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НАУКОВО-ПРАКТИЧНИЙ ЖУРНАЛ **№1 (24)/2019**

Журнал «Адміністративне право і процес» містить результати сучасних наукових досліджень у галузі адміністративного та адміністративного процесуального права України й зарубіжних країн. Дописувачами журналу є провідні українські та європейські вчені, молоді науковці, юристи-практики. Запропонована структура журналу відтворює систему адміністративного права, адміністративного процесуального права, яка відповідає сучасному європейському вченню про сутність і внутрішню побудову цих галузей права.

Для науковців, представників органів державної влади та місцевого самоврядування, юристів-практиків, а також студентів юридичних факультетів та вищих навчальних закладів юридичного спрямування.

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ЗМІСТ

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НАУКОВИЙ АНАЛІЗ СУДОВОЇ ПРАКТИКИ

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THE CONSTITUTIONAL MODEL OF ADMINISTRATIVE DISCRETION IN UKRAINE: DESIGN OR SPONTANEOUS ORDER

Purpose. *The purpose of the study is to analyze the constitutional model of administrative discretion in Ukraine through the prism of F.A. Hayek theory about design and spontaneous order. The additional purpose of the study is to propose changes to the model of the administrative discretion in Ukraine.*

Methods. *The qualitative research method was fundamental in the proposed study. The traditional (non-empirical) legal research approach was a major tool in the study model of administrative discretion in Ukraine.*

Results. *The problem of inefficiency of the model of administrative discretion in Ukraine is studied by the author in the article. The provisions of part 2 of Article 19 of the Ukrainian Constitution are criticized. Limitation of administrative discretion of public officials by the law are considered ineffective. The reasons for the ineffectiveness of the model of administrative discretion are the disregard for spontaneity in the process of drafting legislation, according to the author's assumptions. Thus, the author uses the concept of spontaneous order, which was created by the Austrian economist F.A. Hayek. In accordance with this concept, the disadvantage of the planning system is the inability to predict all situations that may occur in real life. This conclusion can also be applied to the process of creating legislation. Accordingly, the author concludes that the laws cannot provide a perfect code of conduct for public officials.*

Conclusions. *Thus, the author concludes that limiting administrative discretion to the law is not the best solution. The article proposes to restrict administrative discretion not by law, but by legal principles. According to the author, it takes into account the element of spontaneity in public administration. However, the author also emphasizes that the role of judicial review of administrative acts is significantly increasing in such a model.*

Key words: administrative discretion, spontaneous order, constitutional design, public administration.

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If we delegate too much decision-making authority to experts, administration and democracy conflict. We lose control. Yet if we delegate too little authority, we also find democracy weakened.

Justice Breyer "Active Liberty: Determining our Democratic Constitution" (Clayton, 2015)

1. Introduction

The problem of inefficiency of the model of administrative discretion in Ukraine is studied by the author in the article. Limitation of administrative discretion of public officials by the law are considered ineffective. The reasons for the ineffectiveness of the model of administrative discretion are the disregard for spontaneity in the process of drafting legislation, according to the author's assumptions. Thus, the author uses the concept of spontaneous order, which was created by the Austrian economist F.A. Hayek.

The purpose of the study is to analyze the constitutional model of administrative discretion in Ukraine through the prism of F.A. Hayek theory about design and spontaneous order. The additional purpose of the study is to propose changes to the model of the administrative discretion in Ukraine.

2. Criticism of the modern model of administrative discretion in Ukraine

Administrative discretion is one of the most important and complicated categories in the administrative law. The important role of administrative discretion is conditioned by the close relationship between the discretion of the public administration and the rule of law. The origin of administrative discretion is contained in the concept of the rule of law. A well-known British scientist Albert Venn Dicey at the end of the nineteenth century provided quite popular definition of one of the components of the rule of law: "No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land" (Dicey, 1902: 183–184). This expression means a more general idea that forms the rule of law. Government power should be limited by law in order to prevent state arbitrariness. Therefore, this idea is extremely important. As a consequence, many constitutions, which were adopted around the world, restricted government power by the law. Such a model really creates safeguards against government arbitrariness in many countries.

The Ukrainian constitution also contains a similar idea. The second paragraph of Article 19 of the Constitution states

the following: "Public authorities and bodies of local self-government and their officials shall be obliged to act only on the grounds, within the powers, and in the way determined by the Constitution and the laws of Ukraine" (Verkhovna Rada of Ukraine, 1998). Such norm creates a strict limitation for any discretionary powers of the government. It is extremely difficult to abuse the powers under such conditions.

Accordingly, Ukrainian legislation contains many laws, regulations, and instructions that regulate every official's actions. However, it is clear that nobody can predict and plan all circumstances, situations and write laws which will ideally regulate all aspects of the activities of public officials. In this context, Scott Clayton noted the following: "<…> scholars have pointed out on practical grounds that agency's authorizing legislation is often vague and it is impossible to legislate for all possible administrative scenarios, thus requiring a significant amount of administrative discretion to make legislation functional" (Clayton, 2015). But even the rule of law allows a certain freedom of government bodies in public administration. Such freedom is an administrative discretion.

A discretionary action is informal and, therefore, unprotected by the safeguards inherent in a formal procedure. A public official, for example, has administrative discretion when he or she has the freedom to make a choice among potential courses of action. However, such freedom, in accordance with the Ukrainian constitution, is extremely limited.

As a result of such a limited model of administrative discretion, public officials are unable to regulate their areas of responsibility. They either move away from solving certain problems or solve them inefficiently. Also, they often complain that the legislation is imperfect and does not take into account all the situations which arise in real life. In fact, such a model destroys any initiative, variability, and pluralism in public administration. Although bureaucracy is not dangerous, but extremely inefficient and not able to respond properly to the demands of society. It is clear that the reason for such negative consequences lies in the model of administrative discretion existing in Ukraine.

Thus, we can assume that there is a significant difference between the planning of administrative laws and real life, which may be unpredictable. Nevertheless, the threat of arbitrariness cannot be a justification for the lack of efficiency of public administration.

3. Design or spontaneous order

The reasons for the weakness of the administrative discretion model in Ukraine emerge from the imperfection of the legislative planning system. The design of laws and instructions that govern the activities of public officials has an initial disadvantage. As noted earlier, such a system is theoretically unable to take into account all possible situations, which may arise in public administration. Solving this problem is possible through combining design and spontaneous order.

The detailed consideration of this discussion requires the use of the theory of economist F.A. Hayek, who tried to explain the existing systems of orders in the world. In his fundamental study "Law, Legislation and Liberty", he suggests that any human behavior within society is part of two systems of order. According to Hayek, usually, order is described like something that:" <…> must rest on a relation of command and obedience, or a hierarchical structure of the whole of society in which the will of superiors, and ultimately of some single supreme authority, determines what each individual must do" (Hayek, 1982: 36). Such understanding of the order means that the managed and controlled system has a hierarchy, structure, and a clear subordination. In such systems,

the subordinate must clearly comply with the orders of the superior. The manager or authority clearly plans the rules and gives appropriate instructions.

However, Hayek emphasizes that there are other systems different from the planning systems of order. According to Hayek, the essence of the concept of a planning system of order is authoritarian. It is created and coordinated from the outside. A system of spontaneous order, where the development of an entire system depends on its constituent elements, is opposite to planning (Hayek, 1982: 36). Thus, the difference between the two systems is that the planning system of order is somewhat artificial and can be characterized as an organization. While another system is inherent in self-regulation and it can be characterized as spontaneous order (Hayek, 1982: 37).

Hayek's ideas about systems of order can be used to describe the model of administrative discretion in Ukraine. If we try to extrapolate this scheme to an administrative discretion model, then we will be able to see that in this model there are both elements of planning and spontaneous order. Planning elements are manifested in the fact that administrative discretion is a part of public administration. Usually, public administration in Ukraine is a total organization and planning system. Public administration is fully governed from the outside since public officials should act only in accordance with the rules established by law. Officials themselves, as elements of such a system, have no influence on the system as a whole.

The idea of Ukrainian public administration is based on the following provisions. The activities of public officials are fully regulated by laws, instructions which provide a rule for each of their actions. Public officials do not make their own decisions but only act in accordance with laws. The system of public administration has a clear hierarchical structure. In this structure, every official person must follow the orders of his supervisor. Therefore, we can conclude that this is a classic planning system of order, in accordance with the theory of Hayek. And this is not surprising, because such a system is typical for a government mechanism.

Administrative discretion, as an integral part of public administration, is characterized by spontaneity. Rather, administrative discretion is kind of spontaneous order in public administration. Administrative discretion is the freedom of an official to choose an option of behavior. A public official can choose an option of behavior if the law gives several equivalents of behavior. This is very small freedom of behavior, which is limited by laws. Nevertheless, it corresponds to the model of spontaneous order. The existence of the concept of administrative discretion is, in fact, a recognition that the planning system of order is not able to solve all the problems that exist in public administration.

That is why public administration must take into account the element of spontaneity. It is necessary to give some freedom to the authorities. This freedom is important in those areas where planning is very difficult or ineffective. Today, there is an increasing tendency to outsource some areas of public administration to the private sector. As Rebecca L. Keeler notes: "<…> an increasing share of public services is being outsourced to the private sector, much of administrative law is not applicable to governments' contracted agents" (Keeler, 2013: 183). In the modern world, there is an increasing number of new spheres of social life that are difficult to regulate in advance by pre-established rules. In such new areas, officials should have a certain level of freedom in order for public administration to be effective. Despite the fact that administrative discretion is becoming popular throughout the world, its use in Ukraine remains limited. The administrative

discretion of Ukrainian officials is very restricted and extends not to all areas of public administration.

Therefore, in order to make administrative decisions more effective, it is necessary to find the most optimal model for it. In this context, one should answer the question which Scott Clayton was interested in:

An enduring question regarding administrative discretion is how to make the bureaucracy efficient and effective while also ensuring accountability through democratic values of representation and fairness. In other words, how much administrative discretion is appropriate and how best to regulate the regulators? (Clayton, 2015)

The next part of the study is an attempt to answer this question and offer the most optimal constitutional model of administrative discretion.

4. The dilemma between design and spontaneous order: which model is better for administrative discretion

Since the time Hayek researched this problematic, study of the problems of planning and spontaneous order attracted the attention of many scholars. Discussions focused on which of these two systems is better for regulating certain spheres of social life. A similar debate about the law also took place. Such scholars as Caryn Devins, Roger Koppl, Stuart Kauffman, and Teppo Felin were against planning system of order. In their study, they considered the US Constitution as a design object. They tried to understand whether the planning of the founders of the Constitution was really effective or ineffective. Can constitutional rules that were adopted 225 years ago be useful at our time? (Devins et al., 2015: 609). In fact, their research question was whether the constitutional design was a good decision and how to interpret the US constitution in the modern world?

They believe that planning or design are not effective in relation to the Constitution. The authors wrote: "We are against design, not because we oppose planning and foresight. Not because we oppose action to make a better future. We are against design because it is impossible" (Devins et al., 2015: 679). The scientists explained that the constitutional creator does not have all the knowledge that is necessary to anticipate all the situations in the future. They also noted that it is impossible to predict how such a law will be applied in the future. The behavior of public servants often is unpredictable, and therefore, even a good constitution design could be used illegally (Devins et al., 2015).

Their attitude about this issue is well illustrated in the following passage:

Our analysis suggests that two leading theories of constitutional interpretation, originalism and living constitutionalism, are both unsatisfactory. Originalists do not adequately recognize that the present differs from the past. Novel situations unimaginable to the framers make it possible to have multiple, inconsistent, but equally originalist interpretations of the Constitution. Living constitutionalists do not adequately recognize that the future will differ from the present. Present interpretations enable entirely new and unforeseen laws, which may produce outcomes opposite to those intended by the crafters of present interpretations. For this reason, both theories have morphed over time and become more similar, showing that theory itself defies design (Devins et al., 2015: 609).

Despite the fact that scientists criticize the constitutional design, they do not solve all the problems existing in this area (Devins et al., 2015: 680).

Steven Calabresi demonstrates a more balanced view of this issue. He believes that the position of the previous authors is too critical and that the US constitutional design

in the historical retrospective has proven to be successful (Calabresi, 2016: 239). The following passage shows his position regarding the success of the institutional design.

The success of the Planned System of Order, which is the U.S. Constitution, is readily discernable. Thanks to our Constitution, the United States is the third largest country in the world by territory, the fourth most populous country in the world, and is the world's only military superpower. The U.S. economy is the largest economy in the world, and the U.S. has by far the highest GDP per capita of any of the so-called G-20 nations. The superior constitutional design of the U.S. Constitution is in many ways responsible for all of these successes (Calabresi, 2016: 239).

Thus, Calabresi wrote that the Constitutional design is effective and it will be wrong to completely deny it. However, he makes a more important conclusion. He notes that design and spontaneous order does not exist in isolation, but always interact and complement each other (Calabresi, 2016: 240). According to this idea, two systems of order balance each other and fill the gaps of each other. And this is very different from the position of the authors of "Against design".

Which conclusions from this comparison can be made for the Ukrainian model of administrative discretion? It should be noted that the view of Calabresi is absolutely balanced and rational. This means that the institutional model of administrative discretion presented in the study will be determined by combining planning and spontaneous order. That will solve many of the problems existing in this area, including the following: 1) the lack of variability of officials in public administration; 2) their inability to solve new problems that are not yet regulated by law; 3) the inability to negotiate and conduct a dialogue with citizens; 4) failure to provide public interest in public administration; 5) inability to implement projects in cooperation with private business. A combination of design and spontaneous order will help solve all these problems.

Therefore, in order to improve the model of administrative discretion in Ukraine, several circumstances should be taken into account. It is necessary to provide more freedom and variability of officials in decision-making process. At the same time, an effective control mechanism must be provided. Excessive freedom of public officials may lead to arbitrariness and human rights violations. Hence, effective control is extremely demanded. However, it is important to start with the design aimed at expanding the freedom of public administration.

At the beginning of the work, a constitutional model of administrative discretion was described. It is not difficult to understand that it severely restricts public officials in Ukraine. Currently, Article 19 of the Constitution of Ukraine defines law as a factor that limits administrative discretion. This is a pure design model. The laws that are created and adopted by the parliament are a kind of plan that defines the organizational activities of the bureaucracy. Accordingly, the expansion of freedom in this constitutional model of the institute of administrative discretion is a manifestation of spontaneous order. This will increase the importance of the official's personality and allow them to influence the processes in society.

In fact, the problem is reduced to the following. If the law, as a limitation of administrative discretion, is a manifestation of design, then what will be more focused on spontaneous order? Such a limiter may be legal principles. Principles such as legitimacy, rule of law, proportionality, transparency, accountability, and many other similar principles are more focused on the regulation of spontaneous situations. They are not rigidly planned

by the legislator but allow the public servant to be more flexible and more focused on each particular situation. At the same time, the focus on legal principles during public administration cannot be arbitrary, since the legal principles do not justify the violation of human rights. Therefore, the proposed model is completely correlated with the rule of law and does not contradict this concept.

Undeniably, such a constitutional model will develop the role of judicial review of administrative acts. The administrative courts will interpret each case in compliance with legal principles. The increasing role of judicial review indicates that this model is more focused on spontaneous order than on planning. If the administrative discretion in the Constitution is limited by legal principles, this may lead to an incorrect interpretation of such principles in practice. In these cases, the role of administrative courts, which in accordance with Ukrainian legislation, have the right to review administrative acts of executive power (Verkhovna Rada of Ukraine, 2005), will rise. The role of administrative courts will be significant in this model. By expanding the administrative discretion of public officials, we open up opportunities for abuse. The administrative court is only one restraining institution in this case. Therefore, the judicial review of each particular conflict situation can reconcile the concept of planning with unforeseen situations that may occur in real life.

However, it is necessary to consider additional mechanisms to prevent abuse by public officials. Such fuses would be to introduce additional requirements for the civil service ethics and transparency (Keeler, 2013; 183).

5. Conclusions

The constitutional model of administrative discretion in Ukraine is characterized by inefficiency. Such administrative discretion does not allow the bureaucracy to be flexible and effective. The reasons are in the limited constitutional model of administrative discretion. According to the Ukrainian constitution, a public authority is restricted by law. Limiting the law means that there is a planning element in this model. Parliament, which creates laws, should provide all possible situations of public administration and create rules that will fully regulate the activities of a governmental body or official. However, this task is theoretically unrealistic. Parliament cannot create perfect laws for government since it is impossible to predict all situations that may arise in public administration. In fact, such a model does not fully take into account the spontaneous order. Expanding of administrative discretion will help to resolve this problem. In this situation, public officials will be able to be more flexible and better respond to public administration issues. Besides, it is important to ensure the control over public officials in order to eliminate abuse of power.

In order to satisfy all these requirements, a creation of a new constitutional model of administrative discretion is needed. Such a model has to limit administrative discretion through legal principles, but not through the laws. Legal principles as restriction are more in line with the spontaneous order and should improve the activity of public officials. Administrative courts are an important element in such a model because they will provide judicial review of discretionary administrative acts.

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КОНСТИТУЦІЙНА МОДЕЛЬ АДМІНІСТРАТИВНОГО РОЗСУДУ В УКРАЇНІ: ДИЗАЙН ЧИ СПОНТАННИЙ ПОРЯДОК

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Мета дослідження *– проаналізувати конституційну модель адміністративного розсуду в Україні крізь призму теорії Ф.А. Хаєка про дизайн і спонтанний порядок. Також доцільно запропонувати зміни щодо вдосконалення моделі адміністративного розсуду в Україні.*

Методи. *Якісний метод дослідження був основним у статті. Традиційний (або неемпіричний) юридичний дослідницький підхід також використовувався автором під час дослідження моделі адміністративного розсуду в Україні.*

Результати. *У статті автор розглядає проблему неефективності моделі адміністративного розсуду в Україні. Розпочинається аналіз проблематики з критики положень частини 2 статті 19 Конституції України. Обмеження законом адміністративного розсуду суб'єктів публічного адміністрування визнається неефективним. Причинами неефективності моделі адміністративного розсуду, на думку автора, є ігнорування елементу спонтанності в процесі розроблення законодавства. Таким чином, автор використовує концепцію спонтанного порядку, яка належить австрійському економісту Ф.А. Хайєку. Згідно із цією концепцією недоліком системи планування є неможливість передбачити всі ситуації, які можуть виникнути в реальному житті. Цей висновок можна застосувати також до процесу створення законодавства. Відповідно, автор робить висновок про те, що закони не можуть запропонувати ідеальні правила поведінки для державних службовців.*

Висновки. *Таким чином, обмеження адміністративного розсуду положеннями закону не є ефективним. У статті пропонується обмежити адміністративний розсуд не законом, а правовими принципами. На думку автора, такий підхід дасть змогу врахувати елемент спонтанності в публічному адмініструванні. Водночас автор підкреслює, що роль судового перегляду адміністративних актів за такої моделі суттєво зростає.*

Ключові слова: адміністративний розсуд, спонтанний порядок, конституційний дизайн, публічне адміністрування.

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INSTITUTIONAL FRAMEWORK FOR PUBLIC UTILITY REGULATION: CASE STUDY OF THE DISTRICT HEATING SECTOR IN UKRAINE

Purpose *of the paper is to provide the legal analysis of the institutional framework for public utility regulation based on the case study of the district heating sector.*

Methods. *The analysis of the new paradigm for district heating sector regulation, as well as the institutional framework for district heating sector regulation in Ukraine, is based on the formal logical and deductive methods. These methods also became the basis for making proposals aimed at improving the national legislation that determines the institutional framework for district heating sector regulation.*

Results. *The first part is focused on the analysis of traditional and modern approaches to structuring and regulation of utilities in the district heating sector. The traditional approach tends to structure and regulate utilities as vertically integrated monopolies. This modern approach offers to separate natural monopoly from the competitive segment of the market and regulate only the natural monopoly segment. The second part highlights the local character of the district heating sector. The author concludes that there is no unified institutional model of district heating sector regulation. Based on the analysis of the legal framework the author concludes that the lack of a comprehensive administrative law concept of state regulation in public utility sector, as well as inadequate legal framework for district heating sector regulation, affects the effectiveness of state regulation.*

Conclusions. *While the traditional approach tends to structure and regulate utilities as vertically integrated monopolies, the modern approach offers to separate natural monopoly from the competitive segment of the market and regulate only the natural monopoly segment. The modern approach creates a theoretical background for the new paradigm towards district heating regulation. The independent regulatory authority and local public authorities present the institutional framework for district heating sector regulation in Ukraine.*

Key words: public utility regulation, independent regulators, local authorities, district heating sector.

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1. Introduction

District heating sector plays a crucial role in meeting basic heating needs in Ukraine. Despite the importance of the sector, it faces serious problems related to affordability, quality of service, and financial sustainability of the sector. As stated in the World Bank reports, the district heating sector in Ukraine had been heavily subsidized through the provision of natural gas at below-market prices to the utilities that produced heat for residential consumers. Therefore, the cost of residential heat was below the market prices.

Additionally, residential district heating tariffs covered on average of 60 percent of the already low cost of heat production. As a result of low tariffs, district heating companies did not have funds for system modernization and maintenance. Lack of funds negatively affected the quality of heating services. The situation in the sector worsens due to inefficient regulation.

Therefore, this paper aims to provide a legal analysis of the institutional framework for public utility regulation based on the case study of the district heating sector in Ukraine. The tasks of the paper are as follows: to explore the new paradigm for district heating sector regulation and to analyze the institutional framework for district heating sector regulation in Ukraine.

2. New paradigm towards district heating sector regulation

District heating systems are predominantly designed as isolated systems that are not connected. Due to these technological limitations, there is no direct competition between heat suppliers. For many years district heating, together with other network industries, were considered as natural monopolies and therefore were regulated. However, in recent years the approach to utility regulation was changed. Network industries are not treated as monolithic natural monopolies. Instead, they are divided into different activities that allow applying regulation and competition within a single market (Kazantseva, 2018).

District heating is a system of centralized heat production and distribution typically for urban areas. It has already been mentioned above that district heating is a closed system, which consists of heat plants (which often produce heat and electricity simultaneously) and a network of distribution and returns pipes. The heat systems meet residential and commercial needs for space heating and hot water and often provide heat to industry (Mandil, 2004).

The technological chain allows it to distinguish four different activities within the district heating system: heat production, transmission, distribution, and supply. The traditional approach tends to structure and regulate utilities as vertically integrated monopolies. The modern approach offers to separate natural monopoly from the competitive segment of the market and regulate only the natural monopoly segment.

In the scientific literature, it is a widely accepted opinion that heat transmission, distribution, and supply constitute a natural monopoly segment of the district heating market (Soderholm & Warell, 2011; Westin & Lagergren, 2002). Barriers to the market entry and exit are a precondition to natural monopoly status. Extending this approach, M. Wissner argues the following. According to the scholar, free entry means that "newcomers face no disadvantages in terms of production technology and perceived product quality compared to the incumbent". Technically, third party access to district heating distribution grids is possible. However, in practice, it is difficult to ensure free market entry. In contrast to the later, free market exit means that "the company may exit the market without barriers, in particular, that it can recover all the costs incurred when entering the market through sales of the assets used". In general, capital costs for the construction of district-heating distribution grids are substantial. M. Wissner points out that "if competitors built a second heating distribution grids they could hardly earn the costs incurred when leaving the market" (Wissner, 2014). Therefore, district-heating distribution grids, as well as supply networks are not contestable and may be referred to natural monopolies.

In the case of heat production, most scholars support the statement that this activity does not constitute a natural monopoly. Therefore, it allows the introduction of a competitive mechanism. However, opening the market to competition and ensuring non-discriminatory third party access of heat producers to the networks, require the vertical separation between the heat production and heat distribution to the district heating network. Such separation means that the regulation only needs to address the network operations, while the different heat producers will be competing in a mostly free market. However, unbundling is not always possible. The reason is that from an operational perspective production, distribution and supply tend to be tightly integrated.

Furthermore, unlike other network industries, the technology used by district heating makes long distance transmission and supply inefficient. Besides, the district heating sector has a relatively small size of markets that do not allow many entities to operate and compete (Soderholm & Warell, 2011; Kessides, 2004). During the liberalization of the district heating market, these externalities should be taken into account. In case unbundling is not a feasible solution, indirect form of competition such as competition between sources of heat, wholesale competition, competitive bidding and yardstick competition (benchmarking) could also be considered.

3. Institutional framework for district heating sector regulation in Ukraine

The economic and technological characteristics of the public utility sector, together with the level of political and socio-economic development of the country, affect the institutional model of the state regulation. Given the local nature of industries that belong to the public utility sector, the structure and functioning of these industries differ considerably both within a single country and in comparison with other countries. Thus,

the local nature of the public utility sector causes the lack of a unified approach to the organization, regulation, and financing of the sector.

As stated in the World Bank's report on infrastructure reforms, several decisions are crucial for institutional model of the public utility sector, including the sector competence of regulators, the allocation of regulatory powers between regulator and local authorities, as well as relationship of regulatory authorities with sector ministries and competition or antitrust authorities (Kessides, 2004). These decisions also affect the institutional model for district heating sector regulation.

The institutional framework for district heating sector regulation can be presented by independent regulatory authorities (regulators) or governmental institutions (ministries, agencies, inspections, etc.), as well as municipalities or other local administrations that are responsible for the organization of heating, planning of local infrastructure, approval of investment, price regulation and other practical actions in the organization of centralized heat supply.

It is important to emphasize that the legal status of regulators mainly depends on their role and place in the system of public administration. Thus, regulators may have the status of independent bodies of public administration that do not belong to any of the branches of government, or they can enter the system of executive bodies. Accordingly, if regulators are not organizationally separate from the system of executive bodies, they must still be functionally independent. In some cases, specific functions of utility regulation, in particular, licensing, price and tariff setting, control, etc., are the responsibility of the central executive authorities. However, this practice leads to ineffective regulation, since it makes it impossible to ensure the real independence and accountability of such bodies.

Over the decades, sector ministries were responsible for regulation of the district heating sector in Ukraine. In 2010, a new institutional model of public utility regulation in Ukraine was presented by establishing the public utility regulator. Despite centralization of regulatory powers, licensing and tariff regulation powers were divided between the public utility regulator and local authorities – oblast, Kyiv and Sevastopol city state administrations, as well as local self-government authorities.

The analysis of the Laws of Ukraine allows us to conclude that national legislation does not determine a clear institutional model for public utility regulation. The Law of Ukraine "On Natural Monopolies" considers national commissions for natural monopolies regulation, executive authorities and local self-government authorities as regulatory authorities in the sectors that are natural monopolies. The Law also allows to delegate some regulatory powers to the Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city state administrations (Verkhovna Rada of Ukraine, 2000).

The Law of Ukraine "On State Regulation in the Public Utility Sector" (Verkhovna Rada of Ukraine, 2010) stipulates that the National Energy and Public Utility Regulatory Commission is the only authority responsible for regulation of public utility sector. At the same time, there are no provisions in the Law regarding the regulatory powers of local authorities. The lack of provisions on the role of local authorities in the regulation of public utility sector can be explained by the fact that when this Law was adopted, it had a title "On the National Commission for Public Utility Regulation of Ukraine". The Law aimed

at defining the legal basis for the functioning of the public utility regulator. However, in 2011 the Law was amended. As it follows from the new title of the Law as well as from the Preamble of the Law, it determines the legal basis for state regulation in the public utility sector. Therefore, the Law of Ukraine "On State Regulation in the Public Utility Sector" shall include provisions on the role on the role of local authorities in the regulation of public utility sector, as well as clear determine their regulatory powers and relationship with the National Commission for Energy and Public Utility Regulation of Ukraine.

The Law of Ukraine "On Heat Supply" determines that state regulation in the district heating sector is carried out by the Cabinet of Ministers of Ukraine, National Commission for Energy and Public Utility Regulation of Ukraine, the Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city state administrations (Verkhovna Rada of Ukraine, 2005). Special attention shall be paid to the fact that this list of regulatory authorities in the district heating sector excludes local self-government authorities. However, local self-government authorities play an important role in tariff regulation and their regulatory powers in the district heating sector determined by the Law of Ukraine "On Local Self-governance in Ukraine". The Law of Ukraine "On Heat Supply" specifies the powers of the National Commission for Energy and Public Utility Regulation of Ukraine regarding the regulation of the district heating sector. At the same time, the Law does not define the regulatory powers of the Cabinet of Ministers of Ukraine. Regarding the powers of the Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city state administrations, the Law mentioned above only determines that these authorities shall carry out licensing and control.

One of the key conclusions is that the lack of a comprehensive administrative law concept of state regulation in public utility sector, as well as inadequate legal framework for district heating sector regulation, affects the effectiveness of state regulation in general. The Law of Ukraine "On State Regulation in the Public Utility Sector" shall clear determine that the National Commission for Energy and Public Utility Regulation of Ukraine is the only regulatory authority that regulates utilities in the district heating sector, water supply, and sewage, as well as municipal waste management sector. The National Commission for Energy and Public Utility Regulation of Ukraine is entitled to delegate certain regulatory powers to local public authorities. These provisions should be reflected in the Law of Ukraine "On State Regulation in the Public Utility Sector" as well as the Law of Ukraine "On Heat Supply".

4. Conclusions

The traditional approach tends to structure and regulate utilities as vertically integrated monopolies. This modern approach offers to separate natural monopoly from the competitive segment of the market and regulate only the natural monopoly segment. The separation of natural monopoly from the competitive segments of the market achieved by breaking down of vertically integrated monopolies and unbundling of their activities is not always feasible for the district heating sector. However, some forms of indirect competition still can occur in the sector.

The institutional framework for district heating sector regulation in Ukraine includes the independent regulatory authority and local public authorities. The National Commission for Energy and Public Utility Regulation of Ukraine is the only regulatory authority

that regulates utilities in the district heating sector, water supply, and sewage, as well as the municipal waste management sector. The National Commission for Energy and Public Utility Regulation of Ukraine is entitled to delegate certain regulatory powers to local public authorities.

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ІНСТИТУЦІЙНЕ ЗАБЕЗПЕЧЕННЯ ДЕРЖАВНОГО РЕГУЛЮВАННЯ У СФЕРІ КОМУНАЛЬНИХ ПОСЛУГ: НА ПРИКЛАДІ СЕКТОРА ЦЕНТРАЛІЗОВАНОГО ТЕПЛОПОСТАЧАННЯ В УКРАЇНІ

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Мета. *Статтю присвячено аналізу інституційного забезпечення регулювання сфери комунальних послуг на прикладі сектора централізованого теплопостачання.*

Методи. *Для цілей дослідження автор здійснює аналіз нової парадигми регулювання системи централізованого теплопостачання, а також інституційного забезпечення державного регулювання у сфері теплопостачання в Україні шляхом застосування формально-логічного й дедуктивного методів. Ці методи також стали основою для формулювання пропозицій, спрямованих на вдосконалення законодавства України стосовно інституційного забезпечення державного регулювання у сфері теплопостачання.*

Результати. *Перша частина зосереджена на аналізі традиційних і сучасних підходів до визначення структури сфери теплопостачання та її регулювання. Традиційний підхід полягає в тому, що підприємства у сфері теплопостачання є вертикально інтегрованими монополіями, які підлягають державному регулюванню. Натомість сучасний підхід пропонує відокремити природну монополію від конкурентного сегмента ринку та регулювати лише монопольний сегмент. Друга частина висвітлює питання щодо особливостей сфери теплопостачання, а саме її локальний характер. Автор робить висновок про те, що не існує єдиної уніфікованої інституційної моделі державного регулювання у сфері теплопостачання. На підставі аналізу законодавства України визначено, що відсутність цілісної адміністративної правової концепції державного регулювання у сфері комунальних послуг, а також неналежне нормативно-правове регулювання його інституційного забезпечення, що проявляється в неузгодженості законодавства, суттєво впливає на ефективність державного регулювання.*

Висновки. *Сучасний підхід до визначення структури сфери теплопостачання та її регулювання пропонує відокремлювати природну монополію від конкурентного сегмента ринку та, відповідно, регулювати лише монопольний сегмент. Відтак сучасний підхід визначає теоретичну основу для нової парадигми щодо регулювання сфери теплопостачання. Інституційна модель державного регулювання у сфері теплопостачання в Україні представлена незалежним органом державного регулювання та місцевими органами публічної влади.*

Ключові слова: регулювання сфери комунальних послуг, незалежні регулятори, місцеві органи публічної влади, сфера теплопостачання.

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DETERMINANTS OF THE STATE POLICY EFFECTIVENESS IN THE FIELD OF SCIENCE IN UKRAINE

On the modern stage of Ukrainian society's development, we make findings of the fact that there is no conceptual idea about the content of state policy in the field of science, about the mechanisms of its formation and realization. The foregoing stipulates the necessity of formulation of the completed and perfect theory of state policy in the field of science.

The author of the article has set the ***purpose*** *through the prism of the analysis of the current legislation norms, as well as critical studying the works of modern scholars, to formulate the author's concept of state policy in the field of science in Ukraine and to define key determinants of its efficiency.*

Achievement of the formulated objective is carried out by the assistance of comprehensive and consistent application of the proper scientific tools, presented by such ***methods*** *of scientific cognition as: logical and semantic, system, structural and logical, by the methods of grouping, deduction, induction, analysis and synthesis, etc.*

Results. *The author of the article has accomplished analysis of scientific works focused on finding out the content of state policy in the field of science. The author has succeeded to establish that state policy in the field of science is rather often considered from structural point of view, i. e. as derivation, which consists of certain aggregate of elements. In author's opinion, such an approach is mechanical to a certain extent, then those numerous relations and factors, which provide its concerted functioning, remain unaddressed. For solving this task, as noted in the article, it is necessary to determine the state policy in the field of science as a strategy and tactics of state activities in the field of science that corresponds national interests and international standards.*

As a result the author makes ***conclusions*** *that the important stages of forming and, at the same time key determinants of state policy efficiency in the field of science in Ukraine are: forecasting effort, strategic planning and object-oriented programming. To increase the efficiency of the implementation of state policy in the field of science in Ukraine, the author has grounded the necessity of making amendments and alterations to the Law of Ukraine "On Scientific, Research and Technical Activity", which must determine forecasting effort, strategic planning and object-oriented programming as the methods of state regulation and management in the scientific, research and technical activity.*

Key words: policy, state policy, state policy in the field of science, science, efficiency, determinants, forecasting effort, strategic planning, object-oriented programming.

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1. Introduction

The proclamation of independence, the formation of a civil society, the change of economic conditions of the economy management, the ideology of the development of market relations in Ukraine – all of those things set new challenges for the authorities regarding public administration in the field of science. In terms of the globalization challenges, the forms of science organization, historically, can not remain unchanged, so there is an urgent need for the transformation of state policy because of the transition from exclusively state science to the creation of new mechanisms of public administration, sources of funding and organization of scientific activities. Besides, due to the complication of the public administration object, where market elements appeared, it is necessary to develop effective mechanisms that would ensure the development of science and at the same time create conditions for improving its economic and social efficiency.

Various theoretical substantiation of state policy in the field of science in general and in Ukraine in particular can be found in the scientific works of such famous scholars as: A. Abdulov, A. Azizov, V. Arutiunov, A. Bezborodov, O. Vahanov, H. Volkov, L. Hokhberh, N. Hordieieva, D. Hvishiani, A. Hudkova, O. Dynkin, H. Dobrov, S. Zdioruk, H. Kalytych, D. Karkavin, K. Korzhavin, V. Kremen, B. Liebin, B. Malitskyi, L. Mindeli, S. Mykulynskyi, O. Popovych, K. Popper, V. Rasudovskyi, A. Sokolov and others.

2. Previously unsolved problems

Recently, the Ukrainian state has been actively involved in creating elements of the market innovation system and adapting science as its most important element to new political, social and economic conditions. However, the actions of the public administration agencies in this area were not always systematic and consistent. As a result, new and old forms of organization of science both exist in parallel, and come into conflict to some extent. A number of areas of public administration of science does not have adequate human resources, information and analytical, financial support.

The foregoing requires the need to form a complete and perfect concept of state policy in the field of science in Ukraine and to determine the key determinants of its effectiveness.

3. Main part

Speaking about state policy as the category, we must take into account the fact that although the term “state policy” is widely used in the Ukrainian legislation, but it does not contain a clear normative definition of what we should understand under this category.

The analysis of Ukrainian legislation allows us to note the following:

– first of all, the category of state policy is generally used in a particular context, in linking to specific needs. Thus, for example, the clause 1, Part 1 of the Art. 1 of the Law of Ukraine "On the Principles of State Regional Policy" dated from February 5, 2015 enshrined the definition of "state regional policy" (Verkhovna Rada of Ukraine, 2015);

– secondly, the legislation of Ukraine uses synonymous of the category of state policy. For instance, Part 1 of the Art. 116 of the Constitution of Ukraine notes "the policy of the state", and Part 4 of the Art. 138 uses the term "policy of Ukraine" (Verkhovna Rada of Ukraine, 1996);

– thirdly, there is a special Law of Ukraine "On the Principles of Internal and Foreign Policy" dated from July 1, 2010, which, although does not define the concept of "state policy", but outlines the main principles of the implementation of the internal and foreign state policy of Ukraine (Verkhovna Rada of Ukraine, 2010);

– fourthly, state policy, in the context of realization of its certain directions, is mentioned in a fairly large number of laws of Ukraine and subordinate regulatory acts, for instance, in the Law of Ukraine "On Waste Products" dated from March 5, 1998 (Verkhovna Rada of Ukraine, 1998) or in the Regulations about the Ministry of Regional Development, Building and Housing and Communal Services of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine dated from April 30, 2014 № 197 (Cabinet of Ministers of Ukraine, 2014). At the same time, these acts do not define the category of "state policy";

– fifth, the Ukrainian legislation regulates the main directions of the state policy of Ukraine. It is about the foreign and internal state policy of Ukraine. Thus, in accordance with the Law of Ukraine "On the Principles of Internal and Foreign Policy" dated from July 1, 2010, Ukraine's internal policy consists of: internal policies in the spheres of developing local self-government and stimulating regional development; internal policy in the field of the formation of civil society institutions; domestic policy in the field of national security and defense; internal economic policy; domestic policy in the social sphere; internal policy in the environmental sphere and the sphere of technogenic safety, etc. The principles of Ukraine's foreign policy include: ensuring Ukraine's integration into European political, economic, legal space in order to gaine membership in the European Union; ensuring national interests and security of Ukraine by maintaining peaceful and mutually beneficial cooperation with the members of international community in accordance with generally recognized principles and norms of international law; ensuring protection of the sovereignty, territorial integrity and inviolability of Ukraine's state borders, its political, economic, energy and other interests by diplomatic and other means and methods provided by international law; ensuring protection of the rights and interests of citizens and legal entities of Ukraine abroad; establishment of the leading place of Ukraine in the system of international relations, strengthening international authority of the state, etc.

In case of the lack of a clear definition of the category of "state policy" in the legislation of Ukraine, it is necessary to refer to the works of scholars on this issue. In our opinion, any definition of state policy in the field of science should not contradict the general idea about politics in its traditional sense.

Thus, politics can be regarded as a consequence of the effects of the external environment and the distribution of power, as well as a set of leading ideas, and as a set of institutional structures, and as a decision-making process (Tertychka, 2002). In the most abstract form, politics represents the sphere of interaction between classes, parties, nations, peoples, states, social groups, power and population, citizens and their associations. It is the most important and complex part of social life (Matuzov, 1997).

The abstract form of understanding politics does not determine a full-fledged approach to ascertaining its content, as there is a lot of controversy surrounding the definition of the most categorical notion. It is due to the multidimensional and multifaceted nature of this phenomenon.

This statement is confirmed by the historical fact, the essence of which is reduced to the fact that the issues of politics, state, society constantly attracted attention of thinkers of different eras and peoples. In the history of political thought, we distinguish such classical works on social philosophy as "State" and "Laws" by Plato, "Politics" by Aristotle, "On the State" and "On the Laws" by Cicero, "The Prince" by Machiavelli, "Leviathan" by Hobbes, "A Political Treatise" by Spinoza, "The Spirit of Laws" by Montesquieu, "On the Social Contract" by Rousseau, "The Metaphysical Foundations on Natural Science" by Kant, "Grundlagen des Naturrechts" by Fichte, "Philosophy of Law" by Hegel, as well as the works by Locke, Weber, Jaspers and other thinkers of the past and present time. However, it should be noted that the works of the ancient pillars of public opinion study not so much politics as a certain kind of state activity, but as a political world in the modern sense (Gadzhiev, 1997).

The problem of state policy in the national scientific literature has not yet been adequately covered, but some issues of this problem, namely: conceptual foundations of state policy, its analysis, means of implementation, etc. set out in the writings of some domestic scholars. Thus, the conceptual foundations for understanding the state policy in general can be reduced to the following formulations:

– state policy is the political activity of the state and its institutions aimed at ensuring order in society, harmonizing and subordinating various social interests, achieving social harmony and organizing the management of the development of social processes (Lohunova et al., 1999);

– state policy is relatively stable, organized and purposeful activity (inaction) of state institutions, carried out by them directly or indirectly regarding a certain problem or a set of problems that affect the life of society (Rebkalo, Tertychka, 2002);

– state policy is a relatively stable, organized and purposeful government activity in relation to a particular problem or object of consideration, which is carried out directly or indirectly through authorized agents and affects the life of society (Romanov et al., 2003).

In turn, state policy is reflected in its functions. It is well-known that the main function for the modern legal state is to protect the interests of a man, to protect his rights and freedoms, to ensure proper living conditions. Other functions of the state are, to any extent, subordinated to its implementation. Among them, one can distinguish, first of all, the creation of democratic conditions for the definition and coordination of interests of various social groups of society; and secondly, the creation of conditions for the devel-

opment of production; thirdly, the promotion of education, science and culture; fourthly, environmental protection; fifth, protection of the constitutional system; sixth, ensuring law and order.

In this regard, one can talk about state policy in various spheres of society. For instance, we talk about social, cultural, scientific, economic, regulatory, environmental, legal policy of the state. Thus, state policy is reflected in the purpose to regulate social relations, which are formed in real life.

The issue of the very nature of state policy in the field of science also causes contentious debate, reflecting the divergent views of scholars and practitioners on the role of the state in the scientific system. In this context, we consider it necessary to analyze the modern approaches of Ukrainian scholars to the conceptual category titled in this article, which can be reduced to understanding in narrow and broad aspects.

B.A. Malytskyi in the broad sense defines state policy in the field of science as the long-term behavior of the state in regard to the issues related to science (Malytskyi, 2001).

Representatives of the narrow approach perceive the state policy in the field of science as the totality of actions of state officials (state authorities, which they personify), aimed at resolving problems encountered in the process of human activities in the field of science (Zdioruk, 2006; Kalytych, Korzhavin, 2008). They distinguish among the types of principles for the formation of state policy in the field of science the following ones: legislative, normative and purely political (personal). The first two directions are often combined with one another, the latter is mainly considered in the context of an individual's role in the state process because of the complexity of distinguishing the actions of some political leaders in making a political decision, especially when the change of policy direction occurs contrary to the current legislative and normative principles of the activity.

The analysis of the above definitions indicates that state policy is often viewed from structural positions, that is, as an entity consisting of a certain set of elements. This approach is mechanical to a certain extent, because those numerous relations and factors that ensure its smooth functioning remain unaddressed. That is why, in our deep conviction, it is necessary to distinguish two aspects – strategic and tactical as the basis of understanding the state policy.

Taking the following scientific provisions as the basis, we can define state policy as a strategy and tactics that determines the state's activities in a certain area of life of society and the state. Such an activity is carried out by the state systematically in order to achieve certain socially useful results. In our opinion, this very approach to the understanding of state policy allows us to show its teleological nature, i.e. that it is aimed at achieving a certain specific goal, which should be determined by the state policy strategy in a particular field. This, however, does not exclude the possibility that there may be intermediate goals, which achievement is determined by the tactics of state policy and achievements of which are a certain stage in the reaching the general goal of state policy in a particular field.

Taking into account the above mentioned, in our opinion, state policy in the field of science can be nominated as a strategy and tactics of state activity in the field of science, which is in line with national interests and international standards. At the same time,

the important stages of the formation and, at the same time, the key determinants of its effectiveness are forecasting effort, strategic planning and object-oriented programming.

Forecasting effort in the field of science is scientifically grounded hypothesis about the possible state of science in the future, depending on the nature of the forecast background, as well as on the terms and means of achieving the set goals. The modern stage of social development is saturated with spontaneous events, paradoxical phenomena and uncontrolled processes capable of instantly redrawing the image of the future. Under such conditions, no primary forecast (especially medium or long-term) remains forever relevant – from the moment of creation to the end of the action. Under the pressure of random factors, the difference between the initial parameters of the forecast and the actual socio-economic indicators is increasing, until it reaches a critical limit. After this, the forecast finally loses relations with reality, and the programs and plans developed on its basis lose their practical importance.

Only the regular corrections due to changes in the object of regulation and the environment (forecast background) can stop the prognosis "devaluation" of the forecast. Only a systematic correction allows us to ensure the proper flexibility of the forecast, its adequacy to the current situation, and "consistency" with objective tendencies. Thus, scientifically-based forecasting is not simply a basic forecasting (forecast of socio-economic development, forecast of the effectiveness of planned activities, etc.). It is also their continuous refinement at all stages of the process.

Unfortunately, prognostic activities in the field of science are often carried out by evasion of the methodology. Over the past decades, any conceptual or programmatic document on science issues has been reviewed in regard to the relevance of forecasting. Appropriate forecasts remained in force even when their unreality became apparent from the very beginning. In general, prediction in the field of science has limited, static nature. It is carried out only at the previous stages of making strategic decisions and never accompanies the process of their implementation.

Touching upon the problems of forecasting, it is impossible to evade the issue of verification. Verification is an important part of the forecasting process. In the course of verification, the degree of reliability of the forecasts is determined, their gaps are clarified, the causes of the errors are established. In turn, the obtained information helps to rationalize the forecast activity, to avoid past failures and to improve overall planning effectiveness.

Verification is important not only in terms of summing up the final results of the forecast. It is expedient and desirable at the stage of its development. Preliminary verification – is an effective tool for checking the forecasts for the compliance with the requirements of modern science, the calculation of the probability of their implementation for the given confident intervals, assessment of their functional completeness.

Unfortunately, forecasting in the field of science is not supported by verification either at the initial stage or in the final phase. This is precisely why one can explain the fact that many of the forecasts lose relevance shortly after their development, and their methodological errors are replicated with constant consistency.

Strategic planning is the mean of formal prediction of future problems and opportunities in both any sphere and the field of science.

Strategic planning in the field of science is the key element of strategic public administration in the development of science, which helps authorities responsible for the implementation of scientific policy directions to make decisions that are coordinated with the approaches to the realization of their functions, objectives and tasks.

4. The role of strategic planning in forming state policy

The role of strategic planning in forming state policy in the field of science can not be overestimated that allows consolidating resource potential in the most important areas of government activity, rational distribution of existing forces and resources, avoiding various imbalances, unnecessary steps, and wasteful expenditures. Finally, the flexibility of the state policy in the field of science in Ukraine, its tolerance to crisis phenomena and adequacy to the challenges of time precisely depend on the strategic planning in the field of science.

At the present stage of the development of Ukrainian society, the serious disadvantage of strategic planning both in any sphere and in the field of science is its discrete nature. In accordance with the current legislation, the development of state target-oriented programs and their concepts is carried out on the initiative of public authorities by the actualization of certain problems of social life (Law of Ukraine "On State Target Programs") (Verkhovna Rada of Ukraine, 2004). In practice, this means that the target-oriented programs (concepts) are adopted not with a predetermined periodicity, but depending on a number of objective and subjective factors, such as: the existence of a certain problem, the existence of political will to solve it, the appropriateness of socio-political situation, etc. And this leads to the fact that unresolved problems continue to be escalated and gain increasing scales.

The main form of planning in the field of science is the development of state target-oriented programs aimed at solving the most important problems of the development of science.

State target-oriented programming in the field of science is an algorithm for developing a set of interrelated tasks and measures aimed at solving the most important problems of science development, are carried out by the usage of the funds of the State Budget of Ukraine and agreed upon by terms of execution, composition of performers, resource provision.

State target-oriented scientific, research and technical programs are the main mean of concentration of scientific and technical potential of the state for solving the most important natural, technical and humanitarian problems and realization of the priority directions of science and technology development.

The key points of state target-oriented programming in the field of science are: identification and systematization of strategic goals; development of an integrated system of measures aimed at their achievement; construction of a clear algorithm for the implementation of the planned activities (with a preliminary definition of the performers, sources and amounts of financing); maximum determination of planned parameters, criteria, indicators; the presence of control mechanisms and responsibility for the achieved results. Thus, state target-oriented programming in the field of science is characterized by complexity, multi-parameter nature, algorithmics, applied orientation and imperativeness.

Unfortunately, the development, adoption and implementation of most of the science-related programs is outside the unified legal field. There are currently no legislative acts or, at least, government decrees that would establish general requirements for non-targeted program documents, would regulate the procedure for their creation, would provide control over their implementation. This, on the one hand leads to a huge difference in programming, and on the other – stipulates the irresponsibility of its subjects.

Taking into account the above scientific considerations, we can state that the reasonableness of state policy in the field of science, its purposefulness, reality and efficiency depend on the quality of forecasting effort, planning and programming. At the same time, even minor mistakes in their implementation may turn into serious problems while solving important political tasks. That is why, in our opinion, it is expedient to make amendments to the Art. 56 of the Law of Ukraine "On Scientific, Research and Technical Activity" and to supplement it with the Art. 56-1, which should define forecasting effort, strategic planning and object-oriented programming as the methods of state regulation and management in scientific, research and technical activity. To this end, the Articles 56 and 56-1 of the above-mentioned Law shall be worded as follows:

Article 56. Forecasting Effort in the Field of Scientific, Research and Technical Activity

Forecasting effort in the field of scientific, research and technical activity is a scientifically grounded hypothesis about the possible state of scientific, research and technical activity in the future, depending on the nature of the forecasting background, as well as about the terms and means of achieving the set objectives.

Forecasts of the state of scientific, research and technical activity are developed for short-term (1–3 years) and medium-term (5 years) periods.

The central executive authority in the field of science is responsible for developing the forecasts for the state of scientific, research and technical activity.

Forecasts of the state of scientific, research and technical activity are being developed in accordance with the procedure established by the Cabinet of Ministers of Ukraine.

Indicators for predicting the state of scientific, research and technical activity serve as the basis for the development of state target-oriented programs on science issues.

Article 56-1. Planning in the Field of Scientific, Research and Technical Activity

The main form of planning in the field of scientific, research and technical activity is the development of state target-oriented programs aimed at solving the most important problems of science development.

State target-oriented scientific, research and technical programs are developed, approved and implemented on the basis of the Law of Ukraine "On State Target-Oriented Programs", in accordance with the procedure established by the Cabinet of Ministers of Ukraine.

National target-oriented scientific, research and technical programs are developed for a period of five years. Sectoral and local target-oriented scientific, research and technical programs are developed for a period from three up to five years, taking into account the duration of the current national target-oriented programs.

State target-oriented scientific, research and technical programs are the main mean of implementing priority directions of the development of science and technology by con-

centration of scientific and technical potential of the state for solving the most important natural, technical and humanitarian problems.

State target-oriented scientific, research and technical programs on the priority directions of science and technology development are formed by the central executive authority in the field of scientific, research and technical, innovation activity on the basis of target-oriented projects selected on a competitive basis.

5. Conclusions

As a result the author makes conclusions that the important stages of forming and, at the same time key determinants of state policy efficiency in the field of science in Ukraine are: forecasting effort, strategic planning and object-oriented programming. To increase the efficiency of the implementation of state policy in the field of science in Ukraine, the author has grounded the necessity of making amendments and alterations to the Law of Ukraine "On Scientific, Research and Technical Activity", which must determine forecasting effort, strategic planning and object-oriented programming as the methods of state regulation and management in the scientific, research and technical activity.

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ДЕТЕРМІНАНТИ ЕФЕКТИВНОСТІ ДЕРЖАВНОЇ ПОЛІТИКИ У СФЕРІ НАУКИ В УКРАЇНІ

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На сучасному етапі розвитку українського суспільства констатується факт відсутності концептуального уявлення про зміст державної політики у сфері науки, про механізми її формування та реалізації. Викладене зумовлює необхідність формулювання завершеної та досконалої теорії державної політики у сфері науки.

У статті поставлена мета крізь призму аналізу норм чинного законодавства, а також критичного вивчення праць сучасних учених сформулювати авторську концепцію державної політики у сфері науки в Україні та визначити ключові детермінантами її ефективності.

*Досягнення сформульованої **мети** здійснюється за допомогою комплексного й послідовного застосування відповідного наукового інструментарію, представленого такими **методами** наукового пізнання, як логіко-семантичний, системний, структурно-логічний, методи групування, дедукції, індукції, аналізу та синтезу тощо.*

***Результати.** У статті проведено аналіз наукових доробків, присвячених з'ясуванню змісту державної політики у сфері науки. Автору вдалося встановити, що державну політику у сфері науки досить часто розглядають зі структурних позицій, тобто як утворення, що складається з певної сукупності елементів. На думку автора, такий підхід є певною мірою механічним, адже поза увагою залишаються ті численні зв'язки й фактори, які забезпечують її злагоджене функціонування. Для вирішення цього завдання необхідно державну політику у сфері науки номінувати як стратегію та тактику діяльності держави у сфері науки, що відповідає національним інтересам і міжнародним стандартам.*

*Як підсумок робиться **висновок** про те, що важливими етапами формування й водночас ключовими детермінантами ефективності державної політики у сфері науки в Україні є прогнозування, стратегічне планування та цільове*

програмування. Для підвищення ефективності здійснення державної політики у сфері науки в Україні обґрунтовано необхідність внесення змін і доповнень до Закону України «Про наукову і науково-технічну діяльність», у якому варто серед методів державного регулювання й управління в науковій і науково-технічній діяльності визначити прогнозування, стратегічне планування та цільове програмування.

Ключові слова: політика, державна політика, державна політика у сфері науки, наука, ефективність, детермінанти, прогнозування, стратегічне планування, цільове програмування.

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COURT RULINGS IMPACT ON ELECTRONIC COMMUNICATIONS LAW SYSTEMATIZATION

Purpose. *The paper reveals the directions of using legal positions of court rulings to systematize the electronic communications law regarding consolidation of legal regulations within the national legal framework of Ukraine, taking into account supranational practice of legal support of the electronic communications market participants.*

Methods. *For achievement of research purposes, the author uses special legal methods of scientific knowledge: formal-logical, system-functional, comparative-legal.*

Results. *In the first part of the paper, the author deals with the place of the court rulings in the system of sources, according to which the consolidation of the electronic communications law provisions is to be carried out. Taking into account the latest doctrinal approaches, the "truncated" quality of such sources of law is specified. The author gives examples of how the Supreme Court's legal position concerns the definition of the legal limits for the public administration to use tools in relation to the electronic communications, operation of radio frequency and number resources of Ukraine, etc.*

The second part of the paper highlights that the provisions of the European Court of Human Rights practice might affect the electronic communications law not only to determine the essence of certain types of sources of the law, the system of the electronic communications law, but also on the implementation of legal regulations in this area. Role of the European Court of Human Rights practice has been demonstrated as to systematize the electronic communications law in the context of dogmatic legal regulations.

Conclusions. *Firstly, on the basis of the analysis of the European and national court rulings, the author concludes that it is expedient to implement the legal positions of the judicial authorities that will promote the institutionalization of the rule of law principle in the functioning of the electronic communications market. Secondly, it has been proved that the Supreme Court's rulings might contain conclusions on the further practice of dealing with similar cases. Generalization of practice, explanations and guidance of the Plenum is an overhead structure that defines judicial practice in the lower courts with a view to resolving conflicts in conducting activities in the electronic communications market, using activity tools by the public administration.*

Key words: systematization of law, legal system, administrative law, legal framework, tools, implementation, consolidation.

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1. Introduction

The main purpose of the electronic communications law systematization of, as well as any other sphere of public relations, is to optimize regulatory mechanisms in this area, as well as to create conditions for the free and effective functioning of the electronic communications market, to eliminate regulatory gaps and to prevent duplication of regulations on the content and functional purpose. Given the above, the reform of the electronic communications area is to be based on the principles of anthropocentrism, axiology and anthropology of law, existentialism considering the historical context of legal regulation formation for the state and subjects of the electronic communications market. At the same time, the basis of such systematization process should be the dogma of European law, i. e. supranational secondary law of the European Union.

The *purpose of the paper* is to reveal the directions of using legal provisions of the court rulings to systematize the electronic communications law in terms of consolidating legal regulations within the national legal framework of Ukraine, taking into account the supranational practice of legal support of the electronic communications market.

The electronic communications systematization issue is almost not disclosed in the domestic doctrine. Usually, researchers devote their works to the mechanism of adapting Ukrainian legislation in general to the law of the European Union (H. Aslanian, V. Denysov, L. Luts, P. Rabinovych, V. Rumiantseva, Yu. Shemshuchenko et al.). Some aspects of the legal research orientation, relegated to the idea of legislation adaptation, are revealed by such authors as A. Horbenko, I. Kravchuk, O. Tereshchenko, N. Feskov and others. In dynamic terms, the procedure of adapting the legislation of Ukraine to the standards of the European Union has been substantiated by O. Belorus, R. Lucas et al. At the same time, the mechanism of the electronic communications law systematization, which covers not only the legislation, but the secondary law of the European Union, the rules of "soft law", by-laws, etc., remains insufficiently studied, taking into account its adaptation to the European administrative law and the practice of the leading countries in this field.

2. Role of court rulings in electronic communications law systematization

Consolidation of the electronic communications law is to be carried out on a ladder of acts with equal or similar legal

force. In the electronic communications area, according to approaches of R. Melnyk and N. Zadyraka, the relevant sources of law include: regulations of higher legal force (supranational law; the Constitution; the decision of the Constitutional Court of Ukraine; laws of Ukraine); subordinate normative regulations (enactment of the constituent public administration, entities of delegated authority); technical standards; court rulings of the highest level (Melnyk, 2017: 80–81; Hrytsenko, 2014: 100). Thus, a special place in the system of electronic communications law sources is occupied by the acts of the highest judicial authorities. In this regard, R. Melnyk notes about the "truncated" quality of such sources of law, when the law directly burdens the public administration to be guided by such acts in the activities (Melnyk, 2017: 92–93).

For example, the legal positions of the Supreme Court on implementing the institutions of the electronic communications law relate to defining legal boundaries for using tools by the public administration for engagement of electronic communications, operation of radio frequency and number resources of Ukraine and the like. Consequently, the resolution of the Supreme Court in the case № 809/340/14 dated of December 11, 2018 has established that as according to the provisions of the Law № 1770, cancellation of the permission to operation by the radio-frequency resource of Ukraine under the general rule is performed out of court on the basis of the bodies' decision defined by this law. The syntactic analysis of part 3 of the Article 58 of the Law № 1770-III should also be taken into account, indicating that the phrase "judicially" refers only to the method of collecting the sum of debt, otherwise cannot be made. Thus, the panel of judges concludes that the courts of previous instances have come to the correct conclusion that the competence of the National Commission for State Regulation in the Area of Communications and Informatization refers to the cancellation of the permit for the electronic means operation. At the same time, the receipt of information from the tax authority about the failure of the defendant to pay the fee for the radio frequency resource use is the proof of the legislation violation on use of radio frequency resource, in particular, of the Law № 1770-III which is the basis for the plaintiff's state supervision by conducting an unscheduled inspection of the defendant and not appeal to the court with the claim. In this case, the court might decide to revoke the permit only in case of refusal by the National Council of Ukraine on Television and Radio Broadcasting to take a decision within a month. In all other cases, the permit is cancelled by the National Commission for State Regulation in the Area of Communications and Informatization, or the Ukrainian State Radio Frequency Centre (Supreme Court, 2018).

Along the way, the place of the court rulings, as noted by A. Burkov, is defined due to the normative regulation place, according to which the conclusion is made (Burkov, 2002). In particular, in the electronic communications area, there are both Supreme Court rulings and a synthesis of practices, explanations and guidelines of the plenary. The first group of acts are individual in nature, but they might contain conclusions on the further practice of dealing with similar cases. The second group of acts is a superstructure over the practice of the judiciary, in addition to constitutional jurisdiction, and has traditionally defined judicial practice in the lower courts. Examples of such court rulings could be the resolution of the Plenum of the Supreme Court of Ukraine № 2 dated of March 28, 2008 "On Application Issues by the Courts of Ukraine of Legislation when Granting

Permissions to Temporarily Restricting Certain Constitutional Rights and Freedoms of Human and Citizen during the Conduct of Operational Search Activity, Inquiry and Pre-Trial Investigation" (Supreme Court of Ukraine, 2008), resolution of the Supreme Court of Ukraine dated of June 5, 2012 (Supreme Court of Ukraine, 2012), etc.

It should be noted that since Soviet times, the approach has been formed, according to which the decisions of the Plenum of the Supreme Court were determined as the sources of law, and certain enactments of an individual nature were related only to judicial practice, but could not create a precedent (Isaev, 1946; Orlovskiy, 1940). On the territory of Ukraine, this approach did not experience a radical revision until 2010. Then, the Law of Ukraine "On the Judiciary and the Status of Judges" was adopted, in which paragraph 6 of part 2 of the Article 36; part 2 of the Article 38; part 2 of the Article 45 did not grant the right of the Supreme Court of Ukraine to adopt decisions of the Plenum (Verkhovna Rada of Ukraine, 2010). After this change in legislation, the Supreme Court of Ukraine has lost the opportunity to review and make amendments to existing decisions of the Plenum, in particular, in the electronic communications area. Besides, the status of previously issued regulations was left unclear regarding the validity period, action, etc. In fact, the judicial practice continued to apply the provisions of such acts. Higher specialized courts began to adopt new decisions of the Plenum, explaining the legislation (such court rulings were not adopted in the area of electronic communications). This approach is consistent with the general theoretical understanding of the succession process, according to which the previous legal provisions apply to the extent that they do not contradict the current legislation, in the absence of special requirements and the formal abolition of such legal framework (Mazur, 2011).

However, the Supreme Court of Ukraine again has actually got the right to create a precedent in 2015. It is about updating of the edition of the Article 13 of the Law of Ukraine "On the Judiciary and the Status of Judges" on the basis of the Law of Ukraine "On Ensuring the Right to a Fair Trial" (Verkhovna Rada of Ukraine, 2015). Since then, the aforementioned body of the judiciary has been competent to draw conclusions on the application of the law set out in the regulations (Verkhovna Rada of Ukraine, 2015). These enactments have become generally binding for the public administration, guided by the rules of law set out in the regulations following on from which the conclusion was made. Similarly, as a general rule, the findings of the Supreme Court set a judicial precedent for courts of general jurisdiction, except in cases of derogation from legal positions with due reasoning on the part of judges. By the way, a similar rule of law was enshrined in the Article 13 of the Law of Ukraine "On the Judiciary and the Status of Judges" № 1402-VIII dated of June 2, 2016 (Verkhovna Rada of Ukraine, 2016). Argument in favour of the described position are the provisions of part 2 of the Article 14 and part 1 of the Article 370 of the Code of Administrative Justice of Ukraine (Verkhovna Rada of Ukraine, 2005). At the same time, the acts of the highest judicial authorities in the framework of the "additional" rulemaking are mainly focused on the settlement of individual disputes, and not on the regulation of an unlimited number of such cases (Melnyk, 2017). The exception is the model cases that are heard and decided by the Supreme Court. At the same time, there have not been any such cases in the electronic communications area yet.

3. Pragmatics of the rule of law in the court rulings

Moreover, a global electronic communications was the is being institutionalized in a pragmatic dimension. According to A. Pukhtetska, it is a pragmatic aspect of the concept and/or principle of the rule of law in the generalized equivalent (under the decision of the European Court of Human Rights in the case "S.W. v. the United Kingdom") (Pukhtetska, 2010). At the same time, the result of the electronic communications law consolidation is an adequate understanding of the law at the national level, consistent with the requirements of supranational regulatory frameworks. Therefore, the practice of the European Court of Human Rights (hereinafter – ECHR) plays an equally important role in the electronic communications law systematization. Influence on the implementation of legal regulations in the electronic communications area is carried out, in particular, through additions to the system of legal regulation. Examples could be considered as the ECHR'S decisions in the cases "Amann v. Switzerland" (European Court of Human Rights, 2000a), "Amuur v. France" (European Court of Human Rights, 1996) (§ 42), "Bykov v. Russia" (European Court of Human Rights, 2009a), "Copland v. the United Kingdom" (European Court of Human Rights, 2007), "Engel and others v. the Netherlands" (European Court of Human Rights, 1976: § 58), "Gaskin v. the United Kingdom" (European Court of Human Rights, 1989: § 36–37, 48), "Khan v. the United Kingdom" (European Court of Human Rights, 2009b), "Klass and others v. Germany" (European Court of Human Rights, 1978: § 41), "Labita v. Italy" (European Court of Human Rights, 2000b: § 170), "Leander v. Sweden" (European Court of Human Rights, 1987a), "Malone v. the United Kingdom" (European Court of Human Rights, 1984), "Niemietz v. Germany" (European Court of Human Rights, 1992: § 29), "Quinn v. France" (European Court of Human Rights, 1995: § 42), "Van Vondel v. the Netherlands" (European Court of Human Rights, 2006), "Weeks v. the United Kingdom" (European Court of Human Rights, 1987b: § 40) et al.

In this regard, the legal regulations in the ECHR'S decisions play a significant role in the electronic communications law systematization primarily in the context of legal provisions dogmatization. Yu. Oborotov is convinced that such dogmatization of the law in the axiological dimension concerns the coverage of the properties of law through the rules, acts and legal relations (Oborotov, 2002: 150). Thus, the dogmas of law in the practice of the ECHR determine the characteristics, in particular, of the electronic communications law in establishing the behaviour of its subjects. That is, through logical syllogisms (the rules of law in the ECHR's practice and life circumstances), legally significant decisions of the subjects of the electronic communications market are institutionalized. Hence, the approach of the Supreme Court of Ukraine seems unjustified, according to which the ECHR's practice has a doctrinal nature and should be applied in Ukraine only via translated into Ukrainian and officially published ECHR'S decisions (Supreme Court of Ukraine, 2016). Artificial narrowing of the scope of supranational law of the European Union, notably the ECHR's practice, does not correspond to the idea of the rule of law. In addition, this source of law has an applied nature, and therefore could not be considered as a category of doctrinal postulates.

In fact, through the dogmas in the ECHR's practice legal values in instrumental and content dimensions are transferred to the electronic communications law. The

provisions of the ECHR's practice at the same time provide stability, integration and coordination of the electronic communications law through the impact on its system-structural dimension, security, communication, cognitive, heuristic and other functions. In addition, these dogmas have a dynamic nature, creating conditions for the provision of fundamental human values in the activities of subjects of the electronic communications market, as well as for the removal of social tension. Along the way, the change in social circumstances leads to an update of the content of the dogmas presented in the ECHR's practice. Such process becomes possible through the instrumental nature of the supranational law of the European Union as the basis for the electronic communications law systematization. The functional social and technological aspect of values is revealed in the provisions of the electronic communications law, and through the latter – in the activities of the subjects of the electronic communications market.

As O. Sydorenko points out, thanks to the dogmatic methodology, it becomes possible to create, apply and process the rule of law (Sydorenko, 2014). In particular, in the electronic communications law, the dogmatic dimension of the ECHR's practice primarily concerns the interpretation of regulations and the filling of legal gaps. As a rule, the methods of analysis and synthesis, analogy, presumption, casuistry are used. Through linguistic and grammatical interpretation of the provisions of the legislation, by-laws and technical regulations, the ECHR ensures harmonization of the electronic communications law through epistemological procedures. This interpretation determines the context of practical implementation of the electronic communications law. The casuistic methodology is needed for hypothetical coverage of different views on the situation regarding the disputed, unrecognized or violated rights and legitimate interests of the subjects of the electronic communications market.

In fact, the provisions of the ECHR's practice as a dogma of the electronic communications law might have an impact on the law not only regarding the definition of the essence of certain types of regulations, the system of the electronic communications law, but also on the implementation of legal regulation in this area. This contributes to the implementation of the European approaches in this field. In this context, R. Melnyk focuses on the system of law that has two levels: "basic" and "current". Within the framework of the "basic" level, there are rules of law, crystallized throughout the civilizational development of society, which objectively exist and act separately from extraneous factors, the will of individuals and are reflected in the principles of law (the basis for the formation of the "current" level and the objective factor of the European integration process). The content component of the "current" level is determined by the level of legal awareness, culture of society, forms of state, law-making activity (Melnyk, 2012: 11–12). That is why, in the context of the European integration processes, it is appropriate to formulate court rulings in the electronic communications area in such a way as to make allowance for the fundamental principles of the ECHR's practice in the aspect of reducing, and in the future — eliminating the gap between the "basic" and "current" levels of the electronic communications law system in Ukraine. This proposal could be implemented by taking into account the criteria for understanding the essence of the categories "rule of law", "law", "legal" and the like, as well as the "basic" level of the electronic communications law system.

4. Conclusions

Therefore, in order to ensure equal relations between the public administration, subjects of the electronic communications market and consumers (users, subscribers), it is necessary to heed primarily the ECHR's practice and national supreme judicial authorities' rulings. It seems appropriate to implement legal positions of the judiciary, which will contribute to the institutionalization of the rule of law in functioning of the electronic communications market. Thus, the decisions of the Supreme Court could provide insights regarding the future of the practice of similar cases consideration. Generalization of practices, explanations and guidelines of the Plenum is a superstructure that defines the judicial practice in the lower instances in order to resolve conflicts in implementing activities in the electronic communications market of, using the tools by the public administration. Based on the European experience of regulating relations in the electronic communications area, it is to be noted that the Ukrainian legislation needs to be amended in the context of a harmonized regulatory framework for all electronic communication networks and services.

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ВПЛИВ АКТІВ ОРГАНІВ СУДОВОЇ ВЛАДИ НА СИСТЕМАТИЗАЦІЮ ПРАВА ЕЛЕКТРОННИХ КОМУНІКАЦІЙ

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Мета. *Стаття розкриває напрями використання правових позицій актів органів судової влади для систематизації права електронних комунікацій у частині консолідації юридичних норм у межах національної правової бази України з урахуванням наднаціональної практики правового забезпечення діяльності учасників ринку електронних комунікацій.*

Методи. *Для досягнення цілей дослідження автор використовує спеціально-юридичні методи наукового пізнання: формально-логічний, системно-функціональний, порівняльно-правовий.*

Результати. *У першій частині статті автор розглядає місце актів органів судової влади в системі актів, згідно з якими повинна проводитися консолідація норм права електронних комунікацій. З урахуванням новітніх доктринальних підходів уточнено «усічену» якість цих джерел права. Автор наводить приклади того, як правові позиції Верховного Суду стосуються визначення законних меж використання інструментів діяльності публічної адміністрації щодо використання електронних комунікацій, експлуатації радіочастотного та номерного ресурсів України тощо.*

Друга частина статті підтверджує думку, що положення практики Європейського суду з прав людини можуть спричиняти вплив не лише на право електронних комунікацій щодо визначення сутності окремих видів актів законодавства та

системи права електронних комунікацій, а й на порядок реалізації правового регулювання в цій сфері. Продемонстровано роль практики Європейського суду з прав людини в систематизації права електронних комунікацій у контексті догматизації юридичних норм.

Висновки. *На підставі аналізу європейських і національних актів органів судової влади автор доходить висновку, що доцільною є імплементація тих правових позицій органів судової влади, які сприятимуть інституціоналізації принципу верховенства права під час функціонування ринку електронних комунікацій. Також доведено, що в постановах Верховного Суду можуть міститися висновки щодо подальшої практики розгляду аналогічних справ. Узагальнення практики, роз'яснення та керівні вказівки Пленуму Верховного Суду є надбудовою, яка визначає судову практику в нижчих інстанціях із метою розв'язання конфліктів під час провадження діяльності на ринку електронних комунікацій та використання інструментів діяльності суб'єктів публічної адміністрації.*

Ключові слова: систематизація права, правова система, адміністративне право, правовий механізм, інструменти, імплементація, консолідація.

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SPECIALTIES OF JUDICIAL CLAIMING OF ACTS IN CASES OF ADMINISTRATIVE OFFENCES RENDERED BY POLICE OFFICERS (BY RESULTS OF JUDICIAL PRACTICE)

The purpose *of the article is to study specialties of judicial claiming of acts in cases of administrative offences rendered by police officers.*

To conduct the research successfully, the author used the following methods of scientific knowledge: logical, historical, systemic-functional, and formally-dogmatic.

As a ***result*** *of the study, the author analyzes the practice of administrative courts about adjudication of claims on acts of administrative offences made by police officers, including traffic violations.*

Established that a lot of cases in which police officers appear as defendants, cases about appeal against the decision, actions or omissions of police officers due to bringing to administrative responsibility associated with some interconnected factors: a large number of appeals against decisions in cases of violations of traffic rules with a high degree of ignoring the norms of traffic rules by all road users in our country; imperfect (sometimes problematic) road infrastructure; high latency of these offences and due to this a high level of impunity of drivers; conflict drivers and not ability to admit their guilt; absence of affective mechanism of pretrial resolving such disputes; easy access to theirs judicial resolving (no court fee); also don't throw away the procedural illiteracy of police officers. All this in array leads to the fact that this category of cases is an essential part of the activity of general courts as administrative courts.

Conclusions. *Without going to the sociological analyze of this phenomenon, within the article author made the analyze of judicial practice of considering this category of case, found out the position of courts about resolving them that greatly affects on law enforcement practice and sometimes on the legislation and suggested some ways of their application by judges of administrative courts.*

Key words: administrative justice, acts in cases of administrative offences rendered by police officers, judicial appealing of acts of police in cases of administrative offences, judicial practice.

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1. Introduction

Among the bodies of administrative delinquency, which deal with cases of administrative offences and make decisions in these cases, the powers entrusted to the National Police and sufficiently obvious the fact that their decisions (cats) in cases of administrative offences are claimed for legality of the administrative procedure. For example, the analysis of the Unified State Register of Judgments (for the entire period of the National Police acting during the period from September 2015 to September 2018, so it is 3 years) shows that over 2 500 such categories of cases were considered by the courts (Single State Register of Court Decisions).

A large array of litigation cases in which police officers act as defendants, that is, cases concerning appeals against decisions, actions or omissions of National Police in connection with holding responsible to administrative liability related to several interconnected factors: firstly, a significant level of violation of the traffic rules in our country, and consequently a large number of acts in cases of violations of the traffic rules, and the aspirations of offenders to use the possibility of evasion from liability by the legal recourse and expiry application of responsibility; and secondly, the procedural illiteracy of the police officers regarding the drawing up of procedural documents and the deliberate neglect of the requirements of procedural law. All this in aggregate leads to the fact that this category of cases is an essential part of the activity of general courts, as administrative courts.

2. The state of the study of the issue of the article

It should be mentioned that in the scientific literature the issues of the specialties of judicial consideration of certain categories of cases concerning appeals against decisions in cases of administrative offences became the subject of research within the limits of scientific publications, in particular among such works it is possible to note: R. Mkrtchyan "Legal and organizational measures for improvement of the institute of appeals against decisions of the traffic police departments of the Ministry of Internal Affairs of Ukraine" (Mkrtchyan, 2015); I. Boyko "The applicability of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms when considering cases of administrative offenses" (Boyko, 2016); O. Budarny "Problematic Issues of Appeal against Decisions, Actions or Inactivity of the Bodies and Officers of the National Police in connection with their consideration of cases concerning administra-

tive offences" (Budarny, 2017); N. Pisarenko "Appeal of an act on a violation of customs rules: separate issues of application of procedural norms of the Customs Code of Ukraine" (Pisarenko, 2013).

3. Statement of the main constitution

Without going into the sociological analysis of this phenomenon, it would be advisable to carry out an analysis of the main procedural problems that arise in the judicial practice of considering this category of cases and to find out the position of the courts with regard to their solution.

Part 3 of Art. 288 of the Code of Ukraine on Administrative Offences indicates that the decision of another body (official) on imposing an administrative penalty, a ruling on an administrative offense in the field of ensuring road safety, recorded in an automatic mode may be appealed, or in the district , district court in a city, city or city court, in accordance with the procedure established by the Code of Administrative Legal Proceedings of Ukraine with the peculiarities established by this Code (Verkhovna Rada of the USSR, 1984), administrative and should consider cases within their jurisdiction solely on the CSSA and exercise their powers not only in order, but within the limits prescribed aforementioned procedural law (Verkhovna Rada of Ukraine, 2005).

Consequently, when considering cases on appeals against decisions imposing administrative penalties, administrative courts should judge the decisions, actions or inactivity of the subjects of power, guided by Part 2 of Art. 2 the Code of Administrative Legal Proceedings of Ukraine. This is indicated by the Supreme Administrative Court of Ukraine in its Instructions dated January 29, 2010 (Supreme Administrative Court of Ukraine, 2010). This is evidenced by the results of the practice of administrative courts.

The Ivano-Frankovsk City Court considered case № 344/14018/16-a on appeal to the management of the patrol police and an officer of the patrol police for the recognition of unlawful actions and the abolition of the ruling in an administrative offense case (decree of December 19, 2016) (Ivano-Frankivsk City Court of Ivano-Frankivsk region, 2016). The court drew attention to the fact that the police officer did not draw up a protocol on an administrative offense, which was based on the reference to Art. 258 of the Code of Ukraine on Administrative Offences. The court in the resolution considered that, analyzing the provisions of Art. 258 of the Code of Ukraine on Administrative Offences, we can conclude that Part 2 of this article contains two equivalent grounds, when the protocol on an administrative offense does not consist: in cases of committing administrative offenses that are considered by the National Police and administrative misconduct committed in the field of road safety and are locked in auto mode. Instead, Part 5 of this article, the Code of Ukraine on Administrative Offences, contradicts the previous provision of the law, since it specifies, among other things, that the protocol on the commission of an administrative offense does not consist in providing traffic, including those recorded in the automatic mode (in general, refers to the field of road traffic and including those that are fixed in the automatic mode). The Court also took into account the conclusions of the European Court of Human Rights, set forth in the judgment of November, 14, 2013 in the case of "Shmushkovich against Ukraine" № 3276/10 (European Court of Human Rights, 2013), where the expression "established by law" in Art. 11 of the Convention require not only that the measure complained of has a foundation in domestic law, but

also the quality of the law in question. The law should be accessible to interested parties and formulated with sufficient precision in order to enable them, if necessary, to provide, by providing appropriate information, to the extent that it is reasonable, in appropriate circumstances, the consequences that may result from its action. This thesis is repeated in many other decisions of the European Court of Human Rights.

In this regard, the Ivano-Frankovsk City Court noted that the above contradictory provisions of Art. 258 of the Code of Ukraine on Administrative Offences testify to its imperfection, and therefore are not treated in favor of the defendant, who thus violated the procedure for bringing administrative liability and failed to provide the court with proper evidence that the plaintiff committed an administrative offense. Therefore, an order imposing an administrative penalty was canceled by a local court.

What do we see in this example? First, the court, evaluating the decision imposing administrative penalties, turned to the question of the quality of the law, which is to be applied in this case, and pointed out that this law does not comply with the principle of legal certainty. Such argumentation of the court follows precisely from the provisions of Part 2 of Art. 2 of the Code of Administrative Justice of Ukraine, and not Part 1 of Art. 293 of the Code of Ukraine on Administrative Offenses. In addition, legal certainty is, as already noted, an element of the rule of law referred to in Art. 6 of the Code of Administrative Justice of Ukraine and specified in the Code of Ukraine on Administrative Offenses in general. In addition, the court reference to the practice of the European Court of Human Rights corresponds to Part 2 of Art. 6 of the Code of Administrative Justice of Ukraine, according to which the court should apply the rule of law, necessarily taking into account the judicial practice of the European Court of Human Rights.

For a long time in judicial practice, there was no unity in resolving the issue of the limits of the administrative courts interference in the course of proceedings in an administrative offense case. Yes, administrative cases have often been heard, where plaintiffs have asked the court to close proceedings in an administrative offense case, or change the administrative penalty. At the same time, the preliminary version of the Code of Administrative Justice of Ukraine, which was in force until December 17, 2017, in Article 171-2, did not provide for the possibility of a court to make such decisions, in addition to decisions to leave the ruling unchanged, to cancel the ruling, and direct the case for a new hearing. Nevertheless, judicial practice has not always complied with the aforementioned rules of administrative proceedings.

Khmelnitsky City Court considered case № 686/11550/16-a on the suit of the person brought to administrative liability to the management of the patrol police in the city of Khmelnitsky, the Department of Patrol Police. In the original claim, the plaintiff requested the court to cancel the decision imposing an administrative penalty, but then changed the claims and asked the court to change the resolution on imposing an administrative penalty. In a resolution dated July 13, 2016, the Khmelnitsky City Court upheld the plaintiff's arguments and dismissed him from administrative liability on the basis of Art. 22 of the Code of Ukraine on Administrative Offenses, limited to verbal comments; the proceedings were closed (Khmelnytsky City Court of Khmelnytsky Region, 2016a).

However, after the entry into force of the new edition of the Code of Administrative Justice of Ukraine from December 15, 2017, administrative courts were empowered to intervene in proceedings on administrative offenses. Yes, according to Part 3 of

Art. 286 of the Code of Administrative Justice of Ukraine, in consequence of the consideration of a case concerning decisions, actions or inactivity of the subjects of power authorities in cases of bringing to administrative responsibility the local general court as an administrative authority has the right: 1) to leave the decision of the subject of power authorities unchanged, and the statement of claim without pleasure; 2) to cancel the decision of the subject of authority and send the case for a new consideration to the competent authority (official); 3) to cancel the decision of the subject of authority and to close the case of an administrative offense; 4) to change the measure of collection within the limits stipulated by the normative act on responsibility for an administrative offense, however, so that the penalty was not strengthened (Verkhovna Rada of Ukraine, 2017). In fact, this norm duplicates the provisions of Art. 293 of the Code of Ukraine on Administrative Offenses, which regulates the authority of an authority (official) in considering a complaint against a ruling on an administrative offense and gives him the right to take appropriate decisions. In this sense, O. Budarnyi, who notes that the said changes to the administrative procedural law, on the one hand, give courts clear and understandable powers when reviewing decisions, actions or inaction of the authorities in cases involving administrative liability and giving the court effective tools for updating the violated rights of individuals in similar cases, but, on the other hand, using such a way of protecting rights, the administrative court essentially goes beyond its jurisdiction, because of this he actually considers most cases on administrative offenses, although Part 2, Art. 19 of the Code of Administrative Justice of Ukraine provides for the exclusion from the rule of non-interference of the administrative court in cases of imposition of administrative penalties (Budarny, 2017: 262).

It should be noted that such changes in the Code of Administrative Justice of Ukraine are positive given the allocation of administrative court powers to amend the ruling in the case of an administrative offense, which, in general, simplifies the procedure for appealing these rulings and at the highest judicial level will make it possible to establish the truth in the case, which will help to reduce the cases of appeals against these rulings.

A separate issue concerns the possibility of judicially challenging the drafting of an administrative offense record. In the context of the ways in which the plaintiffs protect their rights, freedoms and legitimate interests when appealing against decisions imposing administrative fines made by officials of the National Police, it is also important to draw attention to the fact that the subject of the appeal can not be a protocol, which reflects the circumstances of the offense and other information, no protocol action. Failure to enter into a protocol (except for cases specified in Article 258 of the Code of Administrative Offenses) or errors in its compilation are grounds for the abolition of the decision imposing administrative penalties. In the broader context, the poor quality of protocols by officials of the National Police may be a reason for avoiding offenders of liability, encouraging them to commit new offenses, weakening the rule of law in the relevant areas of public administration, etc. At the same time, the protocol does not contain a publicly-owned decision, and therefore can not affect the rights, freedoms and legitimate interests of individuals. Therefore, the petition for the recognition of unlawful acts on the conclusion of the protocol contradicts Part 1 of Art. 2 of the Code of Administrative Justice of Ukraine, according to which the task of administrative legal proceedings is a fair, impartial and timely resolution

of disputes arising in the field of public-legal relations with the court in order to effectively protect the rights, freedoms and interests of individuals, the rights and interests of legal persons from any violations of parties of power authorities.

At the same time, cases in which the subject of the appeal is a protocol on an administrative offense or the actions of an official of the National Police in relation to its drawing up in the practice of the courts.

The Zhitomir Administrative Court of Appeal, in its ruling № 555/1627/16-a dated November 10, 2016, states that the protocol on an administrative offense is only a document in which certain circumstances are fixed, therefore the protocol itself does not give rise to legal relationships that may to be a subject of a dispute, it does not create legal consequences in the form of rights, obligations, changes or terminations, does not directly affect the rights and duties of the subject of an administrative offense and is not binding, therefore, is not normative-legal act or act of individual action. Thus, such a document is only a way of fixing certain circumstances, and not an act of individual action, in addition, verification of the correctness of its compilation, along with the other, must be carried out by the authorized body in preparation for the consideration of the case of an administrative offense (Zhytomyr Administrative Court of Appeal, 2016).

Important procedural issues that may have significant legal implications include the possibility for the court, together with the cancellation of a ruling in an administrative offense issued by a police officer, to make a separate decision (decree) to impose disciplinary measures against the defendant. Thus, an analysis of the practice of judicial review of this category of cases shows that 30% of the decision to cancel a ruling on an administrative offense committed by a police officer, especially in the field of road safety, and closing an administrative offense case is made by a court in the presence of typical violations of procedural law (not acquaintance of a person with her rights; absence of data on witnesses of the offense indicated by the plaintiff; denial of the right of the person to defend; absence of data in the protocol of the lawlessness or a separate protocol on the inspection of the vehicle, violation of the conditions and procedure for the use of devices for determining the state of alcoholic intoxication of the driver, absence of confirmatory evidence of the driver's being in a state of intoxication, etc.). Moreover, in some cases, these violations are typical and carried out systematically by one and the same police officer. Accordingly, the question arises of the need to apply to the person of the measures of influence, if the assessment of its decisions is carried out by the court, and is it possible to make such decisions?

Dnipropetrovsk District Court of Dnipropetrovsk region considered case number 175/2474/16-a in a suit to the Company's Inspector № 2 battalion № 2 of the SCP in Dnepropetrovsk City Police Department of the Police Department in the Dnipropetrovsk region of the National Police of Ukraine, ordinary police, L. Demchenko, third Person – Patrol Police Department in Dnipropetrovsk, Department of the Patrol Police of the Police in the Dnipropetrovsk region of the National Police of Ukraine on appealing actions, inactivity and the decision of the authority of power (resolution from May 9, 2016) (Dnipropetrovsk district court of Dnipropetrovsk region, 2016). One of the claims of the plaintiff (although not a legal claim) was the issuing of a separate decree against an officer of the National Police, which, according to the plaintiff, unjustifiably brought him

to administrative liability. In the case № 175/2474/16-a, the court refused to satisfy the claim, admitting the plaintiff's arguments to false and unfounded. Therefore, the issue of issuing a separate decree did not end.

However, how would it have responded to this court, if he came to the conclusion that there are grounds for the abolition of the decision imposing an administrative penalty? Should he decide on a separate decree, which could be the basis for disciplinary penalties?

According to parts 1, 2 of Art. 249 of the Code of Administrative Justice of Ukraine, a court which detects certain violations of the law in the course of the consideration of a case may make a separate ruling and send it to the appropriate authorized agents of authority in order to take appropriate measures and eliminate the causes and conditions that contributed to the violation of the law. If necessary, a court may order a separate ruling on the existence of grounds for considering the issue of bringing to justice the persons whose decisions, actions or omissions are found to be unlawful.

Paragraph 1 of Part 1 of Art. 18 of the Law on the National Police in the area of police duties calls for the strict observance of the provisions of the Basic Law, the laws of Ukraine and other normative legal acts regulating the activities of the police. In view of this violation of the police requirements of the law, in particular, the Code of Ukraine on Administrative Offenses formally gives the court a reason to respond to these violations by issuing a separate decree. This ruling may be the basis for imposition of police disciplinary penalties, specified in the Disciplinary Statute of the Ministry of Internal Affairs (Verkhovna Rada of Ukraine, 2015).

At the same time, the practice of making individual decisions in such situations is almost absent today. On my opinion, there should be a practice of making a separate decision by the court regarding the need for disciplinary action against a police officer to systematically (intentionally or on the basis of a lack of legal literacy) violation of the procedure for bringing persons to administrative liability. However, the decisions of these decisions should not be formal, that is to be a consequence of the abolition of the ruling in the case of an administrative offense, especially when it comes to insignificant but sufficient to cancel the decision, the mistake of the police officer. These errors should be corrected as a result of departmental and judicial review, but they should not always entail disciplinary responsibility. In addition, if the policeman feels that any of his mistakes (not intentional acts and even more offenses) will be the result of the issuance of acts of judicial response and disciplinary proceedings, then it will rather demolish the policeman, will develop his distant attitude to his duty, desire to reduce professional activity to a minimum. Consequently, the courts have to make a separate ruling when it comes to obvious and significant mistakes of policemen, gross neglect of the requirements of the law, ignoring the well-known and stable legal positions of the courts, shortcomings in the execution of documents, recording offenses, drawing up minutes or issuing rulings on administrative offenses, which may have led to the cancellation of the latter.

Also problematic is the possibility of satisfaction of the court with the claims of the plaintiff in respect of non-pecuniary damage caused by a decision to bring a person to administrative liability, which was declared illegal by the court on the basis of which it was canceled. What are the legal precedents for this matter?

Thus, in the case № 686/7607/16-a, which was considered by the Khmelnitsky City Court, a plaintiff – a person who was brought to administrative liability in accordance with a ruling on an administrative offense drawn up by the police, was also claimed to claim non-pecuniary damage. The claimant for compensation for non-pecuniary damage was motivated by the fact that, since he is also an employee of the Patrol Police Department in Khmelnitsky, the unjustified bringing of him to administrative responsibility caused him mental suffering, humiliated his honor, and his business reputation. In a ruling of April 20, 2016 the court refused to satisfy the claim in this part of the recovery of non-pecuniary damage (although the ruling on the administrative offense was abolished), stating that as a violation of the co-defendant's honor, dignity and business reputation of the plaintiff, and the amount of compensation in the prescribed manner, was not proved by the plaintiff (in this part the burden of proof lies with the plaintiff) (Khmelnytsky City Court of Khmelnytsky Region, 2016b).

With this position, the local administrative court must agree. Thus, the Plenum of the Supreme Court of Ukraine in its resolution "On judicial practice in cases on compensation for moral (non-property) damage" dated March 31, 1995, № 4, stated that the statement of claim for compensation for moral (non-property) damage should state what the harm caused to the plaintiff by unlawful actions or inaction, on what grounds he proceeded, determining the extent of the damage, and which evidence this is confirmed (Supreme Court of Ukraine, 1995). Part 2 of Art. 77 of the Code of Administrative Justice of Ukraine entrusts the burden of proving to the subjects of power authorities only in administrative cases as to the unlawfulness of decisions, actions or inaction of the latter. So, indeed, the burden of proving the validity of the claim for compensation for non-pecuniary damage lies with the plaintiff. In itself, the fact that a decision to impose administrative penalties was adopted, even if this ruling was subsequently abolished by the court, does not indicate a person's moral hazard in the absence of any additional circumstances (the unethical behavior of the policeman, the image on this side, the deliberate neglect of the requirements of the law, in particular parts of the guarantees of the rights of persons attracted to administrative liability, etc.).

Ambiguous judicial practice also takes place in the context of court costs in case of satisfaction of a claim for the abolition of an administrative offense issued by an official of the National Police.

The decision of the Leninsky District Court of the city of Dnipropetrovsk (now Dnipro) in the case № 205/2941/16-a dated August 12, 2016 recognized the actions of the patrol police officer of the company № 7 battalion number 3 of the Patrol Police in the city of Dnipropetrovsk ordinary Police B. Chmelov illegal and canceled the ruling on administrative offenses from March 25, 2016 series PS2 number 886048 issued by the patrol police officer company number 7 battalion number 3 of the Patrol Police in Dnepropetrovsk Dnipropetrovsk B. Chmelov about bringing the plaintiff to administrative liability and imposition of administrative penalty in the form of a fine of 425,00 UAH. The proceedings on the administrative offense were closed. In addition, the court decided to deduct from the budget allocations of the Patrol Police Department of the Police Department of the City of Dnipropetrovsk the Department of Patrol Police in favor of the plaintiff court costs in the amount of 551,20 UAH (Leninsky District Court of Dnipropetrovsk, 2016).

4. Conclusions

Considering this case, it should be noted that the collection of court expenses at the expense of "budget allocations of the Patrol Police Department of the Patrol Police in Dnipropetrovsk for the Department of Patrol Police" is a significant criticism. After all, since the Police Department in the city of Dnipro is not a legal entity, it does not have an independent budget and is objectively unable to comply with the court order by reimbursing the plaintiff for legal expenses. Moreover, even if it is possible to determine the budget of this particular administration, appropriate funds should be reserved for the reimbursement of legal expenses in this budget, which is also not the case.

Thus, the indication in court that judicial expense are reimbursed at the expense of budgetary allocations of a particular unit or even territorial or between the territorial office of the National Police, leads to the impossibility to execute such a court decision. It is more correct to state that legal expenses are subject to reimbursement from the State Budget.

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ОСОБЛИВОСТІ СУДОВОГО ОСКАРЖЕННЯ ПОСТАНОВ У СПРАВАХ ПРО АДМІНІСТРАТИВНІ ПРАВОПОРУШЕННЯ, ВИНЕСЕНИХ ПРАЦІВНИКАМИ НАЦІОНАЛЬНОЇ ПОЛІЦІЇ (ЗА РЕЗУЛЬТАТАМИ СУДОВОЇ ПРАКТИКИ)

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***Метою** статті є дослідження особливостей судового оскарження постанов у справах про адміністративні правопорушення, винесених працівниками Національної поліції.*

*Для успішного проведення дослідження автором використані такі **методи** наукового пізнання: логічний, історичний, системно-функціональний, формально-догматичний.*

***Результати.** Автор здійснює аналіз практики діяльності адміністративних судів щодо розгляду позовів на постанови в справах про адміністративні правопорушення, які винесені працівниками Національної поліції, зокрема, за порушення правил дорожнього руху.*

З'ясовано, що великий масив судових справ, у яких посадові особи поліції виступають як відповідачі (це справи щодо оскарження рішень, дій чи бездіяльності посадових осіб Національної поліції у зв'язку з притягненням до адміністративної відповідальності), пов'язаний із декількома взаємозумовленими факторами: великою кількістю оскаржень постанов у справах про порушення правил дорожнього руху внаслідок високого ступеня ігнорування в нашій країні норм правил дорожнього руху всіма учасниками дорожнього руху; недосконалою (іноді проблемною) дорожньою інфраструктурою; високою латентністю цих правопорушень, що зумовлене високим рівнем безкарності водіїв; конфліктністю водіїв та їх нездатністю визнати свою провину; відсутністю дієвого механізму досудового вирішення таких спорів; легким доступом до їх судового вирішення (відсутністю судового збору); також не варто відкидати подекуди процесуальну неграмотність самих поліцейських. Усе це в сукупності призводить до того, що розглядувана категорія справ є суттєвим складником діяльності загальних судів як адміністративних.

***Висновки.** Не вдаючись до соціологічного аналізу цього явища, автором у межах статті здійснено аналіз судової практики розгляду цієї категорії справ, з'ясовано позицію судів щодо їх вирішення, яка значно впливає на правозастосовну практику, а іноді й на законотворчість, та запропоновано окремі шляхи вдосконалення законодавства, зокрема Кодексу адміністративного судочинства України та Кодексу України про адміністративні правопорушення, і практики їх застосування суддями адміністративних судів.*

Ключові слова: *адміністративне судочинство, постанови в справах про адміністративні правопорушення, винесені Національною поліцією, судове оскарження постанов поліції в справах про адміністративні правопорушення, судова практика.*

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THE SLOVENIAN PERSPECTIVE OF A MAIN HEARING IN AN ADMINISTRATIVE DISPUTE

Purpose. *This article deals with the current legislation and practice of the Republic of Slovenia concerning main hearing in an administrative dispute. Besides, the article is devoted to legal analysis of Slovenian case law and to examination of demands, established by the European Court of Human Rights regarding the right to a fair trial, particularly the right to a main hearing.*

Methods. *To conduct the research successfully, the author used the following methods of scientific knowledge: logical (analysis, synthesis, induction, deduction), historical, systemic and formally dogmatic.*

Results. *An integral part of the right to a fair trial is formed by the public nature of a trial, which is, in case of administrative dispute, realised on the basis of a concluded main hearing. Its aim is to ensure a democratic trial, exercise public control over a trial, as well as exercise the right of parties to the dispute and other participants in the procedure to be heard in court. This piece discusses the meaning and the role of the main hearing in an administrative dispute. It examines both legal and general social reasons which speak in favour of the execution of the main hearing. The most important decisions of the European Court of Human Rights and of domestic courts regarding the rights to the main hearing are analysed. The statistical data of the Slovenian Administrative Court on conducting main hearings as an indicator of ensuring the right to a fair trial in the Republic of Slovenia is researched.*

The author has reached a conclusion that the main hearing in an administrative dispute is of crucial importance with respect to exercising the right to adversarial procedure and right to fair procedure.

Conclusions. *Despite the numerous advantages of decision-making in an administrative dispute after a completed main hearing, it needs to be taken into account that the obligation of decision-making after a main hearing is not absolute. Consideration of omitting a main hearing ought to be inspired by the criteria adopted by the European Court of Human Rights, as they provide for a high level of protection of a main hearing as human right.*

Key words: main hearing, administrative dispute, human right, administrative court, right to a fair trial, European Court of Human Rights.

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1. Introduction

The principle of oral, direct and public trial, imposing on courts to decide on the rights and duties of parties in the procedure on the basis of a main hearing, is supported by both international as well as Slovenian national law (Žuber, 2018; Rosas, 2014). It seems inconceivable for courts to decide on civil disputes or criminal charges without the main hearing, whereas in an administrative dispute, designated to conduct judicial control over legality of administrative operation and acts, the position somewhat differs.

In the Republic of Slovenia (hereinafter referred as Slovenia) an administrative dispute is a dispute which, considering its concept, typically follows the administrative procedure, whereby an administratively final decision has been (or at least ought to have been) passed after establishing the actual facts of the case by means of proper application of substantive law in line of predetermined procedural rules (Kerševan, 2002; Kerševan, Androjna, 2017). Notwithstanding the above specificities, as defined by legislators, a main hearing must form part of decision-making in an administrative dispute due to its significance. However, this statutory rule is unfortunately not applied in practice, since the Administrative Court of the Republic of Slovenia (hereinafter referred as Administrative Court) mostly adjudicates in a session as opposed to following the main hearing. Consequently, the Supreme Court of the Republic of Slovenia (hereinafter referred as Supreme Court) has long been drawing attention to the duty of executing main hearings in the Administrative Court. Moreover, the issue of failing to conduct the main hearing in an administrative dispute in Slovenia was first raised at the European court of Human Rights (hereinafter referred as ECtHR) in 2018.

This piece discusses the role and the meaning of the main hearing in an administrative dispute in Slovenia. It examines both legal and general social reasons which speak in favour of the execution of the main hearing, as well as presents a few of the most relevant opinions of the ECtHR concerning the execution of main hearings in administrative dispute. Although we distinguish two fundamental types of administrative dispute in Slovenia, i.e. dispute on legality of individual administrative act and dispute of full jurisdiction (Kerševan, Androjna, 2017), the article due to rules on article's volume focuses on common features of a main hearing conducted at the first-instance court, i. e. the Administrative Court.

The aim of this article is to provide scientific analysis of conducting a main hearing in an administrative dispute and underline its characteristics in Slovenian theory and practice. The goal of research is also the consideration of the ECtHR's most important opinions on conducting a main hearing in an administrative dispute. The tasks of the paper are as following: to analyse legal basis for conducting main hearing in administrative dispute, to explore the statistical data of the Slovenian Administrative court on conducting main hearings, to find out whether the number of conducted main hearings in Administrative court is a proper indicator of ensuring the right to a fair trial, to investigate advantages and disadvantages of conducting a main hearing, to analyse most important opinions of the ECtHR on conducting main hearings in administrative dispute, and to determine the importance of such opinions.

2. Legal basis for conducting main hearing in an administrative dispute

The right to a trial at a main hearing is provided for by article 6 of European Convention on Human Rights (right to a fair trial) and article 47 of EU Charter of Fundamental Rights (right to an effective remedy and to a fair trial) at the international level, whereas at the national level it is provided for by the Constitution of the Republic of Slovenia (hereinafter referred as the Constitution) in articles 22 (equal protection of rights), 23 (right to judicial protection) and 24 (public nature of court proceedings).

The institution of a main hearing in an administrative dispute in Slovenia is regulated by the Slovenian act on administrative dispute (Administrative Dispute Act, hereinafter referred as ADA) in articles from 51 to 59 (Državni zbor Republike Slovenije, 2006). Article 51 of ADA establishes the rule that the Administrative Court shall adjudicate after the main hearing and lays down a general rule stating that a main hearing is intended to take evidence. Subsequent articles stipulate the rules on the institution, conduct, and implementation of a main hearing. In addition to ADA, special rules concerning the implementation of a main hearing are provided by certain acts (e. g. acts in the field of insurance, auditing, the financial instruments market).

In exceptional circumstances, which are stipulated in article 59 of ADA, the court may adjudicate in a session (Breznik, Kerševan, 2008). In line with article 59, paragraph 2 of ADA the court may adjudicate in a session in the event of one of the following situations:

– facts of the case that were the basis for the issuing of the administrative act between the plaintiff and defendant are not contentious;

– if it is already evident on the basis of the action, contested act and administrative files, that the action needs to be upheld and the administrative act annulled and the accessory participant with an opposing interest did not take part in the administrative dispute;

– if the facts of the case between the plaintiff and the defendant are contentious, but the parties state only new facts and new evidence, which the court may not take into consideration (due to belatedness) or the proposed new facts and evidence are not relevant for the decision;

– if there is a dispute between the same parties where the factual and legal basis are similar, and the court has already passed a final decision on this issue.

Besides, the court always adjudicates in a session regarding disputes on the legality of acts of electoral bodies (article 59, paragraph 4 of ADA). Where the court adjudicates

in a session, it may only make its decision based on the facts of the case established in the administrative procedure (article 60 of ADA). One of the most important differences between adjudicating after a completed main hearing and adjudicating in a session is that the session shall not be public (article 59, paragraph 5 of ADA).

In Slovenia, failure to conduct a main hearing is an encroachment on human right, which is only permitted exceptionally if so provided by an Act taking into account the principle of proportionality (see: articles 2 and 15 of the Constitution, decisions of the Constitutional Court of Slovenia № U-197/02, № Up-778/04, № Up-1055/05). At this point it is worth recalling the constitutional contention of several sectoral acts excluding a main hearing in all cases beforehand (e. g. article 448 of Insurance Act) or regulating that as a rule, the court shall decide without a hearing, (e. g article 115 of Auditing Act), thereby rendering the execution of a main hearing unnecessary, which is unacceptable from the point of view of the law.

Failure to conduct a main hearing is a violation of human rights, and therefore, is it upon the Administrative Court to state reasons for the non-execution at all times, regardless of whether adjudicating based on provisions of ADA or in view of sectoral acts. Failure to provide statements of grounds is a violation of the right to receive reasons of the decision (see also: decisions of the Constitutional Court of Slovenia № Up-164/14 and № Up-434/14). In recent years, the Supreme Court has stepped up the required standard of reasoning decisions concerning the execution of a main hearing. According to recent case law, arguments of the Administrative Court should be compelling, exhaustive, as well as clearly stating reasons why the proposed evidence would not affect the decision, as these arguments are inextricably linked to the decision of executing a main hearing (Žuber, 2018; see also the following decisions of the Supreme Court: № X Ips 387/2015, № X Ips 233/2014, № X Ips 275/2014).

3. Main hearings in Administrative Court's practice

Even though regulatory framework in ADA defines the conduct of a main hearing as a rule and adjuticating in a session as an exception, the reality of our practice in view of the conduct of a main hearing is quite the contrary in Slovenia. The table below shows conducts of main hearings in an administrative dispute in the Administrative Court since 2013.

Table 1

Conducts of main hearings in the Administrative Court from 2013 to 2018

Year	Caseload	№ of cases decided on the merits	№ of conducted main hearings
2018	3540	2139	144
2017	3976	1816	85
2016	2972	2050	85
2015	2953	2438	39
2014	3291	2776	49
2013	3280	2703	68

Figures in table 1 indicate that the number of conducted main hearings somewhat increased in 2016 for the first time, and then again in 2018. Increase in conducted main

hearings in 2016 can be attributed to the Supreme Court, whose decisions reminded the Administrative Court of more frequent executions of main hearings (on this see the decisions of the Supreme Court № X Ips 233/2014, № X Ips 275/2014). The reason for more frequent executions of main hearings in 2018 most likely lies in an extensively discussed ECtHR's judgement in case of the Mirovni inštitut v. Slovenia (№ 32303/13, 13 March 2018). This was the first case where ECtHR faced allegations of failing to conduct a main hearing in an administrative dispute in Slovenia. Infringement of article 6 of European Convention on Human Rights was established in this case, due to the fact that the Administrative Court failed to take position on the requirement of the applicant to conduct a main hearing, nor did the Court state any reasons for failing to conduct a main hearing. The applicant requested the execution of a main hearing due to factual and legal errors allegedly committed by the Ministry of Education when allocating funds following a call for research projects, to which the applicant had applied but had not been granted the funding. Furthermore, the applicant requested examination of witnesses due to alleged errors that had been committed (impartiality of certain assessors, disregard of criteria).

It can be concluded that the trend of a gradual increase in the execution of main hearings can be considered positive; however, the number of executed main hearings does not reflect the basic statutory rule in ADA, namely that the Administrative Court in an administrative dispute adjudicates after a completed main hearing. On the other hand, this does not imply that there is a systematic problem in administrative disputes in Slovenia with regard to violations of the right to a fair trial due to failure to execute main hearings. This is also supported by the fact that in the last five-year period (2014–2018), ECtHR has found a violation of a right to a fair trial in 13 cases against Slovenia, while it has found violations in 33 cases in the prior five-year period (2013–2009), meaning that, in comparison to the latter time period, the number of determined violations of a right to a fair trial against Slovenia has been reduced by 60% in the last five years.

4. (Dis)advantages of decision-making in administrative dispute after the main hearing

From the perspective of an outside observer, the execution of the main hearing ensures public nature of a trial, whereas from the perspective of parties and other participants in the procedure, it represents a means to personally present arguments to the court. An executed main hearing enhances predictability of parties regarding the proceedings and the outcome of the procedure, as well as prevents a surprise judgement, which occurs when the court shall unexpectedly base its decision on a legal basis which a party with due diligence could not have anticipated. Consequently, completely different facts and evidence from those stated by the party turn out to play a prominent role in the dispute. Surprise judgement is prohibited in the Slovenian legal system, so as to prevent situations when a party loses the possibility to state facts of crucial importance due to the fact that the court has based its decision on a legal basis which the party with due diligence could not have anticipated (see decision of the Supreme Court № II Ips 75/2016, 1 February 2018). Decision of the Supreme Court № II Ips 75/2016 clearly states that a means of preventing surprise judgements is the substantive conduct of proceedings, which is most widely implemented precisely in main hearings and within which the court draws a party's attention to the overlooked legal basis, as well as reveals its own, distinct and

unanticipated point of view of the law, and reminds the party of the legal basis upon which it intends to base the dispute resolution.

On the other hand, failure to conduct the main hearing can result in deficient presenting of exculpatory evidence and deficient substantive conduct of proceedings, due to which a party initially has no possibility of supplementing allegations and applications for evidence (Breznik, Kerševan, 2008). Due to adjuticating after a completed main hearing, owing to the predominance of the oral proceeding principle over the written form principle, parties obtain the impression of a fairer decision (Žuber, 2018). All of the indicated beyond doubt enhances the legitimacy of exercising of judicial authority and contributes to the reputation of the judiciary in general public. The execution of a main hearing does not only benefit parties and other participants in the procedure, but also the Administrative Court. The main hearing enables the court to examine facts and take evidence, get directly acquainted with legal and factual aspects of the procedure, as well as clarify relevant issues regarding the principle of open trial.

As it is the case with the majority of other legal institutions, execution of a main hearing in an administrative dispute can lead to objections (Samuels, 2005), one of the most frequent ones being that conduct of a main hearing burdens and prolongs administrative dispute. The allegation is by all means unfounded in case a main hearing is thoroughly prepared and executed, at best contributing to the acceleration of proceedings (Pirnat, Kerševan, 2005). There is further allegation stating that a completed main hearing fails to serve its purpose in cases when Administrative Court grants the action, annulus the administrative act contested in the administrative dispute and returns the case to administrative authority for re-examination. The allegation can be disputed on the basis of the primary objective of a main hearing, i. e. due to taking evidence (article 51, paragraph 2 of ADA). The right of taking evidence is not an absolute right, since the court is not obligated to take evidence in case it is belated, unsubstantiated, unnecessary, irrelevant, or inappropriate (see decisions of the Supreme Court № X Ips 220/2016, 17 May 2017, № X Ips 233/2014, 3 March 2016, № Ips 114/2013, 23 October 2014). On the other hand, the Administrative court shall not dismiss the conduct of a main hearing as a consequence of anticipated evaluation of evidence, as it is prohibited (see decisions of the Supreme Court № X Ips 220/2016, № X Ips 233/2014). It can only be accepted in case the Administrative Court presents comprehensive and convincing arguments as to why adduced evidence cannot affect the decision: it should start from the assumption that the adduced evidence would succeed in confirming the party's position, regardless of which the court would decide in the same manner considering other compelling evidence (see decision of the Supreme Court № X Ips 233/2014 and decision of the Constitutional Court № Up-219/2015, 19 May 2016). In case the Administrative Court establishes that an administrative authority has unjustifiably (without legally permissible grounds) rejected applications for evidence, and in order to eliminate violations of the rules of the procedure this evidence should be presented, the court itself is obligated to take the evidence at the main hearing. The court can avoid the obligation only in case taking evidence would shift the entire burden of proof from administrative authority to Administrative Court. In case of establishing facts which are different from those established in the administrative decision the Administrative Court can, if the conditions have

been met, decide on the merits of the case on its own or annul the administrative act contested in the administrative dispute and return the case to administrative authority for re-examination. The administrative authority is bound by substantive final judgement as regards the operative part of judgement, as well as main reasons, which justify the operative part of judgement. Substantive final is any decision whereby the court substantively ruled on the legality of final administrative act. The authority that issued the administrative act in new adjudication is not bound only by the legal opinion of the court regarding the application of substantive law and its positions on the procedure (article 64 of ADA), but also by facts established through a decision, since facts of a case are inextricably related to legal positions regarding the right to taking evidence and the operative part of judgement (see decision of the Supreme Court № X Ips 220/2016). Indeed, the latter points to an unsubstantiated allegation claiming that in case of annuling the contested act and a repeated decision of an administrative authority, a completed main hearing and evidence taken have no relevance.

5. Main hearing in the light of ECtHR's jurisprudence

European Convention on Human Rights does not provide the right to a fair trial in case of deciding on each right or obligation of national law; however, to ensure guarantee of a fair procedure it is essential that there is criminal charge or civil nature of a right, which the ECtHR explains autonomously. If the right has been defined as civil under national law of a state, the ECtHR shall not assess its content or its effects, but regards it as such. If that is not the case, the key factor of the assessment is the pecuniary nature of the considered rights or obligations. If the right by itself is not of pecuniary nature, it is crucial whether it causes pecuniary effects for a party (Harris, 2014). Where issues that are governed by public law are decisive in determining private rights and obligations, they fall within article 6, paragraph 1 of European Convention on Human Rights (Schabas, 2015).

The ECtHR decided based on the above criteria that procedural guarantees under article 6 apply to expropriation permits and for issuance of building permits (decision in the case Sporrong and Lönnroth v. Sweeden, № 7152/75, 23 September 1982, paragraph 83 and 79), permissions to sell land (decision in the case Ringeisen v. Austria, № 2614/65, 16 July 1971, paragraph 94), authorizations to operate a private clinic (decision in the case decision in the case König v. Germany, № 6232/73, 28 June 1978, paragraph 94 and 95) and licences to serve alcoholic beverages (decision in the case Tre Traktörer AB v. Sweden, № 10873/84, 10 October 1985, paragraph 43). The ECtHR extended the scope of article 6, paragraph 1 of European Convention on Human Rights to tender procedures (decision in the case Regner v. Czech Republic, № 35289/11, 19 September 2017 and decision in the case Mirovni inštitut v. Slovenia), however, on the other hand, decided that the civil nature of a right shall not apply to electoral dispute, in particular the right to stand for election and retain one's seat (decision in the case Pierre-Bloch v. France, № 120/1996/732/938, 21 October 1997, paragraph 51) and in tax matters, except in tax penalty cases (decision in the case Ferrazzini v. Italy, № 44759/98, 12 July 2001, paragraph 28 and decision in the case Jussila v. Finland, № 73053/01, 23 November 2006).

As it results from case law of the ECtHR, the right to a main hearing, which is based on article 6, paragraph 1 of European Convention on Human Rights, is not absolute

(Žuber, 2018; Helmreich, 2013). Failure to conduct a main hearing is permitted if a party to the dispute renounces the right to a main hearing (explicitly or in a manner that the party does not request to conduct a main hearing). Furthermore, the obligation to conduct a main hearing can be excluded by exceptional circumstances that justify dispensing with a hearing (decision in the case Salomonsson v. Sweden, № 38978/97, 12 November 2002, paragraph 34).

There are a number of interesting cases concerning failure to conduct a main hearing due to dispensing, such as, when party to the dispute renounces the right to a main hearing in the first instance procedure and requests a main hearing in an appeal procedure. In such cases the ECtHR applies a less stringent standard for the execution of an oral hearing, however, it takes into consideration as key circumstances, whether facts could have been established without a main hearing and if a party requested taking new evidence (decision in the case Miller v. Sweden, № 55853/00, 8 February 2005, decision in the case Döry v. Sweden, № 28394/95, 12 November 2002, decision in the case Salomonsson v. Sweden).

When the court of first instance represents the only instance, a main hearing is required unless there are exceptional circumstances that justify dispensing with such a hearing. The fundamental principle when it comes to deciding on conducting a main hearing in such cases is the principle of fair trial (decision in the case Schädler-Eberle v. Liechtenstein, № 56422/09, 18 July 2013, paragraph 99). According to the EctHR, conducting a main hearing is not required in procedures not contesting credibility of findings or proper establishment the actual facts of the case, as well as those in which the court can make a fair and reasonable decision on the basis of written statements of the parties (decision in the case Jussila v. Finland, paragraph 99). Despite the stated position, the ECtHR highlights that the existence of exceptional circumstances requires an assessment for each individual case (decision in the case Miller v. Sweden). The ECtHR attaches great importance to reasonableness of the reasoning why conducting a main hearing failed (decision in the case Jussila v. Finland, paragraph 48, decision in the case Becker v. Austria, № 19844/08, 11 June 2015, paragraphs 39–42, decision in the case the Peace institute v. Slovenia, paragraph 44). Unless it is certain of exceptional circumstances that justify dispensing with a hearing, the ECtHR decides in favour of the applicant (decision in the case Karajanov v. the former Yugoslav Republic of Macedonia, № 2229/15, 6 April 2017 and decision in the case Mirovni inštitut v. Slovenia).

6. Conclusions

A main hearing in an administrative dispute provides for a public nature of a trial and holds significant meaning for the participants in the procedure in the light of exercising the right to adversarial procedure and right to a fair procedure. A main hearing presents a participant's day in court, and therefore enhances predictability of the procedure, as well as exerts a positive impact on confidence in fair conduct of courts. A conducted main hearing is relevant to the Administrative Court as well, since it enables the court to get directly acquainted with both legal and factual considerations of the proceedings, establish facts, as well as take evidence. A main hearing enables the court to fully realise the substantive conduct of proceedings, which, in turn, precludes surprise judgements.

Despite the numerous advantages of decision-making in an administrative dispute after a conducted main hearing, it needs to be taken into account that the obligation of a decision after a completed main hearing is not absolute, be it under Slovenian regulation or in accordance with the ECtHR's practice. In cases when the Administrative Court adjudicates on omitting a main hearing based on national regulations it is obligated to take into account the positions defined by the EctHR, since they provide for a high level of protecting a main hearing as a human right.

Finally, it is worth noting that the responsibility of deciding to conduct a main hearing lies not only with the judiciary, but also legislative branch of government. Special rules regarding conduct of a main hearing in sectoral acts ought to be regulated more consistently and precisely, but above all, in principle there should not exist rules stipulating the omission of a main hearing in certain types of disputes. The decision whether or nor to conduct a main hearing in a specific case should be left to courts, and they, in turn, should not be restricted by abstract statutory rules that absolutely exclude adjutication after a completed main hearing in certain cases.

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СЛОВЕНСЬКЕ БАЧЕННЯ ГОЛОВНОГО СЛУХАННЯ В АДМІНІСТРАТИВНОМУ СПОРІ

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Мета. *Статтю присвячено чинному законодавству та практиці Республіки Словенія щодо основних слухань в адміністративному спорі. Крім того, у статті здійснено правовий аналіз прецедентного права Словенії та розглянуто вимоги, встановлені Європейським судом із прав людини щодо права на справедливий судовий розгляд, зокрема й права на основне слухання.*

Методи. *Для успішного проведення дослідження автор використовував такі методи наукового пізнання: логічні (аналіз, синтез, індукцію, дедукцію), історичні, системні та формально-догматичні.*

Результати. *Невід'ємною частиною права на справедливий судовий розгляд є публічний характер судового розгляду, який у разі адміністративного спору здійснюється на підставі укладеного основного слухання. Його метою є забезпечення демократичного судового розгляду, здійснення громадського контролю над судовим процесом, а також здійснення права сторін у спорі та інших учасників процедури на заслуховування в суді. У цій частині обговорюється значення й роль основного слухання в адміністративному спорі. У ньому розглядаються як правові, так і загальні соціальні причини, які свідчать на користь проведення основного слухання. Аналізуються найбільш важливі рішення Європейського суду з прав людини та національних судів щодо прав на основне слухання. Досліджуються статистичні дані Словенського адміністративного суду про проведення основних слухань як показника забезпечення права на справедливий судовий розгляд у Республіці Словенія.*

Автор дійшов висновку про те, що основне слухання за адміністративним спором має вирішальне значення щодо здійснення права на змагальну процедуру та права на справедливу процедуру.

Висновки. *Незважаючи на численні переваги прийняття рішення в адміністративному спорі після завершеного основного слухання, необхідно враховувати те, що зобов'язання прийняття рішення після основного слухання не є абсолютним. Розгляд питання про виключення основного слухання має ґрунтуватися на критеріях, прийнятих Європейським судом із прав людини, оскільки вони забезпечують високий рівень захисту основного слухання як права людини.*

Ключові слова: основне слухання, адміністративний спір, право людини, адміністративний суд, право на справедливий судовий розгляд, Європейський суд з прав людини.

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DER ACHTUNGSANSPRUCH DER MENSCHENWÜRDE IM ZUGE DER VERTREIBUNG DER BEVÖLKERUNG: ERFAHRUNG DEUTSCHLANDS

Zweck. *Im Artikel werden die verwaltungsrechtlichen Besonderheiten der Feststellung der Vertriebeneneigenschaft sowie ihrer Inanspruchnahme von Rechten und Vergünstigungen gemäß dem deutschen Vertriebenenrecht (das Bundesvertriebenengesetz, die Fassung vom 19. Mai 1953) infolge der Vertreibung der Deutschen aus dem Ostgebiet nach Deutschland (später – Bundesrepublik Deutschland) in Jahren 1945–1949 durch das Prisma der Menschenwürde analysiert.*

Methoden. *Die Fragen der Feststellung der Vertriebeneneigenschaft und der Inanspruchnahme von Rechten und Vergünstigungen der Vertriebenen gemäß dem deutschen Vertriebenenrecht werden durch die teleologische Auslegung, die Auslegung nach dem Wortlaut des Bundesvertriebenengesetzes, (§ 1 BVFG – Vertriebeneneigenschaft und § 9 BVFG – Voraussetzungen für die Inanspruchnahme der Rechte und Vergünstigungen) und durch die systematische sowie geschichtliche Analyse der Vertreibung bearbeitet.*

Resultate. *Die Achtung und der Schutz der Menschenwürde als Kern der Verfassungsprinzipien und subjektives Recht der besonders schutzbedürftigen Personen wie Vertriebene verkörpern auf dem gesetzlichen und praktischen Niveau gute Marker zur Messung des Grades an Demokratie, Rechtsgebundenheit, Stellung der Menschenrechte und sozialer Gerechtigkeit in einem Staat.*

Die Frage der Achtung der Menschenwürde der Vertriebenen, wie erörtert wird, stellt sich nicht erst mit Blick auf die tatsächliche Ausübung der Rechte, sondern bereits bei der Anerkennung der Vertriebeneneigenschaft und dem Zugang zu den besonderen, die Rechtsstellung ausgleichenden Rechten und Vergünstigungen. Die Menschenwürdekonformität der entsprechenden staatlichen Regelungen in diesen Phasen ist für die weitere Existenz der Vertriebenen am Aufnahmeort, ihren rechtlichen Status und die inklusive Teilnahme an den gesellschaftlichen und politischen Angelegenheiten entscheidend.

Die tiefe Analyse der Vertriebenengesetzgebung in Deutschland führt zum dargelegten Fazit – zur Liste vitaler Voraussetzungen für die Achtung der Menschenwürde der Vertriebenen und zum kritischen Punkten, dadurch die Problematik im Sinne der Achtung der Menschenwürde der Vertriebenen in Deutschland herauskristallisiert wurde.

Schlussfolgerungen. *Zum Schluss wird darauf hingewiesen, dass die wissenschaftliche Analyse der Menschenvertreibung als kompliziertes Erscheinen wegen ihrer Aktualität in der Welt eine wesentliche Rolle spielt und weiter geforscht werden muss.*

Schlüsselwörter: Vertriebene, Menschenrechtsschutz, Vertriebenenanerkennung, Ausgleichsrechte, Verwaltungsverfahrensrecht.

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1. Einleitung

Nach dem Zweiten Weltkrieg zählt die Menschenvertreibung wegen ihres Maßstabs und der Konsequenzen für die Staaten und Bevölkerung zu den größten humanitären Katastrophen der Welt. Die Vertreibung kann man als ein Wohnortverlassen durch die Zwangsmaßnahmen oder mit dem Zweck der erzwungenen Suche nach Sicherheit und Schutz aus bestimmten Gründen (z.B. Krieg, Okkupation, Hungernot, Genozid, Naturkatastrophen etc.) charakterisieren, was die Rechte des Menschen – erstmal die laut der liberalistischen Theorie von John Locke angeborenen Rechte auf Leben, Freiheit, Eigentum in einen besonders verletzbaren Zustand gegenüber der Monopolstellung der Staatsorgane einsetzt (Locke, 1967: 202 f.).

Somit bedeutet die Menschenvertreibung immer un- oder mittelbare ***Zwang und Gewalt*** und eine räumliche Einschränkung (innerhalb der Grenzen eines Staates oder eine zielgerichtete Ausweisung ins bestimmte Gebiet) der keinen Platz für eine freie Äußerung des privaten Willens einräumt. Die beiden Begriffe sind typisch für die Vertreibung unabhängig davon, was für einen Vertreibungsgrund vorliegt, ob der Vertreibungsprozess unmittelbar vom Staat begleitet wurde oder ob die Bewegung inner- oder außerhalb des Heimatstaates erfolgte.

Im Laufe der Vertreibung gehen die Menschen ein Risiko für ihr Leben ein, besonders im Fall der Vertreibung – beispielsweise, aufgrund eines bewaffneten innerstaatlichen oder internationalen Konfliktes oder seiner Folgen. Außerdem befinden sie sich auch oft in den unmenschlichen oder erniedrigen Bedingungen (kein Zugang zum Trinkwasser, zur Lebensmittel, ersten medizinischen Hilfe, Toiletten und frischen Luft in einem Transportmittel und/oder Unterbringung). Allerdings kann die Lage sich am meistens am neuen Wohnort durch die Herausforderungen nach der Vertreibung nicht stabilisieren. Da der Staat entweder einige tatsächlich vertriebenen Personengruppen außer Acht lassen kann und ihre Eigenschaft nicht anerkennt oder infolge der Erteilung des Vertriebenenstatus nicht selten eine beschränkte Möglichkeit zur Geltendmachung ihrer Rechte und Freiheiten im Vergleich zu Einheimischen durch die gesetzlichen Regelungen und verwaltungsbezogenen Maßnahmen einräumt.

Solche Situationen verweisen auf die materiell- und formellrechtliche Schwäche der Gesetzgebung. Diese Schwächen können durch die Verletzung der Grundrechte auch oft die Menschenwürde berühren. Da der Mensch bzw. seine

Würde ein Kern der gesicherten freiheitlichen demokratischen Grundordnung ist, was genau durch die subjektive Grundrechte (hier – einschließlich mit Art. 1 I GG) vom Staat geachtet und geschützt werden soll. Außerdem wird die herrschende Stelle der Menschenwürde im Demokratie- (Menschenwürdegarantie als „Grundlage jeder menschlichen Gemeinschaft" und der Kern von der Volkssouveränität (Berg, 2011: 62, Rn. 117)), Sozialstaats- (der Grundsatz der menschenwürdigen Existenz (Berg, 2011: 80, Rn. 165)) und Rechtstaatsprinzip (z.B. die Garantie materieller Gerechtigkeitswerte, wo die materielle Rechtstaatlichkeit aus der Würde des Menschen ausgeht; dazu – keine Demokratie ist ohne Rechtstaatlichkeit möglich (Berg, 2011: 75, Rn. 148)) explizit geprägt.

In diesem Kontext kommt die Aufgabe vor, zu klären, ob die individuellen Bedürfnisse der Vertriebenen in Deutschland vom Staat überhaupt akzeptiert, anerkannt wird, und ob diese Anerkennung in Form der speziellen Gesetzgebung in Einklang mit dem Grundsatz der Menschenwürde steht.

2. Vertreibung aus geschichtlicher Sicht. Allgemeiner Exkurs

Der Ausgangspunkt für die Vertreibung deutscher Minderheiten war die Potsdamer Konferenz im August 1945 mit der Beteiligung der Vertreter von Großbritannien, der Sowjetunion und den USA. Das Ergebnis der Konferenz war die Verkündung des Potsdamer Abkommens, in dem nicht nur die endgültige Bestätigung der deutschen Grenzen, sondern auch Erklärung der kollektiven Zwangsaussiedlung der Deutschen nach Deutschland deklariert wurde[1]. Nach dem Beschluss der Alliierten in Form des Abschnittes XIII des Abkommens (Thomas, 1950: 11) mussten die deutschen Minderheiten aus den osteuropäischen Staaten (Tschechoslowakei, Polen, Ungarn) sowie aus den deutschen Ostgebieten, die der Oder-Neiße Linie östlich waren und in 1945 der polnischen Verwaltung[2] von der Sowjetunion gestellt wurden (Teil von Pommern, Ostpreußen, Schlesien)[3], unverzüglich vertrieben werden. Die Vertreibung sollte „in ordnungsgemäßer und humaner Weise" (Thomas, 1950: 11) erfolgen, was der Realität nicht entsprach.

In der Zeit der Vollziehung des Potsdamer Abkommens und bis Ende 1949 waren insgesamt etwa 12,1 Millionen Deutsche aus osteuropäischen Gebieten einschließlich mit den Territorien unter der sowjetischen Verwaltung nach Deutschland mit der folgenden Verteilung in die Besatzungszonen geflohen. Von dieser Zahl wurden 8 Millionen Menschen in die BRD, etwa 4,1 Millionen in die ehemaligen Gebiete der DDR gewaltsam vertrieben. Somit erschien in Deutschland eine separate Bevölkerungsgruppe – geflüchtete bzw. vertriebene Personen mit dem unklaren Rechtsstatus und ohne Mittel zur bloßen menschlichen Existenz, was irgendwie geregelt werden musste.

[1] 6. Mitteilung über die Dreimächtekonferenz von Berlin (Potsdamer Protokoll), Abschnitt XIII, 2. August 1945. Quelle: Amtsblatt des Kontrollrats in Deutschland, Ergänzungsblatt Nr. 1, S. 13–19 (deutsch, englisch, französisch, russisch) (Rauschning, 1989: 11 ff.).

[2] 6. Mitteilung über die Dreimächtekonferenz von Berlin (Potsdamer Protokoll), Abschnitt IX, 2.August 1945. Quelle: Amtsblatt des Kontrollrats in Deutschland, Ergänzungsblatt Nr. 1, S. 13–19 (deutsch, englisch, französisch, russisch) (Rauschning, 1989: 32).

[3] Einst und Jetzt (1956), 268. Identischer Text in: Einst und Jetzt (1967), 272 (Benthin, 2007: 68; Bundesministerium für Vertriebene, Flüchtlinge und Kriegsgeschädigte, 1960).

Die Besatzungsmächte mussten die ersten zoneneinheitlichen Landesgesetze und Landesverordnungen zur Aufnahme, Eingliederung[4], Soforthilfe und Bekämpfung der Not[5] erlassen. Nach der Verkündung des Grundgesetzes im Jahr 1949 verlangte das Rechtstaats-, Sozialstaats- und Demokratieprinzip von der Bundesrepublik einen fairen Schadensausgleich, die Chancengleichheit in der Ausbildung, auf dem Arbeits- und Wohnungsmarkt für alle und die Gleichstellung der betroffenen Gruppen im Allgemeinen vor dem Gesetz. Diese Phasen waren für die Vorbereitung und Bearbeitung des BVFG-Entwurfes grundlegend. Im Jahr 1953 hat der Gesetzgeber seine Verpflichtung zur Konkretisierung des Art. 116 I GG durch das verabschiedete ***Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge (BVFG)***[6] endlich erfüllt, in dem einheitliche Normierungen zum Status, Rechte und Vergünstigungen der Vertriebenen und der Personen ähnlicher Gruppen (Sowjetflüchtlinge und Sowjetflüchtlingen gleichgestellte Personen) endlich vorgesehen wurden.

3. Die Rechtsstellung der deutschen Vertriebenen nach dem Bundesvertriebenengesetz

3.1. Vertriebeneneigenschaft nach § 1 BVFG

Nach der Legaldefinition im § 1 I BVFG ist ein Vertriebener derjenige, *„<…> wer als deutscher Staatsangehöriger oder deutscher Volkszugehöriger seinen Wohnsitz in den zur Zeit unter fremder Verwaltung stehenden deutschen Ostgebieten oder in den Gebieten außerhalb der Grenzen des Deutschen Reiches nach dem Gebietsstande vom 31. Dezember 1937 hatte und diesen im Zusammenhang mit den Ereignissen des zweiten Weltkrieges infolge Vertreibung, insbesondere durch Ausweisung oder Flucht, verloren hat <…>“.*

Neben einer Person mit dem Vertriebenenstatus haben auch ihre Ehegatten, wenn die Ehe vor dem Zeitpunkt der Vertreibung geschlossen wurde[7], und minderjährigen Kinder ohne deutsche Staatsangehörigkeit oder Volkszugehörigkeit gemäß § 1 III und § 7 BVFG als ***derivative Vertriebene*** das Recht auf einen legalen Aufenthalt in der BRD sowie einen Anspruch auf einen Vertriebenenausweis, gewährleistete Rechte und Vergünstigungen.

Weiter betrachten wir näher alle in der Definition enthaltene Merkmale der Vertriebeneneigenschaft.

3.1.1. Deutsche Staatsangehörigkeit

Nach allgemeinen Regelungen musste die vertriebene Person die deutsche Staatsangehörigkeit „jedenfalls im Zeitpunkt des Verlassens“[8] seines Wohnortes im Vertreibungsgebiet infolge Vertreibung, Ausweisung oder Flucht besitzen. Die deutsche Staatsange-

[4] Beispielweise: Gesetz über die Aufnahme und Eingliederung deutscher Flüchtlinge (Flüchtlingsgesetz) vom 24. Januar 1947, Bayern, amerikanische Besatzungszone. Quelle: Ges. Nr. 59 vom 19.2.1947 (Bayerisches GVBl. 1947, Nr. 5, S. 51) (Thomas, 1950: 91 ff.).

[5] Beispielweise: Gesetz zur Behebung der Flüchtlingsnot vom 27. November 1947, Schleswig-Holstein, britische Besatzungszone. Quelle: GVBl. Schleswig-Holstein, 1948, Nr. 1, S. 1 (Thomas, 1950: 118 ff.).

[6] Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge, BGBl, 1953, Teil II Nr. 22, S. 201 ff.

[7] BVerwGE 51, VIII C 97.75, 244 f.

[8] BVerwGE 58, 8 C 17.79, 259.

hörigkeit konnte gemäß dem damals geltenden Reichs- und Staatsangehörigkeitsgesetz[9] (RuStAG) weder nach dem Geburtsortprinzip auch nach dem damals leitenden Abstammungsprinzip[10], im Folge der Adoption oder der Einbürgerung[11] erworben werden.

Durch den Begriff der deutschen Staatsangehörigkeit im BVFG integrierte der Gesetzgeber die Bestimmungen des RuStAG, die Leitgedanken des Art. 116 I GG über eine einheitliche, vom völkerrechtlichen Staatsfortbestand (Mangoldt, Klein, Starck, 2018: Art. 116 Abs. 1 Rn. 34) ausgegangene deutsche Staatsangehörigkeit ins Gesetz. Dies war dadurch geprägt, dass die „Neuorganisation“[12] Deutschlands und der Abschluss des Vertrages über die Grundlagen der Beziehungen zwischen der BRD und der DDR[13] allerdings den geltenden Verfassungsprinzipien sowie der gesamten Staatlichkeit bzw. der deutschen Staatsangehörigkeit i.S.v. Art. 16 GG i.V.m. Art. 116 I GG nicht entgegenstanden[14]. Folglich wurde die DDR nie als ein neuer souveräner Staat verfassungsrechtlich anerkannt und den Deutschen aus dem DDR-Gebiet ihre deutsche Staatsbürgerschaft nie entzogen.

Außerdem sind sammeleingebürgerte Einwohner in den nach 1937 von Deutschland annektierten Gebieten[15] zu den deutschen Staatsangehörigen zugerechnet, obwohl ihre Anerkennung nicht so eindeutig erfolgte. Laut des BVerwG konnte die zur Zeit der deutschen Herrschaft kollektiv erworbene deutsche Staatsangehörigkeit nach der Befreiung als geltend in diesen Gebieten nur dann anerkannt werden, wenn *„<…> der Heimatstaat die Sammeleingebürgerten nicht selbst in Anspruch nahm und die Betroffenen ständig an der deutschen Staatsangehörigkeit festhalten wollten“*[16].

3.1.2. Deutsche Volkszugehörigkeit

Den Begriff „deutscher Volkszugehöriger“, der im § 1 BVFG verankert ist, hat der Gesetzgeber weiter im Bundesvertriebenengesetz, im § 6, ausführlich definiert und durch die Definition den Sinn und Zweck des Art. 116 I GG erklärt. Somit handelt es sich im § 6 BVFG um Statusdeutsche oder Vertriebene, die außerhalb der Gebiete des Deutschen Reichs nach seinem Stand gelebt haben, über ***keine deutsche Staatsangehörigkeit*** verfügen, trotz fremder Staatsangehörigkeit zur deutschen Minderheit[17] aufgrund der ausgeprägten subjektiven (Selbst- oder Familienbekenntnis als Deutsche) (Häuser, Kapinos, Christ, 1990: 85 ff.) und objektiven Merkmale (Sprache, Erziehung, Abstammung, Kultur, Vorfahren etc.) (Häuser, Kapinos, Christ, 1990: 99 ff.) gehören.

Die zuständigen Behörden verwendeten bei der Prüfung der Volkszugehörigkeitsmerkmale im Verwaltungsverfahren eine Methode der Durchdringung, worauf im § 6 BVGF verwiesen ist: *„<…> sofern dieses Bekenntnis durch bestimmte Merkmale wie Abstam-*

[9] RGBl. S. 583.

[10] Der wegen der Bekämpfung der nationalsozialistischen Führungsmacht seine Leitrolle im deutschen Staatsangehörigkeitsrecht verlor.

[11] GGK II, 6. Aufl. 2012, Art. 116, Rn.13, 14.

[12] BVerfGE 36, 1/ 16.

[13] BGBl. II, 1973, S. 421.

[14] BVerfGE 36, 1/ 2, 15 ff.

[15] Genau zu den von Deutschland annektierten Gebiete während des Zweiten Weltkriegs (Bohn, 1997: 32 f).

[16] BVerwGE 58, 8 C 17.79, 263.

[17] BVerwGE 5, V C 504.56, 241.

mung, Sprache, Erziehung, Kultur bestätigt wird". Der Sinn und Zweck dieser Methode liegt im Nachweisen der subjektiven Authentizität durch die objektive Seite. Als subjektive Authentizität versteht man ein Bekenntnis zum deutschen Volkstum – der subjektive, vor dem Zeitpunkt der Vertreibung[18] erkennbare[19] Wille zu bindenden Beziehungen mit der deutschen Kulturgemeinschaft (Strassmann, Nitsche, 1958: 36 f.). Aus dieser Regel sind Kinder ausgenommen, den das Bekenntnis durch die Seite der Eltern oder eines deutschen Elternteils im Zeitpunkt (frühgeborene) oder schon nach der Vertreibung (spätgeborene) zugerechnet wurde. Diese Zurechnung ist bis zur Möglichkeit eigener Bekenntnisfähigkeit eines Kindes (mit 16 Jahren) (Liesner, 1988: 22) beibehalten[20].

Auf dieser Station ist noch wichtig, in die progressiven Gedanken der Rechtsprechung über die Schutzwirkung des Gesetzes kurz einzugehen. Gemäß der Entscheidung des BVerwG betrifft die Geltung des § 6 BVFG ausnahmsweise aus der Schutzmachttheorie[21] auch diejenigen, die in den Gebieten des Deutschen Reiches immer bodenständig waren, den Verfassungsstatus als Deutsche i.S.d. Art. 116 I GG durch die fremde Staatsangehörigkeit außerhalb des Vertreibungsgebiets verloren haben, aber im Laufe der Vertreibungsmaßnahmen der Schutz Deutschlands für die würdige Existenz eine entscheidende Rolle spielt.

Nach Art. 116 I GG verleiht der Gesetzgeber den Statusdeutschen die deutsche Staatsangehörigkeit automatisch nicht[22], aber stellt sie in ihren Rechen (einschließlich mit den typischen bürgerlichen Rechten wie passives und aktives Wahlrecht etc., trotzdem außer des Rechtes auf Bildung politischer Parteien wegen der „Zwangsassimilationspolitik" (Kossert, Kalte, 2008: 88)) und Pflichten den deutschen Staatsangehörigen gleich[23] und ermöglicht den Volkszugehörigen als einer ausländischen Minderheit die erleichternde Einbürgerung (Wittreck, 2008, Art. 116, Rn. 30). Darüber hinaus sind schon aufgenommene Vertriebene dem Ausländergesetz nicht unterliegt, bedurften eines Aufenthaltstitels für ihren legitimen Aufenthalt in der BRD nicht und genießen die Freizügigkeit (Häuser, Kapinos, Christ, 1990: 4, Rn. 8) nach Art. 11 GG (Ausnahme – Sowjetzonenvertriebene nach § 1 I 1 des Notaufnahmegesetzes vom 22. August 1950[24]). Die Volkzugehörigen, deren Vertriebenenstatus noch nicht festgestellt wurde, genießen die vorübergehende Unterbringung in der BRD[25].

3.1.3. Wohnsitz im Vertreibungsgebiet

Ferner musste ein Vertriebener zum Zeitpunkt der Vertreibung über einen Wohnsitz außerhalb des Deutschen Reichs nach 31. Dezember 1937 oder in den Gebieten östlich der Oder-Neiße-Linie (Strassmann, Nitsche, 1958: 19) verfügen. Der Begriff „Wohnsitz" ist im

[18] Ausnahme: spätgeborene Abkömmlinge. Dazu: BVerfGE, 59, 128/151.

[19] BVerfGE, 59, 128/146.

[20] Richtlinien zur Anwendung des § 6 des Bundesvertriebenengesetzes (BVFG), vom 20.02.1980, 140. Ergänzung – SMB1. NW. – (Stand 1.11.1980 – MB1. NW. Nr. 107 einschl.).

[21] Zur s.g. Schutzmachttheorie: BVerwGE 5, V C 504.56, 239, 244 f.

[22] BVerwGE 5, V C 504.56, 244.

[23] BVerwGE 5, V C 504.56, 243.

[24] BGBl. S. 367.

[25] Verordnung über die Bereitstellung von Durchgangslagern und über die Verteilung der in das Bundesgebiet aufgenommenen deutschen Vertriebenen auf die Länder des Bundesgebietes vom 28.3.1952, BGBl. I S. 236, ber. S. 287, § 1.

Sinne des § 7 f. BGB vom Jahre 1954[26] wegen des Fehlens der Legaldefinition im BVFG und in der folgenden Vertriebenengesetzgebung (wie Lastenausgleichsgesetz) auszulegen[27].

Nach § 7 I BGB muss der Wohnsitz den Merkmalen einer gewillkürten ständigen bzw. permanenten Niederlassung mit dem räumlichen und individuellen Anknüpfungspunkt entsprechen (Prütting, Wegen, Weinreich, 2018: § 7, Rn. 1, 2). Da ist der Fall, wenn ein Vertriebener einen Hauptwohnsitz hatte, der durch seinen Willen zum Mittelpunkt seines Lebensinteresses[28] und persönlichen Beziehungen angemacht und nicht obligatorisch zum Eigentum der vertriebenen Person übertragen wurde. Somit reichen die bloße Wohnortsanschrift oder eine Eigentumsurkunde für die Begründung nicht aus, aber können in den Ausnahmefällen einen Willen zum ständigen Niederlassung begründen (Häuser, Kapinos, Christ, 1990: 32, Rn. 9 f.).

Der festgestellte Wohnsitz begründet nicht nur den Erwerb des bloßen Vertriebenenstatus, sondern knüpft die wichtigsten existenzerhaltenden Leistungen gemäß dem BVFG (III. Abschnitt), dem Lastenausgleichgesetz (LAG) wie Entschädigungsleistungen der Kriegs- (§ 13 LAG), Vertreibungs- (§ 12 LAG), Sparerschäden (§ 15 LAG), und im Rahmen weiteren verbundenen Gesetze an sich an. Deswegen stellt der Gesetzgeber die Frage der Indizierung eines Wohnsitzes in den Vertreibungsgebieten zusammen mit dem Staatsangehörigkeits-, Volkszugehörigkeitsmerkmal gerechterweise auf die Spitze der Anforderungen.

3.1.4. Verlust des Wohnsitzes infolge Vertreibung, Ausweisung oder Flucht im Zusammenhang mit dem Zweiten Weltkrieg

Der Wohnsitz im Vertreibungsgebiet musste ausschließlich aufgrund der Vertreibung, der Ausweisung oder Flucht, die in einer unmittelbaren Verbindung mit dem Zweiten Weltkrieg stehen, verloren sein. Eine Ausnahme bilden hier die Berufssoldaten: in deren Fall geht der Wohnsitz nicht wegen der Vertreibung, sondern wegen der Kapitulation Deutschlands nach 8. Mai 1945 und Abschaffung der Wehrmachteinsätze verloren[29].

Nach der Vollziehung vom Potsdamer Abkommen blieb das unfreiwillige Verlassen des Wohnsitzes in den Vertreibungsgebieten infolge des vermuteten permanenten Drucks[30] durch die nicht-deutschen Einwohner der ost- und mitteleuropäischen Länder gegenüber den Deutschen wegen ihres Selbstbekenntnisses zum Deutschtum (Strassmann, Nitsche, 1958: 22) kontinuierlich. Dem § 1 II Nr. 3 BVFG zufolge hat der Gesetzgeber diesen Prozess als Aussiedlung bestimmt und durch das Konzept der Spätkonsequenz der Zwangsvertreibungsmaßnahmen[31] begründet. Objektiv war die Aussiedlung als Art der Vertreibung gemeint[32]. Hierdurch fasste die Voraussetzung des endgültigen Wohnsitzaufgebens auch die Aussiedler im Vertreibungsgebiet um, da sie zu den vertriebenen Personen nach § 1 I BVFG logischerweise zugerechnet wurden.

[26] BGBl I S. 147.
[27] BVerwG, 22.4.1955, IV C 44.54, NJW 1955, 1044–1045.
[28] BVerwG, 26.10.1970, VIII B 96.68, JurionRS 1970, 13484.
[29] BVerfGE, 3, 288 f.
[30] BVerwGE, 58, 8 C 17.79, 259 f.
[31] VG Darmstadt, Urt. V. 17.1.1977 – Az.: V E 122.75 (Häuser, Kapinos, Christ, 1990: 38, Rn. 31).
[32] Vgl. BVerwG, 13.3.1974, VIII C 24.73 – Buchholz 412.3 § 1 BVFG Nr. 13.

3.2. Voraussetzungen für die Inanspruchnahme der Rechte und Vergünstigungen

Im § 9 BVFG verankert der Gesetzgeber die Voraussetzungen, die einem Vertriebener zur Erfüllung stehen, um zusätzliche statusbezogene Ausgleichsrechte und Vergünstigungen beanspruchen zu können. Unter den bestimmten Rechten und Vergünstigungen nach BVFG versteht der Gesetzgeber: freiwillige Umsiedlung (§ 26–34), Eingliederung in die Landwirtschaft zusammen mit den Beihilfen, Entschädigungen und Darlehen (§ 35–68), Recht auf freie Berufe und Gewerbe (§ 69–71), Förderung selbstständig und unselbständig Erwerbstätiger (§ 72–79), Wohnraumversorgung (§ 80), Schuldregelung (§ 82–89), Sozialversicherung und Ersatz von Fürsorgekosten (§ 90–91), Anerkennung von Prüfungen und Ersatz von Urkunden (§ 92–93), Familienzusammenführung (§ 94), unentgeltliche Beratung (§ 95).

Ferner musste ein Vertriebener ***(Statuserwerb nach § 1 ff. BVFG)*** einen ständigen Aufenthalt im Geltungsbereich des Grundgesetzes (alle Länder einschließlich Saarland seit 1. Januar 1957; Ausnahme: das DDR-Gebiet und die zu Österreich grenzlegende Gemeinde Mittelberg in Bayern) (Strassmann, Nitsche, 1958: 43) oder in West-Berlin ***(Voraussetzung des ständigen Aufenthaltes im § 9 BVFG)*** bis zum 31. Dezember 1952 ***(Stichtagvoraussetzung im § 10 BVFG)*** nehmen.

3.2.1. Ständiger Aufenthalt

Die Voraussetzung eines ständigen Aufenthaltes ist dann erfüllt, wenn ein Vertriebener angefangen hat oder nur noch vorhat, in einem neuen Wohnort im Rahmen der BRD oder in West-Berlin dauerhaft, mit Aussicht auf Bildung persönlicher Lebensverhältnisse (Häuser, Kapinos, Christ, 1990: 110), zu leben. Der Wille zum dauerhaften Aufenthalt muss ***zum Zeitpunkt der Aufenthaltsnahme im Bundesgebiet*** vorliegen[33].

Die Begründung eines bloßen Wohnsitzes in der BRD ist nicht entscheidend, da der Begriff „ständiger Aufenthalt“ viel breiter ist. Ein Vertriebener kann im Laufe der Aufnahmephase auch einen vorübergehenden Wohnsitz z.B. in einem Grenzdurchgangslager[34] gemäß § 80 II BVFG und § 1 I der Verteilungsverordnung vom 28. März 1952[35] ohne schädliche Folgen für die weitere Inanspruchnahme von Rechten und Vergünstigungen erstmal begründen, wenn der Wille zum ständigen Aufenthalt im Vertreibungsgebiet noch vor der Annahme der Notunterbringung indiziert wurde.

3.2.2. Stichtag

Der Anspruch auf bestimmte Rechte und Vergünstigungen nach BVFG ist nach § 10 I BVFG nicht zu entfallen, wenn ein Vertriebener seinen ständigen Aufenthalt im Bundesgebiet bis zum Stichtag genommen hat. Für einen Lastenausgleich musste ein Vertriebener die Voraussetzungen des § 230 I LAG erfüllen und einen ständigen Aufenthalt bis zum 31. Dezember 1950 nehmen. Eine Abweichung von der Voraussetzung im § 10 I BVFG führte i.d.R. zum Ausschluss von bestimmten Leistungen nach BVFG[36]. Allerdings hat der Gesetzgeber im § 10 II und III BVFG die Reihe von Ausnahmen vorgesehen.

[33] VG München, Urt. V. 22.4.2008, M 4 K 05.1731 – OpenJur 2012, 91278.

[34] Analog verwendbar hier: BVerwG, 4.3.1976, III C 62.75 – RzW 1977, 109.

[35] BGBl. I, S. 236, ber. S. 287.

[36] Vgl. BVerwGE 70, 21.9.1984, 159.

3.2.3. Statuserwerb nach § 1 ff. BVFG

Der Stichtag und der ständige Aufenthalt können aber nicht eine erschöpfende Liste der Voraussetzungen erstellen. Da die Rechte und Vergünstigungen in BVFG, anders als im Fall oben, nicht in Betracht kommen, wenn eine vertriebene Person die Erfüllung aller Merkmale nicht nachgewiesen bzw. seinen verwaltungsmäßigen Status nach § 1 ff. nicht erworben hat.

Der Erwerb eines Vertriebenenstatus aus der rechtlichen Sicht ist eine Abschlussphase der Aufnahmeverfahren und ein Ausgangspunkt der Eingliederung der Vertriebenen. Der Statuserwerb von neuangekommenen Vertriebenen wurde durch die Erteilung eines von den drei Ausweisarten nach § 15 ff. BVFG[37] nachgewiesen, der, in seiner Reihe, als Feststellung einer Berechtigung oder Nichtberechtigung zur weiteren staatlichen Betreuung mit einem besonderen Vermerk galt (§ 15 III BVFG). Ein Ausweis konnte entweder am Ende einer von drei Aufnahmeverfahren oder im Rahmen eines gewillkürten Verfahrens nach der Einreise mit dem touristischen Visum (Liesner, 1988: 12 ff.) ausgestellt werden. Besonders wichtig ist die Tatsache, dass das BVFG keine Normen enthält, die Wortlaut oder nach der teleologischen Auslegung den automatischen Verlust des Vertriebenenstatus beim unbegründeten Rückkehr ins Vertreibungsgebiet zulassen. Die Nichterfüllung der Aufenthalts- und/oder Stichtagvoraussetzung haben die Rechtsfolgen in Bezug auf Rechte und Vergünstigungen nach BVFG, jedoch lässt die Statuseigenschaft nach der Logik des Gesetzes unberührt[38].

Die Regelungen zur Aufnahme nach dem Inkrafttreten des BVFG wurden in erster Linie auf die Aussiedler und Sowjetzonenflüchtlinge eingerichtet, da in 50–60er Jahren diese beiden Vertreibungsprozesse noch in Gang waren (Neuhoff, 1977: 19). Das Ausweisverfahren betraf jedoch auch die vorher aufgenommenen Vertriebenen durch den Ersatz ungültigen Ausweise, die noch vor dem Inkrafttreten des BVFG von den Ländern vergeben worden waren. In diesem Fall war ein ungültiger Ausweis nach § 105 BVFG als Beweismittel für die Vertriebenen – oder Flüchtlingseigenschaft bezweckt. Diese Regelung verhinderte den ungerechtfertigten Massenverlust des Status und blieb den Rechtsweg für vertriebene Personen zur weiteren Ausübung der speziellen Rechte und Vergünstigungen offen.

Nach diesem Zusammenhang liegt der Statuserwerb im Grunde einer Anspruchsberechtigung gemäß BVFG und stellt somit die erste von den drei Voraussetzungen für die Inanspruchnahme der Rechte und Vergünstigungen der Vertriebenen dar.

4. Achtung der Menschenwürde der vertriebenen Personen in der deutschen Vertriebenengesetzgebung

4.1. Allgemeine Ausprägungen der Menschenwürdekonformität in gesetzlichen Regelungen Deutschlands

Die Lageanalyse des Achtungsniveaus der Menschenwürde vertriebener Personen durch den Aufnahmestaat beginnt nicht mit der Frage, ob sie ihre Rechte in einer menschenwürdekonformen Weise tatsächlich geltend machen und wie der Staat diese Konfor-

[37] Richtlinien für die Berücksichtigung bevorzugter Bewerber bei der Vergabe öffentlicher Aufträge (Vertriebebe, Sowjetzonenflüchtlinge, Verfolgte, Evakuierte, Schwerbeschädigte) vom 24.02.1969, BAnz. Nr. 94, S.3, § 2 I.

[38] BVerwGE 70, 8 C 4.82, 159–162.

mität sichert. Die Kernfragen sind hier, ob ihre individuellen, nur dieser Bevölkerungsgruppe inhärenten Bedürfnisse vom Staat überhaupt zuerst akzeptiert und in Form eines besonderen Rechtstatus anerkannt werden können. Genau von der Anerkennung der Vertriebeneneigenschaft hängt eine weitere Möglichkeit zur Geltendmachung bestimmter, auf Ausgleich gerichteter Rechte als auch in der Verfassung stehende Grundrechte ab.

4.2. Anerkennung der eigenen Staatsangehörigen und auch anderer Personengruppen als Vertriebene

Im Fall der Vertreibung, besonders beim Vorliegen der zweckbestimmten Zwangsmaßnahmen wie in Deutschland, wäre es unbillig und menschenwürdeverletzend, ausschließlich den Staatsangehörigen die Vertriebeneneigenschaft anerkennen zu dürfen. Vertriebene deutsche Volkszugehörige, bestimmte Gruppen der Ausländer, die die Schäden aufgrund der Vertreibungsereignisse erlitten haben oder erlitten haben konnten, zur Vertreibung gezwungen waren und aus familiären oder anderen Gründen den Schutz des Heimatstaates nicht genießen können, sowie derivative Vertriebene standen/noch stehen in der Abhängigkeit des Aufnahmestaates, seiner Entscheidungen und seines Schutzes. Eine Verachtung des Schutzbedürfnisses dieser Personengruppen in der Vertriebenengesetzgebung würde ihre menschliche Existenz nach der Vertreibung ernsthaft bedrohen und gegen das Prinzip der Einigkeit der Familie (im Fall der derivativen Vertriebenen) verstoßen.

4.3. Ausprägung des Gleichheitssatzes durch die gesetzliche Anerkennung der Vertriebeneneigenschaft

Eine sehr wichtige Rolle für die Möglichkeit der Inanspruchnahme der Rechte und Vergünstigungen spielt die Tatsache, dass die Vertreibung und die Entstehung der Vertriebenen als schutzbedürftige Bevölkerungsgruppe in Deutschland gesetzlich verankert wurden. Der Gesetzgeber des Aufnahmestaates gibt eine erhöhte Verletzbarkeit dieser Bevölkerungsgruppe durch ihre besonderen Merkmale zu und verpflichtet ***gesetzlich*** alle Träger der hoheitlichen Gewalt zur gerechtfertigten Ungleichbehandlung[39] zum Ausgleichszweck der Stellung der Vertriebenen mit den Einheimischen. Dies prägt sich durch die Verleihung bestimmten vertriebenenbezogenen Rechte, Vergünstigungen und Garantien ihrer Realisierung aus und ist wichtig für die Sicherung der Menschenwürde im Rahmen des Sozialstaatsprinzips.

4.4. Weitergeltung des Vertriebenenstatus ohne Berechtigung zur Inanspruchnahme der Rechte und Vergünstigungen

Die Analyse des deutschen Vertriebenengesetzes lässt uns feststellen, dass die Voraussetzungen zur Inanspruchnahme der Rechte und Vergünstigungen (logischerweise außer der Voraussetzung des Statuserwerbs) und die Voraussetzungen zum Statuserwerb nicht verbindlich sind. Somit bleibt der Vertriebenenstatus geltend ungeachtet davon, ob eine vertriebene Person Entschädigung z.B. zur Nebenkostenvorauszahlung erhalten darf oder nicht.

Der verwaltungsrechtliche Vertriebenenstatus ist selbst Ausgangspunkt für die Entstehung aller bestimmten vertriebenenbezogenen Rechte und nicht umgekehrt. Vom Status werden nicht nur die im BVFG vorgesehenen besonderen Rechte und Ver-

[39] BVerfGE 88, 87 (96 f.).

günstigungen, sondern auch zahlreiche, in anderen Gesetzen und Verordnungen verankerte vertriebenenbezogene Leistungen und Garantien abgeleitet. Somit muss z.B. der Ausschluss besonderer Rechte und Vergünstigungen nach dem Vertriebenengesetz den Status aus den Rechtssicherheitsgründen nicht beeinflussen, damit dadurch die weitergeltenden vertriebenenbezogenen Vergünstigungen weiter nicht berührt worden sind. Diese Trennung ist ein wichtiger Punkt für die effektive Garantie des Menschenwürdegrundsatzes aus dem Blickwinkel des Rechtsstaatsprinzips.

5. Schlussfolgerungen

Die tiefe Analyse der geschichtlichen Gründe der Vertreibung und der Vertriebenengesetzgebung in Deutschland lässt uns zusammenfassen, dass vitale Voraussetzungen für die Achtung der Menschenwürde und die volle Inklusion der Vertriebenen in das gesellschaftliche und politische Leben:

a) eine umfassende Verankerung der Merkmale einer vertriebenen Person und der Vertriebenenereignisse;

b) die Unabhängigkeit des Vertriebenenstatus/Voraussetzungen zum Statuserwerb von den Voraussetzungen zur Inanspruchnahme der Rechte und Vergünstigungen;

c) die strenge Trennung des Vertriebenenstatus von den Grundrechten (einschließlich der Bürgerrechte) und ihrer Ausübungsmöglichkeit sind.

Aus menschenrechtlicher Sicht ist die Tatsache, dass Deutschland in der schweren Nachkriegsperiode progressive Ideen bezüglich Aufnahme und Statusverleihung hervor brachte, besonders bemerkenswert. Im Sinne des Vertriebenenstatus lag die Herausforderung schwerpunktmäßig in der Verwaltungspraxis im Bereich der Feststellung und Anerkennung des Vertriebenenstatus. Nach der Analyse der im Artikel erwähnten vertriebenenbezogenen Entscheidungen des BVerwG fallen viele praktische Probleme ins Auge. Vor allem handelte es sich hierbei um die Beweisbarkeit der Staatsangehörigkeit, hervorgerufen durch ein Fehlen der Beweismittel, um die Volks**s**zugehörigkeit, die Aussiedlungsgründe sowie um den Wohnsitzverlust etc. Aus dem Blickwinkel der Menschenwürde war dies höchstproblematisch, weil die weitere Lebenssicherheit und körperliche Unversehrtheit der deutschen Vertriebenen in den meisten Fällen aufgrund der Unmöglichkeit in das Vertreibungsgebiet[40] zurück zu kehren von der staatlichen Anerkennung ihres besonderen Status abhing.

Allerdings spielt das Verständnis der deutschen Vertriebenengesetzgebung im Zusammenhang mit den geschichtlichen Grundlagen dieser Ereignisse im Kontext der aktuellen Vertreibungsprozesse, z.B. in der Ukraine, eine wichtige Rolle. Trotz der oben genannten Herausforderungen ist das deutsche Vertriebenenrecht aber ein gutes Beispiel der effektiven Gleichstellungspolitik der Vertriebenen mit den Einheimischen und der Respektierung eines Menschen in seiner Würde unabhängig von den äußerlichen Umständen.

[40] Infolge des tatsächlichen Drucks, der (drohenden) Verfolgungen, Zwangslage, unmöglichen würdigen wirtschaftlichen, sozialen, kulturellen Existenz etc.

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THE CLAIM TO ATTENTION OF HUMAN DIGNITY IN RELATION TO THE DISPLACEMENT OF THE POPULATION: GERMANY'S EXPERIENCE

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Purpose. *In this article, the special administrative features of the determination of the expellee's status will be analysed through the prism of human dignity as well as their use of rights and advantages according to German expellee law (the Federal expellee law, the version of 19May 1953) as a result of the expulsion of Germans from East Europe to Germany (later – the Federal Republic of Germany) from 1945–1949.*

Methods. *Questions regarding the determination of the characteristic of the expellees as well as the use of rights and privileges of the displaced person according to German expellee law are determined by the teleological interpretation, the interpretation as per the wording of the Federal Expellees Law (Paragraphs 1 and 9 of the BVFG – Displaced Person's Property – the prerequisite for the use of rights and benefits) and through the systematic and historical analysis of the development.*

Results. *The respect and protection of human dignity as one of the core constitutional principles and the protection of the subjective rights of the some of the most vulnerable people, such as those who are displaced constitute good indicators on the legal and practical levels for measuring the degree of democracy, legality, human rights, and social justice in a state.*

The question regarding respect for human dignity of those who are displaced, as discussion, is raised not only in relation to the actual exercise of rights, but already exists in relation to the recognition of the status of the displaced person and that person's access to the special rights and benefits which balance the status. The conforming to human dignity of the corresponding state regulation in these phases in decisive for the continued existence of the displaced persons at their place of admission, their legal status, and their inclusive participation in social and political affairs.

The in-depth analysis of the legislation on displaced persons in Germany leads to the following conclusion – to the list of vital requisites for the respect of the human dignity of the expellees and to the critical points, and thereby the problem in the sense of respect for human dignity for displaced persons in Germany was crystallised.

Conclusions. *In conclusion, it is pointed out that the scientific analysis of human displacement is a complicated phenomenon which, because of its relevance in the world, plays an essential role and requires further research.*

Key words: expellees, displaced persons, human rights protection, recognition of displaced persons, compensation rights, administrative procedural law.

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ZWANGSVOLLSTRECKUNG GEGEN DEN GRIECHISCHEN STAAT (GEGEN DIE ÖFFENTLICHE HAND)

Zweck. *Ziel dieses Aufsatzes ist die kurze Darstellung der Rechtslage hinsichtlich der Zwangsvollstreckung gegen den Staat in Griechenland. Das Thema wird zunächst historisch angenähert; anschließend wird die aktuelle Situation beschrieben unter Fokussierung auf besondere Fragen, die die Ergreifung von Vollstreckungsmaßnahmen gegen den Staat noch heutzutage aufwirft. Festgestellt wird, dass in einer modernen, demokratischen und rechtstaatlich orientierten Staat die Möglichkeit der Vollstreckung gegen den Staat selbst eine Selbstverständlichkeit ist, sowohl aus Überlegungen, die sich auf die interne Rechtsordnung beziehen wie auch angesichts des europäischen Rechtsrahmens. Entsprechend entwickelte sich die Lage in Griechenland, wo anfangs die Zwangsvollstreckung gegen den Staat rechtlich ausgeschlossen war.*

Methoden. *Stimmen in der Literatur gegen diesen Zustand konnten sich nicht durchsetzen, vor allem während der Zeit der Militärdiktatur. Erst danach, als das Land den Weg in die europäische Integration suchte, konnten solche Auffassungen Gehör finden und, unterstützt von entsprechenden Entscheidungen des Europäischen Gerichtshofes für Menschenrechte, anerkannt werden, sogar seit 2002 auf Verfassungsebene.*

Ergebnisse. *Das relevante Verfassungspostulat konkretisierte sich im Verfassungsausführungsgesetz, in dem im Prinzip auch für die Zwangsvollstreckung gegen den Staat auf die allgemeinen relevanten Vorschriften der griech. ZPO verwiesen wurde; nicht aber ohne dabei manche wichtige Ausnahmeregelungen zugunsten des Staates einzuführen, die zu einer privilegierten Stellung dieser „Partei" führten. Im Weiteren waren die Literatur aber auch die Rechtsprechung, vor allem diejenige der Obersten Gerichte, bemüht, diese Ausnahmen entweder restriktiv auszulegen oder mittels contra legem Interpretation abzuschaffen. Jenseits der Behebung von Ungleichheiten bzw. quasi „Staatsprivilegien" beim Zwangsvollstreckungsverfahren, wichtig war und bleibt die Rolle der Rechtsprechung bei der Lösung von weiteren Rechtsfragen und der korrekten und verfassungsmäßigen Definierung von im Gesetz erwähnten, inhaltlich unscharfen Begriffen, wie vor allem die Präzisierung der fundamentalen Frage, gegen welche Vermögenswerte des Staates zur Befriedigung privater, gerichtlich anerkannten Ansprüche, konkret vorgegangen werden kann/darf.*

Schlussfolgerungen. *Im Allgemeinen vertritt der Verfasser die Auffassung, dass nicht nur die deklaratorische Anerkennung der Möglichkeit der Ergreifung vollstreckender Maßnehmen gegen den Staat sondern auch und vor allem die „Normalisierung" dieses Verfahrens, ohne Anerkennung von Sonderprivilegien", vieles über die Rechtstaatlichkeit und die Demokratie in einem Land besagt; dabei steht Griechenland mit Sicherheit nicht auf der letzten Position aber auch nicht auf die vorderste.*

Schlüsselbegriffe: Waffengleichheit der Parteien im (Zwangs-)ollstreckungsverfahren, Europäische Menschenrechtekonvention/Europäischer Gerichtshof für Menschenrechte, Vollstreckungshindernisse/Staatsprivilegien, Rechtskräftiges (= keine Berufung mehr möglich)/ unanfechtbares (= keine Revision mehr möglich) Gerichtsurteil, Vorläufig vollstreckbares Gerichtsurteil, Ausgleich/gegenseitige Aufrechnung, Zustellung des Vollstreckungsbescheids, Vermögenswerte des Staates, die Gegenstand der Vollstreckung sein können, Befolgung/Abdeckung eines öffentlich-rechtlichen Zwecks, Wiedererlangung des illegal Geleisteten.

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1. Einführung (Historischer Überblick)

Das Vollstreckungsverfahren (Gesiou-Faltsi, 2017) zur Befriedigung des Anspruchs einer Privatperson stellt ein Institut des Privatrechtes und des Zivilprozesses dar, welches in der griech. ZPO vorgesehen ist (Art. 904–1054; die übrigens auf das Jahr 1835 datiert ist, ihren Ursprung also in den Jahren der bayerischen Regentschaft Griechenlands hat[3)]. In den relevanten Vorschriften werden die Titel vorgesehen, auf deren Basis das entsprechende Verfahren im Gang gesetzt werden kann, und die Personen, gegen welche sich die Zwangsmaßnahmen richten können, sowie deren Verteidigungsmöglichkeiten. Des weiteren werden die Mittel und die Gegenstände der Vollstreckung sowie deren Schritte – von der Zustellung des Vollstreckungsbescheids bis zur Beschlagnahme und der Versteigerung – eingehend beschrieben. In den letzten Krisenjahren häufen sich in Griechenland die Beschlagnahmen in den Händen von Drittpersonen und vor allem von Bankkonten[4], ein Vorgehen, welches für den Fiskus wesentlich einfacher umzusetzen ist als die direkte Vollstreckung gegen das Vermögen eines Schuldners. Neue Gesetze haben diese Prozedur sowie die Versteigerung von Immobilien zugunsten des Staates vereinfacht, obwohl diese Maßnahmen auf massiven gesellschaftlichen Widerstand stoßen.

Entsprechend ist die zwangsvolle Eintreibung der Schulden der Bürger an den Staat (Fiskus) im Gesetzbuch für das Steuerverfahren vorgesehen und findet nach den Bestimmungen des Kodex über die Eintreibung von öffentlichen Einnahmen statt (Finokaliotis, 2014).

Wie sieht es aber aus, wenn ein Bürger, bzw. eine Privatperson einen noch nicht beglichenen Anspruch gegen den Staat/Fiskus hat? Das Problem der Zwangsvollstreckung

[1] German organization providing expertise in international cooperation for purposes of sustainable development.
[2] Air Force Component Commander.
[3] Siehe hierzu: Georg Ludwig von Maurer, Das griechische Volk, in öffentlicher, kirchlicher und privatrechtlicher Beziehung vor und nach dem Freiheitskampfe bis zum 31. Juli 1834. 3 Bd. Heidelberg 1835; Karl Dickopf: Georg Ludwig von Maurer 1790–1872 (Münchener Historische Studien. Abteilung Neuere Geschichte 4), Kallmünz 1960.
[4] Nach der Ankündigung der Staatsforderung ist das Kreditinstitut verpflichtet, innerhalb von 8 Arbeitstagen dem zuständigen Finanzamt und dem Friedensgericht mitzuteilen, ob eine entsprechende Summe auf dem Konto des Schuldners vorliegt. Dann soll das Guthaben bis zur Höhe der Forderung eingefroren werden. Sollte das nicht geschehen, kann der Fiskus direkt gegen die Bank entsprechend vorgehen und gegen diese vollstrecken.

gegen den Staat war schon seit dem Inkrafttreten der neuen Gesetzbücher (vor allem des BGB) unmittelbar nach der Beendigung des 2. Weltkrieges Gegenstand kontroverser Auffassungen.

Mit einem Gesetz aus dem Jahre 1952[5] hat der griech. Gesetzgeber die Idee der Möglichkeit der Zwangsvollstreckung gegen den Staat ausgeschlossen, ein prozessuales Privileg, welches über den Zentralstaat hinaus auch die Strukturen der kommunalen Selbstverwaltung und die juristischen Personen des öffentlichen Rechts erfasste (Zwangsgesetz aus dem Jahre 1968[6]). Nach der vor allem in der Zeit der Militärdiktatur (1967–1974) herrschenden Ansicht war es aus Gründen der Staatsräson unvorstellbar und gedanklich unmöglich, den Staat und dessen Strukturen als „widerstrebend" gegenüber der Vollstreckung von vollstreckbaren Titeln, die sich gegen diese wandten, einzuordnen. Darüber hinaus sollten die staatlichen Finanzen von Beschlagnahmen, Pfändungen und anderen Vollstreckungsmaßnahmen unberührt bleiben, um die ordentliche Erledigung der Staatsaufgaben nicht zu gefährden.

Diese gesetzlichen Regelungen waren offensichtlich mit dem Prinzip der Waffengleichheit zwischen den Prozessparteien, also dem Staat und dem einfachen Bürger, nicht im Einklang zu bringen, genauso wenig mit dem Verfassungspostulat des gerichtlichen Schutzes (Art. 20 griech. Verfassung; Art. 6 der Europäischen Menschenrechtkonvention), ein Dilemma, das man zunächst mittels einer geänderten Rechtsprechung zu überwinden suchte. Im Jahre 1995 entschied der Europäische Gerichtshof für Menschenrechte, dass auch gegen den griech. Staat Maßnahmen der Zwangsvollstreckung ergriffen werden können[7]. In allen diesen Entscheidungen wurde das Land wegen Missachtung von Art. 6 EMRK verurteilt, indem anerkannt wurde, dass das Recht des gerichtlichen Schutzes nicht lediglich die Möglichkeit betrifft, vor Gericht Anträge vorzutragen und zu verteidigen, sondern auch die Vollstreckung von Gerichtsurteilen umfasst, auch von solchen, die gegen den Staat als Prozesspartei ergehen. Ohne eine Vollstreckungsmöglichkeit wäre das entsprechende Recht lediglich von theoretischem Wert, wobei auch die fehlende Befolgung von Gerichtsentscheidungen durch den Staat, die im Rahmen der entsprechenden staatlichen materiellen und prozessualen Regeln ergingen, als eine krasse Antinomie des gesetzten Rechtes betrachtet wurde. Das Gericht entschied, dass der Ausschluss der Vollstreckungsmöglichkeit gegen den Staat die verfassungsmäßigen Rechte der Bürger massiv und unverhältnismäßig beschränkte.

Die erste Reaktion der griech. Gerichte auf diese Rechtsprechung ließ nicht lange auf sich warten. Das Plenum des griechischen Rechnungshofes (Elengtiko Synedrio) entschied in den Jahren 1998 und 1999 mit Blick auf pensionsbezogene Streitigkeiten, dass in Anwendung von Art. 20 der griech. Verfassung sowie von Art. 6 Abs. 2 und 3 EMRK

[5] Art. 8 des Gesetzes 2097/1952: „*Gegen den Staat ist die Vollstreckung von Gerichtsentscheidungen, von politischen (= zivilrechtlichen) oder strafrechtlichen, von Urteilen des Conseil d´ Etat (Staatsrates) (= das Oberste Verwaltungsgericht) oder des Rechnungshofes <…> nicht erlaubt. Eine Zustellung von Vollstreckungstiteln oder anderen Dokumenten mit entsprechender Wirkung zwecks Zahlung von Forderungen bewirkt keine Verpflichtungen gegen den Staat. Alle entsprechenden Zustellungen, die anhängen, werden retrospektiv für nichtig erklärt, genauso wie jede andere Vollstreckungsmaßnahme".*

[6] Art. 4 Abs. 1 der Rechtsverordnung 31/1968.

[7] Siehe die Entscheidungen: Beis gegen Griechenland (1995), Hornsby gegen Griechenland (1998), Rizos, Antonakopoulos usw. gegen Griechenland (1999) und Georgiadis gegen Griechenland (2001) in http://www.nsk.gr/web/nsk/home.

das Recht auf richterlichen Schutz auch die Vollstreckung des rechtmäßig ergangenen relevanten Gerichtsurteils einschließt. Demnach stellt das entsprechende Urteil des Rechnungshofes, welches die Höhe der Pension neu bestimmt, einen vollstreckbaren Titel dar, aufgrund dessen Zwangsvollstreckungsmaßnahmen gegen das „private" Vermögen des Staates ergriffen werden können. Sollte die Verwaltung nicht dementsprechend handeln, würde das einen Bruch des Legalitätsprinzips bedeuten. Ob jedoch im Anschluss daran weitere Entschädigungsforderungen dem betroffenen Bürger zustehen würden, hat das Gericht offen gelassen.

Die Ansichten des Rechungshofes hat sich kurz darauf auch der Areopag (AP), das oberste Gericht der Zivil- und Strafgerichtsbarkeit des Landes, zu eigen gemacht[8]. Das Plenum des AP entschied im Jahre 2001 einstimmig, dass das übergesetzliche Recht auf gerichtlichen Schutz nicht nur den „Gang" zum Gericht, sondern auch die materielle Befriedigung der Forderung betrifft, selbst wenn diese gegen den Staat erhoben wird. Dieses Urteil war der letzte Tropfen, der den Glass zum Überlaufen brachte und den Weg zur entsprechenden Verfassungsänderung ebnete, welche die Möglichkeit der Vollstreckung gegen den Staat ausdrücklich anerkannte.

2. Geltendes Recht

Angesichts dieser sich langsam durchsetzenden Rechtsprechung wurde im Rahmen der Verfassungsrevision von 2001 das Institut der Vollstreckung gegen die öffentliche Hand/den Fiskus expressis verbis eingeführt, und das sogar auf Verfassungsebene[9]. Das entsprechende Verfassungs-Ausführungsgesetz wurde 2002 verabschiedet und gilt entsprechend seiner später vorgenommenen Änderungen[10]. Nach diesen Vorschriften sind der Fiskus/der Staat, alle staatlichen und kommunalen Behörden sowie alle juristischen Personen des öffentlichen Rechtes verpflichtet, ihr Verhalten den ergehenden Gerichtsurteilen anzupassen und diese selbst und eigenmächtig zu vollstrecken, auch wenn diese sich explizit gegen die vom Staat vertretenen Positionen wenden. Als Gerichtsurteile in diesem Sinne werden alle Entscheidungen der Justiz verstanden, auf deren Grundlage vollstreckbare Titel ausgefertigt werden können.

Den besagten Bestimmungen nach sind Vollstreckungsmaßnahmen gegen den Staat usw. mittels Beschlagnahme dessen Privatvermögens erst 60 Tage nach Zustellung des entsprechenden Gerichtsurteils samt Vollstreckungstitels gegen den zuständigen Minister oder den Zustellungsbevollmächtigten der staatlichen Institution oder der juristischen Person möglich. Im Übrigen verweist das Gesetz im Prinzip auf die entsprechenden Vorschriften der griech. ZPO, wobei mit Ausnahmeregelungen anfangs sehr sparsam umgegangen wurde.

Nichtsdestotrotz und im Gegensatz zur nationalen und internationalen Rechtsprechung und zum entsprechenden Verfassungspostulat führte der Gesetzgeber im Jahre 2012 Regelungen ein[11], die den Vollstreckungsprozess gegen den Staat in der Praxis

[8] AP (Plenum) 21/2001.

[9] Art. 94 Abs. 4 griech. Verfassung: *Zur Zuständigkeit der Zivil- und Verwaltungsgerichte gehört auch die Ergreifung von Maßnahmen zwecks Befolgung der Entscheidungen der Gerichte seitens der Verwaltung. Die Gerichtsurteile werden vollstreckt auch gegen den Staat <...> wie dieses im speziellen Gesetz vorgesehen ist.*

[10] Gesetz 3068/2002 mit Änderungen in den Jahren 2004, 2005, 2010, 2012 und 2014.

[11] Gesetz 4072/2012.

wesentlich erschwerten. So wurde nämlich vorgesehen, dass bei Urteilen, die lediglich rechtskräftig, aber noch nicht völlig unanfechtbar (nicht revisibel) waren, der Betreibende gleichzeitig mit dem Beginn der Vollstreckung ein Garantieschreiben[12] einer Bank in der Höhe seines Anspruches bei der Institution, die für die Zahlung zuständig ist, vorlegt. Das Gericht, welches das relevante Urteil getroffen hat, kann zwar nach Ersuchen des Betreibenden verfügen, dass diese neuartige Vollstreckungsbedingung ganz entfällt oder, dass der garantierte Betrag vermindert wird.

Die Einführung dieses Vollstreckungshindernisses wird in der entsprechenden Gesetzesbegründung wie folgt gerechtfertigt: *Es kommt nicht selten vor, dass bis zum Ergehen des nicht mehr revisiblen Urteils längere Zeitperioden vergehen; sollte dann das Urteil geändert werden, kann es sein, dass die schon bezahlten Beträge nicht mehr wieder eintreibungsfähig sind, da der Betreibende inzwischen insolvent ist oder evtl. nicht mehr existiert (z. B. Todesfall), eine Tatsache, die die Wiedererlangung des illegal Geleisteten als sehr schwierig, wenn nicht gar als unmöglich gestaltet. Darüber hinaus bewirkt das Verlangen eines Garantieschreibens das zügige Vorankommen von Vollstreckungs- und Rechtsmittelstreitigkeiten, da im Falle einer staatlichen „Vorleistung" der Betreibende an einer Verlangsamung dieser Prozesse interessiert wäre*[13].

Trotz dieser verständlichen Begründung bleibt die besagte Vollstreckungsvorbedingung sowohl aus der Perspektive der EMRK (Art. 6) wie auch der griech. Verfassung besonders problematisch. Sie wurde schon vom Conseil d' Etat (Symvoulion tis Epikratias), dem Griechischen Staatsrat[14], dem nach französischem Muster strukturierten Höchsten Verwaltungsgericht des Landes, für verfassungswidrig erklärt, da dadurch die Vollstreckung gegen den Staat übermäßig und unverhältnismäßig erschwert wird. Durch die Regelung werden Vollstreckungshindernisse eingeführt, die in keinem Zusammenhang mit dem Prozessgegenstand stehen und die entsprechenden Vorschriften der Verfassung (Art. 94 und 95) verletzen. Auch rein wirtschaftlich betrachtet, ist die Erstellung eines Garantieschreibens mit (nicht zu vernachlässigenden) Kosten verbunden, welche auch im Rahmen der Vollstreckung nicht erstattet werden können. Somit ist eine hundertprozentige Befriedigung des Betreibenden, auch im Falle eines ihm und seinen Forderungen völlig entgegenkommenden Urteils, ausgeschlossen, was den fundamentalen Gleichheits- und Rechtsprinzipien direkt zuwiderläuft.

[12] Das Garantieschreiben ist ein Dokument, welches durch ein Kreditinstitut erstellt wird und als Garantie gilt, dass im Falle der Unfähigkeit einer Person, ihrer Verpflichtungen nachzugehen, die Bank die entstehenden Schulden begleichen wird. Im normalen Fall wird eine solche Urkunde nur dann erstellt, wenn die Bank über Mittel des Schuldners zumindest in der Höhe der möglichen Schuldleistung verfügt. Diese Mittel werden im Normalfall eingefroren, d.h., dass während der gesamten Vollstreckungsprozedur der Betreibende die von ihm gegen den Staat geforderte Summe vorab bei einer Bank deponieren und keine Verfügungsgewalt darüber haben soll.

[13] Hier muss zugunsten der staatlichen Rechtsposition noch erwähnt werden, dass im griech. Recht und in der dementsprechend konsolidierten Rechtpraxis tatsächlich zahlreiche Vertagungs- und Verzögerungsmöglichkeiten vorgesehen und anerkannt werden, mit der Folge, dass eine nicht gutgläubige Partei die Prozesse übermäßig in die Länge ziehen kann. Die allgemeine, völlig unverhältnismäßige Länge von Gerichtsprozessen in Griechenland hat oft zur Verurteilung des Landes in Straßburg geführt.

[14] Plenarurteil des Staatsrates 9/2013.

3. Besondere Probleme der Vollstreckung gegen den Staat

Im Folgenden wird eine Reihe von besonderen Problemen der Zwangsvollstreckung gegen den Staat, die Behörden der kommunalen Selbstverwaltung und die juristischen Personen des öffentlichen Rechtes dargestellt, die von den allgemeinen Vollstreckungsvorschriften der griech. ZPO abweichen und die Rechtsprechung und die in der einschlägigen Literatur in Griechenland bereits diskutiert wurden. Zunächst sei erwähnt, dass der Ausgleich und die gegenseitige Aufrechnung zwischen den Parteien keine Vollstreckung i.S.v. Art. 4 des Gesetzes 3068/2002 darstellt, da dadurch die Erlösung/Zahlung der Forderung stattfindet und keine genuine Vollstreckungsmaßnahme ergriffen wird. Des Weiteren betreffen das besagte Gesetz und dessen Bestimmungen ausschließlich die Vollstreckung von Geldforderungen. Wenn die Forderung keine Geldzahlung betrifft, sondern eine sogenannte „objektive" ist[15], kann die Vollstreckung gemäß der griech. ZPO vollständig vorangetrieben werden.

Wie schon erwähnt, ist in Art. 4 Abs. 2 des Gesetzes vorgesehen, dass die Vollstreckung erst 60 Tage nach der rechtmäßigen Zustellung des Vollstreckungsbescheids beginnt und die dementsprechenden Maßnahmen ergriffen werden können. Das Ziel dieser Regelung kann kein anderes sein[16], als die Verwaltung bei der zeitgemäßen Leistung der erforderlichen Summe gewissermaßen zu unterstützen, ohne dass dafür belastende Vollstreckungsaktionen stattfinden.

Im folgenden Abs. 3 von Art. 4 wird ein allgemeiner Verweis auf die relevanten Vorschriften der griech. ZPO ausgesprochen, was angesichts der Tatsache, dass die ZPO-Bestimmungen aus einer Zeit stammen, in welcher die Vollstreckung gegen den Staat nicht vollständig anerkannt war und dementsprechend der Staat und die weiteren staatlichen Behörden verschiedenartige Vollstreckungsprivilegien genossen, zu zusätzlichen Problemen führt. Zunächst geht es um das allgemeine Verbot, Gerichtsurteile gegen den Staat usw. als vorläufig vollstreckbar anzuerkennen und einzustufen[17]. Diese Bestimmung wurde in der Literatur i.S.v. Art. 94 Abs. 4 und 25 der griech. Verfassung für verfassungswidrig gehalten (Chrysogonos, 2004), eine Stellungnahme der Rechtsprechung gibt es bisher jedoch nicht.

Den Verfassungsbestimmungen läuft auch der in verschieden gesetzlichen Regelungen vorgesehene[18] automatische Ausschluss der Vollstreckbarkeit im Falle der Einlegung einer Revision seitens des Staates zuwider, da dadurch – wie bereits oben angedeutet – die Befriedigung des Antragstellers übermäßig verzögert wird, während selbst im Falle einer Urteilsänderung infolge der Revision der Schaden des staatlichen Vermögens, gemessen an seiner Gesamthöhe, in der Regel nicht als „unersetzbar" eingestuft wird. Für weitere Ver-

[15] Z.B. wenn der Staat ein Grundstück illegal und außerhalb des für die Zwangsenteignung vorgesehenen gesetzlichen Rahmens zwecks Errichtung einer Kaserne/ Schule usw. besetzt hat, kann der gesetzliche Eigentümer der Immobilie gegen die Besetzung vorgehen und den illegalen Zustand in der Tat aufheben, ungeachtet der Tatsache, dass die Sache inzwischen einen „öffentlichen" Charakter aufweist (Chrysogonos, 2004).

[16] Wie z. B. der in der Zwischenzeit erfolgte Verkauf von staatlichem Privatvermögen, so dass die Vollstreckung erfolglos bleibt!

[17] Art. 909 griech. ZPO.

[18] Z. B. Art. 19 des Gesetzes 1715/1951; Art. 41 vom Gesetz 2065/1992.

wirrung sorgte am Anfang die Bestimmung von Art. 37 des Gesetzes 3659/2008, wonach *alle Vorschriften, die die Aufhebung der Vollstreckbarkeit von Gerichtsurteilen gegen den Staat usw. nach entsprechender Revisionseinlegung und bis zur Beendigung der entsprechenden Streitigkeit vorsehen, für das Verwaltungsverfahren nicht gelten;* die Rechtsprechung vertritt jedoch seit langem die Auffassung, dass das besagte Vollstreckungsprivileg des Staates vollständig und für alle Bereiche hiermit aufgehoben wurde[19].

Ein zentrales Problem bei der Vollstreckungsprozedur gegen den Staat stellt im Allgemeinen die Bestimmung der Sachen und des staatlichen Vermögens, gegen welches entsprechende Maßnahmen ergriffen werden können. In Art. 94 Abs. 4 der Verfassung, in welchem die Vollstreckungsmöglichkeit überhaupt vorgesehen ist, steht kein Hinweis über die Vermögenswerte des Staates, die Gegenstand der Vollstreckung sein können. Das Ausführungsgesetz 3068/2002 bestimmt jedoch diesbezüglich, dass die Vollstreckungsmaßnahmen gegen den Staat, die Behörden der kommunalen Selbstverwaltung und die juristischen Personen des öffentlichen Rechtes nur das private Vermögen dieser Entitäten betreffen können und auf keinen Fall Gegenstände und Vermögenswerte jeder Art, denen ein öffentlich-rechtliches Verhältnis zugrundeliegt oder welche ausschließlich der direkten Abdeckung eines speziellen öffentlich-rechtlichen Zweckes dienen. Die Bestimmung der konkreten Gegenstände und Vermögenswerte der öffentlichen Hand, die somit einer Zwangsvollstreckung unterliegen, stellt eine kritische Frage in diesem Bereich dar, da prima facie behauptet werden kann, dass das gesamte Hab und Gut des Staates dem Dienst der Allgemeinheit gewidmet ist, womit das neueingeführte Institut der Zwangsvollstreckung gegen den Staat und die staatlichen Institutionen praktisch zur Makulatur werden würde.

Entsprechend fand eine Teilung des Vermögens des griech. Staates Anerkennung, und zwar in: 1) die unbeweglichen Sachen, die der Erfüllung von unmittelbar staatbezogenen Aktivitäten und Zielen dienen, welche das öffentliche Vermögen im engeren Sinne darstellen (Verwaltungsvermögen), welches nicht beschlagnahmt, gepfändet oder irgendwie in seinen Funktionen durch Vollstreckungsaktionen beschränkt werden kann[20], und 2) die Vermögenswerte, die im Rahmen der quasi eher privatrechtlichen Handelstätigkeit des Staates und der übrigen staatlichen Behörden erworben werden und die lediglich mittelbar der Erfüllung der genuinen Staatzwecke dienen und somit das private Vermögen des Staates ausmachen (Finanzvermögen), welches der Vollstreckung ausgesetzt sein muss, sollte das relevante Verfassungspostulat in der realen Welt überhaupt Sinn machen. Es ist offensichtlich, dass die Zuordnung zu einer der oben beschriebenen Vermögensgruppen nicht permanent sein kann, sondern jeweils vom materiellen Merkmal abhängt, ob eine bestimmte Sache tatsächlich primär essentiellen staatlichen Zwecken dient oder nicht.

Die inhaltliche Definierung des unbestimmten Rechtsbegriffes der Befolgung/Abdeckung eines öffentlich-rechtlichen Zwecks sollte im Rahmen der richterlichen Interpretationstätigkeit und des entsprechenden Ermessens stattfinden (Tsougkos, 2015: 755 ff.; Chrysogonos, 2004), wobei die inzwischen gefestigte Rechtsprechung diesbezüglich folgende allgemeine Kriterien anerkennt:

[19] Ansatzweise (Verwaltungs-) Berufungsgericht Athen 1632/2015; Berufungsgericht Piräus 12/2013.
[20] Art. 966 griech. ZPO.

– die öffentlich-rechtliche „Widmung“ soll sich aus der Verfassung ergeben (z. B. Nicht-Pfändbarkeit von öffentlichen Schulgebäuden, da diese dem Zweck dienen, das in der Verfassung verankerte Bildungspostulat[21] und die entsprechende absolute Verpflichtung des Staates abzudecken);

– der „öffentliche“ Gegenstand oder der Vermögenswert soll zur direkten Erfüllung des gesetzten Zwecks sowohl geeignet als auch absolut notwendig sein, was im Rahmen des Analogieprinzips beurteilt wird; und schließlich‘

– die „Öffentlichkeit“ der Sache oder des Wertes soll durch rechtliche Bestimmungen als solche anerkannt sein, und eine entsprechende Nutzung seitens der zuständigen Behörde soll tatsächlich vorhanden sein oder zumindest unmittelbar bevorstehen. Auf dieser Grundlage hat der Areios Pagos (Areopag/AP) entschieden, dass im Falle des Kaufs eines Grundstückes durch eine Stadtgemeinde zwecks späteren Baus des Rathauses keine Nichtpfändbarkeit vorliegt, da zur Zeit der Durchführung der Vollstreckungsaktivitäten auf dem Grundstück kein Gebäude stand. Die Pfändung/Beschlagnahme des Grundstücks würde somit das reibungslose Funktionieren der Stadtgemeinde, das unbestritten einen öffentlich-rechtlichen Charakter besitzt, nicht unmittelbar beeinträchtigen[22].

Eine nicht minder brisante Frage ist ferner diejenige nach der Möglichkeit der Pfändung von Geldbeträgen des Staates, die in der öffentlichen Kasse liegen oder in Bankkonten aufbewahrt sind. Diese Geldbeträge können sowohl Steuergelder und andere Staatsgebühren wie auch Mieteinnahmen und andere eher privatrechtliche Erträge sein. Somit reicht das Aufstellen der allgemeinen Behauptung, in ein Konto flößen Steuereinnahmen ein oder, dass das Guthaben der Zahlung von Beamtenabfindungen diene, nicht aus, um die Nichtpfändbarkeit des Kontos oder des gesamten Kontostandes zu erwirken[23]. Der Staat trägt in einem solchen Fall die Berweislast, welche genauen Einnahmen aus „öffentlichen“ Quellen stammen und welche einem „öffentlichen“ Zweck direkt dienen. Was auf jeden Fall unproblematisch ist, ist das Vorgehen bis zu der im Staatsbudget für Entschädigungsforderungen und Zwangsvollstreckungen gegen den Staat vorgesehenen, also auf jeden Fall zur Verfügung stehenden Höhe (diese Budgetlinie wurde auch mit der entsprechenden Verfassungsänderung eingeführt). Darüber hinaus kann gegen die Reserven/Rücklagen vorgegangen werden, da diese Beträge keinem besonderen Zweck im Voraus unterliegen, sondern der allgemeinen Sicherung der Staatsfinanzen dienen und somit für jedwede Verpflichtung, sprich auch für die Abdeckung von vollstreckbaren Ansprüchen gegen den Staat, aufgewendet werden können[24]. Folgende liquiden Staatsmittel wurden u.a. von der Rechtsprechung bereits für unpfändbar befunden: Geldbeträge, die der Beamtenvergütung dienen; Gelder, die an schon fest geplante, öffentliche Investitionen fließen, inkl. Investitionen der Kommunen; Subventionen für den Bau, den Erhalt und das zweckmäßige Funktionieren von Schulgebäuden, inkl. Universitäten; Beträge für den Straßenbau (Tsougkos, 2015: 759 f.).

[21] Art. 16 griech. Verfassung.

[22] Siehe AP 2354/2009.

[23] Siehe ansatzweise Staatsrat 819/2015.

[24] In so einem Fall wie auch gegen jede Geldpfändungsmaßnahme kann der Staat selbstverständlich einwenden, dass dieser über genug andere Vermögenswerte (z. B. freistehende Immobilien) verfüge, gegen welche der Betreibende vorgehen könne.

Zum Schluss, hinsichtlich der prozessualen Frage, nämlich welches Gericht für die eventuell entstehenden Zwangsvollstreckungsstreitigkeiten zuständig sein sollte, war die Lage am Anfang etwas zweideutig, da es Stimmen zugunsten einer ausschließlichen Zuständigkeit der Zivilgerichte gab, und das unabhängig vom zivil- oder z. B. verwaltungsrechtlichen Charakter des ursprünglichen Falles. Das Argument orientierte sich dabei nach dem Willen des Gesetzgebers, der im Prinzip für die Vollstreckung gegen den Staat das gleiche Instrument zur Verfügung stellt (die Vollstreckungsvorschriften der ZPO) wie für das „normale“ Zwangsvollstreckungsverfahren. Ausnahmen davon wurden direkt im Gesetz erwähnt. Da das Ausführungsgesetz zur Zuständigkeitsfrage schweigt, sollten hier die relevanten ZPO-Vorschriften zur Geltung kommen. Ein zusätzliches Argument dafür (zur Zuständigkeit der Zivilgerichte) stellte die Tatsache dar, dass das Ziel der Vollstreckungsprozedur 1) die Abdeckung von privaten Zielsetzungen war; und 2) diese Prozedur lediglich das Privatvermögen des Staates betraf.

Laut der inzwischen absolut herrschenden Rechtsprechung, die auch von der Literatur angenommen wird, sollte für Vollstreckungsstreitigkeiten dasjenige Gericht zuständig sein, im Rahmen der Prozedur dessen der ursprünglich originelle Vollstreckungstitel erstellt wurde. Die Argumentation für diese Lösung geht zunächst von den Prämissen der Einheit der Vollstreckungsprozedur aus und wird durch Hinweise auf die Beschränkung der Rechtsunsicherheit und der Gefahr des Ergehens von sich widersprechenden Gerichtsurteilen bereichert (Tsougkos, 2015: 749 f.). Im Rahmen dieser, sich inzwischen völlig gefestigten Betrachtung, sind für die aus zivilrechtlichen Verhältnissen stammenden Ansprüche gegen den Staat die Zivilgerichte zuständig, während die Vollstreckung der Urteile, die auf einer öffentlich-rechtlichen Basis beruhen, eine Sache der Verwaltungsjustiz ist.

4. Schlussbetrachtung

Aus der staatlichen Perspektive betrachtet, stellt das relativ neu eingeführte Institut der Zwangsvollstreckung gegen den Staat ein quasi notwendiges Übel dar, was auch durch die gesetzliche Normierung dieser Möglichkeit ersichtlich wird. Der Gesetzgeber, der sich angesichts der Bestimmungen von Konventionen supranationaler Geltung zum Schutze der Menschenrechte und wegen der entsprechenden Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte gezwungen sah, das besagte Institut gar auf Verfassungsebene einzuführen, lässt es nicht an Erfindungsgeist mangeln, wenn es dazu kommt, verschiedenartige Regelungen zusätzlich einzuführen, die den Gang der entsprechenden Prozedur, wenn nicht völlig blockieren, zumindest merklich erschweren (vgl. z. B. das oben Erwähnte über die zusätzliche Notwendigkeit der Vorlage eines Bank-Garantieschreibens bei der Vollstreckung von lediglich rechtskräftigen, aber noch nicht auch durch Revision unanfechtbaren Urteilen). Diese Tendenz der Politiker und des Gesetzgebers, den Staat übermäßig vor Maßnahmen der Zwangsvollstreckung zu schützen, stößt berechtigterweise auf Kritik; es liegt jedoch in der Hand des urteilenden Richter, dieser Behinderungstaktik des Staates einen Riegel vorzuschieben, was nicht selten geschieht (vgl. die oben erwähnte Haltung des Staatsrates zu dieser Vollstreckungsvorbedingung).

Rechtsphilosophisch bzw. rechtspolitisch stellt sich die Frage, ob das Institut der Zwangsvollstreckung gegen den Staat ein Armutszeugnis für den Gedanken der Rechtstaatlichkeit und der Gesetzlichkeit darstellt; oder eben das Gegenteil, den Zenit dieses Gedankens, da dadurch dem Bürger der Weg eröffnet wird, auch gegen den prinzipiel-

len Garanten des *Etat de Droit* selbst und anhand von dessen Vorschriften vorgehen zu können? Kann es sein, dass das Institut einen gedanklichen und rechtlichen Widerspruch enthält, der seine Existenz zumindest in Frage stellt?

Auf praktischer Ebene ist jedoch das Institut absolut notwendig, mit Sicherheit auch als ultima ratio, also als „erlebte Vollstreckung". Vielmehr aber als bestehende Möglichkeit, als eine Art Damoklesschwert, welches den Staat und vor allem die staatliche Verwaltung dazu mahnt und schlussendlich zwingt, stets rechts- und gesetzesmäßig vorzugehen; und das nicht nur in den meisten Fällen, in denen der Staat Ansprüche gegen die Bürger erhebt, sondern auch in den Fällen, in denen entgegengesetzte Ansprüche bestehen. Ja, ausgerechnet die Handhabung dieser Fälle, in denen, egal aus welchen Gründen, der Staat selbst der Schuldner und der Entschädigungsverpflichtete ist, ist ein klarer Indikator für die Rechtstaatlichkeit und die Demokratie eines Landes (Manitakis, 2004: 121 f.), wobei auch hier die, wenn nicht hinterlistige aber mit Sicherheit zögernde Haltung des griechischen Gesetzgebers dem Lande nicht gerade die beste Note beschert.

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ENFORCEMENT AGAINST THE STATE ASSETS OF GREECE (AGAINST PUBLIC SECTOR)

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Purpose. *The aim of this article is the brief description of the legal environment in connection with the enforcement against the state assets of Greece. At the very beginning of the article it is considered within the frames of historical aspects; the next part is devoted to the current situation, focusing on the specific issues, with regard to the enforcement measures against the state today. It is noted that in a modern, democratic and constitutionally-oriented state, the possibility of enforcement against the state assets is obvious, not only in relation to the internal legal order but also within the European legal framework. The situation in Greece has developed similarly, though at first the enforcement against the state assets was legally excluded.*

Methods. *According to the relevant literature there was no possibility to change this situation, especially during the period of military dictatorship. Only after the state has found the path to the European integration, other opinions could be heard and supported by the relevant decisions of the European Court of Human Rights, and even approved at the constitutional level since 2002.*

Results. *The relevant constitutional postulate was established in the Law on Constitutional Implementation, which in principle also referred to the general relevant provisions of the Civil Procedural Code of Greece in case of enforcement against the state assets; but not without introducing many important exemptions in favor of the state, which led to a privileged position of this "party". Furthermore, the literature as well as the case law, especially that of the Supreme Courts, tried either to interpret these exemptions restrictively or to abolish them by means of contra legem interpretation. Besides the correction of inequalities or quasi "state privileges" in the enforcement proceedings, the role of jurisprudence is to resolve further legal issues and provide correct and constitutional definition of contextually unclear terms mentioned in the law, which clarify the fundamental issues on determining the assets of the state which can/may be enforced for the satisfaction of private, judicially recognized claims.*

Conclusions. *The author of the article comes to the conclusion that not only the declaratory recognition of the possibility of performing the enforcement against the state assets but also, and above all, the "normalization" of this procedure, without recognition of special privileges, "says much about the rule of law and democracy in one state"; Greece is certainly neither in the last nor in the first place.*

Key words: equality of arms between the parties in the (compulsory) enforcement proceedings, European Convention on Human Rights/European Court of Human Rights, Enforcement/State Privileges, Legislative (= no appeal possible)/ unannounced (= no revision possible) court verdict, Preliminary enforceable court verdict, Compensation/mutual set-off, Service of the enforcement order, Assets of the State which may be the subject of enforcement, Compliance/coverage of a public law purpose.

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ROLE OF "ENTREPRENEURS" IN IMPLEMENTATION OF INTERNATIONAL REGULATION

Purpose. *The purpose of the study is to show the decisive role of a new group of dynamic actors (social, economic and political "entrepreneurs" according to R. Koppl, S. Kauffman, T. Felin, and G. Longo) in implementation of international treaty obligations in the developing country and describe the algorithm of this process. The study also examines the necessary conditions for the successful implementation of international obligations, in particular, approximation of national legislation with EU legislation.*

Methods. *Qualitative method is used to explore the role of "entrepreneurs" in implementation of international treaty obligations and examine theories of transplant effect and spontaneous legal order in adaptation of international regulation by the developing country. Such scholarly approach as case study is used for exploration of the role of "entrepreneurs" in creation of the "ProZorro" platforms and fulfillment of international obligations in the sphere of public procurement (according to the Association Agreement between Ukraine and the EU). Non-empirical scholarly approach helped to analyze the particularities of the Association Agreement in terms of standards for public procurement and evolution of relevant Ukrainian legislation.*

Results. *Successful implementation of international treaty is impossible without taking into account the following conditions. First, institutional capacity is crucial for implementation of treaty obligations. However, when the capacity is low, it can be built due to creative initiative and professional ability of dynamic actors from business, civil society, international organizations. Second, familiarities of legal systems are also very important. However, the case of public procurement demonstrated that effective transplantation was ensured by "entrepreneurs" through their freedom to chose appropriate version of "legal transplant". Third, demand for implementation of the obligations in the area of public procurement was created by "entrepreneurs", who passed the way from the initiative group of volunteer to the public procurement officials. Four, international assistance, both expert and financial, attracted by entrepreneurs was extremely important for elaboration of the legal basis for implementation of the EU regulation.*

Conclusions. *There in no clear algorithm for implementation of regulation. The case of public procurement was characterized by the spontaneity of interactions that were difficult to predict. However, emergence of a new group of dynamic actors in the public administration was decisive for success of the reform. Therefore, to enhance the implementation of regulation of other sectors of the Association Agreement, it is important to create an opportunity for initiative "entrepreneurs" and their cooperation with business, public officials, NGOs, international experts and other stakeholders.*

Key words: e-government, public procurement, international treaty, public administration, Association Agreement, legal transplants.

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1. Introduction

Signing Association Agreement (further – AA) with the EU in 2014 (European Commission, 2014), Ukraine took a responsibility to implement a complex of obligations, which aimed at approximation of Ukrainian legislation to the EU *acquis*[1]. However, the greatest difficulty is that this large volume document written on over 2,000 pages (7 titles, 486 articles, 43 annexes, etc.) envisaged much more than changes in legislation – obligations that "regulate not only state conduct but also the activities of individuals and private entities" (McInerney, 2015: 11).

The political part of AA entered into force on November 2014, the Deep and Comprehensive Free Trade Agreement (DCFTA) – since January 2016. The EU did not experience "such a far-reaching contractual relation to a non-candidate state like Ukraine" (Sushko et al., 2012: 2).

The possible failure of the AA implementation was and still is risky for both sides – the EU and Ukraine – from the following reasons. The situation before and after the signing of the AA was extremely complicated because of EuroMaidan revolutionary events, illegal annexation of Crimea, ongoing war in the East of Ukraine. Ukrainians considered the AA as a chance for radical reforms and rapid economic development, the EU – a possibility to have a stable and reliable partner at its eastern borders. However, after 4 years of the AA implementation, Ukraine shows rather disappointing results and a slow pace of implementation of its obligations (European Commission, 2018: 13).

The lack of quick and effective results of structural reforms, which the Ukrainian population associated the AA with, creates a tension in the society and provides the basis for strengthening the populist and pro-Russian forces. In turn, the EU and other international institutions, whose financial assistance helped to balance the economic situation after a sharp decline in 2014–2015, also does not conceal the disappointment concerning slow implementation of the AA, promised by the Government of Ukraine.

In general, expert organizations, which conduct the monitoring of the treaty implementation, point out on the following

[1] Art. 217 of the Treaty on the EU ("The Union may conclude an association agreement with one or more third countries or international organizations in order to establish an association involving reciprocal rights and obligations, common actions and special procedures") introduces the EU *aquis* for association relationships.

reasons that hinder the successful fulfillment of the AA: 1) poor capacity of the government institutions; 2) low quality of legislative process; 3) conflict of interest of the politicians and stakeholders; 4) lack of the rule of law (NGO "Ukrainian Center for European Policy", 2018). The following international ratings confirmed this opinion. Thus, according to the Rule of Law Index (WJP, 2018) Ukraine's rank is 77 out of 113 countries; in the World Bank index of effectiveness of law-making bodies Ukraine's rank was 120 out of 139 counties (World Bank, 2016); according to Nations in Transit Ratings developed by the Freedom House, Ukraine's democracy score was 4,6 (maximum – 7) with transition hybrid regime (Freedom House, 2018). These indicators prove the thesis of T.F. McInerney, that "institutional and human capacity are critical determinants of states' abilities to implement their treaty obligations" (McInerney, 2015: 10).

However, according to the resent Association Implementation Report on Ukraine elaborated by the European Commission, Ukraine demonstrates rather advanced results in some areas of the AA related to trade. In particular, harmonization of legislation in the field of public procurement, technical regulation (market surveillance, standardization etc.), food and safety regulation are even ahead of the deadlines stipulated in the Association Agreement (European Commission, 2018). These are regulatory requirements that go under the Title IV "Trade and Trade-Related Matters" and Title V "Economic and Sector Cooperation" and are important for establishing and functioning of the DCFTA. Given that these parts of the AA are highly complicated and for its implementing "multidimensional and cross-cutting national capacities must be in place", only public procurement, technical regulation, food and safety area advanced in carrying out of Ukraine's commitments, providing "complex domestic administrative and enforcement mechanisms" (McInerney, 2015: 11). However, which conditions determined the success of these regulation implementation having the same weak institutional capacity, that hamper the others AA sectors progress?

D. Berkowitz, K. Pistor, and J.-F. Richard describe such necessary conditions for regulations' "transplanting" efficiency, as existence of demand, adaptation to local particularities, and familiarity with the legal system the country of origin of the law (Berkowitz et al., 2003). However, the role of entrepreneurial effect (political, social, economic) within these elements needs to be explained more (Koppl et al., 2014).

These three spheres of successful implementation of the AA – public procurement, technical regulation, food and safety – are characterized by co-evolutionary process, more spontaneous that predesigned (Devins et al., 2015) with unpredictable coincidences of circumstances, active participation of volunteers, business, international experts, NGOs, and public officials.

The case of Ukraine's electronic open source government e-procurement system ProZorro regulated by the requirements of the AA regarding public procurement is interesting and quite revealing in this context. Moreover, it affected a wide range of other administrative mechanisms, processes and actors.

In particular, using the case of implementation of public procurement regulation and co-creation of the ProZorro platform (Marín, 2016) (flagship reforms of the Government) we can ask – to which extent it is possible to adhere this algorithm while adapting the other "transplants" of the AA regulation? Can we talk about any algorithm existence in

case of implementation of the public procurement regulation? Or maybe the emergence of this system was more spontaneous, that designed by the AA negotiators and creators? How the institutions and laws can create opportunities for such kinds of non-algorithmic algorithms? Or the lack of the institutional capacity can be an opportunity?

2. Evolution of public procurement regulation

R. Koppl, S. Kauffman, T. Felin, and G. Longo in their study "Economics for a creative world" pointed out that "institutions are generated from the "entrepreneurial" innovations of many dispersed actors, which contribute to the evolution of institutions beyond their original design in order to adapt to shifting environments" (Devins et al., 2015: 624).

This idea worth to be considered as an important assumption of the public procurement regulation success in Ukraine.

The ProZorro platform (electronic public procurement system) was set up and launched on a pro bono basis by a group of different stakeholders "co-creators" – volunteers, anti-corruption activists, business, public officials (a number of volunteers came from the private sector and started to occupy government posts right after the Euro-Maidan revolution) in assistance with the consortium of international organizations leading by Transparency International in 2014 and 2015 (Marín, 2016).

The urgent need to eliminate corruption and ensure the best value for money arose after the sharp economic downturn (GDP fell by 7% in 2014 and 10% in 2015), which stimulated reduction of public expenditures and accordingly introduction of measures for combatting corruption and use public expenditures as much effective, as possible. Thus, according to the Ministry of Economic Development and Trade, Ukraine was losing 2 billion of USD (2,2% of GDP per year) due to different corruption schemes and inefficiency in the public procurement sphere (Dmytryshyn et al., 2018). Also, in 2015 Ukraine occupied 130 position among 168 countries in the rating Corruption Perception Index, elaborated by Transparency International (Transparency International, 2015). But the Government did not consider the reform of public procurement as the first priority.

Therefore, a spontaneous coincidence of threatening circumstances played a decisive role in creating incentives for combatting corruption by emerged political, social and economic "entrepreneurs". Having no trust in the authorities, citizens and non-governmental organizations – together with international observers and international financial institutions – pushed politicians to reform the system (Marín, 2016: 7).

By that time, Ukraine had ineffective and overwhelmed legislation in the field of public procurement. Its evolution started from the first Government regulation in 1997 in order to meet the World Trade Organization requirements. Despite the fact that the first procurement law (adopted in 2000) included best international practices and EU procedures, it had a number of shortcomings. Also, there was a tentative to implement EU Directive 2004/17/EC on the procurement procedures, however, the "transplant" did not work properly and caused significant corruption. During the next years the Government and the Parliament of Ukraine continued attempts to review the legal framework of public procurement, but the success was miserable. A number of changes to the public procurement legislation have created confusing and complicated procedures, which

were paper-based, not transparent, and ineffective. Such environment was perfect for excessive corruption and discouraging for business. "Top-down" approach in creating regulations for public procurement has failed.

This co-evolutionary process between law and society cannot be controlled, predicted, or even fully understood. The spontaneous order of law emerges from the innumerable interactions of judges, lawyers, policymakers, regulated entities and the society at large (Devins et al., 2015: 624). However, how did these entrepreneurs interact during that spontaneous coincidence of circumstances?

In 2014 a group of volunteers at the request of that time Minister of Economic Development and Trade of Ukraine started to work on public procurement as one of the area for reforming under the mandate of the Ministry. They engaged through open discussions all those interesting in the reform, but who was not related to the previous system – "these people became the core of the future ProZorro team" (Marín, 2016: 11).

Having a great credit of trust this group of people managed to involve in the fruitful discussion the representatives of the Parliament, the Government, business, NGO and international organizations.

Without support of the head of the Department of Public Procurement, volunteers got in touch with the experts of the EU technical support project for the public procurement reform in Georgia. Thus, volunteers organized the working group within the Ministry of Economic Development and Trade using the Georgian model for elaboration of public procurement regulation. Also, the volunteers received support from the Open Contracting Partnership in terms of application of the Open Contracting Data Standard.

At the same time, with the involvement of government officials, volunteers have negotiated with the business on providing the market place, and IT developers for the design and creation of the architecture of a new electronic system for public procurement.

Remarkably, that the "novelty intermediation" (Koppl et al., 2014: 14) of volunteers helped not only to use the latest technologies in the construction of a digital platform for public procurement, but create a holistic hybrid system (called "ProZorro") with the innovation in its hart. The Ukrainian version of e-platform located on the private marketplaces is similar to the examples from the countries of the EU with innovative approaches to e-procurement system (Sweden, UK, Denmark) (Marín, 2016: 19). The developers of the Ukrainian ProZorro platform used Ukraine's advantage in the field of IT. Paradoxically, but unlike the low positions in almost all world ratings, Ukraine is among 50 the most innovative countries (ranking 43 in the Global Innovation Index) (Global Innovation Index Report, 2018). The case of ProZorro is characterized by assertion of R. Koppl, S. Kauffman, T. Felin, and G. Longo: "Novelty intermediation is not about the diffusion of innovations. It is about finding the innovation in the first place" (Koppl et al., 2014: 16).

Therefore, the traits of regulation derived from the architecture of the ProZoro platform. In 2014 the working group developed a concept for reform. In February 2015 a pilot version of the ProZorro platform was launched. Remarkably, that it became an interesting example of the private-public partnership, as the business provided free market place entering the market of public procurements, and the e-procurement system received financing form these market places without any financial support form

the state. Also, the team of the ProZorro platform received financing from international organizations.

However, the pilot version of the ProZorro platform functioned without legal approval. A number of government bodies have begun to use the system for their purchases on a voluntary basis. In order to provide an effective functioning of the system and elaborate new legal framework for public procurement, the Minister of Economy and Trade decided to institutionalize the group of volunteers in the Department of Public Procurement. Such an important step toward the strengthening of the institutional capacity of the Ministry of Economic Development and Trade helped to ensure further harmonization of Ukrainian legislation in the field of public procurement with EU legislation, in accordance with the deadlines provided for in the AA.

Hence, the new legal framework regulated the functioning of a unique electronic platform, fully implementing Ukraine's commitments to the EU not simply by transplanting, but by abandoning EU regulation to the organic network a spontaneously created legal order. Thus, after the necessary changes to the new law on public procurement and secondary legislation in 2015, it was declared that all public procurements should be conducted through the ProZorro platform from August 1, 2016.

The same group of "entrepreneurs" develop comprehensive Strategy of reforming the system of public procurement, marking the step-by-step implementation of all obligations under the AA in these spheres, its measures and deadlines, as well as the responsible bodies (Cabinet of Ministers of Ukraine, 2016). The Government adopted the Strategy in 2016. Such a nonlinear path was overcome to create an institutional capacity for implementation of the transplanted EU regulation, which began to significantly affect all actors in the process and also became an example for "entrepreneurs" from other areas of implementation of the AA.

In parallel, cooperation between "entrepreneurs" continues regarding enhancing users' capacity on the procedures and opportunities of the e-platform "ProZorro". Also, a team of former volunteers – new civil servants began to develop a monitoring and analytical tool together with their partners.

That was an example, how "laws are set in motion and catapulted into an ever-evolving dance between the legal system and the entities it regulates" (Devins et al., 2015: 624) plus "entrepreneurship" of volunteers becoming "intermediaries". They find an opportunity "to discover the novel possibilities of the adjacent possible, including novel combinations of elements, some of which may be old and others, perhaps, new" (Koppl et al., 2014: 26).

3. Algorithm of implementation of the treaty commitments

Institutional capacity. Institutional and human capacity are critical determinants of states' abilities to implement their treaty obligations (McInerney, 2015: 10). However, the capacity of the state in implementation of regulation in the field of public procurement was extremely low at the early stage of the reform. Before the EuroMaidan revolutionary events numerous state bodies, involved in the public procurement process, resisted to effective changes, trying only to repaint the facade of the relevant legislation in order "to block innovations that threaten their economic position, their rents" (Koppl et al., 2014: 26).

The fateful coincidence of circumstances gave way to creative innovators who took advantage of the institutional weakness and offered an effective agenda to the stakeholders, who had real demand for public procurement reform. Only after success story with the launch of the ProZorro platform, the Minister of Economy and Trade introduced the group of volunteers to the managing positions of the Department of Public Procurement with the opportunity to begin work on drafting legislation. As a result, the "cross-cutting" capacity development in "legislative drafting, policy-making, planning, organization, administration, enforcement, technology, budgeting, knowledge and information, institutional partnership and monitoring" successfully began (McInerney, 2015: 10).

Remarkably, the institutional capacity was built (even not enhanced) after the signing the AA and heated by the revolutionary events due to creative initiative and professional ability of the volunteers and other "entrepreneurs" from the business, civil society, international organizations.

Familiarities of legal systems and adaptation. Experts, who conduct monitoring of the AA implementation, stressed that one of the factors characterizing successful fulfillment of commitments was a long process of harmonization, which started before the AA signing (Berkowitz et al., 2003). However, the case of public procurement demonstrated that the reason for effective transplantation was not an experience (path dependency made effective changed even more doubtful). The way on how the volunteers decided to use already adapted by Georgia transplanted EU regulation, was decisive. Therefore, "entrepreneurial" freedom from the ineffectual history of successors and their flexibility regarding finding the appropriate version of "legal transplant".

Demand. Since neither the Government, not the Parliament made an inquiry to start implementation of AA from the area of public procurement, the society created the demand through its "entrepreneurs", whose cooperation evolved from the initiative volunteer group to the leading potions responsible for public procurement in the Government (Berkowitz et al., 2003). Therefore, the demand was not "top-down", but "bottom-up". These volunteers were able to try different approaches, not being constrained by the need to win the next set of elections (Marín, 2016: 11).

International assistance. We can not underestimate the expert support from the EU and Georgia, which Ukraine has received for the reform of public procurement. Despite the tendency to criticize European technical projects, the Ukrainian case confirms the importance of expert assistance during the process of elaboration of the legal basis for implementation of the EU regulation. The Harmonization of the Public Procurement System of Ukraine with EU Standards project and Georgian procurement experts brought an extremely valuable experience in terms of successful legal approximation and creation of the e-procurement system (the group of volunteers used the Georgian model as a basis, that in the feature evolved significantly) (Marín, 2016: 11).

4. Conclusions

Summarizing the particularities of the process of the AA regulation implementation in the area of public procurement the following treats were reviled. Nevertheless, it is difficult to talk about clear algorithm, as the sequence of actions is characterized by the spontaneity of interactions that were difficult to predict.

However, one factor was decisive for the success of the reform – the emergence of an absolute new group of dynamic actors in the public administration, which independently undertook the initiative to conduct reform in a critical case scenario – the annexation of the Crimea, the war on the Donbass, the decline of the economy, the inability of state institutions to meet the demands of society. This was a group of volunteers who were able to break away from the past negative experience with incentives based on enthusiasm and motivation to make the public procurement work.

For the first time in Ukrainian history "entrepreneurs" become drivers of the state development and implementation of its treaty obligations due to innovations and creation of effective cooperation with business, NGOs and international organizations. The "entrepreneurs" creatively used the weakness of institutions as an opportunity to set their own agenda and after the successful start of the reform replaced the Department of Public Procurement in the Ministry.

As R. Koppl, S. Kauffman, T. Felin, and G. Longo mentioned, that "central task in entrepreneurial economics is to ask what institutions and laws (conceived, perhaps, as webs of enabling constraints that create adjacent possible opportunities) promote favorable entrepreneurial opportunities" (Koppl et al., 2014: 25). It is equally important to create favorable conditions for entrepreneurs in the context of the implementation of international treaties regulations, especially in those areas where there is a lack of institutional capacity. For this, no algorithms exist, besides emergence of necessary actors and some common traits, which may vary significantly in different spheres. For instance, to enhance the implementation of regulation of other sectors of DCFTA between Ukraine and the EU, it is important to create an opportunity for initiative "entrepreneurs" in cooperation with business, public officials, NGOs, international experts and other stakeholders; rebuild capacity of responsible institutions; use experience of successful adaptation of "transplanted" regulation by other country with the familiar legal system and history; involve expert assistance from the NGOs and international organizations; and meet the demand of society, not the interest of a narrow circle of oligarchic groups. This mean that developing countries like Ukraine have to elaborate more comprehensive to implementation of international regulation.

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РОЛЬ "ПІДПРИЄМЦІВ" В ІМПЛЕМЕНТАЦІЇ МІЖНАРОДНОГО РЕГУЛЮВАННЯ

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Метою *статті є дослідження ролі нової групи динамічних акторів (соціальних, економічних і політичних «підприємців», згідно з Р. Коплом, С. Кауффманом, Т. Феліном та Дж. Лонго) у процесі імплементації міжнародних зобов'язань Україною, а також висвітлення алгоритму цього процесу. У статті також аналізуються умови, необхідні для успішного виконання Україною міжнародних договірних зобов'язань, зокрема, наближення національного законодавства до законодавства Європейського Союзу.*

Методи. *У статті використовується якісний метод наукового дослідження, який застосовується автором для аналізу ролі «підприємців» у процесі реалізації Україною міжнародних договірних зобов'язань, а також під час дослідження значення теорій «ефекту трансплантації» та спонтанного правового порядку в ході адаптації європейських стандартів в окремих сферах публічного адміністрування. Такий науковий підхід, як «case study», використовується для дослідження ролі «підприємців» у створенні платформи «ProZorro» та виконання міжнародних зобов'язань у сфері державних закупівель (відповідно до Угоди про асоціацію між Україною та Європейським Союзом). Неемпіричний науковий підхід дав змогу проаналізувати особливості Угоди про асоціацію в частині вимог до державних закупівель та еволюції відповідного законодавства України.*

Результати. *Успішне виконання міжнародних договорів та адаптація міжнародного законодавства до законодавства України неможливі без урахування певних умов. По-перше, інституційна спроможність держави має вирішальне значення для виконання договірних зобов'язань перед Європейським Союзом. Однак коли інституційний потенціал держави є низьким, то він може бути розвинений за рахунок творчої ініціативи та професійних здібностей динамічних акторів із бізнесу, громадянського суспільства, міжнародних організацій. По-друге, дуже важлива схожість правових систем, від якої залежить успіх подальшої конвергенції. Проте у випадку імплементації Україною стандартів Європейського Союзу у сфері державних закупівель було продемонстровано, що ефективна трансплантація забезпечена шляхом надання новим динамічним акторам свободи в реалізації найбільш оптимальних та успішних підходів до регулювання в цій сфері. По-третє, суспільний запит на виконання Україною договірних зобов'язань у сфері державних закупівель був реалізований «підприємцями», які пройшли шлях від ініціативної групи волонтерів до посадових осіб сектора державних закупівель. По-четверте, міжнародна допомога, залучена «підприємцями» (як експертна, так і фінансова), була надзвичайно важливою для розроблення правової основи майбутніх змін.*

Висновки. *Немає чіткого алгоритму імплементації міжнародних стандартів регулювання певних суспільних відносин. Процес імплементації в Україні стандартів Європейського Союзу у сфері державних закупівель характеризувався спонтанністю,*

яку було важко спрогнозувати й передбачити. Однак поява нової групи динамічних акторів у публічному адмініструванні була вирішальним фактором успіху цієї реформи. Тому для активізації впровадження в національну правову систему регулювання інших секторів Угоди про асоціацію між Україною та Європейським Союзом важливо створити умови, які дадуть змогу ініціативним «підприємцям» реалізовувати відповідні реформи в співпраці з бізнесом, державними посадовими особами, громадськими організаціями, міжнародними експертами та іншими зацікавленими сторонами.

Ключові слова: електронне урядування, державні закупівлі, міжнародні договори, публічне адміністрування, Угода про асоціацію, правові трансплантації.

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SOME ASPECTS OF UNDERSTANDING THE CATEGORY OF "PEACEFULNESS" IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS AS A CONDITION FOR RESPECT FOR THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

The paper is devoted to the analysis of national and international conditions for the exercise of the right to freedom of peaceful assembly, among which the category of "peacefulness" occupies a prominent place. The Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the Constitution of Ukraine, unanimously state that citizens have the right to assemble only peacefully. This formulation defines the ***purpose*** *of the article, to achieve which the author considers in more detail the content of the category of "peacefulness", which is a prerequisite for the exercise of the right to freedom of peaceful assembly. To achieve the stated purpose, the author uses the* ***methods*** *and techniques of logic, from general to specific, namely analyzes the practice of the European Court of Human Rights in the cases of the exercise of the right of citizens to freedom of peaceful assembly, which* ***results*** *in the development of criteria for determining the peaceful character of the assembly. The author dwells on such aspects of the category of "peacefulness" as: the absence during the assembly or non-use of weapons by its participants; lack of purpose and desire to use violence in the organizers and participants of the assembly; active non-peaceful actions of counter demonstrators of the peaceful assembly; appeals and slogans of the assembly, including of the national or political nature, which cause dissatisfaction with the rest of the population; peculiarities of evaluation of negative actions of individual participants in public assemblies.*

As the ***conclusion****, the author notes that the absence in the Ukrainian legislation of a special law that would regulate the procedural aspects of the exercise by citizens of the right to freedom of assembly leads to the creation of situations that result in numerous violations, including in the form of an unjustified ban on the right of citizens to exercise their rights.*

On grounds of this state of affairs, the author sees fit to actively use sources of international law, which have important developments in the regulation of this sphere. One of the most significant sources is the practice of the European Court of Human Rights as an integral part of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides, among other things, a substantial interpretation of the category of "peacefulness" in the resolution of disputes related to violation of the right to freedom of peaceful assembly. The developments of the European Court of Justice should not only be a definite benchmark for the organizers and participants in the peaceful assembly, but also be fully applied by the subjects of public administration.

Key words: peaceful character, non-violent character, weapons, counter demonstrators, slogans, posters, public assemblies, public place.

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1. Introduction

It is extremely important for Ukraine, like any other democratic state, to ensure and adhere to international standards and principles in the field of human rights. One of the most important acts aimed at establishing and guaranteeing the latter is the European Convention on Human Rights (hereinafter referred to as the Convention), an integral part of which is the judgment of the European Court of Human Rights (ECHR). In addition, it should be noted that at the level of law, the ECHR judgment has been recognized in Ukraine as a source of law, and therefore their application, including of the subjects of public administration, is mandatory (Verkhovna Rada of Ukraine, 2006).

The right to freedom of peaceful assembly occupies a pride of place in the Convention (Article 11) (Verkhovna Rada of Ukraine, 1997) and the Constitution of Ukraine (Article 39) (Verkhovna Rada of Ukraine, 2016). Although the right to freedom of peaceful assembly is enshrined at the level of the highest sources of law, this sphere of legal relations has not yet found its proper legal regulation in Ukraine. The absence of a special law that would regulate the procedural aspects of the exercise by citizens of the right to freedom of assembly leads to the creation of situations that result in numerous violations, including in the form of an unjustified ban on the right of citizens to exercise their rights. A similar position of the ECHR was expressed in "Verentsov v. Ukraine", noting that, in the absence of any clear and foreseeable legislative provisions on the regulation of the organization and conduct of demonstrations, the conviction of a person for violation of a non-existent procedure is incompatible with Article 7 of the Convention (no punishment without law) and Article 11 of the Convention (freedom of assembly and association), while the violation of these articles in Ukraine is due to the legislative gap in the freedom of assembly that has remained in the Ukrainian legal system for more than two decades (European Court of Human Rights, 2013).

Cases on the establishment of restrictions on the exercise of the right to freedom of peaceful assembly (assemblies, rallies, campaigns, demonstrations, etc.) are considered by administrative courts (Code of Administrative Justice of Ukraine: Law of Ukraine (Verkhovna Rada of Ukraine, 2005)). It is also interesting that the administrative courts themselves point out the problem of the lack of proper legislative regulation in their judgments'. Thus, in the judgment of the Babushkinsky District Court of Dnipropetrovsk on March 30, 2007, in the case

of S. v. the Executive Committee of the Dnipropetrovsk City Council concerning the adoption of regulations on holding mass events in the city of Dnipropetrovsk, the court held, inter alia, that the procedures for exercising the right to freedom of assembly and the procedures and grounds for restricting the right were not regulated by Ukrainian legislation and therefore the Council had no grounds for adopting the impugned regulation, which would interfere with the rights of citizens. In the absence of proper legal regulation, administrative courts have a wide scope to motivate negative judgments' for citizens. Due to this state of affairs, we see fit to actively use sources of international law, which have important developments in the regulation of this sphere. One of the most significant sources is the practice of the European Court of Human Rights.

The analysis of the right to freedom of peaceful assembly, including in the context of European practice, was the subject of the study of such scientists as R. Kuibida (Kuibida et al., 2018), R. Melnik (Melnyk, 2015), O. Shkarneha (Shkarneha, 2016) and others.

2. Current state of source base

The main legislative sources (the above provisions of Article 11 of the Convention and Article 39 of the Constitution of Ukraine) and the European Court of Human Rights unanimously state that citizens have the right to assemble only peacefully, which makes us consider in more detail the content of the category of "peacefulness", which, accordingly, is a prerequisite for the exercise of the right to freedom of peaceful assembly. In one of the judgments, the Constitutional Court of Ukraine, when considering the issue of whether the Constitution of Ukraine complies with the provisions of part five of Article 21 of the Law of Ukraine "On Freedom of Conscience and Religious Organizations", the latter only briefly referred to the category of "peacefulness", citing, as an example, the Guidelines on Freedom Peaceful Assembly (2nd edition) prepared by the Organization for Security and Co-operation in Europe / the Office for Democratic Institutions and Human Rights and the European Commission for Democracy through Law (Venice Commission) (Constitutional Court of Ukraine, 2016). Thus, the Constitutional Court of Ukraine shares the opinion of international organizations that an assembly is considered to be peaceful if has a non-violent nature and its organizers have peaceful intentions. Western scholars point out that the requirement of the assembly's peacefulness is closely linked to the understanding of freedom of assembly as an instrument of participation in the (political) decision-making process in a democratic society, in which violence can in no way be a means of achieving purposes (Dörr et al., 2013: 1169–1170). However, both the Convention and the Constitution of Ukraine protect not only the right of people to assemble peacefully, but also provide for a mandatory condition for the exercise of this right, according to which participants of the assembly should be without weapons.

3. The concept of "weapons" in the context of the right to freedom of peaceful assembly

Definition of the concept of "weapons" in modern national legislation can be found in the Instruction on the use of weapons, military equipment, hardware, ships (boats), planes and helicopters of the State Border Guard Service of Ukraine, special means and measures of physical influence during the protection of the state border and the exclusive (sea) economic zone of Ukraine, approved by the order of the Administration of the State Border Guard Service of Ukraine dated October 21, 2003 № 200 (State Border Guard

Service of Ukraine, 2003). Thus, in accordance with paragraph 1.3 of the Instruction, weapons are objects and devices intended for the destruction of living targets, ships, aircraft (helicopters) and other objects and have no other purpose. In turn, scholars in different ways approach definition of the concept of "weapons", basing their thoughts on the principle of integrated industry of this concept. Thus, some state that in the administrative law weapons are part of the permit system, an object, usage of which requires obtaining prior permission from a competent executive body of State authority, that is, the circulation of which is carried out in a permissive manner, while in the constitutional law weapons are a means of satisfaction of the constitutional rights of citizens to self-defense (Pietkov, 2008: 17–18]. In more detail, the concept of "weapons" in the sense of Article 39 of the Constitution of Ukraine R. Melnyk concludes that in this context the weapon is: firearm of any kind (military, hunting, etc.); devices for shooting cartridges equipped with rubber or similar in their properties non-lethal projectiles; pneumatic weapons; cold weapons; cold missile weapons; items specially adapted or prepared in advance for bodily injuries; explosives and explosive devices (Melnyk, 2015: 103–104). Summarizing these definitions, we formulate our own opinion, defining weapons in the context of the exercise of the right to freedom of peaceful assembly as weapons in its technical sense, as well as those items that by their nature can be used to cause damage to the life and health of a person or his property.

The requirement of peacefulness from the outset implies that non-peaceful assemblies, and therefore armed assemblies, are automatically excluded from the application of Article 11 of the Convention. Debatable, however, remains the issue of whether participants of the assembly who have the legal right to carry weapons can attend the assembly. On the one hand, the presence of weapons among the participants in the assembly may be considered as a ground for violation of the peacefulness – a key condition for the exercise of this right. However, if Article 11 of the Convention is to be more widely considered, it is quite possible to assume that the assembly will have a peaceful nature, even if its participants have weapons, but do not intend to apply it. This is especially true in those situations where the participants and organizers of the assembly are those who already have weapons as an integral part of their profession. Such categories of individuals are police officers or hunters.

4. Non-violent character of the assembly

Another aspect of the category of "peacefulness" lies in a more hidden form of the threat of violations of peacefulness than weapons. These are the cases where the organizer or some participants of the assembly intend to use violence, approve such behavior from other individuals or have another kind of danger that manifests itself in the application of aggressive actions against people or their property. The ECHR directly denies the peaceful character of the assembly if its organizers from the outset have intentions to accomplish their violent purposes (European Court of Human Rights, 2001). Similar actions of the participants of the peaceful assembly, of course, result in at least a violation of public order (in this case, it is worth noting that the category of "public order" in the Ukrainian legislation is uncertain, and therefore in practice it leads to significant problems), however, the prohibition of holding an assembly is not justified only by the fact that the participants of the assembly violate the latter. For example, the ECHR suggested

that the assembly was peaceful in the case when a group of foreigners without valid residence permits decided to take collective action to draw the attention of the community to the difficulties they had in obtaining a revision of their immigration status in France. Their campaign ended with the decision to occupy the church of St. Bernard, where the group has lived for about two months. Neither the priest nor the parish council of the church were against their presence, and religious services and various ceremonies were held as planned without incidents (European Court of Human Rights, 2002). In addition, cases such as aggressive slogans ("Off…") in conjunction with the arson of flags or portraits, also in the opinion of the ECHR, in themselves, do not indicate the non-peaceful character of the assembly (European Court of Human Rights, 2010a). The court finds it difficult to imagine a huge political demonstration during which people will be able to express their opinions without resorting to a certain noise (European Court of Human Rights, 2007a). The ECHR notes that such actions should be understood as expressions of dissatisfaction and protest, but they can hardly be considered a call to violence, even if they are accompanied by the arson of flags and photographs of political figures. The ECHR considers such actions to be a form of expression of opinion on a matter of great public interest and reminds that members of the assembly have the right to freedom of expression concerning not only information or ideas that are positively perceived in society, but also those who offend, shock or hinder certain individuals (European Court of Human Rights, 1994: 94). This opinion is confirmed by the ECHR in another judgment, stating that Article 11 of the Convention protects a meeting that may annoy or cause negative emotions in other individuals who oppose the ideas or claims that such a peaceful assembly seeks to achieve (European Court of Human Rights, 1988: 88).

5. Assessment of the actions of counter-demonstrators of the peaceful assembly as an opportunity to ban it

Along with this, one can also recall the position of the ECHR, set out in the case of Schwabe v. Germany, which discussed the prohibition of holding a peaceful assembly for participants who intended to participate in demonstrations against the G8 summit. The ECHR noted that the applicants did not expose violent intentions: no weapons were found, and the formulation of the inscriptions on the banners did not allow to prove that the participants intended to incite others to violence. But the possibility of violent counter-demonstrations or the possibility of adding to the demonstration of extremists with violent intentions can not, as such, take away the right to freedom of peaceful assemblies. The notion of "peaceful assembly" does not cover those cases where organizers and participants have violent intentions that from the very beginning lead to mass disturbances (European Court of Human Rights, 1980a).

Continuing to analyze the practice of the ECHR, we see that any counter-demonstrations or disturbances provoked by the assembly can neither lead to the automatic absence of a peaceful character of the assembly nor serve as grounds for its prohibition or dissolution. A similar statement applies even when the purpose of the assembly is controversial, and counter-demonstrations should be feared. This position was expressed in more detail by the ECHR in the judgment of Alekseyev v. Russia, which stressed that if each probability of tension and incitement of confrontation between the opposing groups during the assembly would justify its prohibition, society would face the loss

of the opportunity to hear different views on any issue that offends the feeling of the majority (European Court of Human Rights, 2010b). In this case, the rights of minorities to freedom of expression and peaceful assembly would become only theoretical, not practical and effective, as required by the Convention (European Court of Human Rights, 1980b). In this regard, the ECHR insists that Article 11 of the Convention, on the contrary, implies the duty of the state to protect members of the peaceful assembly from unfriendly opponents of the demonstration (European Court of Human Rights, 1988). Taking into account the above, the ECHR also explicitly states that the burden of proving violent intentions of the organizers of the assembly lies with the authorities and it can not avoid it by imposing on organizers, for example, the exclusion of the participation of certain groups of individuals, or asserting special claims on the organizers of the assembly (European Court of Human Rights, 2010a). Moreover, the ECHR also points out that state authority should not only protect the right to assemble peacefully, but should also refrain from unreasonable indirect restrictions on this right (European Court of Human Rights, 2006a). Continuing this idea, the ECHR adds that although the main object of Article 11 is the protection of a citizen from arbitrary interference of the authorities in the process of the enforcement of guaranteed rights, obligations for the effective exercise of these rights must also be adhered to (European Court of Human Rights, 2003). The ECHR believes that these principles are also applicable to the issue of demonstrations and rallies organized in public places (European Court of Human Rights, 2006a). This position was substantiated by the ECHR in detail in the judgment of the Makhmudov v. Russia, where the applicant complained about the prohibition of holding a peaceful assembly (European Court of Human Rights, 2007b). The reason for the prohibition was the announcement of a terrorist act. In accordance with the circumstances of the case, law enforcement agencies were informed about a possible terrorist act, after which the authorized body decided to revoke the previously issued permission to hold a peaceful assembly. During the trial, the national courts found that the district police did not confirm the fact of the terrorist report, and the regional police refused to provide information, referring to secrecy considerations. In these circumstances, the ECHR concluded that since the authorities relied on information about a "terrorist threat" as grounds for prohibiting the assembly, they were based on assumptions rather than on real facts. Moreover, considering the circumstances of the case as a whole, the ECHR sees compelling reasons to doubt the Statement of the respondent State that the potential threat of a terrorist attack was the real reason for the applicant's refusal to issue a permit for an assembly. In substantiating its position on this case, the ECHR emphasizes that if the relevant authorities were notified of possible terrorist attacks in places of mass gathering, such information, being rather serious and trustworthy, should have led to an increase in security measures in public places, theaters, exhibition halls, sports grounds, etc., and the fact that disturbing information was received before the celebration of the City Day could actually result in the abolition of a number of measures to ensure the safety of the participants. However, as can be seen from the media reports submitted by the plaintiff and not protested by the state, the events organized by the city hall and the government were held in accordance with the approved program on the day following the day of the scheduled assembly. Although the number of those present at the events significantly

exceeded the number of expected participants in the assembly of the applicant, the latter was the only event that was canceled due to the terrorism threat. In this regard, the ECHR considers that the threat of violations of the peacefulness of the assembly has not been proved, and thus the abolition of the permit for its holding violates Article 11 of the Convention. It is clear that in each particular case the court must independently determine the degree of risk of creating a real danger of disturbances or crimes, threats to public health or the rights and freedoms of other people, a real possibility for executive authorities and local self-government to fulfill their authority to ensure the protection of public order during peaceful assemblies, assess the real danger of holding an assembly for the national-security and public-order interests. However, as shown by the practice of the national administrative courts, by satisfying claims about the prohibition of a peaceful assembly or by imposing other restrictions on the exercise of the right to peaceful assembly, courts often saw the possibility of violating national-security and public-order interests in preventing the free access of citizens and employees to state institutions, next to with events were planned; violation of the normal traffic of vehicles in the areas of roads close to the venue; the possibility of conflict situations in case of coincidence in place and time of several peaceful assemblies of different (often opposite) ideological directions, etc. (Supreme Administrative Court of Ukraine, 2012). The practice of the ECHR shows that not always the application of radical measures in the form of depriving citizens of the right to exercise the right to freedom of assembly is justified and necessary in a democratic society.

6. The purpose and location of holding the assembly as a criterion for determining its "peacefulness"

It is not uncommon for authorities to illegally deprive citizens of the possibility of exercising the right to freedom of assembly by prohibiting its holding and justifying this as a threat to the functioning of state power or the interference with the work of its bodies. However, the ECHR, when formulating its own opinion on this matter, in particular, in the case of Kuznetsov v. Russian Federation, noted that even such actions as blocking access to a court building during a picket are not a violation that allows the authorities to apply a prohibition or other action, adding that any demonstration in a public place inevitably introduces certain changes in normal life, including road traffic offenses, so it is especially important for public authorities to demonstrate a certain level of tolerance in relation to peaceful assemblies (European Court of Human Rights, 2008).

Further the ECHR indicates that the assembly does not always lose its character of peacefulness even if its members insist on fundamental constitutional changes and, for example, seek greater autonomy or even separation from the state (European Court of Human Rights, 2001), have a potential impact on national interests, public order, or territorial integrity, contain the words "resistance", "fight" and "liberation". In the context of the possibility of violating the peacefulness of the assembly, the ECHR notes that the above actions do not lead to a clear conclusion that the participants of such an assembly call for violence, armed resistance or rebellion (European Court of Human Rights, 2001). At the same time, the ECHR emphasizes that one of the key characteristics of democracy is the ability to solve the problems of the state through dialogue, without resorting to violence, even if these problems are irritating to certain categories of people or authorities.

Democracy flourishes with freedom of expression. From this point of view, there is no justification for blocking a group of people simply because it seeks to debate on the situation of parts of the population, and tries to find a solution according to democratic rules, able to satisfy all interests (European Court of Human Rights, 1998a). Continuing this idea, in another judgment, the ECHR noted that only very serious violations that threaten political pluralism or fundamental democratic principles could justify the prohibition of an assembly. If, during the assembly there are no calls for violent overthrow of power or any other actions that undermine the principles of pluralism and democracy, it is unwise to assert that the prohibition of an assembly is proportional to its persecuted purpose and that it meets the "pressing social need" (European Court of Human Rights, 2006b).

In this context, the ECHR has indicated that in cases of incitement to violence against a public official or group of officials, public authorities generally have greater freedom of discretion, considering the need for interference with the freedom of expression, but automatically in this case the character of the peaceful assembly is not violated (European Court of Human Rights, 1998b; European Court of Human Rights, 1999).

7. Distinctions of estimation of the actions of individual participants in the assembly

A particular problem, mainly in large events, is how to estimate the violence of individual participants or groups. Obviously, the possibility of disturbances, violence or other unsatisfactory behavior can never be ruled out. They can even be predictable, considering only the very topic of the assembly. However, if one was enough to prohibit the assembly in advance or to dismiss the assembly after its commencement, the protection of fundamental rights for a predominantly peaceful part of the assembly would be violated, since in this case the possibility of applying a fundamental right is in fact in the hands of individuals or groups of individuals. Accordingly, the ECHR considers that, where demonstrators are not involved in acts of violence, it is important that the authorities to some extent exercise tolerance towards peaceful assemblies of civilians, otherwise freedom of assembly guaranteed by Article 11 of the Convention will become devoid of purpose. In such cases, the police intervention or the intervention of another kind is disproportionate and is not necessary to prevent violations of public order (European Court of Human Rights, 2006a). Therefore, the non-peaceful conduct of individuals can not be considered a violation of the peaceful character of the assembly as a whole, even if prohibited acts occur from the participants of the event, and not counter-demonstrators. At the same time, if the degree of non-peaceful conduct reaches a certain threshold of harm, which must be determined in the light of the importance of the fundamental right, then this must and can be attributed to the assembly as a whole. In this case, the competent authorities of the state are obliged to determine the time from which the assembly itself went beyond the protection of fundamental rights as a result of the violation of the peacefulness of its holding. In this respect, the ECHR can only verify whether the estimation of the situation was conducted properly and in accordance with the fundamental right to freedom of assembly. This does not mean that the ECHR should restrict itself to establishing whether the respondent State exercises its discretion in a reasonable, cautious and fair manner; it must also consider the interference complained of, in the light of the case as a whole, and determine, after establishing that it

pursues a "legitimate purpose", whether it is proportional to this purpose and whether the reasons given by the national authorities are justified and sufficient (European Court of Human Rights, 2001). Considering this, one can speak of the fact that the state's duty is to adhere to the declared right of citizens to hold a peaceful assembly. In particular, in the judgment of the Ouranio Toxo and others v. Greece, the ECHR indicated that the state police should reasonably foresee the danger that the tension in society on the port of the opponents of the participants in the peaceful assembly would turn into acts of violence and direct violations of the freedom of association of citizens (European Court of Human Rights, 2005). The State therefore had to take appropriate measures to prevent or at least to deter acts of violence. In cases where proper measures have not been taken by the state, the ECHR considers violations by public administration entities of internationally guaranteed rights. Thus, in another of its judgments', the ECHR points out that the authorities have resorted to a radical and unlawful means by refusing the citizen the fullest possible exercise of his right to freedom of peaceful assembly, and such a complete prohibion of holding a peaceful assembly can not be justified (European Court of Human Rights, 2007c). In the jundgement of the Djavit An v. Turkey (European Court of Human Rights, 2003) the ECHR also indicated that the probable danger of violations of the peacefulness of the assembly should not be conceivable. It should be based on concrete facts or data on the existence of a real threat to peace in society. The ECHR points out that any restriction on the right to freedom of peaceful assembly is possible only if real danger can be really seen. In addition, according to the ECHR, in order to ensure the normal holding of a peaceful assembly of citizens of a political, cultural or other character, it is important to take preventive security measures, such as the presence of first aid services in demonstration venues (European Court of Human Rights, 2006a).

8. Conclusions

On the basis of the foregoing, the following conclusions can be drawn: the European Court of Human Rights gives a meaningful interpretation of the category of "peacefulness" in resolving disputes related to violation of the right to freedom of peaceful assembly. In numerous judgments on the issue of the violation of Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to freedom of peaceful assembly, the European Court of Human Rights gives a detailed description of certain aspects of the category of "peacefulness", thus forming its contents. So, in the practice of the Court, we can find the following criteria for the category of "peacefulness":

- the need for the absence of weapons or its legal presence in the participants of an assembly, but the lack of purpose of its application;
- lack of purpose and desire to use violent intentions in the organizers and participants of an assembly;
- the characteristics of the appeals and slogans of an assembly, including of the state or political nature;
- the possibility of displaying active non-peaceful actions of counter demonstrators of a peaceful assembly or planned provocative conduct unsatisfied with the purpose of holding a peaceful assembly of a part of the population;
- distinctions of estimation of negative actions of individual participants in mass gatherings.

Certainly, these judgments' are worth the attention of the organizers and participants of peaceful assemblies. But moreover, taking into account the shortcomings of domestic legislation in regulating this issue, as well as the constitutional duty of public administration entities to apply the practice of the ECHR, the use of these judgments' will contribute to the democratic consolidation and the observance of human rights in Ukraine.

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ДЕЯКІ АСПЕКТИ РОЗУМІННЯ КАТЕГОРІЇ «МИРНІСТЬ» У ПРАКТИЦІ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ ЯК УМОВА ДОТРИМАННЯ ПРАВА НА СВОБОДУ МИРНИХ ЗІБРАНЬ

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Статтю присвячено аналізу національних і міжнародних умов реалізації права на свободу мирних зібрань, серед яких чільне місце посідає категорія «мирність». Конвенція про захист прав людини і основоположних свобод, як і Конституція України, одноголосно зазначають, що громадяни мають право збиратися лише мирно. Це формулювання визначає ***мету*** *статті, для досягнення якої автор більш детально розглядає зміст категорії «мирність», що є необхідною умовою реалізації права на свободу мирних зібрань. Для досягнення поставленої мети автором використовуються* ***методи*** *та прийоми логіки, сходження від загального до конкретного, зокрема, аналізується*

практика Європейського суду з прав людини в справах щодо реалізації громадянами права на свободу мирних зібрань, ***результатом*** *чого є вироблення критеріїв для визначення мирного характеру зібрання. Автор акцентує увагу на таких аспектах категорії «мирність», як відсутність зброї під час проведення зібрання або незастосування її учасниками такого зібрання, відсутність мети й бажання застосування насильницьких намірів в організаторів та учасників зібрання, активні немирні дії контрдемонстрантів мирного зібрання, заклики й лозунги зібрання різного характеру (у тому числі державного чи політичного), що викликають невдоволення іншої частини населення, а також особливості оцінки негативних дій окремих учасників масового зібрання.*

Як ***висновок*** *автором зазначається, що відсутність в українському законодавстві спеціального закону, який регулював би процедурні аспекти здійснення громадянами права на свободу зібрань, призводить до виникнення ситуацій, які мають своїм наслідком численні порушення також у вигляді необґрунтованої заборони реалізації громадянами наданого їм права. У зв'язку з наведеним автор пропонує активно застосовувати міжнародні джерела права, що мають важливі напрацювання в регулюванні цієї сфери. Одним із найбільш суттєвих джерел є практика Європейського суду з прав людини як невід'ємна частина реалізації норм Конвенції про захист прав людини і основоположних свобод. Суд надає суттєве тлумачення категорії «мирність» під час вирішення спорів, пов'язаних із порушенням права на свободу мирних зібрань. Ці напрацювання європейської судової установи повинні не лише бути певним дороговказом для організаторів та учасників мирного зібрання, а й усебічно застосовуватися суб'єктами публічної адміністрації.*

Ключові слова: мирний характер, ненасильницький характер, зброя, контр-демонстранти, лозунги, плакати, масове зібрання, публічне місце.

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RELEVANT RESEARCH OF ADMINISTRATIVE ASPECTS IN ENSURING THE DEFENSE OF UKRAINE (REVIEW OF V.Y. PASHYNSKY'S MONOGRAPH "ENSURING DEFENSE OF UKRAINE: ADMINISTRATIVE AND LEGAL ASPECTS")[1]

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The monograph of V.Y. Pashynskyi "Ensuring defense of Ukraine: administrative and legal aspects" is a comprehensive scientific research of the relevant theoretical and practical problems of administrative provision of state defense at the present stage of the development of the statehood of Ukrainian people. The monographic research is timely and relevant taking into account the need for conducting defense reform and the establishment of an effective system of defense of the state in the difficult conditions of Russian armed aggression, the "hybrid war" against Ukraine.

The author of the scientific paper has carried out the research of the following problems: theoretical and legal foundations of ensuring defense of Ukraine; methodological principles and status of administrative provision of state defense; specific features of administrative and legal status of the subjects of ensuring defense of Ukraine (state authorities and civil society); legal status, functions and tasks, features of administrative provision of the activity of the Armed Forces of Ukraine and other components of the defense forces in the system of the state defense; the ways to improve administrative and legal provision of Ukraine's defense in the light of modern national and international experience.

The monograph contains a clear and detailed comparative and legal analysis of the norms of the current national legislation in the sphere of Ukraine's defense and NATO member states, which is due to the intensification of the process of Ukraine's integration into the structures of the North Atlantic Alliance. Particular attention is focused on determining directions and implementation of modern approaches in regard to administrative and legal provision of defense of Ukraine, taking into account international experience and NATO standards in the field of defense and military and administrative sphere of public relations.

[1] Пашинський В.Й. Забезпечення оборони України: адміністративно-правові аспекти : монографія. Київ : ФОП Маслаков, 2018. 408 с.

Pashynskyi V.Y. Zabezpechennia oborony Ukrainy: administratyvno-pravovi aspekty: monohrafiia [Ensuring defense of Ukraine: administrative and legal aspects: monograph]. Kyiv: FOP Maslakov, 2018. 408 p. [in Ukrainian].

The research of the legal nature, the essence, components of the state defense and its administrative and legal provision, accomplished by the author of the monograph is positive. There are issues among them that deserve particular attention, namely: the place of defense as a state and legal phenomenon within the legal system of the state, legal science, the system of ensuring national security and defense; conceptual and methodological foundations of administrative and legal provision of defense (essence and content, structure, objective, tasks); the system of public administration of the state defense and all components of the security and defense sector; definition of the concept, content and essence of administrative and legal relations in the field of defense; clarification of administrative and legal status of the subjects of ensuring defense and division of their powers, the formation of the system of democratic civilian control in the field of defense. The author correctly and scientifically substantiated lists the following characteristic features of administrative and legal provision of the defense of Ukraine: the development of key theoretical and practical issues of administrative and legal provision of the state defense; organizational and managerial activity in the field of defense; normative activity related to the development and adoption of legislative acts defining the legal framework of the defense, subordinate regulatory acts of the head of the state, agencies of executive power, agencies of local self-government and agencies of military management (military command) on defense issues; organization of legal work (legal provision) on effective implementation, in particular, the application, acts of military management in the activities of the subjects ensuring the state defense. The author logically and convincingly substantiates the conclusion that it is impossible to organize and carry out the state defense, to conduct an effective defense reform without the implementation of measures of administrative and legal provision.

Important scientific novelty is also observed in the author's periodization of the formation and development of the system of the state defense; scientific substantiation of the content and structure of administrative and legal relations in the field of defense of Ukraine; the allocation of military and administrative law as a sphere of Ukraine's defense; the allocation of military and administrative law as an independent institutional entity, an independent sub-branch in the system of Special Administrative Law; the classification of social relations in the field of defense that influence on the formation of military and administrative law; the classification of characteristic features, structure and subjects of administrative and legal provision of Ukraine's defense; the classification of the functions of Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, the President of Ukraine as the Supreme Allied Commander, the National Security and Defense Council of Ukraine, the Civil Society within the system of subjects of legal provision of Ukraine's defense; the author's classification of characteristic features and structure of administrative and legal provision of the activity of the Armed Forces of Ukraine; the allocation of characteristic features of the Armed Forces of Ukraine as a special agency (institution) of the state; propositions for improving the system of administration of defense forces based on the distribution of powers, functions, tasks, responsibilities and responsibilities in the field of defense, which are in line with the principles adopted in the NATO member states, etc.

A notable scientific significance has refinement and improvement of conceptual and categorical apparatus in the field of state defense accomplished in this monographic research. In particular, the following author's definitions are important and well-considered: "Ukraine's defense", "administrative and legal provision of Ukraine's defense", "subjects of administrative and legal provision of the defense of Ukraine", "administrative and legal status of the subjects of administrative and legal provision of the defense of Ukraine", "military and administrative relations", "military and administrative legislation", "National Defense Forces of Ukraine", "Supreme Commander-in-Chief of the National Defense Forces of Ukraine", etc.

A considerable number of used and analyzed scientific sources and regulatory acts, scientific works of domestic and foreign scholars in law field provide reasoning and objectivity of the research results. Thoroughness and comprehensiveness of the research, which made it possible to make concrete and logical theoretical conclusions, practical propositions and recommendations concerning the ways of improving administrative and legal provision of Ukraine's defense, are valuable characteristics of the monograph.

The author of the monograph scientifically reasoned the necessity of working out draft laws and adopting new laws of Ukraine "On National Defense of Ukraine", "On the Commissioner of Verkhovna Rada of Ukraine on Security and Defense Sector Issues", which should become an important part of administrative and legal provision of defense, will legislatively establish the present state of social relations in the field of defense, principles of public administration of the state defense system according to NATO standards.

The work is written in modern business Ukrainian, with the use of legal terminology, logical and consistent presentation of the material, the main provisions and conclusions of the monograph.

All this provides grounds for asserting the author's scientific maturity, his ability to research and solve complex scientific issues regarding the development of administrative law, and, based on the obtained results to outline the perspectives for further scientific research in this field in the context of military and administrative legal relations.

Taking into account the aforementioned, comprehensive scientific monographic study accomplished by V.Y. Pashynskyi undeniably has a significant value for further development of administrative science in the system of law of Ukraine, for studying problems of military and administrative law. It is carried out at a high scientific and theoretical level, contains new scientifically grounded results, which totally solve the scientific problem, which consists in the development of the conceptual provisions of the theory and practice of administrative and legal provision of the defense of Ukraine.

ДО УВАГИ АВТОРІВ

До друку приймаються наукові статті провідних фахівців у галузі публічного права, представників юридичної практики, молодих науковців.

Технічні вимоги до оформлення статті:

Формат А 4; поля – 2 см (нижнє) х 2 см (верхнє), 3 см (ліве) х 1,5 см (праве); абзац – 1,25 см; міжрядковий інтервал – 1,5 см; шрифт – Times New Roman; кегль – 14.

Обсяг статті – від 10 до 20 сторінок.

У тексті слід використовувати символи за зразком: лапки «…», дефіс (-), тире (–), апостроф (’).

Послідовність розміщення структурних елементів у науковій статті:

1. Вказується мовою статті:

назва;

прізвище, ім’я, по батькові автора (-ів) статті (не більше двох осіб);

посада, місце роботи/навчання, науковий ступінь, вчене звання (за наявністю), електронна адреса;

анотація та ключові слова.

2. Текст статті:

Вступ (Introduction) є обов’язковою частиною роботи, в якій автор вказує новизну теми та актуальність наукових рішень. Мета дослідження повинна бути чітко вказана поряд з науково-дослідницькими завданнями. Необхідно вказати методологію дослідження, логіку уявлення дослідженого матеріалу.

Основний текст повинен бути поділеним на змістовні розділи з окремими заголовками (до 4-6 слів).

Стаття повинна містити висновки з проведеного дослідження (Conclusions), в яких представлені розгорнуті конкретні висновки за результатами дослідження і перспективи подальших досліджень у цьому напрямку.

3. Список використаних джерел. Бібліографічний опис списку оформлюється з урахуванням розробленого в 2015 році Національного стандарту України ДСТУ 8302:2015 «Інформація та документація. Бібліографічне посилання. Загальні положення та правила складання». За умови неправильного оформлення списку використаних джерел стаття може бути відхилена рецензентами.

4. References. Оформлюється відповідно до стандарту APA (APA Style Reference Citations). Автор (трансліт), назва статті (трансліт), назва статті (в квадратних дужках переклад англійською мовою), назва джерела (трансліт), вихідні дані (місто з позначенням англійською мовою), видавництво (трансліт). Наприклад:

Dikhtiievskyi, P. V., Lahniuk, O. M. (2015). Kadrove zabezpechennia sudiv zahalnoi yurysdyktsii: administratyvno-pravovyi aspekt [Staff assistance of of courts of general jurisdiction: administrative and legal aspect]. Kherson: Helevetyka. [in Ukrainian]

Bondarenko, I. (2002). Sudova systema Ukrainy ta yii reformuvannia v suchasnykh umovakh [Judicial system of Ukraine and its reforming in the modern conditions]. Pravo Ukrainy, no. 8, pp. 37–39.

Транслітерація імен та прізвищ з української мови здійснюється відповідно до вимог Постанови Кабінету Міністрів України «Про впорядкування транслітерації українського алфавіту латиницею» від 27 січня 2010 р. № 55.

Транслітерація з російської мови здійснюється відповідно до ГОСТ 7.79-2000. Система стандартов по информации, библиотечному и издательскому делу. Правила транслитерации кирилловского письма латинским алфавитом.

5. Вказується англійською мовою:

назва;

прізвище, ім'я, по батькові автора (-ів) статті (не більше двох осіб);

посада, місце роботи/навчання, науковий ступінь, вчене звання (за наявністю), електронна адреса;

розширена анотація та ключові слова. В анотації повинно бути зазначено: предмет дослідження, методологія, мета і висновок дослідження. Мінімальний обсяг анотації 350 слів.

Посилання на літературу подаються у тексті тільки в круглих дужках відповідно до прикладу:

При цьому кожен громадянин України, який відповідає встановленим вимогам до кандидата на посаду прокурора, має право звернутися до Кваліфікаційно-дисциплінарної комісії прокурорів із заявою про участь у доборі кандидатів на посаду прокурора (ЗУ «Про прокуратуру», 2015).

Усі статті, що надходять до редакції проходять закрите рецензування та перевіряються на плагіат.

Редколегія вправі рецензувати, редагувати, скорочувати та відхиляти статті. У разі недотримання зазначених вимог щодо оформлення рукописів редакція залишає за собою право не розглядати їх. Редакція не завжди поділяє позицію авторів публікацій. Передрук статей можливий лише з дозволу редакції.

ВНИМАНИЮ АВТОРОВ

К печати принимаются научные статьи ведущих специалистов в области публичного права, представителей юридической практики, молодых ученых.

Технические требования к оформлению статьи:

Формат А 4; поля – 2 см (нижнее) х 2 см (верхнее), 3 см (левое) х 1,5 см (правое) абзац – 1,25 см; межстрочный интервал – 1,5 см; шрифт – Times New Roman; кегль – 14.

Объем статьи – от 10 до 20 страниц.

В тексте следует использовать символы по образцу: лапки «...», дефис (-), тире (–), апостроф (‘).

Последовательность размещения структурных элементов в научной статье:

1. Указывается на языке статьи:

название;

фамилия, имя, отчество автора (-ов) статьи (не более двух человек);

должность, место работы / учебы, ученая степень, ученое звание (при наличии), электронный адрес;

аннотация и ключевые слова.

2. Текст статьи:

Введение (Introduction) является обязательной частью работы, в которой автор указывает новизну темы и актуальность научных реше ний. Цель исследования должна быть четко указана рядом с научно-исследовательскими задачами. Необходимо указать методологию исследования, логику представления исследованного материала.

Основной текст должен быть разделен на содержательные разделы с отдельными заголовками (до 4-6 слов).

Статья должна содержать выводы из проведенного исследования (Conclusions), в которых представлены развернутые конкретные выводы по результатам исследования и перспективы дальнейших исследований в этом направлении.

3. Список использованных источников. Библиографическое описание списка оформляется с учетом разработанного в 2015 году Национального стандарта Украины ДСТУ 8302: 2015 «Информация и документация. Библиографическая ссылка. Общие положения и правила составления». При неправильном оформлении списка литературы статья может быть отклонена рецензентами.

4. References. Оформляется в соответствии со стандартом APA (APA Style Reference Citations). Автор (транслит), название статьи (транслит), название статьи (в квадратных скобках перевод на английский язык), название источника (транслит), выходные данные (город с обозначением на английском языке), издательство (транслит). К примеру:

Dikhtiievskyi, P. V., Lahniuk, O. M. (2015). Kadrove zabezpechennia sudiv zahalnoi yurysdyktsii: administratyvno-pravovyi aspekt [Staff assistance of of courts of general jurisdiction: administrative and legal aspect]. Kherson: Helevetyka. [In Ukrainian]

Bondarenko, I. (2002). Sudova systema Ukrainy ta yii reformuvannia v suchasnykh umovakh [Judicial system of Ukraine and its reforming in the modern conditions]. Pravo Ukrainy, no. 8, pp. 37-39.

Транслитерация имен и фамилий с украинского языка в соответствии с требованиями Постановления Кабинета Министров Украины «Об упорядочении транслитерации украинского алфавита латиницей» от 27 января 2010 № 55.

Транслитерация с русского языка осуществляется в соответствии с ГОСТ 7.79-2000. Система стандартов по информации, библиотечному и издательскому делу. Правила транслитерации кирилловского письма латинским алфавитом.

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должность, место работы / учебы, ученая степень, ученое звание (при наличии), электронный адрес;

расширенная аннотация и ключевые слова. В аннотации должно быть указано: предмет исследования, методология, цель и вывод исследования. Минимальный объем аннотации 350 слов.

Ссылки на литературу даются в тексте только в круглых скобках в соответствии с примером:

При этом каждый гражданин Украины, который соответствует установленным требованиям к кандидату на должность прокурора, вправе обратиться в квалификационно-дисциплинарной комиссии прокуроров с заявлением об участии в отборе кандидатов на должность прокурора (ЗУ «О прокуратуре», 2015).

Все статьи, поступающие в редакцию проходят закрытое рецензирование и проверяются на плагиат.

Редколлегия вправе рецензировать, редактировать, сокращать и отклонять статьи. В случае несоблюдения указанных требований по оформлению рукописей редакция оставляет за собой право не рассматривать их. Редакция не всегда разделяет позицию авторов публикаций. Перепечатка статей возможна только с разрешения редакции.

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The article volume is from 10 to 20 pages.

It should be used symbols as follows: quotes "…", hyphen (-), dash (–), apostrophe (').

Sequence of placement of structural elements in a research article:

1. It is indicated in the language of the article:

title;

surname, name, patronymic of author (-s) of the article (no more than two persons);

job position, place of employment/study, academic degree, rank (if any), e-mail;

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Introduction is an obligatory part of the research, where the author indicates topicality of the subject and actuality of scientific decisions. Goal of research should be clearly indicated along with the research tasks. It is necessary to specify the methodology of research, the logic of presentation of the investigated material.

The main text should be divided into content-rich sections with separate headings (up to 4-6 words).

The article should contain conclusions from the study, which present detailed findings from the study and the prospects for further research in this direction.

3. Bibliography. Bibliography description is carried out taking into account the National Standard of Ukraine DSTU 8302: 2015 "Information and documentation. Bibliographic reference. General principles and rules of composition". Reviewers can reject an article in the case of improper execution of bibliography.

4. References. It is composed according to standards APA (APA Style Reference Citations). There is an author (transliteration), title of the article (in square brackets, English translation), source name (transliteration), source data (city with the English mark), publishing house (transliteration). For example:

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Bondarenko, I. (2002). Sudova systema Ukrainy ta yii reformuvannia v suchasnykh umovakh [Judicial system of Ukraine and its reforming in the modern conditions]. Pravo Ukrainy, no. 8, pp. 37–39.

Transliteration of names and surnames is carried out in accordance with the requirements of the Resolution of the Cabinet of Ministers of Ukraine "On Normalization of Transliteration of the Ukrainian Alphabet by Means of the Latin Alphabet" dated January 27, 2010, No. 55.

Transliteration from Russian is carried out in accordance with GOST 7.79-2000. System of standards on information, librarianship and publishing. Rules of transliteration of Cyrillic script by Latin alphabet.

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References to the literature are given in the text only in parentheses in accordance with the example:

At the same time, every citizen of Ukraine, who meets the established requirements for a candidate for a post of prosecutor, has the right to appeal to the Qualification Disciplinary Commission of Public Prosecutors with application of participation in the selection of candidates on the post of prosecutor (The Law of Ukraine "On Public Prosecution Service", 2015).

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