in another definition, criminal jurisdiction is the authority assigned to the criminal authority by law.

In fact, due to the specialization of the court, the study of the rules of jurisdiction, which is in fact dedicated to the division of labor between the courts, and as cases of deviation from it is of great importance. In fact, by examining the structure and jurisdiction of criminal courts, both public and private, we will see the appropriate changes that have been achieved inspired by the criminal structure and procedure in the past and have led to a fundamental change in it (Guinchard and Buisson, 2008).

French law belongs to the Roman-German family of written law and has become the source of legislative changes in the Middle East. and in France, under the influence of a collection of ideas and thoughts of scientists and philosophers of law and social sciences, the reform movement in criminal law began in the eighteenth century and after the French Revolution in 1789, reforms of criminal law and criminal law began, and the first French General Penal Code was passed by the Constituent Assembly in 1791, based on the idea of individual originality and the preservation of collective values and the protection of individuals and property. His goal was to defend the human person and the desire for the full development of talents and to defend him against any aggression (Ahmadi Golian, 2017).

During the one hundred and eighty years of the rule, the above-mentioned law had its strengths and weaknesses, and finally in 1810, based on the new amendments, the general punishment known as the code (Napoleon) was passed. In general, the criminal procedure of the Napoleonic Empire was a combination of the mixed penal system between the old French penal

system and the penal system after the French Revolution. Finally, after two centuries of rule, the new French Penal Code was passed in 1992, which is currently in force (Ahmadi Golian, 2017).

Given the importance of French law and their impact on Middle East law, a comparison of the terms and conditions of deviation from jurisdiction in the Iranian and French criminal procedure can explain the areas of identification of weaknesses and challenges in the Iranian criminal procedure. However, in our country, so far, no article or dissertation has been registered that comprehensively examines the issue of deviation from the jurisdiction in the criminal procedure of these two countries. The researches done are mainly in two special categories.

The first category is research that has examined the issue of jurisdiction over specific crimes, such as cybercrime or international litigation. The second category includes studies that have exclusively examined one of the competencies, including intrinsic, local, personal, and relative competencies, and have avoided a comprehensive study of the types of competencies. In the field of comparison with other countries, in a few cases, comparisons of personal and local jurisdiction have been made between the penal systems of Iran and Turkey, Iran and France, which have been briefly compared in a limited framework of differences and similarities.

In addition, the disadvantage that is observed in most of the researches is that the researches have studied the criminal jurisdictions according to the laws approved before 2013, which due to the significant changes in the criminal procedure approved in 2013, the need New research is needed to update studies based on new rules.

In view of the above, it has been necessary to conduct a comprehensive and complete study of the weaknesses, strengths and methods of exercising jurisdiction in the Iranian criminal procedure and compare the identified cases with an advanced criminal procedure such as France. The results of the forthcoming research can be considered by the judiciary of our country as well as research and study institutions as a source for the issue of jurisdiction of criminal courts in the judicial system of Iran and France.

1. Research Literature

1.1. Jurisdiction

Jurisprudence in the word means competence, desirability, deservingness (Dehkhoda, 1962) and in reform, refers to the ability and jurisdiction of judicial authorities in handling lawsuits (Goldoost Joybari, 2014). In procedural terms, it is the authority given by law to a court to hear

a case. In other words, the legal jurisdiction of the court to hear a specific lawsuit is called jurisdiction in legal terms. In fact, in criminal matters, the prosecuting authority must have the competence and authority to intervene and deal with the matter, and this jurisdiction of the prosecuting authority is usually predicted in four ways: inherent jurisdiction, local jurisdiction, personal jurisdiction and relative jurisdiction.

1.2 Intrinsic Jurisdiction

Among the types of jurisdiction, first is the inherent jurisdiction, the determining criterion of which is the subject of the accusation, and in this respect, the inherent jurisdiction of the criminal authorities may be different. In our legal system, the jurisdiction of judicial and administrative authorities in general in relation to each other in terms of class, and the jurisdiction of public and private courts such as the General Legal and Criminal Court the Revolutionary Court in terms of type, and the jurisdiction of first and highest courts are inherently different (Karimi, 2018).

1.3 Local Jurisdiction

According to Article 310 of the Code of Criminal Procedure, local jurisdiction is the jurisdiction of the reference of the crime scene. In other words, the accused is tried in a court in which the crime takes place. If a person commits several crimes in different jurisdictions, the trial will take place in the court in which the most important crime took place. If the offenses are equal in punishment, the court in which the perpetrator is arrested will try them all. If the accused has not been arrested, the court in which the prosecution first began has jurisdiction over all crimes (Karimi, 2018).

1.4 Relative Jurisdiction

Claims that are determined in terms of the subject matter of the claim or the quorum of the claim or the amount of the claim are called relative jurisdiction. Such as eviction disputes, expropriation, etc., and the purpose of the price demanded or the quorum of the demand, the amount and value of the demand is what has been the subject of the claim. The subjects can deviate from relative jurisdiction by compromising each other (Sadrzadeh Afshar, 2006).

Also, in criminal cases, for some crimes, depending on the extent and severity of the crime, the criminal jurisdiction also changes. For example, according to Article 303 of the Code of Criminal Procedure adopted in 2013, all crimes related to drugs, psychotropic substances and their precursors, and smuggling of weapons, ammunition, items and controlled substances are under the jurisdiction of the Revolutionary Court. In fact,

the Revolutionary Court is a special court because, according to the law, it has only the jurisdiction to deal with limited and specific crimes, and outside that framework, it does not have jurisdiction over it (Sadrzadeh Afshar, 2006).

In fact, the principle is that the criminal court has two jurisdictions to deal with all drug offenses, except as provided in Article 303. As another example, according to Article 302 of the Code of Criminal Procedure, intentional crimes against physical integrity with a fine of half full or more or more are within the criminal jurisdiction of one. If the diyat is less than the mentioned amount, the criminal court will have two jurisdictions.

1.5 Personal Jurisdiction

Personal jurisdiction is the jurisdiction that the legislature determines according to the position, personality, occupation, and age of the perpetrator, so that a court that does not have the local jurisdiction to hear a case may be assigned to the crimes of certain individuals. In fact, the legislator, regardless of the place of the crime and only with regard to the perpetrator, considers another competent court competent to hear (CÉRÉ, 2011).

2. Examples of deviation from jurisdiction in the criminal procedure of Iran and France

According to Article 11 of the Code of Criminal Procedure, whenever a person commits a crime, he will be tried in the court where the crime took place, and if a person commits several crimes in different places, those crimes will be tried in the court where the most important crime took place and whenever the offenses are of a degree, the court in which the accused was arrested shall be tried. In this case, the court of each place carries out the necessary investigations in accordance with its duties and sends the results of the investigations to the prosecutor of the court that must hear them.

In addition, Article 12 of the Code of Criminal Procedure stipulates that if a person is accused of committing several crimes of various types, he or she will be tried in a court that has jurisdiction over the most important crime, with inherent jurisdiction. Also, according to Article 14 of the Code of Criminal Procedure, the accomplices and accomplices of the crime are tried in a court that has jurisdiction to try the main perpetrator. On the other hand, according to Article 20 of the Rules of Procedure of the Revolutionary Courts and Courts, the accused will be prosecuted in a court that has committed a crime in the same area, and if he has committed a crime in several areas, he will be prosecuted in the court where the most important crime took place. Will take. Recognition of the most important

crime is with the court in which the accused has been detained. And if the crimes are of the same degree, the accused will be tried in the area where he was detained.

Article 197 the Code of Criminal Procedure also stipulates that whenever a person is accused of committing several crimes of different degrees, he will be tried in a court that has jurisdiction over the most important crime. In addition, under Article 198 of the Code of Criminal Procedure, the accomplices and accomplices of the offender go to court, which has jurisdiction over the principal offender.

2.1. Deviation from the inherent jurisdiction to cancel the suspension of punishment

According to Article 33 of the Penal Code of 1991, the court that issued the suspension order or the successor court was competent to revoke it. In the Islamic Penal Code adopted in 2013, part of Article 54 states: "After the final verdict is final, the court cancels the suspension order and issues an order to execute the suspended sentence and announces the matter to the court issuing the suspension order."

According to this part of the article, two cases occur:

According to Article 55 of the new law, the court that issued the suspension order, after issuing the order, finds that the convict has a history of effective conviction or other final convictions, among which was a suspended sentence. In this case, the suspension will be canceled.

The other court, after examining the other charge of the accused, finds out with certainty that the convict has already committed one of the crimes subject to hadd, qisas, ta'zir up to the seventh degree.

Here, the legislator, contrary to the previous law, has considered a new situation. Thus, this court, which was not the issuer of the suspension order in principle, revoked the suspension order and issued an order to execute the suspended sentence and announced the matter to the court issuing the suspension order. In fact, the court that did not issue the suspension revokes it and even orders the execution of the previous sentence. The creation of additional jurisdiction for a court that was not originally in the process of suspension can be criticized, because in principle it would have been better for the court issuing the suspension to lift the sentence in all circumstances, rather than the court that ruled in another case.

Therefore, when a suspension decision is issued in one branch and then the case is heard in another court, in this case, too, the court, regardless of its inherent jurisdiction, is allowed to cancel the suspension and execute the sentence issued by the said branch and comment. It is about that that one of the exceptions is deviation from inherent jurisdiction.

2.2. Examples of deviation from intrinsic jurisdiction in French criminal procedure

In French criminal procedure, in criminal, misdemeanor or misdemeanor cases, the criminal branch of the Supreme Court can disqualify any investigative or judicial authority and send the case to another authority due to a legitimate suspicion. The request for referral can be submitted by the Attorney General of the Supreme Court or the court located in the requested authority or by the litigants. This request must be communicated to all litigants who have a ten-day deadline to submit the bill to the Office of the Supreme Court. The submission of a request has no suspensive effect unless the Supreme Court issues another order in this regard (Article 662 of the French Code of Criminal Procedure, paragraphs 2-3).

Similar cases are not mentioned in the Iranian Code of Criminal Procedure, and they can hardly be classified under such headings as maintaining public order. There seems to be a gap in accepting the referral of a case from one judicial authority to another. In general, it can be said that in the French Code of Criminal Procedure, the legislator has provided for the issue of violation of the rule of inherent jurisdiction in both the prosecutor's office and the court.

3. Examples of deviation from local jurisdiction in the criminal procedure of Iran and France

3.1. Examples of deviation from local jurisdiction to maintain public order and security

Violation of the rule of local jurisdiction on the basis of public order and security is one of the common cases in the two legal systems of Iran and France. According to Article 420 of criminal law:

In addition to the cases mentioned in the previous article, in order to maintain public order and security, on the proposal of the head of the judiciary with the Attorney General and the Supreme Court, the case will be transferred to another jurisdiction.

This legal article can be considered as one of the cases in which the security consequences with the effects of criminal proceedings on public interests are a criterion and justification for violating the rule of local jurisdiction. The text of the article does not explicitly mention a specific crime and the possibility of the mentioned expediency of maintaining public order and security in different situations is conceivable. Some have cited the maintenance of order in the city and the general public as examples of this title, such as that a criminal trial disrupts urban security (Goldoost Joybari, 2014).

Despite the benefits that can be imagined in this regard, and some of which will be mentioned later in French law, however, the existence of the phrase is general and vague, and in fact gives the relevant authority broad authority to violate the local jurisdiction rule. Seems. Perhaps this is why some have considered it outside the existing global framework and principles of human rights and in clear contradiction with Article 34 of the Constitution on the right of individuals to access a competent legal court (Akhoondi, 2009). Article 665 of the French Code of Criminal Procedure also provides:

The transfer of a case from one authority to another can be ordered by the criminal branch due to public security and only at the request of the Attorney General of the Supreme Court ...

It can be seen that the French legislature has a similar procedure in the discussion of public security and the only difference is in the jurisdiction of the applicant, who in Iran, along with the Attorney General, the head of the judiciary has the same authority, but in the French legal system This authority is limited to the Attorney General of the Supreme Court.

3.2. Deviation from local jurisdiction due to difficulty with the complexity of the case

The severity or complexity of the crime, especially in cases where there are a large number of plaintiffs or defendants and the crime rate is high in terms of geographical or social consequences, requires that, like simple cases with fewer problems, a single investigating judge Not addressed and more appropriate and factual mechanisms should be put in place for them. In fact, traditional methods of investigation today are not the answer to new crimes, which are sometimes committed in a gang and organized way or with modern and advanced tools.

Establishment of judicial cooperation commissions at the level of the prosecutor's office, which based on the severity and complexity of the crime committed and at the discretion of the president of the city court, can investigate the case of these investigative commissions, is one of the mechanisms envisaged by the French It is considered better and faster. In addition, in French law, contrary to the practice of the Iranian legislature, there is another type of violation of the rule of local jurisdiction, which is based solely on the type of crime committed and will be discussed later.

Regarding the complexity and complexity of the case, Article 1-52 of the French Code of Criminal Procedure provides:

In some city courts, investigating judges meet in an investigative panel. These judges in this investigative panel are only competent to conduct criminal investigations. These judges are also competent to deal with matters under Articles 1-13. And 2-83 of the French Code of Criminal Procedure require the need for judicial cooperation, have the authority...

This article of the law, which is included in the chapter on the investigating judge and its local jurisdiction, refers to the existence of an investigative body that, in the case of crimes and cases of complexity and complexity, has a different local jurisdiction than that provided for an individual investigating judge. Has been determined. The local jurisdiction of these research bodies and the geographical areas in the territory of each of them are determined according to a separate regulation.

Apart from the discussion of crimes mentioned in the article, which is within the jurisdiction of the panel, the complexity of the case is another criterion for disqualifying a competent local investigating judge by expanding his or her jurisdiction and referring the case to the investigating panel. According to Article 1-83 of the French Code of Criminal Procedure:

When the severity of the case justifies the matter, the investigation may be subject to judicial co-operation in accordance with the procedures provided for in this article ... Or, if there is an obstacle for his successor, as soon as the investigation begins directly or at the request of the city prosecutor in the initial application, he selects one or more press officers to join the investigator in charge of the investigation ... In cases where the investigation is ongoing in a reference where there is no investigative board, the president of the city court where the investigative board is located, after declaring the incompetence of the interrogator in favor of the board, the interrogator in charge of the investigation and one or more interrogators in Selects criminal matters. This declaration of incompetence will take effect from the date of appointment of the investigative board (Tadayon, 2015: 155).

The Iranian legislature in the Code of Criminal Procedure (similar to the Code of Criminal Procedure of 1378) does not provide a similar mechanism to facilitate and expedite the processing of cases that are particularly difficult and complex, and in all cases speak of an investigating judge or interrogator. It is responsible for conducting preliminary investigations into all crimes, regardless of their severity and complexity.

3.3. Deviation from local jurisdiction for the proper judicial review

In addition to the reasons for public safety in the French Code of Criminal Procedure, the proper handling of the case is one of the justifications that can be used to refer the case from a competent local judicial authority to another authority. This factor is stated in Article 665 of the French Code of Criminal Procedure.

The same factor in law Iran does not exist, and instead the Iranian legislature focuses on referrals to similar cases, such as the residence of the accused or more defendants in another court, or the proximity of another court to the crime scene so that another (incompetent local) court is easier. Has been able to address the issue (paragraphs a and b of Article 419 of the

Code of Criminal Procedure). However, the proper administration of the proceedings can be considered close in some respects to the two paragraphs mentioned above in Iranian law.

However, the French legislature has set more formalities and rules than in Iranian law for referrals in this case. Requesting the referral of a case on this basis, contrary to the case of maintaining public security (paragraph 1 of Article 665 of the French Code of Criminal Procedure), which is exclusive to the Attorney General of the Supreme Court, can also be referred by the parties and the Attorney General. The crime is within its local jurisdiction, too. Of course, in any case, the referral is with the criminal branch of the Supreme Court. In addition, the request based on this direction must be notified to the parties to the case and they have eight days to submit their defense bill to the office of the criminal branch. It would have been better for the Iranian legislator to refer the case based on paragraphs A and B of Article 419; It provided for such a right for the litigants to express their views in rejecting or approving the decision to remit the case. In any case, the criminal branch of the French Supreme Court must decide within eight days.

3.4. Deviation from local jurisdiction due to legitimate suspicion

Another case that according to law France can authorize the referral of a case from a local jurisdiction to another jurisdiction, provided there is a legitimate suspicion. The French legislature has not provided a definition of legitimate suspicion, but according to some judgments, a request for referral due to legitimate suspicion should target a judicial process, not a judge with a specific name and identity. In another case, legitimate claims against the gendarmerie and the judiciary were not admissible.

A request to transfer a case from a competent local branch to another branch can be made at the request of the Attorney General of the Supreme Court or the relevant geographical tribunal or the litigants.

The request has been notified to the parties and each party can submit its bill to the Office of the Criminal Branch of the Court within ten days (Article 662 of the French Criminal Procedure, paragraphs 2-3).

Asimilar case is not mentioned in the Iranian Code of Criminal Procedure, and it is difficult to place them under such headings as maintaining public order. There seems to be a gap in accepting the referral of a case from one judicial authority to another.

In general, as has been seen, in the Code of Criminal Procedure of France, Muqtada has provided for the issue of violation of the rule of local jurisdiction in both the prosecutor's office and the court together and in several cases.

3.5. Deviation from local jurisdiction according to the type of crime committed

As mentioned in the previous discussion, in addition to establishing investigative committees based on the severity and complexity of the crime committed, the French legislature has established, on a number of specific occasions, peer-reviewed competent courts under the general rule. The establishment of specialized tribunals for specific crimes began in 1975 and was intensified and regulated by Law 204-2004 of March 9, 2004.

Following the enactment of the Law of March 9, 2004 on the adaptation of the judiciary to criminal developments, violations of the rule of local jurisdiction have increased according to the type of crime and the number of these specialized authorities has increased. To better combat high-risk, organized and complex crimes, “committees” have been set up consisting of police investigation, prosecution, investigation and prosecution departments. In this case, the jurisdiction of a city court can be extended to the jurisdiction of one or more courts of appeal (Tadayon, 2015).

In fact, in specific offenses defined by law, the local jurisdiction of a county court and a criminal court extends to the jurisdiction of one or more appellate courts. In the geographical complex of France, eight major city courts have been established in the form of special interregional courts. These jurisdictions are in alphabetical order: Bordeaux, Fort de France, Lille, Lyon, Marseille, Nancy, Paris Verne. These courts have a similar and non-exclusive jurisdiction over the jurisdiction that prevails under the general rules of local jurisdiction. In addition, these courts have changed in some way through the specialization of appointed judges. These changes include a special section of the judiciary and designated structures of specialized investigation and prosecution to detect crimes (Dinarvand *et al.*, 2021).

In each city court, which is formed in the form of an inter-regional court, the provincial prosecutor and the head of the appellate court, after obtaining the opinion of the city prosecutor and the head of the city court, one or more judges, prosecutors and judges of the special investigation meeting, Determine prosecution. There is no longer any interference from the Supreme Council of Judicial Officers. These authorities have the following specialties:

Economic and financial crimes, crimes related to health, terrorism, drug trafficking, organized crime, water pollution by ship effluents.

With the exception of two special tribunals for terrorist offenses and drug trafficking, which were adopted on December 16, 1992, most of the tribunals were established by the March 9, 2004 law and followed the model of the tribunals for terrorism and narcotics.

In one belief, the Special Criminal Courts in the field of terrorism are in fact extraordinary courts created in the wake of the exceptional terrorist incidents of 1986 in France and then transformed into permanent special courts and special courts in the field of economic crimes and Finance, drug trafficking, etc. have been created by following the example of special criminal courts in the field of terrorism (Gozzi, 2003).

4. Examples of deviation from personal jurisdiction in the criminal procedure of Iran and France

4.1. Examples of deviation from personal jurisdiction in Iranian criminal procedure

Violation of the rule of local jurisdiction by the perpetrator is one of the cases that have been considered in the Iranian criminal justice system. In criminal procedure code Adopted in 2013, except for the repetition of the cases of the previous law, with some amendments, the cases of violation of the local jurisdiction rule have been added to the credibility of the perpetrator. In this regard, Article 307 of the Criminal Procedure Code, in determining the jurisdiction of the capital's criminal courts, provides:

Investigating the allegations of the heads of the three forces and their deputies and advisers, the chairman and members of the Expediency Council, members of the Guardian Council, members of the Islamic Consultative Assembly and leadership experts, ministers and deputy ministers, judicial holders, chairman and prosecutor of the Court of Audit, ambassadors , Governors, governors of provincial centers and general crimes of military and law enforcement officers of the rank of brigadier general or higher or with the rank of second brigadier general working in the ranks of the general brigade or the command of the independent brigade and general managers of provincial intelligence, as the case may be in Tehran criminal courts. "Unless other authorities have jurisdiction over these crimes under special laws."

In the case of crimes committed by military personnel with the rank of brigadier general or higher, all their crimes, whether military or general, are tried in the military or civilian courts of the capital, as the case may be. In this regard, Article 3 of the Law on Determining the Jurisdiction of Military Courts and Courts of the Country, approved by the Expediency Council in 1994, stipulates: "All military crimes with the rank of brigadier general and higher are prosecuted in the relevant judicial authorities in Tehran" (Khanali Pourvajargah, 2017: 14).

In addition, Article 308 of the Code of Criminal Procedure stipulates:

Investigating the allegations of advisers to ministers, the highest officials of governmental organizations, companies and institutions, and public non-governmental organizations and institutions, general managers, governors, managers of institutions, organizations, government departments, and public non-governmental organizations and provinces." "Cities, heads of universities and higher education institutions, mayors of city centers and district governors, as the case may be, have jurisdiction over the criminal courts of the provincial capital, unless these charges are dealt with by other authorities under special laws.

In this regard, as is clear from the text of the article, the scope and scope of the persons whose jurisdiction to investigate the charges is contrary to the jurisdiction of the crime scene is within the jurisdiction of the provincial criminal court. For example, from all judicial base holders to all governors and governors and even advisers to the three branches. An overview of the list of persons mentioned confirms that there is no clear and acceptable justification for justifying the jurisdiction of many persons on this list to the Tehran Criminal Court, contrary to the usual rule; In particular, this article covers all charges without distinction. In addition, there has been a deviation from jurisdiction in this case, regardless of whether the crime was committed due to a government job or not, and in this case it has deviated from the principles related to jurisdiction to a large extent (Rahmadl, 2018).

The development of violations of local jurisdiction and the abundant allocation of this rule makes the main rule, including the jurisdiction of the crime scene and strong justifications beyond it, ease of gathering evidence and preserving the effects of the crime, ease of prosecuting the accused and partners and deputies, ease of witnesses and Informed, etc.) to be set aside.

4.2. Examples of deviation from personal jurisdiction in the French criminal procedure

Violations of local jurisdiction by the perpetrator's validity are not as widely used in the Iranian Code of Criminal Procedure as in the French Code of Criminal Procedure. Conversely, the French legislature focuses on the type and severity of the local jurisdiction rule rather than the type, severity and emphasizes the complexity of the crime committed. However, there are exceptions and limitations; For example, in the Code of Judicial Procedure of the French Armed Forces, there are cases of deviation from local jurisdiction as a perpetrator. In this regard, Article 3-112 of this law provides:

"To deal with the crimes of cavalry (marshal) and admiral officers, generals or their ranks and members of the Army Command and Control Center, a High Court of the Armed Forces shall be established in time of war, the seat of which shall be determined by regulations. "This court can be formed in all parts of the territory of the French Republic. In exceptional circumstances, the seat of this court can be determined in another place according to the regulations of the Council of Ministers" (Tadayon, 2015: 155).

5. Examples of deviation from relative jurisdiction in the criminal procedure of Iran and France

5.1. Examples of deviation from relative jurisdiction in Iranian criminal procedure: Jurisdiction of the criminal court one

The criminal court has two general powers to deal with all crimes, unless the law on the investigation of a crime places the jurisdiction of another authority (Article 301 of the Code of Criminal Procedure). The court is composed of one judge in the jurisdiction of the city. (Article 290 of the Code of Criminal Procedure) In places that have not yet become a city due to small population and are considered “districts” in terms of national divisions, if necessary at the discretion of the head of the judiciary, the district general court is formed and handles domestic crimes within the jurisdiction of the Second Criminal Court. (Article 299 of the Code of Criminal Procedure)

Article 302 of the Code of Criminal Procedure adopted in 2013, while the jurisdiction of the first criminal court has declared the investigation of 4th degree and higher criminal offenses, the main third degree crimes include offenses that in many cases for a single criminal act in addition to imprisonment, other punishments such as Fines and other penalties are also provided.

Regarding the jurisdiction of the first criminal court, it is necessary to pay attention to two other points. First, if a crime under Article 302 of the Code of Criminal Procedure is brought before the first criminal court and the court, after sufficient investigation and conclusion of the trial, determines that the act has another criminal title that is within the jurisdiction of the court. There are two criminal cases, the first criminal court will investigate this crime and issue an appropriate sentence (Note 2 of Article 316 of the Code of Criminal Procedure). In this case, the reason for the permission of the first criminal court to try a crime under the jurisdiction of the second criminal court is the existence of a single inherent jurisdiction between them, but the opposite is not true. That is, if the case was initially sent to this court on the basis of the general jurisdiction of the criminal court, but the court finds out after the trial that the crime falls within the jurisdiction of the first criminal court, because the crimes within the first jurisdiction of the criminal court must Judges will be tried, the criminal court will not be allowed to continue the trial and issue a verdict.

Second, if a person accused of committing two crimes, one under the jurisdiction of one criminal court and the other under the jurisdiction of the second criminal court or juveniles, all his charges will be tried in the first criminal court (Note 1 of Article 316 of the Code of Criminal Procedure). Criminal proceedings.

5.1.2. Exclusive jurisdiction of the courts of the center of the province or the capital

In some cases, either because of the importance of the crime and the need for more careful trial in the central courts, or because of the official position of the perpetrator, who usually serves in the provincial or capital center, the legislature deviates from the general principle of jurisdiction. And has dealt with it exclusively within the jurisdiction of the provincial capital courts or the courts of Tehran. In these cases, the competent court to conduct investigations, as the case may be, is the city court of the capital of the province or the capital court, because according to Article 29 of the Code of Criminal Procedure: "It is the place where the crime took place, it is the responsibility of the prosecutor's office, which acts in the presence of a competent court, unless otherwise provided by law."

Another case of jurisdiction of the provincial central courts, which of course this time is accompanied by the determination of the inherent jurisdiction of this court, is political and press crimes, which are tried not in the court where the crime was committed, but in the criminal court of a provincial center. Regarding press crimes, the note of Article 36 of the Amended Press Law of 1998 states: "Press crimes will be tried in the competent courts of the provincial capitals." But criminal procedure code, After the above article, it has been approved and in addition to determining the local jurisdiction (center of the province), it has also determined the inherent jurisdiction of the court dealing with these crimes and political crimes (criminal one). Article 305 Code of Criminal Procedure "Political and press crimes are prosecuted publicly in the criminal court of a provincial center where the crime took place in the presence of a jury, in accordance with Article 352 of this law,"

It is necessary to pay attention to this point that the above article refers to "criminal courts" and to see the types of criminal courts, one should pay attention to Article 206 of the Code of Criminal Procedure. Therefore, the crimes of the mentioned persons, as the case may be, are tried in one or two criminal courts, one or two military courts, or the Tehran Revolution, and not necessarily in one criminal court. Also, the exception to the last part of the article is provided by the legislator for special cases, such as the jurisdiction of special clerical courts, which are in principle outside the criminal courts enumerated in Article 296 and are subject to special regulations.

Regarding the time of holding the above positions, Article 309 adds: Have been criminalized. Therefore, for the exceptional jurisdiction provided in Articles 307 and 308, the perpetrator must hold either of the above positions at the time of the commission of the crime or at the time of the investigation of the crime. Sufficiency of committing a crime before holding

these positions to qualify for a court in Tehran or the provincial capital, clearly shows that the crime does not have to be related to the performance of duties.

Finally, according to Article 59 of the Law on Patents, Industrial Designs and with the approval of the Judicial and Legal Commission of the Trademark Parliament, which was reached on 2010-10-29 and must be implemented on a trial basis for a period of five years: This law and its executive regulations are under the jurisdiction of a special branch or branches of Tehran's public courts ...) However, according to the word "disputes", which in our legal language appears in legal issues and lawsuits, it is difficult to The citation of this article considered the investigation of the crimes contained in this law in the exclusive jurisdiction of the judicial authorities of Tehran, but Article 179 of the executive regulations of this law, approved on 2008-3-30, explicitly provides that:

According to Article 59 of the law, legal and criminal lawsuits related to the law and this regulation are within the jurisdiction of a special branch or branches of the Tehran General Court, which is appointed by the head of the judiciary and, if possible, is located in the General Directorate of Industrial Property. To be. In the case of criminal cases, if the crime took place outside of Tehran or was discovered or the accused was arrested outside of Tehran, then a preliminary investigation was carried out at the scene of the crime or the discovery or arrest of the accused and the case was referred to the above courts?

In this regard, other examples can be mentioned, including: Note 2 of Article 46 of the Law on Combating Commodity and Currency Smuggling, approved on 2013-12-24, regarding the investigation of all the accusations of the heads and members of the branches of the Government Punishment Organization They are involved in cases of smuggling of goods and currency, in the central courts and tribunals (Khaleqi, 2015).

5.1.3. Jurisdiction of the Revolutionary Court in dealing with drug crimes

Pursuant to paragraph c of Article 303 of the Code of Criminal Procedure adopted in 2013, the Revolutionary Court is a special court to deal with all crimes related to drugs, psychedelics and their precursors and the smuggling of weapons, ammunition and items and controlled substances. In fact, the principle is (under Article 301) that the criminal court has two powers to deal with all crimes, except in cases where the law has explicitly conferred jurisdiction on the court subject to Article 294 in a particular case.

After adding Articles 301 and 303 of the new Code of Criminal Procedure, we come to the conclusion that the jurisdiction of the Revolutionary Court is exceptional; That is, the principle is based on its incompetence in criminal matters; Unless permitted by the legislature. Also, Article 1 of the Law Amending the Anti-Narcotics Law adopted in 1997 in 9 paragraphs

refers to the actions that should be in principle under the jurisdiction of the Revolutionary Court;

Such as poppy cultivation (absolutely), cannabis cultivation (for drug production); Importing, sending, exporting, producing and manufacturing all kinds of drugs; Storage, transportation, purchase, distribution, concealment, transit, supply and sale of drugs; Establish or manage a place for drug use; Drug use in any form and by any means except legal cases; Production, manufacture, purchase, sale and maintenance of tools and equipment and tools related to the manufacture and use of drugs; Escaping or sheltering drug suspects or convicts arrested or arrested; Includes the elimination or concealment of evidence of drug offenders, and the placement of drugs or tools and equipment in a place intended to accuse another.

However, one of the issues raised here is the crime of practical and verbal defamation, which is mentioned in Articles 26 and 27 of the Anti-Narcotics Law, respectively. The question is whether the crime of verbal and practical defamation, due to their nature, should be under the jurisdiction of the Revolutionary Court or not?

Practical defamation refers to a case in which a person places drugs or psychotropic substances in order to accuse another. But verbal defamation is just an accusation that is made in order to prosecute a person in the competent authorities. With regard to jurisdiction over practical defamation, there seems to be no doubt that it falls within the jurisdiction of the Revolutionary Court; Because the perpetrator is to be sentenced to the maximum punishment for the same crime. But regarding Article 27, which deals only with defamation and slander, is the investigation of this crime also under the jurisdiction of the Revolutionary Court?

According to the various opinions issued by the Legal Department of the Judiciary in this regard, it seems that defamation has nothing to do with drugs, and in cases of doubt, we should refer to the principle; That is, Article 301 of the new Code of Criminal Procedure, which is based on the jurisdiction of the Second Criminal Court. In this regard, the argument is that the nature of the crime is merely defamation and slander, which has been criminalized by the legislator of the Islamic Penal Code, although the subject of slander or defamation is related to drugs.

On the other hand, another argument can be made that although it is a public offense, but since its proof requires proof of the “falsity of the claim”, although this proof is achieved simply by not providing evidence by the mufti, it is possible. Defendant to provide evidence to substantiate his claim. Accordingly, verbal defamation is under the jurisdiction of the Revolutionary Court.

5.2. Examples of deviation from relative jurisdiction in French criminal procedure

Pursuant to Article 76-706 of the Code of Criminal Procedure of France, the city prosecutor, the investigating judge and the criminal courts established in accordance with Articles 70-75 have the same jurisdiction as the courts and tribunals which, according to the general laws of local jurisdiction are recognized as competent. In addition, terrorist acts with criminal descriptions are tried by a special criminal court without a jury. The tribunal consists of a president and six advisers to professional judges. Under normal circumstances, however, the criminal court is composed of three specialized judges (one president and two advisers) and one member of the jury (Reza Vanaki *et al.*, 2021).

There has been criticism of them since the establishment of the Special Terrorist Courts. In fact, the formation of these courts is based on the fact that the nature of the terrorist crime and the pressures from which it can be directed at the jury, justifying the need for a special trial with professional judges (Rezvani and Daryanvard, 2012).

On the other hand, some people are against considering these courts as exceptional, and in fact, they have not considered the philosophy of their status as contrary to the general rules, and in this regard, Exceptions have given a negative answer (Gozzi, 2003). It has been argued that Muqtada did not intend to establish an exceptional judicial system in the law of September 9, 1986 (Sepehri, 2006). Accordingly, it is more appropriate to consider a criminal court without the presence of a jury as a special character by nature.

In this sense, the legislature did not intend to re-establish exceptional courts, such as the National Security Court, by creating these courts with the same jurisdiction as the general courts, and in fact these courts have a relative jurisdiction over criminal offenses of a criminal nature. That is what happens in peacetime. From this perspective, does the existence of these special courts contradict the principle of equality of persons before the law in Article 7 of the 1789 Declaration of Human Rights or not? The Constitutional Council has considered the existence of these courts to be compatible with criminal courts and to help ensure a fair trial.

Conclusion

The Code of Criminal Procedure, as an extract of the ideal of justice, legalism and order in societies, guarantees individual rights and freedoms and provides social security in various fields. One of the key issues in the Code of Criminal Procedure is determining the jurisdiction of judicial authorities

In fact, after committing a crime, it must be determined from all criminal courts which one has the jurisdiction to judge the behavior of the perpetrator. Depending on the type of crime, the importance of the crime committed, the place of the crime, the occupational and social status of the offender, and also taking into account the age and military rank (in the case of military personnel), the powers of judicial authorities Relatively divided.

The principle of jurisdiction of judicial authorities derives from the principle of legality of the court and is part of the jurisprudential rules in criminal proceedings, so that the litigants can not agree in any way contrary to what the law determines the jurisdiction of a court. However, in the criminal procedure and in special circumstances, exceptions have been provided for deviation from the mentioned jurisdictions, and the present study has compared these cases in the Iranian and French criminal procedure.

Regarding intrinsic jurisdiction, the research findings indicate that in both Iranian and French criminal proceedings, the most important basis in distinguishing and recognizing the inherent jurisdiction of the court is the type of crime committed and the amount of punishment. According to the commonalities of the Iranian and French criminal procedure, intrinsic jurisdiction is tied to public order and its rules are among the rules of jurisprudence and are unchangeable in implementation, and violation of its rules causes the absolute invalidity of any decision made from it. However, in the Iranian criminal procedure, deviation from inherent jurisdiction is permitted in cases such as issuing a collective verdict and observing the rules of multiple offenses.

The result is that because the degree of punishment determines the jurisdiction of the courts and the punishments are divided into eight degrees based on weakness and severity in Article 19 of the Islamic Penal Code, and in case of multiple punishments, imprisonment is considered the most severe punishment, so in case of multiple punishments, imprisonment should be punished. In addition, when a suspension judgment is issued in a branch and then the case is heard in another court, the court, regardless of its inherent jurisdiction, is allowed to overturn the suspension and enforce the sentence. From the mentioned branch and comment on it.

In fact, the court that did not issue the suspension revokes it and even orders the execution of the previous sentence. Deviation from inherent jurisdiction can be criticized for a court that was not originally suspended. Because, in principle, it would have been better for the issuing court to suspend the sentence in all circumstances, rather than for the court that issued the final verdict in another case. In French criminal procedure, deviation from inherent jurisdiction is possible in limited cases and only within the framework of a referral.

On the other hand, the findings indicate that in the Iranian criminal procedure, deviation from personal jurisdiction within the position and position of the perpetrator is provided. Also, contrary to the Iranian criminal procedure, in the French criminal procedure, deviation from personal jurisdiction in cases where the crime committed by French nationals outside the territory of France is not a crime or misdemeanor and also when the crime is a misdemeanor in the country of occurrence. It is not considered a crime or punishable. In addition, French criminal procedure provides for the waiver of personal jurisdiction in cases such as the plaintiff not filing a complaint and the lack of discretion of the prosecutor to make the prosecution appropriate.

Also, based on the findings in both Iranian and French criminal proceedings, relative jurisdiction is determined based on the merits of each of the criminal authorities that have inherent and local jurisdiction, based on the importance of the crime and the extent of their punishment. However, deviation from the jurisdiction of the relative court in the Iranian criminal procedure is envisaged within the jurisdiction of the first criminal court, the provincial or capital courts and the revolution regarding crimes such as diyat, drug trafficking and the prosecution of official crimes. On the other hand, in the French criminal procedure, unlike in Iran, deviation from relative jurisdiction in cases such as position, general circumstances and type of crime is provided within the jurisdiction of the juvenile court, juvenile police and the local police court.

In addition, the results of the study show that in the case of the rule of deviation from local jurisdiction, the fact that, without any exception, the said rule can not lead to a favorable judicial review of criminal cases, is common to both criminal proceedings. In fact, the need to provide for exceptions and violations of this rule to increase the efficiency of the judiciary is inevitable. However, it should be noted that the determination and emphasis on the rules of jurisdiction as mandatory rules in the criminal proceedings, including the rule of local jurisdiction for the purpose of establishing judicial order and especially the protection of the rights of the accused, is a matter of course and accepted.

In addition, a look at the violations of the rule of local jurisdiction in the two legal systems of Iran and France confirms that despite the French legislature, which has undergone extensive changes in this regard in recent years, the Iranian legislature, especially in the Code of Criminal Procedure adopted in 2013. Its cases are also limited and it can be considered as the source of change. On the other hand, the findings of the study indicate that the Iranian Muqtana, as observed in the classification of cases of violation of local jurisdiction, except in cases of violation of the rule on the authority of the perpetrator, in other cases are satisfied with general conditions such as maintaining public order and security.

In contrast, there are several violations of the rule depending on the type of crime committed in the French system. In addition, the findings of the study show that in both Iranian and French criminal procedure, the basis for determining personal jurisdiction is the perpetrator, so that the criminal procedure has placed the investigation of the charges of certain individuals in the jurisdiction of a specific authority. This jurisdiction is only effective in changing the local jurisdiction.

Given these results, it is suggested that the Iranian legislature, like the French legislature, provide for the right to notify judicial decisions in order to refer the case to the litigants and to present a defense bill. Pay special attention to the developments of delinquency in recent years, especially the quantitative and qualitative development of gang and organized crimes and terrorist crimes, and adapt the traditional solutions for dealing with all types of crimes with today's delinquent developments.

On the other hand, what can substantiate the violation of the local jurisdiction rule is better handling of the case and increasing the efficiency of the judiciary, and what better guarantees this increase is the anticipation of specialized courts and tribunals. Are competent under the general rule of local jurisdiction.

In fact, what we have seen in the French legal system includes commissions of inquiry with specialized judicial institutions, provided that they do not become specialized courts contrary to the rule of inherent jurisdiction and less legal than what is provided in the general judicial system for litigants, especially defendants. Can not be determined, can increase the efficiency of the judiciary and fight more effectively and better, especially with new forms of crime.

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