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ТЕОРІЯ ДЕРЖАВИ І ПРАВА

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LAW ANTAGONALITY AS A FEATURE OF CIVILIZED SOCIETY

The issue of the law as a factor that influences the formation of civilized society in Ukraine is considered. The positive and negative aspects of such kind of influence are studied. The antagonistic, but not antagonal character of the process is underlined.

Key words: society development, law antagonality, law antagonism, civilized society.

Problem statement. The difficulties in the Ukrainian state's formation for the last two ten years have been connected first of all with uncertainty of a development civilization vector. Acceptance of a diversity of new laws as a rule was dictated by need of response to concrete changes in social and economic, political and information society spheres.

The choice of the new development civilization vector is connected in many aspects with expansion of circle changes which need certain people's classification that affected on persons outlooks which don't want to remain further some «parameter that is operated by the state».

The kind stagnation's condition in which our country has been stayed during the Soviet period, has been continuing its existence with finding of independence by it, and anyway it was undoubtedly shown and in law, but exactly the law is the relations' regulator in society.

Today, more than ever earlier, it is needed the new, deeper understanding of law based new paradigm of modern science, which considerably broadens the substantial-intrinsic vision of law sphere, without being limited by the sphere of an individual's legal consciousness at various levels of his existence — ordinary, theoretical.

Analysis of recent researches and publications. There is a lot of scientific works dedicated to the mentioned issues as far as these issues were always crucial for society development. But talking about the recent studies we may emphasize the works of Ershova-Babenko Y., Shevchenko M.,

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Berher P., Lukman T., Bihun V., Busova N., Tykhomyrov Y., Kampo V., Pryhozhyn Y.

Paper purpose is to discover the main nowadays tendencies of society development analyzing the process in the context of law determination that has its positive and negative aspects.

Paper main body. For the first time we come up against a situation when it seemed that objective tendencies of development of legal relations happen against absolutely other picture of world and society.

There is a situation when environment's function, function of its formation passes from nature to person, and it is necessary to notice that environment becomes more and more aggressive.

The research of environment aggressive factors revealed that «the changing mechanism of internal (intramental, intrapersonal) world and person's behavior (self-appraisal with a certain acts adequacy level in relation to itself) is under the influence of its own states. It also develops on the level of external behavior which can be as negative, deviant (offense), so positive (creativity)» [1, p. 6].

Antagonistic relations, aggressive behavior not at all promote development of internally thinking which essence is in aspiration to finding of coordination various forms of joint efforts against such relations, and at the same time understanding of these processes doesn't mean that the way to their neutralization has been found yet.

The main aspects of this problem in the field of the theory and legal philosophy are needed to be considered both in concrete and substantial plan, and in wider theoretical and methodological context.

Our legal experience within the independent state is too small to draw any conclusions, however one conclusion nevertheless can be drawn — we belonged and in some extent belong to development of legal thought as to a highly specialized, legal problem, but events in Ukraine of 2013 and 2014 years convincingly showed that this problem is all-social, all-humanitarian and common cultural.

If we force out law from habitat of real people which have absolutely different focus of interest, different world outlook installations, different personal legal experience, it is quite natural the emergence of situation at which any, even most «correct law» won't work.

It isn't also necessary to forget that fact that all our history is a fight for creation of a state or fight of the state against those who created it, the most contemporary history isn't an exception in this plan.

After disintegration of the Soviet Union, one of the main tasks for Ukraine, other former republics of the USSR, there was a creation of civil society for which the corresponding social base — middle class is certainly necessary. And before speaking about the antagonistic character of law and order, it was necessary to liquidate contradictions between the state and the personality as with development of civil society personal interests act in a contradiction with public, and civil society gradually turns into society of mass, in which communications between individuals are formal.

The latest events[1] showed that there was a threat from the state to civil society. Therefore its structures actively joined in development of new measures which would prevent anti-lawful actions, didn't break harmony between persons and the state [2, p. 282].

From the beginning of military operations in the East of Ukraine we constantly heard appeals about the need of compromise adoption solutions, and question even not in weather we want or don't, and in that is whether we are able to make it, without breaking the basic principles of the constitutional state, in which individual is not object, but the subject of the state and any other relations. He has full authority to demand from the government certain guarantees of the activity.

For many decades the principle of confrontation was a basis of our ideology which reflected the revolutionary type of thinking peculiar to K. Marx, F. Engels, V. I. Lenin which meant that «one party surely has to be destroyed, the victory of another was transition to a higher step» [3, p. 26].

The Maidan of 2004 year gave hope for emergence of essentially new legal policy, however not all legal ideas which sounded on it were heard by authorities in power.

In this regard axiological value of legal compliance requirement to the law increases, and as we steadily connect the law with justice steadily, in fact, we are talking about the main and supreme social value — about freedom and general forms and norms of its realization, and the pledge of it is existence in society of antagonistic balance between own and another's freedoms and rights.

Today's realities are such that law leaves on background and even care of self-preservation doesn't refrain growth of hostility, frank aggression based on discrepancy of interests as between separate individuals, social groups, as between them and state.

In an incestuous congestion of people — A. Ferguson wrote, — «we turn away from those who doesn't occupy us, and we settle in that community which most corresponds to our mood ... we become in opposition and we take part in skirmish on behalf of fraction or party, without having any material subject of dispute ... Isolation and alienation, as well as opposition, increase that abyss which emergence wasn't connected with any offense» [4, p. 58].

The history of our country developed in such a way that throughout centuries one or other part of society felt offended and if the people allocated with the power could explain the readiness for the conflict with national interests at the level of ordinary consciousness, people have not always found an explanation for the acts.

Strengthening of globalization processes also significantly influenced on attitude changes towards law, and first of all it was expressed in determination attempt of its dependence from a person «the person in the consciousness doesn't display the world, and design it ... and it is caused by subject's belonging to a certain type of culture, social, valuable contextual type of space» [5, p. 42].

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[1] And not only in Ukraine, a comment of the author.

Stages of civilization process (and in ideal the creation of humanistic, liberal and democratic civilization) are stages of expansion of freedom degree of the individual, and here there are naturally two questions: a) whether we accept civilization characteristics, or it is about a new civilization; b) what is degree freedom in civilization society.

If we aspire to a certain level of the western civilization, it is necessary to notice that social and economic, religious crises happening before our eyes, anyway lead the West to a presentiment of that the civilization created by them doesn't bear in itself rescue from possible critical destructions.

Freedom degree considered as the special reaction to life and understanding of life on the one hand, on another — surely assumes a legal side of a personal freedom within the reasonable structure of social society.

«The right and the person are the interconnected phenomena, but in «fight for the right» people can show not the best qualities. From here is the law task — to be stabilizer, to promote a resolution of conflicts that stimulates manifestation in the best human qualities. The law development by people's improvement» [6, p. 26].

An internally character of law and order is possible where «the unification of a many is possible, consent of a discorded and relative uniformity of a various. He assumes such relations between social unity and its parts when the parties remaining contrasts nevertheless come to the relations of contractual balance of interests, duties and rights ... The person who is in this system feels rather comfortably to use the rights which are available to his order and freedoms for self-realization» [7, p. 75–76].

At the same time, it is hardly possible to speak about any comfort if there is no confidence in existence of legal guarantees providing certain contracts.

One of the most difficult questions for modern jurists is a question of how predictable our law is.

The existence of civil society in our realities assumes that any citizen «with a fine precision is able expect in what cases can be coercion is applied ... the legal system has to be independent of other sources of a standard order — religions, morals, and at the same time to be the power protected from any actions which is guided by reasons of momentary political expediency» [8, p. 31].

In civilization society where there are customs along with the law, traditions, religions which throughout centuries are valuable reference points for various social groups and which don't correspond to a new legal reality, need of tolerance as an internally principle of social interaction is particular important.

Sociological law and legal philosophy give the chance to look at this problem under another point of view.

«Alive law» (and this term is quite often used in legal literature today), is understood as changing of conduct rules which are created by people every minute in the course of their daily communication and which according to the contents aren't regulated by rules of law, and after all it is one of the main reasons for emergence of social and legal contradictions.

Sociological approach to consideration of these or those legal phenomena, allows establishing interrelation of the law with other public phenomena, to cause their causal relationship with social, political, culturological, psychological, economic, and other aspects of public life.

Without such detailed sociological approach it is very difficult to understand that qualitative distinctions between the parties aren't the basis for mutual hostility that under any circumstances it is possible and it is necessary to speak and agree, — and after all the agreement as one of emergence and implementation forms of law represents «a compromise of carriers interests of equal force ... at which the truth is a definition of freedom measures and interests differentiation» [9, p. 422].

Coincidence of personality interests, civil society and state even if it is about the constitutional social state (in this context the social state is understood as its narrower aspect — existence of the certain benefits provided to the person, systems of social services, etc.) is rather difficult task.

Readiness for a compromise assumes a certain psychological spirit as individual and society in general.

As A. Ferguson fairly notices, «it was vain to hope that we will be able to bring in people in mass feeling of unification, without having confirmed hostility to opponents» [4, p. 62]. And at what level it wouldn't be shown — at the level of the state, party, fraction, an individual — anyway the rights of other people which at this concrete moment appeared in opposition are quite consciously violated.

An internally character of the constitutional state is an ideal to which most would arrange to balanced condition in essence (intermediate between antagonism and full harmony).

The understanding of internally thinking essence depends on level of legal culture when the legal culture is understood as this or that measure of development and using of legal values, its communication with a certain level of development of legal consciousness and behavior.

In scientific literature the attention more often is paying to the fact that for the Ukrainian society this subject has the special importance today. The legal culture «as expression of achievements of the Ukrainian civilization in the legal sphere is characterized by a certain dualism… it develops into two traditions: European and Eurasian… the European assumes an active role of citizens and liability for violation of their rights, — Eurasian proceeds from a primacy of the state, and actually the official has to care of people, citizens, and other. And therefore citizens shouldn't take the responsibility for a state of affairs in state and society, and to carry out mainly advisory functions. Because the power goes from the state, and from the people — only trust to it» [10, p. 51].

These models are rather independent and in it there is no dominating one, and still in spite of the fact that Ukraine aspires to the European model, in real life prevails Eurasian one which is oriented on preservation of the existing public relations, and the situation at which to the forefront there are not antagonal, but antagonistic relations which according to the contents are unlawful.

For modern Ukraine for many years has been specific the situation when, adopting these or those laws the state seeks to order quite confused system of relationship between people who owing to a number of circumstances appeared on the different parties of barricades.

The world changes and changes promptly, today more and more obvious is an understanding of that the person needs to refuse the aggressive positions not only in relation to another, but also in relation to the inner world, many researchers state «deterioration of a mental condition of the population and, as a result, deterioration of a state of health. The European countries are seriously concerned by economic losses from the diseases caused by information and emotional overloads of mentality of the person» [7, p. 118].

Human life is always intelligent life and such categories as «sense», «values» are keys for specifics understanding of our life legal sphere, and in this plan a valuable and semantic understanding of antagonist nature of the law plays huge role.

For the XXI century an essential task is transition from aggression to a compromise, both at personal level, and at the level of the state.

The law sphere covers all spaces of people's civilization existence «represents one of concrete forms of need's expression of a civilization for self-preservation. The will of civilization community to protect against dangers of internal destruction with all definiteness is proved in the law» [7, p. 118].

Today with extraordinary speed new mechanisms of human communication and interaction appear, the interrelation and interdependence of the most different cultures and religions extends and amplifies, the processes of migration and emigration force to live togerther a number of people sometimes with opposite views of world around.

And as I. Prigozhin fairly noticed: «as the Universe evolves, circumstances create new laws» [11, p. 103].

The internal nature of the law gives the chance to understand that any law in the realization is modified by concrete historical circumstances, changes of the accompanying action of other laws, has borders of the action, but anyway, as Hegel noted «is narrow, incomplete, approximate», and, therefore, can be never adopted by all members of society.

Enduring a stage of gradual and very painful movement of various historical civilizations, it is impossible to allow the intercivilization conflict, but civilization out of person and without it doesn't exist, and each person has an interest, and in this regard the law, which nature is antagonistic, is urged to align the interests contradicting each other, calling for search of compromises, civilized forms of settling of the conflicts.

The history of law as however any another is based on judgment of times link — past, real and future.

The general vector of progress, in more considerable degree, than in the past, depends on will and intension of the people relying on historical experience.

Today it is already absolutely clear that the generalized logic of constitutional state's formation first of all becomes dismantle of the obsolete insti-

tutes of old legal system, the era providing a factor of antagonistic relations existence to the system assuming antagonal type of social legal relations.

For years of independence in Ukraine the new generation of people which, in fact, had to be deprived of this pervasive spirit of antagonism grew, but it isn't necessary to forget that in general, in our education, and in law, in particular, there was so-called «an intellectual provincialism» inherent in Soviet period and though in general, education gave the necessary level of knowledge, global vision, and forms of legal thinking were defined by interests or a class, or social groups, proceeded from features of ordinary consciousness, it is peculiar to this or that audience.

Defining a place of Ukraine in world civilization process, in our opinion, it is necessary to pay attention to that fact that at various stages various types of social and legal contradictions were inherent in it: a) antagonistic in which the aspiration of the parties prevailed to mutually denial; b) antagonal at which contrasts assume the equilibrium relations, various type of the arrangement, compromises; c) agonal, at which purpose of the parties — the mutual positive transformations conducting to unification of the parties.

The antagonism is immanent, inherent in the law as its formation and development is dialect of two of opposite bases — firmness and flexibility. Also without it development of the intrinsic nature of law would be impossible which is characterized by such categories as freedom, equality, justice, a formalization, optionality, security, normativity, etc. «The law always expresses will of the dominating people; the law expresses a measure of freedom of the individual, differentiates interests, orders public interests» [12, p. 65].

In the recent past in scientific literature the attention was repeatedly focused on the idea that new historical conditions idea of national states consigns to the past, giving way to a certain universal civilization. However the beginning of the XXI century, practically on all continents, for various reasons put in action a bit different mechanism which is possible to be expressed «national egoism».

Without simplifying a problem and without identifying a civilization with the state or the concrete people, it should be noted that real life introduced the amendments to sometimes not absolutely adequate relation to civilization measurement of the joint history.

V. A. Bachinin pays attention to that only «... mutual ethical insistence and mutual legal responsibility of the state, the personality and civil society report to social life extremely important quality called civilization» [7, p. 80].

The people who came to the Maidan in November, 2013 with the requirement of their basic rights and freedoms guarantee and wait today for establishment of legal equality for all citizens, irrespective of a property state, a religious and national identity and which is impossible in the conditions of negligence to the law, readiness to work according to the principle of «permissiveness», intolerance to another point of view which in any parameters didn't coincide with «the dominating during this period of time».

Conclusions. We already mentioned that the law is an all-humanitarian and common cultural problem, but not especially legal «... the law is that sociohis-

torical and fair measure of freedom and equality, caused by owing objective all-importance has to gain official and imperious recognition and validity. ... [T]herefore justice is actually fair because it is an abstraction of the law and expresses itself, represents the legal beginning — the principle of formal equality and people's freedom, as legal entities independent from each other and from legal form of communication» [13, p. 2].

But legal reality is of that kind that different antagonisms continue to deform moral and legal consciousness of people, for example, information war to which our country wasn't ready and which doesn't promote finding compromises, rejects any possibility of productive dialogues.

The psychoemotional condition of the most part of our society — the alarm, bitterness, and concern connected with destruction of spiritual and moral ideals, total absence of local and legal ban can lead to full degradation.

In a huge measure the ordering of internal life of the country is assigned to the law which expresses need of the civilization for self-preservation.

References

1. Ершова-Бабенко И. В. Психосинергетические стратегии человеческой деятельности (концептуальная модель) [Текст] : Монография / И. В. Ершова-Бабенко. — В. : NOVA KNYHA, 2005. — 360 с.
2. Шевченко М. Д. Курс лекций по философии и философии права [Текст] // М. Д. Шевченко. — М. : Изд-во «Щит-М», 2009. — 392 с.
3. Шинкарук В. І. Маркситсько-ленінська філософія у світлі «останніх рішень» [Текст] / В. І. Шинкарук. // Філософська і соціологічна думка. — 1995. — № 4. — С. 23–27.
4. Фергюсон А. Опыт истории гражданского общества [Текст] : перевод с англ. / Под ред. М. А. Абрамова / А. Фергюсон. — М. : РОССПЭН, 2000. — 392 с.
5. Бергер П., Лукман Т. Социальное конструирование реальности [Текст] : трактат по социологии знания / П. Бергер, Т. Лукман. — М. : Медиум, 1995. — 323 с.
6. Бігун В. С. Антропологія, аксіологія та соціологія права. До питання про праворозуміння [Текст] / В. С. Бігун // Часопис Київського університету права. — 2005. — № 4. — С. 26–28.
7. Бачишин В. А. Философия права и преступления [Текст] / В. А. Бачишин. — Харьков : «Фолио», 1999. — 607 с.
8. Бусова Н. А. Модернизация, рациональность и право [Текст] / Н. А. Бусова. — Харьков : «Прометей-Пресс», 2004. — 352 с.
9. Тихомиров Ю. В. Диалектическая философия [Текст] / Ю. В. Тихомиров. — Одесса : «Феникс», 2007. — 440 с.
10. Кампо В. М. Суспільство і право [Текст] : роздуми українського вченого-констуціоніста / за заг. ред. Є. В. Бурлая. — К. : Вид-во Акад. муніціпального управління. Тов-во конституційного права, 2007. — 74 с.
11. Пригожин И. Креативность в науках и гуманитарном знании: исследование отклонений между двумя культурами [Текст] : Синергетическая парадигма. Человек и общество в условиях нестабильности / И. Пригожин. — М. : Прогресс-Традиция, 2003. — С. 99–105.
12. Тихомиров Ю. В. Основы философии права [Текст] / Ю. В. Тихомиров. — М. : Вестник, 1997. — 603 с.
13. История права: Англия и Россия [Текст] : рук. авт. кол. В. С. Нерсесянц, У. Батлер. — М. : Прогресс, 1990. — 304 с.

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АНТАГОНАЛЬНІСТЬ ПРАВА ЯК ОЗНАКА ЦИВІЛІЗОВАНОГО СУСПІЛЬСТВА

Резюме
У статті розглядається проблема права як чинника, який впливає на формування цивілізованого суспільства в Україні. Вивчено позитивні та негативні аспекти такого роду впливу. Підкреслюється антагоністичний, а не антагональний характер процесу. Був зроблений висновок про те, що різного роду антагонізми в правовій реальності сучасного суспільства продовжують деформувати моральну і правову свідомість людей, одним із наслідків чого стала нинішня інформаційна війна.

Ключові слова: розвиток суспільства, антагональність права, антагонізм права, цивілізоване суспільство.

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АНТАГОНАЛЬНОСТЬ ПРАВА КАК ПРИЗНАК ЦИВИЛИЗОВАННОГО ОБЩЕСТВА

Резюме
В статье рассматривается проблема права как фактора, который влияет на формирование цивилизованного общества в Украине. Изучены положительные и отрицательные аспекты такого рода влияния. Подчеркивается антагонистический, а не антагональный характер процесса. Был сделан вывод о том, что различного рода антагонизмы в правовой реальности современного общества продолжают деформировать моральное и правовое сознание людей, одним из последствий чего стала нынешняя информационная война.

Ключевые слова: развитие общества, антагональность права, антагонизм права, цивилизованное общество.

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NOTION OF JUDICIAL PRACTICE

The issues of understanding of judicial practice are analyzed. Different approaches to the conception are considered. The members of judicial practice are distinguished and the nature of their relationship is established.

Key words: judicial practice, judicial activities, enforcement experience, legal provisions.

Problem statement. Judicial practice as one of the basic types of judicial practices embodies all the potential that is peculiar to its generic category, so the nature of judicial practice, in its place, the notion and role in judicial system are relevant both among scientist and among legal practitioners. There has been a shift to expand the interest of scientist to the issue of judicial practice in native legal science in the last decade. This category has begun to fix in the minds of legal practitioners as a source of law.

The judicial practice can be understood as the activity of courts with respect to the application of laws in the resolution of specific cases. Another comprehension could be as a tendency in court's resolution of certain categories of cases that takes into consideration the court decisions, primarily of the higher courts, that acquired the force of law. In several states judicial practice is regarded as a source of law and acts as the creator of new norms, for example, in the form of precedent.

However, a palette of diametrically opposed views on the essence and the essential components of judicial practice do not allow express it as a source of law.

Analysis of recent researches and publications. Today, the analysis of special researches of Ukrainian and Russian scientists suggests that, despite the criticism, the debate about the nature of judicial practice that still revolves around the perception of judicial practice as the unity of the court's operations and results of such activities, even if a certain part of the work and some of its results. Among them it is worth mentioning the studies of V. Y. Solovyov, D. Y. Khoroshkovskaya, V. A. Kryzhan, S. S. Zmiyvska.

So, V. Y. Solovyov considers jurisprudence as «the unity of the judiciary in the implementation of justice and the outcome (the experience) this activity, objectified in the form of court decisions that have come into force» [2, p. 8].

D. Y. Khoroshkovskaya considers judicial practice as mutual unity «activities of the courts and the results of this activity expressed in new legal pro-

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visions worked out by the judicial authorities and set out in decisions on specific cases and / or acts on the specific set of similar court cases» [3, p. 32].

V. A. Kryzhan in judicial practice combines both certain legal activities of all the judicial organs to implement the tasks entrusted to them, and all the results of this activity [4, p. 6].

S. S. Zmievskay suggests that the jurisprudence reflects the unity of the various activities of the courts and different results (experience) of this activity [5, p. 22].

From these points of view, it is clear that, despite their validity, the issue is of determining the scope of judicial activities and the results that assemble the essence of jurisprudence.

Paper purpose. The purpose of this article is to analyze the main points of view on the issue of understanding of judicial practice as a legal phenomenon, linking together lawmaking process and implementation of law.

In addition, the article includes an attempt to build a logical chain of the development of understanding of elements of the legal system of a state as social practice, practice of law and jurisprudence.

Also, the target direction of our study involves the analysis of main essential characteristics of judicial practice: judicial activities, experience in the application of law and result of judicial activity, which is transformed into a rule of legal provisions.

Paper main body. Currently, there are three basic approaches to the determination of essential elements of judicial practice.

The first of them is to ensure that the jurisprudence is seen in the «broad sense» and represent the judiciary to administer justice.

Criticizing such a statement, we note that understanding of judicial practice only as legal activity divorced from the realities of everyday life and professional legal capacity.

Appearing on the shelves of bookstores, in libraries, online collections of jurisprudence contain just the results of Court activity (enactment, decisions, sentences, etc.), which indicates the absence of one-sidedness and methodological validity of the conclusions.

In addition, understanding of judicial practice only as judicial activity violates the principle of similarity species concept with the generic concept, in which the essential components required to turn on formalized result.

The second of existing approaches is the judicial practice in the «narrow sense» as a fixed outcome of judicial activities.

In our view, the reduction of judicial practice as the concept of species, only to the results and the resume of the judiciary does not correspond to its generic concept — category of «legal practice», where one of the essential components is proceeding (activities). In addition, this understanding of judicial practice, as a philosophical category, can not be interpreted in a narrow, simplistic sense, no matter how convincing arguments to justify such a simplistic interpretation.

Thus, the third and essentially «complete» understanding of the judicial practice, as the unity of judicial work of justice administration and the spe-

cial result of this activity, perceived logical conclusion and methodologically verified.

It should be noted that the criticism of the statement was to ensure that «this understanding of judicial practice does not give a complete picture of the main objectives of courts and the basic principles of functioning of judicial activity, the influence of the subject and the means of such activities on its main results, i.e. does not bring to light specifics of judicial practice as a variety of legal and social practices [1, с.11].

In our opinion, the jurisprudence can be considered that part of the judiciary, which is associated with a specialization applied by the court of law to the circumstances of a particular case. On the other hand, judicial activity, characterized as judicial practice, takes place in the event when the court overcomes the absence of standards set by the state, which allows to resolve a particular dispute, i.e., in the case of overcoming the «gap of law».

By establishing such a framework of judicial activity, we can not help delve into the sphere of legal reality, which is characterized by a high degree of creativity and subjectivity.

For example, in the case of specificity of court's provisions of common legal standards (perhaps to a lesser extent), and in the case of overcoming the gap in law (probably more) there is such a legal action as court's discretion.

In general, the regulation of public relations (including the proceeding) can be carried out by strict regulation of behavior of agents and providing them with a certain freedom of choice. In modern conditions there is a trend towards greater flexibility in the use of methods of legal technique. In this context, the problem of discretion of the court is entering a qualitatively new level of understanding.

In this study, we consider the existence of court's discretion, as a confirmation that the work, which is one of the essential components of the judicial practice is not detached from reality and based on the experience of applying the rule of law, without which the implementation of court's options for legal solutions, is not possible in principle.

Thus, the dynamic development of public relations sometimes so overtakes the current legislation that sooner or later it ceases to meet the challenges of today. In turn, the court, considering specific cases, can not respond to such challenges, in connection with which the rule of law in its application can be specified either the norm should be formulated by the court within the meaning of rules, or on the basis of general legal principles, i.e. the court must bridge the gap in law.

There is no doubt that this situation can be corrected by the adoption of regulations (regulations for quick filling a gap in law, or of more detailed nature, if required by life), but that, logically, does not run out of specification requirements of established norms and probably it will not eliminate all gaps in legislation.

Therefore, the result of the judicial activity, which is characterized by us as jurisprudence, is of such a kind that the court is to develop specific rules

(regulations), specifying a legal provision and allowing to overcome a gap in law.

In the legal science such special rules are called legal provisions. They are necessary link, mediating the application of law in the case of dispute. Thus, there is a settlement under the law of a particular individualized relationship. Without the mediation of court enforcement activities in vast majority of cases, would have been impossible.

The problem of understanding of the category of «legal provisions» lies in the fact that the understanding of this category is far from uniform, and is reinforced by the problem of sometimes confusion of «legal provisions» in comparison with the legal rule, judicial precedent, or just as a source of interpretation of the law.

First we should explain that, with all the gravitas, this term is not a substitute for the rule of law and does not apply to lawmaking, and, in fact, is worked out in the course of enforcement of the rule.

Secondly, it's correct to compare the legal provisions with the judicial precedent only if we accept the latest official recognition of the sources of law in the domestic legal system. The mechanism of development of the classical judicial precedent is very specific [6, p. 181–250] having little in common with process of legal provision creating.

Thirdly, the issue of legal provision giving to it force and weight of law source of course lies in the relationship of both theoretical developments and practical implementation, but denies adjudication of similar cases and the final decision, even suspended sentence, but with the type, you can not.

Fourthly, the name of object is not decisive for its understanding. There is the main assessment of elements of essence and content of the object. So, the name of «legal provisions» does not carry the full meaning and can be transformed into the term «judicial custom», for example.

Fifth, we believe that there are no restrictions for parts of the judicial system, which could in its activity work out a particular legal provision.

Sixth, regarding the legal provisions as a result of a special judicial practice, giving it the features of novelty, positivity and progress of regulation of public relations, is not always the case for the creation of a legal rule. This position is shared by some modern scholars [6, p. 92].

Legal provisions, as a result of concentrated jurisprudence, are able to compensate for a natural lag of law on the dynamics of public relations, and can eliminate the contradictions between «conservative» law and variability of social life. Ultimately, the judicious use of legal provisions ensures the stability of law and order, strengthening the rule of law, gives stability to the state's policy.

Conclusions. Assessing the analysis of essential characteristics of the phenomenon under investigation, it can be concluded that the jurisprudence is based on the law enforcement of judicial experience, the result of which is the development of legal provisions.

This definition is consistent with a philosophical understanding of the category of practice, covering all the main components of the judicial practice

and the ability to serve as a research content, social purpose and functions of jurisprudence system ties in which it is located with other events of legal reality.

References

1. Безина А. К. Судебная практика в механизме правового регулирования трудовых отношений [Текст] / А. К. Безина — Казань : Изд-во Казанского ун-та, 1989. — 183 с.
2. Соловьев В. Ю. Судебная практика в российской правовой системе [Текст] : дис. … канд. юрид. наук : спец. 12.00.01 «Теория и история права и государства; история правовых учений» / В. Ю. Соловьев. — М. : РГБ, 2003. — 188 с.
3. Хорошковська Д. Ю. Роль судової практики в системі джерел права України: теоретико-правове дослідження [Текст] : дис. ... канд. юрид. наук : спец. 12.00.01 «Теорія та історія держави і права; історія політичних і правових учень» / Д. Ю. Хорошковська. — К. : ІДІП НАНУ, 2006. — 194 с.
4. Крыжан В. А. Правовой обычай и правовой прецедент как источники права [Текст] : автореф. дис. ... канд. юрид. наук : спец. 12.00.06 «Природоресурсное право; аграрное право; экологическое право» / В. А. Крыжан. — Пермь : Изд-во ПГУ, 2006. — 19 с.
5. Зміївська С. С. Судова практика як джерело формування та розвитку права (загальнотеоретичний аналіз) [Текст] : дис. ... канд. юрид. наук : спец. 12.00.01. «Теорія та історія держави і права; історія політичних і правових учень» / С. С. Зміївська. — Х. : НУ ЮАУ, 2012. — 208 с.
6. Малишев Б. В. Судовий прецедент у правовій системі Англії [Текст] / Б. В. Малишев. — К. : Праксіс, 2008. — 344 с.
7. Лічман Л. Г. Правоположення як форма судового тлумачення цивільно-правових норм [Текст] / Л. Г. Лічман // Науковий вісник Херсонського державного університету. — 2013. — Вип. 3. — Том 1. — С. 90–92.

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ПОНЯТТЯ СУДОВОЇ ПРАКТИКИ

Резюме

В юридичній науці немає єдиної точки зору щодо визначення поняття «судова практика», а також у визначенні її ролі, значення та місця в правовій системі України. Визначення судової практики як видового поняття не повинно суперечити своєму родовому та типовому поняттю — юридична і соціальна практика. Судова практика являє собою певну діяльність судових органів по напрацюванню і закріпленню в своїх рішеннях правоположень, яка здійснюється на підставі набутого правозастосовного досвіду.

Ключові слова: судова практика, судова діяльність, правозастосовчий досвід, правоположення.

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ПОНЯТИЕ СУДЕБНОЙ ПРАКТИКИ

Резюме

В юридической науке нет единого подхода к определению понятия «судебная практика», а также в определении ее роли, значения и места в правовой системе Украины. Определение судебной практики как видового понятия не должно противоречить своему родовому и типовому понятию — юридическая и социальная практика. Судебная практика представляет собой определенную деятельность судебных органов по наработке и закреплению в своих решениях правоположений, осуществляемую на основе приобретенного правоприменительного опыта.

Ключевые слова: судебная практика, судебная деятельность, правоприменительный опыт, правоположение.

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SYNERGETIC APPROACH AS A METHODOLOGICAL BASIS FOR THE SIMULATION OF JUDGE PROFESSIONAL COMPETENCE DEVELOPMENT

The article specifies the nature of synergistic approach as a methodological basis for the simulation of judge professional competence development; author's interpretation of the notion of «judge professional competence» is given; the necessity of application of the synergetic dynamics concept to simulate open, nonlinear systems for the development of judge professional competence is substantiated.

Key words: judge professional competence, synergistic approach, simulation of judge professional competence development.

Problem statement. Urgency of the article is stipulated by the fact that «in the process of development of rule-of-law state, one of its most important criteria is to create a fair, transparent and effective judiciary. Currently, there is a significant need for radical change of the judicial system and reforming of some of its institutions» [1]. At the same time, the steps for these changes in the state are limited to the branch of legislation and restructuring of litigation. The effectiveness of changes in the judicial system of Ukraine depends directly on the skill level of the panel of judges, i.e. level of their professional competence. Therefore, integral development of methodological, theoretical and procedural foundations of professional training and activity of judicial system specialists in Ukraine becomes an important area of theory and practice of research in the field of legal psychology.

Analysis of recent researches and publications. According to the interpretation of the Constitutional Court of Ukraine «under Article 124 of the Constitution of Ukraine the justice is an independent branch of state activity performed by the courts through consideration and solution of civil, criminal and other cases in court proceedings in a special procedural form prescribed by law « (paragraph 1 of cl. 3 of the Decree of the Constitutional Court of Ukraine № 44 of October 14, 1997). Specified provision is repeated and *detailed by new meaning*, for example, in civil, administrative and criminal proceedings. In particular, in provisions of Article 1 of the Civil Procedure Code of Ukraine («The objectives of the civil proceedings are fair, impartial and timely consideration and resolution of civil cases for the protection of violated, unrecognized or disputed rights, freedoms and interests of individuals, rights and interests of legal entities, interests of the state «). This is not about any consideration and resolution of cases, but such an article is

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implemented «to protect the rights, freedoms and interests» of individual or the state [2].

A strong, independent judiciary is able to exercise substantial, comprehensive impact on the life of the state, actively assist it in becoming a legal institution. Judicial reform, which consistently occurs in Ukraine, requires not only improving of the regulatory and procedural activities but also taking into account of psychological patterns in judiciary sphere, since the activities of judges is a complex, multifaceted and responsible due to consideration of cases different by their nature.

That is why it was necessary to study and give scientific credence to the nature of synergistic approach as a methodological basis for simulation of judge professional competence development, ascertain the nature of functions performed by them from a perspective of legal psychology that today becomes paramount. But practical optimization of judicial activities in general and in particular activities judges can be implemented by using scientific results of legal and of psychological principles in the sphere of legal proceedings, including administrative one, which will lead to more qualified and efficient work of judges, their mental health, strengthening of legitimacy and public order in the state.

Some aspects of the studied issues were covered in the works of national and foreign lawyers and psychologists. Thus, the attention to procedural problems of judge activities was given by scientists: O. F. Bondarenko [3], M. V. Kostytsky [4], and others. The authors studied the issues of the specificity of psychological knowledge and its place in the work of judges, the importance of ideological and philosophical principles in the context of hermeneutic nature of judicial proceedings, but the legal and psychological bases of judge professional competence in terms of the administrative process from the standpoint of legal psychology were considered insufficiently. Papers of the following authors are devoted to some aspects of the formation of professional competence of social-and-economic specialists: O. I. Pometun [5], S. L. Rubinstein [6] and others. Certain legal and psychological aspects of studied issues were covered in the papers of: O. M. Bandurka [7], V. V. Bedya [8], and others. In particular, this is the issue of judge activities both during the preliminary investigation and the trial in different instances.

By definition of O. I. Pometun, the *competence* is a specially structured set of knowledge, skills, capabilities and attitudes that enable the future specialist to determine, i.e. identify and solve problems regardless of context, which is typical for a particular direction of professional activity [5]. However, legal and psychologically significant determinants of synergetic approach as a methodological basis for simulation of judge professional competence development were not substantively addressed.

Paper purpose is to specify the essence of synergetic approach as a methodological basis of simulation of judge professional competence development.

Paper main body. In XX century there have been many important changes in the methodology of knowledge. It was realized that developed subject structure of knowledge does not allow to precise approach to solving com-

plex problems relating to the activities of the highest level of organization: law, education, and personality. Thus, the ideas of synergy appeared. In the twentieth century, the humanity fell into the area of development *instability* (which continues to the present) when seemingly insignificant actions, the actions of individuals lead to significant / catastrophic consequences for society. Therefore, the development of the doctrine of *human-like* behavior strategies is crucial, that would allow avoiding dangerous effects for society in the information and legal environment.

In our opinion, the core of synergy as the methodological basis for simulation of judge professional competence development is authentic (congruent) synergy that develops at the intersection, constructive synthesis of three principles, namely: *nonlinear modeling, practical philosophy and subject knowledge*; intersection, which is particularly evident in interdisciplinary interactions. At the same time, the level of synthesis efficiency and professionalism of combined application of these principles determines the degree of authenticity.

Unlike interdisciplinary *systemic* approach of the first half of the twentieth century, the synergetic paradigm not only «combines» previous theories, but also «enriches» them. This provision is called «*synergy*» (from the Greek συνεργός — acting together) — increase in the efficiency of activity as a result of synthesis, combination of individual parts in a single system through the so-called «reinforcing» effect. Often the term «*synergetic effect*» is used instead of word «synergy» — the combined effect of two or more factors, characterized by the fact that their combined effect significantly exceeds the effect of each individual component and their sum. This thesis, in its simplest form, can be explained as: «the whole is greater than the sum of its parts» [9]. That is, in case of joint activity the knowledge and efforts of several persons are organized so that they are mutually reinforced.

As is known, change in a principle leads to a change in approach — defined position, point of view, which determines the research, design, organization of any phenomenon, process (in our case — education). In vocabulary interpreting by V. I. Dahl, the «approach» is defined as: «to go downhill anything, to be the basis of something». The approach is marked by certain idea, concept and centered on the basic one or two or three categories. For example, for systematic approach the defining category is «system»; for problem approach — «problem».

Relations of judges and persons with specialized knowledge, gathering and transmitting information by them for study of the objects, and participation of judge in this process are still poorly studied. This is caused by the lack of established conceptual-categorical apparatus, clear and unanimous determination of the concepts of «judge professional competence» by the lawyers, its meaning and significance, and the relationship between the level of formation of judge professional competence and the performance of their professional activities.

Consideration of the features of full-scale *synergetic simulation* process in legal sciences and interdisciplinary design gained momentum in recent decades. Models are considered as simplified theories that allow studying the

relationship between various indicators in society. V. Stoph in the book «Modeling and philosophy» states that «*Model* is a system conceptually conceived or materially realized, which, reflecting or reproducing the object of study is able to replace it so that its study provides new information about such an object» [10, p. 12]. Built model provides a significant «compression» of information, but at the same time some limits of the process under study are eliminated as insignificant.

The logic says that in practice there are no ideal systems of modeling, and each of those used has its own strengths and weaknesses. Therefore, there is a need not to search ideal but to design models with a greater number of productive benefits. From this perspective, one should note that self-realization in professional activity along with professional position (social values consciously accepted as priorities of vital importance) is the basis for the dynamics of professional competence. The increase in the level of professionalism is associated with understanding and improvement of methods and technologies of implementation of own functional duties.

From this perspective, the *judge professional competence* is an integrated characteristic of a specialist personality as self-developing open nonlinear system, which should be understood as the presence of complex of attitudes, values, knowledge, abilities and skills necessary for successful implementation of professional activities and manifested in the ability to perceive individual, professional and social needs; to ensure social and professional self-realization in judiciary sphere, as well as providing opportunities for professional and personal self-development throughout life.

Based on the understanding of principal occupational activities (competencies) the activities of judges are grounded on the following central characteristics: *searching activity*: observance, curiosity, erudition, attentiveness; *communicative activity*: perceptivity, emotional steadiness, responsiveness, ability to listen and speak; *certification activity*: exactitude, punctuality, developed written speech; *organizational activity*: self-organization, level-headedness, perseverance, volitional powers; *reconstructive activity*: memory, imagination, analytical thinking, intuition, general and special intelligence; *social activities*: patriotism, humanity, honesty, adherence to principles, desire for truth and justice triumph, and professional pride.

In this aspect, it is possible to develop plans for the development of professional competence of judges at different stages of their training based on key competencies.

In the aspect of simulation of judge professional competence development the concept of *systemic synergetic dynamics* that launched application of simulation of developing open, nonlinear systems is a basis. Complex systems are characterized by a huge amount of *feedback* between the elements (both positive and negative) mutually influencing upon each other through the system of elements. Therefore, the effectiveness of application of the systemic dynamics method in this area is undeniable.

Conclusions. Thus, the *synergetic approach* is transdisciplinary scientific and methodological theory, because synergetic methodology appears just at

the intersection of simulation of interdisciplinary communication and collective expertise. From this perspective, this approach provides a new meaning and the need to emphasize everything given by scientific thought for practical applications for simulation of judge professional competence development. Since the complex of measures on professional training of judges for the development of their professional competence is associated with social self-organization, then for skilled explanation of theoretical foundations of stated complex it is necessary to develop mechanisms for extrapolation of synergetic approach to the theory and methodology of professional training of judges in Ukraine.

References

1. The Concept of Judiciary Reforming in Ukraine [Electronic resource] / Association of Lawyers of Ukraine — Access mode: http://uba.ua/ukr/project_ref_sud. — Title from the screen.
2. Bigun V. S. Justice as the Purpose and Goal of Justice (to the Issue of Justice Philosophy) [Text] / V. S. Bigun // State and Law. — 2009 — Edition 46. — P. 9–13.
3. Bondarenko O. F. The Specificity of Psychological Knowledge and Its Place in the Judge's Activities [Electronic resource] / O. F. Bondarenko — Access mode: www.judges.org.ua. — Title from the screen.
4. Kostytsky M. V. Philosophical and Psychological Problems of Jurisprudence: Selected Research Papers [Text] / M. V. Kostytsky. — Chernivtsi: Ruta, 2008. — 560 p.
5. Pometun O. Formation of Civic Competence: a View from the Perspective of Modern Pedagogy [Text] / Olena Pometun // Newsletter of school exchange programs. — 2005. — № 23. — P. 34–42.
6. Rubinstein S. L. Principles of General Psychology [Text] / S. L. Rubinstein — St. Petersburg: Peter, 2000. — 712 p. — (Series «Masters of Psychology»).
7. Bandurka A. M. Legal Psychology [Text]: textbook / [Bandurka A. M., Bocharova S. P., Zemlyanskaya E. V.] — Kharkov: Publishing House of National University of Internal Affairs, 2001. — 640 p.
8. Bed V. V. Legal Psychology: schoolbook for students of higher education institutions [Text] / V. V. Bed. — 4th edition — Lviv: «Noviy Svit-2000», 2007. — 376 p.
9. Semenova A. V. Paradigmatic Modeling in the Professional Training of Future Teachers [Text] : monograph / Alla Semenova — Odessa: Legal literature, 2009. — 504 p.
10. Stoph V. A. Modeling and Philosophy [Text] / V. A. Stoph. — M.: Nauka, 1966. — 308 p.

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СИНЕРГЕТИЧНИЙ ПІДХІД ЯК МЕТОДОЛОГІЧНА ОСНОВА МОДЕЛЮВАННЯ ПРОЦЕСУ РОЗВИТКУ ПРОФЕСІЙНОЇ КОМПЕТЕНТНОСТІ СУДДІВ

Резюме

У статті конкретизовано сутність синергетичного підходу як методологічної основи моделювання процесу розвитку професійної компетентності суддів. Подано авторське трактування поняття «професійна компетентність судді». Обґрунтована необхідність застосування концепції синергетичної динаміки для моделювання відкритих, нелінійних систем щодо розвитку професійної компетентності суддів.

Ключові слова: професійна компетентність судді, синергетичний підхід, моделювання процесу розвитку професійної компетентності.

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СИНЕРГЕТИЧЕСКИЙ ПОДХОД КАК МЕТОДОЛОГИЧЕСКАЯ ОСНОВА МОДЕЛИРОВАНИЯ ПРОЦЕССА РАЗВИТИЯ ПРОФЕССИОНАЛЬНОЙ КОМПЕТЕНТНОСТИ СУДЕЙ

Резюме

В статье конкретизирована сущность синергетического подхода как методологической основы моделирования процесса развития профессиональной компетентности судей, дана авторская трактовка понятия «профессиональная компетентность судьи», обоснована необходимость применения концепции синергетической динамики для моделирования открытых, нелинейных систем в отношении развития профессиональной компетентности судей.

Ключевые слова: профессиональная компетентность судьи, синергетический подход, моделирование процесса развития профессиональной компетентности.

МІЖНАРОДНЕ ПУБЛІЧНЕ І ПРИВАТНЕ ПРАВО

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TO THE UNITED NATIONS SECURITY COUNCIL REFORM

This article is dedicated to the issue of the United Nations reformation process in general and the Security Council reform in particular. The authors study the problem that has had increasing importance for decades. They point out the main concepts of the Organization and main matters of argument when it comes to the process of the Security Council reform. These include: the matter of enlargement, the matter of veto, the matter of representation.

Moreover, in the paper some approaches to reform's execution are stated, as well as a brief analysis of how they might affect the Organization in general.

Key words: United Nations, Security Council, reformation, veto, enlargement, representation.

Problem statement. The issue of the United Nations Security Council reform has been a matter of discussion for decades now for it has proven to be ineffective in many ways in the last fifty years. It is utterly important now because all the agreements that were achieved after the World War II don't work anymore. Since the events in Ukraine the very system of international relations is crumbling and is it vital to find the way to fix it. The problem to do so raises one of the history's most dangerous questions: must we await a serious conflict before the common sense comes into play?

Analysis of recent researches and publications. Specialists in different subjects such as international law, international relations have been trying to find answers to the most important questions since the first signs of need of the UN reformation appeared. Their works are dedicated to different aspects

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of the matter, or address the problem in general. Some theorists are trying to find an optimal solution to change the currently existing veto system whereas others are looking for a way to improve the representation inside the Security Council in order to make it as effective and efficient as possible. Among them we would like to distinguish Fassebender B., professor of Gallen University, Switzerland, whose publications 'UN Security Council and the Right of Veto: A Constitutional Perspective' and 'The United Nations Charter as the Constitution of the International Community' provide detailed insight on the problem of veto. We would also like to mention Luck E. C. and Weiss, T. Whose publications «UN Security Council: Practice and Promise» and «The Illusion of UN Security Council Reform» respectively provide a more critical view on the reformation process.

Paper purpose. Given the before-mentioned reasoning, the purpose of the article is to cover the most important questions that need to be addressed in order to successfully reform the Security Council. It also covers different approaches on how to regard some of the questions that are more likely to be addressed in the near future as well as those that don't have a definite answer yet.

Paper main body. The United Nation Security Council (hereinafter — UNSC) is the main executive body in the United Nations structure. Its main responsibility is the maintenance of peace and stability in the world. The UNSC was created in 1945 during the San-Francisco Conference when the Charter of the United Nations was signed (came in force on 24 October 1945). It is one of six UN Principal Organs, others being General Assembly, Economic and Social Council, Secretariat, International Court of Justice and Trusteeship Council (suspended operation on 1 November 1994, as on 1 October 1994 Palau, the last United Nations Trust Territory, became independent). All of the UN Principal Organs are located in the New York City, USA except for International Court of Justice which is located in Hague, the Netherlands [2].

The UNSC has been central in the conduct of global politics since its creation. However, while the global community has undergone massive change during that period, the Security Council has remained unaltered. To understand the main challenges that must be faced in order to reform the UNSC and the UN in general it is of utmost importance to understand what principles the UN as an organization is based on. Those are: the UN is a voluntary association; its members are self-determined and sovereign; they are formally and solemnly deemed to be equal; considering the voluntary nature of the organization, members are granted rights and immunities; in addition to rights and immunities there are assigned some obligations; the members are called upon to harmonize their actions in order to achieve the goals of the organization [3].

The main question that arouses is what those common goals are. As stated in the Charter they include: to «save succeeding generations from the scourge of war;» to «maintain international peace and security;» to «promote social progress and better standards of life in larger freedom» and to defend and guarantee the rights of all human beings [1]. The first thing that comes into mind is that these goals are exceptionally general and seemingly impossible to

achieve which reflects the very nature of the UN — the only universal organization in the world. Other questions that appear are how this association will be organized to achieve its goals. What's the mechanism of deciding on the agenda? Was the system created to ensure that the members neither exceed their privileges, nor fail to fulfill their obligations?

The answer can be found in the Charter and it consists of two parts. First and foremost, the Charter distinguishes five members from all others. In fact, these members decide the importance of every issue and are themselves above the law. These are the Permanent Members of the Security, often referred to as the «Permanent Five» or «P-5». Second, the Charter creates an objective Secretariat to provide advice, information and recommendations. It is headed by the Secretary General of the UN that is obliged to be objective. The Charter also provides a set of contradicting arguments. On one hand, there is a notion of equality among members, common purpose and commitment. On the other hand, a group with astonishing privileges is established, which is supposed to play a dominant role — the Permanent Five [4].

When talking about what is wrong with the Security Council, we would like to quote an Indian politician and former UN employee Shashi Tharoor who made a very accurate description of the problem in his article: «The problem of reforming the Security Council resembles the situation in which a number of doctors gather around the patient and all agree on the diagnosis, but it's impossible for them to agree on the prescription. The diagnosis is quite clear: the Security Council reflects the geopolitical realities of 1945 and not of today. This situation can be analyzed mathematically, geographically, and politically, as well as in terms of equity» [3].

When the UN was founded in 1945, the Council consisted of 11 members with a total number of UN members being 51. It means that some 22 percent of the member states were on the UNSC. Today, there are 193 members of the UN, and only 15 members of the Council — fewer than 8 percent. This leads to a big number of countries, both in absolute numbers and as a proportion not feeling adequately represented on the body [2].

The current composition of the Council also resembles the balance of power of at least a half century ago. Europe, for instance, that accounts for barely five percent of the world's population still controls 33 percent of the SC seats (that doesn't include Russia, regarded by a lot of specialists as another European country).

In terms of equity, this situation is unjust to those countries whose financial contributions to the UN outweigh those of four of the five permanent members. For instance, Japan and Germany have for decades been the second- and third-largest contributors to the UN budget, at roughly 19, and 12 percent respectively, while still being referred to as «enemy states» in the UN Charter. Moreover, the current Council membership denies opportunities to other states that have contributed in other kind (i.e. through participation in peacekeeping operations) or by size, or both, to the evolution of world affairs in the more than six decades since the organization was born. India and Brazil are notable examples of this latter case [4].

For more than a decade now, the Group of Four (G4) — Brazil, Germany, India, and Japan — have been in the forefront of an attempt to execute the Security Council reform, certainly expecting to earn their way of becoming the permanent members. From this new problems arouse.

Firstly, smaller countries understand that they will in no way benefit from these changes and they're quite content competing with each other every two years for a place of a temporary Council member. There are medium-sized countries who resent this kind of reform for it leads to selected few breaking free from their current second-rank status in the world. Some of these countries (Canada and Spain for example) consider the very existence of permanent membership wrong and they don't want to add up to the already existing «sin» by approving this kind of enlargement. Other countries that are thwarting the process of reformation are guided by different principles: a spirit of competition, historical unfairness or simple envy. These countries have created a coalition previously called a «coffee club» and now «Uniting for Consensus» [4].

The second problem is a very complicated procedure of accepting amendments to the UN Charter. It requires a two-thirds majority of the UN membership — 128 of the 193. Then it would need ratification by the same two-thirds of the membership. As ratification is a parliamentary procedure in many countries, it is easy for particular forces to halt the process [1].

Finally, what countries would the world want to see on an expanded SC? The answer is obvious: states that displace some weight in the world and have major contributions to the UN whether financially or in other ways. But if Germany and Japan mentioned earlier do make it into the UNSC it will further skew the existing North-South balance which means that they'd need to be balanced out by new permanent members of the developing world. The question here is who those members should be?

Can it be India in Asia, the world's largest democracy, and fifth-largest economy? But Pakistan which positions itself as its main opponent on the subcontinent and Indonesia don't fancy India being a member of the «permanent club». Similarly, Brazil in Latin America occupies the same position as India in Asia but its neighbouring countries, namely Mexico and Argentina, point out that a Portuguese-speaking country cannot represent a largely Hispanic region. And talking about Africa, how should one determine whether the continent's largest democracy, Nigeria, its largest economy, South Africa, or its oldest civilisation Egypt is worth a place [3]?

Another major problem is the «power of veto», established by Chapter IV of the UN Charter which allows any of the Council's permanent members to prevent the adoption of any non-«procedural» draft resolutions. The Permanent members are the United States, the United Kingdom, France, the Republic of China, and the Russian Federation (formerly the Union of Soviet Socialist Republics). This power they wield often prevents the Council from acting according to the situation where it needs be [1].

For example, the UNSC didn't pass any resolutions on the major conflicts of the Cold War period, including the Soviet invasion in Czechoslovakia, the

Vietnam War, and the Soviet invasion in Afghanistan. Additionally, it applies to the selection of the UN's Secretary-General, as well as any amendments to the UN Charter (Articles 108, 109), which gives them great influence [1].

Thinking about why the veto power was given to these chosen members, the answer is very simple: these were the so-called victor powers of World War II. The argument behind giving them the power of veto was that these five countries are ready to argue successfully against surrounding opposition and that unless these powers were given to them, there would be no new Organization.

The representative of the United States, at San Francisco, stated: 'the great powers could preserve the peace of the world if united….they could not do so if dissention were sowed among them. The great powers had every reason to exercise the requirement of unanimity for high and noble purposes, because they would not want again to expend millions in wealth and lives in another war» [4]. He warned that killing the veto would kill the Charter.

The representative of the Soviet Union said: 'the agreement on a joint interpretation [that is of the veto power] would facilitate the creation of a truly effective and efficient international organization for the maintenance of peace' [4].

The representatives of France and China adopted similar positions, but the position of the representative of the United Kingdom deserves particular attention. He said: 'The present voting provisions were in the interest of all states and not merely of the permanent members of the Security Council. Peace must rest on the unanimity of the great powers for without it whatever was built would be built upon shifting sands, or no more value than the paper upon which it was written. The unanimity of the great powers was a hard fact, but an inescapable one. The veto power was a means of preserving that unanimity, and far from being a menace to the small powers, it was their essential safeguard. Without that unanimity all countries, large and small, would fall victims to the establishment of gigantic rival blocs which might clash in some future Armageddon. Cooperation among the great powers was the only escape from this peril; nothing was of comparable importance» [4].

The matter of veto is strongly interconnected with the problem of enlargement for there seems to be less support across the full UN membership for new veto wielders than there is for the abolition of the veto altogether. Understanding the signal, they announced they would voluntarily forgo the privilege of a veto for ten years, but this did not noticeably add momentum to their cause. Considering a very specific nature of the problem it is safe to say that this question will be a subject of discussion for a long time. Abolition is not the only solution there is. Other proposals to reform the veto power include: 1) limiting the use of the veto to vital national security issues; 2) requiring agreement from multiple states before exercising the veto.

The main problem with the veto is that its reform will require the consolidated position of the Permanent members of the Security Council more than anything else. Considering that it would lead to them sharing their unique powers with others or even more, being deprived of these powers, it is very likely that this matter will not be addressed in the near future [3].

Conclusions. To conclude the article we would like to emphasize that in the point of view of many international law and international relations scientists as well as former and current UN employees the perspective of complex UN reformation is rather vague and indefinite. Considering the scale of the Organization it is important to understand that the consolidated will of most countries in the world is required in order to successfully complete this process. There are many concepts of how to address certain issues that cause the highest degree of discussion as well as those that are not directly connected with the Security Council activity — finances, transparency, etc. These require not so much of world's united effort as every member's responsibility in their obligations fulfillment.

References

1. Charter of the United Nations [Electronic resource]. — Access mode: http://www.un.org/en/documents/charter — Title from the screen.
2. Hardwick N. A. Should the UN be Reformed. How? [Electronic resource] / Nicola-Ann Hardwick. — Access mode: http://www.e-ir.info/2011/03/22/should-the-un-be-reformed-and-if-so-how. — Title from the screen.
3. Theroor S. Security Council Reform: Past, Present, and Future [Electronic resource] / Shadshi Theroor. — Access mode: http://www.carnegiecouncil.org/publications/journal/25_4/essay/001.html — Title from the screen.
4. Butler R. Reform of the United Nations Security Council [Electronic resource] / Richard Butler. — Access mode: http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1001&context=jlia — Title from the screen.

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ЩОДО РЕФОРМУВАННЯ РАДИ БЕЗПЕКИ ООН

Резюме

Статтю присвячено питанню про реформування Ради Безпеки ООН як одного із головних органів Організації. Автори досліджують сучасний стан цього процесу, його еволюцію та перспективи. Вони виокремлюють основні принципи, на яких побудована ООН, а також різноманітні підходи до вирішення найголовніших питань, які виникають в експертному середовищі: про розширення Ради Безпеки, про право вето, про принципи прийняття рішень, про відповідність організації Ради Безпеки сучасному стану міжнародних відносин.

Ключові слова: Організація Об'єднаних Націй, Рада Безпеки, реформування, розширення, вето.

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О РЕФОРМИРОВАНИИ СОВЕТА БЕЗОПАСНОСТИ ООН

Резюме
Статья посвящается вопросу о реформировании Совета Безопасности ООН как одного из главных органов Организации. Авторы исследуют современное состояние этого процесса, его эволюцию и перспективы. Они выделяют основные принципы, на которых построена ООН, а также различные подходы к решению наиболее важных вопросов, возникающих в экспертной среде: о расширении Совета Безопасности, о праве вето, о принципах принятия решений, о соответствии организации Совета Безопасности современному состоянию международных отношений.

Ключевые слова: Организация Объединенных Наций, Совет Безопасности, реформирование, расширение, вето.

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INTERNATIONAL COURTS IN THE INTERNATIONAL LAWMAKING PROCESS

The article is dedicated to the issue of role of international courts in international lawmaking process. The author studies the problem of recognizing international judicial bodies as international lawmaking subjects. She considers different scientific approaches to meaning of judicial decisions for lawmaking process in international law: from the classic understanding of them as subsidiary means for the determination of rules of law to a new vision of international courts' judgments as international law sources.

Moreover, in the paper some international tribunals' activity is considered and the international lawmaking capacity of their majority is stressed. The courts' classification in the context of international lawmaking is also done.

Key words: international court, international lawmaking, international judicial lawmaking, classification of international courts.

Problem statement. The issue of international law sources has always been a topic one. Being firstly resolved in the article 38 of the Statute of the Permanent Court of International Justice and in the same article of the Statute of the International Court of Justice this question seemed to be closed but actually it was not so. Even at the very beginning there were many discussions on the list of international law sources. One of the most important aspects of such debates has always been the issue of international courts in international lawmaking process. Although the general and more spread approach requires to considerate judicial decisions as a subsidiary mean for law determination, there are a lot of scientists that see it in completely different way. They talk about lawmaking functions of international adjudicators. The discussion became especially acute at the late twentieth century with the rapid proliferation of international judicial bodies. This process continues at the present time but seems to be uncontrolled end unfounded that could lead to some systemic and practical problems either in international judicial activity either in international lawmaking process. That's why we suppose that the above-mentioned sphere requires well-grounded studies and systematization.

Analysis of recent researches and publications. The works of many famous scientists and specialists in the sphere of international law are dedicated to different aspects of international lawmaking. They are Anzilotti, Brownlie, D'Amato, Kelsen, Martens, Butkevich, Kolosov, Levin, Lukashuk, Merezhko, Tunkin and others. Some authors, for example, D'Amato, Danilenko, Merezhko, Shokin, conducted the complex studies of international treaty and interna-

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tional custom making. But unfortunately there are no enough specific scientific studies of full international lawmaking process neither of new tendencies of its development such as a tendency of international judicial lawmaking.

Paper purpose. Given the before-mentioned reasoning the purpose of the article is to figure out a place of international adjudication in international lawmaking process, to define more important in this aspect international courts and to rank them according to different criteria for the scope of further systematization.

Paper main body. Since the period after the Second World War the question of international law sources has provoked many discussions in scientific circles all around the world. The well-known classic concept made on the positivism grounds strictly insists on the existence of two main and almost exclusive sources of international law: international treaty and international custom. The main normative support of this theory is the prominent Artcile 38 of the Statute of the International Court of Justice that says that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations ; d) subject to the provisions of Artcile 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. As you see according to the article there is three categories of international law norms sources: international conventions (treaties), international customs and «the general principles of law», but the last one has always been disputed since there is no unique comprehension of the very concept of the general principles of law nor of their list so their using is very rare. As for the paragraph (d), judicial decisions and the teachings of the most highly qualified publicists of the various nations are only subsidiary means «for the determination of rules of law», but not for their making. Actually the text of the article is almost the literal copy of the analogical article of the Statute of the Permanent Court of International Justice of 1920.

Such a normative and scientific position is typical for the beginning of the XX century when the legal positivism putting state's will in the center of any international legal process was the most popular especially in international law science.

But the nowadays realities of the international life demonstrate radical changes in international law sources and international lawmaking conceptions. Some of these changes touch the issue of the role of international courts' decision in international lawmaking processes. If before in the early twenties century the common idea was to consider judicial decisions only as subsidiary means for the determination of rules of law, lately in the mid-twentieth century there were some scientists that have seen them as international law sources having a certain lawmaking effect, now there is a lot of researchers that is sure about lawmaking force of international courts' judgments.

The citations of some prominent international law scientists could be a good illustration of this thesis. For example, Tom Ginsburg, associate professor of law and political science of University of Chicago is convinced that «judges at the international level, like judges in national legal systems, frequently make law in the course of resolving disputes» [1, p. 1]. He talks about the inevitability of international judicial lawmaking: «Judges are supposed to resolve disputes in accordance with pre-existing legal rules, but quite often pre-existing legal rules do not provide a definitive answer. When confronted with a situation where there is no clear pre-existing rule, the judge must make a new rule» [1, p. 4]. What's more he thinks that «the existence of international judicial lawmaking is acknowledged by state practice. State pleadings before international courts often exhibit a concern with the possible rule-creating functions of international judicial decisions» [1, p. 6].

Gilbert Guillaume, member of the Institut de Droit International, former president of the International Court of Justice expresses his thoughts in more moderate but similar way. He says that «it is interesting to note that from awards to judgments, arbitrators and judges have essentially always relied on the jurisdictional precedents that they enumerate, without even questioning the opinion of the States as to the peremptory nature, or even the customary nature of the applied norms. The recourse to precedent does not hide well the desire to ignore positive law and to promote natural law created by the conscience of judges» [2, p. 23].

We can find the same thoughts in the works of many other younger scientists like Marjan Ajevski: «Courts do make law. Plain and simple. They have an enormous normative pull, especially in a system of law that is largely unwritten» [3, p. 17]. And they also talk about different problems emerging in the connection: «This system of international constraint on judges is lacking to say the least. Not only are judges elected to international tribunals in a highly political way there are also very few mechanism that would ensure professional quality whilst on the bench. Very few institutional constraints exist in terms of the election, training and deliberations of international judges. In furtherance, there is no unified education system that would mould judges in a specific ethos, since there is no specific ethos to begin with. Quite the contrary, if anything the international system, if not value neutral, is value plural. Consequently, the international system has had to develop some informal mechanisms for constraining judges» [3, p. 17].

Obviously the international judicial lawmaking is in the process of transformation. But the role of different international courts in it is quite varied. The absence of a strict normative regulation provokes huge inhomogeneity in courts' practice and procedures. We would like to bring some order in the enlarging and complicating system of international courts.

There are some studies dedicated to the lawmaking functions of different international courts but on our view it lacks a large comparative analysis of the mentioned system that would give more complete and broad vision of the whole international judicial lawmaking process having place in the last years.

At the same time the necessity of such a study is emerging since there are some risks of uncontrolled development of the system.

«First, it increases the risk of overlapping jurisdictions and contradictory judgments. This was the case for interstate relations in the swordfish dispute between the European Union and Chile, which the former wished to bring before the International Tribunal for the Law of the Sea, and the latter before the World Trade Organization. ... Yet this proliferation not only creates risks of contradictory decisions in specific cases, but also risks of contradictions of jurisprudence. Such inconsistencies can be the fruit of a stated desire to distance precedents that are estranged from the tribunal in question. Thus, in the Tadic case, the International Criminal Tribunal for the former Yugoslavia wished to oppose the International Court of Justice with regard to the issue of the law governing the responsibility of a State involved in a civil war within the territory of another State. In certain branches of law, these divergences can also be the consequence of a growing specialization that judges and arbitrators are pursuing. Thus, in the Loizidou case, the European Court of Human Rights distanced itself from the jurisprudence of the International Court of Justice on reservations in the name of the specificity of human rights. Finally, the divergences can simply be the fruit of ignorance» [2, p. 18].

It's worth mentioning the study of Marjan Ajevski «International Criminal Tribunals as Lawmakers — Challenging the Basic Assumptions of International Law» in which he did a thorough research of the practice of international criminal courts. He also talks about the importance of such studies since «in the recent years the explosion of international tribunals has been astounding. Never before have international communications and international relations been so «legalized» the Project on International Courts and Tribunals has counted *forty three* (emphasis added — O. N.) existing, extinct, dormant or nascent judicial bodies. It has applied five set of criteria to define what it considers a «judicial body». The vast majority of these judicial bodies has been established or remodeled in the past two decades. More importantly, a large number of these judicial bodies have started to resemble a specific model, i.e. a supranational tribunal» [4, p. 63]

Within the most relevant international lawmaking judicial bodies it's worth mentioning the International Court of Justice (hereinafter — the ICJ), the International Tribunal for the Law of the Sea, international criminal courts (the International Criminal Court (hereinafter — the ICC), the International Criminal Tribunal for Yugoslavia (hereinafter — the ICTY) and the International Criminal Tribunal for Rwanda (hereinafter — the ICTR), the Appellate Body of the World Trade Organization, the European Court of Justice (hereinafter — the ECJ) and the European Court of Human Rights (hereinafter — the ECtHR), the Iran-US Claims Tribunal, the Court of Arbitration for Sport, the International Centre for Settlement of Investment Disputes etc.

It's clear that exactly the ICJ plays a key role in the international lawmaking although its practice is not so constant. The Court first repeatedly confirmed that it was not the role of the Court to create the law. Thus, in *the Fisheries* case, it clarified in 1973 that «as a court of law, [it] cannot render

judgment sub specie legis ferendae or anticipate the law before the legislator has laid it down» [5]. Similarly, in the 1996 advisory opinion on *the Legality of the Threat or Use of Nuclear Weapons*, the Court refused to replace a failing legislator, and consequently decided that, in view of the state of international law, it could not rule on the legality of the threat or use of nuclear weapons in «an extreme circumstance of self-defense, in which the very survival of a State would be at stake» [6]. «On numerous occasions, members of the Court in various statements or opinions have also recalled that 'that it is not the role of the judge to take the place of the legislator... [It] must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign States» [2, p. 8].

At the same time the situation is not as simple as it seems at the theoretical level since there are a lot of ICJ's decisions that demonstrate the lawmaking capacity of the court. It's worth mentioning the ICJ's advisory opinions in *the Reservations to the Genocide Convention, the Certain Expenses, Reparations for Injuries* cases, the *Barcelona Traction* case. In the latest «the ICJ introduced the distinction between two sets of obligations, one that exists inter se, i.e. among the parties, and a second one that is owed to the international community as a whole» [4, p. 67], well-known as obligations *erga omnes*. Actually exactly the ICJ is considerate by many scientists as «one of the biggest developers of general international law» [4, p. 66]. But it's not a common point of view because the others think that «the International Court of Justice does not recognize any binding value to its own precedent» [2, p. 12].

The lawmaking tendencies appear in the practice of other international courts, for example, the International Tribunal for the Law of the Sea (hereinafter — the ITLOS). On the view of James Harrison, «it is already possible to determine the development of a consistent jurisprudence in the decisions of the ITLOS which has only been in operation for ten years. For instance, the factors that the Tribunal propounded in the initial cases on prompt release have been relied on in subsequent prompt release proceedings» [7, p. 218]. One may see the *Camouco* case, the *Monte Confurco* case, the *Volga* case, the *Juno Trader* case etc.

Even in more evident way we can find the manifestation of lawmaking activity in international criminal tribunals' practice. Although the ICTY clearly explained its approach to the lawmaking question in the so-called *Kupre [ki]* Trial Chamber judgment of 2000, its latter practice evidenced another tendency. In the judgment of 2000 the court said that «being international in nature and applying international law principaliter, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a «subsidiary means for the determination of rules of law» (to use the expression in Article 38(1)(d) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law). ... Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. .... More specifically, precedents may constitute evidence of a

customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law» [8, par. 540]. But lately this year in the *Aleksovski* Appeals Chamber judgment of 2005 the court actually crossed out its previous position. It said that «the Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given per incuriam, that is a judicial decision that has been «wrongly decided, usually because the judge or judges were ill-informed about the applicable law» [9, par. 107–108] (footnote omitted — O. N.). The consequence of this is that now Trial Chamber of the ICTY and the ICTR are bound by the judgments of the Appeal Chamber and that the Appeal Chamber itself is the only one that can depart from a previously decided precedent and only with cogent reasons.

Talking about another prominent international criminal tribunal we must accept that unfortunately it's too early speak about the solid ICC's approach to judicial lawmaking questions since it has only 13 years of practice and 3 final decisions. But the analysis of its argumentation gives to the researchers the possibility to conclude that «the ICC simply accepted the decision of the ICTY as settled law» [4, p. 208]. Clearly that with time the practice of the court could change but the existence of hierarchical structure gives more reasons to think that the ICC would follow the the ICTY's and the ICTR's approach to the applicable law.

Regarding to the courts of regional character it's interesting to study the ECtHR's practice since it has a long history enough and a lot of cases to analyze. In its 1990 *Cossy v United Kingdom* decision, the Court deduced that it «is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions» [10, par. 35].

On this basis, in the past 10 years the ECtHR has several times explicitly declared that it was reversing its case-law, with the goal of either creating new rights (for example, for the benefit of prisoners, minorities and transsex-

uals) or to abandon the rule of judicial economy in order to more fully determine the rights of litigants [2, p. 13]. But it cannot overturn the abundant case-law use of the court.

The ECJ's decisions are also full of references to its previous decisions. But it «did not hesitate to change its jurisprudence over time. To do this, it primarily employed the method of distinguishing between precedent invoked and cases examined. However, in certain cases it proceeded to truly and explicitly overrule precedent» [2, p. 14]. On the other hand the ECJ «has been called as being one of the key actors in reshaping the European Communities and the European Union. Through the introduction of the doctrines of direct effect, supremacy of EC law of implied powers and of human rights it creates a system of law that is far mare radical than anyone expected in 1951» [4, p. 67–68].

What's more although the ECtHR and the ECJ are considered so-called self-reliant or self-contained regimes they often use judgments of each other. «The former, as we know, assures member States' respect of the European Convention on Human Rights. The latter assures the European Union's respect for the fundamental rights guaranteed by the Convention. The overlap of competence, at times contested and finally called into question by the Lisbon Treaty, has raised certain problems despite the care taken by each Court to consider the jurisprudence of the other. Difficulties have arisen recently, for example, with respect to the rules governing the fight against international terrorism or the status of real property in Northern Cyprus. Here again, precedent was not ignored, yet each jurisdiction pursued its course according to the goals that the treaties assign to them» [2, p. 20].

This example demonstrates the use of external precedents that lately becomes more frequent. «A ruling in one regime may affect a ruling in another that seemingly has little to do with that specific regime… [E]ven though certain international courts are designed to interpret a regime specific law it may have incidental consequences outside of that specific regime. This is not surprising given that fact that all of these judicial bodies are interpreting a certain type of international law as well as the general tenets of international law. They cannot but apply rules that are used throughout the international law system» [4, p. 69–70].

Unfortunately in the article limits we have no possibility to review the practice of all international judicial bodies but even the abovementioned analysis demonstrates a wide precedent use of external and internal character. Such a practice gives us the possibility to conclude that international courts become more active participants of international lawmaking process. Now we would like to make some systematization with the purpose to define which courts are more effective in the process and more constant using precedents.

First of all we should mention the difference in the lawmaking activity of the courts of a global and regional character. On the view of Gilbert Guillaume «if the legal situation is the same for the courts of a global nature and those of regional character, the practice of these courts is very different. In both cases, precedent is often invoked. In the first, it is rarely abandoned.

In the second, evolutions or even outright changes in jurisprudence are more frequent» [2, p. 13]. Actually a contradictory practice of the ECtHR and the ECJ mentioned above demonstrates the thesis of more changeable character of regional courts' activity.

Speaking above the lawmaking in international law we must state that the international global courts' practice is more important for the process since in this way the general international law is forming.

Another approach to the international courts distinction is to divide all international judicial bodies in dependent and independent ones. On the view of Eric A. Posner and John C. Yoo, professors of law from the universities of Chicago and California, «a tribunal is independent when its members are institutionally separated from the state parties, when they have fixed terms and salary protection, and the tribunal itself has, by agreement, compulsory rather than consensual jurisdiction. Conventional wisdom holds that independence at the international level, like independence at the domestic level, is the key to the rule of law as well as the success of formalized international dispute resolution. We argue, by contrast, that independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant to use international tribunals unless they have control over the judges. On our view, independence prevents international tribunals from being effective» [11, p. 7].

Such a position isn't a common one in international law science. For example, Tom Ginsburg doesn't agree with it. He thinks that «they have the wrong criteria for operationalizing independence. There is nothing about permanence, or what might be called institutionalization, which will necessarily render standing courts ineffective. Posner and Yoo argue that domestic courts, unlike international courts, are subject to mechanisms of political control. I argue that the differences are only of degree rather than kind. Every international dispute resolver is subject to constraints. Certainly one can imagine bodies that are appointed for the purpose of resolving a particular dispute and are able to exercise substantial independence, while conversely there may be standing bodies that are substantially constrained» [1, p. 38].

We agree with the Ginsburg's thesis saying that «from the point of view of judicial lawmaking, standing tribunals may be more effective than those appointed for a particular dispute. To the extent that they see a stream of cases presenting similar issues over time, standing tribunals may develop mechanisms of signal and interaction with their political principals that may make them more effective delegates. Standing bodies may develop proficiency in determining state interests and preferences as they see the same parties in a series of disputes over time. They may be better able to establish creative focal points that maximize disputant payoffs; indeed their reputation for choosing effective rules may itself generate compliance in future cases. They may create rules that will discourage future disputes — in other words, effective precedent» [1, p. 39].

He also arrived to the conclusion about some factors that lead to greater discretion on the part of international tribunals. «First, lawmaking power

increases with the number of parties to a regime. Second, lawmaking power increases with the difficulty of amending the treaty or overruling the lawmakers. Third, lawmaking power increases with the cost of exiting the regime. The first two propositions imply that multilateral regimes tend to be more conducive to judicial discretion than bilateral regimes, because the difficulty of obtaining agreement to revise or amend the treaty increases with the number of parties that must negotiate change. … The third proposition is that the more costly and difficult it is for states to exit a regime, the greater the discretion of the court» [1, p. 39–40].

The first factor by Tom Ginsburg works also for the international courts division in interstate and transnational or supranational tribunals. «The more cases a court has the bigger the chances that it will create a sizable reference point for itself and the more opportunities it will have for expanding the law through interpretation. The way a tribunal is structured has a significant influence on the number of cases that it will have. An interstate tribunal (one that is limited to only hearing state to state complaints e.g. the ICJ) is likely to have fewer cases before it than a supranational one» [4, p. 72]. The examples of the latest are the ECJ, the ECtHR, the ICTY, the ICTR, the ICC etc. They are established by a group of states or the entire international community and exercise jurisdiction over cases directly involving private parties. « [T]he direct link between supranational tribunals and private parties creates opportunities for those tribunals to establish direct or indirect relationships with the different branches of domestic governments. Through these relationships, a supranational tribunal can harness the power of domestic government to enforce its rulings in the same way that the judgments and orders of a domestic court are enforced» [12, p. 290].

So, another criterion of international lawmaking courts distinction could be the interstate or supranational character of a court. Evidently the bigger is a body the bigger lawmaking importance it has.

Conclusions. To conclude the article we would like to emphasize that in the point of view of many international law scientists international courts can create legal norms. What's more they are creating them at the moment. The absence of a strict regulation and even more of a solid scientific conception that could interpret judicial lawmaking has led to the situation where the courts have different approaches to the use of precedent. The practice of internal and external precedents use is even more diverse. But more o less the courts making decisions appeal to norm of other judgments. This fact gives to researchers the grounds to argue that judicial decisions are much more than subsidiary means for the determination of rules of law and can be seen as real international law sources.

The brief analysis of practice of some more prominent international tribunals gives us the possibility to conclude that the precedent use is characteristic for all of them. But we can state that some judicial bodies occupy more important place in lawmaking process at the moment. For example, the courts of a global nature are more stable in their precedent use that the regional ones and the norms that they form are more important for the creation of general

international law. The supranational or transnational tribunals having a more abundant practice are more effective producing the international legal norms than the courts of interstate character. Finally the so-called independent tribunal with a higher possibility will produce international law norms rather than the provisions that are compulsory only to the contesting parties. Evidently judicial lawmaking processes must be regulated in more uniform and systematic way in some international legal documents to avoid the possible future abuses.

References

1. Ginsburg T. Bounded Discretion in International Judicial Lawmaking [Electronic resource] : Tom Ginsburg // Virginia Journal of International Law. — 2005. — Vol. 45. — Access mode: http://home.uchicago.edu/~/tginsburg/pdf/articles/BoundedDiscretionInInternational Judicial Lawmaking. pdf (reference date : 07.03.2015). — Title from the screen.
2. Guillaume G. The Use of Precedent by International Judges and Arbitrators [Text] / Gilbert Guillaume // Journal of International Dispute Settlement. — 2011. — Vol. 2. — № 1. — P. 5–23.
3. Ajevski M. Judicial Law-making in International Criminal law — The Legitimacy Conundrum [Text] / Marjan Ajevski // Select Proceedings of the European Society of International Law. — 2010. — Vol. 3. — P. 127–141. — Oxford: Hart Publishing, 2012. — 418 p.
4. Ajevski M. International Criminal Tribunal as Lawmakers — Challenging the Basic Assumptions of International Law [Electronic resource] : PhD thesis; Central European University Collection / Marjan Ajevski. — 331 p. — Access mode: www.etd.ceu.hu/2011/ajevski_marjan.pdf (reference date: 07.03.2015). — Title from the screen.
5. Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland *v.* Iceland) [Electronic resource]: International Court of Justice Judgement of 25 july 1974. — Access mode: http://www.icj-cij.org/docket/files/55/5977.pdf (reference date: 07.03.2015). — Title from the screen.
6. Legality of the Threat or Use of Nuclear Weapons [Electronic resource]: Advisory Opinion of the International Court of Justice on the request made by the General Assembly of the United Nations of 8 july 1996. — Access mode: http://www.icj-cij.org/docket/files/95/10407.pdf (reference date: 07.03.2015). — Title from the screen.
7. Harrison J. Evolution of the Law of the Sea: Developments in Law-making in the Wake of the 1982 Law of the Sea Convention [Electronic resource] / James Harrison. — Edinburgh, 2007. — Access mode: https://www.era.lib.ed.ac.uk/ bitstream/1842/ 3230/1/J %20 Harrison, %20 Evolution %20of %20the %20Law %20of %20the %20Sea, %20PhD %20Thesis, %202008.pdf (reference date: 09.03.2015). — Title from the screen.
8. Prosecutor v. Zoran Kupre [ki] and others [Electronic resource]: Trial Chamber Judgment of 14 January 2000 of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. — Access mode: http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf (reference date: 09.03.2015). — Title from the screen.
9. Prosecutor v. Zlatko Aleksovski [Electronic resource]: Trial Chamber Judgment of 24 March 2000 of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. — Access mode: http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf (reference date: 09.03.2015). — Title from the screen.
10. Cossey v. the United Kingdom [Electronic resource]: European Court of Human Right Judgment of 27 September 1990. — Access mode: http://archive.equal-jus.bispecialist.net/151/1/ECHR %2C_Cossey_v._United_Kingdom %2C_no._10843 %3A84_ %5B %5D1990.pdf (reference date: 13.03.2015). — Title from the screen.
11. Posner E., Yoo J. Judicial Independence in International Tribunals [Electronic resource] / Eric A. Posner and John C. Yoo // California Law Review. — Jan. 2005. — Vol. 93. — Is-

sue 1. — 74 p. — Access mode: http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1308&context= californialawreview (reference date : 15.03.2015). — Title from the screen.

12. Helfer L., Slaughter A.-M. Toward a Theory of Effective Supranational Adjudication [Electronic resource] / Laurence R. Helfer, Anne-Marie Slaughter — Access mode: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2659&context=faculty_scholarshi(reference date : 15.03.2015). — Title from the screen.

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МІЖНАРОДНІ СУДИ У МІЖНАРОДНОМУ ПРАВОТВОРЧОМУ ПРОЦЕСІ

Резюме

Статтю присвячено розгляду питання щодо ролі, яку відіграють міжнародні суди у процесі міжнародної правотворчості. Авторка досліджує проблему визнання міжнародних судових інституцій як суб'єктів міжнародної правотворчості. Вона розглядає різноманітні наукові підходи щодо значення, яке мають судові рішення для правотворчого процесу у міжнародному праві: від їхнього класичного розуміння як допоміжних засобів для визначення правових норм до нового бачення рішень міжнародних судів як джерел міжнародного права.

Крім того, у статті розглянуто діяльність деяких міжнародних судів та наголошено на їхній правотворчій потенції, а також проведено їхню класифікацію у контексті міжнародної правотворчості.

Ключові слова: міжнародний суд, міжнародна правотворчість, міжнародна судова правотворчість, класифікація міжнародних судів.

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МЕЖДУНАРОДНЫЕ СУДЫ В МЕЖДУНАРОДНОМ ПРАВОТВОРЧЕСКОМ ПРОЦЕССЕ

Резюме

Статья посвящается вопросу о той роли, которую играют международные суды в международном правотворческом процессе. Автор исследует проблему признания международных судебных институций в качестве субъектов международного правотворчества. Он рассматривает различные научные подходы касательно того значения, которое имеют судебные решения для правотворческого процесса в международном праве: от их классического понимания в качестве вспомогательных средств для определения правовых норм до нового видения решений международных судов в качестве источников международного права.

Кроме того, в статье рассматривается деятельность некоторых международных судов и акцентируется их правотворческий потенциал, а также проводится их классификация в контексте международного правотворчества.

Ключевые слова: международный суд, международное правотворчество, международное судебное правотворчество, классификация международных судов.

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UNIFICATION OF INTERNATIONAL PRIVATE LAW: TOPICAL ISSUES

The article examines the stages of development of unification of international private law and conceptual changes that have lately affected its forms and methods.

Key words: private international law, unification of law, unification by international treaties, regional unification, not normative unification.

Problem statement. The characteristic features of the modern world are being displayed through the strengthening integrity of the global economy, which in many respects is possible due to the development of economic relations between states, trade liberalization and the creation of modern communication and information systems, global technical standards and regulations. The intensification of the process of international economic integration in the context of globalization, the expansion of migration, and other processes have objectively led to the development of the unification of international private law, which aims to provide uniform regulation of various institutions: the international sale of goods, banking, international road, rail, air and sea transport. In addition to these areas there have recently emerged new areas of legal relations, which had not previously been subjected to unification, in particular: insolvency; e-commerce; transparency and openness of the activity of legal entities operating in the territory of offshore zones; new types of contractual obligations; torts; certain institutions of family law (such as «international» surrogate motherhood), etc. Issues related to the unification of private international law in the framework of the existing integration organizations (European Union) have also increasingly attracted the scholarly interest.

Analysis of recent research and publications. A number of domestic and foreign researches in the field of private international law explore problematic issues of unification of law as a whole, its individual forms, techniques, methods, fields, and so on. Among such scholars are: Anufriyeva L. P., Bachin S. V., Basedow J., Bonell M. J., Vilkova N. G., Dovgert A. S., Komarov A. S., Kisil V. I., Lunts L. A., Makovskiy A. L., Merezhko A. A., Neshatayeva T. N., Rubanov A. A., Tetley W., Twining W., and many others.

In the last decade in Ukraine there have been done a series of research in the field and defended dissertations: «Unification of Norms of the IPL in the Frames of UNIDROIT» (by L. G. Varsholomidze), «Unification of Legal

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Regulation of Conditions of the International Commercial Contracts in the IPL» (by E. I. Porfiryeva), «Unification of the IPL Rules in the Frames of the Hague Conference» (by V. V. Popko), «Unification of IPL in the European Union» (by O. V. Rudenko), etc.

Paper purpose is to identify the current trends in the unification of international private law and the problematic issues accompanying this process.

Paper main body. As examination of the problems of unification of law shows, a number of authors devote their research to unification of material and conflict law rules through international treaties, as one of the most historically and traditionally sought early forms of legal unification [1, p. 126 p.; 2, p. 254; 3, p. 92; 4, p. 382]. The effectiveness of this form, along with the certainty of the contents of norms, the stability of regulation of appropriate relations, is evidenced by the fact that the entry into force of a treaty, as a prerequisite for this form of unification, its performance and the actual implementation of its rules is maintained by the power of the State party.

Development of the unification of private law by international conventions, on a global scale, has passed certain stages. The first phase took its start in the second half of the 19th century, when there was felt the necessity for the unified legal regulation of intellectual property. In this area the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886) became the «first signs». Then maritime conventions took over: the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924), the Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (1910), the Convention for the Unification of Certain Rules of Law Relating to Collision Between Vessels (1910) and others.

The second stage of the unification through international treaty began after the Second World War and was also accompanied by a successful initiative: in the second half of the 20th century there was adopted a number of international conventions in the field of transport (e.g., the UN Convention on the Carriage of Goods by Sea (1978), the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999), and others.); in the field of trade and economic relations (Vienna Convention on Contracts for the International Sale of Goods (1980), the Ottawa Convention on International Financial Leasing (1988), etc.). However, it should be noted that despite the high hopes that were pinned on the international conventions, unfortunately, not all of them have proved to be effective, since never entered into force for various reasons, for example, because of the insufficient number of accessions. There are also other reasons of legal, political and economic character deserving a separate study.

Thus, one of the main problems in the sphere of the unification of law through international treaties deals with the situation that some conventions never enter into force, which, in its turn, represents an obstacle on the way to the desired result of the unification. Another problem in this area concerns the need to revise, modify, and supplement existing conventions due to evolution of relations subject to their action. Practice shows that in some cases

the lack of effective mechanisms for such modifications prevents this process, and, as an outcome, there emerged more than one international treaty acting in a given sphere and governing the same relations. The Montreal Convention of 1999 and the Warsaw Convention of 1929 — in the field of air transport; Hague, Hague-Visby Rules and the Hamburg Rules — in the field of maritime transport of goods; and others are examples of this. However, certain international conventions, the mentioned above conventions on intellectual property, may perform as a good example, even as «model» international instruments. Adopted almost at the end of the 19th century, they are still viable, adapted to regulate sufficiently mobile and fragile areas due to very difficult, but reasonable system of administration of the conventions with special bodies, bases, conditions and timing of the review [5].

The above-mentioned obstacles to international universal unification over the last 50–60 years have led to the transformation of the concepts of international unification of private law: today there is felt more foreseeable need for new methods and forms of unification, which may be explained by qualitative and quantitative changes in the nature of international trade, the lack of legal instruments ensuring the balance of interests of participants of the international commercial turnover.

In connection with this the third stage of unification, the so-called informal unification, appeared, which has gradually started its way since the end of the 20th — beginning of the 21st century and continues to evolve nowadays. It is generated by the development of institutions of contract law on the background of the complexity of social relations, trade, and contractual relations and is not focused on the development of international conventions. The growing development of the principles of international private law, as the party autonomy, freedom of contract allows business entities to develop their own contractual standard forms and structure for the exchange of goods, financial markets, namely, model contracts, general conditions, a set of uniform rules, etc. These capabilities give rise to a number of legal issues related, in particular, to the clarification of the legal nature of such structures from the perspective of treating them as a source of law. As it is known, within each national legal system there are different established approaches to the question of what the source of law is, therefore, in respect of these documents there are different views. Not all state courts acknowledge them as sources of law, and in some cases use them as complementary institutes. However, in practice, they have a very important practical significance and have a regulating effect on certain relationships [6, p. 50–51].

In this perspective, the doctrine of Lex Mercatoria (now called by researchers «the new Lex Mercatoria») that has been known since the Middle Ages is worth mentioning. As it is accepted, the essence of this doctrine is to create an autonomous system of regulation of international trade on the basis of established customs and practices [7, p. 245]. In favor of this doctrine evidences also the fact that the method of regulation by conflict of law rules does not fully satisfy the needs of international trade. As a result of application of the conflict of law rules international trade transactions are governed by the

national legislation that does not sufficiently take into account the specificity of international trade, is intended to rule internal relations, and reflects the traditions, the history and characteristics of the legal machinery of a particular state. Thus, the contradiction between the international nature of a transaction and the national character of governing rules has facilitated the development of the new Lex Mercatoria [9]. Despite the attractiveness of the concept of this doctrine, it also has its opponents who criticize it, in particular, for the uncertainty of its sources. In order to find a compromise in this matter the international community through the UNIDROIT initiated the development of a set of standard rules, which had to become an example of general principles. This work resulted in the adoption in 1994 of the Principles of International Commercial Contracts of the UNIDROIT, which is still in force (the third edition of 2010), the fact that indicates the relevance of this document. The aim of working out this document was to create rules that would apply in appropriate cases as the rule of law, that is, that by choosing the UNIDROIT Principles as the applicable law, they would be similar to the parties' choice of any national law or to any national law applicable by virtue of the conflict of law rule [9, p. 185].

International commercial arbitration institutions in their practice have widely applied these principles. It should be emphasized as well, that in general, the current stage of development of relations, which are the subject of international private law, is being characterized by an increase in demand of the mechanism of non-state international arbitration, because a dispute resolution procedure creates the necessary conditions for the application of contractual structures, which the parties develop for the regulation of their relations, and provides adequate application of uniform rules of the Lex Mercatoria. In this regard, the prospect for unification of law on alternative ways of settling commercial disputes — cross-border conciliation (conciliation) procedures is becoming more and more topical. In this context, a special role belongs to the UNCITRAL Model Law on International Commercial Conciliation and Mediation Rules [10; 11], as well as to regional harmonization of legislation on mediation in civil and commercial matters within the European Union that can be applied as a basis for the development of national legislation on mediation. Although today in Ukraine a system of alternative dispute resolution is yet to be formed, it is possible to assert the need for the introduction of mediation in the domestic system of law. First of all, because it is the most acceptable and the preferred method of dispute resolution, and, in addition, there is a positive experience of its use in many countries [12, p. 248]. The Draft Law of Ukraine «On Mediation» (March 2015), however, did not consider the mentioned regulations as guiding principles. This fact seems to create additional obstacles to the unification in this area, and hence — on the way of rapprochement and cooperation between national legal systems.

Another feature of the present stage of unification of international private law on a global scale — the regional unification of private law — is seen as a more effective mechanism of regulation of relations in comparison with universal unification by international treaties. This refers to the unification

within the EU, the CIS, the Eurasian Economic Community, Latin America, Africa, etc. [13, p. 92]. The new impetus to the unification of private international law in interstate integration associations was given by the development and complexity of regional economic integration.

For example, the EU has been experiencing the process of harmonization and unification of contract law. This phenomenon has developed in stages: in 1998, there was set up a team to research the European Civil Code; at the end of the 1990s, the Lando Commission developed the Principles of European Contract Law; in 2008 series of documents referred to as Principles and directions for the regulation of certain types of contractual and non-contractual relationship (principles of European Law on commercial agency, franchise, distribution and others) were published; in 2009 the Draft Common Frame of References (hereinafter — DCFR) was prepared, which represents a codification of European contract law; in 2010 there came out the Green book on European contract law, which offered for further discussion seven versions of the DCFR; etc. Thus, the EU has developed a unified system of regulation of contractual relations, which include, in addition to the relevant EU regulations, principles and general scheme of a recommendation nature [14].

One of the directions of the regional unification of law, which is broadly defined as a process of harmonious interaction of legal systems, was manifested by the decisions of the courts of integration associations in Latin America, for example, the Court of Justice of the Andean Community, Mercosur Permanent Court, the Caribbean Court of Justice, and the Central American Court. The main objective of the establishment and operation of such courts is associated with ensuring a uniform formation, interpretation and application of the uniform law of the integration association [15].

The diffusion of law represents one of the new trends in contemporary studies of international private law. The diffusion theory is considered as a natural penetration of foreign legal norms in force into national law. According to scholars, one of the benefits of the diffusion as a way of unification of law is that it is carried out regardless the mutual agreement between the subjects of international law and can be regarded as an alternative to the international unification of law [16, p. 505]. Examination of the diffusion of law is relevant in view of the fact that the borrowing successfully formulated legal norms and a principle is becoming more prevalent. Due to the transition of many countries to the market system, most often, in the depths of the economic relations there are found the same type of contractual arrangements. Along with the diffusion of law such new methods of unification as transplantation of law and export of law were introduced to the science of international private law. These methods are considered as different types of harmonious interaction between national legal norms that is to unify the legal regulation of the relations between the subjects of the civil law of different countries. Researchers believe this theory is mostly fitted for adaptation of a foreign legal system to a given national circumstances [16, p. 506].

It is broadly admitted, that the process of unification of law is initiated mainly by governmental or non-governmental organizations, in some cas-

es — by individuals. One of the leading roles in this matter is played by the International Chamber of Commerce (hereinafter — the ICC), UNCITRAL, UNIDROIT, etc. In particular, the International Court of Arbitration of the ICC has made a significant contribution to the resolution of the conflict of law issues, in particular, it is the only court that does not specify the law to be applied based on the direct method, and provides greater powers to the arbitrators to decide the dispute based on the legal rule, which they deem applicable [17]. The activity of the ICC is aimed at addressing the most pressing issues, including the development of uniform rules and standards of business conduct, and dealing with problems related to the liberalization of international trade. Among the documents, developed by the ICC, are: the Incoterms (last edition of 2010), documents providing payments between the participants of contracts (Unified Rules on Letter of Credits, etc.), standard forms of international contracts. Within the UNIDROIT there were designed, in particular, the mentioned above Principles of international commercial contracts, as well as were established a number of uniform substantive rules governing the relations of representation in international commercial transactions, and others.

Conclusions. An overview of contemporary issues of unification of international private law allows to conclude that, firstly, unification, in its various forms, methods and instruments, has been and remains a regular trend of international private law; secondly, the factors of political and economic nature affect considerably the dynamics of various forms of unification; thirdly, the further development of the principles of private law, as the party autonomy, freedom of contract; changes in the number and quality of relations between subjects of different national legal systems and integration associations have led to a rethinking of the traditional forms of unification and the development of alternative, non-normative, unification, as well as new methods and techniques, such as diffusion of law, export of law, transplantation of law, etc.; fourthly, for achieving the primary objectives of the unification there should be used, depending on the particular circumstances, all available unification tools, and where it is necessary — in conjunction of its different forms, methods, etc.

References

1. Маковский А. Л. Проблемы международного частного морского права [Текст]: дис. ... докт. юрид. наук : 12.00.03 /А. Л. Маковский. — М., 1984. — 421 с.
2. Вилкова Н. Г. Договорное право в международном обороте [Текст] / Н. Г. Вилкова. — М. : Статут, 2002. — 511 с.
3. Frederic D. C. Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules [Text] / D. C. Frederic // 22 Journal of Maritime Law and Commerce. — 1991. — P. 81–117.
4. Стрельцова Е. Д. Этапы формирования единообразного морского права [Текст] / Е. Д. Стрельцова // Правова держава. — 2012. — № 12. — С. 381–388.
5. The Paris Convention for the Protection of Industrial Property, 1883 [Electronic resource]. — Access mode: ww.wipo.int/treaties/en/text.jsp?file_id=288514 — Title from the screen; the Berne Convention for the Protection of Literary and Artistic Works [Electronic resource]. —

Access mode: http://www.wipo.int/treaties/en/text.jsp?file_id=283698 — Title from the screen.
6. Венская конвенция о договорах международной купли-продажи товаров: практика применения в России и за рубежом [Текст] / Отв. ред. А. С. Комаров. — М. : Волтерс Клувер, 2007. — 288 с.
7. Berger K. The Creeping Codification of the Lex Mercatoria [Text] / K. Berger // Kluwer Law International. — 1999. — P. 243–275.
8. Sweet A. S. The New Lex Mercatoria and Transnational Governance [Electronic resource] / Faculty Scholarship Series. — 2006. — Paper 92. — Access mode: http://digitalcommons.law.yale.edu/fss_papers/92 — Title from the screen.
9. Бахин С. В. Субправо (международные своды унифицированного контрактного права) [Текст] / С. В. Бахин. — СПб. : Издательство «Юридический центр Пресс», 2002. — 311 с.
10. UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 [Electronic resource]. — Access mode: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html — Title from the screen.
11. UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use (2002) [Electronic resource]. — Access mode: http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03–90953_Ebook.pdf — Title from the screen.
12. Redfern A. Law and Practice of International Commercial Arbitration [Text] /A. Redfern. — London: Sweet & Maxwell, 2004. — 659 p.
13. Лунц Л. А. Курс международного частного права: В 3 т. [Текст] / Л. А. Лунц. — М. : Спарк, 2002. — 1007 с.
14. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) [Electronic resource]. — Access mode: http: // ec.europa.eu/justice/contract/files/European-private-law_en.pdf — Title from the screen.
15. Рафалюк Е. Е. Решения судов интеграционных объединений Латинской Америки как форма унификации международного частного права: дис. ... канд юрид. наук: 12.00.03 «Гражданское право и гражданский процесс; семейное право; международное частное право» [Текст] / Е. Е. Рафалюк. — М., 2010. — 194 с.
16. Twining W. Diffusion and Globalization Discourse [Text] / W. Twining // Harvard International Law Journal. — 2006. — Vol.47. N.2. — P. 507–515.
17. ICC Rules of Arbitration (1998) [Electronic resource]. — Access mode: http://www.icc.se/skiljedom/rules_arb_english.pdf — Title from the screen.

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УНІФІКАЦІЯ МІЖНАРОДНОГО ПРИВАТНОГО ПРАВА: АКТУАЛЬНІ ПИТАННЯ

Резюме

Загальний огляд сучасних проблем уніфікації міжнародного приватного права дозволяє дійти висновку про те, що уніфікація, у різних її проявах, способах і формах, була і залишається закономірною тенденцією розвитку міжнародного приватного права. Багато в чому чинники політичного і економічного характеру впливають на динаміку тих чи інших форм уніфікації. Розвиток і зміцнення таких принципів приватного права, як автономія волі сторін, свобода договору, а також зміна кількості та якості різного роду правовідносин між суб'єктами різнонаціональних правових систем, інтеграційних об'єднань (наприклад, ЄС) призвели до переосмислення традиційних форм уніфікації та вироблення альтернативної, ненормативної, уніфікації, а також нових способів і прийомів, таких як: дифузія права, експорт права, трансплантація норм права тощо. Для досягнення цілей уніфікації доцільно використовувати, залежно від конкретних обставин, весь наявний «арсенал» уніфікації, а в необхідних випадках — різні її форми, способи тощо можливо використовувати у поєднанні.

Ключові слова: міжнародне приватне право, уніфікація права, міжнародно-договірна уніфікація, регіональна уніфікація, ненормативна уніфікація.

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УНИФИКАЦИЯ МЕЖДУНАРОДНОГО ЧАСТНОГО ПРАВА: АКТУАЛЬНЫЕ ВОПРОСЫ

Резюме

Общий обзор современных проблем унификации международного частного права позволяет прийти к заключению, что унификация, в разных ее проявлениях, способах и формах, была и остается закономерной тенденцией развития международного частного права. Во многом факторы политического и экономического характера влияют на динамику тех или иных форм унификации. Развитие и укрепление таких принципов частного права, как автономия воли сторон, свобода договора, а также изменение количества и качества разного рода правоотношений между субъектами разнонациональных правовых систем, интеграционных объединений (например, ЕС) привели к переосмыслению традиционных форм унификации и выработке альтернативной, ненормативной, унификации, а также новых способов и приемов, таких как: диффузия права, экспорт права, трансплантация норм права и т. д. Для достижения целей унификации целесообразно использовать, в зависимости от конкретных обстоятельств, весь имеющийся «арсенал» унификации, а в необходимых случаях — использовать сочетание разных ее форм, способов и т. д.

Ключевые слова: международное частное право, унификация права, международно-договорная унификация, региональная унификация, ненормативная унификация.

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GENOCIDE AS AN INTERNATIONAL CRIME AND PROBLEMS OF ITS RECOGNITION

The article is dedicated to the issue of the role of genocide in international law. The authors study the problems of recognizing the genocide as international crime. They consider different scientific approaches to meaning of genocide in international law: from the classic understanding of it, its appearance as a crime to becoming a disputable issue in its recognition based on examples from the XX century.

Moreover, in the paper some international tribunals' activity is considered. The conventions' classification in the context of international law is also done.

Key words: genocide, recognition, politicide, Genocide Convention, Pan-Armenian Declaration.

Problem statement. The issue of genocide as an international crime has been a topic one from the beginning of the XX century. Genocides are committing even nowadays in the XXI century. The problems of its recognition and condemnation become more and more disputable.

Analysis of recent researches and publications. The works of many famous scientists and specialists in the sphere of international law are dedicated to different aspects of genocide as an international crime. There are the dissertation of Avanesyan V. V., the article of Matveeva N. V., Barsegov Yu.G. In the article also are used the Convention on the Prevention and Punishment of the Crime of Genocide adopted by UN and the Pan-Armenian Declaration on the Genocide Centennial.

Paper purpose. Given the before-mentioned reasoning the purpose of the article is to determine the genocide as an international crime and identify the problems of its recognition on the example of the Armenian Genocide in the Ottoman Empire in 1915.

Paper main body. Today the genocide is one of the contentious issues in international law. As a crime, genocide appeared since ancient times, but more extended it became in the XX century. Crimes of this century are the next: the Armenian Genocide in Ottoman Empire in 1915, the genocide of the Slavic population and the Jews during World War II, committed by Nazi Germany,

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the genocide of Hutu and Tutsi tribes in Rwanda and Bengal in the 1960s, the genocide of the Hindu population in East Bengal in 1971, the genocide in the 1990s in Yugoslavia and Rwanda, at the beginning of the XXI century in Darfur (Sudan), the Democratic Republic of the Congo, the Central African Republic.

The urgency of the struggle against genocide in the modern world is so great that the UN Secretary General in the framework of the organization in 2004 introduced the post of Special Adviser on the Prevention of Genocide. Many states have established specialized research institutions. For example, in Canada, in 1994, the International Association of Scientists Dealing with the Crime of Genocide was founded, which, together with the International Institute for Genocide Studies and Human Rights since 2006, publishes the academic journal «Genocide Research and Prevention»; in the United Kingdom in 2000 an international center for scientific study of genocide *Aegis* was opened; at the National Press Club of USA in 2007 was established «Task Force on the Prevention of Genocide» by former US Secretary of State Madeleine Albright and former Secretary of Defense William Cohen. The subject of problems associated with the crime of genocide becomes more urgent today, that's why on July 1, 2002 the International Criminal Court was established *inter alia* for judicial investigation of crimes of genocide.

The term «genocide» was introduced into circulation in 1944 by Polish lawyer of Jewish descent Raphael Lemkin, who proposed to declare the action aimed at the liquidation and the destruction of racial, ethnic, religious and social communities, as a barbaric crime in the international law. The term «genocide» is derived from the fusion of the Greek words γένος — race or tribe, and the Latin, *caedo* — killing [3]. Though the term «genocide» came into circulation after the completion of the physical annihilation of the Armenian people in the whole western part of Eastern Armenia, in fact, both terms and the determination of the composition of the crime are closely connected with the Armenian genocide. The Armenian Genocide was the first time in history qualified *expressis verbis* as a crime against humanity in the Declaration of the Principal Allied Powers of 24 May, 1915 [5].

In a special report to the Fifth Conference on the Standardization of International Criminal Law, held in Madrid on October 1933 Lemkin made a proposal to declare actions aimed at the destruction of racial, religious or social groups, barbaric crime under international law — *delicta juris gentium*. The only large-scale crime that Lemkin could mention in 1933 was the Armenian Genocide as the real basis of his proposed definition, and which contained the offense of genocide. Nazis coming to power forced to recall the bloody deeds of their forerunners — the Young Turks. It became obvious that if humanity does not make proper conclusions and take the necessary preventive measures for the Armenian Genocide, new acts of genocide would be followed.

The first document with international character, which uses the term «genocide» was an indictment of October 18, 1945 against the major German war criminals brought before the Nuremberg Military Tribunal, but it used

the term post factum. Neither in the Charter of the International Military Tribunal for the trial of the major war criminals of the European Axis Powers or in its judgment on October 1, 1946 the word «genocide» does contain.

Thus, the Charter of the International Military Tribunal, which judged major war criminals in Germany and acts of genocide committed by them against the Jews and the Slavic population of the occupied countries of Eastern Europe, in the list of crimes subject to the jurisdiction of the Tribunal has not yet applied the term of genocide, although it has meant this offense: item «C» of Article 6 refers to «murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds…» [5].

Determining the validity of the actions' qualification covered by the composition of the offense on the basis of a formal recognition, the possibility of such qualification would not only limit the acts of genocide committed after the adoption of Genocide Convention, but by the range of the signatory states which have ratified it. Legal and political absurdity of such an assumption is obvious. So, the question about the term and related question of the legal qualification of the genocide acts committed before the adoption of the Convention or committed after its adoption by states, which are not signed or ratified the convention becomes very essential.

December 9, 1948 the United Nations General Assembly adopted the «The Convention on the Prevention and Punishment of the Crime of Genocide», according to which genocide was considered as an international crime.

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: 1) killing members of the group; 2) causing serious bodily or mental harm to members of the group; 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; 4) imposing measures intended to prevent births within the group; 5) forcibly transferring children of the group to another group [1].

Countries that have signed the Convention oblige to prevent genocide and punish for committing it. According to Article III of the Convention the following acts shall be punishable: 1) genocide; 2) conspiracy to commit genocide; 3) direct and public incitement to commit genocide; 4) attempt to commit genocide; 5) complicity in genocide.

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. According to Article IX disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute [1].

The UN Convention does not consider as the fact of genocide the killings of political groups. Renowned sociologist, an expert on the history of geno-

cides Leo Cooper believes that in today's world, political differences are as much a cause for looting and destruction, as well as racial, national, ethnic or religious differences. In addition to the convention well-known scientists Ted Gur and Barbara Harf coined the term «politicide». Politicide or political assassination is determined by the premeditated and massive destruction of the nation, the people or the political, social, military, cultural and scientific figures from committing genocide.

April 24, 1915 considered as the day of the extermination of nearly a thousand representatives of the Armenian intelligentsia and subsequently the number of victims reaches the million and a half Armenians from two million in Ottoman Empire. There are a lot of proofs of this act which is denied by Turkish government. The citations of some prominent international law scientists and historians could be a good illustration of this thesis. For example, the Swiss newspaper «Bazler Nachrichten» characterized the actions of the Turkish government as «planned», «destruction of an entire people», carried out by «vile and brutal destruction of the system» [4]. Jacques de Morgan, French scientist said in 1917: «The deportations of Western Armenians have nothing more than a veiled destruction of the people. There are no words to describe the horror» [3, p. 377]. Another German scientist Joseph Marquart: «Even after the proclamation of the Constitution the main slogan of the Turkish policy remains: when Armenians will be exterminated, there will be no Armenian question» [3, p. 377].

Why does the Republic of Turkey refuse to recognize the genocide of Armenians in Ottoman Empire in 1915? The issue of responsibility for a crime encourages Turkey to fiercely resisting the recognition of the Armenian genocide. Firstly, the Republic of Turkey does not want to be responsible for the acts of their ancestors, and secondly, the recognition means political defeat and the obligation to carry both political and financial responsibility. Turkey refuses to recognize the Armenian Genocide, citing the fact that this massacre occurred during the hostilities of World War I and was not carrying a purposeful anti-Armenian nature.

The official campaign of Armenian Genocide denial by Turkey has escalated on the 100th anniversary of the Armenian Genocide. The Turkish State mobilizes all opportunities, spends huge resources and traditional means of political pressure on the government and bribery media widely resorts to paid services of professional lobbying organizations. There are many documents confirming the Armenian Genocide in the Ottoman Empire, but Turkish government twice cleaned the archives with documents on the Armenian Genocide in 1919 and the 90-ies of XX century. In order to destroy traces of Armenians in Turkey, the country systematically destroyed the monuments of Armenian architecture. The most recent evidence of anti-Armenian position is that Turkey has recalled its ambassador to Austria in 2015 after the Austrian parliament adopted a declaration recognizing the Armenian Genocide in the Ottoman Empire.

At the same time, foreign policy support of the state policy on denial of the crime is a subject of concern of the Turkish government. Just as it was in the

late XIX and throughout the XX centuries, Turkey prevents the resolution of the Armenian issue, based on the political support of some of the great powers. Despite the radical change in the situation in the world, the USA is still assign the role of Turkey as one of its main military partners, despite the fact that 45 of the 50 states recognize the Armenian Genocide and declare April, 24 the Day of Remembrance of the Victims of the Armenian Genocide.

The Republic of Armenia, in turn, continues to fight for recognition and on January 29, 2015 it adopted the Pan-Armenian Declaration on the Genocide centennial, in which the Republic of Armenia and Armenians: condemns the illegal blockade of the Republic of Armenia imposed by the Republic of Turkey, its anti-Armenian stance in international area and the imposition of preconditions in the normalization of interstate relations, considering this a consequence of the continued impunity of the Armenian Genocide, Meds Yeghern; calls upon the Republic of Turkey to recognize and condemn the Armenian Genocide committed by the Ottoman Empire, and to face its own history and memory through commemorating the victims of that heinous crime against humanity and renouncing the policy of falsification, denialism and banalizations of this indisputable fact. Armenia also supports those parts of Turkish civil society whose representatives nowadays dare to speak out against the official position of the authorities; appeals to UN member states, international organizations, all people of good will, regardless of their ethnic origin and religious affiliation, to unite their efforts aimed at restoring historical justice and paying tribute to the memory of the victims of the Armenian Genocide; expresses gratitude to those states and international, religious and nongovernmental organizations that had political courage to recognize and condemn the Armenian Genocide as a heinous crime against humanity and even today continue to undertake legal measures to that end, also preventing the dangerous manifestations of denials; expresses the hope that recognition and condemnation of the Armenian Genocide by Turkey will serve as a starting point for the historical reconciliation of the Armenian and Turkish peoples [2].

Conclusions. To conclude the article we would like to emphasize that in the point of view of many international law scientists and experts the Armenian Genocide is fully consistent with the composition of an international crime. Some states act as the protectors and successors to this crime, trying to relieve the responsibility for the genocide of the Armenians of the Turkish state. Unable to hide objective and generally known facts or considerations justifying this action by «national security» and «the right of self-preservation», which clearly and unequivocally rejected by international law, they are trying to hide behind «legal» arguments of a purely formal nature. Due to that, they argued that the Turkish state could not commit the crime of genocide, as this concept came later and its punishable was established only with the entry into force in 1955 the Genocide Convention.

Denying the validity of the qualification of the physical destruction of the Armenian population by the Turkish state in 1878–1923 as the crime of genocide, they deny the legitimacy of such qualification and for all other cases of

mass destruction of national groups committed before the date of entry into force of this convention, including the historical fact of the destruction by Nazi Germany of 12 million people of Slavic and Jewish origin. This approach is refuted as by the Nuremberg and other trials of Nazi war criminals as by the Convention itself.

Those rules of international law that have been applied in evaluating the actions of Nazi Germany against the Jews and the Slavic population of Eastern Europe are also applicable to the assessment of identical content actions of the Turkish state against the Armenians. This is confirmed not only by logical reasoning, but also by specific international legal instruments, directly and indirectly related to the Armenian Genocide. The crime of genocide is not just a complex that violates human rights, it encroaches on the sphere of human security as a whole: to life, physical health, mental health, human genetics, reproductive ability, intelligence, spirituality. The fact of the Armenian Genocide by the Ottoman government is justified, recognized and confirmed by eyewitness accounts, laws, resolutions and decisions of various countries and international organizations. Turkey as the successor of the Ottoman Empire is responsible for the material and territorial damage caused of Armenians' genocide. A compromise is possible only after Turkey recognizes the Armenian Genocide in the development and adoption of specific measures to address the effects of the crime on the basis of a package of political and legal decisions on the whole range of the Armenian-Turkish relations.

References

1. Convention on Prevention and Punishment of the Crime of the Genocide [Electronic resource] : Adopted by the General Assembly of United Nations on 9 December 1948. — Access mode: www.treaties.un.org/doc/Publication/UNTS/Volume %2078/volume-78-I-1021-English.pdf. — Title from the screen.
2. Pan-Armenian Declaration on the Genocide Centennial [Electronic resource] : Adopted by The State Commission on the Coordination of Events Dedicated to the 100th Anniversary of the Armenian Genocide on 25 January 2015. — Access mode: www.armeniangenocide100.org/files/uploads/2015/02/declaration-eng.pdf. — Title from the screen.
3. Dadrian V. N. The History of the Armenian Genocide: Review of the Armenian Genocide in a Comparative Perspective [Electronic resource] : Vahakn Dadrian. — Access mode: http://www.armeniansgenocide.am/images/menus/176/The %20history %20of %20Armenian %20Genocide.pdf. — Title from the screen.
4. Аванесян В. В. Геноцид: криминологическое исследование [Электронный ресурс] / В. В. Аванесян. — Режим доступа: http://www.dissercat.com/content/genotsid-kriminologicheskoe-issledovanie. — Название с экрана.
5. Матвеева Н. В. Проблема ответственности за геноцид в изучении истории российских немцев [Электронный ресурс] / Н. В. Матвеева. — Режим доступа: www.cyberleninka.ru/article/n/problema-otvetstvennosti-za-genotsid-v-izuchenii-istorii-rossiyskih-nemtsev. — Название с экрана.

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ГЕНОЦИД ЯК МІЖНАРОДНИЙ ЗЛОЧИН І ПРОБЛЕМИ ЙОГО ВИЗНАННЯ

Резюме

У статті розглянуто питання про геноцид як міжнародний злочин, досліджено проблему визнання геноциду як міжнародного злочину. Особлива увага приділяється аналізу різних наукових підходів до визначення поняття «геноцид» у міжнародному праві та розгляду спірних питань його визнання на основі прикладів з XX ст.

Крім того, в роботі розглядається діяльність деяких міжнародних трибуналів. Акцентується увага на окремих статтях конвенцій і декларацій.

Ключові слова: геноцид, визнання, політицид, Конвенція про геноцид, Всевірменська декларація.

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ГЕНОЦИД КАК МЕЖДУНАРОДНОЕ ПРЕСТУПЛЕНИЕ И ПРОБЛЕМЫ ЕГО ПРИЗНАНИЯ

Резюме

В статье рассмотрен вопрос о геноциде как международном преступлении, исследована проблема признания геноцида международным преступлением. Особое внимание уделяется анализу различных научных подходов к определению понятия «геноцид» в международном праве и рассмотрению спорных вопросов его признания на основании примеров из XX ст.

Кроме того, в работе рассматривается деятельность некоторых международных трибуналов. Акцентируется внимание на отдельных статьях конвенций и деклараций.

Ключевые слова: геноцид, признание, политицид, Конвенция о геноциде, Всеармянская декларация.

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LEGAL STATUS OF TEMPORARILY OCCUPIED TERRITORIES IN ACCORDANCE WITH INTERNATIONAL LAW

The article is dedicated to the issue of occupied territories. The authors study the evolution of the international law and how conventions and rules on occupied territories were adopted. The article contains extracts from conventions and protocols, which help to understand the phenomenon of occupation.

Key words: international humanitarian law, occupied territories, military occupation, status of occupied territories.

Problem statement. The evolution of the concept of occupation, the rules attached to it and the development of international law in general reflects all of the changes that were made in the track of historical events. Attempts have been made from the 18th century by international law to distinguish the difference between military occupation and territorial acquisition of a country. A clear distinction has since been established among the principles of international law after the end of the Napoleonic wars in the 19th century. These customary laws of belligerent occupation which evolved as part of the laws of war gave some protection to the population under military occupation of a belligerent power.

Analysis of recent researches and publications. Modern literature pays much attention to the problems of the occupation. We would like to mention the works of B. Clarke, O. Ben-Naftali, A. M. Gross, K. Michaeli, A. Wyrozumska. Nevertheless, there remain a number of unsolved problems and unsettled questions.

Paper purpose. The aim of this work is to define the notions of temporary occupied territories, determine the status of these territories and to respond to the following questions: what is the law of occupation, when does the law of occupation start to apply and what are the most important principles of governing occupation.

Paper main body. Firstly, we would like to provide a list of documents and normative acts that contain rules relating to military occupation: the Hague

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Convention of 1907 further clarified and supplemented these customary laws, specifically within «Laws and Customs of War on Land» (Hague IV); October 18, 1907: «Section III Military Authority over the Territory of the Hostile State.»; the Fourth Geneva Convention in particular — Section III: Occupied territories; Protocol I, which was adopted in 1977 as an amendment protocol to the Geneva Conventions relating to the protection of victims of international conflicts, defined as «armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes»; doctrinal sources of judicial decisions (derived primarily from the International Committee of the Red Cross (hereinafter — ICRC)).

Articles 42 and 43 of the third section of the Hague Convention state that «*territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country*» [2]

The regulations of the second article of the Fourth Geneva Convention, which took place in 1949, apply to any territory occupied during international hostilities. They also apply in situations where the occupation of a state territory is met with no armed resistance. The legality of any particular occupation is regulated by the UN Charter and the law known as *jus ad bellum*. The law of occupation is applied once a situation which factually amounts to an occupation takes place — whether or not the occupation is considered lawful.

Therefore, for law of occupation to become applicable, there is no factual difference whether an occupation has received an approval of the Security Council, what its initial aim is, or indeed whether it is labelled an «invasion», «liberation», «administration» or «occupation». As the law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the grounds that determine its application.

We argue that the legality of the phenomenon of occupation, as it relates to the function of managing the situation, is to be measured in relation to three fundamental legal principles: (a) sovereignty and title in an occupied territory are not vested in the occupying power. The roots of this principle emanate from the principle of the inalienability of sovereignty through actual or threatened use of force. Under contemporary international law, and in view of the principle of self-determination, sovereignty is vested in the population under occupation; (b) the occupying power is entrusted with the management of public order and civil life in the territory under control. In view of the principle of self-determination, the people under occupation are the beneficiaries of this trust. The dispossession and subjugation of these people violate this trust; (c) occupation is temporary. It may be neither permanent nor indefinite [3, p. 554– 555].

We further argue that the legality of occupation, in its function to create an orderly space that is nevertheless distinct from the normal political order

of sovereign equality between states, is to be measured by its exceptionality: once the boundaries between the normal order (i.e., sovereign equality between states) and the exception (i.e., occupation) are blurred, an occupation becomes illegal. The nexus between the two functions is clear: an occupation that is illegal from the perspective of managing an otherwise chaotic situation is also illegal in that it obfuscates the distinction between the rule and its exception. Yet, the distinction between these two forms of illegality is important; the former is grounded in the intrinsic principles of the law of occupation, while the latter is extrinsic to this law and delineates its limits [3, p. 556].

A clear distinction should be drawn between occupation and acquisition of a territory. Acquisition or invasion requires complete subordination on behalf of the vanquished conqueror, which is then followed by the end of the military conflict and the cessation of sovereignty of the defeated state and the elimination of its legal institutions. Occupation, contrary to the above, is characterized by the preservation of power structures of the defeated state (even in exile) and the continuation of resistance and military operations against the occupying state. The rules relating to the occupation do not apply to acquisition (invasion). Therefore, if the occupation of the enemy's territory is followed by complete and unconditional surrender and then by complete subjugation of the territory, the demise of the national military structures and the government, as well as the cessation of all forms of struggle against the occupational regime change, and the right of occupation is no longer applicable [4].

However, modern international humanitarian law is based around the principle that the occupational law cannot be applied exclusively in cases where occupation is a result of resistance against the aggressor. This thesis, in particular, was adopted as one of the decisions of the Nuremberg Tribunal. Responding to the argument put forward by the defendant, it was claimed that the German Reich was not bound by the law of military occupation (in regard to the territories captured by Germany). The Court ruled that the doctrine of conquest does not apply to the notion of aggressive war. «According to the Tribunal, there is no need to decide whether the doctrine applies to occupation… where occupation is a result of war or aggression.» Therefore if an occupation of a territory or part of it is preceded by war of aggression, it is not recognized by international law, since it opposes *ius contra bellum.*

The rules of international humanitarian law relevant to occupied territories become applicable whenever the territory comes under the effective control of hostile foreign armed forces, even if the occupation meets no armed resistance and there is no fighting [4].

The question of «control» calls up to at least two different interpretations. It could be taken to mean that a situation of occupation exists whenever a party to a conflict exercises some level of authority or control within a foreign territory. So, for example, advancing troops could be considered bound by the law of occupation within the initial phase of invasion of hostilities. This is the approach suggested in the ICRC's Commentary to the Fourth Geneva Convention (1958).

An alternative and more restrictive approach would be to say that a situation of occupation exists only once a party of the conflict is in a position to exercise sufficient authority over enemy territory to enable it to discharge all of the duties imposed by the law of occupation. This approach is adopted by a number of military manuals [4].

The main principle of international humanitarian law of military occupation is protection of those who are deprived of assistance from their own state. In this regard three basic legal issues exist.

An issue exists between international and municipal law (with municipal law being the law of at least two states– the occupied and the occupying) due to this institute being a part of international law.

A «mobility» problem lies in a situation where an occupational regime may be established or terminated in space and time depending on the course of unfolding events. In other words, due to rapidly changing circumstances, occupational law needs to be justified every time it is applied to a particular territory in a particular period of time.

There is also difficulty in applying law of military occupation. There is a huge amount of specific situations and unsettled single issues. Conventional rules of international humanitarian law are difficult to apply to certain contemporary circumstances — unknown at the time of the adoption of the convention. Moreover, economic and political relations present at the beginning of the twentieth century and at the time of the Hague Convention «Laws and Customs of War on Land», were absolutely different from ones present currently. An obvious fact, of course, is that literal interpretation and application of the convention is hardly practicable in present circumstances. The question, however, remains: how far may a ruler of a court or any other enforcement authority derogate from the acts of the convention?

Much of the Fourth Geneva Convention is relevant to protected persons in occupied territories and Section III «Occupied territories» is a section which specifically covers the issue. The following is stated: *protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.* [5]

Article 49 prohibits the forced mass movement of people out of or into the occupied state's territory. *Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.... The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.* [5]

The domestic law of occupying powers constitutes another source of legal obligations for occupying forces. Where there are a number of powers exercising control over adjoining geographical regions of occupied territory, differing domestic laws of the respective occupiers will create separate and distinct

obligations for each occupier. This may have a significant impact upon the overall administration of the occupied territory by creating different norms in different zones of occupation. For example, occupying troops from different states may be operating under different rules of engagement. Rules of engagement set out the permissible methods for conducting military operations, and reflect the obligations of the relevant state under both customary and treaty law. Whilst not laws in themselves, rules of engagement enunciate the legal obligations of the respective military forces.

One consequence of having occupation forces operating under different rules of engagement may be that procedures for dealing with crimes allegedly committed by soldiers from different states may vary significantly depending upon the nationality of the soldier under investigation. The domestic laws of the occupied territory itself constitute another applicable source of law. Municipal laws remain on foot during a military occupation unless suspended or repealed by the occupying powers. The occupier's discretion to repeal or suspend laws of the occupied territory can only be exercised in a narrow set of circumstances. They include the removal of a local law that: (1) violates fundamental human rights, (2) is inconsistent with the effective administration of justice, (3) is inconsistent with the maintenance of law and order or (4) is an obstacle to the application of the 4th Geneva Convention itself. Most domestic laws do not fall fowl of the above criteria, and therefore escape repeal or suspension during a military occupation. Finite resources and the desire to maintain the status quo are factors that influence occupying powers to maintain most existing laws. Clearly, minimal disruption to civil society is promoted by non-interference with local laws, and this in turn furthers the public order and security objectives of the occupying forces.

Occupying forces (like other persons present in occupied territory) are technically bound by local laws. None of the applicable treaties on occupation confer immunity on occupying forces from the jurisdiction of local courts. However occupying powers generally consider themselves to have such immunity. [1]

Protocol I (1977) («Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts») has additional articles that cover military occupation, but a great deal of countries, including the U. S., are not signatory to this additional protocol.

In the situation of a territorial cession as the result of war, the specification of a «receiving country» in the peace treaty merely means that the country in question is authorized by the international community to establish civil government in the territory. The military government of the principal occupying power will continue past the point in time when the peace treaty comes into force, until it is legally supplanted.

In most wars some territory is placed under the authority of the hostile army. Most military occupations end with the cessation of hostilities. In some cases the occupied territory is returned while in other cases the land remains under the control of the occupying power but usually not as a militarily oc-

cupied territory. Occasionally the status of presences is disputed by a party to the situation. Military occupation is usually a temporary phase, preceding either the restitution of the territory, or its annexation.

Conclusions. To sum everything up, the phenomenon of occupation is defined as the effective provisional control of a certain ruling power over a territory which is not under the formal sovereignty of that entity, without the volition of the actual sovereign. It is considered to be such according to the specificities of international law in regards to the notions of law of occupation. It should be noted that the qualification of the occupation as «illegal,» while it does not affect the continued application of both humanitarian and human rights law so as to avoid a legal vacuum and to offer protection to the occupied population so long as the illegal situation persists.

References

1. Clarke B. Military Occupation and the Rule of Law: The Legal Obligations of Occupying Forces in Iraq [Electronic resource] / B. Clarke. — Access mode: http://www.austlii.edu.au/au/journals/MurUEJL/2005/8.html (date of reference 23.05.15). — Title from the screen.
2. Laws and Customs of War on Land [Electronic resource] : Adopted by The High Contracting Parties on 18 October 1907. — Access mode: http://avalon.law.yale.edu/20th_century/hague04.asp#art41 (date of reference 17.05.15). — Title from the screen.
3. Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli. Illegal Occupation: Framing the Occupied Palestinian Territory [Text] / Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli // Berkeley Journal of International Law. — 2005. — Vol. 23. — Issue 3. — P. 551–614.
4. Occupation and International Humanitarian Law: Questions and Answers [Electronic resource] : International Committee of the Red Cross on 04 August 2004. — Access mode: https://www.icrc.org/eng/resources/documents/misc/634kfc.htm (date of reference 17.05.15). — Title from the screen.
5. The Fourth Geneva Convention [Electronic resource] : Adopted by International Committee of the Red Cross on 12 August 1949. — Access mode: https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/380 (date of reference 17.05.15). — Title from the screen.
6. Wyrozumska A. The Opinion by the Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland [Electronic resource] / A. Wyrozumska. — Access mode: http://www.msz.gov.pl/resource/d93bc452-c276–4f5a-8551-a04464c6b202:JCR (date of reference 17.05.15). — Title from the screen.

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ПРАВОВИЙ СТАТУС ТИМЧАСОВО ОКУПОВАНИХ ТЕРИТОРІЙ ІЗ ТОЧКИ ЗОРУ МІЖНАРОДНОГО ПРАВА

Резюме
Стаття присвячується праву військової окупації — інституту міжнародного гуманітарного права. Автори дають визначення даному феномену, досліджують питання про його джерела в міжнародному праві і правові наслідки окупації. Вони розглядають правовий режим, який впроваджується на території під час окупації.

Крім того, у статті містяться витяги з міжнародних конвенцій, що дозволяє визначити ступінь їх відповідності сучасним тенденціям розвитку цього міжнародно-правового інституту.

Ключові слова: міжнародне гуманітарне право, окуповані території, військова окупація, статус тимчасово окупованих територій.

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ПРАВОВОЙ СТАТУС ВРЕМЕННО ОККУПИРОВАННЫХ ТЕРРИТОРИЙ С ТОЧКИ ЗРЕНИЯ МЕЖДУНАРОДНОГО ПРАВА

Резюме
Статья посвящается праву военной оккупации — институту международного гуманитарного права. Авторы дают определение данному феномену, исследуют вопросы о его источниках в международном праве и правовых последствиях оккупации. Они рассматривают правовой режим, который вводится на территории во время оккупации.

Кроме того, в статье содержатся извлечения из международных конвенций, что позволяет определить степень их соответствия современным тенденциям развития данного международно-правового института.

Ключевые слова: международное гуманитарное право, оккупированные территории, военная оккупация, статус временно оккупированных территорий.

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RESPONSIBILITY TO PROTECT IN THE CONTEXT OF OPPOSITION TO VIOLATION OF HUMAN RIGHTS

The issues of the responsibility to protect and humanitarian intervention were investigated in this article. The authors also considered the evolution of the conceptions and studied the transformations of responsibilities of human rights violations. The main perspectives and different approaches also were investigated.

Key words: responsibility to protect, RtoP, R2P, humanitarian intervention, state sovereignty, human rights violation.

Problem statement. The issue of responsibility to protect has always been a topic one of the most controversial and ambiguous. The lack of the investigation of this issue is quite perceptible. The doctrine of the responsibility to protect has its new view on the state sovereignty. Thus, it causes many discussions in the scientific world. Let us quote Monica Serrano, the director of the Global Centre for the Responsibility to Protect: «While critics have claimed that the Responsibility to Protect (hereinafter — R2P) is a North-South polarizing issue and is therefore controversial, this is a deliberate misrepresentation in a rhetorical war led by a small minority of UN member states» **[6]**.

Analysis of recent researches and publications. The works of many famous scientists and specialists in the sphere of responsibility to protect are dedicated to different aspects of this issue. They are James Pattison, Monica Serrano, Roger Cohen, Francis M. Deng, and others. One should mention that the lack of the investigations among the Ukrainian scientists is perceptible. But, nevertheless, there are researchers which should be named: L. Aleksidze, V. Denisov, G. Tunkin, Yu. Chaykovskyy and others.

Paper purpose. The goals of the article are: to define a place of the responsibility to protect doctrine in international community's means for the prevention and acting in a case of the large-scale human rights violations; to analyse the peculiarities and main rules under which the responsibility to protect is undertaking; to retrace the evolution of this conception; to try to predict the main perspectives in the international law, referring to the given doctrine.

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Paper main body. The topicality of this subject is determined by the modern international relations, the more interdependent contacts among the world-wide authorities. One of the main aims of the United Nations is to maintain peacekeeping all around the world, but what be done in the case, when state sovereignty is used to cover the large-scale human rights violations. Article 2 of the Charter of the United Nations states: «All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations». This can be regarded as not as an absolute ban for weapon usage. What if the military ways of resolve the problem are used not against the territorial integrity or political independence of a state, but for a human rights protecting, in accordance with the Purposes of the United Nations [2]?

The conception of responsibility to protect («RtoP» or «R2P' terms are also used) shifted from the idea of state rights to intervene towards the conception of the right of suffering people to survive. Nevertheless, the humanitarian interventions were also often used by the third persons for their own goals. Thus, there is a threat that R2P could be just a new tool of neo-imperial interests. Scientists around the world are still investigating the question of the main differences and the essence of these two terms — «responsibility to protect» and «humanitarian intervention». J. Pattison states that: «…it is important to reiterate that (a) humanitarian intervention is only one part of the doctrine of the responsibility to protect, but that (b) it is a part of the responsibility to protect». He also suggests that humanitarian intervention is both broader and narrower than RtoP. On the other hand, humanitarian intervention broader because of the possibility of the usage in the case of the Security Council approved [4].

On the other hand, the doctrine of R2P includes more elements than just the military intervention. The report of the International Commission on Intervention and State Sovereignty (hereinafter — the ICISS) presented in December 2001 states: «The responsibility to protect embraces three specific responsibilities: (a) the responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk; (b) the responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention; (c) the responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert» [7].

Kofi Annan's, former UN Secretary General, rose the problem of the actions of the international community in a case of the large-scale human rights violations at the United Nations General Assembly first time in 1999. He expressed the idea of the limits of the state sovereignty and the international community responsibility in the report «We the Peoples: the Role of the United Nations in the Twenty First Century» during the Millennium Assembly of

the United Nations: «…if humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violations of human rights? » [8]

James Pattison in his work «Humanitarian Intervention and the Responsibility to Protect» gives very clear meaning of the sovereignty: «… the principle of sovereignty emphasizes a state's freedom from external interference, so that it can pursue whatever policies it likes within its own boundaries. Although this notion of sovereignty as authority seemed to provide a legal and normative barrier that weaker states could use to fend off the interference of larger states, it presented the leaders of certain states with what was essentially a free hand to violate their citizens' human rights with impunity» [4].

But the modern international law tends to place the human rights in the first place in the security policy of the international community, while the role of state sovereignty looks like forgotten.

In the response of the Kofi Annan's question, the government of Canada in 2000 established the International Commission on Intervention and State Sovereignty. R2P was clarified by the 2001 Report of the ICISS. The responsibility to protect means that a state has a responsibility to protect its people against massive human rights violations, such as starvation, mass murder and rape. If a state is unable to handle a situation, the international community ought to guard the people from the sufferings [5].

All UN Members States in 2005 embraced R2P and issued «2005 World Summit outcome document». J. Pattison states that this agreement was a watershed moment for humanitarian intervention. The adaptation of the principle in Paragraph 139 defines that: «The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means … to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity». But in a case if the peaceful means would be inadequate, the international community can exercise the collective actions through the Security Council [1].

Based on the previous document, Ban Ki-moon, Secretary General, issued «Implementing the Responsibility to Protect» in 2009, which determined three pillars of the responsibility to protect: «Each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity». The second pillar includes the commitment of states to assist the willing, but weak states to exercise their responsibility to protect. The third one refers to the failed or unwilling states to protect their population [3].

The report «The Role of Regional and Sub-Regional Arrangements» in 2011 also discussed some key issues of the problem. The report deals with the main questions of the cooperation of the regional and sub-regional organizations and the international community in the sphere of the responsibilities, stated in the 2009 Secretary General's report. The regional and sub-regional organizations can contribute to the state governments by: connecting global standards to local and national action; responding to the spillover effects of

national crises; training and awareness-raising programs around conflict prevention; encouraging governments to fulfill obligations; establishing regional norms; identifying and resolving existing conflicts with early and quiet diplomacy; promoting international and regional justice, etc [3].

In the sphere of the international assistance to member states (the essence of the second pillar) given organizations contribute: facilitating security sector reform and strengthening of the rule of law; sharing information and building capacity for crisis analysis; developing regional military and civilian capacity, etc [3].

According to the third pillar (responding to mass atrocity prevention and protection) the regional and sub-regional arrangements can contribute by: timely sharing of information and preventing incitement in collaboration; adding criteria to mass atrocities to regional and sub-regional organization membership; peacekeeping and military assets; local and national cooperation with the International Criminal Court, etc [3].

R2P reminds another theory, issued in the 1949 by the Fourth Geneva Convention — the Protection of Civilians (hereinafter — PoC). They both are aimed at the redressing human-induced atrocities. However, PoC is used during the armed conflict situations, while R2P was created for both war and peace times. It must be mentioned that R2P is used for such crimes as: genocide, crimes against humanity, war crimes and ethnic cleansing. The patch was applied to the UN missions, such as in Afghanistan, Central African Republic, Cote d'Ivore, etc [5].

The Security Council's main tools to fight with mass human rights violations include economic, political, transport sanctions, and then, just as an extreme step, military forces might be used. The problem is to define this extreme case, the line between the usage of the non-military tools and the military ones.

There are the main principles to be followed to justify the military intervention for people rights protection. The first thing to be understood is the usage just in case of extraordinary measures. That means that civilians must face large-scale loss of life, actual or anticipated.

Besides, one of the precautionary principles is the «right intention». The main purpose is to stop human suffering. By the way, another thing should be mentioned here: practically the «right intense» could be mixed with special interests of the countries and according to the ICISS report, «supported by regional opinion and the victims concerned» [4].

Military intervention is the «last resort» — that means that it is used in case when all the non-military tools have been exercised and in the state that all the lesser measures would not have succeeded.

Only the «proportional means» should be used. Of course, the magnitude, duration and intensity of reciprocal measures should be commensurate with the source of the problem. Moreover, the military intervention should be aimed at the people security.

And «reasonable prospects» includes: «reasonable chance of success in halting or averting the suffering which has justified the intervention, with

the consequences of action not likely to be worse than the consequences of inaction» [1].

Nevertheless, this mechanism doesn't exclude double standards, caused by the veto-power of five permanent members of the Security Council.

The General Assembly practically couldn't be regarded as a body executing the authority for military intervention. The researchers point out that just the program «Uniting for Peace» includes the idea of General Assembly two thirds majority, which able to make the Security Council to rethink about its position [4].

Sanction for military intervention is issued by the Security Council or regional organization with the Security Council's confirmation. Post-factum authorization would also be exercised.

The Security Council, as one of the main bodies of the UN, can exercise the authority to intervene as collective actions, agreed with the UN. Unilateral intervention can't be regarded as a legal. The matter is in the question of the permanent members' agreement not using their veto-power [4].

In addition, experts also warn that if the realization of «R2P» conception will be successful, the UN statute will face the need of serious changes.

In 2004, the UN Secretary-General appointed the first Special Adviser on the Prevention of Genocide. In 2008 a Special Adviser on the Responsibility to Protect was also appointed. In 2010 Secretary-General established a joint office for genocide prevention and the responsibility to protect. On 12 July 2013, Secretary-General Ban Ki-Moon announced the appointment of Dr. Jennifer Welsh as the new Special Adviser on the Responsibility to Protect.

In practice, the first case of usage of R2P was exercised in 2006 authorizing the deployment of UN peacekeeping troops to Darfur, Sudan. Then it was used in Libya, in Cфte D'Ivoire, Yemen, South Sudan in 2011. There was an attempt to use it towards Syria, but the case faced with Russia-China vetoes [5].

Conclusions. To sum up, it should be mentioned that the responsibility to protect is an attempt of the international community to regard the human rights protection not as an excuse for humanitarian intervention, but as a chance for people to survive. In general, military intervention, which can be called by the Secretary-General or regional organization with the approval of the Secretary General, should be used just in case of the extreme steps, when all the non-military ways had been used. Besides, there are such precautionary principles: right intense, last resort and proportional means.

The world practice of the usage of R2P shows that the development of this conception in spite of the critics finds its place during large-scale human rights violations. However, it should be taken into account that world's states may apply sometimes not altruistic interests at all. Thus, the researchers even express their ideas about the development of the cosmopolitan UN force under the rule of the independent democratic cosmopolitan institutions, the reforms and strengthening of the regional organizations. And the development of the issue and the filling of the gaps in the responsibility to protect doctrine by the highest ranks world leaders are also extremely important.

References

1. 2005 World Summit Outcome [Electronic resource]: Resolution adopted by the General Assembly in 2005. — Access mode: http://www.un.org/womenwatch/ods/A–RES–60–1–E.pdf. — Title from the screen.
2. Charter of the United Nations and Statute of the International Court of Justice [Electronic resource] / Charter of the United Nations and Statute of the International Court of Justice in San Francisco in 1945. — Access mode: https://treaties.un.org/doc/publication/ctc/uncharter.pdf. — Title from the screen.
3. Evans G., Sahnoun M. The Responsibility to Protect [Electronic resource] / Gareth Evans, Mohamed Sahnoun. — Access mode: https://www.foreignaffairs.com/articles/2002–11–01/responsibility–protect. — Title from the screen.
4. Pattison J. The Humanitarian Intervention and the Responsibility to Protect [Text] James Pattison. — New York : Oxford University Press, 2010. — 295 p.
5. Notaras M., Popovski V. The Responsibility to Protect [Electronic resource] / Mark Notaras, Vesselin Popovski. — Access mode: http://unu.edu/publications/articles/responsibility–to–protect–and–the–protection–of–civilians.html. — Title from the screen.
6. Serrano M. The Responsibility to Protect and its Critics: Explaining the Consensus [Electronic resource] / Mynica Serrano. — Access mode: http://yale.edu/polisci/conferences/sovereignty/mserrano.pdf. — Title from the screen.
7. Responsibility to protect [Electronic resource] : the Report of the International Commission on Intervention and State Sovereignty in 2001. — Access mode: http://responsibilitytoprotect.org/ICISS %20Report.pdf. — Title from the screen.
8. We the Peoples: the Role of the United Nations in the Twenty First Century [Electronic resource] : report of the Secretary General during the Millenium Assembly of the United Nations in 2000. — Access mode: http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf. — Title from the screen.

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ОБОВ'ЯЗОК ЗАХИЩАТИ В КОНТЕКСТІ ПРОТИДІЇ ПОРУШЕННЯМ ПРАВ ЛЮДИНИ

Резюме

Статтю присвячено питанню про обов'язок захищати, його еволюції протягом останніх років у сфері міжнародного права. Автори досліджують проблему використання цієї доктрини у випадках масового порушення прав людини. Вони розглядають різні погляди науковців щодо проблеми. Також досліджуються головні елементи та правила, за якими застосовується обов'язок захищати. Більше того, автори визначили головні відмінності між термінами «обов'язок захищати» та «гуманітарна інтервенція». Також розглянуто найбільш поширені ідеї щодо майбутнього концепції.

Ключові слова: обов'язок захищати, відповідальність за захист, гуманітарна інтервенція, державний суверенітет, порушення прав людини.

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ОБЯЗАННОСТЬ ЗАЩИЩАТЬ В КОНТЕКСТЕ ПРОТИВОДЕЙСТВИЯ НАРУШЕНИЯМ ПРАВ ЧЕЛОВЕКА

Резюме

Статья посвящается вопросу об обязанности защищать, ее эволюции на протяжении последних лет в сфере международного права. Авторы исследуют проблему использования этой доктрины в случаях массового нарушения прав человека. Они рассматривают разные взгляды ученых по поводу проблемы. Также исследуются главные элементы и правила, в соответствии которыми применяется обязанность защищать. Более того, авторы определили главные отличия между терминами «обязанность защищать» и «гуманитарная интервенция». Также рассмотрены наиболее распространенные идеи по поводу будущего концепции.

Ключевые слова: обязанность защищать, ответственность за защиту, гуманитарная интервенция, государственный суверенитет, нарушение прав человека.

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TO THE PROBLEM OF FORMATION OF INTERNATIONAL CUSTOM ON PROHIBITING KILLING OF WHALES

The article is dedicated to the problem of formation of international custom on prohibiting killing of whales. The authors study the notions of «international custom» and «persistent objector» in international law and its elements. Also the article analyzes whether the custom is formed as for the prohibition of killing of whales and Japan's attitude to this issue.

Key words: custom, persistent objector, Taiji cove, prohibiting killing of whales, Ric O'Barry's project.

Problem statement. The topicality of the problem is determined primarily by the protection of the surrounding fauna. Over the last 15 years ruthless trapping and killing of dolphins have taken place in Japan in Taiji cove. The Japanese government provides 23,000 permits every year for the killing of dolphins in coastal areas, which occur as the mass slaughter of cetaceans. Besides, this problem affects human rights, as Japanese consumers eat poisoned meat, but the Japanese government has made great efforts to hide it.

Analysis of recent researches and publications. To research that problem the author worked with electronic recourses. And the major role in the work given was played by the film «The Cove» [1]. It presents an ocean conservationist's point of view. The film highlights the fact that the number of dolphins killed in the Taiji dolphin drive hunting is several times greater than the number of whales killed in the Antarctic, and claims that 23,000 dolphins and porpoises are killed in Japan every year by the country's whaling industry. It has drawn controversy over neutrality, secret filming, and its portrayal of the Japanese people. Also the articles of such authors as Gopalakrishnan Manazite [4] and Dmitry Desyaterik [5] are being searched. Their works are widely dedicated to the unformed ban on killing of whales.

Paper purpose. The goals of this work are to determine what the custom is in international law and its elements; to investigate whether the custom is formed on the prohibition of killing whales in international law; if «yes», what elements prevail; to analyze Japan's attitude to this issue; the concep-

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tion of «persistent objector», its role in the formation of the custom; to determine whether that custom should be formed.

Paper main body. To explore this issue, it should be noted that the custom is usually created by a long application in relations between all or some states, but not enshrined in an international treaty; it is a source of law in such cases when relations are not regulated by an international treaty [7]. A necessary condition for the recognition of the international source of law or custom, as it is called, a customary rule of international law, is the recognition of all or some of the states, expressed either in an active form or by abstinence (opinio juris). Customs, which are based on the principles of equality and sovereignty, bind on all countries. Other customs act for the member states which recognized them.

It should be noted that the real evidence of whaling Norwegians come from Scandinavia in the 1000 AD. From the Bay of Biscay whaling spread north along the coast of Europe and to Greenland. In the following century the Danes and later the British began to fish in waters of the Arctic. In the next century whaling also started on the east coast of North America. In the first half of the XIX century, it began in South Africa and the Seychelles [4]. In Japan, this kind of fishing originated in the 1600s and continues today. There is nobody to hinder whalers and complete extermination of entire populations, such as the gray whale.

Only since 1986 the international ban on whaling for commercial purposes, which monitors the execution of the special commission, has started to have effect [3]. The International Whaling Commission (hereinafter — IWC) is the global body charged with the conservation of whales and the management of whaling. The IWC currently has 88 member governments from countries all over the world. All members are signatories in the International Convention for the Regulation of Whaling. This Convention is the legal framework, which established the IWC in 1946.

Uncertainty over whale numbers led to the introduction of a 'moratorium' on commercial whaling in 1986. This remains in place although the Commission continues to set catch limits for aboriginal subsistence whaling [1]. Today, the Commission also works to understand and address a wide range of non-whaling threats to cetaceans including entanglement, ship strike, marine debris, climate change and other environmental concerns. Among all measures of that Commission these are aimed: to complete prohibition of production of certain types of cetaceans; to allocate certain areas of the world ocean as «whale sanctuaries»; to establish quotas for cetaceans; to impose restrictions on the size of harvested whales; to set opening and closing of seasons and areas of whaling; to prohibit production of cubs fed by mother's milk, and female whales with calves.

In addition, it is obligatory to report, including fishing statistics collected during harvesting biological information [3]. The IWC also initiates, coordinates and sponsor research and publishes the results of cetacean research. However, a lot of countries continue to hunt under the scientific programs. Japan has also decided to continue to hunt in a similar way.

In view of the latest data, the fishery gradually has reached its peak, and some countries have taken the appropriate measures, however, Japan avoids ecological catastrophe, and is only pretending.

At the last meeting of the IWC in Japan they brought a number of charges in the largest whaling, where they stated that it was the way they fight pests, which in turn were like people, being the apex of the food chain, absorbing large amounts of fish. Why do they forget that people in this case are «pests»?! For example, the gross world production of the fishery field in the world in January-November 2014 amounted to 21 855.7 million AMD, which is 25.3 % higher than the same figure for 2013 [6]. In this situation, it is simply biological nonsense. It is obvious that the volume of fishing will be reduced, and the reason is people and not someone else.

If the IWC lifts the ban on whaling for commercial purposes, the gap between supporters and opponents of a mining will be deepened. During the discussion at the meeting the organization for the protection of the environment will watch for the monitor closely.

The most ardent supporters of lifting the ban are Iceland, Japan and Norway, which come up with scientific purposes and catch thousands of whales annually. Japan has long made no secret of the fact that all the meat of marine giants, allegedly murdered in the interests of science, gets on the table of the Japanese [1].

In addition, it should be noted that the custom of the ban on commercial whaling on a larger scale began to emerge in the 2000s. For example, the Central Zoo Authority of India (CZA) banned maintenance of dolphins in captivity in their country and declares that the nature of the Dolphins' highly intellectual and sensitive «and should be regarded as» non-human beings [5]. But Japan still produces annually about 20,000 permits for whaling in the small town of Taiji and the same number of dolphins each year during the hunting season from September to May is destroyed or sold to dolphinariums around the world for thousands and millions of dollars.

Besides, this custom ban was also formed primarily due to the following facts: dolphin's meat is considered to be a delicacy in some regions, but for culinary delights, you can pay a lot. On the coast of Taiji, where dolphins are found, there is a high concentration of mercury. According to the study by the Health Sciences University of Hokkaido and Daiichi University's College of Pharmaceutical Studies, the concentration of mercury in the bodies of residents of Taiji is ten times higher than the standard indicators of the country. For example, the mercury concentration with an index of 0.005 % may cause kidney damage [4]. Thanks to this, dolphins' meat was removed from the school lunch program in Taiji and reduced scale catching of dolphins.

For a more detailed consideration of the problem of habit forming to ban whaling should be considered such a concept as a concept of «persistent objector». Each state has the right to declare the non-recognition of one or another of the new rules of customary law. In this case, it will not have legal force for it; it will be a norm «strongly objects» (persistent objector). The non-recognition should be clearly defined and unambiguous. «Objected strongly» does not

accept the norm as a whole, without any reservations and exceptions. In this case, Japan itself is a persistent objector and doesn't intend to make a similar custom, because it believes that the country had formed the custom for a long time which is based on extraction of marine mammals, and more than half of the Japanese believe that it should not be interrupted since the tradition of the imperial system. And the population is in favor of the approval of Prime Minister Shinzo Abe [5]. As it is stated above, the IWC must protect cetaceans in nature, but for some reason, small whales, dolphins and porpoises, are not protected. A former representative of Japan in the organization argued that there had never been an occasion to discuss that some kind is special.

In the world there are many animal protection organizations, but in Japan they, unfortunately, do not work properly. Some groups simply post information about the dolphin captivity issue on their websites for fund-raising purposes.

Richard «Ric» O'Barry is an American first recognized in the 1960s for capturing and training the five dolphins that were used in the well-known TV series Flipper [3]. O'Barry made a radical transition from training dolphins in captivity to assertively combating the captivity industry soon after Kathy, one of the Flipper dolphins, died in his arms. O'Barry believes Kathy committed suicide. He said: «She looked into my eyes and stopped breathing. I released her and she plunged to the bottom of the pool» [2]. This moment is a life trainer turned dolphin activist in zoo-protectioner.

In 1970 he founded the Dolphin Project, a group aimed at the education the public about captivity and, where feasible, free captive dolphins. He was featured in the Academy Award-winning film, «The Cove» (2009), which used covert techniques to expose the yearly dolphin drive hunting that goes on in Taiji, Japan. Also, this work was chronicled in films such as «A Fall from Freedom» and in the Animal Planet mini-series «Blood Dolphins» [3].

As Ric says that there are many organizations in Japan: Green Peace, WWF, and the International Fund for Animal Welfare — and they all share millions of dollars between them. Each year, the biggest whaler restarts its work and organizations remain as they have never existed in principle.

There is one organization that is supposed to protect cetaceans in nature, this is the IWC (International Whaling Commission — the only body that regulates the fishery, which is officially recognized by the UN), but for some reason, small cetaceans are not protected. And according to the Ric O'Barry project the reason for this situation is the fact that customers of the commission have their shares in this business. In Finland, the Japanese use special equipment to lure dolphins [1]. They asked Japan to clarify the situation with this sphere of hunting, to which Japan responded that it's just a matter of local importance, and the IWC does not extend its competence for that.

Never the less, the Taiji dolphin slaughter begins every September. Every year about 20000 dolphins die because of that hunting, they are taken to the dolphinariums, their meet is taken to the restaurants and then consumers of this meat increase the concentration of mercury in their bodies. In April, 2015 Ric O'Barry met with members of the Obama Administration at the

White House to personally deliver over 1 million signatures of petition to end the dolphin slaughter in Taiji and that we'll see, could 2015 be the year of the dolphin [2].

Conclusions. After examining this information, several conclusions must be made. First, following the definition of the word «custom», it is usually created by a long-term application in relations between states, but it is not enshrined in a treaty, and in this case the rule is mandatory for all states only if it is based on principles of equality and sovereignty. Other customs are recognized for its member states, it refers to such practice and the prohibition to kill whales. Today the situation with the marine mammals in the world is getting worse, and inaction of the organizations to protect the rights of animals and developing whaling may lead to environmental disaster. And Japan as a persistent objector inactive in the given situation, and as a country with the most intense whaling, it aggravates. I think this practice should be mandatory for all states with the majority voted for this custom. According to research scientists, particularly dolphins are highly developed and intelligent creatures. And scientists believe that the killing of these mammals at the legal level should be equated with the murder of a man, and it is necessary to protect their rights properly. Alas, the formation of custom ban to kill whales is possible only if all nations agree. Considering the position of the Japanese government, this event will not soon delight rights activists and freedom of marine mammals.

References

1. Psihoyos L., Stevens F., DuPre Pesmen P. Film «The Cove» of 2009 [Electronic resource] / L. Psihoyos, F. Stevens, P. DuPre Pesmen. — Access mode: https://my-hit.org/film/8579/ (reference date: 13.08.2014). — Title from the screen.
2. O'Barry R. Could 2015 be the year of the dolphin [Electronic resource] / R. O'Barry. — Access mode: https://dolphinproject.net/blog/post/could-2015-be-the-year-of-the-dolphin-2/ (reference date: 03.05.2015). — Title from the screen.
3. Баринова А. Япония продолжит охоту на китов [Electronic resource] / А. Баринова. — Access mode: http://www.nat-geo.ru/nature/48341-yaponiya-prodolzhit-okhotu-na-kitov/ (reference date: 17.05.2015) — Title from the screen.
4. Гопалакришнан М. Япония: рыбаки возвращаются в печально известную бухту для ежегодной охоты на дельфинов [Electronic resource] / М. Гопалакришнан [перев.: С. Улямаева]. — Access mode: http://ru.globalvoicesonline.org/2014/02/21/28204/ (reference date: 03.05.2015). — Title from the screen.
5. Десятерик Д. Багровая вода [Electronic resource] / Д. Десятерик. — Access mode: http://www.delfinariy.info/2010/04/blog-post_1381.html#more (reference date: 30.04.2015). — Title from the screen.
6. Производство в сфере рыболовства за январь-ноябрь 2014 г. превысило показатель за тот же период 2013 года [Electronic resource]. — Режим доступа: http://analitikaua.net/2015/proizvodstva-v-sfere-ryibolovstva-za-yanvar-noyabr-2014g-prevyisil-pokazatel-za-tot-zhe-period-2013-goda/. (reference date: 04.05.2015). — Title from the screen.
7. Шаммасова Л. Р. Международно-правовой обычай в современном международном праве [Electronic resource] / Л. Р. Шамасова. — Режим доступа: http://www.dissercat.com/content/mezhdunarodno-pravovoi-obychai-v-sovremennom-mezhdunarodnom-prave (reference date: 16.05.2015). — Title from the screen.

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ДО ПРОБЛЕМИ ФОРМУВАННЯ МІЖНАРОДНО-ПРАВОВОГО ЗВИЧАЮ ПРО ЗАБОРОНУ ВБИВСТВА КИТІВ

Резюме

Стаття присвячена розгляду питання щодо формування міжнародно-правового звичаю, який би забороняв вбивство всіх видів китоподібних. В роботі аналізуються поняття «міжнародний звичай» і «persistent objector», так як заборона вбивства китів тісно пов'язана з міжнародним правом. Японія в даному випадку є державою «persistent objector», що не приймає подібний звичай. Слід зазначити, що в статті досліджується наполеглива робота проекту Ріка О'Баррі, єдиного із захисту морських тварин і риб, який діє на території Японії. Авторки вважають, що формування звичаю про заборону вбивства китів можливо тільки в тому випадку, якщо всі держави дадуть на це згоду, але позиція Японії із цього питання уповільнює зазначений процес.

Ключові слова: міжнародний звичай, persistent objector, бухта Тайцзи, заборона вбивства китів, проект Ріка О'Баррі.

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К ПРОБЛЕМЕ ФОРМИРОВАНИЯ МЕЖДУНАРОДНО-ПРАВОВОГО ОБЫЧАЯ О ЗАПРЕТЕ УБИЙСТВА КИТОВ

Резюме
Статья посвящена рассмотрению вопроса о формировании международно-правового обычая, который бы запрещал убийство всех видов китообразных. В работе анализируются понятия «международный обычай» и «persistent objector», так как запрет убийства китов тесно связан с международным правом. Япония в данном случае является государством «persistent objector» и не принимает подобный обычай. Следует отметить, что в статье исследуется упорная работа проекта Рика О'Барри, единственного по защите морских животных и рыб, который действует на территории Японии. Авторы считают, что формирование обычая о запрете убийства китов возможно только в том случае, если все государства дадут на это согласие, но позиция Японии по этому вопросу замедляет упомянутый процесс.

Ключевые слова: международный обычай, persistent objector, бухта Тайцзи, запрет убийства китов, проект Рика О'Барри.

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PUBLIC POLICY CLAUSE IN PRIVATE INTERNATIONAL LAW

The article gives an overview of one of the mechanisms for the protection of ordre public which to prevent the devastating effects of foreign law on national public policy — a public policy clause. The analysis of nature and character of the wording of national norms of different countries shows that provisions aimed at protecting national public policy may be constructed differently. The world practice knows two concepts of clause of ordre public: positive and negative, and the negative concept of public policy clause is dominant in contemporary private international law.

Key words: ordre public, public policy, ordre public clause, public policy clause.

Problem statement. Public policy (*ordre public* — fr.) clause is a recognized institute of private international law and plays an important role in the mechanism of regulation of private relations of an international character. Under the conflict rules it's possible potentially to choose the law of any state of the world, and to provide all the consequences of this choice is not possible. It is possible to eliminate the negative effects of foreign law and aimed reservation of public policy. Institute of reservation of public policy outlines the permissible scope of application of foreign law on its territory, and is one of the mechanisms for the protection of national ordre public.

Analysis of recent researches and publications. Protecting the state public policy through the use of the ordre public clause has been known for a long time in private international law. However, the category of ordre public and public policy clause not thoroughly investigated. We find a mention of public policy in works of F. Savigny, Ch. Broche, A. Makarov, A. Pilenko, L. Luntz, G. Dmytrieva, V. Kysil. Among the special works we can call the works of M. Brun «Order Public in Private International Law» (1916) and Y. Bogatina «The Public Policy Clause in Private International Law: Theoretical Problems and Modern Practice» (2010).

Paper purpose. The purpose of this article is to explore the content of the concept of ordre public in private international law, as well as study the nature and character of public policy clause formulations in various national legal systems.

Paper main body. At the modern stage, to resolve issues arising from the activities of foreign citizens and legal entities, the state traditionally, along with the effect of domestic law allows the application of foreign law, therefore

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agreeing to provide foreign standards with the same legal value as they have in the state. The consequence of interaction of national legal systems in regulating international civil relations is penetration into a national legal space of foreign state acts — laws, judicial and arbitral decisions, requests for legal assistance.

But, any state has its own factors that contribute to the formation of law: the differences in the historical development and national identity, traditions and religious beliefs, moral and cultural values of a society, and different levels of integration into the international community. Each national legal system is based on its own general principles; each national legal system is the product of society, reflecting its features. And, as pointed out by Montesquieu, it is rare when the laws of one nation may occur suitable for the other. Therefore, by a reasonable remark of L. Raape, appeal to foreign law is always a «leap into the unknown» [1, p. 96]. A foreign rule present within the legal framework of the state can be seen as a foreign formation that does not fit in the legal system of the state, built on the social, ideological, economic and moral platforms. The use of such a rule could lead to the destabilisation of cultural and spiritual foundations of society, break it ordre public. Therefore, the modern private international law has a task to ensure a balance of private and public interests. One of the mechanisms to achieve this balance is the public ordre clause.

In deciding a conflict of laws question, a judge will sometimes say, «The foreign law ordinarily applicable will not be applied in this case because to do so would violate our public policy». The concept of public policy is one of the most ancient, esoteric and pervasive creations in the history of private international law. Its origins have been traced by one author to the fifteenth century, although it is probable that the doctrine is as old as the concept of the law itself. In the nineteenth century, the courts sought to confine the reach of the doctrine to the limited number of categories. The general judicial attitude of the period is summarized by the famous statement of Burrough J. in *Richardson v. Mellish*, that public policy «is a very unruly horse, and when once you get astride it you never know where it will carry you» [2].

Reference to the impossibility of applying of foreign law because of its contradictory to moral and good manners has already occurred during post-glossators (XIV century) [3, p. 269]. In the XVII century, the Dutch specialist in conflict of laws U. Huber noted that the recognition of foreign law (based on comitas gentium) is allowed in cases where such recognition does not diminish the sovereignty of the Dutch provinces and the rights of their citizens [4, p. 9]. One of the founders of the Soviet science of private international law A. Makarov, on the question whether a judge may apply any foreign law in accordance with the conflict of laws rule or not, answered that not: «foreign law that conflicts with domestic ordre public may not be applied, though its application would come out of the stated conflict rule» [5, p. 52]. Modern researchers, in particular, G. Dmytrieva [6, p. 182], V. Kysil [7, p. 94] also emphasize the impossibility of applying foreign law because of its contradictory to national ordre public.

The first species of public policy has been identified with equity, the natural law, the law of reason, and ultimately the divine law. It is referred to by early legal commentators with wonder, as an animistic spirit dwelling deep within our jurisprudence that is «written in the heart of every man and tells him what to do and what to avoid» [2]. Ultimately, it was in the gradual rationalization of this supra-human tendency against which « [n]either statute nor custom can prevail that the modern idea of public policy was first developed and readied for conscious application.

The doctrine of public policy today plays an extremely important, although often subtle, role in private international law. Explaining why the problem of public policy is so difficult end elusive for legal doctrine, legislation, and court practice, the Ukrainian professor V. Kysil has stated that the problem is related to the very essence of public policy, which is determined by the historic, social-economic, political, ethno-cultural and other factors of the given legal system's development [8, p. 198].

According to O. Merezhko, public policy (with regard to Ukraine) encompasses the following elements: 1) the fundamental, most important, principles of Ukrainian law, and first of all its constitutional, private law, and civil-procedural principles, 2) the generally accepted principles of morality, upon which the Ukrainian legal order is based, 3) the legitimate interests of Ukrainian citizens, legal persons, and the state, the protection of which is a major task for Ukraine's legal system, and 4) the generally recognized principles and norms of international law, including the international legal human rights standards [9].

It has been argued that besides the Constitution of Ukraine the major principles upon which Ukraine's public policy is based can be found in Art. 3 of the Civil Code, Art. 5 of the Commercial Code of Ukraine, and Art. 7 of the Family Code of Ukraine. The Supreme Court of Ukraine has defined the concept of public policy with respect to the recognition and execution of foreign courts decisions. According to Supreme Court, «public policy ... should mean the state's legal order that defines principles that form the basis of the existing system there (relating to independence, integrity, fundamental constitutional rights, freedoms, guarantees, etc.)».

The analysis of nature and character of the wording of national rules of various states, which deny the application of foreign law, has showed that the provisions aimed at protecting a national ordre public may be constructed differently. The world practice knows two concepts of public policy clause: positive and negative. The content of these concepts was first formulated by L. Raape, which indicated that the order public clause may take the form of «offensive» or «defensive». The clause based on own law may be called positive, as it ensures the application of its own law in the borderline cases — this is the «offensive» clause. Opposite to it is a negative clause, which rejects the foreign legal rule. This clause is not «offensive», but only «defensive». It prevents the application of foreign law through controversy of the latter with good manners… the foreign legal rule is only rejected without the use of Germanic legal rule» [1, p. 98].

Based on the analysis of French, Italian, German doctrines and practices of public ordre clause, L. Luntz concludes that the legal and technical side of Germanic concept differs significantly from the Franco-Italian. If the Franco-Italian concept of ordre public is presented as a set of French (Italian) substantive rules that reject the effect of foreign law because of their qualities (the so-called positive concept of public ordre), the Germanic doctrine... covers the properties of foreign law that prevent its use, despite the reference to it of domestic conflict rules (the so-called negative concept of ordre public) [3, p. 274]. It should be noted that L. Luntz, who made significant contribution to the disclosure of the content of public policy, and has left us a legacy of the concept of positive and negative clauses of public policy and ordre public itself as perception of unacceptability of concrete results of social relations legal regulation as a result of the application of foreign law by the state, society and individuals, and the public policy clause as a mechanism to protect it, does not distinguish nor emphasize the latter.

At the present stage of development of private international law in the national legal systems the concept of a positive clause of public order is also based on certain principles and rules of national law with special positive value for the state; the negative clause comes from the content of foreign law.

The negative concept of public policy clause dominates in the modern private international law; it is enshrined in the laws of many states. Specifically, Article 6 of the Polish Act on Private International Law of 1965 states that «foreign law may not be applied if its application would have consequences that are incompatible with the fundamental principles of law of the People's Republic of Poland» [10, p. 470], Article 17 of the Swiss Federal Act on Private International Law of 1987 stipulates that «foreign law does not apply if the consequences of its use are incompatible with the Swiss ordre public» [10, p. 632]. Standards with contents may be found in Turkish, Chinese, German, Vietnamese, Portuguese legislations and so on.

The Ukrainian private international law also reflects the concept of negative forms of public policy clause. The Law of Ukraine «On Private International Law» states that «The rule of law of a foreign state shall not apply in cases where its application leads to consequences manifestly incompatible with the basics of law (public policy) of Ukraine. In such cases, it shall apply a law which has the closest connection with the legal relationship, and if it is impossible to define or apply such a law, it shall apply the law of Ukraine. Failure to apply the law of a foreign state may not be based only on differences in legal, political or economic systems of the foreign state from legal, political or economic systems of Ukraine» [11, p. 12]. Analysis of the given article shows that, firstly: order public clause may be only when applying the law of a foreign state leads to consequences manifestly incompatible with the basics of Ukrainian law; secondly: referrals to incompatibility with order public may be only when the negative effects of foreign law (not the foreign law itself) is contrary to the fundamentals of the rule of law in Ukraine; thirdly, it is referred to the impossibility of applying a specific rule of foreign law, not foreign law at all. As it can be seen, this approach of our legislators not only

refers to the application of lex fori, as the clause is directed only against certain provisions of foreign law, which, in itself, is decisive for a relationship.

Conclusions. The negative concept of public policy clause dominates in the modern private international law. The Ukrainian private international law also reflects the concept of negative forms of public ordre clause. The implementation of public ordre clause in this form allows to protect the national public policy, on the one hand, and to realize certain international private law interests by linking them to a particular legal system, which is the basis of rights and obligations, on the other.

References

1. Раапе Л. Международное частное право [Text] / Л. Раапе. — М. : Иностр. лит., 1960. — 607 с.
2. Kain B., Yoshida D. The Doctrine of Public Policy in Canadian Contract Law [Electronic source] : Brandon Kain, Douglas T. Yoshida // Annual Review of Civil Litigation. — 2007. — Access mode: https://www.mccarthy.ca/pubs/The Doctrine of Public Policy in Canadian Contract Law.pdf (reference date : 20.05.2015). — Title from the screen.
3. Лунц Л. А. Курс международного частного права: В 3 т. [Text] / Л. А. Лунц. — М. : Спарк, 2002. — 1007 с.
4. Пиленко А. Очерки по систематике частного международного права [Text] / А. Пиленко. — СПб. : Тип. М. М. Стасюлевича, 1911. — 444 с.
5. Макаров А. Н. Основные начала международного частного права [Text] / А. Н. Макаров. — М. : Юрид. изд-во Наркомюста РСФСР, 1924. — 151 с.
6. Международное частное право: учеб. [Text] / Л. П. Ануфриева, К. А. Бекяшев, Г. К. Дмитриева. — 2-е изд., перераб. и доп. — М. : Проспект, 2009. — 688 с.
7. Міжнародне приватне право. Науково-практичний коментар Закону [Text] / за ред. А. Довгерта. — Х. : ТОВ «Одіссей», 2008. — 352 с.
8. Міжнародне приватне право: підручник [Text] / за ред. А. С. Довгерта і В. І. Кисіля. — 2-ге вид. — К. : Алерта, 2014. — 656 с.
9. Merezhko O. Public Policy (Ordre Public), Mandatory Norms and Evasion of Law in Ukrainian Private International Law [Electronic resource] : Oleksandr Merezhko // Czech Yearbook of International Law. — 2012. — Vol. 3. Public Policy and Ordre Public. — Access mode: https://books.google.com.ua/books?id=BnpVBAAAQBAJ&pg=PA149&hl=uk&source=gbs_toc_r&cad=4#v=onepage&q&f=false (reference date : 17.05.2015). — Title from the screen.
10. Международное частное право: Иностранное законодательство [Text] / сост. и научн. ред. А. Н. Жильцов, А. И. Муранов. — М. : Статут, 2000. — 892 с.
11. Про міжнародне приватне право [Electronic resource] : Закон України від 23.06.2005 р. із змін., внес. згідно із Законами України : за станом на 09.06.2013 р. — Access mode: http://zakon4.rada.gov.ua/laws/show/2709–15 (дата зверн : 20.05.2015). — Title from the screen.

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ЗАСТЕРЕЖЕННЯ ПРО ПУБЛІЧНИЙ ПОРЯДОК У МІЖНАРОДНОМУ ПРИВАТНОМУ ПРАВІ

Резюме

Досі тривають намагання розкрити зміст поняття публічного порядку. Причина цьому — сама специфіка категорії публічного порядку. Категорія ця перш за все не правова, а соціальна, належна до категорій та понять системи внутрішньодержавних відносин. Тому, в кожному конкретному випадку вирішення питання про застосування іноземного права має проводитись з точки зору категорій саме цієї системи: як зачіпаються інтереси держави, який вплив здійснюється на ці інтереси, чи можна внаслідок такого впливу вивести систему з рівноваги та ін.

Механізм захисних застережень, як спосіб унеможливити руйнівний вплив іноземного законодавства на національний публічний порядок, сьогодні добре відомий у міжнародному приватному праві. У статті дається огляд одного з них — застереження про публічний порядок. З аналізу природи та характеру формулювань національних норм різних держав видно, що положення, спрямовані на захист національного публічного порядку, можуть конструюватися по-різному. Світовій практиці відомі дві концепції застереження ordre public: позитивна та негативна; причому негативна концепція застереження про публічний порядок є домінуючою у сучасному міжнародному приватному праві. Застереження про публічний порядок у міжнародному приватному праві України дає можливість, з одного боку, захистити національний публічний порядок, а з іншого — реалізувати певні міжнародні приватноправові інтереси через встановлення зв’язків останніх з тією правовою системою, яка і виступає підґрунтям суб’єктивних прав та обов’язків.

Ключові слова: ordre public, публічний порядок, застереження ordre public, застереження про публічний порядок.

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ОГОВОРКА О ПУБЛИЧНОМ ПОРЯДКЕ В МЕЖДУНАРОДНОМ ЧАСТНОМ ПРАВЕ

Резюме

Попытки раскрыть содержание понятия публичного порядка не прекращаются и до сегодняшнего дня. Причина этого кроется в самой специфике категории публичного порядка. Категория эта, прежде всего, не правовая, а социальная, которая относится к категориям и понятиям системы внутригосударственных отношений. Поэтому в каждом конкретном случае решение вопроса о применении иностранного права должно осуществляться с точки зрения категорий именно этой системы: каким образом затрагиваются интересы государства, какое воздействие осуществляется на эти интересы, возможно ли вывести систему из равновесия вследствие такого воздействия и др.

Механизм защитных оговорок как способ предотвратить разрушительное воздействие иностранного законодательства на национальный публичный порядок сегодня хорошо известен в международном частном праве. В статье дается обзор одного из них — оговорки о публичном порядке. Из анализа природы и характера формулировок национальных норм различных государств видно, что положения, направленные на защиту национального публичного порядка, могут конструироваться по-разному. Мировой практике известны две концепции оговорки ordre public: позитивная и негативная; причем негативная концепция оговорки о публичном порядке является доминирующей в современном международном частном праве. Оговорка о публичном порядке в международном частном праве Украины дает возможность, с одной стороны, защитить национальный публичный порядок, а с другой — реализовать определенные международные частноправовые интересы путем установления связей последних с той правовой системой, которая и выступает основой субъективных прав и обязанностей.

Ключевые слова: ordre public, публичный порядок, оговорка ordre public, оговорка о публичном порядке.

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TO THE ISSUE OF DEVELOPMENT AND OUTLOOK OF GLOBAL INFORMATION NETWORK «WIPONET»

In the article the question of creation and implementation of WIPOnet that is aimed at creating a global information network for intellectual property offices was considered. The main objective of WIPOnet is to support the deployment of adequate local infrastructure in intellectual property offices, focusing on the development of infrastructure in developing countries, providing them with the necessary software and hardware that will allow these offices to connect to the Internet and take advantage of some communication and information services of WIPO.

Key words: international organization, Internet, intellectual property, WIPOnet.

Problem statement. Intellectual property rights are legal rights, which result from intellectual activity. The World Intellectual Property Organization (hereinafter — WIPO) defines intellectual property (hereinafter — IP) as legal rights that result from intellectual activity. Usually there are 4 major types: copy right, patent, trademark, design protection. The question about intellectual property regulation lies on. First, the IP mass seems to be violating by existing software which allows the free distribution of copyrighted material. Second, it's important to guarantee the protection of data privacy against illegitimate uses on the part of companies operating through the Internet. With the appearance of the Internet the protection of IP becomes easier and harder simultaneously. The widespread character of the Internet gives the grateful ground for illegal copying of materials. On the other side with the development of technologies it becomes simply to defend the materials. Unfortunately the question is about searching the facts of illegal use of IP materials. This is twofold situation. If the author prohibits access to his product, the nature of IP rights will be broken. The compromise is found with adopting of digital scheme, calling «trusted system». The author offers to find the balance of this event by implementation of device of WIPOnet. So its main position is to reveal the process of establishing the technical information gap between developed and developing countries and to analyze the development of legal digital recourses. This extension was meant to improve the enforcement mechanisms applicable to copyright violations that were almost absent before the coming of WIPOnet.

Analysis of recent researches and publications. Notwithstanding the great importance of the IP rights defense on the Internet there is no enough of sci-

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entific studies dedicated to the theme. It's worth mentioning the dissertation papers of O. V. Mozolina «Public Law Aspects of International Law Regulation of Relations in Internet», K. S. Shahbazyan «International Law Bases of Regulation of Relations on Internet», etc. But the recent tendencies of IP regulation in international law, such as the WIPO net, are unclosed in the national international law science.

Paper purpose. The author will try to find advantages of using this system and to discover its benefits within the international regulation of IP relations.

Paper main body. One of the most important positions in using it is its international side. So it seems that only if the international law completely fulfils the expectations of business within the internet field it will be a preferred tool for states to regulate this area of human activity. So can right be defended online? May online system combine digital divide between the countries? Author sets such tasks: to create a set of guiding principles and objectives which were defined by WIPO and to seek solutions resulting from the impact of e-commerce in the field of IP rights. What will reflect the desire of WIPO to take practical steps for ensuring that to all countries that participate in the process of defining policy and addressing issues to adapt intellectual property law for the digital age [1, p. 1].

As the Internet continues its remarkable expansion, its capacity to disseminate information, knowledge and content has thrust the intellectual property system to the center of the debate over the future shape of the online world. In this new and rapidly changing environment, information and knowledge are increasingly the source of value; hence the intellectual property system — the body of law protecting creations of the mind — is crucial in maintaining a stable and equitable foundation for the development of the digital society. While the intellectual property system will play a critical role in shaping the digital world, the Internet will have a profound effect on the system itself. The long-term influences are as yet unclear. What is immediately apparent, however, is that this new medium presents a host of complex opportunities and challenges for the intellectual property community. As the International Intellectual Property Organization, WIPO has launched a far-reaching program of activities — the WIPO Digital Agenda — which reflect and respond to the influence of the Internet and digital technologies on the intellectual property system, and vice versa, in the coming years. The organization is committed to formulating appropriate responses aimed at encouraging the dissemination and exploitation of creative works and knowledge on the Internet, as well as at protecting the rights of their creators. In the constantly evolving digital environment, this is a truly unique challenge.

The WIPOnet broaden the participation of developing countries for accessing to IP information, participation in global policy formulation and give opportunities to use their IP assets in e-commerce. The WIPOnet gives the entry into force of the WIPO Copyright Treaty (hereinafter — WCT) and the WIPO Performances and Phonograms Treaty (hereinafter — WPPT). The WIPOnet promotes adjustment of the international legislative framework to

facilitate e-commerce through the extension of the principles of the WPPT to audiovisual performances, the adaptation of broadcasters' rights to the digital era, progress towards a possible international instrument on the protection of databases. The program implements the recommendations of the Report of the WIPO Domain Name Process and pursues the achievement of compatibility between identifiers in the real and virtual worlds through the establishment of rules for mutual respect and the elimination of contradictions between the domain name system and IP rights.

Issues that are covered by the digital agenda include the challenge of the digital divide, the application of intellectual property law in transactions via the Internet, the impact of the Internet and digital technologies on the areas of copyright and related rights, trademarks and domain names, and patents, as well as dispute resolution. The WIPO Digital Agenda was launched in September 1999 by the Director General of WIPO at the WIPO International Conference on Electronic Commerce and Intellectual Property [1]. It was approved later that month by WIPO's member states at their General Assembly. To keep the public fully informed about its activities under the Digital Agenda, WIPO has created a website dedicated to electronic commerce issues. This web site, maintained in English, French and Spanish, provides extensive information regarding WIPO programs in the areas concerned, background papers on substantive issues and a comprehensive calendar for meetings.

The wrapped Conference on Electronic Commerce and Intellectual Property was conducted by the CEO of WIPO, Kamil Idris. On this conference ten-point plan was introduced, which was set out in the Digital Agenda. The main idea behind this program is to provide access for all departments in the world to electronic communication facilities, information about IP and information arrays of WIPO [2]. Under this program the WIPOnet network will also provide reliable access to the most sensitive data about the objects of IP. It is planned that the network will link together 320 intellectual property offices in 178 countries and will be based mainly on existing communication tools. Its implementation will allow achieving greater efficiency in the activities of departments through the use of new informational technologies and providing the opportunity of using the services that is provided by WIPO. Services such as reliable electronic communications, listing services, translation for placement in the network, file transfer and a forum for discussing issues connecting with IP.

The network WIPOnet allows 154 intellectual property offices which currently don't have access to the Internet basic means connection and set of services for operation in the network. These services should include the detection of viruses, messaging, e-mail (routine and confidential information), post listings and means access to the network. The WIPOnet network will also function as a portal to other systems provided by WIPO, including the Intellectual Property Digital Libraries. The main feature of WIPOnet will be its ability to provide secure transmission of confidential intellectual property data from point to point, that will promote the use of WIPO's international registration services for patents, trademarks and designs.

From a design perspective the WIPOnet project consists of two main components: 1) the establishment of a central component, that is the center of WIPOnet, and deployment of network services at WIPO headquarters in Geneva; 2) providing Internet connectivity and appropriate computer hardware for the WIPO's intellectual property offices that do not have yet access to the Internet [3, p. 148].

The project WIPOnet is planned in two stages. The first phases is focused mainly on building infrastructure of the project at the International Bureau and establish basic communication with the authorities of the member states of WIPO, which don't have access to the Internet and providing them basic services. The selected approach to the creation and installation of material part of the project aims to support the needs of infrastructure network, which must be scalable and stable (i.e., it can be expanded to scale and support needs change over time). Meanwhile, during the first stage communication will be provided to select agencies located in countries that don't have Internet access.

The second phase will cover the remaining intellectual property offices with no connection to the Internet, but located in countries in which there is access to the Internet.

The main set of tools connecting to the WIPOnet is basic computer hardware, software, training and reliable means of communication with the Internet. Deployment means for connecting is completed today in 48 departments out of 154 elected offices. This kit allows the relevant intellectual property offices to access the Internet and to the WIPO Center of WIPOnet, as well as the services provided by the centre. Offices getting the set of fixed assets, will be able to use the following: WIPO's paid access to the Internet for 360 hours per year, reliable channels protected means of communication over the public Internet, email, file transfer facilities and other interdepartmental communication with the tools to support them, hosting service in the network and related support: for intellectual property individual departments will be provided a method of centralized virtual hosting. This means that agencies that do not have the necessary technical means, will be given the opportunity to place their servers on WIPOnet system until that time when their network services will have the opportunity to migrate on servers of local authorities after the acquisition of technical training by local staff. Reference services: WIPOnet provide phone services and email and services to provide various information about IP [3, c. 150].

Initially, the WIPOnet will support only those activities that will be carried out between intellectual property offices and between the agencies and the International Bureau. However, with the development of technological systems, the improvement of business models and the adoption of new standards in the field of IP the WIPOnet will serve for implementation of other objectives including: electronic filing of patent applications under the Patent Cooperation Treaty, electronic filing of trademark applications in accordance with the Madrid System for the International Registration of Marks, electronic filing of industrial designs under the Hague System for the International

Deposit of Industrial Designs, access to electronic libraries of intellectual property, currently located within the hosting service of WIPO, providing search capabilities and output display data from different collections of IP These collections include data about the Hague, the Madrid Agreements, the Patent Cooperation Treaty contract and non-patent information of «Journal of Patent Associated Literature», the electronic exchange of administrative information generated in the performance of the administrative functions of the WIPO registration system under the Patent Cooperation Treaty, Madrid, Hague Agreements and following Protocol, and distance learning system which are located in administration of the WIPO Worldwide Academy and designed to promote better understanding of the intellectual property system and to assist and accelerate the establishment of the training system in the member states of WIPO [4,5].

The Patent Cooperation Treaty is an agreement for international cooperation in the field of patents. It is often spoken of as being the most significant advance in international cooperation in this field since the adoption of the Paris Convention itself. It is however largely a treaty for rationalization and cooperation with regard to the filing, searching and examination of patent applications and the dissemination of the technical information contained therein. The Patent Cooperation Treaty does not provide for the grant of «international patents»: the task of and responsibility for granting patents remains exclusively in the hands of the patent offices of, or acting for, the countries where protection is sought (the «designated offices»). The Patent Cooperation Treaty does not compete with but, in fact, complements the Paris Convention. Indeed, it is a special agreement under the Paris Convention open only to States which are already party to convention [6, p. 276].

The Madrid Agreement differs with such options as: a choice for the applicant, allowing international registrations to be based on national applications and not only on national registrations; a period of 18 months, instead of one year, for contracting parties to refuse protection, with the possibility of a longer period in the case of a refusal based on an opposition; the possibility for the office of a designated contracting party to receive, instead of a share in the revenue from the standard fees, an «individual fee» whose amount may not be higher than the fees it charges for national or regional registration or renewal, the said amount being diminished by the savings resulting from the international procedure; the transformation of an international registration which is no longer protected because the basic mark has ceased to have effect in the country of origin, international or regional applications in some or all of the designated contracting parties, with the filing date, and where applicable the priority date, of the international registration; the possibility for the Protocol to be joined not only by states, but in addition by any intergovernmental organization which has an office for registering marks with effect in its territory [6, p. 286].

The main aim of the international deposit of industrial designs is to enable protection to be obtained for one or more industrial designs in a number of states through a single deposit filed with the International Bureau of

WIPO. Under the Hague Agreement, any person entitled to effect an international deposit has the possibility of obtaining, by means of a single deposit made with the International Bureau of WIPO, protection for his industrial designs in contracting states of the agreement with a minimum of formalities and expense. The applicant is thus relieved of the need to make a separate national deposit in each of the states in which he requires protection, thus avoiding the inherent complication of procedures that vary from one state to another [6, p. 293].

The WIPOnet and WIPO's services in the field of IP that currently provided on-line, such as the Intellectual Property Digital Libraries, and those who will be in the future, i.e. the system of the Patent Cooperation Treaty — Secure Applications Filed Electronically (PCT-SAFE) provide a unique opportunity to prevent the widening of the gap between developed and developing countries regarding access to and use of network systems. In the near future it will be even more obvious and immediate advantage of the system [7, p. 36].

The important role in the IP rights defense belongs to the Institute of Electrical and Electronic Engineers (hereinafter — IEEE) that is the world's largest professional association dedicated to advancing technological innovation and excellence for the benefit of humanity. IEEE and its members inspire a global community through IEEE's highly cited publications, conferences, technology standards, and professional and educational activities. IEEE, pronounced «Eye-triple-E,» stands for the Institute of Electrical and Electronics Engineers. The association is chartered under this name and it is the full legal name. IEEE recognizes the increasing importance of bibliometric indicators as independent measures of quality or impact of any scientific publication and therefore explicitly and firmly condemns any practice aimed at influencing the number of citations to a specific journal with the sole purpose of artificially influencing the corresponding indices. IEEE, in its leading position as the world's largest professional association dedicated to advancing technological innovation and in its desire to fulfill its primary mission of fostering technological excellence for the benefit of humanity, also recognizes the recent concerns expressed by the scholarly community about the inappropriate application of bibliometrics to the evaluation of both scientists and research proposals. «Bibliometric indicators provide numerical scales that are intended to quantitatively determine the value of scientific research and the scholarly publication in which that research is published. Since scientific performance cannot, of course, be directly «measured», citations acquired by each published paper are assumed as a proxy for quality, without prejudging the reasons for the citations.

More specifically, IEEE endorses the following tenets in conducting proper assessment in the areas of engineering, computer science, and information technology: the use of multiple complementary bibliometric indicators is fundamentally important to offer an appropriate, comprehensive, and balanced view of each journal in the space of scholarly publications. IEEE has recently adopted the Eigenfactor and the Article Influence in addition to the Impact Factor for the internal and competitive assessment of its publications and

welcomes the adoption of other appropriate complementary measures at the article level, such as those recently introduced in the framework of the so-called altmetrics, once they have been appropriately validated and recognized by the scientific community; any journal-based metric is not designed to capture qualities of individual papers, and must therefore not be used as a proxy for single-article quality or to evaluate individual scientists. All journals' bibliometric indices are obtained by averaging over many papers, and it cannot be assumed that every single article published in a high-impact journal, as determined by any particular journal metric, will be highly cited; while bibliometrics may be employed as a source of additional information for quality assessment within a specific area of research, the primary manner for assessment of either the scientific quality of a research project or of an individual scientist should be peer review, which will consider the scientific content as the most important aspect in addition to the publication expectations in the area, as well as the size and practice of the research community» [8].

Conclusions. The protection of IP is twofold. For solving this problem it should be regulated on international level because it went beyond the borders of national law. In other words, international law does not directly govern these issues and only serves as an instrument to settle or ease regulatory conflicts. It is private international law which has played an important role in Internet governance until now. However, there is every reason to try to reach the consensus necessary to keep improving cooperation and harmonization. The advantage of having more international treaties and agreements in the Internet field is that regulatory conflicts would be diminished to a large extent. In this regard, while the protection of IP is already covered by several international treaties, and therefore there is no conflict anymore. To achieve this goal it becomes indispensable that electronic libraries which WIPOnet provides access timely and adequately should be replenished. Moreover, it is necessary that the technology behind the system should be maintained at the current level and the technical means provided by the systems that are established in different countries, should be maximum commonality. This task obviously is the responsibility of WIPO and the competence of departments that provide digital libraries or similar systems that are based on the use of networks to which access is provided via WIPOnet. However, there is a second aspect of the problem which is the responsibility of countries using the system. There is an urgent need in training experts in the field of information and communication technology that could ensure the success and sustainability of WIPOnet for the future. The organization began work on this matter; it is carried distance learning out. At the same time the WIPOnet provides deployment of a training program aimed at developing the skills needed to use it. These skills and talents should be brought up on the ground in order to support the development of the system in the future. It is needed to develop a legal instrument that regulates in each state party of the program the activities of local and regional employees, and the possibility of cooperation. It is necessary to create an algorithm checking the database field.

References

1. WIPO Digital Agenta [Electronic resource] / World Intellectual Property Organization. — Access mode : itu.int/dms_pub/itu-s/md/03/wsispc2/c/S03-WSISPC2-C-0098!!MSW-E.doc. — Title from the screen.
2. WIPO Outlines «Digital Agenda» [Electronic resource]: Press Releases PR/1999/185, Geneva, October 31, 1999 — Access mode: http://www.wipo.int/pressroom/en/prdocs/1999/wipo_pr_1999_185.html. — Title from the screen.
3. Intellectual Property on the Internet [Electronic resource]: World Intellectual Property Organisation. — Access mode : http://brownwelsh.com/Archive/2002_WIPO_eIssues_report.pdf. — Title from the screen.
4. Intellectual Patent System [Electronic resource]. — Access mode : http://www.wipo.int/pct/en/index.html. — Title from the screen
5. International Trademark System [Electronic resource]. — Access mode : http://www.wipo.int/madrid/en/index.html — Title from the screen.
6. Word Intellectual Property Handbook [Electronic resource]: World Intellectual Property Organisation. — Access mode : www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf. — Title from the screen.
7. The Review of Programme Performance [Electronic resource] : World Intellectual Property Organization. — Access mode: wipo.int/edocs/mdocs/govbody/ru/a_37/a_37_4.doc. — Title from the screen.
8. Advancing Technology for Humanity «Appropriate Use of Bibliometric Indicators for the Assessment of Journals, Reach Proposals, and Individuals» [Electronic resource]. — Access mode: www.ieee.org/publications_standards/ publications/rights/ ieee_bibliometric_ statement_sept_2013.pdf. — Title from the screen.

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ДО ПИТАННЯ ПРО РОЗВИТОК ТА ПЕРСПЕКТИВИ ГЛОБАЛЬНОЇ ІНФОРМАЦІЙНОЇ МЕРЕЖІ «WIPONET»

Резюме

У статті було досліджено питання створення і реалізації програми «WIPOnet», спрямованої на створення глобальної інформаційної мережі для відомств з інтелектуальної власності. Загальна мета «WIPOnet» полягає у підтримці процесу розгортання адекватної місцевої інфраструктури у відомствах з інтелектуальної власності, приділяючи основну увагу розвитку інфраструктур у країнах, що розвиваються, забезпечуючи їх необхідними програмними і технічними засобами, які дозволять цим відомствам підключитися до Інтернету і скористатися деякими комунікаційними та інформаційними послугами Всесвітньої організації інтелектуальної власності.

Ключові слова: міжнародна організація, мережа Інтернет, інтелектуальна власність, WIPOnet.

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К ВОПРОСУ О РАЗВИТИИ И ПЕРСПЕКТИВАХ ГЛОБАЛЬНОЙ ИНФОРМАЦИОННОЙ СЕТИ «WIPONET»

Резюме

В статье исследован вопрос создания и реализации программы «WIPOnet», направленной на создание глобальной информационной сети для ведомств по интеллектуальной собственности. Основная цель «WIPOnet» состоит в поддержке процесса развертывания адекватной местной инфраструктуры в ведомствах по интеллектуальной собственности, уделяя основное внимание развитию инфраструктур в развивающихся странах, обеспечивая их необходимыми программными и техническими средствами, которые позволят этим ведомствам подключиться к Интернету и воспользоваться некоторыми коммуникационными и информационными услугами Всемирной организации интеллектуальной собственности.

Ключевые слова: международная организация, сеть Интернет, интеллектуальная собственность, WIPOnet.

ЦИВІЛЬНЕ ПРАВО

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SOME ISSUES OF REALIZATION OF CONTRACTUAL STABILITY IN UKRAINIAN PROFESSIONAL FOOTBALL

The article is devoted to consideration of features of contractual stability and its realization in the sphere of professional football in Ukraine. The features of legal regulation and observance of the principle of contractual stability, consequence of its violation, in particular, which led to judicial proceedings, are studied. The conclusion about an important role of contractual stability in protection of rights and interests, both professional football clubs and professional football players was made. Particular attention is given to the relevant Ukrainian civil law and international norms of FIFA acts in order to determine how contractual stability is guaranteed in practice.

Key words: contractual stability, international transfers, compensation and solidarity mechanism, professional football.

Problem statement. The transfer system of modern Ukrainian football is based on strict observance and performance by its participants of the fundamental principles one of which is the principle of contractual stability. However, it is rather difficult to define the legal nature and features of such an international principle of football as contractual stability, especially its influence on the national law system, which regulates the sport sphere.

Analysis of recent research and publications. Among the scientists, which have worked with the questions of features of the principle of contractual stability, we can note the following people: Colantuoni L., Revello E, Michele Colucci, Ian Blackshaw, Boris Kolev, and others.

Paper purpose. The aim is to determine the legal nature and features of contractual stability in Ukrainian professional football.

Paper main body. The extensive autonomy granted to football sport organizations for the self-regulation of their activities is a fundamental characteristic of football as compared to other social activities.

In the absence of a special law in the professional football sphere, the self-regulation of public relations between subjects of this sphere steps forward. It should be noted that adoption of a special law would allow to combine

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in a complex the autonomous regulation and self-regulation of civil relations in the sphere of professional football, thereby having recorded possibility of contractual self-regulation by participants of these relations [1, p. 44].

Contractual regulation in the sphere of professional football is important because the majority of relations in this sphere are regulated by the norms of civil law, the special role among which is played by civil contracts. The contract takes an important place in the international sports law in regulation of the relations that arising in command sports between participants of sports competitions [2, p. 69]. Civil contracts now are the most widespread basis of emergence of the majority of public relations and obligations in the sphere of professional football. For example, many contracts concluded within the framework of sports management or agency following normal civil law concepts [3, p. 23].

Along with contractual regulation, the procedural acts of sports organizations are important in the sphere of professional football. The local (corporate) acts of sports organizations play an important role in development of the international football competitions. It is connected with the principle of «unity of sport» which is realized in Europe. This principle means that management of different types of sport is always carried out «from above» by the international sports organizations (for example, the Fйdйration Internationale de Football Association (hereinafter — FIFA) and the Union of European Football Associations (hereinafter — UEFA) in professional football) which develop uniform rules (in the form of procedural, corporate documents) and oblige national sports federations to transfer such rules to the provisions, charters, other local documents [4, p. 30].

In Ukraine, the Football Federation of Ukraine (hereinafter — FFU) is an Association that has been admitted into membership of FIFA by the Congress. FFU as a member has the obligation to comply fully with the statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (hereinafter — CAS) passed on appeal on the basis of Article 60 para. 1 of the FIFA statutes [5]. FFU according to this obligation frames and adopts local (corporate) acts on the basis of FIFA procedural documents.

It should be noted that contemporary football is caught between two very powerful concepts: the freedom of movement of players on one side and contractual stability on the other. The freedom of movement is the consequence of many social, cultural and political developments, which have caused an increase in international mobility of players in the recent past [6, p. 14]. Moreover, this specified principle completely corresponds to the right to free movement of workers, which is being guaranteed by the European Union as one of the fundamental freedoms of European law system. Nevertheless, in football sphere the right to move and reside freely within the territory of the member states of the European Union is limited to observance of the principle of contractual stability. Moreover, the FIFA rules to maintaining contractual stability in football are seem to be geared towards promoting a balanced competition as far as a football player is concerned.

The principle of contractual stability is one of the most important in the modern professional football. The aim of FIFA regulations in building an efficient transfer system is to protect the rights of professional football club and football players to safeguard the principle of maintenance of contractual stability between a professional football club and football players.

The principle of contract stability on the one hand is generation of norms of the FIFA and FFU procedural documents and isn't recorded by rule of law, on the other hand — it is directed to implementation of contractual self-regulation in the sphere of professional football.

The Head of Players' Status and Governance, FIFA Legal Affairs Division, O. Ongaro emphasized that the principle of maintenance of contractual stability between professional football players and clubs as well as the Dispute Resolution Chamber (hereinafter — DRC) were included in the FIFA Regulations on the Status and Transfer of Players and implemented within FIFA's regulatory framework in September 2001, following the agreement reached in March 2001 between the joint FIFA/UEFA delegation and the European Commission on the principles that should form the basis of international transfer rules in order to make them compatible with the European law [6].

FIFA attempts to provide a universal guideline on how to deal with contractual stability and international mobility. CAS had to decide upon several cases of unilateral breach of contract under Article 17 of the FIFA Regulations on the Status and Transfer of Players. In addition, Articles from 13 to 18 of the FIFA Regulations on the Status and Transfer of Players regard a fundamental principle of the international sports legal order: contractual stability between football clubs and footballers [7, p. 14].

Under the norms of the FIFA Regulations on the Status and Transfer of Players, a contract between a professional and a club may only be terminated upon expiry of the term of contract or by mutual agreement. However, a contract between a professional and a club may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause [8].

As it was already noted above CAS considers the cases arising of unilateral breach of contract under Article 17 of the FIFA Regulations on the Status and Transfer of Players.

Under the norms of the FIFA documents, a contract between a professional and a club may be terminated without just cause in following provisions.

In all cases, the party in breach shall pay compensation. Compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specific city of sport, and any other objective criteria; entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.

In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. The sporting sanctions shall remain suspended in the period

between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.

In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach [8].

The FFU Regulations on the Status and Transfer of Players also fixes provisions of contract stability, in particular, Article 11 «Particular provision of terminating of the contract».

FIFA DRC and CAS firmly and unanimously always established that Article 17 of FIFA Regulations does not allow a club or a player to unilaterally terminate an employment agreement. The unilateral termination of an agreement between a player and a club without just cause or without «sporting just cause» is legally a breach of a contract. Any interpretation of Article 17 that are inconsistent with such a principle would result in a wrong application of the rule [7, p. 15]. According to this, the FFU Regulations on the Status and Transfer of Players have the obligations to sign the employment contract not only taking into account the labor legislation of Ukraine, but also taking into account requirements authorized and procedural documents of FIFA, UEFA, FFU and relevant associations. It was made with the aim of observing the principle of contract stability and conditions that the party in breach of terminating a contract without just cause shall pay compensation, because the labor legislation of Ukraine has not the similar norm.

Moreover, contractual stability is similar by the legal nature to norms of civil law about contractual regulation, in particular with the Article 525 of the Civil Code of Ukraine according to which unilateral refusal from obligation or unilateral change of its conditions shall not be allowed, unless otherwise established in contract or law and Article 651 of the Civil Code of Ukraine according to which amendment or cancellation of the agreement shall be allowed only by the parties' consent, unless otherwise is established by the agreement or the law [9].

Therefore, it should be noted that one of consequences of violation of the principle of contract stability is compensation payment. The FIFA Regulations on the Status and Transfer of Players does not contain the compensation calculation formula therefore compensation pays off for each case by the body which is considering dispute.

Juan de Dios Crespo Pйrez, the arbitrator of the European Handball Federation (ECA), noticed that «the contractual stability and the possibility to terminate a professional contract by a footballer ante tempus was not to be decided on a single angle but on a case-by-case basis and each proceedings will end with a different award, depending on several factors and multiple criteria» [10].

In a question of definition of compensation the important role is got by practice of the Sports Arbitration Court of Lausanne considering similar cases. For example, the provisions of Article 17 of the FIFA Regulations on the Status and Transfer of Players, was applied by the CAS in the well-known case of football player Matuzalem from Shakhtar Donetsk. Considering that this case played an important role in realization of contract stability in the Ukrainian football, we will focus the case of Matuzalem regarding the application of the parameters settled by Article 17 of the FIFA Regulations on the Status and Transfer of Players.

According to case (CAS 2008/A/1519), in July 2004 the Ukrainian club Shakhtar Donetsk signed a five year contract with the professional football player — Matuzalem Francelino da Silva. The Ukrainian club Shakhtar Donetsk paid a transfer fee of EUR 8,000,000 to the Italian club Brescia to secure the Matuzalem's services. Matuzalem had served three years of a five year playing contract with the Ukrainian club Shakhtar Donetsk in the 2 of the July 2007, when he decided to terminate his contract prematurely and unilaterally using the possibility given by Article 17 of the FIFA Regulations on the Status and Transfer of Players. After this, Matuzalem signed a playing contract with the Spanish club Real Zaragoza for three seasons with an annual remuneration of approximately EUR 1,000,000. The Ukrainian club Shakhtar Donetsk remained Matuzalem that he could only extinguish his playing contract and a join a the Spanish club «Real Zaragoza» (new club) if he paid the EUR 25, 000,000 to former club (Ukrainian club Shakhtar Donetsk) [11]. In particular, according to Clause 2.2 of playing contract of Matuzalem «transfer of Matuzalem to another club or a squad prior to expiration of the contract is supposed only with the consent of the Ukrainian club Shakhtar Donetsk and under condition of compensation the Ukrainian club's Shakhtar Donetsk expenses on the keeping and training of the Matuzalem, cost of his rights, search of substitute and other costs in full measure. The size of indemnity is defined under the agreement between the Ukrainian club Shakhtar Donetsk and Matuzalem» (Paragraphs 1 to 11 of The Court of Arbitration for Sport, the Matuzalem Decision, 19 May 2009.) [11]. According to Clause 3.3 of playing contract of Matuzalem, the Ukrainian club Shakhtar Donetsk may receive a transfer fee in amount of 25,000,000 EUR or exceeding the same above the Ukrainian club Shakhtar Donetsk undertakes to arrange the transfer in the agreed period [11].

After the studying of facts of the case and consideration of materials the CAS ordered that Matuzalem and the Spanish club Real Zaragoza (new club) were jointly and severally liable to pay to the Ukrainian club Shakhtar Donetsk (former club) EUR 11.86 million. Besides, in this case the conclusion was drawn that Article 17 of the Regulations does not provide a legal basis for the right to a unilateral termination of a contract between a professional player and a club. As clearly stated in the mentioned CAS award «Article 17 FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement at no price or at a given fix price» and «the purpose of Article 17 is basically nothing else than to reinforce the

contractual stability, i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player » [11].

In assessing the amount of compensation payable by Matuzalem under Article 17(1) of the FIFA regulations, the CAS stated that a judging body must keep «in mind that the dispute is taking place in the somehow special world of sport. In other words, the judging body shall aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case» [11].

Besides, CAS accepted that despite that the exact extent of the damaged caused by the contractual breach it might include all the elements that is considered relevant. In particular, this conclusion was based on «the spirit of Article 17 para. 1 FIFA Regulations and having regard to the specificity of sport and to the applicability, subsidiarily, of Swiss law and in particular of Article 99 para. 3 and 42 para. 2 of the Swiss Code of Obligations, according to which if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and the measures taken by the damaged party to limit the damages...» [11].

In the Juan de Dios Crespo Рйrez, the arbitrator of the European Handball Federation, opinion that Matuzalem's case was quite different from that of Webster's case, because the transfer amount was not amortized when Matuzalem terminated his playing contract, with two remaining years still existing and no renewal of contract was involved. That is why a sum was granted to the Ukrainian club Shakhtar Donetsk (former club) for such pending amortization of the transfer fee. All the parties appealed to CAS and the novelty in the procedure at CAS has been the presence of FIFA, which has requested to be a party, even though Matuzalem and the Spanish club Real Zaragoza did initially not admit it. This is a clear sign that FIFA wanted, at last, not to be taken out of the legal decisions of CAS, contrary to its previous insistence not to be a party in the appeal [10].

Conclusions. Therefore, after studying the issue we can draw the following conclusions.

The contractual stability is one of the most important principles in contemporary professional football for which realization FIFA attempts to provide a universal guideline on how to deal with contractual stability. One of problems is diversity of national regulations in football that has internationalized rapidly and it is rather difficult to defend the contemporary transfer system in light of certain interferences with public and private law.

The principle of contract stability on the one hand is generation of norms of the procedural documents of FIFA and FFU and isn't recorded by rule of law, on the other hand — it is directed to implementation of contractual self-regulation in the sphere of professional football.

However, in Ukraine, the principle of contract stability by legal nature is civil and its applications to employment playing contracts contradicts the cur-

rent Ukrainian labor legislation. That is why the contractual self-regulation and regulations by local documents of FFU and procedure documents of FIFA comes to the forefront.

Summing up, it is justified that the FFU Regulations on the Status and Transfer of Players have the obligations to sign the employment contract not only taking into account the labor legislation of Ukraine, but also taking into account requirements authorized and procedural documents of FIFA, UEFA, FFU and relevant associations. It was made with the aim of observing the principle of contract stability and conditions that the party in breach of terminating a contract without just cause shall pay compensation, because the labor legislation of Ukraine has not the similar norm.

References

1. Гніздовська Г. М. Цивільно-правове регулювання суспільних відносин у сфері професійного футболу України [Text] : автореф. дис. ... канд. юрид. наук : 12.00.03 «Цивільне право і цивільний процес; сімейне право; міжнародне приватне право» / Гніздовська Ганна Михайлівна ; Ін-т законодавства Верховної Ради України. — Київ, 2014. — 20 с.
2. Hendrickx F. Player's Agents in Professional Football and Employment–Finding Laws in Belgium and the Netherlands [Text] / F. Hendrickx // ISLJ. — 2002. — p 23–27.
3. Thornton P. Sports Law [Text] / T. Patrick. — Burlington, Massachusetts : Jones & Bartlett Learning, 2010. — 823 p.
4. Тукманов С. А. Особенности трудоправового статуса профессионального футболиста [Text] : автореф. дис. ... канд. юрид. наук : 12.00.05 «Трудове право; право соціального забезпечення» / С. А. Тукманов. — М., 2007. — 24 с.
5. FIFA Statutes Regulations Governing the Application of the Statutes Standing Orders of the Congress of 2014 [Electronic resource]. — Access mode: http://www.fifa.com/ — Title from the screen.
6. Ongaro O. Maintenance of Contractual Stability between Professional Football Players and Clubs — the FIFA Regulations on the Status and Transfer of Players and the Relevant Case Law of the Dispute Resolution Chamber [Text] / Omar Ongaro ; Contractual Stability in Football, by Colucci // European Sports Law and Policy Bulletin. — 2011. — № 1. — P. 45.
7. Colantuoni L. Contractual stability in professional football [Text] / Lucio Colantuoni // Спортивное право: перспективы развития : материалы Шестой междунар. науч. — практ. конф. / Моск. гос. юрид. акад. им. О. Е. Кутафина, Общерос. обществ. организация «Ассоциация юристов России», М–во спорта Российской Федерации [и др.] ; под общ. ред. К. Н. Гусова. — М. : [б.и.], 2012. — С. 14–19.
8. Regulations on the Status and Transfer of Players [Electronic resource]. — Access mode: http://www.fifa.com — Title from the screen.
9. Цивільний кодекс України [Text] : Закон України від 16 січня 2003 р. // Відомості Верховної Ради України. — 2003. — № 40–44. — Ст. 356.
10. Juan de Dios Crespo Pйrez. Matuzalem CAS Award Commentary [Text] // International Sports Law Review Pandektis. — November, 2010. — Issue 3/4. — P. 170.
11. FC Shakhtar Donetsk (Ukraine) v. Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA; Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v. FC Shakhtar Donetsk (Ukraine) & FIFA, Award [Electronic resource] : CAS of 2008 (CAS 2008/A/1519). — Access mode: http://arbitrationlaw.com — Title from the screen.

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ДЕЯКІ ПИТАННЯ РЕАЛІЗАЦІЇ КОНТРАКТНОЇ СТАБІЛЬНОСТІ У ПРОФЕСІЙНОМУ ФУТБОЛІ УКРАЇНИ

Резюме

Стаття присвячена розгляду особливостей контрактної стабільності та її реалізації в сфері професійного футболу в Україні. Вивчено особливості правового регулювання та дотримання принципу контрактної стабільності, наслідки його порушення, зокрема, що призвели до судових розглядів. Обґрунтовано висновок про важливу роль контрактної стабільності в захисті прав та інтересів, як професійних футбольних клубів, так і футболістів-професіоналів. Особливу увагу приділено співвідношенню норм українського цивільного права і норм міжнародних актів ФІФА з метою визначення того, як контрактна стабільність повинна реалізовуватися на практиці.

Ключові слова: контрактна стабільність, міжнародні трансфери, механізм компенсації та солідарності, професійний футбол.

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НЕКОТОРЫЕ ВОПРОСЫ РЕАЛИЗАЦИИ КОНТРАКТНОЙ СТАБИЛЬНОСТИ В ПРОФЕССИОНАЛЬНОМ ФУТБОЛЕ УКРАИНЫ

Резюме

Статья посвящена рассмотрению особенностей контрактной стабильности и ее реализации в сфере профессионального футбола в Украине. Изучены особенности правового регулирования и соблюдения принципа контрактной стабильности, последствия его нарушения, в частности, приведшие к судебным разбирательствам. Обоснован вывод о важной роли контрактной стабильности в защите прав и интересов, как профессиональных футбольных клубов, так и футболистов-профессионалов. Особое внимание уделено соотношению норм украинского гражданского права и норм международных актов ФИФА с целью определения того, как контрактная стабильность должна реализовываться на практике.

Ключевые слова: контрактная стабильность, международные трансферы, механизм компенсации и солидарности, профессиональный футбол.

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LOSS INDEMNITY AS A LEGAL IMPLICATION OF CONTRACTUAL DELINQUENCY

The legal category of loss indemnity as a legal implication of contractual delinquency was considered in the scientific article. The comparative legal analysis of the category «loss indemnity» in Ukraine and some countries of the European Union was made. Also there was given a definition of «loss indemnity» as a legal implication of contractual delinquency.

Key words: loss indemnity, legal implication, contractual delinquency.

Problem statement. The humanity has always faced the need to recover losses. Since the establishment of commodity-money relations in society the issue of protection of rights and legitimate interests of participants of these relations has become particularly relevant. One of the most ancient and fundamental institutions in the protection of violated rights is the institute of loss indemnity which safes its value to this day.

The analysis of recent studies and publications. The problem of loss indemnity was contemplated by scientists in the framework studies protecting civil rights and interests liable in civil law. Certain aspects of the concept of loss, the grounds and procedure for their compensation were considered in the works of scholars such as T. V. Bodnar, I. O. Dzera, I. S. Kanzafarova, V. M. Kossak, A. A. Kot, I. E. Kras'ko, D. V. Primak, S. M. Pristupa, etc. However, the question of components of the concept of loss indemnity is the least developed in civil law science.

Paper purpose. It is proposed to investigate certain aspects of loss indemnity as a legal implication of contractual delinquency in this article. The scientific investigation is based on comparative legal analysis of the category «loss indemnity» in Ukraine and some other countries of the European Union.

Paper main body. Article 611 of the Civil Code (hereinafter — CC) of Ukraine identifies the following implications of contractual delinquency: termination of obligations due to unilateral withdrawal; termination of obligations due to the termination of the contract; changing the terms of the obligation; payment of the penalty; loss indemnity and moral damages [1].

The CC of the Czech Republic does not contain a separate article on the legal implication of contractual delinquency. However, concerning to termination of certain types of contracts the following legal effects are provided: unilateral refusal of the agreement (Article 2125 of the CC of the Czech Republic — «the buyer has the right to require replacement things, or to cancel

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the agreement»); the termination of the obligation due to termination of the contract (Article 2133 of the CC of the Czech Republic — «if the buyer does not pay more than one tenth of the purchase price, the seller has the right to break the contract»); changing the terms of the obligation (Article 2531 of the CC of the Czech Republic — «due to changes in the amount spent on the trip means, the organizer has the right to change the terms of the contract»); penalty; damages (Article 2048 — «failure to comply with the payment of a penalty in a certain size and in a certain order, the creditor is entitled to demand payment of damages at its discretion») [2].

The CC of Italy also contained no provision regarding the legal implication of contractual delinquency. However, there is a general rule that: «in case of damage to the property of others — one who has committed a wrongful act must pay loss indemnity (Article 2043). Also for each of the types of contracts the CC enshrines the right to demand loss indemnity, in particular: Article 1494 — «in the event of termination of the contract of sale and purchase as a consequence of its breach — the buyer is obliged to pay damages in case of defects caused», Article 2050 «if damage is caused in the way of operating means of increased danger — the tortfeasor would have to be obliged to repair damages...» [3].

Interesting is the fact that the CC of Spain considers the legal implication of contractual delinquency through the prism of the legal implication of agreement. Chapter 5 of the CC divides legal implications of contractual delinquency into lawful and unlawful: implication of wrongful termination (Article 1291): termination of the contract; changing the terms of the obligation; payment of the penalty; loss indemnity and moral damages [4].

Paragraph 280 of the German CC establishes the obligation of the liable party to recover loss indemnity in case of implication of contractual delinquency [5].

In France the implication of contractual delinquency arises out of Article 1382 of the French CC, according to which «any action harmful to another person requires from the responsible party to reimburse it» [6].

In English law there is no clear definition of implication of contractual delinquency. Individual peculiarity arises from judicial practice.

Since the studied countries belong to the European Union (hereinafter — EU), and the Ukrainian legislation should be adapted to the European, we cannot but mention the international Conventions and Principles.

In Articles 81–84 of the UN Convention about Contracts for the International Sale of Goods is regulated the implication of contractual delinquency. Thus, in particular, the parties are released from their obligations in respect of the fact that they haven't done, but what they ought to perform in case of preservation of the contract. Thus, the obligations of the parties cease to have effect for the future. The right of the parties to recover damages is guaranteed by Articles 74 to 79 of the Convention [7]. Under Clause 2, Article 81, a party who has performed the contract either wholly or in part has the right to demand from the contractor refund paid or delivered to him under the contract. If the contract is partially performed by each of the parties, the other party has the same right. But they must realize this right at the same time.

As for the definition of «loss indemnity», in the studied countries only the CC of Ukraine and France are directly define the specified category.

The CC of Ukraine in Paragraph 2 of Article 22 treats loss indemnity as losses, which a person has undergone as a result of destruction or damage things, as well as the costs that the person has made or should make for restoration of their violated rights (actual losses); the income that the person would actually get under normal circumstances, if his right had not been violated (lost profits). That is, loss indemnity in the civil law of Ukraine is, first, the protection of civil rights and interests, and secondly, one of the ways of compensation of property harm.

Differences in matters of loss indemnity in the CC of Ukraine and the CC of the Czech Republic can be noticed by examining the definition of loss. According to the legislation of Ukraine as losses are considered: 1) the loss, which the person has undergone as a result of destruction or damage things, as well as the costs that the person has made or should make for restoration of their violated rights (actual losses); 2) the income that the person would actually get under normal circumstances, if his right had not been violated (lost profits). As a general rule, this approach to the definition of losses can be considered inherent in the civil legislation of the Czech Republic. However, unlike the legislation of Ukraine, the CC of the Czech Republic stipulates that the lender, in its sole discretion, regardless of conditions, determines the amount of loss indemnity (Article 2048). In domestic law, the term «loss indemnity» is used in a broader sense. For example, in Ukraine the amount of loss indemnity is determined by proven losses that arise as a result of breach of contractual obligations.

Under French law loss indemnity in the field of contract law traditionally refers to the loss that their lender has incurred due to non-fulfillment of the contract by the debtor. The general concept of loss given in Article 1149 is: «loss indemnity that must be paid by the lender, are as a general rule, the loss incurred by the lender, or benefit that he lost».

In German law, the indemnification is not explicitly enshrined in law, however, from CC follows that the loss indemnity in German law is considered as compensation. Paragraph 249 of the German CC is the expression of thoughts about what should be protected, the integrity and interests of the victim. It may require primarily of harm compensation in its natural form. Only in cases where the performance of an obligation in kind did not happen on time, or it is impossible or possible, but very costly, there is a requirement of compensation in money (compensation). That is the aggrieved party must obtain such a financial compensation, which would allow her to be in a position in which it would be in the case of execution of the contract.

Also in theory and in practice, difficulties arise in deciding the ratio of losses with other related categories (interest, penalty).

Various scientists have a different approach to solving this issue. For example, V. V. Vitrianskiy, L. A. Lunts believe that the concept of «loss indemnity», «interest» and «penalty» are separate and distinct categories [8, p. 6–9]. But O. P. Podtserkovniy argues that the interest and penalties are a

form of damages [9, p. 271]. In our opinion, the most extensive is the concept of «loss», because the collection of interest and penalties involve property losses for the offender of the obligation, that is the penalty and interest are transformed into losses.

The principle of full reparation is established in the law of all studied countries, that means that and positive damage, both lost profits are recovered. In some cases the amount of compensation may exceed the amount of the damage: if the damage resulted from the personality, life and health (Germany); when the behavior of the person is particularly dangerous, of daring nature (England) [10, p. 53].

The amount of liability can be reduced if: there is a fault of the victim, the damage is done to insane citizen; heavy is the financial status delinquent (continental law); the amount of compensation is too large (the judge has the right to reduce it); the law provides for the reduction of compensation (reduced damages); if the solvency of the defendant is low (English law) [10, p. 55–56].

In the English-American legal system there is a concept of nominal harm that is being used by the court in cases where the plaintiff suffered no actual loss indemnity, but his rights have been violated and need to be protected. The court awards the recovery of conventional (nominal) amounts, which confirms the right of the victim (creditor), for example, 2 pounds in England. Illegal actions are manifested in the violation of the norms of objective law, which protects the interests of individuals, and an attack on someone else's subjective right or interests, the abuse of the law [10, p. 58].

The doctrine and jurisprudence of England classified illegal actions depending on the number of victims, against whom they were directed: mass tort (against a very large group of people, for example as a result of the crash, the accident at the nuclear power plant, chemical plant, etc.); group tort (compared to a group of people, for example, defamation of the collective of employees of the corporation); individual tort (against one individual) [11, p. 95–97].

On the French concept of civil liability, the wrongfulness of an act is an element of guilt of someone who has damage [11, p. 99].

Foreign civil law in sufficient detail considers diversified theories of causal relation as conditions of liability for causing damage (the theory of essential causation, the theory of equivalence, the theory of adequate communication, etc.). In the doctrine and jurisprudence has been established the rule that the unlawful act must be a necessary condition of the possibility of such damages. Only such a harm is subject to compensation.

Non-refundable: damages arising without adequate causation (Germany, Spain, the Czech Republic), indirect damages (France, Italy), too «remote» for the causal relationship (England) [11, p. 99–100].

The law of all studied countries establishes delinquent's guilt as mandatory condition of liability of causing damage. In order of contractual tort liabilities' relationships the defendant's fault is not allowed, it should be proved; the burden of fault's proof was assigned to the injured party.

In cases prescribed by law and judicial precedent, so-called absolute liability is possible offensive, i.e. liability regardless of fault, without fault of

someone who has harm. To the consequences which cause liability without fault in civil law countries are concerned: damage causing by the actions of employees during the performance of official duties, which are the responsibility of the employer (Para. 831 of the CC of Germany, Article 1384 of the CC of France, Article 1805 of the CC of Spain), causing damage to buildings (Par. 836–838 CC of Germany, Article 1386 of the CC of France, Article 2020 of the CC of the Czech Republic), to animals (Para. 833–834 of the CC of Germany, Article 1385 of the CC of France), poor-quality goods (Article 2055 of the CC of Italy), a source of danger, and causing moral harm to the dissemination of information discrediting the honor, dignity or business reputation.

In the countries of English-American law in such circumstances, as a rule, is causing harm to animals, including domesticated and wild; injury to a passenger at the time of embarkation or disembarkation, launch, flight, or landing; due to defects in goods and services, activities that pose an increased risk [10, p. 321].

So these are the general rules of tort liability, however, the right of each country has its own peculiarities of institute of non-contractual liability.

It seems to be the most transparent system of a general tort which is enshrined in French law. In the corresponding article of the CC of France (Article 1382) are established general rules of tort liability: any action causing harm to another person requires the responsible party to reimburse her. The provisions of this article shall apply to any civil offences in all cases of harm, so have the name «General offence».

By the form of guilt the judicial practice distinguishes the concept «quasi-delict» — unlawful damage causing that occurred as a result of negligent actions of the delinquent; tort is only intentional illegal acts. However, the legal consequences of torts and «quasi-delicts» are the same — the duty to compensate loss indemnity.

German law, unlike French, Spanish and Italian, establishes a system of so-called mixed tort that encompasses general and special torts. Thus, it is impossible to state confidently that there is a clear legislative definition of the general tort, but in some articles of the CC of Germany (Para. 823, 826) lays down the provisions that the obligation to make reparation occurs in the case of a violation of any law and tort for any unlawful actions.

In English law there is no general concept of tort, but the common law establishes a number of independent set of facts of civil torts that causes damage compensation, which is conventionally called the singular system of torts. The specific formulations of the offences are developed by court practice; the protection of law outside it is seen as problematic. By the objects of assault these offences are combined into certain groups: (a) encroachment on the individual — trespass (physical body — trespass to person): violence, threat of violence, imprisonment; negligence (neglect of duty, for example, not a warning about the harmful qualities of things sent to storage); oral or written defamation; (b) attacks on property — violation of property (trespass); crimes (harmful act, the creation of obstacles in the use of property); (c)

dispossession, content (illegal things deductions by a person who has no right to do it); embezzlement; defamation of title (dissemination of false information regarding the rights of the plaintiff on the item or its quality); violations of the exclusive rights; (d) the attack on the stability of the household and the denial relationship of service (employee's violation of the agreement on services provision); inducement to breach of contract; misrepresentation (deception) [12, p. 106–110].

Conditions of liability in certain types of offences may differ. In particular, in some cases, the presence of harm and the existence of guilt are not of crucial importance for the emergence of tort obligation. If there is no actual damage, recovery of nominal damages will be awarded [12, p. 110].

In the legislative practice of England the issue of a clear statement of the tort also remains unsolved: there is no general definition of the tort. In the doctrine there are also different points of view on this occasion; almost all scientists acknowledge that the delict (tort) is not a contract.

Generally, the law of England is developing a system of singular torts (separate factual elements of offences), which are reflected in the common law, establishes the general principles, clarifies and articulates the purpose and roles of tort liability. The most common types of torts is trespass, which has three varieties: (a) violation of the ownership of land or other real estate (entry to land or a building without sufficient cause, refusing to leave the land (building), placing, moving things on earth owner), except for cases when such actions are permitted by law; (b) violation of possession of movable property, unlawful use of things of the owner, depriving its owner of things, damage of things; (c) violation of personal integrity (physical violence or the threat to use, unlawful imprisonment; intentional interference with the person). Liability for trespass occurs regardless of the availability of damages for atrocities (nuisance), harmful acts — acts or omissions that cause interference, cause worry or trouble during the implementation of the person's rights as a member of society (public crimes) or property rights, land ownership, servitude and similar rights. Examples of such actions may be: placing on the neighboring plot of land harmful production, construction of the infectious disease hospitals, homes for the mentally ill, amusement park, smoke, shading the neighboring territories, creation of obstacles to traverse, to travel through your site by individuals who have servitude rights and any other actions that create the inability or inconvenience in the lawful use of property or enjoyment of other rights.

Jurisprudence develops also other types of torts, which include, for example, the liability of a seller of alcoholic beverages for injuries caused by a drunk driver; the responsibility of the administration for damage caused by guests to third parties; liability of public carriers and owners of social objects (shopping, sports, cultural centers, etc.) for damage caused by visitors with third parties; liability for acts aimed at destruction of evidence, which is necessary for victim in the process, deception, malicious conspiracy against the undertaker, spreading false information, interference with contractual relations, trade under an assumed name, and many others [13, p. 147–152].

Finally it should be noted that as a result of complications of social relations, sometimes, it is difficult to distinguish cases of contractual liability and liability for tort offences that's why a uniform basis for the obligation to compensate for harm must be established.

In some countries (Spain, Italy, and the Czech Republic) there is a tendency to the unification of contractual and tort liability, the possibility of application of the rules governing Delco liability, contractual relations, and in some of them formed the concept of the so-called competition claims. It means that the victim has the right to decide to submit the claim about compensation of harm caused by the contract or caused by the offence (tort) or not.

The consequences of filing a claim will be somewhat different, since there are major differences in the regulation of contractual and tort liability in terms of appearance, the burden of proof of fault as a prerequisite of liability, the possibility to claim compensation for moral damage and such as.

Competition of claims is allowed in the law of the Federal Republic of Germany, of England, but not French, Czech, Spanish and Italian law [14, p. 122–128].

In the jurisprudence of common law countries the most common claims, connected with breach of obligations, are the claims for damages payment. As it was noted by Zenin, law and jurisprudence of England does not recognize the impossibility of performance of obligations as any commitment can be turned into money, and money is always paid by the debtor [15, p. 92]. But in the countries of Romano-Germanic legal families the indemnification is not less common mean of protecting property rights in contractual relations.

Legal indemnity is the most common form of contractual liability. Because the losses are manifested in the reduction, loss or damage to property, the compensation is aimed at restoring the violated property rights of the lender's owner, and not directly to the protection of property rights, which cannot be recovered [16, p. 139].

The creditor is entitled to compensation for the damages caused in case of violation of obligations that is reinforced in the civil legislation of all countries.

So, although there is no definition of breach of commitments, the German CC in Chapter 325 establishes: if in a bilateral contract, the performance of an obligation has become impossible through the fault of one party, the other party shall have the right to claim damages [17, p. 140].

Article 1142 of the CC of France contains provisions that every obligation to do or not to do leads to damages in case of default by the debtor [17, p. 50].

It should be noted that a necessary condition for the application of responsibility measures as one of the contracting obligatory remedies in continental European countries is the fault of the debtor (Article 209 of the CC of Ukraine, Article 634 of the CC of the Czech Republic, Article 483 of the CC of Italy, Article 1147 of the CC of France, Article 282 of German CC, 656 of the CC of Spain). The presumption of guilt of the debtor's right enshrined in the CC, therefore, the creditor is required to prove only the fact of non-performance or improper performance of obligations.

The same refutation of the presumption rests with the debtor. The legislation does not define guilt; indicate only the forms of its manifestation: the intent and negligence. If the debtor wishes to exempt from liability for the breach of an obligation, he must prove that it was a case or force majeure.

The provisions of the English-American law concerning contractual liability differ markedly from the norms of civil law. The basic principle of common law is that agreements must be kept under all circumstances and regardless of fault of the debtor.

If the person has assumed the obligations under the contract, it may not refuse to perform the last of the motives it is impossible to do so. Such an absolute liability comes from understanding the nature and content of the contract at common law as promises, guarantees, which the debtor undertakes in respect of the creditor. In this case, the debtor does not guarantee the actual performance of the obligation, but only the receipt by the lender of a sum of money. With this approach, the question of impossibility of performance does not arise at all, because the money to pay it is always possible [15, p. 95].

Different laws of different countries addressed the issue of the possibility of a combination of several obligatory-legal means. Of course not always the party, whose rights under the treaty are violated, wants to use only one obligatory legal remedy. Sometimes the combination of these funds is more advantageous, for example, the injured party favorable is the insistence on the performance of the contract and damages in connection with the delay. If due to some circumstances the responsible party is unable or unwilling to perform the contract or the contract is lost to the injured party «economic benefit», the latter is interested in applying to the court with claims for damages and rescission of the contract for its failure. But not all countries legislation gives to the aggrieved party a right to combine the funds of property rights protection.

For example, Article 1184 of the CC of France provides the opportunity to align the requirement to terminate the contract and claim for loss indemnity. It provides for a provision according to which the creditor is entitled to require performance of the contract or its termination and damages in this regard.

The authors of the German CC, on the contrary, exclude the combination of termination and loss indemnity, because they believed that it is impossible to claim damages and to destroy the legal basis for this contract's claim through its termination. Thus, Section 326 of the German CC emphasizes that if in the presence of a bilateral treaty, one party has delayed the granting of performance, the other party may assign the corresponding period for the execution, warning that after the expiration of this period, she will not accept performance. After this deadline, she has the right either to claim damages from nonperformance of a contract, or to terminate the contract [18, p. 268]. That is, the German CC obliges the lender to make a choice between the two remedies.

The civil legislation of almost all countries studied provides for the debtor's obligation to reimburse the losses incurred by the creditor in full (except

Spain). The same rule is contained in the current legislation of Ukraine. This applies both to the costs made by the lender, loss or damage to its property, and to the income not received by the creditor which he would have received if the debtor had fulfilled the obligation (Article 203 of the CC).

Liability in these cases is considered full. But despite the consolidation of this rule, in Ukraine the most common at present is the limited liability. The use of limited liability for nonperformance or improper performance of the obligations is enshrined in Part 1 of Article 206 of the CC of Ukraine. This means that for breach of responsibility is paid only penalty, and losses are not reimbursed or are reimbursed but not in full amount.

According to Article 204 of the CC of Ukraine, if for non-performance or improper performance of the obligation set penalty, the losses shall be compensated in the part which is not covered by the forfeit. The law or the contract may stipulate the cases when are permitted only recovery of damages, but not losses, when losses may be recovered in full in excess of the penalty; when at the choice of the creditor damages or losses may be recovered, or liquidated.

Full loss indemnity, caused by contractual delinquency between organizations, is provided now in the areas of supply, purchase and sale, some contracting relationships and such as. In relation to the majority of other liabilities not complete, but limited liability for breach of contract is assumed (paid in the form of a penalty or in the form of actual damage compensation without the right to compensation of missed profit).

It does not meet modern requirements, since it would be more natural application of the principle of full compensation for damages for breach of obligations as widely as possible, in all phases of economic relations.

Differences in matters of damages by the laws of different countries can be noticed while researching the definition of losses. According to the legislation of Ukraine losses are: (a) the loss, which the person has undergone as a result of destruction or damage things, as well as the costs that the person has made or should make for restoration of their violated rights (actual losses); (b) the income that the person would actually get under normal circumstances, if his right had not been violated (lost profits).

This is an approach to the definition of losses inherent in the civil law countries of Europe. Unlike European law, in common law the term loss is used in a broader sense. As in European countries, in common law countries the amount of damages is determined by proven losses that arise as a result of breach of contractual obligations. But unlike the laws of Ukraine, they include not only the amount of damages and profits, which was expected, but might include moral damages. Despite the fact that loss is a monetary value of property damage [19, p. 538] according to the legislation of Ukraine non-property (moral) harm is not part of the damages. The right to compensation for moral harm caused by the breach of contractual obligations arises under the laws of Ukraine only in the cases provided for by law or contract, particularly in the case of moral damage from purchase of improper quality goods in the retail network (Article 24 of the Law of Ukraine «About Protection of Consumer Rights»). Under the laws of England, for example, losses can be charged for

a substantial physical inconvenience or discomfort, in certain circumstances, may be awarded damages for disappointment, frustration, hope, caused by a violation [20, p. 344–345]. So in English law, as in common law in general, this question is more developed.

The problem of compensation of moral harm most radically decided in the countries of Anglo-Saxon system of law. In the UK which law does not know the difference between pecuniary and non-pecuniary damage, the main condition for reimbursement is the reality of the harm and the seriousness of the offense. Compensation should be full and adequate. However, there is the rule that moral damages are limited to the scope of tort law. That is, non-pecuniary damage as a result of breach of contract, are non-refundable, unless the agreement provides otherwise. The last rule is not absolute, and in some states may vary.

When moral damages are in the field of tort law, the court may go beyond real damages, either pecuniary or moral, and to award in addition to compensatory damages (compensatory damages), the so-called punitive or exemplary damages (exemplary damages) depending on the moral assessment of the offence, manner of its causation, repeatability and, of course, value of the consequences. In this case, such payments become like a kind of punishment of the offender.

In Germany the issue of compensation of moral harm is viewed from another angle of view. On the one hand, the German legislation in the field of torts do not have a common principle of responsibility, which is characteristic for both proprietary and non-proprietary harm, as was done in the civil codes of other countries. Paragraph 253 of the German CC establishes that if the harm caused to the person and not to property, monetary compensation can be obtained only if specially prescribed by law. Violation of consumer rights in this list is missed. However it is permitted indemnification of moral harm on contractual obligations.

The CC of France does not distinguish material and moral harm. Article 1149 determines that the damage speaks for damages or loss in general and is not limited to monetary damages. For moral compensation and material prejudice the defendant must be guilty in causing damage. Unlike the German CC the French CC allows you to receive compensation for moral damage, no matter what was the cause of its appearance, breach of contract or tort. But traditionally in France the amount of compensation for non-pecuniary damage is lower than in countries of common law.

In determining the damages arising from contractual delinquency, the common law generally assumes that normal loss is the loss that may be incurred by any person, if it was caused by analogic damage. Specific damages are those damages that were actually suffered from causes inherent only in the circumstances of the case. Sometimes, the contract meets the warning, which establishes the payment of a certain sum of money as damages for violation of contract. Such conditions, which are named clause of liquidated damages, shall be deemed valid when: (a) difficult or impossible to prove the amount of actual damages in case of breach of contractual obligations; (b) liquidated

and stipulated damages reasonably related to the damages that could actually occur because of violations of contractual obligations [21, p. 111–112].

In addition to these types of damages in common law countries, if the party had not suffered damages for breach of contract, it is entitled to recover nominal damages. The court decision on recovery of nominal damages is awarded with a symbolic amount, for example, in England — two pounds sterling.

The courts of common law countries draw the border between the uncertainty of the availability of damages and the uncertainty of the extent of the damage. The plaintiff must prove that he has suffered damage and it is a direct result of the breach of contract, but there is no responsibility of proving the amount of damage. The question of the extent of the amount subject to the award may be submitted for consideration by the jury. If we can merely guess about whether in breach of contract was or not caused the harm, the plaintiff is not entitled to an award of compensatory damages [22, p. 24–25].

In Ukraine, according to the CC the amount of damages caused by the breach must be proved by the lender.

Thus damages are the one of obligatory remedies while admitting civil legislation of almost all countries but its application is specific.

The bottom line is that in Ukraine, Europe and the countries of common law damages from the breach of contract are awarded to compensate the caused damage, but not as punishment for the harm caused.

Besides the difference in the obligation of proving the amount of damages, the set of damages is also different (actual damages and lost profits, as losses that is provided by the legislation of Ukraine and countries of Europe, to the set of damages by the law of common law countries is also included moral damages, substantial damages for physical inconvenience, discomfort, and disappointment). The common law countries are aware of the concept of nominal damages. Civil law, like the laws of most developed countries, allows for the possibility of a combination of several obligatory remedies.

The principle of performance of the obligation in kind is found quite categorical in the consolidation of the norms of German CC in respect of contractual and tort liabilities, which consider the damages as an exceptional measure, mounted on case when performance would be impossible or inadequate to fully restore the interests of the lender.

In French law the so-called institute of the obligation enforcement in kind, which is applied by many countries of this civil-law system, is developed by court practice, and further enshrined in the procedural legislation: if the debtor refuses to perform the action to which it is obliged by the court decision, it is awarded to pay to the creditor a certain amount of money — fine per each day of delay of execution (asteriated). The amount of the fine is left to the discretion of the court and is not limited; it can grow arbitrarily and does not depend on the size of damages incurred by the lender, which can lead to substantial uncompensated losses of the debtor.

If the execution of the obligation in kind is physically possible and the creditor insists, on Romano-Germanic law, the court must make a decision about the enforcement of debtor's obligation in kind.

The awarding of monetary reimbursement, as already noted, the continental law is regarded as a minor sanction in liability for failure to perform the obligation which is established in case the performance in kind is impossible or creditor lost interest in this performance. Although in commercial transactions this form is most prevalent.

In Anglo-American law it was developed a principle opposite to continental law that the main civil liability for failure to perform obligations is the way of monetary compensation, which is provided by common law. Loss indemnity is viewed as the primary tool to protect the interests of lender which in the event of default by the debtor always has the right to claim monetary compensation.

Compulsory execution of obligations in kind as an additional measure of responsibility was developed in English-American legal system in the practice of the courts of justice. Latest judicial practice applies it more widely, especially in relation to trading (business) transactions. The execution has spread to the transaction in respect of which have not been used previously: construction contract, employment recruitment (evident in the re-employment), that deals not only with real estate, but also with other things that are classified as unique (antique, precious, other goods that cannot be purchased in the buyer's market) and so on [23, p. 2 81]. However, enforcement is still regarded as an exceptional measure, to be used by the court in the case where monetary compensation may not be an adequate remedy, and provided that there is no fault of the injured party and the contract concluded on the basis of adequate counter consideration (remuneration). The decision on compulsory enforcement of obligations in kind may be made depending on the content of debtor's duties violation and in the form of imposing the duty to perform certain actions in kind (specific performance), or in the form of a restraining court order (injunction) prohibiting the debtor to perform certain actions that violate its obligations under the contract.

You should also pay attention to the fact that Section 1 of Article 7.3.6 of the UNIDROIT principles provides that if the parties' return of all received under the contract in kind is not possible, appropriate compensation must be made in cash. In case of cancellation of contract the UN Convention about Contracts for the International Sale of Goods and the Principles contain two methods of calculation of losses subject to compensation. This specific method of calculation on the basis of substitution of the agreement (Article 75 of the Convention and Article 7.4.5). The principles and method of calculation are based on current rates — abstract method (Article 76 of the Convention and Article 7.4.6. of the Principles). It must be considered that in the determination of damages as a constraint is a rule about «predictability» of losses.

The use of a specific method of calculation of damages involves the presence of two necessary conditions. First, breach of contract should lead to its cessation. Secondly, the aggrieved party should carry out the substitution agreement.

In the presence of these conditions the lender, using a specific method of calculation may recover from the violator of the contract losses in the amount

of the difference between the contract price and the price realized in return transaction if the conclusion of the replaced agreement is held in a different location than the original deal, and is on other terms, the amount of damages should be determined taking into account may increase costs. When using this method, you must follow two conditions. Replace the deal should be done in a reasonable manner and within a reasonable time [24, p. 175]. Based on the principle of good faith of the parties to the contract and the interests of commerce, sensible way substitution agreement shall be such a method that will ensure its maximum efficiency taking into account the specific circumstances. A reasonable period of time within which must be enclosed model agreement, is determined by the characteristics, specific goods and trade in the good.

The use of abstract method of calculation of damages also requires certain conditions. First, it is necessary that the breach of contract led to his termination. Secondly, you must have the current price for this product at the time of termination. Thirdly, there must be a substitution agreement.

When these conditions exist the injured party has a right to claim as damages, the difference between the prices set in the contract and the current price at the time of termination. An abstract method can be used also in the case where it is not possible to determine exactly weather instead of contract's termination was made another deal.

Also in the Convention and in the normative Principles was defined the current price, with which to compare the contract price. So, the current is the price that would prevail in the place where should be delivered. The amount of damages may be reduced if the damage could be reduced by reasonable actions of the injured party.

Conclusions. Thus, compensation by the debtor, who did not fulfill or fulfilled obligations improperly, damages, that occurs from lender, in all the studied countries, is considered as a measure of civil liability, has exceptionally proprietary nature. The principles of indemnification are common to all countries: indemnification should be complete, i.e. compensated as a positive good (real costs and losses of the creditor), and missed profits (which he could receive if the obligation has been executed by the debtor properly); monetary compensation is purely compensatory in nature, that is, it should recover the creditor's position and put it in a position in which he would have been if the obligation had been performed, but it is limited to the amount of liability of the debtor. There are some exceptions to these general rules, which were considered in this research paper.

References

1. Цивільний кодекс України [Electronic resource] : Закон України від 16.01.2003 р. із змін., внес. згідно із Законами України : за станом на 23.07.2014 р. — Access mode: http://zakon1.rada.gov.ua. — Title from the screen.
2. Občanskэ zákoník [Electronic resource] : The Law of Chez Republic of 20.02.2012, with changes, made according to the Laws of Chez Republic on a state of 22.01.2015. — Access mode: http://www.zakonycr.cz/seznamy/040–1964-sb-obcansky-zakonik.html. — Title from the screen.

3. Codice civile Italiano [Electronic resource] : The Law of Italy of16.03.1942, with changes, made according to the Laws of Italy on a state of 12.03.2015. — Access mode: http://www.jus.unitn.it/cardozo/obiter_dictum/codciv/Codciv.htm. — Title from the screen.
4. Cуdigo civil Espacol [Electronic resource] : The Law of Spain of 24.07.1889, with changes, made according to the Laws of Spain on a state of 14.06.2014. — Access mode: http://www.wipo.int/wipolex/ru/text.jsp?file_id=221319. — Title from the screen.
5. Burgerliches Gesetzbuch [Electronic resource] : The Law of Germany of 18.08.1986, with changes, made according to the Laws of German on a state of 4.03.2015. — Access mode: http://www.gesetze-im-internet.de/bgb/index/html. — Title from the screen.
6. Le Code civil des Fransais [Electronic resource] : The Law of France of 21.03.1804, with changes, made according to the Laws of France on a state of 1.08.2015. — Access mode: http://www.napoleon.org/fr/salle_lecture/articles/files/pointsrepere_codecivil04_delage.asp. — Title from the screen.
7. Конвенція ООН про договори міжнародної купівлі-продажу товарів 1980 р. [Electronic resource]. — Access mode: http://zakon4.rada.gov.ua/laws/show/995_003. — Title from the screen.
8. Витрянский В. В. Проблемы арбитражно-судейской защиты гражданских прав имущественного оборота [Text] : дис. ... докт. юрид. наук: спец. 12.00.03 «Цивільне право і цивільний процес; сімейне право; міжнародне приватне право» / В. В. Витрянский — М., 1996. — 23 p.
9. Подцерковний О. П. Грошові зобов'язання господарського характеру: проблеми теорії і практики [Text] / О. П. Подцерковний — Ed. 1. — Київ: «Юстиніан», 2006. — 426 p.
10. James V. Calvi. American Law and Legal Systems [Text] / V. James– Ed.7. — 2011. — 530 p.
11. Best A., David W. Barnes. Basic Tort Law: Cases, Statutes, and Problems [Text] / David W. Barnes — New York: Aspen, 2003. — 324 p.
12. Shapo, Marshall S. Principles of Tort Law [Text] / S. Marshall — Ed.2 –St. Paul, Minn.: West. — 654 p.
13. Calnan Alan. A Revisionist History of Tort Law [Text] / A. Alan — Durham, N. C.: Carolina Academic Press. — 2003. — 451 p.
14. Loiacono Kristin. A Good Fight in the House. Over Medical Malpractice «Reform» [Text] / K. Loiacano — Trial 11. — 2003. — 232 p.
15. Зенин И. А. Гражданское и торговое право капиталистических стран [Text] / И. А. Зенин — М.: Изд-во МГУ, 1992. — 421 p.
16. Дзера І. О. Цивільно-правові засоби захисту права власності в Україні [Text] / І. О. Дзера — К.: Юрінком Інтер, 2001. — 286 p.
17. Гражданское, торговое и семейное право капиталистических стран [Text] / Под ред. В. К. Пучинского, М. И. Кулагина — М.: Изд-во Университета дружбы народов, 1986. — 336 p.
18. Германское гражданское уложение. Основы гражданского права Германии [Text]. — М.: Изд-во Бек, 1996. — 432 p.
19. Цивільне право України: Підручник у 2-х книгах [Text] / За ред. О. В. Дзери, Н. С. Кузнєцової. — В.1. — К.: Юрінком Інтер, 2001. — 736 p.
20. Ансон В. Р. Договорное право [Text] / В. Р. Ансон — М.: Юрид. лит., 1984. — 464 p.
21. Организационные и правовые основы коммерческой деятельности на рынках Англии, США и Канады [Text] / Под ред. В. М. Смирнова. — М., 1997. — 434 p.
22. Ласк Г. Гражданское право США (право торгового оборота) [Text] / Под ред. Е. А. Флейшиц. — М.: Изд-во иностранной литературы, 1961. — 52 p.\
23. Богатых Е. Гражданское и торговое право капиталистических государств [Text] / Е. Богатых. — М.: Юрист, 2004. — 367 p.
24. Schlechtriem Peter. Internanionales Kaufrecht [Text] / P. Schlechtriem. — Tubingen, 1996. — 364 p.

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ВІДШКОДУВАННЯ ЗБИТКІВ ЯК ПРАВОВИЙ НАСЛІДОК ПОРУШЕННЯ ДОГОВОРУ

Резюме
Відшкодування боржником, який не виконав або неналежно виконав зобов'язання, шкоди, що виникла у зв'язку з цим у кредитора, у всіх досліджуваних країнах розглядається як захід цивільно-правової відповідальності, що має суто майновий характер. Загальними для всіх країн є принципи відшкодування збитків: відшкодування має бути повним, тобто відшкодовується як позитивна шкода (реальні витрати й втрати кредитора), так і неодержані ним доходи (які він міг би отримати, якби зобов'язання було виконане боржником належно); грошове відшкодування має суто компенсаційний характер, тобто воно повинно відновити становище кредитора і поставити його у таке положення, в якому б він знаходився, якби зобов'язання було виконане, але цим і обмежується обсяг відповідальності боржника. Існують окремі винятки з цих загальних правил, що були розглянуті у даному науковому дослідженні.

Ключові слова: відшкодування збитків, правовий наслідок, порушення договору.

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ВОЗМЕЩЕНИЕ УБЫТКОВ КАК ПРАВОВОЕ ПОСЛЕДСТВИЕ НАРУШЕНИЯ ДОГОВОРА

Резюме
Возмещение должником, который не выполнил или выполнил обязательство ненадлежащим образом, ущерба, возникшего в связи с этим у кредитора, во всех исследуемых странах рассматривается как мера гражданско-правовой ответственности и носит чисто имущественный характер. Общими для всех стран являются принципы возмещения убытков: возмещение должно быть полным, т. е. возмещается как позитивный ущерб (реальные затраты и потери кредитора), так и неполученные им доходы (которые он мог бы получить, если бы обязательство было исполнено должником надлежащим образом); денежное возмещение имеет чисто компенсационный характер, то есть оно должно восстановить положение кредитора и поставить его в такое положение, в котором бы он находился, если бы обязательство было выполнено, но этим и ограничивается объем ответственности должника. Существуют отдельные исключения из этих общих правил, которые были рассмотрены в данном научном исследовании.

Ключевые слова: возмещение убытков, правовое последствие, нарушение договора.

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LEGAL NATURE OF FINANCIAL SERVICES AGREEMENT AND ITS PLACE IN CIVIL CONTRACTS' SYSTEM

In the article the legal nature of the financial services agreement is investigated. The place of the financial services agreement in civil contracts' system is defined.

Key words: financial service, financial services agreement, system of civil contracts.

Problem statement. Nowadays the financial services agreements are gaining the increasing popularity. First of all it is connected with the development and complication of civil circulation, differentiation of civil obligations. A significant amount of fundamental issues regarding these obligations didn't get appropriate decision in rule-making practice and lighting in theoretical researches that is caused by lack of studied doctrinal bases of regulation of financial services agreements. Referenced circumstances don't allow to define appropriate place of financial services in civil law system and accurately distinguish them from the related legal institutes. These problems don't give any opportunity to promote stability of development and legal regulation of financial services.

Analysis of recent researches and publications. The issues of financial services and their providing are widely discussed in scientific literature. In particular, in the works of M. M. Agarkov, A. B. Altshuller, G. Berman, N. I. Braginsky, J. Gold, V. P. Gribanov, R. David, N. V. Drozdov, F. Kann, K. Tsvaygert, R. Tsimmermann, I. Shikhat, etc.

Paper purpose. The purpose of the scientific research is the ascertainment of financial services agreement's legal nature and the definition of its place in the system of civil contracts.

Paper main body. All civil contracts establish uniform system which is characterized by both internal unity, and differentiation of the contractual relations that is caused by peculiarities of the concrete property relations that is mediated by contracts.

Classification of civil contracts can be carried out by various criteria. So, depending on the conclusion's purposes scientists distinguish the following groups of civil contracts: contracts about estate transferring in property, full economic maintaining or operational management (purchase and sale, delivery, loan, exchange, donation, supplying of energy resources); contracts about estate transferring in temporary use (property employment, rent, housing employment, household hire, free estate using, leasing); contracts about work

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performance (contract of work and labor, independent-work contract for capital construction, contract for performance of project and prospecting works, contract for performance of auditor works); contracts about transferring of creative activity's results (author's contract, license contracts, contracts about transferring of scientific and technical products); services contracts (transferring, insurance, assignment, commission, storage, intermediary services, lifelong contents, credit agreement, financial services); joint activity contracts (foundation agreement, agreements about scientific and technical cooperation) [1, p. 358].

Financial services agreements are included to the system of services contracts. The famous civil scientist N. I. Braginskiy divided services contracts into two groups: 1) contracts which are constructed on consumer work agreement model, that is contracts are directed on work performance (for example, consumer work agreement on capital construction, on performance of project, research works); 2) contracts which are constructed on assignment contract model, that is services contracts (storage, expedition and transferring) [2].

In this situation it is worth reminding that service in civil law is identified with action, and it means that providing of any service is impossible without commission of a certain action. On the basis of the given by N. I. Braginsky classification of services contracts it is possible to come to a conclusion that in the result of performance of one of them the new thing is created or its properties change (for example, services on implementation of repair work), and other contracts cause movement of material object (for example, services in freight transferring) [2].

Article 901 of the Civil Code of Ukraine fixes legal definition of the services contract, noting that under such contract one party (performer) obligates to provide service which is consumed in the process of certain action or activity commission, on the instructions of the second party (customer), and the customer obligates to pay to the performer noted service if another isn't established by the contract.

It should be noted that a feature of commutative services contract follows from its legal definition, however the parties have an opportunity to provide other conditions in the contract. The object of services contract are the commission of certain actions by the performer (for example, granting hotel rooms for accommodation) or commission of certain activity (hairdresser's services). Thus, the object is the useful effect from commission of an action or activity by the performer who never gets form of a new thing or change (improvement of consumer qualities) of the already existing acts.

The parties of the services contract are the customer (service recipient) and the performer (service supplier). The last can be any subject of civil law, as in the legislation there are no restrictions about subject's composition of the obligation. However the special subject's composition of this contract can be provided by the law or follow from service's nature. For example, only doctors can render medical services, only financial institutions can grant the loans.

It should be noted that the essence of financial service is shown through the content of service in its classical understanding. M. I. Braginskiy and

V. V. Vitryanskiy, characterizing essence of service, allocate two elements connected among themselves — purpose to which service serves (advantage) and means of achievement of this purpose — commission of action by that who provides service [3, p. 209].

Regulation of issues concerning the financial services contract can be carried out on the basis of norms of several branches of law. The financial services contract is regulated by the special Law of Ukraine «About Financial Services and State Regulation of the Markets of Financial Services». In the Civil Code of Ukraine there are no special articles concerning the financial services contract, but to the last can be applied general provisions of Chapter 63 of the Civil Code of Ukraine, and also can be applied separate kinds of civil contracts which are combined in the financial services contract (for example, Art. 1058 of the Civil Code of Ukraine «Contract of a bank deposit»). In particular, in the condition of compliance to the provisions of the Law of Ukraine «About Financial Services and State Regulation of the Markets of Financial Services» and the Civil Code of Ukraine, separate provisions of the laws of Ukraine regulating financial activity (for example, the Law of Ukraine «About Banks and Bank Activity», «About Consumer Protection» and others) can be applied. However, at such significant amount of the law precepts, which regulate a certain sphere of the relations, it is very important to adhere to the uniform approaches of legal regulation of the corresponding public relations.

The Law of Ukraine «About Financial Services and State Regulation of the Markets of Financial Services» is priority. The specified law establishes the general legal bases in the sphere of providing financial services, implementation of regulatory and supervising functions behind activities for providing financial services. It also governs the relations arising between participants of the markets of financial services during implementation of operations from providing financial services.

So, according to Art. 1 of the referenced Law, financial service is the operation with financial assets which is carried out in interests of the third parties on their own expense or at the expense of these persons, in the cases provided by the legislation, at the expense of financial assets attracted from other persons for the purpose of receiving profit or preservation of real cost of financial assets [4, Art. 1].

So, it is possible to allocate three main features of financial service: 1) operations are carried out in favor of the third parties, thus they have intermediary character; 2) the object of the transaction are financial assets; 3) the operation purpose — receiving profit or preservation of real cost of a financial asset.

That is, the key moment of legal definition of the concept «financial service» is «financial assets». Along with it, legal definition of the concept «financial assets» doesn't exist, but only Para.1 of Art. 1 of the referenced Law contains the list of the objects which are relating to financial assets: money, securities, debt obligations and rights of requirement of a debt.

Concerning definition of the concept «financial assets» — here opinions of scientists are different. Some identify «financial asset» and «security», un-

derstand under them as «official confirmation of the right to future profits at observance of arrangements» [5, p. 324]. Others — concerning financial assets use the term «fictitious capital» as the capital embodied in security papers [6, with. 9]. Economists claim that the financial asset is non-thing asset that represents legal requirements of this asset's owners on obtaining the defined monetary income in the future [7, p. 10].

In our opinion, the term «financial asset» should be defined as the category which is connected with the movement of the objects having cost and is result of last events that are capable to bring economic benefits in the future and are in property and under control of economic subjects, in their existing form or in the form of monetary and financial instruments.

We suggest to improve legal definition of the concept «financial service», concretizing it through the studied categories, in particular to add Art. 1 of the Law of Ukraine «About Financial Services and State Regulations of the Markets of Financial Services of Ukraine» with the following contents: «Financial service is a certain operation which is consumed in the course of commission of a certain action or implementation of a certain activity which is connected with the movement of the objects which have cost and is result of last events that are capable to bring economic benefits in the future and are in property and under control of economic subjects, in their existing form or in the form of monetary and financial instruments which one party, on the instructions of other party, for a certain payment, undertakes to provide».

According to the Law of Ukraine «About Financial Services and State Regulation of the Markets of Financial Services», service supplier of financial services can be only legal entity or sole proprietor who has standardly certain right for it, that is allocated with the legal status determined by the law and carry out the activity according to the authorized documents, to the law and in the cases established by the law — it needs special permission (license).

That is the main subject is the financial institution. According to Art. 1 of the specified law the financial organization is the legal entity which according to the law provides one or several financial services, and also others services (operation) connected with providing financial services in the cases which are directly determined by the law, and it is also brought the corresponding register in the order, established by the law. To financial institutions pertained banks, credit unions, pawnshops, leasing companies, confidential societies, insurance companies, establishments accumulative provision of pensions, investment funds and companies and others legal entities which exclusive kind of activity is granting

financial services, and in the cases which are directly determined by the law — others services (operation) connected with providing financial services.

Concerning the customer (the consumer of service) we will notice that the legislation doesn't limit their circle. Therefore, any person — legal or physical which will address to a service supplier for the purpose of receiving a certain financial service — can become it.

So, all services contracts can be considered as public contracts (Art. 633 of the Civil Code of Ukraine). However, in our opinion, such a situation is

incorrect. For example, the loan is granted not to any natural or legal entity. To the discretion of bank, which is granting credit, it can be refused to person who, for example, has the outstanding credit.

The onerousness of financial service is shown in receiving profit or preservation of real cost of financial assets. Drozdova N. V. in her dissertation research recognizes the financial services contract to enterprise transactions [8]. It is proved by that the receiving profit is a characteristic sign of business activity that testifies to existence of enterprise nature of implementation of financial service which (enterprise character) is based on onerousness of such service. However, in our opinion, such an approach is not absolutely true, as in some cases, for example, in case of implementation of supplementary (deposit) operations, this service is free in its essence as the fact of attraction of funds of persons in bank deposits (deposits) doesn't demand from them implementation of payment in favor of bank. The payment for money storage on a bank deposit in banking institution is received only by the client (investor) in the form of percent. However, on the other hand, the bank receives benefit from that the last can carry out other operations with the help of invested funds.

In the Law «About Financial Services and State Regulation of the Markets of Financial Services» is very important the definition of the list of services which admit as financial (P.1 of Art. 4): 1) release of payment documents, payment cards, traveler's checks and/or their service, clearing, other forms of ensuring calculations; 2) trust management of financial assets; 3) activities for a currency exchange; 4) attraction of financial assets with the obligation of their following return; 5) financial leasing; 6) granting means in a loan, including on the terms of the financial credit; 7) provision of guarantees; 8) money transferring; 9) services in the sphere of insurance in system of accumulative provision of pensions; 10) professional activity on securities market, subject to licensing; 11) factoring; 11–1) administrations of financial assets for acquisition of goods in groups; 12) management of property for financing of construction objects and/or implementation of operations with real estate according to the Law of Ukraine «About Financial and Credit Mechanisms and Management of Property at Construction of Housing and Operations with Real Estate»; 13) operations with mortgage assets for the purpose of issue of mortgage securities; 14) banking and other financial services which are provided according to the Law of Ukraine «About Banks and Bank Activity».

Though the legislation contains the exhaustive list of types of financial services, however uniform criteria of classification are absent. We suggest financial services to subdivide behind subjects of granting on: 1) services of banks; 2) services of insurance companies; 3) services of the credit unions; 4) services of pawnshops; 5) services of the leasing companies; 6) services of confidential societies; 7) services of establishments of accumulative provision of pensions; 8) services of investment funds.

In a form of legal regulation: 1) financial services which are regulated by the general norms of civil law; 2) financial services which are regulated by special laws (management of property for financing of construction objects

and/or implementation of operations with real estate (The Law of Ukraine «About Financial and Credit Mechanisms and Management of Property at Construction of Housing and Operations with Real Estate»); 3) banking and other financial services (the Law of Ukraine «About Banks and Bank Activity»).

Depending on types of financial assets — the financial services connected with: 1) cash; 2) securities; 3) debt obligations; 4) rights of requirement of a debt that aren't carried to security papers.

Conclusions. The financial services contract has many common features with the services contract and is its version. On the basis of the carried-out analysis and detection of features of the financial services contract, we can offer its following definition. The financial services contract is a contract according to which the service supplier (financial institution or, in the cases established by the law — other subject of managing) provides to a service recipient (client) the financial service which is consumed in the course of commission of a certain action or implementation of a certain activity and which is connected with the movement of the objects, which have cost and is result of last events that economic benefits are capable to bring in the future, and are in property and under control of economic subjects, in their existing form or in the form of monetary and financial instruments, and the service recipient (client) undertakes to pay the specified service if another isn't established by the contract — on the professional beginnings.

References

1. Цивільне право України: підручник у 2 кн. [Text] / За ред. О. В. Дзери, Н. С. Кузнєцової. — К. : Юрінком Інтер, 2002. — В. 2. — 640 p.
2. Брагинский М. И., Витрянский В. В. Договорное право: Общие положення [Electronic resource] / М. И. Брагинский, В. В. Витрянский. — М. : Статут, 1997. — 682 p. — Access mode: http://www.litmir.info/br/?b=48117. — Title from the screen.
3. Брагинский М. И., Витрянский В. В. Договорное право в 3 кн.: Договоры о выполнении работ и оказании услуг [Text] / М. И. Брагинский, В. В. Витрянский. — М. : Статут, 2002. — В.3. — 1038 p.
4. Закон України «Про фінансові послуги та державне регулювання ринків фінансових послуг України» [Electronic resource] : Закон України від 12.07.2001, із змін., внес. згідно із Законами України: за станом на 06.02.2015 р. — Access mode: http://zakon4.rada.gov.ua/laws/show/2664–14. — Title from the screen.
5. Шарп У. Инвестиции [Text] / У. Шарп, Г. Александер: Translated from English. — М. : ИНФРА-М, 1997. — 1024 p.
6. Анфигенов О. В. Бухгалтерский учет и аудит финансовых активов коммерческих организаций [Text]: автореф. дис. .... канд. экон. наук: спец. 08.00.14 «Мировая экономика» / О. В. Анфигенов. — Саратов, 2009. — 17 p.
7. Зомчак Л. М. Моделювання динамічних характеристик фінансових активів в умовах стохастичного середовища [Text] : автореф. дис. ... канд. екон. наук: спец. 08.00.14 «Світова економіка» / Л. М. Зомчак. — Львів, 2007. — 24 p.
8. Дроздова Н. В. Договір про надання фінансових послуг у цивільному праві України [Electronic resource]: автореф. дис. ... канд. юрид. наук: спец. 12.00.03 «Цивільне право і цивільний процес; сімейне право; міжнародне приватне право» / Н. В. Дроздова; Київський національний ун-т ім. Тараса Шевченка. — К., 2005. — Access mode:: http://www.lib.ua-ru.net/diss/cont/130350.html. — Title from the screen.

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ПРАВОВА ПРИРОДА ДОГОВОРУ ПРО НАДАННЯ ФІНАНСОВИХ ПОСЛУГ ТА ЙОГО МІСЦЕ У СИСТЕМІ ЦИВІЛЬНО-ПРАВОВИХ ДОГОВОРІВ

Резюме

У статті досліджується правова природа договору про надання фінансових послуг та визначається його місце у системі цивільно-правових договорів. На основі проведеного аналізу та виявлення особливостей договору про надання фінансових послуг пропонується наступне його визначення. Договір про надання фінансових послуг — це правочин, згідно з яким послугонадавач (фінансова установа або у випадках, встановлених законом, інший суб'єкт господарювання) надає послугоотримувачу (клієнту) фінансову послугу, яка споживається в процесі вчинення певної дії або здійснення певної діяльності та яка пов'язана з рухом об'єктів, що мають вартість, та є результатом минулих подій, що здатні приносити у майбутньому економічні вигоди й знаходяться у власності й під контролем економічних суб'єктів, у їх наявній грошовій формі чи у формі грошових і фінансових інструментів, а послугоотримувач (клієнт) зобов'язується оплатити зазначену послугу, якщо інше не встановлено договором, на професійних засадах.

Ключові слова: фінансова послуга, договір про надання фінансових послуг, система цивільно-правових договорів.

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ПРАВОВАЯ ПРИРОДА ДОГОВОРА О ПРЕДОСТАВЛЕНИИ ФИНАНСОВЫХ УСЛУГ И ЕГО МЕСТО В СИСТЕМЕ ГРАЖДАНСКО-ПРАВОВЫХ ДОГОВОРОВ

Резюме

В статье исследуется правовая природа договора о предоставлении финансовых услуг и определяется его место в системе гражданско-правовых договоров. На основе проведенного анализа и выявления особенностей договора о предоставлении финансовых услуг предлагается следующее его определение. Договор о предоставлении финансовых услуг — договор, согласно которому услугодатель (финансовое учреждение, или в случаях, установленных законом, иной субъект хозяйствования) предоставляет услугополучателю (клиенту) финансовую услугу, которая потребляется в процессе совершения определенного действия или осуществления определенной деятельности и которая связана с движением объектов, имеющих стоимость, и является результатом прошлых событий, которые способны приносить в будущем экономические выгоды, и находятся в собственности и под контролем экономических субъектов, в их существующей форме или в форме денежных и финансовых инструментов, а услугополучатель (клиент) обязуется оплатить указанную услугу, если иное не установлено договором, на профессиональных началах.

Ключевые слова: финансовая услуга, договор о предоставлении финансовых услуг, система гражданско-правовых договоров.

АКТУАЛЬНА ПРОБЛЕМА

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COURT PROTECTION GUARANTEES OF FOREIGN CITIZENS' PROPERTY RIGHTS

The article is dedicated to the issue of the specifics of legislative regulation and practice of foreign citizens' protection of their constitutional property rights in Ukrainian courts. The problem is analyzed in terms of the issue of foreign investments protection guarantees as one of the directions of current reforms in Ukraine.

Key words: court protection, foreign citizens, constitutional property rights, enforcement procedure, judgment.

Problem statement. According to the recently approved Strategy of Sustainable Development «Ukraine-2020» «Deregulation and Enterprise Development» And «Program on Attraction of the Investment» were proclaimed as one of the 62 reforms, which should be performed in Ukraine. Under this reform in order to support the investment activity and investors' protection it is necessary based on best world practice to ensure the effective protection of private property, including by means of the judiciary, to harmonize the provisions of the legislation of Ukraine on protection of national and foreign investors and creditors, protection of economic competition with the EU legislation, to introduce the incentive mechanisms of investment activity. Also according to the Strategy Ukraine should be promoted under the brand message: «Ukraine — is a hub for investments» [1].

Thus the Strategy identifies the judicial protection of property rights of foreign nationals as one of the most important steps towards ensuring of the investment climate and business development in Ukraine.

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Analysis of recent researches and publications. Some theoretical aspects of judicial protection of foreign citizens' rights are covered in the works of the civil law scientists, particularly Bigun V. [2; 88], Fedyniak L. [3; 15], Yakimenko A. [4; 80] as well as the experts in private international law, such as Boguslavskiy M. [5; 345], etc. However, in constitutional law there is no complex study devoted to the analysis of legislative guarantees of foreign nationals' constitutional right to judicial protection of their property rights.

Paper purpose. Given the before-mentioned reasoning the purpose of the article is to figure out the condition of guarantees of judicial protection of foreign nationals' property rights, to define the most important problems that hinder their protection as well as possible solutions of such problems.

Paper main body. The rules on the free access of foreign citizens to the justice are provided for in international treaties of Ukraine. According to Art. 1 of The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, concluded between the countries — members of the CIS, the citizens of each state as well as those who live in its territory enjoy in the territory of other states — parties to the Convention the same legal protection of their personal property rights as well as the citizens of the state. The citizens of each state, as well as other persons living on its territory, have the right freely and easily to go to court, prosecutors and other agencies of other countries, whose competence includes civil, family and criminal cases, can act in such bodies, present petitions, file lawsuits and perform other procedural acts on the same conditions as nationals of that state. These provisions also apply to legal entities established under the laws of each state [6].

Thus, the procedural protection is provided for the citizens and legal persons of the contracting party, and in accordance with the Art. 1 of the Convention — persons residing in the territory of each country. The volume of legal protection is determined by national regime.

The similar provisions are usually stated in the bilateral international agreements. For example, Article 1 of the Agreement on Legal Assistance in Civil and Criminal Cases between Ukraine and China provides that citizens of one state shall enjoy in the territory of the other state the same legal protection of their personal and property rights, as well citizens of their own country. They have the right to go to court and other agencies, whose competence includes civil (commercial, business, marriage and family, labor) and criminal cases, and may present the petitions and carry out other proceedings under the same conditions as the citizens of their own country. This provision shall also apply to legal entities established in the states in accordance with their legislation [7]. Similar rules are stipulated in the Agreement between Ukraine and the Republic of Georgia on Legal Assistance and Legal Relations in Civil and Criminal Cases [8] and other bilateral agreements.

As for the national legislation of Ukraine, it does not set any restrictions of legal protection to foreign citizens' rights, they are guaranteed the right to free and unimpeded protection in the courts of Ukraine.

According to Art. 26 of the Constitution of Ukraine, foreign citizens and stateless persons who reside in Ukraine on legal grounds enjoy the same rights

and freedoms and bear the same responsibilities as citizens of Ukraine, with some exceptions established by law [9]. Part 1 of Art. 73 of the Law of Ukraine «On International Private Law» stipulates that foreign persons have the right to apply for protection of their rights, freedoms and legitimate interests in the courts of Ukraine [10].

In particular, according to Art. 410 of the Civil Procedure Code of Ukraine foreign natural and legal persons, stateless persons, foreign governments (their bodies and officials) and international organizations have the right to apply for protection of their rights and legal interests to the courts of Ukraine and can be subjects of civil legal proceedings [11].

Thus, the law of Ukraine establishes the national legal regime for the protection of the rights and interests of foreigners, which means that foreign citizens, stateless persons, foreign organizations are applied the same treatment as for individuals and legal entities of Ukraine and they have the same procedural rights. With that the spread of the national regime principle on the above persons is based on the principle of absoluteness, that is not associated with any mandatory requirements for their residence in the territory of Ukraine and others.

Civil and commercial procedural capacity and capability of a foreign citizen are determined by the law of the state of which he is. However, even if the person under the law of his own state is not procedurally capable, it can be recognized as such on the territory of Ukraine, if he has civil procedural capability in accordance with the procedural legislation of Ukraine. Legal capacity of the foreign legal entity is determined by the law of the state in which it is registered. Because of this the legal standing of this category of procedural relations participants must be confirmed by documents of the appropriate state, which have to be legalized with the features defined in the convention abolishing the requirement of legalization for foreign public documents [12].

Consequently, the Ukrainian national law, which determines the procedural legal rules, subject-matter jurisdiction and jurisdiction of cases with a foreign element, procedural status of the case participants, applies to natural and legal persons of foreign states regardless of the presence in their state of law, which determines the equivalent rights for individuals and legal entities of Ukraine.

However, it should be noted that declarative equality of procedural rights of Ukrainian citizens and foreign citizens, unfortunately, is not always a guarantee of protection of their rights in practice.

Thus, the foreign national having passed all the complexity of the formal judicial process in Ukraine and received the judgment faces the necessity of its enforcement, which in the property disputes often means the necessity of the recovery of a certain amount of money from the defendant. Herewith often in the cases with a foreign element the amount, which has to be recovered, is determined in the judgment according to the currency of the infringed obligation, which is usually stated in a foreign currency.

If the foreign citizen reside in Ukraine, has a bank account in national currency and has no objections against the receipt of the recovered amount in

national currency (despite the fact that according to the judgment the amount should be recovered in the foreign currency), then he unlikely will face the bureaucracy of the State enforcement office of Ukraine and in general will be satisfied with the justice and state bodies of Ukraine.

However, the situation described above generally in practice is more the exception than the rule, because most of the foreign citizens and legal entities want their funds to be returned back on their personal bank accounts abroad, because usually they do not have any accounts in the national currency in Ukraine.

But it is necessary to point out that since 2011 in terms of the Law of Ukraine «On Enforcement Proceedings» this situation should not cause any problems in practice, because Art. 53 provides that when the amount of debt should be recovered in the foreign currency enforcement officer in case of presence of the debtor's funds in the relevant currency is obliged to collect the funds in foreign currency to the accounts of the state enforcement office for their further transfer to the bank account of the plaintiff. In the case of presence of the funds in hryvnia or other currency the enforcement officer instructs the bank to purchase the relevant currency purchase and transfer of foreign currency to the account of the state enforcement office [13].

However, the practice in Ukraine shows that enforcement officers do not act under the law automatically, but only in case of active position of foreign citizens, which are forced to fight for their constitutional rights for the appropriate judgment enforcement.

In most cases, due to the incompetence and relative vulnerability of foreign nationals, enforcement officers collect the funds in national currency and ignore their statutory obligations on the purchase of currency. After that, during a year the enforcement officers formally requested from the creditor his bank account in hryvnia details, which often does not exist. For example, if the creditor is a foreign legal entity, in order to open an account in the national currency it needs to register in Ukraine an official representation, which is very complex, time-consuming and expensive procedure.

If within one year since the funds were collected the creditor did not submit the details of his bank account in local currency, under Art. 45 of the Law of Ukraine «On Enforcement Proceedings» the funds are automatically transferred to the state budget, and enforcement proceedings are closed [13].

In some cases, during the year the foreign citizens manage to force the enforcement officers to comply with the requirements of law. Usually this can be achieved by judicial appeals against the actions of the enforcement officer, or by complaints to the higher authorities, appeals through diplomatic channels and raising the issue in the media.

It is needless to say that this experience of return of the investments, moreover by means of judicial protection, for a long time discourages the investors' interest in Ukraine, and in some cases even leads to a baseless state appropriation of foreign investments.

Conclusions. To conclude the article we would like to emphasize that despite the presence of some gaps in legislation as well as conflicting rules, to-

day the problem in law enforcement practice make even explicitly prescribed and just obligatory for regulation of investment relations standards. It is obvious that the situation of nihilism by public authorities of their duties, which all by itself constitute not only guarantees of the constitutional right to court protection, but also the constitutional right to private property, is simply not acceptable in the light of the global legal reform in Ukraine.

Impeccable execution of such an important stage of justice as the enforcement of the judgment should become an integral feature of the Ukrainian justice, and do not leave any opportunity for corruption and abuse. Confidence in the ability to protect through the court the property rights, namely investments, should be a signal for the growth of the activity of foreign investors in Ukraine.

References

1. On the Strategy for Sustainable Development «Ukraine — 2020» [Electronic resource]: Decree of the President of Ukraine of 12.01.2015. — Access mode: http://zakon4.rada.gov.ua/laws/show/5/2015 — Title from the screen.
2. Begun V. Civil legal standing and civil procedural legal capacity of foreign citizens in Ukraine [Text] / V. Begun // Law of Ukraine. — 1999. — № 10. — P. 86–90.
3. Fedyniak L. The Right of Foreign Citizens' Legal Action in Ukraine (Civil Procedural Aspects) [Text]: PhD Dissert. Abstr. ... Cand. Jur. Sc.: 12.00.03 «Civil Law and Civil Procedure law; Family law; Private International Law» / L. Fedyniak; Ivan Franko National University of Lviv. — Lviv, 2000. — 20 p.
4. Yakimenko A. Peculiarities of preparation of civil cases for trial with foreign elements [Text] / A. Yakimenko // Law of Ukraine. — 1998. — № 7. — P. 85–89.
5. Boguslavskiy M. Private International Law [Text] / M. Boguslavskiy. — M.: Intern. relations, 1997. — 416 p.
6. Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases [Electronic resource]: International document of 01.22.1993. — Access mode: http://zakon2.rada.gov.ua/laws/show/997_009 — Title from the screen.
7. Agreement between Ukraine and China on Legal Assistance in Civil and Criminal Cases [Electronic resource]: International document of 31.10.1992. — Access mode: http://zakon2.rada.gov.ua/laws/show/156_014 — Title from the screen.
8. Agreement between Ukraine and the Republic of Georgia on Legal Assistance and Legal Relations in Civil and Criminal Cases [Electronic resource]: International document of 09.01.1995. — Access mode: http://zakon4.rada.gov.ua/laws/show/268_542 — Title from the screen.
9. Constitution of Ukraine [Text]: Law of Ukraine of 28.06.1996 // State Paper of Verkhovna Rada of Ukraine. — 1996. — № 30. — 141 p.
10. On International Private Law [Text]: Law of Ukraine of 23.06.2005 // State Paper of Verkhovna Rada of Ukraine. — 2005. — № 32. — 422 p.
11. Civil Procedure Code of Ukraine [Text]: Law of Ukraine dd. 18.03.2004 // State Paper of Verkhovna Rada of Ukraine. — 2004. — № 40–41, 42. — 492 p.
12. Convention Abolishing the Requirement of Legalization for Foreign Public Documents [Electronic resource]: International document of 05.10.1961. — Access mode: http://zakon2.rada.gov.ua/laws/show/995_082 — Title from the screen.
13. On Enforcement Proceedings [Electronic resource]: Law of Ukraine of 21.04.1999 // State Paper of Verkhovna Rada of Ukraine. — 1999. — № 24. — 207 p.

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ГАРАНТІЇ СУДОВОГО ЗАХИСТУ МАЙНОВИХ ПРАВ ІНОЗЕМНИХ ГРОМАДЯН

Резюме

У статті досліджено актуальні питання стану гарантій судового захисту майнових прав іноземних громадян в Україні, передусім з точки зору захисту іноземних інвестицій, що є однією з основ інвестиційної привабливості держави. На підставі аналізу норм Конституції та прийнятих на її виконання законів зроблений висновок про те, що декларативні гарантії судового захисту, закріплені в Основному законі, часто не знаходять своєї реалізації на практиці у зв'язку із недотриманням державними органами норм закону, зокрема, на етапі виконання рішення суду, що призводить до порушень прав іноземних громадян, створює умови для корупції і зловживань, що, у свою чергу, негативно впливає на умови ведення іноземними громадянами бізнесу в Україні.

Ключові слова: судовий захист, іноземні громадяни, конституційні майнові права, виконавче провадження, рішення суду.

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ГАРАНТИИ СУДЕБНОЙ ЗАЩИТЫ ИМУЩЕСТВЕННЫХ ПРАВ ИНОСТРАННЫХ ГРАЖДАН

Резюме

В статье исследованы актуальные вопросы состояния гарантий судебной защиты имущественных прав иностранных граждан в Украине в первую очередь с точки зрения защиты иностранных инвестиций, являющейся одной из основ инвестиционной привлекательности государства. На основании анализа норм Конституции и принятых во имя ее исполнения законов сделан вывод о том, что декларативные гарантии судебной защиты, закрепленные в Основном законе, зачастую не находят своей реализации на практике в связи с несоблюдением государственными органами норм закона, в частности, на этапе исполнения решения суда, что приводит к нарушениям прав иностранных граждан, создает условия для коррупции и злоупотреблений, что в свою очередь негативно влияет на условия ведения иностранными гражданами бизнеса в Украине.

Ключевые слова: судебная защита, иностранные граждане, конституционные имущественные права, исполнительное производство, решение суда.

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PROCEDURE FOR PROVIDING MEDICAL ASSISTANCE TO CONVICTS SENTENCED TO IMPRISONMENT IN UKRAINE

This article reveals the procedure for providing medical assistance to persons serving sentences of imprisonment.

Ability to provide medical care to convicts sentenced to imprisonment is significantly restricted to conditions of detention in places of non-freedom: quality of work of the medical unit, availability of the necessary medicines and qualified doctors, access to medicine of an adequate standard.

The work of a lawyer is not only in protection against accusations, but also in an enforcement of rights of the client during the proceedings and serving his/her sentence.

Key words: medical assistance, conditions of non-freedom, free choice of doctor, quality, timeliness.

Problem statement. In current Ukrainian conditions it's extremely important to disclose the order of providing medical assistance to those who are in places of non-freedom, opportunities of imprisoned person and order of actions aimed at restoration of rights of that person.

Analysis of recent researches and publications. There is a lot of scientific studies dedicated to the legal status of prisoners. Among them: S. K. Akimov, A. B. Bryllyantov, N. V. Vytruk, L. D. Voevodyn, A. Y. Zubkov, Y. Y. Karpets, A. V. Kuznetsov, N. Y. Matuzov, M. P. Melentev, H. L. Mynakov, A. C. Mykhlyn, A. E. Natashev, Y. S. Noi, P. H. Ponomarev, V. Y. Selyverstov, H. A. Struchkov, Iu.M. Tkachevskyi, V. A. Utkyn, V. D. Fylymonov, Y. V. Shmarov, etc. But at same time there is no enough of complex researches on the medical assistance to such a group of patients, although many scholars and practitioners have repeatedly drawn attention in their studies and publications that medical rights of patients who are in places of non-freedom are in critical danger. The insularity, lack of effective secure communication with relatives and friends at large, «tied hands» of prisoners themselves leads to leveling of rights of patients that threatens human health and life.

Paper purpose is a disclosure of legislatively minimum standards of actions of penal institution's staff, aimed at ensuring and protection of health of those persons, who are serving their sentence in prison, in order to examine the possibility of actions needed to restore the violated rights.

Paper main body. According to Art. 27 of the Constitution of Ukraine everyone has the inalienable right to life. No one shall be arbitrarily deprived of

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life. The duty of the state is to protect human life. Everyone has the right to protect his life and health, life and health of others from unlawful encroachments.

Serving sentence in detention facilities does not deprive a person of the right to protect his health, doesn't narrow or limit his rights. Unfortunately, in practice, it is hard for prisoners to maintain their health at the proper level; we mean a state of complete physical, mental and social wellbeing, not merely the absence of disease or disability. Terms of punishment in general are unfavorable for maintaining a state of complete health, and not even for recovery.

Along with the objective reasons of improper medical care there are the subjective reasons, which include client ignorance of his/her rights and opportunities, reluctance of representatives of detention facilities to fulfill the requirements of current legislation and their duties.

Each convict has those rights in the sphere of health protection: right to life [1, Art. 27], [2, Art. 281]; right to choose the doctor, which includes: right to choose the medical institution; right to choose a doctor; right to replace the doctor [3, Art. 34, 38]; right to information, which includes: right to get information about health; right to get information about medical intervention [2, Art. 285], [3, Art. 39]; right to privacy [2, Art. 288], [3, Art. 39–1]; right to choose methods of medical intervention [2, Art. 284]; right to personal security, including right to refuse medical intervention [2, Art. 284, 289], [3, Art. 43]; right to proper quality of health care [3, Art. 6]; right to compensation [3, Art. 6].

The rights of prisoners in the health protection sphere, the main principles of medical assistance and interaction of health care institutions of the State Criminal-Executive Service of Ukraine with health protection institutions on providing medical assistance to prisoners are stated by the Order of Organization of Providing Medical Assistance to Prisoners Sentenced to Imprisonment [4].

Healthcare institutions of State Criminal-Executive Service of Ukraine (hereinafter — SCES) include: specialized TB hospitals; specialized dermatology and venereal hospitals; specialized psychiatric hospitals; multidisciplinary hospital; multidisciplinary hospital for disabled of I and II groups that require constant medical care and rehabilitation; outpatient clinics; outpatient and preventive department; medical unit of penal facilities; points of health protection; pharmacy.

In health care institutions of SCES emergency medical assistance, primary medical assistance, specialized (secondary) medical assistance are provided, sanitary-hygienic and anti-epidemic measures are carried, provision of medicinal products and medical devices is organized, rehabilitation treatment after diseases and injuries are performed [4].

In medical unit of penal facilities there is duty to control the health condition of prisoners through medical examinations, inspections, exercise of clinical supervision, provision of primary health assistance, emergency medical care, outpatient and inpatient care in accordance with the Basic Laws of Ukraine on Health Protection.

Talking about the basic rights of the convict, he has the right to free choice of a doctor [4]. In case when convict makes a request for admission of a chosen doctor, medical worker of SCES's health institution prepares a medical report on the health of the convict and the request to the administration of penal institution during one day.

Administration of the penal institution provides the access of the doctor to the convict within three working days after the presentation of passport, certificate of education and a specialist certificate made by the chosen doctor.

Health examination conclusion, consultations and information about the medical treatment made by the doctor have to be necessarily included in the medical record of the convicted person. Compensation of costs associated with the provision of medical care made by the chosen doctor is carried out by the own funds of the convict or his relatives.

Counseling, medical examination and medical treatment that are provided by the doctor chosen by the convict are carried out in conditions of SCES's medical institution in the presence of medical personnel.

In case of necessity of additional medical examinations, which may not be made in SCES's medical institutions (available equipment, laboratories and capability of health care is not provided for conducting these medical examinations), their conducting is implemented on the basis of medical institutions which are included in the indicative list where such medical examinations may be performed.

Administration of the penal institution during the period defined by the doctor provides directing of the convict for medical examination to the certain medical institution from the indicative list.

If it is found by the results of the medical examination of the convict that he needs medical assistance in the health institution from the indicative list, doctor of SCES's medical institution prepares a medical report about the health of the convict and requests the administration of penal institutions.

Administration of penal institutions provides transportation of the convict to such health institution from the indicative list no later than in period defined by the doctor. The administration also organizes and provides day and night ward of the convict during medical treatment in medical institution.

Medicinal products (or their equivalents) and technical and other means of rehabilitation can be obtained from relatives of convicts or other persons only if they are prescribed by a doctor and approved by the chief of SCES's medical institution [4].

For transfer of medicinal products (their equivalents) relatives of the convicts have to submit an application, which then have to be filed in a medical record. After receiving the parcel the convict scrutinizes the list of tools and products that have been transferred for his medical treatment and personally signs the document.

Another important aspect is a right to primary medical examination of convicts [4]. Upon arrival in penal facilities all prisoners undergo the primary medical examinations during the day in order to identify people who have suffered injuries, people who are posing a threat of epidemic to the environment

or are in need of medical care, and those with pediculosis. Results of survey are recorded in the medical card that is sent from detention centre together with the personal file of the convict.

In case of detection of injuries medical worker reports immediately to administration of penal institutions and comprises a reference in three copies, where he/she describes in detail the nature of the damage, their size and location. Two copies of reference are attached to the personal file and medical records, and the third copy is granted to convict [4].

About the fact of detection of injuries of convict the administration of penal institution informs the prosecutor in written form during the day and documents the injuries identified in the logbook.

In the case of detection of the prisoner's illness health medical officer estimates the health condition of the convict and possible danger to the environment. He also defines the possibility of providing medical care in the medical unit's conditions or determination of convict to the hospital or health institution from an indicative list.

Medical assistance to convict is provided immediately in conditions of medical unit of penal facilities. In case of impossibility of providing of such assistance fully the convict is determined to the hospital or the health care institution from the indicative list within the period determined by a medical worker in the medical record.

All HIV-infected convicts are taken on dispensary registration; registration record of HIV-infected person is filled.

After the primary medical examination convicts are sent to the quarantine, diagnostic and distribution department.

Within fourteen days of stay of convicts in the quarantine, diagnostic and distribution department they are subjected to full medical examination, that is performed by doctors of medical unit according to their professional direction, and fluorography examination (besides those convicts, that are examined during the last 11 month).

The complete medical examination includes: anamnestic information' collection; anthropometric researches (height, body weight); objective examination of organs and systems; gynecological examination of women with cytological smears for examination, girls — fingertip examination through the rectum (if indicated); evaluation of visual and hearing acuity; tuberculin diagnosis in penal institutions — for minors; blood samples (erythrocyte sedimentation rate, hemoglobin levels, leucocytes quantity, blood sugar indicated); urinalysis; ECG; fingertip examination through the rectum (if indicated); pneumotachometry (if indicated); women — palpation examination of breasts; review by therapist, psychiatrist, dentist and if necessary — review by other doctors; identification of persons with symptoms that require mandatory testing for tuberculosis because of the clinical screening' results (productive cough with sputum that lasts more than two weeks, weight loss, fever, night sweats, coughing up with blood, chest pain), in case of identifying of such persons — carrying out of double examination of sputum with the method of microscopy smear of sputum.

After the survey (obtainment of the results of the survey) doctor prepares the conclusion on the health of the convict (with the diagnosis) with recommendations for employment immediately, which is introduced in medical card.

Depending on the health condition and diagnosis convict is immediately provided with medical assistance.

Further medical monitoring of health of convicts is carried out during preventive medical examinations, as well as in the case of appeals of prisoners complaining for their health condition to the medical unit.

After the diagnosis of HIV infection [4] indications for appointment of antiretroviral therapy are defined by infectious disease specialist together with medical worker of medical unit of penal institution, who is responsible for pre- and post-test counseling, measures specified with «The Procedure of Interaction Between Health Care Institutions, Local Bodies of Internal Affairs, Penal Institutions and Detention Centers in Terms of Coherence of Follow-Up for HIV-Positive Persons, the Implementation of Clinical and Laboratory Monitoring about the Progress of the Disease and Antiretroviral Therapy» are taken [5].

In order to detect and prevent the spread of infectious, parasitic, detect of somatic and mental illness in penal institution prophylactic medical examination is conducted annually.

Preventive medical examination is conducted twice a year for juvenile convicts and convicts that are held in penal institutions in the areas of chamber type.

Therapist, psychiatrist, dentist are necessarily involved in preventive medical examination. In the absence of these professionals in the medical unit they are involved. Preventive medical examination of minors is hold by pediatrician, otolaryngologist, ophthalmologist, neurologist, surgeon, dentist and psychiatrist.

During the preventive medical examinations are carried out: anamnesis collection; anthropometric research (height, body weight); examination of organs and systems; gynecological examination of women with cytological smears for examination, girls — fingertip examination through the rectum (if indicated); visual and hearing acuity; tuberculin diagnosis in penal institutions for minors; blood count (erythrocyte sedimentation rate, hemoglobin levels, leucocytes quantity, blood sugar indicated); urinalysis; electrocardiography (from 15 years — once in 3 years, 30 years — every year); fluoroscopy (X-ray) of the chest — once a year; fingertip rectal examination (if indicated); pneumatic (if indicated); women — palpation examination of breast; review therapist, psychiatrist, dentist; review of convicts on pediculosis; if indicated — review of other doctors.

The results of preventive medical examination are recorded in the register of the results of passing of prophylactic medical examination and are fixed into the medical card of the convict.

Outpatient reception of convicts is performed in the medical unit at specific times each day, for which convicts are recorded in the journal of prior appointment for the outpatient reception. Reception without prior registration is hold by the decision of a doctor.

Prior to the outpatient reception an assistant picks outpatient cards of convicts, asks patients to ascertain their complaints, measures their body temperature, provides an overview on pediculosis and determines the order of referral to the reception according to their state condition.

Outpatient treatment, which lasts no more than 15–20 days, is nominated for those convicts, that don't need complicated methods of diagnosis and treatment.

The scope of diagnostic and therapeutic measures for patients depends on opportunities of providing laboratory, X-ray and other examinations in terms of medical unit.

Patients assigned to outpatient treatment, come to the medical unit for receiving medications and perform other procedures during the day at the certain hours. If there is a necessity of round-the-clock emergent medication medicines are given to the patients (not exceeding the daily requirement) by the prescription of the doctor.

Conclusion on temporary release from work is made by that doctor, who has made the reception, but no more than for three days at once.

For convicts, who are on the premises of chamber type, in the disciplinary detention centers, outpatient medical care is provided in situ by the medical worker during daily checking of the overall health condition of convicts. In cases where there is a threat to the health or life of the convict, who is held in these premises, medical worker informs immediately in writing the chief of the penal institution, who authorizes the movement of the convict to the medical unit.

Hospital of medical unit is designed to: examination and treatment of convicts who need inpatient treatment, with the treatment period up to 30 days; necessary inpatient aftercare of convicts discharged from medical or healthcare institutions; temporary isolation in an insulator of medical unit of infectious or suspected at being infectious convicts before departure of them in the specialized hospital; inpatient treatment of non-transportable convicts up to stabilization of their condition and departure to hospital or health care institution; placing of juvenile convicts that belong to health-improvement groups.

In conditions of hospital of medical unit inpatient treatment of minor convicts with diseases that can be cured in two weeks is carried only, in the presence of a medical pediatrician. In the absence of pediatrician or in case when minor convicts require a longer period of inpatient treatment, they are immediately sent to the health institution from the indicative list.

Reception of convicts in hospital of medical unit is carried out if there is an output of the doctor about the necessity of examination and treatment in hospital in the medical record.

Medical card is prepared for each convict, which includes data on all diagnostic and treatment process, including those obtained during examination of the convict, with a letter of assignments. Chief of the medical unit (another medical worker) reports about all cases of emergency or planned hospitalization and discharge from the medical unit to the head of the department of social and psychological services.

All patients must undergo sanitization. Underwear of convict is handed over to the laundry, and then it is disinfected and is returned to the convict after the discharge from the hospital. Clothing and footwear of convict are stored in the medical unit.

In hospitals preventive disinfection measures and the current and final disinfection considering the diagnosis of infectious is hold.

In the hospital convicts who pose a danger to the environment (infectious, contagious skin diseases, mental illness, etc.) are placed separately from other prisoners. To do this in a hospital infectious and psychiatric insulators are equipped.

During his stay in hospital the convict is examined according to his/her disease. Through this examination all the medical techniques of instrumental and laboratory researches are used.

Bearing in mind the results of the examination and diagnosis the doctor of medical unit immediately appoints the treatment to convict in the scope prescribed by standards and norms of medical assistance in public health, clinical protocols of medical assistance.

In hospital medical unit medical worker is on duty around the clock. The doctor on duty corrects medical appointments considering the health conditions of the patient.

Prisoners with mental and behavioral disorders are assigned to the restorative therapy with agents that affect the metabolism, and sensitizing therapy, because of use of psychotropic substances in hospital medical unit.

In the cases of mental and behavioral disorders, aggressive behavior with manifestations of violence, attempt to commit self-mutilation, state of excitement, measure of isolation in the form of placement to a single-chamber insulator of medical unit is used to the convict.

The isolated convict has to be examined by the medical worker at least once every three to four hours. The duration of single-purpose insulation is installed to eight hours, to continue its term a new appointment is made. In order to extend the isolation term for more than 48 hours and before each new appointment the patient has to be examined by the psychiatrist (commission of psychiatrists).

For minors who are physically weakened, are weighing below the established norm, are suffering various serious diseases, trauma, surgery, with long-term nature deviations in health, and are belonging to a special group of accounting and are subjected to constant medical observation, health-improvement groups in inpatient medical units are created.

The convict is subjected to referral for hospitalization in medical institutions in case when the disease emerged or chronic diseases worsened and their medical treatment requires hospitalization to medical institution, as well as in need of further medical examination in hospital conditions.

Medical record and an extract from the medical record (in convertible form) of the convict, who was treated in the medical unit of the prison, are attached to the personal files of the convict, who is sent to the hospital.

In case of direction of a woman with her child the child's birth certificate and the history of child's growth development are attached.

Medical staff has an access to medical records exclusively.

Considering the state of health of convict according to the conclusion of a doctor, the convict who is hospitalized to the medical institution have to be transported in accompany with the medical worker, who is taking part in the escort of prisoners, provides medical care to prisoners during transportation and is appointed by the chief medical officer of prison. Transportation of prisoners with leprosy is carried out in specially equipped cars.

Reception of prisoners in hospital of penal institutions is based on the command and the presence of medical opinion about the necessity of treating of convict in hospitals or examination in inpatient medical units.

It is forbidden to take convicts with infectious diseases to multihospitals in the case of absence of an infection-boxed compartment in a part of the hospital. These prisoners are immediately sent to the hospital or the health care institution from the indicative list of the profile, under which there is such a branch.

Prisoners who came to the hospital are recorded in logbooks; everyone gets a medical record, which recorded data on all diagnostic and treatment process.

Conclusions. Ukrainian legislative framework clearly regulates the treatment of convicts in order to maintain their health and life. Knowledge of the principles and consistency of care for persons who are in places of non-freedom, and legal requirements for quality and timely medical care allows such persons to control the administration and staff of penal institutions to respond to their omission, negligence or willful violation of the legislation. In each case, it will help to save a life and greatly improve his/her health, both physically and mentally.

References

1. Constitution of Ukraine [Text]: Law of Ukraine of 28.06.1996 // State Paper of Verkhovna Rada of Ukraine. — 1996. — № 30. — 141 p.
2. Civil Code of Ukraine [Electronic resource]: Code of 16.01.2003 № 435-IV. — Access mode: http:// http://zakon2.rada.gov.ua/laws/show/435–15 — Title from the screen.
3. Basic Laws of Ukraine on Health Protection [Electronic resource]: Law of Ukraine of 19.11.1992 № 2801-XII. — Access mode: http://zakon2.rada.gov.ua/laws/show/2801–12 — Title from the screen.
4. On Approval of the Provision of Medical Assistance to Convicts Sentenced to Prison [Electronic resource]: Order of Ministry of Justice of Ukraine, Ministry of Health of Ukraine of 15.08.2014 № 1348/5/572. — Access mode: http://Search.Ligazakon.Ua/L_Doc2.Nsf/Link1/RE25767.Html — Title from the screen.
5. Procedure of Interaction Between Health Care Institutions, Local Bodies of Internal Affairs, Penal Institutions and Detention Centers in Terms of Coherence of Follow-Up for HIV-Positive Persons, the Implementation of Clinical and Laboratory Monitoring about the Progress of the Disease and Antiretroviral Therapy [Electronic resource]: Order of the Ministry of Health of Ukraine, the Interior Ministry of Ukraine, the Ministry of Justice of Ukraine of 05.09.2012 № 692/775/1311/5. — Access mode: http://zakon4.rada.gov.ua/laws/show/z1615–12 — Title from the screen.

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ПОРЯДОК НАДАННЯ МЕДИЧНОЇ ДОПОМОГИ ЗАСУДЖЕНИМ ДО ПОЗБАВЛЕННЯ ВОЛІ В УКРАЇНІ

Резюме

Дана стаття розкриває порядок надання медичної допомоги особам, які відбувають покарання у вигляді позбавлення волі.

Можливість надання медичної допомоги засудженим до позбавлення волі суттєво обмежується умовами перебування у місцях несвободи: якістю роботи медичної частини, наявністю необхідних медичних препаратів, кваліфікованих лікарів, доступу до медицини належного рівня.

Робота адвоката полягає не тільки у здійсненні захисту клієнта від обвинувачення, але й забезпеченні дотримання прав клієнта під час здійснення провадження та відбування покарання.

Українська законодавча база досить чітко регламентує порядок поводження із засудженими з метою збереження їхнього здоров'я та життя. Знання принципів та послідовності надання медичної допомоги особам, які перебувають у місцях несвободи, та вимог законодавства щодо якісної та своєчасної медичної допомоги таким особам дозволяє контролювати адміністрацію та працівників установ виконання покарань, вчасно реагувати на їх бездіяльність, халатність чи умисне порушення вимог законодавства, що, в кожному окремому випадку, дасть змогу зберегти життя людині та в значній мірі покращити стан її здоров'я, як фізичного, так і психічного.

Ключові слова: медична допомога, умови несвободи, вільний вибір лікаря, якість, своєчасність.

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ПОРЯДОК ОКАЗАНИЯ МЕДИЦИНСКОЙ ПОМОЩИ ОСУЖДЕННЫМ К ЛИШЕНИЮ СВОБОДЫ В УКРАИНЕ

Резюме

Данная статья раскрывает порядок оказания медицинской помощи лицам, отбывающим наказание в виде лишения свободы.

Возможность оказания медицинской помощи осужденным к лишению свободы существенно ограничивается условиями пребывания в местах несвободы: качеством работы медицинской части, наличием необходимых медицинских препаратов, квалифицированных врачей, доступа к медицине надлежащего уровня.

Работа адвоката заключается не только в осуществлении защиты клиента от обвинения, но и в обеспечении соблюдения прав клиента во время осуществления производства и отбывания наказания.

Украинская законодательная база достаточно четко регламентирует порядок обращения с осужденными с целью охраны их здоровья и жизни. Знание принципов и последовательности оказания медицинской помощи лицам, находящихся в местах несвободы, и требований законодательства относительно качественной и своевременной медицинской помощи таким лицам позволяет контролировать администрацию и сотрудников учреждений исполнения наказаний, своевременно реагировать на их бездействие, халатность или умышленное нарушение требований законодательства, что, в каждом отдельном случае, позволит сохранить жизнь человеку и в значительной степени улучшить состояние его здоровья, как физического, так и психического.

Ключевые слова: медицинская помощь, условия несвободы, свободный выбор врача, качество, своевременность.

ІНФОРМАЦІЯ ДЛЯ АВТОРІВ

ПРОФІЛЬ ЖУРНАЛУ ТА ОСНОВНІ ВИМОГИ

1.1. «Вісник Одеського національного університету. Серія: Правознавство» здійснює такі види публікацій:

1.1.1. наукові статті;

1.1.2. короткі повідомлення;

1.1.3. матеріали конференцій;

1.1.4. бібліографія;

1.1.5. рецензії;

1.1.6. матеріали з історії науки.

1.2. В одному випуску один автор має право надрукувати тільки одну самостійну статтю.

1.3. Мови видання — українська, російська, англійська.

1.4. До редакції «Вісника...» подається:

1.4.1. текст статті з анотацією, надрукований на папері — 2 примірники;

1.4.2. рисунки та підписи до них;

1.4.3. резюме — 2 примірники;

1.4.4. колонтитул;

1.4.5. рекомендація кафедри або наукової установи до друку — для осіб без наукового ступеню;

1.4.6. відомості про авторів;

1.4.7. відредагований і узгоджений з редколегією текст статті, в електронному виді в редакторі Word (кегль 14; відстані між рядками 1,5 інтервалу; поля сторінок — не менш 20 мм з кожного боку).

ПІДГОТОВКА СТАТТІ — ОБОВ'ЯЗКОВІ СКЛАДОВІ

Оригінальна стаття має включати:

2.1. вступ та визначення актуальності обраної теми;

2.2. мету (завдання) даної роботи;

2.3. перелік авторів, що досліджували зазначену проблему раніше;

2.4. викладення основного матеріалу та результатів дослідження;

2.5. висновки (у разі необхідності) та визначення перспектив подальшого дослідження обраної теми;

2.6. анотацію (мовою статті) та резюме (двома іншими мовами);

2.7. ключові слова (до п'яти);

2.8. колонтитул.

ОФОРМЛЕННЯ РУКОПИСУ. ОБСЯГ. ПОСЛІДОВНІСТЬ РОЗТАШУВАННЯ ОБОВ'ЯЗКОВИХ СКЛАДОВИХ СТАТТІ

3.1. Граничний обсяг статті — 8 сторінок, 2 рисунки, 2 таблиці, 15 джерел у списку літератури.

3.2. Послідовність друкування окремих складових наукової статті має бути такою:

УДК — зліва;

ініціали та прізвище авторів (згідно з паспортом) — нижче УДК зліва;

назва наукової установи (в тому числі відділу, кафедри, де виконано дослідження);

повна поштова адреса (за міжнародним стандартом), e-mail, телефон для співпраці з авторами — *на окремому аркуші*;

назва статті. Вона повинна точно відбивати зміст дослідження, бути короткою, містити ключові слова;

анотація мовою оригіналу друкується перед початком статті після інтервалу 20 мм від лівого поля;

під анотацією друкуються ключові (основні) слова (не більше п'яти, мовою оригіналу статті);

далі йде текст статті і список літератури;

резюме друкується на окремому аркуші паперу та включає: назву статті, прізвища та ініціали авторів, назву наукової установи, слово «Резюме» або «Summary», текст резюме та ключові слова;

рисунки додаються (в окремому конверті) разом з підписами та необхідними поясненнями до них.

3.3. Другий екземпляр статті повинен бути підписаний автором (або авторами).

МОВНЕ ОФОРМЛЕННЯ ТЕКСТУ: ТЕРМІНОЛОГІЯ, УМОВНІ СКОРОЧЕННЯ, ПОСИЛАННЯ, ТАБЛИЦІ, СХЕМИ, РИСУНКИ

4.1. Автори несуть повну відповідальність за бездоганне мовне оформлення тексту, особливо за правильну українську наукову термінологію (її слід звіряти за фаховими термінологічними словниками).

4.2. Якщо часто повторювані у тексті словосполучення автор вважає за потрібне скоротити, такі абревіатури при першому вживанні надаються у дужках.

4.3. Посилання на літературу подаються у тексті статті, обов'язково у квадратних дужках, арабськими цифрами. Цифра в дужках позначає номер праці у «Списку літератури» (див. далі «Література»).

4.4. Цифровий матеріал, по можливості, слід зводити у таблиці і не дублювати у тексті. Таблиці повинні бути компактними, мати порядковий номер; графи, колонки мають бути точно визначеними логічно і графічно.

4.5. Рисунки повинні бути представлені в двох ідентичних екземплярах, виконаних на комп'ютері (файли з розширенням tif, pcx, jpg, bmp). Підписи на них повинні бути короткими, їх слід, по можливості, заміняти цифрами чи буквами, які розшифровуються в підписах до них; криві нумеруються арабськими цифрами. Однотипні криві повинні бути виконані в однаковому масштабі на одному рисунку. Рекомендується застосовувати декілька масштабних шкал для об'єднання різних кривих в один рисунок. Зображення на рисунках структурних та інших формул небажано. Всі ілюстрації повинні бути пронумеровані в послідовності, яка відповідає згадуванню їх у рукописі, та номерами прив'язані до підрисункових підписів. На звороті рисунка позначається його порядковий номер, прізвище автора, назва статті.

4.6. При викладі результатів слід уникати повторення змісту таблиць та рисунків, а звертати увагу на найважливіші факти та певні закономірності, що з них випливають. Висновки роботи повинні відповідати меті (завданню), що була поставлена на початку роботи.

ЛІТЕРАТУРА

Список літератури друкується мовою оригіналу відповідної праці. Він оформлюється згідно з ДСТУ 7.1:2006 і повинен містити тільки назви праць, на які посилається автор. Назви праць у списку літератури розташовуються в порядку згадування.

АНОТАЦІЯ. РЕЗЮМЕ. КОЛОНТИТУЛ

Анотація (коротка стисла характеристика змісту праці) подається мовою статті, містить не більше 50 повнозначних слів і передує (окремим абзацем) основному тексту статті.

Резюме (короткий висновок з основними положеннями праці) подаються двома іншими мовами, кожне містить не більше 50 повнозначних слів і друкується на окремому аркуші.

Статті приймаються до друку після попереднього рецензування. Редколегія має право редагувати текст статей, рисунків та підписів до них, погоджуючи відредагований варіант з автором, а також не приймати рукописи, якщо вони не відповідають вимогам «Вісника ОНУ. Серія: Правознавство». Рукописи статей, що прийняті до публікування, авторам не повертаються.

Українською, російською та англійською мовами

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