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ЗАГАЛЬНЕ АДМІНІСТРАТИВНЕ ПРАВО

ОСОБЛИВЕ АДМІНІСТРАТИВНЕ ПРАВО

АДМІНІСТРАТИВНИЙ ПРОЦЕС (АДМІНІСТРАТИВНЕ СУДОЧИНСТВО)

ЗАРУБІЖНЕ АДМІНІСТРАТИВНЕ ПРАВО ТА ПРОЦЕС

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WAIVER OF HUMAN RIGHTS: A RIGHT OR A CHALLENGE?

The author discusses the new tendencies of waiving human rights. In the article they are qualified as a new emerging institute of Human Rights Law. The definition of human rights waiver is discussed, as well as the necessity to give a legal regulation to it. The author presents the existing definitions of human rights waiver, but does not share any of them, particularly most of them define human rights waiver as not utilization of human rights, but the author calls this definition as a passive application of human rights, whilst waiver of human rights has its own content which is discussed in the article in details. Human rights waiver is discussed in the light of the co-relation of the right to autonomy and the principle of paternalism. The author presents some case law on waiver of human rights, which is very rare. Specifically, the author presents the case law of the Constitutional Court of the Republic of Armenia and the case law of the European Court of Human Rights. The legal positions of the mentioned bodies can serve as good criteria in dealing with human rights waiver. Particularly, the Constitutional Court of the Republic of Armenia held a decision dedicated to this issue and qualified waiver of human rights as an exception from the classical perception of human rights ideology. The author agrees with idea reflected in decision of the Constitutional Court concerning the correlation of human rights waiver and right to autonomy, according to which right to autonomy cannot be absolute and that absolute waiver of human rights can, in its turn, violate the human rights. In this context the author highlights the necessity of defining the limits of human rights waiver offering two important directions for discussion of this question; the scope of the rights which can and cannot be waived, the framework and criteria of a waiver of human rights.

Key words: human rights, new right, right to waive human rights, autonomy, paternalism.

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1. Introduction

The history of the development of human rights, the struggle for them, for their declaration, and moreover, for their real protection was difficult and impressive. The human race made so many efforts over thousands of years to achieve the idea of human dignity, equality, freedom, private life, and all the others. From the ancient oriental philosophy, antic philosophy, through middle ages, renaissance, new era, and presently so many concepts, ideas, so many lives, struggle for the declaration of a human being to be the highest value. From the idea of Protagoras – the measure of all things is a human being, to the contemporary perception of human rights and freedoms: the journey has been long and hard.

We did it! We have an enormous quantity of international treaties, courts, national legislation, and state bodies all to serve humanity, to protect their rights and freedoms. But what phenomenon do we meet? A new demand – for a human being to be able to waive their rights. What does this mean, how is it applied, how should a state respond?

The waiver of human rights is sometimes interpreted as non-realization of a right. I call this passive realization. From my point of view, a waiver of a human right is a demand addressed to a state to derogate from its obligations to protect a certain right concerning which the person demands a waiver, for example, not to ensure the right to advocate during criminal proceedings even if such participation is mandatory according to the legislation or not to protect life or mental or physical integrity and etc. Is this phenomenon possible? Is it in compliance with the idea of human rights and the obligations of the state, what are the limits of a claim to waive a right, should the state go in this direction or not, should it be regulated by law or not? All these questions need some research and some response as they have already become a part of the legal reality at both an international and domestic level.

2. Waiver of Human Rights

2.1. Definition

A definition of a human rights waiver has not been discussed a lot within the scientific literature and one unanimous approach does not exist. Originally, even the idea of waiving human rights was rejected. It was believed that one of the characteristics of human rights

is that they cannot be waived or taken away (Office of the United Nations High Commissioner for Human Rights, (United Nations), Frequently asked questions on a human rights-based approach to development cooperation, New York and Geneva, 2006, 1, December 27, 2019). The same idea can be met within judicial practice as well. In the Webber Academy Foundation v. Alberta (Human Rights Commission) (2015 AHRC 8 (CanLII)) case considered by the Alberta Human Rights Tribunal justice Poelman held that waiver is not a possible defense in any case, as human rights are a matter of public policy and protect the inherent dignity of every individual; thus they "cannot be waived or contracted out of" (H. Shireen, Human Rights Cannot Be Renounced or Waived, University of Calgary Faculty of Law BLOG September 1, 2016, 1). Mart Susi – Professor of the Human Rights Law at the Tallinn University, discussing the issue of a waiver of human rights in the context of the European Convention on Human Rights and the case law of the European Court of Human Rights considers that "The possibility of the waiver of a convention right also seems to contradict the obligations taken up by Member states of the Council of Europe under Article 1 of the convention – to guarantee to everyone under their jurisdiction the rights and freedoms specified in article 1 of the convention" (M. Susi, Recent Judgments and Decisions of the European Court of Human Rights towards Estonia, Juridica International XI/2006, 97).

In the judgment of the Supreme Court of Canada concerning the case Dickason v. University of Alberta it is stated that the Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of an enactment which may not be waived or altered by private contract (Dickason v. University of Alberta, Supreme Court of Canada, September 24, 1992, 22700, 213-14). The same idea has been emphasized in another judgment held by the Supreme Court of Canada in Insurance Corp. of British Columbia v. Heerspink. In the judgment it was stated that "Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection" (Insurance Corp. of British Columbia v. Heerspink, Supreme Court of Canada, August 9,1982, 16525, 158).

At the same time some tendencies in the opposite direction are coming up. For example, David Miller in his article "Are human rights conditional?" discussing the inalienable nature of the rights stated that "Human rights are also often said to be inalienable: they are not things that a person can lose by virtue of the way she acts" (D. Miller, Are Human Rights Conditional?, CSSJ Working Papers Series, SJ020, Centre for the Study of Social Justice Department of Politics and International Relations University of Oxford Manor Road, Oxford OX1 3UQ United Kingdom, September 2012, 2012, 2). D. Miller noting this statement with some exception, especially stated that "I leave aside here the question of voluntary waivers of human rights, such as occur, in the short term, when a person agrees to have invasive

surgery" (Ibid). Here as we can see the idea of waiving human rights is mentioned as an existing one. Another source stated that "Some human rights can be waived, but only in limited circumstances; and certain rights can never be waived, such as the right to liberty and protection from torture. Other human rights may be waived but that waiver must be established in an unequivocal manner. For example, it can be lawful to waive your rights in the employment context" (A Training Manual on International Human Rights Law, Building Human Rights into Practice, The Bingham Centre for the Rule of Law, London, UK, 2012). The idea of waiving human rights and its practical application can be met also within the recent case law of the European Court of Human Rights and some domestic jurisdictions.

However, the existing ideas and case law is vague. "It is not theoretically clear whether an individual may waive his or her rights under the convention at all, nor to what extent or exactly which convention rights may be waived" (M. Susi, Recent Judgments and Decisions of the European Court of Human Rights towards Estonia, Juridica International XI/2006, 97).

The examination of the rare research shows that waiving human rights is discussed in the following manner; the legitimate decision of the person not to use his/her right in a specific situation (A. Ghambaryan, Waiver of subjective human rights and the conditions of legitimacy, Journal "Legality", Yerevan, 2016, 24, to use the right in violation of the deadlines stipulated by the law (A. Gambaryan, Отказ от субективных прав молчанием (Tacit waiver) (Waiver of subjective right by silence (Tacit Waiver)) Теория и практика общественного развития N4 (2018)). Some specialists argue fairly that not realization of the rights does not amount to a waiver of human rights (Отказ от субъективных гражданских прав: диссертация кандидата юридических наук: 12.00.03 / Суханова Юлия Владимировна).

In my opinion a waiver of human rights implies the demand of the person addressed to the state to stop realization of its obligations, especially positive ones for the protection of a special right of a special person. The parties of the relations deriving from human rights are the human being and the state. Even in the case of horizontal relations it is the state who carries a responsibility towards the person to ensure the realization of their rights in relations with another human being. The responsibility carrier in human rights relations is the state. The human rights stipulated in the international treaties and the domestic basic laws/Constitutions are addressed to the state who is obliged to perform some obligations directed to the protection of these rights.

A human right is a freedom of the person to choose the possible legally formulated version of his/her behavior concerning a special situation. The idea that a waiver of a human right is just a non-realization of a right cannot be justified as non-realization of a right is also a form of its realization, of its enjoyment, just in a passive way. Besides, in case of non-realization of a right, the obligation holding party of human rights relations – the state, does not participate in any manner, which is not possible as to waive a right implies some consequences which cannot leave the state

without any role. So, if the relation based on human rights is a relationship between a state (here I consider the classical understanding of human rights relation – vertical relations. Though in case of horizontal relations the state in any case holds active role as it is the state's obligation to protect the person in those horizontal relations) and a human being, and if the state carries obligations to ensure those rights, it means that waiving a human right is a demand of the person addressed to the state to stop performance of its obligations, especially positive obligations concerning the waived right. In this situation another question arises – whether the state has an obligation to stop performance of its obligations based on such a demand of the human being or it comes to the margin of appreciation of the state to decide this issue. In the context of this issue such ideas should be discussed as autonomy and paternalism which refers to another question – limits of a human rights waiver.

2.2. Limits of a Waiver of Human Rights

The idea of a waiver of human rights arises from the right to autonomy. Autonomy is a familiar concept within legal, moral, and political philosophy (J. Coggon and J. Miola, Autonomy, Liberty, And Medical Decision-Making, Camb Law J. 2011 Nov; 70(3): 523–547). For example, such issues as assisted suicide, euthanasia, voluntary interference with mental and physical integrity, and etc., which are the types of waiver of such rights as life, physical and mental integrity, are the expressions of the right to autonomy. The European Court of Human Rights discusses these issues within the right to self-development which is also an element of right to autonomy. The right to autonomy implies the possibility of a human being to make decisions about their life. It denotes self-government. The specialists also stress the free will of a human being and possibility to act without the interference of third parties. Human rights in turn exist to protect some sides of human life and life itself too. Correspondingly, human rights demand the existence of a state's obligations to take care for these rights. As a result, when it comes to the correlation of human rights and the right to autonomy the issue of a waiver comes out when the person demands not to protect their rights, when the person demands from the state to take away its care. In this context, another famous question comes out – whether the state has an obligation to stop its care, i.e., protection of human rights in any case the person demands it. In my opinion the proper balance between the right to autonomy and paternalism should be kept. The aforementioned is especially true when it comes to such spheres as end of life, physical and mental integrity. In these cases, people can be especially vulnerable and letting them make decisions which can harm themselves will go too far in the sense of the protection of life as a value. In ECtHR judgment on the case of Pretty v. the United Kingdom the Court expressed an approach on this issue that went too far, particularly it stated that "...in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity". Such position is marginal in my opinion. It contradicts the Court itself; its

position in accordance with which Article 2 and 3 of the European Convention on Human Rights are the core values of the Convention. In this case the Court undermines the life of the person, by passive actions; in other words, by not giving the treatment the state, in fact, does not fulfill its positive obligations for the protection of the right to life. It shall be stressed that there is no right to die. Thus, countries shall take positive means to protect life, even in case the person refuses medical treatment which can safe their life. However, if the state acts conversely, the state becomes a supporter of suicide. One should keep in mind that the whole legal system and the state in general exist for only one main aim – to protect human life, to make it prospective and secure. This is the main idea of the theory of the emergence of a state on the basis of the social contract and natural law which are the basis for democratic societies. It also shall be taken into account that in difficult situations which require medical treatment with fatal consequences people are under emotional and psychological pressure and are not able to understand what they are doing. In such cases, in my opinion, where the treatment is fatal and the adult refuses it, the opinions of relatives and those who have a close relationship shall be taken into account. The person should also be given some psychological help if he/she refuses the treatment which could allow recovery. In such cases, the person can be under immense stress.

The mentioned position of the court is also in direct conflict with the Hippocratic oath, which requires "all measures [that] are required"…"I will apply, for the benefit of the sick". Generally, no enforcement can be made and no treatment can be performed against the will of the person, however, some mechanisms to try to save the life should be introduced, as the life is the highest value.

In 2002 in the case of Pretty v. the United Kingdom the ECtHR held that the very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that "…it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity. […] The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 §1 of the Convention".

I would like to stress three elements in this judgment specifically, which can be challenging from the point of view of dignity and autonomy as well. Firstly, the Court mentioned "what she considers". This means that the Court did not state any criteria for a situation in which the person can choose death. In such a case even a little disadvantage in life could be defined by a person in this way. Secondly, the Court mentioned "mental decrepitude" as a ground which can make life undignified. But here a question arises, whether the person may enjoy personal

autonomy and decide on life or death issues while being mentally ill? The answer seems to be obvious. Finally, the third one is when the Court mentioned as a ground for making life undignified "being in old age". In my opinion such statement undermines the value of the elderly. Such a statement from the Court reminds some form of eugenics. In Haas v. Switzerland the Court developed the idea adding that "... an individual's right to decide the way in which and at which point his or her life should end, provided that he or she was in a position to freely form his or her own judgment and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention".

The ideas expressed in Gross v. Switzerland seem to be ideological support for death even in cases of absence of any illness. Here the Court cited the mentioned ideas and added that "... having regard to the above considerations, and, in particular, the principle of subsidiarity, the Court considers that it is primarily up to the domestic authorities to issue comprehensive and clear guidelines on whether and under which circumstances an individual in the applicant's situation – that is, someone not suffering from a terminal illness – should be granted the ability to acquire a lethal dose of medication allowing them to end their life. Accordingly, the Court decides to limit itself to the conclusion that the absence of clear and comprehensive legal guidelines violated the applicant's right to respect for her private life under Article 8 of the Convention, without in any way taking up a stance on the substantive content of such guidelines".

Thus, the Court considers it possible for states to help people die in cases where they are only elderly or do not wish to become elderly or in any other case instead of calling on the states to take care of such people and showing them social and moral aid.

Positions like these undermine the idea of life as a value in general. In this regard, some authors have already expressed the idea that "the basic argument for assisted suicide is that life has its value only as long as it has a meaning for the person whose life it is…" (E. Drogoń, 'The Right to Die with Dignity', in: T. Gries and R. Alleweldt, Human Rights within the European Union, Berlin: Berliner Wissenschafts-Verlag 2004, 100). Such approaches to human life are risky as ideologically they are full of nihilism to human life and human beings in general, like "do what you want, nobody cares for you". So, in all the aforementioned cases, paternalism can be justified, and the waiver rejected.

There is another important justification against an absolute waiver. In several cases the state shall not stop its protection as the opposite will result in violation of human rights as the highest value. It is important to understand that the protection of human rights does not imply merely the protection of the interest of a concrete person who has entered into relations with the state concerning a special right. By protection of human rights, the state protects the special human right as a value, as a general value. For example, when the state starts an investigation of a murder it is directed not merely to that special case, not only to resolve that special case but also to show its concern about human life in general, that it cares about human

life as a value, as a general value. Investigation in this case is directed also to prevent crime in the future and to educate people. The object of the protection of a human right includes not only the interest of the specific person but also the general interest of the whole society. So, the protection provided by the state does not refer merely to the will of that person and therefore it cannot be waived by a wish of the person because the waiver can be attractive for a specific person but be in contradiction with the will of the society. In this case the waiver can violate the idea and value of the special right.

In the context of the aforementioned the issue of the limits of human rights waiver arises. I would like to discuss these limits in two directions;

→ the scope of the rights which can and cannot be waived,

→ the framework and criteria of a waiver of human rights.

In regard to the first issue I would like to differentiate human rights into two groups by applying the criterion of humiliation of the nature of a human being. I can suppose that a human rights waiver can never be used in regard to those human rights the waiver of which will result in humiliation of a human life and human nature. For example, right to life, right to physical and mental integrity.

What about the rights which can be waived? Such as the right to fair trial, right to freedom of movement, right to freedom of speech etc.? Can these human rights be waived in an unlimited manner? In my opinion some criteria should be applicable to a waiver of these rights too. In my opinion the most reasonable criterion in this regard can serve the criterion of violation of the very essence of the given right. This is a very significant criterion/principle recognized by the case law of the European Court of Human Rights. This principle is also enshrined in the Constitution of the Republic of Armenia. Particularly Article 80 of the Constitution stipulates that the essence of the provisions on basic rights and freedoms enshrined in this Chapter shall be inviolable (The amendments to the Constitution of the Republic of Armenia were introduced through a referendum on 6 December 2015, Article 80).

As for the procedural rights, the waiver here cannot be unlimited either. The main limit here can be the interests of justice, for example in cases where the state appoints an attorney it could act against the wish of the accused to defend himself *pro se*.

3. Practical Realization of a Waiver of Human Rights

3.1. Legal Regulation of a Waiver of Human Rights

No international legal act regulates the relations concerning the waiver of human rights. Some domestic legal acts regulate this phenomenon but mainly in regard to the procedural human rights. The same is true for the case law of the European Court of Human Rights (Poitrimol v. France, Håkansson and Sturesson v. Sweden). In these cases, the European Court of Human Rights developed some principles for the application in regard to the waiver of procedural human rights. Especially in the case of Poitrimol v. France the European Court of Human Rights stated that, 'however, such a waiver must, if it is to be effective for the Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with

its importance. In case of Håkansson and Sturesson v. Sweden the European Court of Human Rights added that "waiver must be made in an unequivocal manner and must not run counter to any important public interest". Therefore, as we can see, the waiver concerning even the procedural rights is not absolute.

The Constitutional Court of the Republic of Armenia also discussed the principles of the human rights waiver in its decision DCC-1403 adopted on February 13, 2018. It stated that "the application of the institution of refusal without reservations may lead to violation of rights". The European Court of Human Rights also developed the legality test for the waiver of human rights. The failure to comply with the test amounts to a violation of a right. The mentioned comes to prove that absolute waiver of human rights is not possible, which is justified as the legal system and the state exist to protect the inviolability of the rights, dignity, and substance of the human being.

In my opinion waiver of human rights is a new emerging legal institution which requires definite legal regulation. All the issues concerning human rights should comply with the principle of legal certainty. To resolve this problem, I would offer to stipulate some legal norms in the domestic legislation. The practical realization of waiver of human rights can be performed via a separate legal act or legal norms stipulated in the basic laws of the states. In the Constitutions the states separately and definitely enshrine the human rights and their limitations. In the same logic, the waiver should be regulated taking into account the tendency of application of this institution by the domestic courts as well as by the European Court of Human Rights.

3.2. The Armenian Case Law on a Waiver of Human Rights

In the Republic of Armenia only one case exists concerning the waiver of human rights (Decision of the Constitutional Court of the Republic of Armenia – DCC-1403, 13.02.2018) The Human Rights Defender of the Republic of Armenia brought a case to the Constitutional Court. The Applicant considers that the challenged provisions regulated by the Criminal Procedural Code contradict Part 2 of Article 67 and Article 79 of the Constitution of the Republic of Armenia insofar as the application of the institution of compulsory participation of a defender contradicts the full exercise of the defendant's right to be defended personally or through his chosen counsel. In the Applicant's opinion, existing legal regulations create a situation in which, on the one hand, the fundamental right of a suspect or accused for the defense, in person or through a lawyer chosen by him, is opposed, and on the other hand, the obligation of the body conducting the criminal proceedings (as part of the right to a fair judicial trial) to ensure effective legal representation, within which the body conducting the proceedings has the right not to accept (and in the case of applying the sanctions as the removal of the defendant from the courtroom, the court does not accept) the refusal of the suspect, accused or defendant from the defender. The Applicant notes that, as a general condition, the defense counsel assumes their authority with the consent of the person accused of a criminal offense (Part 2 of Article 68 of the RA Criminal Procedure Code), whereas in the case of applying sanctions against the defendant without their consent, applying the institution

of mandatory legal representation, a public defender is involved, which indicates a contradiction between these legal regulations and legal uncertainty. The Applicant asserts that the RA Criminal Procedure Code does not specifically and clearly regulate in which case the duty of the state represented by the implementing body to ensure compulsory legal representation prevails over the fundamental right of the accused to defend themselves or through their chosen counsel. Referring to some precedents of the European Court of Human Rights, the Applicant argues that the right of an accused person to have a defender of their choice is not absolute. This right can be ignored or considered secondary by the court if there are relevant and sufficient grounds for this due to the priority interest of the justice. According to the Applicant, the RA Criminal Procedure Code should clearly indicate the boundaries, as well as the criteria and standards by which the body conducting proceedings can determine whether there are actually "relevant" and "sufficient" grounds to consider the existence of a priority interest of justice.

As a result of the consideration of the case the Constitutional Court of the Republic of Armenia held that in the context of realization of the institutions of the protection of human rights and waiver of human rights proportionality should be ensured. The Constitutional Court also stressed that the absolute waiver would result in violation of human rights. The Constitutional Court held that "waiver of human rights shall not become a demand addressed to a state to abandon its positive obligations directed to the protection of human rights. In this case the state should give priority to human rights not only as a possibility of people to choose their behavior but as an absolute value".

3.3. Regulation of a Waiver of Human Rights Within the Jurisdiction of International Bodies

The case law of the European Court of Human Rights refers to the procedural rights. It is worth noting from the very beginning that the European Court of Human Rights does not defend the waiver of human rights in all cases. Some fundamental ideas were expressed by the Court in cases such as Croissant v. Germany, Lagerblom v. Sweden, Correia de Matos v. Portugal, Sakhnovskiy v. Russia, Pishchalnikov v. Russia, Håkansson and Sturesson v. Sweden, Sejdovic v. Italy, Simeonovi V. Bulgaria, Jones v. the United Kingdom, Talat Tunç v. Turkey and others.

In the case of Sakhnovskiy v. Russia the European Court of Human Rights stated that "neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial". As mentioned above in the case of Håkansson and Sturesson v. Sweden the European Court of Human Rights also stressed that "such a waiver must be established unequivocally and must not run counter to any important public interest".

In the case of Sejdovic v. Italy the European Court of Human Rights has also stated that "before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be".

Notwithstanding the fact that the European Court of Human Rights considers it possible to waive the procedural rights under Article 6 of the European Convention on Human Rights, the case law of the Court proves that the opposite, i.e. the absence of waiver under the domestic legislations is not considered to be in breach with the European Convention on Human Rights. Particularly the case of Correia de Matos v. Portugal is worth noting in this sense, as the Court here adopted fundamental legal positions in the context of waiver of procedural rights. In this case the applicant alleged that the decisions of the domestic courts refusing him to conduct his own defense in the criminal proceedings against him and requiring that he be represented by a lawyer had violated Article 6 § 3 (c) of the Convention. The European Court of Human Rights did not find a violation of human rights here. Although judge Pinto De Albuquerque and judge Sajó adopted dissenting opinion concerning this. They were against the statement of absence of the violation.

Concerning the waiver of human rights in the abovementioned context some ideas were expressed by the United Nations Human Rights Committee (HRC) in the Communication No 1123/2002. In this decision the HRC expressed ideas concerning the wish of the person and cases when the state may act against that wish. Particularly the HRC stated that the "right to defend oneself without a lawyer was not absolute. The interests of justice could require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of the trial, or facing a grave charge but being unable to act in his own interests, or where it was necessary to protect vulnerable witnesses from further distress caused if the accused were to question them himself. However, any restriction on the accused's wish to defend himself had to have an objective and sufficiently serious purpose and could not go beyond what was necessary to uphold the interests of justice" (U.N, Doc., CCPR/C/86/D/1123/2002, Communication No 1123/2002, 28 March 2006, para 7.4). "The assessment of whether in a specific case the assignment of a lawyer was necessary in the interests of justice had to be made by the competent courts" (U.N, Doc., CCPR/C/86/D/1123/2002, Communication No 1123/2002, 28 March 2006, para 7.5).

4. Conclusions

Human rights waiver is a new emerging phenomenon. It is an exception from the general rule to protect the human rights. Human rights waiver is a person's demand addressed to the state to not protect his/her rights, to stop performance of its obligations for the protection of human rights. Human rights waiver is not regulated by any international legal act, nor does any domestic law exist specially for the waiver. Some rare case law exists but mainly regarding the procedural human rights.

The aforementioned research showed the necessity to regulate human rights waiver in more detail as it can lead to such consequences as end of life, or interference with mental and physical integrity. Waiver and right to autonomy are strongly linked. But even wish and autonomy cannot be unlimited. The criteria which limit the possibility to waive the human rights should be defined by the domestic legal acts

at the minimum. Vague and not regulated realization of waiver of human rights can lead to violation of human rights.

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ОТКАЗ ОТ ПРАВ ЧЕЛОВЕКА: ПРАВО ИЛИ ВЫЗОВ?

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Автор обсуждает новые тенденции отказа от прав человека. В статье они квалифицируются как новый формирующийся институт права прав человека. Обсуждается определение отказа от прав человека, а также необходимость его законодательного регулирования. Автор представляет существующие определения отказа от прав человека, но не разделяет ни одно из них, в частности, большинство из них определяют отказ от прав человека как неиспользование прав человека, но автор называет это определение пассивным применением прав человека, в то время как отказ от прав человека имеет свое содержание, о котором подробно рассказывается в статье. Отказ от прав человека обсуждается в свете взаимосвязи права на автономию и принципа патернализма. Автор представляет некоторые прецедентное право об отказе от прав человека, которое является очень редким. В частности, автор представляет прецедентное право Конституционного Суда Республики Армения и прецедентное право Европейского суда по правам человека. Правовые позиции упомянутых органов могут служить хорошим критерием при рассмотрении и применении отказа от прав человека. В частности, Конституционный Суд Республики Армения принял решение, посвященное этому вопросу, и квалифицировал отказ от

прав человека как исключение из классического восприятия идеологии прав человека. Автор согласен с идеей, отраженной в решении Конституционного суда относительно соотношения отказа от прав человека и права на автономию, согласно которому право на автономию не может быть абсолютным, и что абсолютный отказ от прав человека может, в свою очередь, привести к нарушению прав человека. В этом контексте автор подчеркивает необходимость определения границ отказа от прав человека, предлагая два важных направления для обсуждения этого вопроса; объем прав, от которых можно и нельзя отказаться, рамки и критерии отказа от прав человека. Автор предлагает также принципы определения границ отказа от прав человека, в частности автор разделяет две группы прав человека в зависимости от того, нарушает ли отказ от этих прав сущность человеческой натуры. Следовательно, отказ от прав, нарушающий сущность человеческой натуры, невозможен. Второй принцип касается тех прав, на которые первый критерий не распространяется. В этом случае может применяться принцип нерушимости самой сущности права, то есть если объем отказа от данного права человека нарушает сущность данного права, то отказ невозможен.

Ключевые слова: права человека, новое право, право отказа от прав человека, автономия, патернализм, новый институт прав человека.

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ADMINISTRATIVE OFFENCE IN THE FIELD OF INTELLECTUAL PROPERTY AS THE GROUND FOR ADMINISTRATIVE LIABILITY

The article deals with homogeneous group of administrative offences - administrative offences in the field of intellectual property as a basis of administrative liability. It is emphasized that the objective features of this administrative offence are its social harm, wrongfulness and punishment, and subjective ones are guilt and subjectivity. It is emphasized that only in the presence of all these features can one speak of qualifying an individual's act as an administrative offence and resolving the issue of bringing him to administrative liability. The definition of the term "administrative offence in the field of intellectual property" is proposed as envisaged by the legislation on administrative liability of socially harmful, unlawful, guilty act, committed by the subjects of such unlawful acts that encroach on the set of property and personal non-property rights to the intellectual results. It is established that all warehouses of administrative offences in the field of intellectual property (art. 51-2, 107-1, 156-3 (in the part concerning intellectual property objects), 164-3, 164-6, 164-7, 164-8, 164-9, 164-13) there are such elements as objective signs and subjective features, which in their unity form the composition of administrative offences of this group. It is noted that the only generic object of these administrative offences is the group of public relations of intellectual property, which are protected by the law on administrative liability, and the subject of this group of public relations are objects of intellectual property. It is proved that the objective side of administrative offences in the field of intellectual property is a set of ways of infringement of intellectual property rights. Attention is drawn to the fact that in practice the violation of intellectual property rights to different objects has different economic, social and legal consequences, and therefore the degree of their social harm is different, and therefore there is a need to differentiate administrative liability depending on the intellectual property. Subjective signs of the administrative offences of this group, which are represented by their subject, are established, and the subjective side is characterized by the fact that they are committed only intentionally.

Key words: administrative liability, administrative offence, administrative misconduct, intellectual property, objective part, ground for administrative liability, subjective part, area of intellectual property.

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1. Introduction

The basis for the application of administrative liability for violation of intellectual property rights is a homogeneous group of administrative offences – administrative offences in the field of intellectual property. We believe that without a clear understanding of the essence of the concept of an administrative offence in intellectual property, an effective solution to the problems of intellectual property protection will be impossible, because its content determines the further directions of legal regulation in this field and is the basis for the legislative enforcement of the relevant legal actions. However, the disclosure of the concept of administrative offence in intellectual property requires, first of all, attention to the general theoretical concept and features of administrative offence, which, long before the legislative consolidation of this definition in the theory of administrative law, was actively developed by many scholars. The issue of defining the term "administrative offence" remains relevant today and is essential not only in theoretical but also in practical aspects. The importance of this area of research lies in the fact that the quality of interpretation of the concept of an administrative offence depends on the resolution of specific issues of administrative law, such as grounds for administrative liability, determining the range of its actors, as well as assessment of administrative offences. In addition, solving these problems is of great practical importance as it will facilitate the proper assessment of this type of offences and the application of administrative penalties for committing them.

2. Analysis of recent research and publications

The issue of the need to separate administrative offences in the field of intellectual property into a separate group of illegal acts is hardly considered by the administrative law science. It should be noted that part of the scientists (V.V. Halunko, T.A. Harbuz, O.M. Golovkova, I.H. Zaporozhets, H.S. Rymarchuk, N.V. Trotsyuk, Ye.V. Yurkova) do not consider to be justified the above arrangement of the rules on administrative liability for offences in the field of intellectual property in the structure of the Special part of the Code of Ukraine of Administrative Offences (hereinafter – the CUAO),

and critically referring to the proposals to consolidate the rules of these articles in separate chapter. They argue that such changes will not only contribute solving any functional problems, but also capable of raising a number of additional issues. However, some of them (T.O. Harbuz, H.S. Rymarchuk) agree that the specifics of legal regulation of public relations in the field of intellectual property and because of the dual nature of objects of intellectual property does not allow to attribute the composition of these administrative offences to administrative offences affecting property, or to administrative offences in the fields of commerce, catering, services, finance and business.

Meanwhile, on the pages of scientific legal literature, there is an increasing number of proposals regarding the need to group articles that assume liability for unlawful encroachments on intellectual property into one structural element of the CUAO. For example, N.V. Trotsyuk noted that it is advisable to set aside a separate chapter in the CUAO for the Protection of Intellectual Property as a Special Legal Relationship Category, which will allow to take into account the peculiarity of the object of the unlawful encroachment. However, the authors of such proposals are not strictly unanimous. Thus, some experts (F.O. Kirilenko, V.A. Svyryda) argue for the need to isolate a special chapter on administrative offences in the field of intellectual property, while others (I.S. Kravchenko, A.H. Maidanevych) support their inclusion in the composition of the existing chapters of CUAO.

The article's objective is to formulate the concept and study of objective and subjective features of an administrative offence in intellectual property as a ground for administrative liability and development of proposals for improvement of legislative regulation of issues of administrative liability for this type of offences.

Methods of research. Philosophical, general scientific and special methods are used to achieve the article's objective. The dialectical method was used to make a comprehensive analysis of the administrative offence in the field of intellectual property. The application of methods of analysis, synthesis, systemic and structural-functional methods allowed to study the main components of an administrative offence in the field of intellectual property. The application of the structural-functional method facilitated a comprehensive study of the administrative-legal relations that arise in the process of violation of intellectual property rights.

3. Basic content

Art. 9 of the Code Of Ukraine of Administrative Offences (hereinafter CUAO) defines an administrative offence as unlawful, guilty (intentional or negligent) act or omission that encroaches on public order, property, citizens' rights and freedoms, in accordance with the established procedure of administration, and under which the law provides for administrative liability (Kodeks Ukrayiny' pro administraty'vni pravoporushennya, 1984, gruden 7). This article defines the general concept of "administrative offence", reveals its material content, legal nature and social essence, analyzing which can formulate the main features of administrative offence, in particular, and offences in intellectual property. Unlawful act in the theory

of administrative law is recognized as an administrative offence if, in the aggregate, it contains all without exception objective and subjective features that distinguish them from lawful behaviour, as well as from other offences (crimes, disciplinary offences, civil law offences). Objective signs of an administrative offence are its social harm, wrongfulness and punishment, and subjective – guilt and subjectivity. Only in the presence of all these signs can one speak of qualifying an individual's act as an administrative offence and resolving the issue of bringing him/her to administrative liability.

We believe that these features are also characteristic of all administrative offences in intellectual property. And the first most significant feature of administrative offences in intellectual property is their social harmfulness, which consists in violation of intellectual property rights and causing damage (tangible and intangible) or threatening to cause them to the actors of those social relations that have arisen due to the use of intellectual creative activities and are protected by legislation on administrative liability. Public harmfulness of an administrative offence means that it causes harm to certain social relations, which are protected by legal rules: state and public order, property, citizens' rights and freedoms, established management order (Olishevs'ky'j, 2016). This harm can be both material and other (moral, organizational, etc.). The act or omission of the entity causes or threatens to cause harm to the objects of administrative and legal protection, in this case an encroachment on intellectual property rights, such as copyright or trademark rights (goods and services mark). Public harmfulness in these cases acts as an objective property of such offences and a real violation of the intellectual property rights relationship, constituting the "destruction of the social wrongdoing in the object – relations of the right to the intellectual property objects" (Selivanenko, 2013). The emergence, alteration or loss of social harm of such action is conditioned by the objective regularity of social development, inextricably linked with those socio-economic processes that take place in society.

Although today there is almost no debate among scholars about the nature and material properties of administrative offences, the aspect of its social danger and harmfulness remains debatable. Some authors (G.I. Petrov, A.M. Yakuba, M.S. Strogovich, Yu.P. Bytyak) exclude public danger from among the signs of administrative misconduct, while others acknowledge its spread both to crimes and to administrative offences. (O.Ye Lunyov, O.F. Shishkov, A.V. Seryogin). V.M. Potsiluiko considers the public danger of administrative misconduct as damaging to public relations, because in the linguistic sense, "dangerous" is harmful, capable of causing harm (Pocilujko, 2017). In our view, an administrative offence should be considered a socially harmful act with a degree of danger less than that found in the criminal offence. The Administrative Offences of Administrative Institution are not called "socially dangerous" – there are definitions such as "occurrence of harmful consequences", "act that harms…", "harm caused", etc. This makes it possible to characterize an administrative offence as socially harmful. That is, harm is an inherent feature of every administrative offence.

As for the assessment of the public harm of administrative violations of intellectual property rights, it occurs at two levels: legislative (to date, the legislator has already placed most of the composition of these offences in the CUAO (Art. 51-2, 107-1, 156-3 (in the part concerning intellectual property), 164-3, 164-6, 164-7, 164-8, 164-9, 164-13) and law enforcement (when public administration entities evaluate its degree in a specific in case of violation of intellectual property rights). Social harmfulness belongs to evaluation concepts, and the criterion of its degree is the objective and subjective features of the composition of the administrative offence in intellectual property: a specific object of intellectual property (the result of a person's literary and artistic activity, the result of his/her scientific and technical activity or the result individualization of goods (services) and their manufacturers), consequences, method of committing an administrative offence, guilt, motive and purpose. The damage caused by the violation in intellectual property finds its assessment in the sanction of the legal rules. Its high level is evidenced by the fines with a solid lower limit. Small amounts of damage are evidenced by the minor offence. Only the assessment of the whole set of features can reveal the gravity of the wrongful act – objective and real harm.

Administrative offences in intellectual property that directly cause damage are manifested in the real, material result (they are called offences with material composition). These include, in particular, the display and distribution of films without a state certificate for the right to distribute and display films (Articles 164-4 of the CUAO), the illegal distribution of copies of audiovisual works, phonograms, videograms, software and databases (Articles 164-9 CUAO). Administrative offences, which involve only danger or the possibility of causing harm and encroach on the legal form, are formal. Such are violations of mandatory rules that outline certain obligations and rights (e.g., infringement of intellectual property rights (art. 51-2 of the CUAO), violation of the legislation governing the production, export, import of disks for laser systems reading, exporting, importing of equipment or raw materials for their production (art. 164-13 of the CUAO).

The legal form of expression of social harmfulness of an administrative offence in intellectual property is its illegality, which indicates the illegality of such acts and their prohibition in the legislation on administrative liability. Unlawfulness is an intrinsic property of any administrative misconduct, which consolidates both the negative assessment of a certain act by the legislator, as a representative of the state, and the actual fact of leveling a legal order that determines the relevant attitude to the person-delinquent (Kalyenichenko, 2016). Unlawfulness, as a sign of an administrative offence in intellectual property, provides for a direct indication of this in the law, that is, it excludes the possibility of administrative liability for actions not provided for by the legislation on administrative offences. The administrative offence is only recognized as such unlawful act for which the lagislator provides for a special type of state coercion – administrative liability. The wrongfulness of an administrative offence is a violation of the mandatory rules established by

the state. The administrative offence can be manifested in both unlawful action and unlawful inaction. In the first case, an act prohibited by law is committed, and in the second, the offender does not act, although the law requires him/her to take active actions. A sign of wrongfulness means that a right that is clearly established in a particular law, or whose violation is specifically enshrined in a special legislative act, is violated. Special legal acts defining the fundamental rights to intellectual property objects are "On copyright and related rights", "On protection of rights to inventions and utility models", "On protection of rights to plant varieties", etc.

Administrative unlawfulness is closely linked to public harm and is an objective manifestation of the real harmfulness of actions for public relations in intellectual property and its legislative evaluation. In addition, administrative unlawfulness is a legal feature of social harm, and its degree determines the objective limits of unlawfulness, beyond which the question of criminalization of this act already arises (Py's'mens'ky'j, 2015). Allocation of administrative unlawfulness as a mandatory sign of an administrative offence is a concrete expression of the principle of legality in administrative law, since administrative liability is subject only to the person who committed a socially harmful act (the actor of misconduct), i.e. an act of specific, conscious and volitional behavior in the form of inaction, which is contrary to administrative law. Due to the presence of such a feature of administrative offences in intellectual property as unlawfulness, among all possible human acts in the specified area, the offences which are the subject of legal regulation of administrative law are distinguished.

Another mandatory feature of administrative offences in intellectual property, which is detected at the time of the offence and reflects its internal psychological content, is the presence of guilt. Thus, an administrative offence is not only a socially harmful, unlawful, but also a guilty act, that is, a result of the offender's will and mind. Guilt implies the presence of a person's own mental attitude to the relevant act and its consequences (Venger, 2015). Guilt forms are of great legal importance. Acting deliberately, the offender is aware of the unlawful nature of his/her act, anticipates and desires (direct intent) or knowingly permits (indirect intent) the occurrence of harmful consequences. An administrative offence may also be committed by negligence. Negligence is manifested in the form of overconfidence or negligence. Overconfidence is that a person anticipates the occurrence of a wrongful, harmful effect, but flippantly counts on its prevention. Negligence is that a person does not foresee the possibility of unlawful consequences, although under these circumstances he/she should and could have foreseen them.

This feature embodies the most important principle of administrative law – the principle of subjective incrimination, that is, liability only for the guilt that arises under Art. 62 of the Constitution of Ukraine. Guilt is the mental attitude of a person to the act or omission he or she commits and their consequences, expressed in cases of infringement of intellectual property rights in the form of intent. It is the fault that determines the very presence of the subjective part of the administrative offence and to a large extent its content (Kozyurenko, 2016).

Administrative offence in intellectual property is a unity of objective and subjective: act and mental (conscious and volitional) attitude to it. As an act cannot be disclosed out of touch with a person's mental attitude to it, so does the content of a mental attitude (guilt) not be determined out of touch with the nature of the act: the result of the intellectual creative activity that the person is harassing, the way of assault, the consequences and other objective features thereof. The guilt largely determines the nature of the act and the degree of its severity and is an important criterion for recognizing it as an administrative offence. The guilt is sometimes called the second substantive feature of an administrative offence and is its obligatory subjective feature. Without fault, there is no wrongdoing, and therefore there can be no administrative influence on one or another act against intellectual property.

Thus, the presence of the offender's guilt in one form or another is an important and necessary attribute of an administrative offence, which facilitates and clarify the assessment, determines the objectivity of the approach in determining the degree and type of aggravation charged to the perpetrator.

An important feature of an administrative offence in intellectual property is its administrative penality, which is understood to mean the threat of punishment for a given offence contained in administrative sanctions in due cases. A specific act can be recognized as an administrative offence only if its law provides for administrative liability (Chy'shko, 2015). As noted above, administrative misconduct is characterized by an internal trait – wrongfulness. This means that a certain act is defined by the legislator as prohibited and in the legislative act is indicated as an administrative offence. If a person commits actions that are prohibited by law or does not act in accordance with a legal act, there is an unlawful act that entails the use of administrative punishment – recovery. It is an outward sign of misconduct – penality. Penality, by its very nature, stems from public harm and administrative wrongdoing: it therefore becomes administratively punishable, since it is socially harmful and provided for by administrative law as an offence.

Thus, the state of administrative punishment is a measure of administrative prevention, since it does not entail negative consequences for the offender, but performs only a preventive function, that is, aimed at preventing the repeated commitment of an administrative offence. Without any administrative sanction, it is impossible to combat any offences (Kolpakov, 2016). However, this does not mean that the punishment provided for in the sanction must necessarily be applied to the person who has committed the act formulated in the disposition of a particular article. A person recognized as an offender may be released from administrative liability. In some cases, the presence of all signs of an administrative offence in a person's act does not mean that the act automatically entails the administrative liability provided for by the Code of Administrative Offences. For example, according to Art. 18 of the Code of Administrative Offences, an act that contains all the features of an administrative offence is not such if it was committed in an emergency. Punishment, as a sign of administrative misconduct, provided for by

Art. 51-2 of the Administrative Code in the form of a specific type of punishment: fine and confiscation of illegally manufactured products and equipment and materials intended for its manufacture. In some cases, particularly in cases of urgent need, the existence of all indications of administrative misconduct may not entail administrative liability. With regard to intellectual property, an urgent need may arise in the following cases: in the case of using the patented claims without the consent of the patentee to create a medicinal product necessary to preserve the life and health of the person (group of people) (My'ky'ty'n, 2016). However, the urgency does not allow for the use of procedures for obtaining the patent owner's license or compulsory license.

And the last sign of this type of administrative offence is their subjectivity. Administrative offences in t intellectual property are acts committed by the subject of the offence, since not every person who commits a publicly harmful administrative-unlawful act is subject to administrative liability (Frolov, Vasy'l'yev, 2014). He/she should be aware of and manage his/her own actions, reach a certain age, and so on. Without this, a person cannot be recognized as an offender, and committing a socially harmful act – an administrative offence. The legal characteristic of the actor of administrative offences in intellectual property allows to determine the social and legal nature of their actors, to identify the causes and conditions that contribute to the development of administrative tort in the field of intellectual property, because, the correct determination of the legal status of the actor of this administrative offence, setting the level and directions of his/her professional training, social, financial status, as well as personal interests and preferences contributes to a complete and objective aligning administrative offences committed by participants in the analyzed field. In other words, the concept of "subjectiveness of an administrative offence in intellectual property" answers the question not only of who can commit a particular offence under specific circumstances, but also in what socio-legal status and using what professional, personal and unlawful behaviour of a specific participant of intellectual property relations may be formed.

4. Conclusions

Thus, an administrative offence in intellectual property can be defined as envisaged by the legislation on administrative liability socially harmful, unlawful, guilty act committed by the actor of such unlawful acts that encroach on the set of property and personal non-property rights to the results of conscious intellectual artistic activity. If a person commits an administrative offence in intellectual property containing the composition of an administrative violation this will be ground for bringing him/her to administrative liability and applying to it appropriate administrative penalties. depending on the type of offence in relation to specific intellectual property objects, liability for violation of rights for which are established by law.

We believe that an urgent measure to improve the legal framework for the protection of intellectual property is the allocation of relevant administrative offences in a separate chapter of the Special part of the CUAO. Certainly,

the integration of rules is not capable of eliminating all the difficulties, since there are also problems that, as the practice shows, usually come to the fore – problems related to the enforcer's personality. But this does not mean that, since there are enforcement problems, the law should not be improved. After all, to achieve a truly effective result of improving the administrative and legal protection of intellectual property, just combining the relevant articles of law in a separate chapter will not be enough. The new structural element of the CUAO should be based on the current concept of intellectual property protection and have an appropriate structure that meets the current requirements.

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АДМІНІСТРАТИВНЕ ПРАВОПОРУШЕННЯ У СФЕРІ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ ЯК ПІДСТАВА АДМІНІСТРАТИВНОЇ ВІДПОВІДАЛЬНОСТІ

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У статті розглянуто однорідну групу адміністративних правопорушень – адміністративних правопорушень у сфері інтелектуальної власності як основи адміністративної відповідальності. Підкреслюється, що об'єктивними ознаками цього адміністративного правопорушення є його суспільна шкода, протиправність та покарання, а суб'єктивними – винність та суб'єктивність. Підкреслюється, що лише за наявності всіх цих ознак можна говорити про кваліфікацію діяння фізичної особи як адміністративного правопорушення та вирішення питання про притягнення її до адміністративної відповідальності. Визначення терміна «адміністративне правопорушення у сфері інтелектуальної власності» пропонується таким, що передбачено законодавством про адміністративну відповідальність за суспільно шкідливий, протиправний, винний вчинок, вчинений суб'єктами таких протиправних дій, що посягають на сукупність майна та особисті немайнові права на інтелектуальні результати. Встановлено, що всі склади адміністративних правопорушень у сфері інтелектуальної власності (ст. 51-2, 107-1, 156-3 (у частині, що стосується об'єктів інтелектуальної власності), 164-3, 164-6, 164-7, 164-8, 164-9, 164-13) існують такі елементи, як об'єктивні ознаки та суб'єктивні ознаки, які у своїй єдності утворюють склад адміністративних правопорушень цієї групи. Зазначається, що єдиним родовим об'єктом цих адміністративних правопорушень є група суспільних відносин інтелектуальної власності, які охороняються законом про адміністративну відповідальність, а предметом цієї групи суспільних відносин є об'єкти інтелектуальної власності. Доведено, що об'єктивною стороною адміністративних правопорушень у сфері інтелектуальної власності є сукупність способів порушення прав інтелектуальної власності. Звертається увага на те, що на практиці порушення прав інтелектуальної власності на різні об'єкти має різні економічні, соціальні та правові наслідки, а тому ступінь їхньої соціальної шкоди різна, та існує необхідність диференціювати адміністративну відповідальність залежно від інтелектуальної власності. Суб'єктивні ознаки адміністративних правопорушень цієї групи, які представлені їх суб'єктом, встановлюються, а суб'єктивна сторона характеризується тим, що вони вчинені лише навмисно.

Ключові слова: адміністративна відповідальність, адміністративне правопорушення, адміністративний проступок, інтелектуальна власність, об'єктивні ознаки, підстава адміністративної відповідальності, суб'єктивні ознаки, сфера інтелектуальної власності.

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THE PHASE-OUT OF NUCLEAR POWER IN GERMANY

Over the past 20 years, political attitudes in Germany towards the nuclear industry have been characterised less by consistency than by some major policy shifts, and the same can be said for the legislation that emerged from these attitudes. Although a number of these about-turns were predictable, others were less so because of their dependence on external factors.

What now looks likely to be the final[1] decision to phase out the civil use of nuclear power in Germany by 31 December 2022[2] raises a whole host of legal questions. In particular, the procedure followed to implement this phase-out provides ample material for debates on questions of constitutionality. Further matters of jurisprudential interest include the agreements concluded with the nuclear industry before the final phase-out decision was taken and the chronologically close political about-face themselves. Finally, a degree of legal uncertainty still surrounds not only the as-yet still unresolved issue of final repositories but also the resurgent debate over the source of funding for the dismantling of nuclear power plants. After providing an overview of the initial situation and the problems arising in connection with Germany's phasing out of the civil use of nuclear energy, this paper will place these issues in their proper legal context before evaluating them and highlighting the connection between these points of nuclear law and the current upheaval in German energy policy.

Key words: nuclear power, Atomic Energy Act Germany, Fukushima power plant accident, German nuclear phase-out decision.

[1] Given that the last Conservative/Liberal (CDU/CSU and FDP) coalition also reneged on its commitment on nuclear power, a further policy reversal in this area is extremely unlikely even in the event of another change of government and would not gain the support of the majority of the public unless other sources of energy were affected by unexpected shortfalls in supply.

[2] The last nuclear power plants to be taken offline pursuant to section 7(1)(a)(6) *Atomgesetz* (AtG) (Atomic Energy Act) will be the reactors Isar 2, Emsland and Neckarwestheim 2.

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A. Legal developments up to the 2011 phase-out decision

Industrial policy considerations were a decisive factor driving the civil use of nuclear energy in Germany from the outset (Di Fabio, 1999, Radkau, 1983, Becker, 2011), even though the energy industry itself initially opposed the use of nuclear power to generate electricity (Radkau, 1983) on grounds of cost. The country's nuclear generation programme only got off the ground with the help of huge state subsidies and the introduction of a liability cap for energy producers (Becker, 2011). These initial problems are indicative of the fact that nuclear power has always aroused a great deal more political interest than other sources of energy,[4] and it should come as no surprise that the nuclear policy U-turns of the past 15 years have been primarily motivated by the differing energy agendas of the respective political camps in government.

I. The first phase-out decision (2000) and the lifespan extensions (2010)

In 2000, after decades of government funding for the nuclear industry (Funding for nuclear power was initially given first place among the stated aims of the Act) (Bundestag, 1959, Becker, 2011), the SPD/Green coalition in power at the time and the relevant energy companies reached an agreement on a gradual phasing out of the use of nuclear power, known as the "Nuclear Consensus I" (Federal Government, 2000). The Nuclear Phase Out Act (Bundestag, 2002) adopted in 2002 codified the implementation of this agreement. Key features of the amendments made at the time to the Atomic Energy Act included: first, a ban on new nuclear plants and, second, provisions limiting the residual electricity volumes of the 20 existing nuclear plants to a total of 2 623 TWh (Federal Government, 2000, Schneehain, 2005, Fillbrandt and Paul, 2012). The volumes were initially determined on an individual basis for each nuclear plant, but the option was given to transfer them in order to encourage early

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[4] It should, however, be noted that funding for the coal industry under the "Century Contract" and the switch to renewables under the Renewable Energies Act were also largely driven by state energy policy.

decommissioning of individual plants (De Witt, 2012, Mann, 2009). The last nuclear power plant was expected to go offline in 2021 on the basis of these provisions (Kloepfer and Bruch, 2011).

The "Energy Concept 2050" presented in September 2010 by the Conservative/ Liberal coalition, which subsequently came to power, referred to nuclear power as a "bridging technology" that could be used to reduce CO2 emissions on a transitional basis until such time as renewables provided the bulk of the country's energy (Federal Government, 2010, Fillbrandt and Paul, 2012). The 11th Amendment to the AtG accordingly increased the residual electricity volumes for the nuclear power plants, thus extending their lifespans by an average of 12 years (Bundestag, 2010). This amendment, known as the "Nuclear Consensus II" (Federal Ministry for Economic Affairs and Energy, 2010), was again preceded by negotiations with the energy industry. In a draft paper (the "Development Fund Agreement"), the nuclear industry and the Federal Government reached an arrangement that some of the additional revenues resulting from these lifespan extensions should go towards an "Energy and Climate Fund" (The Fund was set up by the Act on the Creation of a Special Energy and Climate Fund of 8 December 2010, BGBl 2010 I, p. 1807, later amended by Article 1 of the Act of 29 July 2011, BGBl 2011 I, p. 1702). The Federal Government also introduced a nuclear fuel tax (Bundestag, 2010), even though the parties had failed to reach a final agreement on this issue.[5] The 12th Amendment to the AtG (Bundestag, 2010) tightened up safety procedures for nuclear power plants in view of the length of time they had been in operation.[6]

II. The legal problems posed by "done deal" legislation

Negotiations therefore took place between the Federal Government and the energy industry in advance of both the "first" phase-out decision taken by the SPD/Green coalition in 2000 and the life extensions adopted by the Conservative/Liberal coalition in 2010. In each case, the Bundestag (the lower chamber of the German Parliament) was involved only after an agreement had been reached, and its role was limited to adopting parliamentary acts to lend legislative force to the substance of these agreements. From a legal point of view, this begs the question of why the concerned governments obtained prior consent from the energy industry, and whether "done deal" legislation of this kind can be reconciled in any way with rule-of-law principles.

The answer to the first question differs according to the case being discussed. Back in 2000, the big four energy suppliers still generated over 80% of Germany's electricity, and so a sustainable energy policy could be developed

[5] See the provisions of section 2 of the Development Funds Agreement, which provide for a reduction in funding if a nuclear fuel tax or similar tax exceeding an annual sum of EUR 2.3 billion is levied.

[6] For very informative points on the effectiveness of these directives in relation to the actual greater need for safety improvements and the risk associated in particular with older nuclear power plants, see Renneberg, W. (2011). *Laufzeitverlängerung und nukleare Sicherheit – zum rechtlichen und technischen Zusammenhang von 11. und 12. AtG Novelle* [Lifespan extensions and nuclear safety – on the legal and technical context of the 11th and 12th Amendments to the AtG]. ZNER. Vol. 15. Ponte Press Verlag, Bochum. p. 106 et seq.

only in co-operation with these companies rather than in opposition to them. The Federal Government was keen to avoid the avalanche of appeals which the energy providers would otherwise have lodged in response to the planned phase-out of nuclear power. A consensus was also intended to bridge the deep divisions within German society over the issue of nuclear power. By way of contrast, the life extensions for currently operational nuclear power plants granted under the second Nuclear Consensus in 2010 were, on the whole, good news for the energy providers thanks to the additional revenues they could expect to receive from power plants which, in most cases, had already been written off the balance sheet, regardless of the fact that some of these revenues would be siphoned off by the Federal Government to fund the development of renewables. The Nuclear Consensus II thus essentially consisted of little more than a *quid pro quo* for the lifespan extensions.

Doubts about the compatibility of this approach with the dictates that the rule of law stems from the principle of democracy (Article 20(1) and (2) of the Basic Law (*Grundgesetz*) (GG)) and the separation of power (GG Article 20(2) sentence 2). In order to ensure that public authority emanates from the people as a principle of democracy, the people must be able to endorse or reject particular policies in elections and referenda, and speeches held for and against the policies in Parliament must make it clear who is responsible for specific political decisions so that this right can be exercised effectively. Every citizen must also be granted an equal opportunity to influence political decisions. Prior arrangements with parties likely to be affected by a future piece of legislation place these parties in a privileged position compared to average citizens who are unable to influence specific legal provisions (Kloepfer, 2012, Sauer, 2004). Holding these negotiations behind closed doors also results in a lack of transparency over political positions, and this is particularly true in cases where the Federal Government presents Parliament with a delicately balanced set of regulations that has emerged from negotiations, in order for them to be made into law with as few amendments as possible. This significantly curtails Parliament's constitutionally guaranteed power of discretion (Schorkopf, 2000), as well as infringes on the "theory of essentiality" and violates the principle of the separation of power (Morlok, 2003, Sauer, 2004).

Each government took steps to avoid these accusations of unconstitutionality by painstakingly ensuring that the agreements with the nuclear power plant operators could not be deemed legally binding contracts (Schorkopf, 2000, Hellfahrt, 2003, Schoch, 2005; for a different view, see Frenz, 2002) which refers to a binding obligation on the grounds of the detail and accuracy of the agreement, the way it was presented to the public and the political confidence established on this basis.), since an unamended contractual agreement made into law by the parliamentary majorities backing the Government would have been problematic for the aforesaid constitutional reasons. Criticism on grounds of unconstitutionality is accordingly unfounded if it is assumed that the outcome of the consensus falls under the heading

of "informal state action" (Langenfeld, 2000, Schorkopf, 2000) and that Parliament was theoretically able to amend the details of the agreement when making it law.

B. The 2011 "nuclear phase-out"

Only a few short months after Germany's nuclear power plants were granted life extensions, the same Conservative/Liberal coalition led by Chancellor Angela Merkel made an about-face on nuclear policy. In the aftermath of Japan's Fukushima Daiichi nuclear power plant accident on 11 March 2011, and in response to the public uncertainty fuelled by this disaster, the Federal Chancellor announced an initial "moratorium" on 14 March 2011. This moratorium involved a three-month suspension of operation of Germany's seven oldest nuclear power plants[7] and the permanent decommissioning of the Krümmel plant, which had already been taken offline. The Reactor Safety Committee was also tasked by the Federal Government with carrying out a comprehensive safety assessment of all of the country's 17 nuclear power plants (CDU/CSU and FDP groups, 2011). At around the same time, the Ethics Committee led by the former federal environment minister, Prof. Dr. Klaus Töpfer, delivered an energy strategy for the Federal Republic of Germany ("A Safe Energy Supply") that gave absolute priority to the issue of nuclear safety (Ziehm, 2012). This strategy formed the basis for the 13th Amendment to the AtG (Bundestag, 2011) adopted on 6 June 2011, which rescinded the previous increases in residual electricity volumes, permanently decommissioned the nuclear power plants shut down under the moratorium and set a date for the final shutdown of each of the nine remaining power plants[8].

The plant operators E.ON and RWE, and later also Vattenfall, responded by lodging appeals with the Federal Constitutional Court.[9] Vattenfall also sought recourse from the Washington-based International Centre for Settlement of Investment Disputes.[10] The legality of the moratorium imposed in March 2011 has been challenged, and doubts have been raised regarding the future applicability of the Energy and Climate Fund Act. These legal issues will be examined below.

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[7] The reactors in question were Neckarwestheim I, Philllipsburg I, Biblis A and B, Isar I, Unterweser and Brunsbüttel, all of which were commissioned before 1980.

[8] Compare AtG section 7(1a) in conjunction with Annex 3 Column 2.

[9] By way of contrast, the power plant operator EnBW Energie Baden-Württemberg AG (EnBW) cannot cite the infringement of fundamental rights and is thus not entitled to lodge a constitutional appeal with the Federal Constitutional Court due to the fact that it is now a fully state-owned company.

[10] There is some controversy over the issue of whether Vattenfall is entitled to lodge an appeal with the Federal Constitutional Court as a foreign legal person, given that its parent company is fully owned by the Swedish State. In this respect, see Kloepfer, M. (2011), "13. *Atomgesetznovelle und Grundrechte*" (13th Amendment to the Atomic Energy Act and Fundamental Rights) in *Deutsches Verwaltungsblatt* (DVBl.), Vol. 126, Heymanns Verlag, Cologne, p. 1439; Schneehain, A. W. (2005), *supra* note 8, p. 177; or, for an alternative view, see Bruch, D. and H. Greve (2011), "*Atomausstieg 2011 als Verletzung der Grundrechte der Kraftwerksbetreiber?*" (The 2011 nuclear phase-out as an infringement of the fundamental rights of the power plant operators?), DÖV, Vol. 64, W. Kohlhammer GmbH, Stuttgart, p. 794 (796); Wallrabenstein, A. (2011), "*Die Verfassungsmäßigkeit des jüngsten Atomausstiegs*" (The constitutionality of the latest nuclear phase-out) in *Humboldt Forum Recht [HFR]*, Vol. 11, available at: www.humboldt-forum-recht.de, p. 113. For similar conclusions, see also Ziehm, C. (2012), *supra* note 22, p. 222.

I. Underlying factors

The Fukushima Daiichi disaster was undoubtedly the de facto trigger for the decision to rescind the life extensions, which had only been recently granted. According to the explanatory statement for the 13th Amendment to the Atomic Energy Act: "Despite the tragic events in Japan, considerations relating to security of supply, climate protection and the availability of reasonably priced energy mean that it is not yet possible to stop using nuclear power immediately and completely. At the same time, however, the events in Japan mean that the risks associated with nuclear power must be reassessed." (CDU/CSU and FDP groups, 2011 (draft).

This paper is unable to assess the extent to which the events in Japan did in fact alter the safety profile of German nuclear power plants, and whether it was in fact Fukushima that caused the Federal Government to reassess the situation and revise its opinion, or whether this decision was instead made with one eye on the forthcoming electoral campaign, as supposed by many.[11] What can be stated with a degree of certainty is that a substantial majority of Germans were opposed to the continued use of nuclear power in Germany in the immediate aftermath of the Fukushima disaster (Tagesschau.de, 2011). In the opinion of the Federal Government and the Ethics Committee, an immediate phase-out was incompatible with the three basic axioms of German energy supply, namely: security of supply, appropriate pricing and climate protection (Ethics Committee, 17/6070). Detailed preparations were therefore made for an "energy revolution", which would allow the use of nuclear power to be phased out in the medium term. As well as a gradual phase-out of nuclear power, the package of measures adopted to implement this "energy revolution" provided for an even more ambitious use of electricity generated from renewables.

II. The moratorium of March 2011

A first step towards the phasing out of nuclear power was taken with the moratorium announced by Federal Chancellor Merkel on 14 March 2011. A number of minister-presidents of the federal states were consulted before the announcement,[12] but the Bundestag was not. The moratorium therefore raises a number of legal concerns that have been debated not only in expert commentary but also by the Higher Administrative Court in Kassel (Higher Administrative Court of Kassel, 2013) and, at second instance, the Federal Constitutional Court (Federal Administrative Court, 2013).

[11] This was at least the view held by the majority of Germans following the phase-out announcement. In a survey carried out by ARD-Deutschlandtrends on 9 June 2011, 57% of Germans stated that Federal Chancellor Merkel and her Government had decided to phase out nuclear power as a pre-election strategy. URL www.tagesschau.de/inland/deutschlandtrend1342.html.

[12] These were the minister-presidents for Bavaria, Schleswig-Holstein, Baden-Württemberg, Hessen and Lower Saxony; see the statements made at the Federal Government press conference on 15 March 2011. URL: www.bundesregierung.de/ContentArchiv/DE/Mitschrift/Pressekonferenzen/2011/03/2011-03-15-statement-nutzung-kernenergie.html.

1. Background information

The Federal Government's announcement indicated that the recently adopted statutory lifespan extensions would be suspended under the moratorium and that the oldest nuclear power plants would consequently have to be taken offline. A few days later, AtG section 19(3), sentence 2, No. 3, was cited as the legal basis for this (at the time temporary) decommissioning order, and, on the orders of the Federal Ministry of the Environment pursuant to GG Article 85(3), the competent federal state ministries issued operating bans on this basis to the nuclear power plants concerned.[13] All of the plant operators complied with these decommissioning orders.

2. Legal considerations

Questions can, however, be raised about the very idea behind the moratorium. The announcement by the Federal Chancellor made it clear that the life extensions granted to German nuclear power plants under the law adopted on 8 December 2010 would be rescinded by the moratorium (Bundeskanzlerin.de, 2011), and the Federal Government believed that this would result in the seven oldest nuclear power plants being forced to stop operating on the basis of the previously adopted provisions on lifespans, given that they would have used up all of their residual electricity volumes (Kloepfer, 2012, Kloepfer and Bruch, 2011). In fact, however, all of the power plants except for Neckarwestheim I would have had sufficient residual electricity volumes to continue operating, meaning that the power plants could still have remained online under the regulations previously adopted by the Conservative/Green coalition (Kloepfer, 2012). On its own, therefore, the "disapplication" of the formerly adopted 11th Amendment to the AtG would not have delivered the desired consequences in law.

The moratorium as a first step towards the phasing out of nuclear power was furthermore manifestly unconstitutional. The mere "disapplication" of the 11th Amendment to the Nuclear Act by the executive violates the principle of the primacy of law (GG Article 20(3)) (Kloepfer, see above), since a formally adopted parliamentary law cannot be annulled by means of a simple decree, let alone a mere declaration of political intent by the Federal Government, at the very least as a basic principle of the separation of powers (Ewer and Behnsen, 2011,

[13] See Rebentisch, M. (2011) "*Kraftwerks-Moratorium versus Rechtsstaat*" (Power plant moratorium versus the rule of law), NVwZ, Vol. 15, C.H. Beck Verlag, Munich, p. 533; according to Ewer, W. and A. Behnsen (2011), "*Das 'Atom-Moratorium' der Bundesregierung und das geltende Atomrecht*" (The "nuclear moratorium" of the Federal Government and the applicable nuclear law), *Neue Juristische Wochenschrift* (NJW), Vol. 64, C.H. Beck Verlag, Munich, p. 1183, instructions were not issued by the Federal Environment Ministry; instead, a consensus was negotiated between the Federal Chancellor and the minister-presidents. In its ruling, the Higher Administrative Court of Kassel assigned responsibility to the federal state authority on the basis of AtG section 24 and section 2 sentence 1 No. 6 of the Ordinance on Responsibilities in the Area of Nuclear and Radiation Protection, irrespective of any instructions that may have been issued.

Kloepfer M. see above). One of the fundamental dictates of the democratic rule of law is the executive's compliance with the law (Huster, and Rux in Epping and Hillgruber, 2013, Sachs in Sachs, 2011, Ewer and Behnsen, 2011), and so it can be concluded without doubt that the Chancellor's announcement of a purportedly binding moratorium was unconstitutional (in the same vein, see also Kloepfer and Bruch, 2011, Papier, 2011).

Given that the legal basis for the temporary suspension was cited several days after the Federal Chancellor's announcement as AtG section 19(3), sentence 2, No. 3, and reference was made to the regulatory grounds for the measure (Schmale H., 2011), the decommissioning orders issued by the relevant state ministries on this legal basis could also be deemed unlawful in that they met neither the formal nor the *de facto* requirements of the aforesaid AtG section 19(3)[14]. The operator of the Biblis A and B plants was not consulted during the proceedings before the Kassel-based Higher Administrative Court on formal grounds, for example, even though such consultations were neither superfluous nor remediable (VGH Kassel, supra note 27, p. 369). The key substantive requirement imposed by AtG section 19(3) is the presence of a risk to life, health or property due to the ionising radiation. As a basic principle, the term "risk" is used in nuclear law, as in other legal contexts, to refer to a situation in which there is an adequate likelihood of objective harm to legal interests in the foreseeable future if no counter-measures are taken (Schoch in Schmidt-Aßmann and Schoch, 2008; Mann, 2012). Factual indications that a suspected risk may exist are sufficient to meet the definition of a risk (Federal Administrative Court, 1985; Schoch, 2008; Mann, 2012); in the same vein, see also the grounds put forward by the competent Federal Minister for the Environment and Reactor Safety on 18 March 2011, who regarded "the abstract prevention of risks and the mere suspicion of risk" as sufficient to establish that the requirements set out in AtG section 19(3) have been met.), but the risk must be concrete rather than abstract (VGH Kassel, supra note 27, p. 371; Kloepfer and Bruch, supra note 9, p. 386). The abstract "residual" risk invariably associated with a nuclear power plant has already been deemed to provide inadequate grounds for a decommissioning order pursuant to AtG section 19(3) in the Kalkar ruling by the Federal Constitutional Court (Federal Constitutional Court, 1978). Instead, specific systemic safety concerns must exist in relation to the power plant in question (BVerfGE, 1989, VGH Kassel, supra note 27, p. 371). The broad based "reassessment of risk" announced by the Federal Government in response to the "events in Japan" did not meet these

[14] VGH Kassel, *supra* note 27, p. 368, notes correctly that the real legal basis is AtG section 19(3) sentence 1 and that sentence 2 No 3 determines only the consequences in law. In formal terms, this means that the basis for the claim is no longer valid; in the same vein, see also Rebentisch, M. (2011), *supra* note 31, p. 534.

criteria (VGH Kassel, supra note 27, p. 373), since the fact that both earthquake and flood risks had already been accounted for in the permits granted to German power plants under the Atomic Energy Act (VGH Kassel, supra note 27, p. 373; Battis and Ruttloff, 2013) meant that the disaster in Japan provided no new grounds for a reassessment. The explanatory statement for the 11th Amendment to the AtG even made specific reference to the particularly high safety standards maintained by German nuclear power plants as justification for the life extensions granted thereby (VGH Kassel, see above), and the existence of a tangible suspected risk, let alone a risk within the meaning of AtG section 19(3), can accordingly be ruled out.

A final point worthy of criticism relates to the authorities' failure to exercise discretion in relation to the decommissioning order, the deliberations behind which were not explained in any way by the very brief and formulaic statement of grounds (Rebentisch, 2011, Battis and Ruttloff, 2013). Detailed explanations justifying the proportionality of the measure are particularly important in cases where plants are suspended on an *ultima ratio* basis (see above), and a simple reference to "the events in Japan" or the age of the plants neither demonstrates the need for the measure nor clarifies the considerations that led to it (VGH Kassel, supra note 27, p. 374).

3. Interim conclusion concerning the moratorium of March 2011

The manifest unconstitutionality of the moratorium announced by Federal Chancellor Merkel is compounded by the fact that the decommissioning orders issued by the federal ministries on the basis of AtG section 19(3) were unlawful in both procedural and substantive terms. The Kassel Higher Administrative Court consequently ruled in favour of RWE, the operator of Biblis A and B, in proceedings on this issue.

III. The 13th Amendment to the Atomic Energy Act

The 13th Amendment to the AtG adopted on 31 July 2011 had two main aims. One aim was to withdraw the additional residual electricity volumes that had been granted to the nuclear power plants only eight months earlier by means of the 11th Amendment to the AtG, and the other was to set the first ever binding dates for the closure of each individual power plant, in order to prevent operational life being extended by residual electricity volumes being transferred between the power plants with the result that some could operate beyond their "proper" remaining lifespan (for a detailed examination of this possibility, see Mann T., 2009, supra note 8, p. 17 et seq.). This brought about only a small change in the final phase-out date, however, since the last power blocks will now be shut down on 31 December 2022 at the latest (Isar 2, Emsland and Neckarwestheim 2) (see AtG section 7(1a) sentence 1 No 6), whereas the assumed shut-down date for the last nuclear power plant had been 2021 under the first phase-out strategy.

The power plant operators were opposed to this flip-flop on nuclear policy and brought various legal actions[15] and, as was the case when the first nuclear phase-out was announced,[16] the constitutionality of the measure was debated in the jurisprudential literature. The legal arguments mainly focused on issues relating to the legislative process and compatibility with the power plant operators' fundamental rights, with particular reference to GG Articles 14, 12 and 3.

The author developed already in 2015 his opinion, that it can be concluded that the 13th Amendment to the AtG does not infringe GG Articles 14, 12 or 3 and would stand up to examination by the Federal Constitutional Court and that a ruling in favour of the applicants would be unlikely on the basis of this considerations (Mann/ Sieven, 2015). With its ruling from February 2016 the Federal Constitutional Court found a differentiated answer (see section C. III 2)

C. Developments after the 13th Amendment to the AtG

In response to the 13th Amendment to the Atomic Energy Act, the power plant operators pursued various remedies against the nuclear phase-out measures and legislation in order to establish the unconstitutionality of the 13th Amendment to the AtG or to claim compensation.

In procedural terms, a distinction should be made between the remedies pursued by the operators against the 13th Amendment on a primary basis and the compensation claims lodged on a secondary basis.

I. Constitutional appeals

E.ON, RWE and Vattenfall lodged a constitutional appeal to the Federal Constitutional Court in Karlsruhe against the 13th Amendment to the AtG (BvR 2821/11, BvR 321/12, BvR1 456/12). This "route to Karlsruhe" was, if nothing else, financially beneficial for the companies. The decommissioning and dismantling reserves that the power plant operators are obliged to hold under commercial law (See section 249 of the Commercial Code (Handelsgesetzbuch) (HGB), according to which companies must build up reserves for future liabilities.) are not taxed and are freely available to the companies, which means that they resemble interest-free loans (Ziehm, 2012). The reactors that have already been taken offline cannot be

[15] More details on this issue are provided below.

[16] In this respect, see also Schneehain, A.W. (2005), *supra* note 7; Di Fabio, U. (1999), *supra* note 1; Hellfahrt, D. (2003), *supra* note 3; Langenfeld, C. (2000), *supra* note 20; Koch, H.J. (2000), "*Der Atomausstieg und der verfassungsrechtliche Schutz des Eigentums*" [The nuclear phase-out and the constitutional protection of property] in *Neue Juristische Wochenschrift* [*NJW*], Vol. 53, Verlag C. H. Beck, Munich, p. 1529 et seq.; Kruis, K. (2000), "*Der gesetzliche Ausstieg aus der Atomwirtschaft und das Gemeinwohl*" (The legislative phasing out of the nuclear industry and the common good), DVBl., Vol. 115, Carl Heymanns Verlag, Cologne, p. 441 et seq.; Rebentisch, M. (2002), "*Rechtliche Zweifelsfragen der gesetzlichen Beendigung der Kernenergienutzung durch Strommengenregelungen*" (Legal questions regarding the statutory discontinuation of the use of nuclear power on the basis of residual electricity volume regulations), *Festschrift für Jürgen F. Baur*, Nomos Verlag, Baden-Baden, p. 623 et seq.; Wagner, H. (2001), "*Atomkompromiss und Atomausstiegsgesetz*" (Nuclear compromise and the Nuclear Phase-Out Act), NVwZ, Vol. 20, Verlag C. H. Beck, Munich, p. 1089 et seq.

dismantled until the constitutional appeals have been settled, and so the companies will continue to dispose of these reserves until a ruling is handed down by the Federal Constitutional Court.

II. Settlement proceedings before the ICSID

The Swedish parent company Vattenfall AB also lodged an application for investment settlement proceedings against the Federal Republic of Germany on 20 December 2013 (ICSID Case No. ARB/12/12) with the International Centre for Settlement of Investment Disputes (ICSID) in Washington. The legal basis cited was Article 26 of the Energy Charter Treaty, which provides for the possibility of settlement proceedings between an investor and a contracting party (Energy Charter Treaty, 1994), Buntenbroich D. and M. Kaul, 2014). In its application for proceedings, Vattenfall submitted that the German nuclear phase-out and the resulting loss of its investments in the nuclear power plants it owns (Brunsbüttel and Krümmel) and in which it has shares (Brokdorf) represent an infringement of its investment rights (Buntenbroich and Kaul, 2014). No details have been made public regarding the exact provisions of the Energy Charter Treaty which Vattenfall claims have been infringed or the amount of compensation it has demanded[17]. The company's application is, however, generally believed to have a higher chance of success than the appeals before the Federal Constitutional Court, since an infringement of investor trust could conceivably have been committed on the basis of the criteria used in the settlement proceedings (Winter, 2013, Buntenbroich and Kaul, 2014).

III. Compensation claims

There are various aspects of the nuclear phase-out that can be used as a basis for the enforcement of compensation claims by the nuclear power plant operators.

1. Moratorium

In chronological terms, the first grounds for compensation arose in connection with the temporary operating bans imposed by the federal state environmental authorities under the three-month moratorium. After an appeal by the operator RWE was initially allowed in an interim ruling by the Higher Administrative Court of Kassel on the grounds that there was a genuine intention to pursue a subsequent compensation claim with a reasonable chance of success against the Federal State of Hessen through the civil courts (VGH Kassel, supra note 27, p. 634), the unconstitutionality of the moratorium in formal and material terms was established in two judgments by the Higher Administrative Court concerning the power plants Biblis A and B[18]. These judgments became legally binding after the Federal Administrative Court dismissed the appeals lodged by the Federal State of Hessen[19]. According to figures quoted in the press, RWE AG suffered losses of approximately EUR 187 million as a result

[17] Ibid. at p. 3, also for a more detailed examination of the issues relating to the transparency of proceedings before the ICSID.

[18] Ibid. at p. 367 et seq.

[19] Ibid. at p. 236 et seq.

of being forced to shut down Biblis A and B (Legal Tribune Online, 2013). In 2014, E.ON also lodged a claim for compensation of some EUR 250 million in connection with the unlawful decommissioning of its power plants Isar 1 and Unterweser (Frankfurter Allgemeine Zeitung, 2014.

Public liability claims (BGB section 839 in conjunction with GG Article 34) and claims of encroachment equivalent to expropriation are potential grounds for these compensation demands (VGH Kassel, supra note 27, p. 634 et seq., Battis and Rutloff, 2013), but the key criterion for both, as already established by the legally binding judgment of the Higher Administrative Court of Kassel, is the performance of an unlawful action by the state. As demonstrated above (section C. II) that the authorities did directly encroach upon the owners' right of use within the meaning of GG Article 14. The encroachment furthermore constitutes a "special sacrifice" for the power plant operators, such that encroachment equivalent to expropriation should provide suitable grounds for a compensation claim. Public liability claims can be enforced alongside claims relating to an encroachment equivalent to expropriation and would have a good chance of success, although they also require the establishment of fault. In spite of the fact that the Federal Environment Ministry issued "*de facto* instructions" to the federal state authorities in connection with the moratorium, the Higher Administrative Court of Kassel found that the Hessen-based nuclear regulatory body was responsible for the operating bans (VGH Kassel, supra note 27, p. 373 et seq.). Questions can therefore be raised regarding the extent to which the Federal State of Hessen would be indemnified by the Federal Government in the event that the Court ruled against it[20].

2. 13th Amendment to the Atomic Energy Act

As indicated above, the 13th Amendment to the AtG contains no provisions concerning financial compensation for the curtailment of remaining lifespans. Since the reductions cannot be deemed expropriation within the meaning of GG Article 14(3), any compensation demands would again be based on claims relating to an encroachment equivalent to expropriation or public liability claims (Wagner G., 2011), Durner W., U. Di Fabio and G. Wagner, 2011). As emerged from the analysis in section C. III above, however, the 13th Amendment to the AtG differs from the moratorium in that it can be deemed constitutional, and so any such claims would be dismissed due to the lack of any unlawful action by the authorities.

Irrespective of this fact, compensation claims have been pursued by E.ON, RWE and Vattenfall, whose management boards believed that legal action must be taken to avert the risk of the billion-euro losses which may result from the nuclear phase-out (Bruch D. and H. Greve, 2011), if only to discharge their duty of diligence under corporate law, namely the Stock Corporation Act, AktG (*Aktiengesetz*) section 93. E.ON and RWE have therefore lodged compensation claims of at least EUR 8 billion and EUR 2 billion respectively against the Federal

[20] The legal basis would be GG Article 104a(2) und (5) sentence 1.

Government (Spiegel-online, 2012), although these claims would be doomed to failure if the constitutional appeals against the 13th Amendment to the AtG are dismissed. It was expected that, in the event that the Federal Constitutional Court does find the 13th Amendment to the AtG unconstitutional, the legislator would have the option of adopting a compensation clause with retrospective effect in order to maintain the proportionality of the nuclear phase-out (Battis and Ruttloff, 2013), supra note 43, p. 824.).

In 2016 the Federal Constitutional Court came to a decision on the 13th Amendment to the AtG (Federal Constitutional Court, 2016). He did not complain about the intent of the legislator to phase-out of nuclear energy production, because the judges accepted a leeway in decision-making for the parliament. The accident in Fukushima was, in that perspective, a reason to strengthen the efforts in protecting the resident population and the environment by phasing-out of nuclear technology faster. But on the other hand, according to the Court, the 13th Amendment did violate property rights, as far as the energy supply companies had confidence in the guaranteed residual electricity volumes, which were given to them in 2010 ("frustrated investment"). The Federal Constitutional Court called upon the legislator to make a compensation law. This law was enacted in 2018 (Bundestag, 2018).

3. Nuclear fuel tax

By way of contrast, the nuclear power plant operators have a very good chance of successfully claiming back the nuclear fuel tax first imposed in 2010 by the 11th Amendment to the AtG, and appeals to this effect were lodged by E.ON, RWE and EnBW with the fiscal courts. Following rulings by the Fiscal Courts of Hamburg and Munich, which questioned the constitutionality of the nuclear fuel tax (Fiscal Court of Hamburg, 2011, Fiscal Court of Munich, 2011), the Fiscal Court of Hamburg finally deemed the tax unconstitutional and referred the case first to the Federal Constitutional Court and second to the ECJ on the grounds of possible infringements of EU law (Fiscal Court of Hamburg, 2013). The Fiscal Court of Hamburg granted the power plant operators interim relief in a number of rulings handed down on 11 April 2014 (Fiscal Court of Hamburg, 2014), since serious doubts had emerged as to the constitutionality and EU-law compliance of the Nuclear Fuel Tax Act. In the court's opinion, the nuclear fuel tax was not a tax on the consumption of nuclear fuels or electricity, but a stand-alone tax that levied the profits of the power plant operators, which meant that the Federal Government was wrong to cite its legislative competence in the area of taxes on consumption. The Fiscal Court of Hamburg furthermore regarded the tax as incompatible with EU law on the grounds that the principle of "output taxation" enshrined in the EU Energy Taxation Directive prohibits any extra taxation of energy products on top of the taxation of the electricity itself. This ruling issued in summary proceedings means that the power plant operators that lodged the appeal must be paid over EUR 2.2 billion in reimbursed nuclear fuel tax before the legal situation is finally resolved.

D. Conclusions

The legislative steps taken by Germany to implement its nuclear phase-out are, in many respects, a counter-example of good law-making, and the moratorium imposed by the Federal Government in 2011 represents a particularly blatant infringement of the Basic Law. By way of contrast, it can, in the author's opinion, be concluded that the 13th Act Amending the Atomic Energy Act, which laid down the legal framework for the nuclear phase-out, is constitutional since it balances the interests of the energy industry and consumers against public welfare concerns. Although there are various controversial points of detail, the legislator must ultimately be granted a broad prerogative on key issues where legal matters must take second place to political considerations. Having recognised the socially controversial nature of the debate on final repository sites, the Bundestag has also adopted a legal framework in the form of the Repository Site Act that safeguards greater public involvement while, at the same time, deliberately accepting the curtailment of legal redress for citizens brought about by aspects of the "planning by law" process.

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48. In this respect, see also Schneehain, A.W. (2005), *supra* note 10; Di Fabio, U. (1999), *supra* note 3; Hellfahrt, D. (2003), *supra* note 3; Langenfeld, C. (2000), *supra* note 25; Koch H. J. (2000). Der Atomausstieg und der verfassungsrechtliche Schutz des Eigentums [The nuclear phase-out and the constitutional protection of property]. *Neue Juristische Wochenschrift [NJW] – New legal weekly*. Vol. 53, Verlag C. H. Beck, Munich, p. 1529 et seq. [in German]; Kruis, K. (2000). *Der gesetzliche Ausstieg aus der Atomwirtschaft und das Gemeinwohl" [The legislative phasing out of the nuclear industry and the common good]*. Gologne: Carl Heymanns Verlag [in German]; Rebentisch, M. (2002). Rechtliche Zweifelsfragen der gesetzlichen Beendigung der Kernenergienutzung durch Strommengenregelungen [Legal questions regarding the statutory discontinuation of the use of nuclear power on the basis of residual electricity volume regulations]. *Festschrift für Jürgen F. Baur*, Nomos Verlag, Baden-Baden, p. 623 et seq.'[in German]; Wagner, H. (2001). Atomkompromiss und Atomausstiegsgesetz [Nuclear compromise and the Nuclear Phase-Out Act]. *NVwZ*. Vol. 20, Verlag C. H. Beck, Munich, p. 1089 et seq. [in German].

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ПОСТУПОВА ВІДМОВА ВІД ЯДЕРНОЇ ЕНЕРГЕТИКИ В НІМЕЧЧИНІ

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У зв'язку з намірами Німеччини припинити цивільне використання ядерної енергетики виникає ціла низка правових питань, пошук відповідей на які потребує ретельного теоретичного обґрунтування.

***Метою** дослідження є висвітлення законодавчих кроків, які вжила Німеччина для відмови від ядерної енергетики. Зокрема, стосовно аналізу прийнятих законодавчих актів на предмет відповідності Основному Закону ФРН.*

***Методи дослідження.** Методологічною основою дослідження є сукупність загальнонаукових та спеціально-юридичних методів і прийомів наукового пізнання. Їх застосування зумовлюється доцільністю системного підходу для досягнення єдності соціального змісту та форми. У роботі використані методи наукового пізнання, методи аналізу, синтезу, узагальнення, порівняння, абстракції.*

***Основні результати дослідження**. Державна програма в галузі ядерної енергетики країни передбачала величезні державні субсидії та запровадження суттєвих обмежень відповідальності виробників енергії. Прийнятий у 2002 році Закон про ядерне припинення запровадив не тільки заборону відкриття нових атомних електростанцій, а й ввів обмеження на залишкові обсяги електроенергії наявних атомних станцій, що мало на меті припинення роботи всіх атомних електростанцій до 2021 року. «Енергетична концепція 2050» підтримала діючий політичний рух, обґрунтовуючи це скороченням викидів CO2 на перехідній основі до тих пір, поки відновлювані джерела енергії забезпечують основну частину енергії країни.*

Автором звернено окрему увагу на те, що зміни до Закону про атомну енергію не були сприйняті керівництвами електростанцій. Останні вживали різних засобів захисту проти застосованих заходів, а також намагались встановити неконституційність прийнятих змін до законодавства про припинення ядерної енергії і вимагати компенсації.

***Висновки.** На думку автора, 13-й Закон про внесення змін до Закону про атомну енергію, який створює законодавчу базу для припинення ядерної енергетики, є конституційним, оскільки він врівноважує інтереси енергетичної галузі та споживачів послуг. Попри це, автор наголошує на існуванні правової невизначеності, зокрема, в контексті використання сховищ для відпрацьованого ядерного палива та джерел фінансування ліквідації атомних електростанцій.*

Ключові слова: ядерна енергетика, Закон про атомну енергію ФРН, аварія на електростанції Фукусіма, рішення про припинення ядерної енергетики Німеччини.

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THE OBJECT OF THE ADMINISTRATIVE OFFENSE IN THE QUALIFICATION AND SYSTEMATISATION OF DOMESTIC ADMINISTRATIVE-TORT LEGISLATION ON ROAD TRANSPORT

The article deals with the subject of administrative misconduct in road transport and its role in the rulemaking and enforcement activities. The basic doctrinal approaches to understanding the object of administrative misconduct in road transport are summarized. It is concluded that there is no single vision of their nature and content in domestic administrative law. The necessity to harmonize scientific positions and develop a unified concept of the object of administrative misconduct (including administrative misconduct in road transport) at all levels of its generalization and objectification is substantiated.

On the basis of the analysis of modern scientific researches and the current administrative-tort legislation the classification of objects of administrative offenses in the road transport is made. The author's definitions of the concepts of general, generic, species and direct object of administrative offenses in road transport are formulated. Their actual content is specified. The essence of the main and additional object of administrative misconduct is revealed. The polysubjectiveness of the majority of administrative offenses in the road transport is ascertained.

The role of the object of administrative misconduct in the structuring and systematization of domestic administrative-tort legislation is investigated. It is determined that the generic object of administrative misconduct is the main criterion for the division of the Special part of the Code of Administrative Offenses into separate Chapters. Topical issues of legal regulation of administrative-tort relations in road transport are highlighted. A set of legislative proposals aimed at harmonizing the structure of the Code of Administrative Offenses, in particular, regarding the regulation of liability for administrative offenses in road transport, has been elaborated.

Key words: object of administrative misconduct, qualification of administrative misconduct, road transport, administrative liability, administrative misconduct.

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1. Introduction

An important element of the structuring of the legislation of Ukraine on administrative liability and the qualification of administrative misconduct is the determination of their object. It is the object of administrative misconduct that characterizes its antisocial orientation and social danger. In many cases, it is it that allows to distinguish a specific administrative offense from other such offenses. And, after all, it is the criterion for structuring the Code of Administrative Offenses as the pivotal act of administrative and tort legislation.

As a mandatory feature of administrative misconduct, the object of the assault determines the orientation, the course and the results of the qualification. On its basis the factual action is identified as a tort of a certain type (criminal, administrative, civil or otherwise), it is concluded in which proceedings it should be considered, the range of subjects of qualification is defined, its tools, algorithm and procedural forms are determined. Without defining the object, qualification of an administrative offense, a priori, is impossible. Because its absence or uncertainty does not allow to consider human behavior as socially dangerous and entailing legal (in particular, administrative) responsibility.

Against this background, issues of administrative misconduct have traditionally attracted the attention of the wide scientific community. Their importance for administrative law science, rulemaking and jurisprudence is ascertained by V.B. Averyanov, Y.P. Bityak, V.K. Kolpakov, O.V. Kuzmenko, S.G. Stetsenko and many other well-known scientists. Researchers of organizational and legal aspects of responsibility for misconduct in transport A.V. Gurzhiy, D.Y. Veselov, G.K. Golubeva, V.V. Donenko, O.V. Drozdov, E.V. Tsiba also recognize importance of these issues. However, despite the unanimous emphasis on the role of the object of administrative misconduct, the representatives of national administrative law do not show a unified view of its essence, structure, classification and a number of other important aspects.

The purpose of the article is to identify the object of administrative misconduct in road transport and to formulate a unified approach to its understanding of its nature, content and levels of concretization.

2. Presenting the main material

Domestic theory of administrative law posits a rule according to which any administrative offense has a destructive effect not only on the correspondent social connection, but also on the macrosystem of social relations (Gurzhii, 2003). Of course, the impact of a certain administrative misconduct on such a system is almost imperceptible. However, on a social scale, administrative misconduct, the actual number of which reaches almost astronomical indicators, undoubtedly undermines the stability of the whole system of relations protected by administrative and tort law. In view of this, such a system is regarded as *a common object of administrative misconduct*. This approach underlies virtually all current research on liability for administrative offenses in road transport. However, their authors are far from equally defining the borders of the common object of such misdeeds. For example, N. Bortnyk and S. Esimov extend them to: "the totality of social relations, the protection of which is ensured by the rules of the Code of Administrative Offenses" (Bortnik, Eshimov, 2016). From G.K. Golubieva's viewpoint, they cover: "public relations, regulated by the rules of administrative legislation, protected by administrative sanctions in order to ensure the proper functioning of the order of administration, protection of property, rights and freedoms of citizens" (Golubeva, 2008). In turn, A.V. Gurzhiy understands under the general object of administrative misconduct in road transport the whole multitude of public relations protected by administrative penalties (Gurzhi, 2012).

In our view, the most reasonable approach seems to be the latest one. On the one hand, the current Code of Administrative Offenses is by far not the only act of domestic legislation that regulates administrative liability and protects public relations from unlawful encroachment (therefore, under neither conditions, nor can it, nor the sanctions provided by it, determine the limits of the general administrative misconduct). On the other hand, it is well-known that administrative-tort norms provide giude and protection of public relations regulated by many different branches of law, in particular, administrative, civil, economic, criminal-procedural, criminal-executive, transport, land, etc. All of these relationships suffer from the negative impact of administrative misconduct and thus, in their totality, serve as a common object.

3. The object of administrative misconduct in road transport

Certainly, the general object of administrative misconduct in road transport is of great importance for their proper qualification. A.O. Storozhenko quite rightly emphasizes: "often, on the basis of features of a common object, an authorized subject of qualification can make a grounded conclusion about the administrative-tort nature of the act, or vice versa – about his criminal-legal, civil-legal, business law, etc. Nature (Storozhenko, 2008)". However, this is not enough to determine on a basis of the object the specific administrative-tort standard required for the application, to distinguish between "related" administrative offenses or something else.

This predetermines necessity of the analysis of the object of administrative misconduct (including misconduct in road transport) at different stages of its

specification. In particular, within the common object it is customary to distinguish certain groups of public relations, which more defined and clearly characterize the anti-social orientation of administrative misconduct. Such groups of social relations are referred to as "generic objects".

4. Axiological and branch objects of administrative misconduct

As a rule, in domestic administrative law, generic objects of administrative misconduct are distinguished by two main criteria: axiological and brunch. The first (axiological) criterion is the general social values around which the social relations protected by the administrative-tort law are formed. According to this criterion public relations concerning property; public relations regarding public order; public relations regarding the exercise of popular will, etc. can be defined as generic objects.

Instead, the second criterion is the branch or sphere of social life in which relevant social relations are formed. According to this criterion, the following generic objects of administrative misconduct are distinguished: public relations in industry; public relations in the field of trade; public relations in the field of standardization; public relations in the military sphere; public relations in transport, etc.

Both of these criteria formed the basis for the structuring of the Special Section of the Administrative Code into separate chapters (Gurzhii, 2009; Gurzhi, 2015). Some chapters of this part of the Code have accumulated rules on liability for administrative misconduct that infringe upon certain socially significant values (above all, these are Chapters 6, 14, 15 and 15-A of the Code of Administrative Offenses). The rest states about responsibility for misconduct in a particular field or field of public life (Chapters 5, 7–13 of the Code of Administrative Offenses have been formed on the basis of an industry criterion). In this connection, the following fact cannot be overlooked. Almost all researchers recognize the generic object of administrative misconduct as the main criterion for structuring the Code of Administrative Offenses and, in particular, the allocation of Chapter 10 "Administrative Offenses in the Transport, Road and Communications:" in its structure (Gurzhii, 2010). The logical continuation of this approach should be the statement that the public relations in the field of transport and communications are the generic object for all administrative offenses envisaged by this chapter of the Administrative Code. However, contrary to this logic, the vast majority of scholars, speaking of the specific administrative misconduct included in Chapter 10 of the Code of Administrative Offenses, interprete their generic object much more narrowly.

Traffic law offenses have been systematized by the legislature within Chapter 10, – N. Bortnik and S. Eshimov write, but they add that: the generic object of these crimes (retained author's edition – A.N.) is road safety (Bortnik, Eshimov, 2016). Some other authors hold similar views, recognizing the generic object of certain industrial offenses: "road safety" (O.Yu. Salmanova, R.V. Yarova; Salmanova, 2002; Yarova, 2016), "public relations on road safety" (E.V. Tsiba)

(Tsyba, 2016), "public relations regarding road safety or the road safety itself" (A.S. Sobakar) (Sobakar, 2015), "the established order of public relations in the field of road safety " (V.V. Donenko) (Donenko, 2003), "specific relations that fall under the category of "road traffic" (that is, they have certain generic characteristics) and are protected by administrative and legal norms that provide for liability for unlawful encroachment on them" (V. Gorkava) (Gorkava, 2017), "provided state of protection of life, health of people, their interests, as well as the interests of others while moving people and goods by motor vehicles, as well as people without vehicles on the roads" (Koller, 2011).

Without going into the terminological nuances of these definitions, it should be noted that some of them contradict both the position of the legislator and the initial principles of the research within which they were formulated. At the same time, their authors, as a rule, do not burden themselves with detailed arguments. However, single attempts to justify the anchoring of a generic object of particular violations to the field of the road traffic are unconvincing. It is worth noting that, basing on an individual vision of its content and scope, some researchers propose to review the structure of Chapter 10 and the Specific part of the Code of Administrative Offenses. Some of them insist on the separation of norms about responsibility for administrative offenses in the field of road traffic into the independent chapter of the Code of Administrative Offenses (Sobakar, 2015). Instead, others consider it advisable to "break" Chapter 10 of the Code of Administrative Offenses into several independent chapters which would regulate liability for: administrative misconduct in transport; administrative misconduct in the field of road economy; administrative misconduct in the sphere of communications (Gurzhii, 2013).

In our view, both the idea of fragmentation of Chapter 10 of the Code of Administrative Offenses, and the proposed ways of its implementation, are highly doubtful. Moreover, both the theoretical validity of this step and its practical expediency are in doubt. In particular, the allocation of rules on liability for administrative offenses in the field of road traffic in the independent chapter of the Code of Administrative Offenses (along with Chapter 10) will destroy the architectonics of the Special part of the Code of Administrative Offenses, based on the structural model: "a separate chapter of the Code of Administrative Offenses protection of separate branch / sphere of public relations". In turn, though the division of Chapter 10 of the Code of Administrative Offenses into several "branch chapters", does not contradict to this principle, but it is deprived of practical sense. After all, as a result of this division, the vast majority of the provisions of Chapter 10 of the Code of Administrative Offenses, will be "transferred" to the chapter on liability for administrative offenses in transport. The only notable novelty will be the emergence of two small chapters (each of them consists of 2–3 articles) in the structure of the Special part of the Code of Administrative Offenses about responsibility for misconduct in the field of road economy and in the sphere of communications.

5. Cocretization of the object of administrative misconduct in road transport

Going to the next (species) level of concretization of the object of administrative misconduct in road transport, it should be noted that its analysis is more scientific and theoretical than practical. In fact, to date, domestic science has not formed a clear criterion for the selection of a specific object of administrative misconduct.

One of the few known attempts to outline such a criterion was made by V.K. Kolpakov, O.K. Chernovsky and V.V. Gordiev, according to whom: "the existence of systematic legislation within the generic object (which testifies to its corresponding independence and systematic nature) should become a correct criterion for the determination of a species object of administrative misconduct" (Kolpakov, Chernovsky, Gordev, 2010). But it is quite obvious that such an approach cannot be considered universal. By and large, it allows to define species objects only for those administrative misconduct that encroaches on public relations, regulated by specialized complex legal acts (for example, the Law of Ukraine "On Road Transport"). At the same time, this criterion makes it impossible to define a species object for violations of the direct prohibitions of the Code of Administrative Offenses, such as: petty hooliganism, forgery of travel tickets, damage to payphones, etc.

In general, the definitions of the species object of administrative misconduct in the legal literature are not lacking, but for the most part they are not informative enough. Almost all scientists, while constructing authorial definitions, are limited to stating that a species object of administrative misconduct is a group of homogeneous public relations, allocated within a certain generic object (Milovidova, 2016), (Vasilyov, 2016). In this case, the species objects of certain administrative misdeeds are determined utilitarianly, taking into account one or another scientific purpose. As a consequence, many different concepts of the species object of administrative misconduct in transport can be found in the domestic scientific and legal literature. Their specificity depends on which subsystem of social relations the author focuses on.

We are not going to determine the most successful concept of a species object, since the content of most of them is determined by the context of specialized scientific research. Let us note only that they can all be useful for the in-depth systematization of the regulatory material of Chapter 10 of the Code of Administrative Offenses. For today, in the systematization of the provisions of this Chapter, only brunch criterion is more or less traced. At the same time, at the lower level, that is, "inside" the normative blocks on liability for different means of transport, separate articles (groups of articles) of the Code of Administrative Offenses are located without a clear logical sequence. The same can be said about the internal structure of some articles. Their division into parts and points is not always logical. Undoubtedly, all this regulatory array needs to be organized into a harmonious regulatory system, and at several levels at once: sectoral, sub-sectoral, functional and so on. And then the main doctrinal approaches to the definition and classification of species objects of administrative misconduct can come useful for a legislator.

6. Direct object of administrative misconduct

The next and highest level of specification of an administrative misconduct object is the so-called direct object. According to the analysis of the scientific and legal literature, practically it is impossible to study the substantive aspects of liability for administrative offenses in transport without consideration of their direct objects. However, at the same time many researchers in this brunch do not reveal the essence of this concept and do not define it, but only specify the social relations, which, in their opinion, are the direct object of this or that misconduct. It should be noted that conceptual differences in the understanding of the direct object of administrative misconduct in transport become apparent while considering such concretizations.

In particular, referring to the direct object of administrative misconduct in the field of road safety, Y.S. Koller emphasizes that such object is the specific public relations in the field of traffic safety, taken under the protection of a certain article of the Code of Administrative Offenses (Sobakar, 2015). Speaking about the direct object of speeding, V.K. Kolpakov and V.V. Gordyev propose to understand under it: "state of safety on a certain road" (thus the authors consider specific public relations protected by the administrative sanction as the direct object of an administrative misdemeanor) (Kolpakov, Gordeev, 2016). According to V.V. Donenko, the direct object of driving a vehicle in a state of intoxication may be: public relations in the field of road safety, as well as life, health and property, and the relations in the field of traffic management, that is, the the established order of management" (Donenko, 2003). But O.V. Drozdov and A.O. Sobakar came to the conclusion that the objects of road traffic offenses were the life, health and property of its participants, their rights and legitimate interests, and established management order (Drozdov, Sobakar, 2015).

In this connection, first of all, it should be emphasized on the falseness of the thesis that public relations protected by a certain article of the Code of Administrative Offenses is a direct object of the administrative misconduct. The direct object is a single phenomenon. It is associated only with those relationships that have been broken (destabilized) in the result of commiting a specific offense. Instead, the vast majority of articles in Section 10 of the Code of Administrative Offenses provide for liability for a number (sometimes several dozen) of administrative misconduct, many of which encroach on different social relationships. Thus, one article of the Code of Administrative Offenses can protect a very wide range of public relations, which are not always broken by a particular misdemeanor, and therefore do not act as a direct object of it.

For the same reason, it is impossible to agree with the excessive extension of the borders of a direct object by including in it a large variety of social relations (concerning the protection of the right to life and health, property protection, established management procedures, etc.). None of the administrative offenses provided for in Chapter 10 of the Code of Administrative Offenses directly affect such a large number of objects. It can only impinge them indirectly – through

the destabilization of certain social ties in the field of transport. Therefore, only the latter can be considered as its direct object.

On the whole, the most justified is the position of V.K. Kolpakov and V.V. Gordeev, who in this context are talking about specific social relations protected by administrative sanction. However, this position can also be clarified, since the relevant public relations are not always the object of administrative misconduct, but only in the case of enroachment on their security (speaking simplier, there is no object of the offense without the offense itself). In our opinion, this fact should be obligatory reflected both in the general definition of the direct object of administrative misconduct and in the concretization of the direct objects of specific misdeeds in road transport.

With this in mind, the direct object of an administrative offense can be defined as: *protected by administrative-tort sanction public relations whose security and stability are violated as a result of an unlawful encroachment.*

7. The main and additional objects of administrative misconduct

Along with the classification of objects of administrative misconduct by degree of concretization (general-generic-specific-direct), in the theory of administrative law, it is customary to divide the objects of administrative misconduct into basic and additional. This division is based on the idea that some administrative misconduct always encroaches on two or more objects, that is, the are polyobjects. At the same time, from the point of view of systematization of administrative-tort legislation, qualification of misdemeanors and prosecution of offenders, only one of them, which lies in the plane of the generic object (the main object), is crucial. Simultaneously, other objects, although they suffer from the same misdemeanor, do not directly affect its qualification and legislative classification as a specific category of offenses (additional objects).

A clear example is the administrative misconduct provided by the Article 124 of the Code of Administrative Offenses "Violation of traffic rules, which caused damage to vehicles, cargo, roads, streets, railroad crossings, road structures or other property". This category of misconduct at the same time encroah on both public relations about road safety and property relations. The first ones determine the place of Article 124 in the structure of the Code of Administrative Offenses (in particular, its affiliation with Chapter 10), determine the specifics of penalties provided by this article (for example, deprivation of the right to drive a vehicle) and are subject to mandatory establishment in qualification. For this reason, they are considered the main object of misconduct. Instead, property relations in this case serve as an additional object, the clarification of which is purely ancillary.

In general, the classification of the object of administrative misconduct as major or additional is determined by the position of the legislator. The main object is considered to be the object of administrative misconduct, which is in the plane of the generic object, reflected in the name of the corresponding chapter of the Special part of the Administrative Code (Gurzhii, 2011).

No denying the role of the legislator in the classification of objects of administrative misconduct, it should be noted that the position of the legislator in this case is not always indisputable. At present, it is difficult to call some articles (parts of articles) of Chapter 10 of the Code of Administrative Offenses as its organic component. Against the background of the generic object outlined in the title of this chapter, they seem to be an artificial "incorporation" into the general logic of its construction.

First of all, it concerns the Article 119 of the Code of Administrative Offenses "Violation of the rules of using road transport and electric transport". Despite its highly expressive name, this article provides for responsibility not only for violations of the rules of using transport, but for violations in other spheres of social life. It is quite obvious that the main direct objects of the offenses provided by it are the public relations concerning: property (Part 1 of Article 119 of the Code of Administrative Offenses), environmental protection (Part 2 of Article 119 of the Code of Administrative Offenses), ensuring public order (Part 3 of Art. 119 of the Code of Administrative Offenses). Instead, relations in the field of transport services, relations in the field of fire safety, relations in the field of health care are additional objects of the offense.

Such an approach to the systematization of the content of the Code of Administrative Offenses does not fit into the common notion of qualitative technique of rulemaking. Weak correlation between the names of Chapters (generic object) and individual articles (main direct object), cloning of virtually identical administrative and tort bans – all this leads to unjustified accumulation of the normative array, breaks its logical structure, complicates the qualification of administrative misconduct and application of administrative and tort standards.

The highlighted problem is complex. By and large, it concerns not only the Article 119 of the Code of Administrative Offenses, but also a number of other articles (parts of articles) of Chapter 10 of the Code of Administrative Offenses, which provide for liability for administrative misconduct in the various modes of transport and communications. Therefore, this problem should be solved on the basis of a comprehensive approach. In our view, all the provisions of Chapter 10 of the Code of Administrative Offenses, which provide for liability for property damage, environmental damage and public nuisance, should be transferred to Chapters 6, 7 and 14 of the Code of Conduct, respectively.

8. Conclusions

Summarizing the above, we can conclude that the exact identification of the object of administrative misconduct in road transport is of great scientific and practical importance. It has a significant impact on the systematization of administrative and tort legislation, defines measures for its improvement. It is the guaranty of the proper qualification of traffic offenses, the rationality of administrative proceedings and the proper application of certain administrative and tort rules.

However, many issues related to the doctrinal definition and practical identification of the object of administrative misconduct in road transport remain

unresolved. These include, in particular, the issue of its definition, the issue of its classifications, its role in rulemaking, and many others. Mostly, they are multidimensional and debatable. However, in the light of reforming domestic administrative-tort legislation (in particular, the prospect of adopting the new Code of Administrative Offenses (Gurzhii, 2004) there is an objective need to harmonize scientific positions and develop a single concept of administrative object. misdeeds at all levels of its generalization and objectification.

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ОБ'ЄКТ АДМІНІСТРАТИВНОГО ПРОСТУПКУ У КВАЛІФІКАЦІЇ ТА СИСТЕМАТИЗАЦІЇ ВІТЧИЗНЯНОГО АДМІНІСТРАТИВНО-ДЕЛІКТНОГО ЗАКОНОДАВСТВА ЩОДО АВТОМОБІЛЬНОГО ТРАНСПОРТУ

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Стаття присвячена питанням об'єкта адміністративних проступків на автомобільному транспорті та його ролі в нормотворчій і правозастосовній діяльності. Узагальнено основні доктринальні підходи до розуміння об'єкта адміністративних проступків на автомобільному транспорті. Зроблено висновок про відсутність єдиного бачення їх природи та змісту у вітчизняній адміністративно-правовій науці. Обґрунтовано необхідність

узгодження наукових позицій та вироблення єдиного концепту об'єкта адміністративних проступків (в тому числі адміністративних проступків на автомобільному транспорті) на всіх рівнях його узагальнення та об'єктивізації.

На підставі аналізу сучасних наукових досліджень та чинного адміністративно-деліктного законодавства здійснено класифікацію об'єктів адміністративних проступків на автомобільному транспорті. Сформульовано авторські дефініції понять загального, родового, видового та безпосереднього об'єкта адміністративних проступків на автомобільному транспорті. Конкретизовано їх фактичний зміст. Розкрито сутність основного та додаткового об'єкта адміністративних проступків. Констатовано полісуб'єктність більшості адміністративних проступків на автомобільному транспорті.

Досліджено роль об'єкта адміністративних проступків у структуризації та систематизації вітчизняного адміністративно-деліктного законодавства. Встановлено, що родовий об'єкт адміністративного проступку є головним критерієм поділу Особливої частини Кодексу України про адміністративні правопорушення на окремі Глави. Висвітлено актуальні проблеми правового регулювання адміністративно-деліктних відносин на автомобільному транспорті. Вироблено комплекс законодавчих пропозицій, спрямованих на гармонізацію структури Кодексу України про адміністративні правопорушення, зокрема в частині регулювання питань відповідальності за адміністративні проступки на автомобільному транспорті.

***Метою статті** є визначення об'єкта адміністративних проступків на автомобільному транспорті та формування єдиного підходу до розуміння його природи, змісту та рівнів конкретизації.*

***Система методів**, що використовується під час дослідження окремих питань статті: історичний метод (коли і ким вперше було запроваджено), діалектичний метод (місце та роль держави в регулюванні визначень об'єкта адміністративних проступків на автомобільному транспорті), метод моделювання (яким має бути адміністративно-правовий механізм регулювання визначення об'єкта адміністративних проступків на автомобільному транспорті).*

***Результати.** Важливим елементом структуризації законодавства України про адміністративну відповідальність та кваліфікації адміністративних проступків є визначення їх об'єкта. Саме об'єкт адміністративного проступку характеризує його антисоціальну спрямованість та суспільну небезпеку. У багатьох випадках саме він дозволяє відмежувати конкретний адміністративний проступок від інших подібних правопорушень. І саме він є критерієм структурування КУпАП як стрижневого акту адміністративно-деліктного законодавства.*

Будучи обов'язковою ознакою складу адміністративного проступку, об'єкт посягання визначає спрямованість, перебіг і результати кваліфікації. На його основі фактичне діяння ідентифікується як делікт певного типу (кримінальний, адміністративний, цивільний тощо). Робиться висновок про те, у рамках якого провадження його слід розглядати, окреслюється коло суб'єктів кваліфікації, визначаються її інструменти, алгоритм і процесуальні форми. Без встановлення об'єкта кваліфікація адміністративного проступку a priori неможлива. Адже його відсутність або невизначеність не дозволяють розглядати людську поведінку як суспільно небезпечну й таку, що тягне за собою юридичну (зокрема адміністративну) відповідальність.

***Висновки.** Підсумовуючи викладене, можемо констатувати, що точне встановлення об'єкта адміністративних проступків на автомобільному транспорті має важливе наукове і практичне значення. Воно чинить помітний вплив на систематизацію адміністративно-*

деліктного законодавства, визначає заходи його вдосконалення. Воно є запорукою правильної кваліфікації транспортних правопорушень, раціональності адміністративного провадження та належного застосування окремих адміністративно-деліктних норм.
Водночас чимало питань, пов'язаних із доктринальним визначенням та практичним встановленням об'єкта адміністративних проступків на автомобільному транспорті, лишаються до кінця не вирішеними. Це, зокрема, і питання його дефініції, і питання його класифікацій, і його роль у нормотворенні, і багато інших. Здебільшого вони мають багатоаспектний і дискусійний характер. Тим не менш, у світлі реформування вітчизняного адміністративно-деліктного законодавства (зокрема перспективи прийняття нового КУпАП – Кодексу України про адміністративні проступки [23, с. 156]) є об'єктивна потреба в узгодженні наукових позицій та виробленні єдиного концепту об'єкта адміністративних проступків на всіх рівнях його узагальнення та об'єктивізації.

Ключові слова: об'єкт адміністративного проступку, кваліфікація адміністративних проступків, автомобільний транспорт, адміністративна відповідальність, адміністративний проступок.

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PECULIARITIES OF ADMINISTRATIVE AND LEGAL REGULATION OF BUSINESS ENTITIES ACTIVITIES DURING THE QUARANTINE IN UKRAINE

The aim *of the article is to investigate the peculiarities of administrative and legal regulation of the activities of business entities during quarantine and to consider possible directions of improvement of such regulation.*

Methods. *The theoretical and methodological basis of the research is modern general scientific and special legal methods and techniques of scientific knowledge. The formal and logical method determines the importance of administrative and legal regulation of the activities of economic entities during quarantine. Formal and legal method allowed analyzing the current legislative and other normative-legal acts concerning administrative and legal regulation of activity of economic entities during quarantine. The structural and logical, comparative and legal methods outline the main directions of improving of implementation the administrative and legal regulation of the activities of economic entities during quarantine.*

Results. *Attention is drawn to the fact that business entities are limited in their actions due to the introduction of quarantine and emergency regime in Ukraine. The article analyzes the legislative and other legal acts adopted to prevent the spread in Ukraine of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2, which regulate the activities of business entities. It is noted that the Government of the State, taking into account the important role of economic entities in the economy of the country, makes prudent measures to support them during quarantine. However, there are certain conditions under which business entities face problems that need to be addressed, primarily at the legislative level.*

Conclusions. *The article indicates the expediency of amending the current legislation to harmonize it in connection with the adoption of a number of regulatory acts aimed at preventing the spread of acute COVID-19 respiratory disease caused by the SARS-CoV-2 coronavirus in Ukraine and use in the legislation of different terminology related to COVID-19.*

Key words: administrative-legal norms, coronavirus pandemic, emergency, counteraction to the coronavirus pandemic, benefits, responsibility of business entities.

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1. Introduction

Currently, there is a problem of the spread of acute COVID-19 respiratory disease caused by the SARS-CoV-2 coronavirus in almost all countries of the world. Ukraine is no exception. One of the important steps aimed at overcoming the coronavirus pandemic is the introduction of effective measures by the authorities of each state. The introduction of total quarantine is precisely such a measure that can prevent as many people as possible from the disease not only within one country, but in almost all countries of the world. The Government of Ukraine has introduced restrictive measures that significantly affect the livelihoods of the population, as measures have been introduced to socially distance and mobilize the community to prevent infection and save lives. In these circumstances, the activities of business entities have also undergone significant changes.

The following scientists have devoted their attention to the issues of administrative and legal regulation of business entities activity and legal support for the control of the activity of business structures in Ukraine: O.M. Bandurka, O.O. Bandurka, O.I. Baranovsky, D.M. Bahrach, Yu.P. Bytyak, L.K. Voronova, M.I. Geets, O.P. Dysyak, M.M. Ermoshenko, M.I. Kamlyk, T.E. Koganovskaya, A.T. Komziuk, M.V. Kurkin, M.N. Kurko, M.P. Kucheryavenko, O.V. Pokataeva, S.M. Popova, V.P. Petkov, L.A. Savchenko, O.Yu. Sinyavska, O.P. Ugrowiecki, N.P. Flissak and others (Popova, 2018; Popova, 2019). In today's context, the question arises of the need to study the peculiarities of administrative and legal regulation of the activities of economic entities during quarantine due to the pandemic of coronavirus disease, which significantly changed the living conditions not only in Ukraine but in almost all countries of the world.

The aim of the article is to investigate the peculiarities of administrative and legal regulation of the activities of business entities during quarantine and to consider possible directions of improvement of such regulation.

2. The essence of state management of business activities during the quarantine

In order to prevent the spread of acute COVID-19 respiratory disease caused by the SARS-CoV-2

coronavirus in Ukraine, a quarantine has been established throughout Ukraine on April 3, 2020 (Law of Ukraine № 1645-III, 2000; Resolution of the Cabinet of Ministers of Ukraine № 211, 2020). The Government of Ukraine subsequently extended the quarantine decision in Ukraine until April 24, 2020 (The only web portal of the executive authorities of Ukraine "Government Portal"a) and then until May 11, 2020 (The only web portal of the executive authorities of Ukraine "Government Portal"b). An emergency regime has also been introduced throughout Ukraine (The only web portal of the executive authorities of Ukraine "Government Portal"c).

President of Ukraine Volodymyr Zelensky has signed, and the Verkhovna Rada of Ukraine passed, at an extraordinary meeting on March 17, 2020 laws aimed at combating the spread of coronavirus, in particular, on taxpayer support and on the availability of medicines and medical devices.

Legislative and other regulatory acts have been in place in Ukraine for the prevention of the spread of coronavirus disease in the territory of Ukraine in the treatment of "coronavirus COVID-19" or "coronavirus disease (COVID-19)" (Laws of Ukraine "On Amendments to some legislative acts of Ukraine aimed at preventing the emergence and spread of coronavirus disease (COVID-19)" (Law of Ukraine № 530-IX, 2020), "On Amendments to the Tax Code of Ukraine and Other Laws of Ukraine on Support of Taxpayers for the Period of Measures to prevent the emergence and spread of coronavirus disease (COVID-19)" (Law of Ukraine № 533-IX, 2020), the Decree of the Cabinet of Ministers of Ukraine "On the Prevention of COVID-19 Coronavirus Dissemination in the Territory of Ukraine" (Resolution of the Cabinet of Ministers of Ukraine № 211, 2020), "On Approval of the List of Medicines, Medical Devices and / or medical equipment necessary for the implementation of measures aimed at preventing the occurrence and spread, localization and elimination of outbreaks, epidemics and pandemics of coronavirus disease (COVID-19), which are exempt from import duties and operations for the importation into customs territory countries are exempt from tax on value added" (Resolution of the Cabinet of Ministers of Ukraine № 224, 2020) and so on.

By Resolution of the Cabinet of Ministers of Ukraine of April 2, 2020, № 255, certain amendments to the legislation concerning the prevention of the spread of the pandemic coronavirus in the territory of Ukraine were introduced. First of all, it should be noted that in the title and text of the Cabinet of Ministers of Ukraine of March 11, 2020, № 211, the interpretation "On Prevention of Spread of COVID-19 Coronavirus in Ukraine" was replaced by the following: "On Prevention of Acute Respiratory Disease in Ukraine COVID-19 caused by the coronavirus SARS-CoV-2" (Resolution of the Cabinet of Ministers of Ukraine № 225, 2020). Corresponding changes have been made to the Cabinet of Ministers of Ukraine of March 16, 2020 № 215, March 20, 2020 № 242, March 25, 2020 № 239, and March 29, 2020 № 241.

Therefore, in order to prevent inaccuracies in the legislative and other legal acts and to avoid confusion, it is advisable to make all relevant changes to the Ukrainian legislation.

Resolution of the Cabinet of Ministers of Ukraine of April 2, 2020 № 255 provides for strengthening of a number of quarantine measures, namely: prohibition of work of economic entities, which provides for the reception of visitors, in particular catering establishments (restaurants, cafes, etc.), shopping and entertainment centers, other entertainment establishments, fitness centers, cultural establishments, retail and consumer services. Exceptions are certain types of activities of business entities, provided that personnel and visitors are provided with personal protective equipment (including respirators or protective masks, including self-made ones), and compliance with appropriate sanitary and anti-epidemic measures. The following activities of economic entities include:

– trade in food, hygiene products, medicines and medical devices, veterinary preparations, fuel, parts and accessories for vehicles and agricultural machinery, technical and other means of rehabilitation, feeds, pesticides and agrochemicals, seeds and planting material, means of communication and telecommunications (no more than one visitor per 10 square meters of retail space is allowed in the premises);

– medical practice, activities for the manufacture of technical and other means of rehabilitation, veterinary practice;

– conducting activities for providing financial services, activities of financial institutions and activities for collection and transportation of currency values;

– activity of gas stations, sales, leasing, technical maintenance and repair of vehicles, periodic tests of vehicles for road safety, certification of vehicles, their parts and equipment, maintenance of registrars of settlement operations;

– trading and catering activities using targeted delivery of orders;

– activities on connection of consumers to the Internet, replenishment of accounts of mobile communication, payment of utilities and services of access to the Internet, repair of office and computer equipment, equipment, supplies, household goods and personal consumption items, postal service providers, qualified electronic trust service providers;

– activities of accommodation establishments in which health care workers and persons under observation reside, as well as other persons in accordance with the decision of the State Commission on Technogenic and Environmental Safety and Emergency Situations (Resolution of the Cabinet of Ministers of Ukraine № 225, 2020).

According to the Resolution of the Cabinet of Ministers of Ukraine № 255 of April 2, 2020, it is also prohibited to hold all mass (cultural, entertaining, sports, social, religious, advertising and other) events, except for the measures necessary to ensure the work of state and local self-government bodies, provided that participants are provided with personal protective equipment, including respirators or protective masks, including self-made ones, as well as compliance with appropriate sanitary and anti-

epidemic measures, etc. It is allowed for individual entrepreneurs and individuals who carry out independent professional activity, temporarily, for the period of quarantine, to keep records of income and expenses without using books of income and expense accounting (books of income) if these books are to be started after quarantining. The Resolution states that this is possible subject to further submission by such persons of books of income and expenses (books of income), which contain data on income and expenses received (made) by them during quarantine, for registration to the controlling bodies within three months from on the day of the decision to cancel the quarantine (Resolution of the Cabinet of Ministers of Ukraine № 225, 2020).

In order to prevent the spread in Ukraine of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 as early as March 17, 2020 a number of important regulatory acts were adopted regulating the activity of economic entities (establishing privileges for taxpayers, restrictions on transportation anti-epidemic goods outside the customs territory of Ukraine, regulation of holidays, etc.):

1) by The Law of Ukraine dated 17.03.2020 № 530-IX during the quarantine prohibited the carrying out of scheduled checks in the sphere of economic activity, allowed the performance of work remotely (at home), introduced administrative penalties and increased criminal liability for quarantine violations. According to the Law, quarantine is considered force majeure (Law of Ukraine № 530-IX, 2020);

2) by The Law of Ukraine of March 17, 2020 № 531-IX defines a person authorized to make health care purchases, which is a legal entity (procurement organization), established by a central body of executive power, which ensures the formation and implementation of state policy in the field of health care, and is authorized to procure medicines, medical devices, other goods and services at the expense of the state budget, as well as at the expense of grants (sub-grantees) for the implementation of the Global Fund programs. According to the Law registration certificates for medicinal products purchased by specialized procurement organizations have been extended until March 31, 2022 (Law of Ukraine № 531-IX, 2020);

3) by law dated March 17, 2020, № 532-IX, temporarily, until December 31, 2022, the following operations shall be exempted from VAT: a) operations on the importation into the customs territory of Ukraine of medicines, medical devices and auxiliaries funds for them, which are procured at the expense of the state budget by a person authorized to make purchases in the healthcare sector (for the implementation of programs and implementation of centralized health care measures); b) operations for the supply in the customs territory of Ukraine of medicines, medical devices and auxiliaries to them, purchased at the expense of the state budget by a person authorized to make purchases in the field of health care (for the implementation of programs and implementation of centralized health care measures'). The provisions of Clause 198.5 and Article 199 of the Tax Code of Ukraine do not apply; c) operations for free supply (transfer) by a person authorized to carry out purchases in the field of health care, medicines, medical devices and auxiliary products to them, which have been imported and / or

delivered in the customs territory of Ukraine for the benefit of structural units on issues health care of regional, Kyiv and Sevastopol city state administrations or economic entities licensed to conduct business activities in medical practice, etc. (Law of Ukraine № 532-IX, 2020);

4) according to the Law of Ukraine dated March 17, 2020, № 533-IX, it is provided that no penalties will be applied for violations of tax legislation committed from March 1 to May 31, 2020; establishes a moratorium on documentary and factual inspections of the MRF from March 18 to May 31 2020; the annual income statement is extended until July 1, 2020; provisionally exempt from the calculation and payment of the ESAs all natural persons-entrepreneurs, persons engaged in independent professional activity and members of the farm for the period from March 1 to March 31 and from April 1 to April 30, 2020 for themselves; the payment for the land is not accrued or paid in the period from March 1 to April 30, 2020; non-residential real estate owned by natural or legal persons will not be considered as subject to real estate tax for the period from March 1 to April 30, 2020, etc. (Law of Ukraine № 533-IX, 2020).

The Resolution of the Cabinet of Ministers of Ukraine № 224 of March 20, 2020 approved the list of medicines, medical devices and / or medical equipment necessary for the implementation of measures aimed at preventing the occurrence and spread pandemics of coronavirus disease (COVID-19) which are exempted from import duties and operations for the importation of which into the customs territory of Ukraine are exempt from VAT: 1) medicines for the provision of medical care to patients with COVID-19; 2) disinfectants and antiseptics; 3) medical equipment for health care facilities to assist patients with COVID-19, including artificial lung ventilation, non-invasive ventilation system (BIPAP / CPAP), personal protective equipment, medical devices for screening patients, etc. (Resolution of the Cabinet of Ministers of Ukraine № 224, 2020).

3. The essence of state policy against entrepreneurial activity during quarantine in Ukraine

Small and medium-sized businesses are unquestionably considered the most vulnerable to shocks and disasters a segment of the economy not only in Ukraine but worldwide. Therefore, in the context of quarantine and the financial crisis, measures aimed at ensuring the survival of small businesses became one of the first anti-crisis steps in many countries of the world. After all, the well-being of almost tens of millions of families, not only the businessmen and self-employed persons, but also their employees, depends on it.

In the USA small businesses will receive $ 1.8 billion under a new payroll protection program, which provides interest-free loans to cover wage costs. If staffing positions are retained throughout the quarantine period, the borrowed money may not be refunded. Switzerland plans to spend 40 billion francs (almost $ 41 billion) on its interest-free business lending program. Similar mechanisms are introduced by other developed countries (Obukh,

2020). In Ukraine, there is no way to use this scale of financial resources, so the government goes through the introduction of tax preferences and easing fiscal pressure.

The Government is constantly undertaking measures to support business entities, in particular entrepreneurship. Thus, the Cabinet of Ministers of Ukraine has made a decision to provide additional social guarantees for the quarantine period for individuals-entrepreneurs who have children and people who have lost their jobs and registered at the employment center as unemployed. In particular, the Government's decision introduced the payment of child support to individual entrepreneurs who belong to the first and second group of single tax payers and paid a single social contribution, for the period of quarantine and for one month after the date of its abolition. Such assistance will be provided for each child up to 10 years of age in the amount of the subsistence minimum (for children under 6 years – UAH 1,779; for children between 6 and 10 years – UAH 2 218). The term of overdue arrears on payment of housing and communal services to recipients of housing subsidies and privileges, for which a housing subsidy is not assigned, was also extended from two to three months (The only web portal of the executive authorities of Ukraine "Government Portal"d).

In the context of the COVID-19 pandemic and quarantine throughout the country, it is envisaged to channel funds allocated by the European Union to support Ukraine (EUR 190 million) not only to support the healthcare system (about EUR 15 million) and the economy (EUR 61 million), but also to support small and medium-sized enterprises (EUR 20 million), small farms (EUR 25 million) (Kuleba, 2020).

The state takes all necessary measures during quarantine conditions in order to support business entities and reduce the negative effects of the coronavirus pandemic in the country's economy. However, there are also some problematic areas that need to be addressed. Thus, from March 1 to April 30, 2020, individual entrepreneurs are exempted from paying ESAs. If individual entrepreneurs have paid this contribution in advance for March and April, then these funds will automatically be credited as payment for subsequent periods. However, the contribution for March and April of individual entrepreneurs working on all tax systems, self-employed persons and members of farms does not pay only for themselves. This is not the case for their employees. That is, a small business owner with several employees must pay more than UAH 1000 for each employee on a monthly basis, although in a quarantine environment, the company does not work and does not make a profit. There are many such problematic areas and all of them need to be addressed and regulated at the legislative level.

According to the author, it would be expedient to support small and medium entrepreneurs not only by the implemented measures (in particular, the abolition of scheduled inspections during quarantine, or the abolition of fines for late payments), but, above all, permission for other categories of entrepreneurs to conditions for compliance with the rules for providing staff and visitors with personal

protective equipment (respirators or protective masks, including self-made), as well as compliance with the relevant and anti-epidemic measures (in particular, staying in the premises of not more than one visitor per 10 square meters). This proposal is especially relevant given the extension of quarantine for an indefinite period and in the context of reducing the attack of coronavirus around the world.

4. Conclusions

The introduction of quarantine throughout Ukraine to prevent and counteract the spread of the coronavirus pandemic has directly affected the activities of business entities. Most small and medium-sized businesses are on the brink of survival.

The government of Ukraine goes through the introduction of tax preferences and easing fiscal pressure. The authorities have taken a number of measures to regulate holidays, restrict the transportation of certain anti-epidemic goods outside the customs territory of Ukraine, etc., as well as introduce administrative penalties and increase criminal liability for violations of quarantine rules, sanitary and anti-epidemic rules and regulations. However, there are a number of problematic areas and they all need to be addressed and regulated at the legislative level. In terms of prolonging quarantine and in the context of reducing coronavirus attacks worldwide, it would be appropriate to allow small and medium-sized enterprises to operate subject to all necessary sanitary and anti-epidemic measures.

It is advisable to amend the legislation in force in order to harmonize it with:

a) adoption at the legislative level of a number of legal acts aimed at preventing the spread of acute COVID-19 respiratory disease caused by the SARS-CoV-2 coronavirus in Ukraine, which significantly affected the activities of economic entities during quarantine;

b) replace in the legislative and other normative acts the statement: "acute respiratory illness COVID-19 caused by the coronavirus SARS-CoV-2" instead of "coronavirus COVID-19", which was used in the legislation before the Cabinet of Ministers of Ukraine adopted Resolution April 02, 2020, № 255.

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ОСОБЛИВОСТІ АДМІНІСТРАТИВНО-ПРАВОВОГО РЕГУЛЮВАННЯ ДІЯЛЬНОСТІ СУБ'ЄКТІВ ГОСПОДАРЮВАННЯ ПІД ЧАС КАРАНТИНУ

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Мета *статті – дослідити особливості адміністративно-правового регулювання діяльності суб'єктів господарювання під час карантину та розглянути можливі напрями вдосконалення такого регулювання.*

Методи. *Теоретико-методологічною основою дослідження є сучасні загальнонаукові та спеціально-правові методи та прийоми наукового пізнання. Формально-логічний метод визначає важливість адміністративно-правового регулювання діяльності суб'єктів господарювання під час карантину. Формально-правовий метод дозволив проаналізувати діючі законодавчі та інші нормативно-правові акти, що стосуються адміністративно-правового регулювання діяльності суб'єктів господарювання під час карантину. Структурно-логічні, порівняльно-правові методи окреслюють основні напрями вдосконалення здійснення адміністративно-правового регулювання діяльності суб'єктів господарювання під час карантину.*

Результати. *Звертається увага на те, що суб'єкти господарювання обмежені у своїх діях через введення карантину та надзвичайного режиму в Україні. У статті проаналізовано законодавчі та інші правові акти, прийняті для запобігання розповсюдженню в Україні гострого респіраторного захворювання COVID-19, спричиненого коронавірусом SARS-CoV-2, які регулюють діяльність суб'єктів господарювання. Зазначається, що уряд держави, беручи до уваги важливу роль суб'єктів господарювання в економіці країни,*

вживає розсудливих заходів для їх підтримки під час карантину. Однак існують певні умови, за яких суб'єкти господарювання стикаються з проблемами, які потребують вирішення насамперед на законодавчому рівні.

Висновки. *У статті вказано на доцільність внесення змін до чинного законодавства для його гармонізації у зв'язку з прийняттям ряду нормативно-правових актів, спрямованих на запобігання розповсюдженню в Україні гострого респіраторного захворювання COVID-19, спричиненого коронавірусом SARS-CoV-2, та використанням в законодавстві різної термінології, що стосується COVID-19.*

Ключові слова: адміністративно-правові норми, пандемія коронавірусу, надзвичайна ситуація, протидія пандемії коронавірусу, пільги, відповідальність суб'єктів господарювання.

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ELECTRONIC EVIDENCE IN THE ADMINISTRATIVE PROCEDURE IN UKRAINE IN THE LIGHT OF THE INFORMATIONAL APPROACH

*The **purpose** of the scientific paper is to develop solutions for the improvement of the electronic evidence sub-institute in the administrative procedure in Ukraine based on the informational approach. The **methodological framework** for the research is represented by theoretical advances in the field of procedural law, with an emphasis on the theory of evidence and proof, as well as computer forensics, information law and technical literature. Comparative and formal legal **methods**, structural-functional analysis, inductive and deductive reasoning have been used to conduct the research. As a **result** of the research the analysis of the current theoretical developments in the study of the interdisciplinary sub-institute of the electronic evidence has been conducted; scientific comparison between the "objective" (traditional to the domestic theory of proof) and "informational" approaches to the definition of electronic evidence has been carried out; main theoretical and practical issues, arising from the application of different approaches to the perception of electronic evidence have been discovered and propositions for legislative amendments were made. **Key findings** of the study are briefly summarized below. In determination of the concept and the essence of electronic evidence an optimal combination of both objective and informational approaches to the perception of the electronic evidence should be applied. Differentiation between the original and the copy of electronic evidence should not be abandoned, and it should be allowed for the court to substantiate its findings with the copies of the electronic evidence in specific cases. Particular amendments to the Code of Administrative Procedure of Ukraine should be made with respect to: the definition of the original and the copy of electronic evidence; legal regulation of particular issues concerned with the use of originals and copies of the electronic evidence when proving the factual circumstances of the case (as well as when rendering the final and interim decisions by the court and when using the special knowledge) – primarily, in compliance with technical standards, that have recently been approved in Ukraine, regulating certain issues on the processing of electronic digital evidence.*

Key words: electronic (digital) data, judicial procedure, Code of Administrative Procedure of Ukraine, original of electronic evidence, copy of electronic evidence.

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1. Introduction

The separation in 2017 of the interdisciplinary sub-institute of electronic digital evidence in judicial procedure created more favorable conditions for the use of electronic digital data in justice. That was particularly important in the view of the absence of a uniform approach to the categorization of electronic digital data in terms of certain means of proof: in the Code of Administrative procedure of Ukraine (hereinafter referred to as "CAP of Ukraine") electronic documents had been long considered as written evidence, while audio and video recordings – as real evidence, until respective provisions of the Code were amended in 2017.

However, yet even the renewed legislation (amended by the Law No. 2147-VIII) has not solved all of the problematic issues. In legal science today still remains perhaps as the most conceptual issue the choice of an approach to understanding electronic evidence: either "objective" or "informational" (both of which regard the criterion of the degree of connectedness of electronic data to its primary medium). In practice, there still remain not entirely clear criterions for distinguishing the original and copies of electronic data, the way of certification of the paper and electronic copies of electronic evidence, the procedure for collection (fixation) of certain types of electronic evidence.

At the same time it worth noting, that in Ukraine even before the legislative implementation of the sub-institute of electronic evidence (with regard to foreign experience and technological trends) there has been rising an increasing interest among legal scientists to the regulation of the use of electronic (digital) data in different types of judicial procedure. Among first Ukrainian scholars conducting researches in question were D.M. Tsekhan, Krytska O.I. (criminal procedure), A. Yu. Kalamaiko, Yu.S. Pavlova and others. In 2016 there was published a monograph entitled "Electronic means of proof in civil procedure", prepared by A. Yu. Kalamaiko. After the implementation of the sub-institute of electronic evidence into Ukrainian procedural codes scientific developments in the stated area moved on to more practical concerns. In 2019 there was published a dissertation entitled "Electronic document as a source of evidence in civil procedure", prepared by Yu. S. Pavlova. Also at the present stage following

Ukrainian scholars are conducting researches related to electronic evidence: O.S. Chornyi, O.I. Antoniuk, O.Iu. Husiev, M. Hetmantsev, V.S. Petrenko, K.B. Drohoziuk, M.V. Pushkar, S.Ia. Fursa, O.M. Lazko, O.V. Sirenko, A.S. Shtefan, N.Y. Holubieva, Moskovchuk D.O. (civil procedure), K.O. Zerov (intellectual property law), H.O. Kurtakova, A.M. Naichenko, V.I. Drishliuk (commercial procedure), A.V. Stolitnii, I.H. Kalancha, O.P. Metelev, V.H. Khakhanovskyi, M.V. Hutsaliuk (criminal procedure), I.V. Kazachuk, S.S. Yesimov (proceedings for an administrative offence), V.V. Muradov (forensic aspect) and others. Within the framework of the administrative procedure following Ukrainian scholars devoted their studies to the examination of certain aspects of the use of electronic evidence in judicial proceedings: N. Blazhivska, O.V. Haran, Ya.S. Kalmykova, A.V. Zlenko, H.V. Muliar, O.S. Khovpun, D.I. Holopapa.

The purpose of the study is to define with the use of the informational approach possible theoretical and practical solutions to the problems related to functioning of the sub-institute of electronic evidence in administrative procedure. To achieve the goals of the study following tasks are to be carried out: 1) identification of the main controversies and problems, in particular, those arising in judicial practice of the administrative courts of Ukraine with regard to the application of legislative provisions, regulating the interdisciplinary sub-institute of electronic digital evidence; 2) assessment of the extent to which the problematic issues have been formerly examined; 3) formulating proposals for resolving of the current problems; 4) defining subsequent research directions.

2. Defining the concepts "evidence" and "means of proof". Application of the "objective" approach

Yu. S. Pavlova, with reference to I.V. Sukhanov, notes that the definition of the concept "evidence" has long been controversial, resulting in development of three main conceptions of what is meant by the term "judicial evidence": 1) evidence as merely factual data (in 2002 this definition was transformed into "information on facts"); 2) evidence as a combination of factual data (information on facts) and means of proof; 3) evidence as either factual data (information on facts) or means of proof, differently in every single case depending upon the context (the theory of dual understanding of judicial evidence) (Pavlova, 2019). According to A.Yu. Kalamaiko this list may be supplemented by two other conceptions, under which: 4) means of proof include evidence and means of its collection; 5) evidence and means of proof are treated as equal (Kalamaiko, 2016). Without resorting to deep analysis of each of outlined above conceptions of evidence, it should be mentioned that the conception defining evidence as a combination of factual data and means of proof seems to be the most exact and reasonable taking into account existing scientific researches and legislative provisions. The analysis of the stated position is given below.

A.Yu. Kalamaiko defines evidence as "a concept, that connects factual data and means of proof as the content and its procedural form" and emphasizes that

"unlike the scientific and logical evidence, judicial ones have the prescribed by the law procedural forms, which are means of proof. It is important to distinguish the form of existence and the expression of the content of evidence, that is, on the one hand, what is characteristic of evidence as a phenomenon of the outside world, and on the other hand – the procedural form, prescribed by the law. The form of the information – signs, spoken word, real code – provide access of conscience to the content of the evidence. The content and the form of the evidence are indivisible and constitute a single concept "evidence" (Kalamaiko, 2016). In our view, that means that the concepts of the written and real evidence combine both the tangible medium with certain signs or specific properties (means of proof/procedural form of evidence) and the information encoded in the mentioned signs or properties (the content of the evidence). Consequently, when referring to written and real evidence *the "objective" approach* is to be applied, *according to which the "encoded" information is integral to its medium* (Luspenyk & Mamchenko, 2018). Such an approach is currently implemented in Ukrainian procedural law.

3. Electronic evidence: applying the "informational approach"

Primarily, it should be noted that today the majority of legal scholars, based on the technical researches, international standards and recommendations, and legislative provisions, support the so-called "informational approach". Such an approach could be defined through the properties of electronic data, for example: intangible form of digital data, the absence of an integral link to its medium (the possibility of changing the medium without loss of data), need for application of tools for "reading" the electronic information as well as the "absence of the concept "original" of electronic means of proof due to the complete identity of the electronic copies" (Kalamaiko, 2016; Pavlova, 2019). In this regard D.D. Luspenyk notes that since according to respective provisions of procedural law "electronic evidence is defined as information ", then such a definition "…is an example of an informational approach"; whereas "written evidence are defined as documents" and "real evidence are defined as objects of the material world" and "obviously, the last two definitions refer to a particular material object, that is to say the legislator uses the "objective" approach" (Luspenyk & Mamchenko, 2018).

It is also worth noting, that in the context of the procedural form of the electronic evidence it would be reasonable to refer to the term "data". M.V. Bryzhko points out that within the electronic environment "data may be regarded as formalized combinations comprised of signs and code, that provide information and are designed to its automatic processing". At the same time in respect of "information on facts" M.V. Bryzhko emphasizes that "only the human may possess the knowledge, and only for human the variety of graphical symbols may serve as "information on facts" (Bryzhko, 2011). Basically such a position complies with the respective provisions of the Law of Ukraine "On information", where in paragraph 1 of the Article 1, when giving the definition of "information", distinction is made between the concepts of "data" and "information on facts". In the Law

of Ukraine "On Electronic documents and electronic workflows" data is specified as "information, presented in the form that is suitable for its processing by electronic tools". In the Requirements for the Data Formats in Electronic Workflows in State Authorities, approved by the Order No 60 of 07.09.2016 of the State Agency on E-Governance of Ukraine electronic data is defined as "files, electronic signatures, electronic stamps which are used to certify certain data of respective files, folders and metadata that are contained in a container". A.Yu. Kalamaiko states that "the broadest concept in electronic sphere is the "file" as a unit of creation, preservation and transmission of the information in the electronic environment. A file may contain audio-and video information, graphic images, including electronic documents and messages, in other words, is an equivalent to the concept "real evidence" in electronic sphere" (Kalamaiko, 2016).

It seems appropriate that the shift from the objective to informational approach at the legislative level most broadly shows itself in the sphere of document management. *While* in part 1 of the Article 1 of the Law of Ukraine "On information" *document* is defined as "a tangible medium, containing information, the main functions of which are preserving and transmitting information over time and space", *at the same time* in paragraph 1 of the Article 5 of the Law of Ukraine "On Electronic documents and electronic workflows" *document* is articulated as a "document, the information in which is recorded in the form of electronic data, including obligatory requisites of the document". As noted by D.D. Luspenyk and O.Yu. Husiev the informational approach is in line with the international standards of the International Organization of Standardization in the area of document management (Luspenyk & Mamchenko, 2018; Husiev, 2019). In fact, as of today the International Organization of Standardization issued more than a dozen of international standards, that directly or indirectly regulate various aspects of using electronic data in document management (creation, preservation, transmission and destruction), and are based on informational approach.

4. Distinguishing copies and originals of electronic evidence. Other related evidentiary issues

It is specified in paragraphs 2 and 3 of the Article 99 of the Code of Administrative Procedure of Ukraine (hereinafter referred to as CAP of Ukraine) that electronic evidence should be submitted in originals or in copies that are certified by an electronic digital signature, or in paper copies. According to paragraph 4 of the Article 99 of CAP of Ukraine case participant, who is submitting a copy of electronic evidence, has to provide information on possession of the original of the electronic evidence by himself or by other persons. In paragraph 5 of the Article 99 of CAP of Ukraine it is enshrined that should the copy (or paper copy) of the electronic evidence be submitted, the court may request from the respective person the original of the electronic evidence upon the motion of the party or on its own initiative. In case the original of the electronic evidence is not submitted and the case participant challenges the authenticity of the copy (paper copy) of the original, the court does not take account of that evidence.

Notwithstanding the fact that the concepts of the "original" and the "copy" of electronic evidence are not directly defined in the procedural law, an expected and reasonable case law has been developed on the stated point: the authentic electronic data on the primary medium is generally treated as the original of the electronic evidence, while the copy is referred to as any reproduction of the authentic data on a different medium, than the primary (See, for example, the decisions of the Second Appellate Administrative Court Decision of February 2, 2020 in case No 584/1572/19; Khersonskyi Circuit Administrative Court Decision of December 06, 2018 in case No 2140/1315/18; Polonskyi disctrict court of the Khmelnytskyi region decision of April 19, 2018 in case No. 681/276/18).

As indicated above, somewhat more pronounced *informational approach* is being applied with respect to electronic documents (see, for example, the above-mentioned Decision of December 06, 2018 in case No 2140/1315/18). Unlike the copy of the electronic document, certain exemplar of the electronic document is treated as an original not owing to the fact that electronic data has been initially created on certain primary medium, but due to the fact that this electronic data contains specific legally relevant requisites, and its authenticity and integrity is certified with the electronic digital signature of the author of the document (Pavlova, 2019). Precisely enough such an approach has been set out in the draft of The Regulations on the Unified court informational telecommunication system (an informal text), wherein the electronic copy of the electronic document is defined as "a document in electronic form, containing the visual image of the other electronic document without the qualified electronic digital signature of its author (authors). The authenticity and the legal status of the electronic copy of the electronic document is certified with the electronic signature of the person, who is not the author of that document". The definition for the original of the electronic document in the stated Regulation was used the same as that established in the Law of Ukraine "On electronic documents and electronic workflows" as follows: "the document, information in which is recorded in electronic data, including the compulsory requisites of the document, the legal status of which is certified with the qualified electronic signature of the author" (The Regulations on the Unified court informational telecommunication system (informally published text, 2019).

It also should be noted that controversial enough is the judicial practice on using of paper copies of electronic evidence. Primarily, that regards printouts and screenshots.

For instance, in its decision of June 12, 2019 in case No 520/9482/18 the Second Appellate Administrative Court accepted as evidence a screenshot without taking additional measures to verify such a paper copy of electronic evidence.

In other cases, there are frequently found court's refusals to accept the paper copy of the electronic evidence in the absence of its original (see, for example, the Kyiv Circuit Administrative Court in its decision of March 13, 2020 in case No 640/13066/19).

At once we shall notice, that in this regard a well-grounded seems to be the position set out in the explanation note to the Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings, adopted by the Committee of Ministers on 30 January 2019, at the 1335th meeting of the Ministers' Deputies, where it was stated in paragraph 27 that "Printouts of electronic evidence can be easily manipulated as they exclude metadata or other hidden data. Consequently, a screen printout from a web browser is not reliable evidence as it is nothing but a copy of the screen dis-play. It can be modified in a very simple manner because no special software or hardware are required for this purpose" (Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings and the explanation note thereto, 2019).

In our view, paper copies of electronic evidence might be used at the time of submission of the statement of claim (for convenience), or in particular cases at later stages of the proceeding, provided that certain fact or circumstance is undoubtedly proved with the body of evidence in the case.

But as a common rule rather the submission of the evidence in electronic form is recommended.

In general, as of today there are in the Ukrainian legal science *three main positions* with regard to the necessity and the way of distinguishing of the originals and the copies of the electronic evidence:

1). Objection of the necessity of distinguishing the concepts "original" and "copy" of the electronic evidence. The outlined position in practical terms is based upon the rationale that the copy of electronic digital data is identical to its original, and in the theoretical context it relies on the informational approach to the definition of the "evidence" concept (Husiev, 2019).

2). Those who advocate the second of the positions call on to distinguish the concepts "original" and "copy" of electronic evidence merely with regard to particular types of electronic evidence ("the midpoint position") (Chornyi & Antoniuk, 2018).

3). Those who uphold the need to distinguish between the concepts "original" and "copy" of electronic evidence (Shtefan A.S.).

This position (the third of the ones listed above) does not contradict the data contained in technical literature. For example, according to M.M. Fedotov to perform an expert examination in particular cases the original of the authentic electronic data on the primary medium is needed. In other cases, it is acceptable to use the copy of electronic data, copied by the expert from the primary medium (Fedotov, 2007). In this case E. Casey puts stress on the correctness of the data copying, in order to prevent errors in the data as well as its loss, corruption and misrepresentation (Casey, 2010).

In addition, for example, in paragraph 30 of the Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative

proceedings is implied a situation when for proper examination of the electronic data it may be needed to get access to the cloud service provider's hardware (Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings and the explanation note thereto, 2019).

5. Outlining propositions for legislative amendments

In our view, each of the three above – mentioned positions is based on the same theoretical and practical developments in the field of technical sciences. Therefore, most of the controversies occur due to lack of coherence with regard to the legal framework of the use of electronic data in judicial proceedings and articulation of the respective legal rules in terms of juridical technique.

Below there are provided technically founded provisions that neither of the representatives of all of the three positions deny and which enable us to formulate the alternative version of the respective articles:

1. Electronic data that is primarily created and stored on certain medium may play a significant probative role specifically with respect to the connection that is has with the particular medium (as well as for the conduction of the expert examination of the respective electronic data). When copying or transmitting electronic data through communication channels, errors in data (including metadata) or its loss may occur, or data may be corrupted, destroyed fully or in part either intentionally or recklessly, what will make it impossible to fully establish the circumstances of the case.

2. Given that copying or transmitting of the electronic data is conducted in the proper way it may be transferred without the loss of its original content and specific features. That is why in particular cases insignificant distinctions between the original and the copy of the electronic data may be ignored without a threat to the establishment of the factual circumstances of the case due to the high degree of likeness of both data exemplars.

3. With regard to certain types of the electronic data, namely, electronic documents there are distinctions drawn by virtue of law between the originals and the copies thereof through establishment of respective requisites (primarily, the electronic digital signature), which are designed to certify the authenticity of the original and differentiate it from the copy.

4. Certification of the paper copies of the electronic evidence may be conducted in the manner, provided for written evidence (paper documents).

Having synthesized the aforementioned as well as particular legislative provisions and scientific and practical ideas one can come to conclusions, on the basis of which certain propositions on the amendment of the current legislative provisions can be made. The main ones are summarized below:

1. We consider inappropriate the abandonment of the concepts "the original of the electronic evidence" as authentic electronic data created and stored on its primary medium and "the copy of the electronic evidence" as electronic data, created through the reproduction of the authentic electronic data including the cases when it is stored on the "secondary" medium.

With regard to electronic documents we propose to define the concepts of the original and the copy in the way provided for in the Law of Ukraine "On the electronic documents and electronic workflows".

The stated approach would not contradict the legal positions and recommendations of the international institutions. For it was indicated, for example, in paragraph 28 of the decision of the ECHR in case García Ruiz v. Spain, No 30544/96 that "While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts…" (Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings and the explanation note thereto, 2019).

2. If the participant of the case possesses the original of the electronic evidence and its submission is not connected to or does not entail any difficulties or negative consequences, the participant is obliged to provide to the court such an original on its primary medium on the court's request.

3. At the same time the court should not request the original of the electronic evidence merely on formalistic grounds. In every case when such a decision is to be taken it should be motivated and grounded. Furthermore, there should be provided for in the legislation a benchmark when it is recommended or obligatory for the court to request the medium and when not. However, the stated provisions should not undermine the discretion of the court and the limits of its inner conviction.

In other words, the legal mechanism that is proposed herein could function as follows: the participant of the case shall submit the copy of the electronic evidence. The court shall be empowered to request its original, while the legislation shall contain a set of conditions (circumstances) under which the court shall establish the fact based on the copy of the electronic evidence.

4. We consider it also reasonable to adopt separate provisions on engagement of the specialist for preparation of the electronic evidence for its submission to the court and recording (protocolling) all of such preparative actions. Unlike the criminal proceeding, in administrative proceedings this issue is not comprehensively regulated (particularly in the light of the recent adoption of the State Standard of Ukraine ISO/IEC 27037:2017 "Information technology – Security techniques – Guidelines for identification, collection, acquisition and preservation of digital evidence").

Despite the different procedural forms (including the rules on evidence and proof), in our view, the use of special knowledge and thorough recording of the preparatory actions (processes) shall contribute to the efficient and objective examination of the submitted electronic evidence.

5. In our view, it would be appropriate to reduce the time for the consideration of the claim of securing electronic evidence given the fragility of the electronic data. The effectiveness of respective provisions in this particular case, not least, depends on timeliness of its application.

6. Conclusions

In the theory of evidence and proof there are existing different approaches to the understanding of the concept of evidence. Most broadly supported is the definition, which combines information as the content of evidence and means of proof as its procedural form. With respect to real and written evidence the objective approach should be used, according to which the medium is an integral part of the evidence. Taking into account the essence of electronic evidence, the informational approach should be applied, under which a certain ordered set of electronic data is in itself an autonomous object of informational and evidentiary activities. The difference between the concepts "information" and "data" is pointed out, when the first is the content of a piece of electronic evidence, and the latter – its procedural form. "Data" is defined as combinations of signs and codes that are designed for their automatic processing. "Information on facts" is information in the form, available for human perception.

When distinguishing originals and copies of electronic evidence it is proposed to treat as the "originals" the authentic electronic data created and stored on the primary medium, and the "copies" thereof – as electronic data, created through the reproduction of the authentic electronic data, including its storing on the other medium than the primary.

Somewhat specific approach is applied to the distinction of the originals and the copies of electronic documents. By virtue of law the original is distinguishable from the copy primarily by the electronic digital signature of the author of such a document.

Given the high degree of similarity of the copies and the originals of electronic evidence it is proposed where there are respective grounds (for instance, in case of loss or destruction of the originals) to accept the electronic copies of the electronic evidence instead of the originals, provided there are not any doubts as to the relevance, admissibility and reliability of the evidence in question.

It is also recommended to apply special knowledge not only when examining electronic evidence, but also in the process of its preparation for the submission to the court.

Among other proposed legislative amendments is the reducing of the time frame for the consideration of applications for securing evidence in the view of the fragility of electronic data and, consequently, the existing necessity for taking timely and effective measures.

In the longer term it is considered appropriate to articulate the responsibility for committing unlawful acts with regard to electronic evidence (in particular, impeding submission to the court, corrupting, destructing), including acts qualified as criminal. Also the start of functioning of the Unified Court informational telecommunication system is essential. Except the separate regulation on the work of such a system, it is necessary that special regulations on processing and submitting of electronic evidence be adopted.

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DEVELOPMENT OF THE ADMINISTRATIVE LAW IN THE KYRGYZ REPUBLIC

The article provides an overview and stages of the development of law and legislation on administrative procedures and administrative justice in the Kyrgyz Republic. The article discusses the adoption, implementation, content and the application of the new Law on Administrative Procedure and the Administrative Procedure Code of the Kyrgyz Republic.

At the beginning, the socio-political background and the rationale for the ongoing judicial reforms and the efforts of the state to strengthen the rule of law in the Kyrgyz Republic are described. A significant part of article considers steps for developing a law on administrative procedures of the Kyrgyz Republic and the problems associated with its development. Then, the content and issues of implementation and the problems of the practical application of the new law on administrative procedures of the Kyrgyz Republic are disclosed. A separate part is devoted to the development, content, implementation and practice of the application of the new Administrative Procedure Code of the Kyrgyz Republic. The article also outlines the problems and shortcomings in the practice of applying legal norms on administrative procedures and administrative justice in the Kyrgyz Republic.

In general, the article summarizes that a new system of administrative law has been formed in Kyrgyzstan to replace "Soviet" administrative law, but there are still problems in understanding and applying the new administrative legislation: not all the regulatory framework and practice of administrative agencies are brought into line with the new legislation; there are facts of not understanding, ignoring and not applying the new legislation by public authorities; not all curricula of higher legal education are brought in line with a new understanding of administrative law. It is necessary to continue the implementation measures to put into practice the new administrative legislation through organizational measures to educate and train law applicators, as well as the development of judicial practice in administrative cases.

Key words: administrative law, Kyrgyz Republic, administrative activity, administrative procedure, administrative act, administrative justice, administrative claim, judicial reform, state body, administrative agency (authority), regulatory legal act, inquisition principle.

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1. Introduction

Since gaining its independence, the Kyrgyz Republic has passed several stages of judicial reform. The most significant reforms began in 2010 and are still ongoing. The two revolutions (March 2005 and April 2010) and the resulting socio-political crisis required the new authorities to pay special attention not only to economic and social reforms but also to judicial reform and the rule of law strengthening. During this period, almost all codes and laws relating to the judicial and law enforcement systems have undergone major changes and innovations. The Constitution of the Kyrgyz Republic of 2011 laid down new general provisions, structure, and basics of the judicial system of the republic. To implement the norms of the Constitution, Conceptual directions were developed for further reforming the judicial system of the Kyrgyz Republic, adopted by the Decree of the President of the Kyrgyz Republic "On Measures to Improve Justice in the Kyrgyz Republic" dated August 8, 2012 (Ukaz Prezidenta Kyrgyzskoj Respubliki…, 2012). This, in fact, the Concept on judicial reform identified the main directions for reforming the judicial system and legislation in the field of the judiciary, the status of judges, administrative law and process, civil law and process, criminal law and process, criminal enforcement law, executive production, access to justice, etc. As the implementation of this Concept, a package of laws in the field of judicial reform was developed and adopted. The new Administrative Procedure Code, the Civil Procedure Code, the Criminal Code, the Criminal Procedure Code, the Criminal Enforcement Code, the Code on misdemeanors, the Code on offenses, the Law on the Basics of Administrative Activity and Administrative Procedure, the Law on Enforcement Procedure, the Law on Free Legal Aid, as well as amendments to laws on the status of judges and judicial self-government. These codes and laws are already in place and are being actively implemented in practice.

This research will focus on the reform of administrative legislation related to the adoption of the Law on the Basics of Administrative Activity and Administrative Procedure (Zakon Kyrgyzskoj Respubliki…, 2015) and the Administrative Procedure Code (Administrativno-protsessual'nyy kodeks…, 2017). At the same time, there will be no talk about reforming the legislation on

administrative offenses, since these legal relations in Kyrgyzstan are no longer related to the administrative law. With the adoption and implementation of the new Code on Offenses on January 1, 2019, instead of the Code of Administrative Responsibility, such concepts as "administrative offense", "administrative responsibility" lost the adjective "administrative" and the legislator now refers these relations to the scope of the criminal law. So, there will be no talk on the administrative law in the Soviet conception, as the law on administrative offenses, but the new administrative legislation in the Western conception related to the settlement of public law disputes will be described.

First of all, it is necessary to describe the new Law "On the Basics of Administrative Activity and Administrative Procedure". This Law introduces a unified procedure for state activities and establishes uniform procedures for the activities of public authorities, regulates legal relations between authorities and individuals, legal entities in resolving public law disputes. In general, the activities of state bodies should be aimed at ensuring high-quality execution of the powers vested in them in the interests and for the public good. And such activities of state bodies should be subject to uniform, comprehensive and unified rules. Such rules, for example, are provided for the legislature in the form of law-making procedures that directly establish the procedure for the adoption of laws. In the Kyrgyz Republic, such legislative procedures are established in the Constitution (Konstitutsiya Kyrgyzskoy Respubliki, 2011), the Law "On the Rules of Procedure of the Jogorku Kenesh (Parliament) of the Kyrgyz Republic" (Zakon "O Reglamente Zhogorku Kenesha…, 2011) and the Law "On Regulatory Legal Acts of the Kyrgyz Republic" (Zakon "O normativnykh pravovykh aktakh…, 2009). Judicial power is exercised through legal proceedings based on special procedural rules legally enshrined in the procedural laws (Administrative Procedure Code, Civil Procedure Code, Criminal Procedure Code, Code on Offenses).

The activities of executive authorities and their officials, state and municipal employees should be determined not only by a variety of material legal norms but also by a system of procedural administrative and legal norms. If legal procedures in the activities of the legislative and judicial branches of state power of the Kyrgyz Republic have come a long way in their development, having rich historical experience, that cannot be said about administrative procedures (Satarov, 2015).

Administrative procedures are a relatively new institution for Kyrgyzstan since administrative procedures began as a separate subject of legal regulation only in 2004 when the Law of the Kyrgyz Republic "On Administrative Procedures" (Zakon Kyrgyzskoy Respubliki "Ob administrativnykh…, 2004) was adopted. This law was aimed at regulating relations between an administrative body and a citizen by considering appeals of persons addressed to state bodies, local self-government bodies, and their officials, adopting an administrative act, appealing against the actions of administrative bodies, execution of an administrative act, administrative expenses, as well as compensation for harm, caused by an administrative procedure.

Unfortunately, the Law has not been applied in the daily practice of administrative bodies since its adoption. Such a conclusion was made already in 2008 when studying the results of a survey of a large number of bodies, conducted by a working group, which included representatives of state organizations. No one of the surveyed 22 bodies or ministries included a new law at least in the regulatory sources, which are the basis of daily work (Pudelka and Deppe, 2014). The fact that the law was practically not applied by state bodies is explained by its too many declarative formulations, gaps, many reference norms, and its inappropriate systematics. As a result, the law was not integrated into the national legal system. Particularly, the Law was not based on a clear understanding of the very essence of the administrative procedure, the concept of an administrative act, its types, etc.

The lack of enforcement of this law was due to the following. Firstly, the law on administrative procedures is a new and poorly studied institution for Kyrgyzstan. Secondly, there is an alternative to this law in the form of the Law of the KR "On the Procedure for Considering Citizens' Appeals", which is stated in a more understandable language, in contrast to the law on administrative procedures. Thirdly, there were no implementation measures aimed at putting administrative procedures into practice. State officials were not trained to apply the law. No training was held, there was no media support for the Law, which would help clarify its nature, purpose, content and other circumstances.

As previously mentioned, for the first-time research in the field of application of the Law on Administrative Procedures was conducted in 2008. At the same time, the development of a new Law was started. A separate working group was created, which over about 5 years conducted this work with the support of the GIZ program "Promotion of the Rule of Law in Central Asia". As a result, a draft Law "On the Basics of Administrative Activity and Administrative Procedure" (hereinafter referred to as the Law or the Law on Administrative Procedure) was prepared, which was submitted to the Parliament at the end of 2012. After lengthy work in the parliament to discuss and promote the bill with varying successes and difficulties, the Law was ultimately passed by the Parliament and signed by the President of the Republic in July 2015. Since the Law provides for 9 months for transitional events, the Law entered into force in May 2016.

How is the new Law on Administrative Procedures fundamentally different from the old? The new Law has more precise regulation of previously undefined provisions and norms, introduces a uniform procedure for activity and establishes uniform procedures for the activities of public authorities. The role of the new Law is as follows: on the one hand, this Law establishes general rules of law for the uniform activity of government bodies and the enforcement of their decisions following constitutional principles; on the other hand, it serves as an evaluation criterion for judicial control over decisions of public authorities. That's why the focus of the Law is on the optimization, harmonization of management and administrative activities of state bodies, local authorities and their officials.

The new Law details the procedure for implementing administrative procedures, as well as the specific terms and basic rules for the implementation of administrative procedures, the procedure for the adoption of administrative acts and their appeal, the execution of an administrative act, compensation for damage caused by an administrative procedure are established.

The law introduces new principles for the activity of government bodies, such as: the proportionality of the application of law, the presumption of guilt of an administrative body, the prohibition of abuse of formal requirements, the principle of efficiency, the principle of "more includes less" and others.

The law defined such concepts as an administrative activity, administrative procedures, and administrative act. Administrative activity – the activity of administrative bodies that makes an external influence and ends with the adoption of administrative acts, as well as an action or inaction that entails legal and/or actual consequences for individuals or legal entities. Administrative procedures – actions of an administrative body based on an application from an interested person, an initiative of an administrative body to establish (provide, certify, confirm, register, secure), change or terminate rights and/or duties, including those ending with the issuance of an administrative act (its adoption, approval), or registration or registration of the interested person, his property, or the provision of funds, other property and/or condition at the expense of the state budget, from the property owned by the state or municipal property. An administrative act is an act of an administrative body or its official, at the same time: a) having a public law and individually defined character; b) having an external effect, i.e. not having an interdepartmental character; c) entailing legal consequences, i.e. establishing, modifying, terminating the rights and obligations for the applicant and/or interested person.

The law determines that an administrative act is usually adopted in writing. And when initiating an administrative procedure at the request of the addressee, only a written administrative act is accepted. At the same time, it should be noted such an innovation as an oral administrative act, as well as an administrative act in the form of light, sound signals and signs, images and in other forms provided by law. As a rule, an administrative act must be sufficiently clearly defined in form and content. For example, an oral administrative act is more difficult appealed. In this connection, the legislator obliged the public authority, upon the oral or written request of the person concerned, to draw up an oral administrative act in writing in accordance with all the requirements for a written administrative act (Boronbaeva, 2015).

One of the significant differences between the new law and the previous Law of the Kyrgyz Republic "On Administrative Procedures" is the introduction of the institution of a mandatory pre-trial procedure for appealing an administrative act in the administrative body itself or in a higher administrative body. Moreover, the law provides for exceptions to this rule. So, without observing the pre-trial procedure for the consideration of the dispute, the applicant has the right to appeal

to the court – if the cancellation of the administrative act may entail the seizure of property against the will of the owner. In this case, the administrative act shall be recognized as invalid in court. This exception follows from the requirements of the Constitution of the Kyrgyz Republic, in accordance with Art. 12 of which – the property is inviolable, no one can be arbitrarily deprived of his property, the seizure of property against the will of the owner is allowed only by decision of the court.

The applicant also has the right to appeal against the inaction of the administrative authority in an administrative procedure or in court – if during the time established by law for the administrative procedure instituted based on the application, the administrative act is not adopted by the authorized administrative body. In this case, the legislator provided a certain alternative to appeal against inaction for the applicant – either to the court or to a higher authority. In addition, the actions and inactions of an administrative authority are directly appealed in court in the absence of a higher administrative authority or higher official.

These are just some of the important provisions of the new Law, some of which have not previously been legislated, and the other part of the provisions has been concentrated on different line regulations.

It is important not only to draft and adopt a law but to effectively implement it in practice. That's why in order to implement the Law by order of the Head of the Government Office of the Kyrgyz Republic dated October 8, 2015 No. 140, a working group was formed to develop and submit to the Government of the Kyrgyz Republic a draft Plan for the implementation of the Law of the Kyrgyz Republic "On the basis of administrative activities and administrative procedures", and to further coordinate activities on the implementation of the above Law. The work of the working group was supported by the regional GIZ Program and its component-project of the European Union "Promotion of the Rule of Law in Kyrgyzstan". First, a draft order of the Government of the Kyrgyz Republic on approval of the action plan of the Government of the Kyrgyz Republic on the implementation of the Law was developed, which was further approved by the Government and aimed at the execution by all executive bodies.

At the same time, quite a lot of work was done to analyze and identify by-laws and regulatory legal acts to be brought into line with the Law. According to the results of the analysis, the experts of the working group identified 125 regulatory legal acts (hereinafter RLA), which should be brought in accordance with the Law. These acts were subsequently subjected to a more thorough analysis together with interested state bodies. Based on the results of the working group's work with ministries and departments, amendments to 33 RLA were developed and adopted by the Government of the Kyrgyz Republic from the list of RLA identified by the working group.

The GIZ program and the EU project, together with the Government of the Kyrgyz Republic, initiated a large-scale training program for state and municipal employees on the implementation and application of the new Law. According

to the results of the training, from May 2016 to the present time, together with the Academy of Public Administration under the President of the Kyrgyz Republic, more than 60 trainings were conducted for more than 1,400 state and municipal employees who familiarized themselves with the basics of administrative activities and administrative procedures.

Despite the enormous and large-scale work to implement the Law unfortunately the Law has not fully worked and not all state bodies apply it in their work.

By the decision of the Committee on Constitutional Legislation, state structure, Judicial Legal Issues and the Rules of the Jogorku Kenesh of the Kyrgyz Republic dated June 26, 2018, a working group was formed to study the practice of applying the Law of the Kyrgyz Republic "On the basics of administrative activities and administrative procedures". Based on the results of this study, an analytical report was prepared and, in December 2019, a decision was made by the relevant parliament committee with conclusions and recommendations for law applicants.

The Report notes that an analysis of the documents submitted and the study of the activities of state bodies and local self-government bodies revealed that in most cases the requirements of the Law are not respected. So, the Report contains the following conclusions:

– According to the results of the study the Ministry of Justice of the Kyrgyz Republic and its territorial divisions is the only body, which fully applies the Law on Administrative Procedures regarding formal requirements. Most administrative acts of the Ministry of Justice contain both a motivation part with justification and a reference to specific provisions of legislative acts, as well as a resolution part indicating the time for appealing the act and the authority where the act can be appealed, although there are some drawbacks.

– In some other bodies, including State agency on architecture and construction, State registration agency and Bishkek City Hall, the situation with the application of the Law on Administrative Procedures is gradually improving. But today this concerns exclusively the consideration of complaints about decisions and actions of lower bodies and structural units by the central apparatuses of these bodies. Although there are flaws here, these decisions on complaints are increasingly complying with the requirements of the Law. In the structural and territorial divisions of these bodies, the provisions of the Law are still not respected.

– The requirements of the Law on Administrative Procedures are either partially observed or not at all in other state bodies, their territorial divisions and local self-government bodies. While the administrative acts for the most part contain some details stipulated by the Law (name of the administrative body, name of the official, date of adoption, etc.), the motivating and resolving part of the acts everywhere do not meet the requirements of the law.

– Regarding the motivation part, decisions with legal consequences for the citizen, including refusals to allocate a land plot, refusals to issue a building permit, etc. either do not contain any justification at all, or contain the shortest

justification that does not meet the requirements of the law. Only in a few cases does the administrative act contain any reference to the legislative basis of the decision. Regarding the operative part, the verifiable decisions did not contain an explanation of the appeal procedure following the Law. The deadline for the decision to enter into force is either not indicated at all or it is indicated incorrectly (it is indicated that the decision takes effect from the moment of its registration, while following the Law on Administrative Procedures it takes effect from the day it is served). Some state bodies make decisions, which are essentially administrative acts, in the form of a letter, which makes it very problematic to appeal these letters.

– Courts and judicial practice more actively use the Law in their work, and the rules on mandatory pre-trial appeal have gained widespread application. In the first months after the enactment of the Law, there was a large percentage of citizens who did not follow the mandatory pre-trial appeal procedure being left without consideration and returning claims. This number has gradually decreased and today very few citizens and organizations turn to the courts, bypassing pre-trial appeal. Nevertheless, the quality of court decisions on the abolition of administrative acts according to other criteria and requirements of the Law is growing.

In terms of judicial control over the activities of public authorities, it is important to have a legally established procedural form separate from civil and criminal proceedings. The main content of judicial control in the field of public administration is that claimers can appeal administrative acts in courts.

Administrative proceedings are carried out according to the rules of the Administrative Procedure Code of the Kyrgyz Republic (hereinafter referred to as APC) adopted on January 25, 2017, which entered into force on July 1, 2017.

In terms of judicial control over the activities of public authorities, it is important to have a legally established procedural form separate from civil and criminal proceedings. The main content of judicial control in the field of public administration is that plaintiffs can challenge administrative acts in courts.

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For effective judicial control over the activities of administrative bodies, the Administrative Procedure Code of the Kyrgyz Republic provided for the following types of administrative claims:

1) a claim appealing an administrative act or action, which contains a requirement to cancel an administrative act or actions of the defendant in whole or in part;

2) a claim for the protection of the right, which contains a requirement on the defendant's obligation not to adopt an administrative act that burdens the claimant, or not to perform another action by the administrative authority;

3) a claim for the performance of an obligation, which contains a requirement for the obligation of the defendant to adopt an administrative act or perform certain actions;

4) a claim to verify the legality of a regulatory legal act, which contains a requirement to invalidate a defendant's regulatory legal act;

5) a claim to verify the legality of an expired administrative act, which contains a requirement to declare unlawful the expired administrative act of the defendant.

Administrative cases in the first instance are resolved by inter-district courts (which also consider economic cases). In the second instance, administrative cases are considered by regional courts, (Bishkek city) as an appeal instance. The cassation instance is the Supreme Court, which reviews cases on the correct application of substantive and procedural law by lower courts, while evidence is collected in the courts of the first and second instances in the Supreme Court, evidence not investigated earlier, participants in the process cannot present.

Particular importance in modern judicial practice are cases on appeal of regulatory legal acts on the grounds of their failure to comply with the law. The novelty is characterized by the very nature of this category of cases, since the object of judicial appeal will be a legal act. Judicial protection in such cases affects the public interests of an indefinite circle of people, since the legal act itself extends its action to an unlimited circle of people. By considering such cases, the court exercises judicial control over the appealed normative acts of another normative act, which has great legal force and significance in the hierarchy of legal acts.

Today in the republic there is a clear understanding of the term "administrative justice" or "administrative process" used in the APC, i.e. this is legal proceedings on disputes arising from administrative-legal (public-law) relations between administrative bodies and (or) their officials, on the one hand, and individuals and legal entities, on the other hand.

When considering cases on appealing administrative acts, actions (inaction) of state bodies, local authorities, other bodies, officials, the court shall check (Article 173 of the APC):

– does the administrative act comply with the Constitution, laws and other regulatory normative legal acts of the Kyrgyz Republic;

– whether an administrative act was issued in compliance with administrative procedures prescribed by law;

– whether the procedure for adopting an act prescribed by law has been followed;

– the competence of state authorities, local authorities and their officials who have adopted the impugned act;

– whether the rights, freedoms and legitimate interests of the person who has applied to the court have been violated, or whether obstacles have been created to this person to exercise his rights, freedoms and legal interests.

It should be noted that the court, when considering and making a decision, the court is not bound by the arguments included in the claim, this rule follows from the "Inquisition principle", i.e. the active role of the court in a public legal dispute.

The "Inquisition principle" is the most important principle of the administrative process, which is characteristic in that it allows the court to conduct an objective

investigation of the administrative case and essentially balances the position of the claimant in a dispute with the state, since the claimant is always a "weaker" participant in the process with the state powerful apparatus and features.

This concept is laid down in article 12 of the APC as follows:

– the court, not limited to the explanations, statements and proposals of the participants in the proceedings, the evidence and other materials available in the case, examines all the factual circumstances of the case that are relevant to the proper resolution of the dispute;

– the court, on its initiative or based on the application of the participants in the process, collects other evidence. The court may require the parties to submit additional information and evidence.

The new APC has absorbed all the advanced and modern ideas and developments in the field of resolving public law disputes, borrowed from the laws of Germany, Austria, Latvia, Ukraine, Azerbaijan and other countries that have a system of modern administrative law. The Administrative Procedure Code of the Kyrgyz Republic is the first such procedural law adopted among the countries of Central Asia.

Of course, the new APC and the practice of its application have their disadvantages. In particular, there are some gaps and contradictions in the text of the APC, the diverse and sometimes contradictory practice of applying the APC by the courts, the displacement of administrative and civil proceedings in judicial practice, not all judges still fully apply the Inquisition principle, etc. Some of these disadvantages will be removed with acceptance amendments to the APC and other laws that are currently developed and sent for adoption in the parliament of the republic. These amendments also provide for the formation of administrative courts based on inter-district courts with sole jurisdiction in administrative cases.

Conclusions. Thus, a new system of administrative law has already been introduced in Kyrgyzstan de jure, which is getting rid of the "Soviet" law on administrative offenses that is unusual for it. There are still de facto problems in understanding the new system of administrative law: not all the regulatory framework and practice of administrative bodies are brought into line with new legislation; there are facts of not understanding, ignoring and not applying the new legislation by public authorities; not all curricula of higher legal education are brought into line with the new understanding of administrative law and, accordingly, lecturers and students are not trained and do not receive the necessary knowledge.

In general, it is necessary to continue implementing measures to put into practice both the Law on Administrative Procedures and the APC through organizational measures to educate and train law applicants. Particularly hope is laid on judicial practice, because it is through judicial control that it is possible to effectively implement the provisions of laws, at least in the long term.

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РОЗВИТОК АДМІНІСТРАТИВНОГО ПРАВА В КИРГИЗЬКІЙ РЕСПУБЛІЦІ

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У статті представлено огляд та етапи розвитку права і законодавства про адміністративні процедури й адміністративного судочинства в Киргизькій Республіці. У статті розглядаються питання прийняття, реалізації, змісту і застосування нового Закону про адміністративне судочинство і Адміністративно-процесуального кодексу Киргизької Республіки.

На початку описуються соціально-політичний фон і обґрунтування проведених судових реформ, а також зусилля держави по зміцненню верховенства закону в Киргизькій Республіці. Значна частина статті розглядає кроки по розробці закону про адміністративні процедури Киргизької Республіки і проблеми, пов'язані з його розробкою. Потім розкриваються зміст і питання реалізації та проблеми практичного застосування нового Закону про адміністративні процедури Киргизької Республіки. Окрема частина присвячена розробці, змісту, впровадження і практику застосування нового Адміністративно-процесуального кодексу Киргизької Республіки. У статті також викладені проблеми і недоліки в практиці застосування правових норм про адміністративні процедури і адміністративному судочинстві в Киргизькій Республіці.

Загалом у статті констатується, що в Киргизстані сформувалася нова система адміністративного права замість «радянського» адміністративного права, однак ще є проблеми в розумінні та застосуванні нового адміністративного законодавства: не вся нормативна база і практика адміністративних органів приведена у відповідність до нового законодавства; є факти нерозуміння, ігнорування і незастосування нового законодавства з боку органів державної влади; не всі навчальні програми вищої юридичної освіти приведені у відповідність до нового розуміння адміністративного права. Необхідно продовжувати імплементаційні заходи щодо впровадження на практиці нового адміністративного законодавства через організаційні заходи по освіті і навчанню правозастосувача, а також розвитку судової практики в адміністративних справах.

Ключові слова: адміністративне право, Киргизька Республіка, адміністративна діяльність, адміністративні процедури, адміністративний акт, адміністративне правосуддя (судочинство), адміністративний позов, судова реформа, державний орган, адміністративний орган (орган), нормативно-правовий акт, принцип інквізиції.

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TRANSFORMATION OF SOVIET ADMINISTRATIVE LAW: UZBEKISTAN'S CASE STUDY IN JUDICIAL REVIEW OVER ADMINISTRATIVE ACTS

Judicial protection against individual and normative acts of the public administration continues to be problematic in Uzbekistan. One central reason for this mischief is the continuing prevalence of Soviet-style ideas and patterns in legal thinking as well as the legal practice. This article describes the problems of jurisdictions face when trying to overcome their Soviet heritage by developing legal protection in administrative matters, and analyses the strategies for the improvement of this situation. Key factors are a comprehensive and harmonised development of administrative procedure and administrative litigation in the field of legislation, and what might be termed a "constitutionalisation" of legal thinking, theory and teaching – i.e. the respect for values enshrined in Constitution such as the rule of law and access to judicial protection against the public administration – in the field of legal science. Uzbekistan is a good example how foreign partners and donors of international legal assistance can help strengthen these factors.

This paper explores (1) to what extent Soviet thinking on judicial review over administrative acts has been set aside or to what extent is it still alive in today's Uzbekistan, and (2) what are the transformation points of judicial review. Overall, I argue that Soviet thinking on judicial review over administrative acts has big change in legislation level under new regime of Uzbekistan, however legal reforms are not still accepted by legal practice, doctrine and legal education.

To analyse these statements, the first step is to describe the main characteristics and legal reforms on judicial review over administrative acts taken in Soviet period (part II). Part III and IV analyses the current legal system and judicial practise of Uzbekistan. Lastly, I map out recent steps taken to introduce some reforms in the field of judicial review over administrative acts in Uzbekistan (part V).

Key words: Soviet style administrative justice, administrative litigation, administrative procedure, legal education, the Strategy Action 2017–2021, administrative courts, jurisdiction, case study, textual positivism, judge-made law.

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1. Introduction

Judicial review over administrative acts in Uzbekistan and other post-Soviet countries has its common history. Until the 1960s, it was mainly refused by the Soviet regime. Later, there were major changes in the law, but legal practice did not change much. The 1977 Constitution of the USSR and the 1987 Law „On the procedure for appealing to the court against unlawful acts by officials that infringe the rights of citizens" played a significant role in introducing judicial review over administrative acts into Soviet law. After the collapse of the Soviet Union, legal thinking and practice in the field of judicial review over administrative acts has not changed substantially in many post-Soviet countries, as well as in Uzbekistan which causes problems in putting into reality the right of access to the courts and to a fair procedure in court trials of administrative cases.

2. Background: the Soviet style administrative justice

Judicial review over administrative acts was called 'administrative justice' in Soviet legal doctrine, though its existence was not admitted in Soviet legislation for a long time[1]. Barry points out that the disfavour leading to a rejection of administrative justice during the Stalin period was largely based on two reasons: Administrative justice was deemed to be a „bourgeois" legal concept, and administrative justice was associated with a separate system of administrative courts which did not have much support among Soviet lawyers (Donald D. Barry, 1989: 65). Additionally, the existence of the system of complaints to the procuracy which was faster and less costly than going to courts, was a major alternative and deterrent to using courts in reviewing administrative acts (Peter Solomon, 2000: 70). However, the nature of court review and of complaining to the procuracy is different. Administrative justice mainly aims to protect the citizen's subjective rights and freedoms, not so much to provide the objective legality of the administration. Rather, complaining to the procuracy – even if it had indirect effects and was an informal process of recovery of infringed individual rights and interests – was mainly

[1] For the difference between the terms „administrative justice" and „judicial review", cf. (Donald D. Barry, 1989: 64-66).

used to guarantee what was called the "socialist legality" in the administration. It was under the discretion of the administration as to how and to what extent infringed rights of citizens were remedied. There were no guarantees that these informal proceedings repaired all infringed rights.

Furthermore, the main reason for the weak development of administrative justice in the Soviet Union was that socialism denied the antagonism between the state and the citizens as a principle (Burkov, 2005: 25). The interests of the state, which were illustrated by administrative bodies, were deemed not to be in conflict with citizen's interest. However, Sirenko argued in the late 1970s that even when interests are realized and correctly reflected in policy, history shows that in practice they did not always reach the necessary unity and implementation. This covers to a certain degree how socialist states envisioned their role in society (Sirenko, 1980: 32–34).

In sum, Soviet scholars brought an argument for a possible inconsistency of interests between the administration and the citizens even in socialist states. This kind of thinking already had been accepted by the majority of Soviet scholars in the 1960s, and prominent Soviet legal scholars supported the introduction of administrative justice in USSR (Konstantin Simis, 1979: 206). More and more Soviet scholars argued that there was no rational argument for barring citizens from complaining about administrative bodies to the courts and for not permitting them to file court cases. The administrative justice was considered more effective than administrative complaints made to higher administrative bodies for various reasons. First, administrative justice was perceived to have more procedural guarantees for citizens (Eliseykin, 1963: 30; Stolmakov, 1971: 10). Second, decisions made upon administrative complaints were of a more declarative nature (Guk, 1991: 2) whereas decisions made by courts were legally binding. Third, administrative complaints procedures did not guarantee impartial and independent decisions (Nedbaylo, 1957: 26; Kvitkin, 1967: 41), and four, the more channels for remedy existed, the better chances a citizen had to obtain a remedy (Bonner and Kvitkin, 1973: 6). Other points were also mentioned (Barry, 1989: 71; Gordon Smith, 1978: 37–54).

These arguments stressed by Soviet scholars gradually changed the way of thinking of the Communist regime and led to changes in the 1977 USSR Constitution. This 1977 Constitution adopted for the first time the constitutional right of citizens to appeal to the court against administrative acts.

However, this constitutional provision was „dead letter" (Ioffe, 1989: 499; Jürgen Kuss, 1990: 167–268) until the adoption of the Law of the USSR „On the procedure for appealing to the court against unlawful acts by officials that infringe the rights of citizens" on 30 June, 1987 (hereafter, 1987 Law on Appeal). The 1987 Law on Appeal adopted a general clause for judicial review over officials' acts which was also widened to administrative bodies' acts by the Law of the USSR „On the procedure for appealing to the court against unlawful acts by administrative bodies and officials that infringe the rights of citizens" on 2 November, 1989 (hereafter, 1989 Law on Appeal). Although

Article 3 of the 1987 Law on Appeal stated some exceptions from judicial review, the citizen's right to appeal against administrative acts to a court became a reality for the first time in the USSR. However, it was still problematic "whether judicial practice delivers what the words of the statute seem to promise" (Barry, 1989: 79).

Administrative justice became a reality, but it was still considered to be an instrument for providing socialist legality, not as a guarantee of the protection of the citizens' rights and freedoms. In this regard, traditionally, the legal protection of human rights and freedoms was not considered as important in the Soviet Union as they were in Western countries. More attention was paid to the material satisfaction of certain needs, and less importance was paid to the legal protection of certain rights and freedoms of citizens (Kvitkin, 1967: 13). However, more and more Soviet scholars admitted that the legal protection of rights, freedoms and interests of citizens were important to make sure that administrative bodies observed them. While some scholars indicated the importance of legal protection (Chechot, 1969: 32; Malein, 1975: 124; Khamaneva, 1984: 75–77), others mentioned the nature of the legal relationship arguing that right and obligation existed in administrative legal relationships (Yurkov, 1974: 47; Stolmakov, 1971: 4) even because a right without a corresponding obligation was fiction (Chechot, 1969: 55). Thus, it became an accepted fact that judicial review, without the legal protection of rights and freedoms and a sophisticated procedural system, could not function (Khamaneva, 1984: 75–77).

However, in reality, there were almost no statutes that guaranteed rights, freedoms and interests for citizens in the field of public administration, a fact that influenced administrative practice. In most cases, the administration was deemed to have a wide range of discretion which barred the courts from reviewing administrative acts in favour of citizen's rights and freedoms. In this regard, some scholars such as Chechot argued that the adoption of a general clause of judicial review over administrative acts would lead to a triumph of administrative discretion in the courts since courts did not take a final political responsibility for public administration (Chechot, 1972: 43). For this reason, it seems that Chechot admitted to the existence of a wide range of administrative discretion that was in most cases completely beyond the control of the law, which made Chechot hesitate to grant such discretion to the courts. Khamaneva stressed that deciding administrative cases based on discretion in absence of any procedural legal norms would have a negative effect on the whole administrative activity in general (Khamaneva, 1984: 26).

Additional obstacles were also created by the constitutional basis of the Soviet Union. Since it rejected the separation of powers, the administrative justice system was not impartial and independent from the administrative branch. Furthermore, the most problematic issue was the definition of administrative law in the USSR which had different meanings and structures compared to Western administrative law. Hazard points out that the administrative law in the USSR was understood as the branch of law penetrating the very spheres of activity that were repeatedly mentioned by Soviet

leaders as a goal towards the eventual achievement of communism (John Hazard, 1989: 28). However, Western understanding of administrative law is mainly targeted at controlling the power of administration in its statutory limits (Bernard Schwartz, Roberto L. Corrada, J. Robert Brown, 2010: 4–5; William Wade, Christopher Forsyth, 2000: 4–5). These obstacles were so immense, as well as complicated, that they rendered the implementation of the 1989 Law on Appeal inoperative. Nonetheless, the fall of the Soviet Union in 1991 did not bring the expected changes in most of the Post-Soviet countries.

3. Administrative litigation in modern Uzbekistan: continuity, changes, and problems

Uzbekistan's Constitution and laws guarantee rights and freedoms for citizens and private entrepreneurs in relation to the administration. For instance, Article 44 of the Constitution of Uzbekistan (December 8, 1992) guarantees to everybody the right to appeal to courts against administrative acts (right to access the courts)[2] .

Uzbekistan has tried to introduce legal reforms in the sphere of administrative justice. Administrative litigation in ordinary courts was based on the Law "On appealing against actions and decisions violating human rights and freedoms in court"[3] and the former Civil Procedure Code (hereinafter referred to as former CPC) in Uzbekistan. There were many similarities between these laws in the early stages of their adoption.

Uzbekistan's 1995 Law on Appeal contains the general rules and consists of 10 articles which were quite similar to the 1989 Law on Appeal of the USSR. There was a general clause which allowed individuals to appeal to the court against any action of administrative bodies without any exception. However, in practise it was quite difficult to appeal to the court in a number of cases. For example, normative legal acts (regulatory acts of administrative bodies) and inaction of administrative bodies could not be objects of litigation in Uzbekistan, which caused difficulties for individuals in finding remedies for their violated rights.

Article 7 of the 1995 Law on Appeal and Article 265 of the former CPC of Uzbekistan set out that the court hears appeals in agreement with the rules of civil procedure, which refers to the general rules of the former CPC. However, Shorahmetov argues that, in reality, there were no differences and additions in the procedural provisions on administrative litigation, and administrative cases are action based proceedings, which referred to the civil litigation procedure

[2] "Everyone shall be entitled to legally defend their rights and freedoms, and shall have the right to appeal any unlawful action of state bodies, officials and public associations." (Article 44 of the Constitution of Uzbekistan). For the English translation of the Constitution of Uzbekistan cf. http://gov.uz/en/constitution/#a1836 (accessed on 01.04.2020). In this paper, the term „administrative litigation" is used to indicate the judicial review over administrative acts as guaranteed by article 44 of the Uzbek Constitution.

[3] Law "On appealing against actions and decisions violating human rights and freedoms in court" of the Republic of Uzbekistan, August 30, 1995, № 108-I; hereinafter, 1995 Law on Appeal, http://www.lex.uz/Pages/GetAct.aspx?lact_id=116760 (accessed on 01.01.2018).

(Shoakbar Shorahmetov, 2007: 346). The former CPC of Uzbekistan was based on the adversarial system. Nevertheless, in administrative litigation, one side of the process – the appellant (citizen) – is much weaker than the administrative body. For this reason, the judge should be more active towards protecting the appellant's rights (inquisitorial principle).

The Uzbek legal systems did not provide detailed provisions regarding the standards of review. Thus, courts lack a clear understanding about the degree to which they may review fact findings and interpret the law and the conclusions reached by the administrative body. Constantly, courts can hear new facts (de novo), and court procedure is more akin to litigation or a trial. As far as there were no administrative procedural rules on rendering an administrative decision in Uzbekistan, the court hearings were not limited to the facts collected by the administrative body.

4. Case studies

It is difficult to generalize all main features of legal practice on administrative litigation in Uzbekistan, but some tendencies of legal practise on administrative litigation can be mentioned by following cases.

Case № 1.

According to the case file, the applicant, whose permanent residence is in X region, applied for a permit to travel abroad as a tourist. According to the letter of the Department of Immigration and Citizenship of the X region dated April 6, 2017 No. 22/4-1395, the issuance of an exit permit (sticker) was found to be temporarily inappropriate due to the fact that the exit was controlled.

Also, according to the information received by the competent authorities by the letter No. 22/V-13 dated April 13, 2017 of the Ministry of Internal Affairs of the Republic of Uzbekistan, the applicant was announced that he was under temporary control due to a violation of law in the UAE.

The court of the first instance was informed that the applicant had been restricted from traveling abroad due to his illegal activities abroad, in reviewed case in the UAE, on the basis of information received from the competent authorities[4].

– Comment on the case № 1 –

On the grounds that the restriction of the right to travel abroad for the reasons specified in subparagraph "z" of Section 3 of the "Procedure for entry into the territory of the Republic of Uzbekistan", approved by the Cabinet of Ministers of the Republic of Uzbekistan dated January 6, 1995 No. 8, the appellate and supervisory instance (the Supreme Court) rejected the appeal, arguing that it was inexpedient to apply to the court with a complaint about the restriction of the right to travel abroad.

It has to be mentioned that a citizen has the right to appeal to the court

[4] Examples of Administrative Proceedings [Text]. Tashkent : Baktria press, 2018. P. 380–383. [In Uzbek]

against the actions (decisions) of state bodies and their officials, enshrined in Article 44 of the Constitution of the Republic of Uzbekistan. Provisions restricting this right are not mentioned in the Constitution and other laws.

Case № 2.

The applicant J.S., the administrator of the liquidation enterprise of Kashkaldak Beruni SFU, filed a lawsuit against the responsible Uychi district khokimiyat (mayor), in which he asked to revoke the decisions of the Uychi district khokim No 5782 of July 30, 2019 and № 5998 of August 23, 2019.

After reviewing the application and the documents attached to it, the administrative court considers it necessary to refuse to accept the application (complaint) for processing on the following grounds.

According to Article 189 of the Code of Administrative Litigation of the Republic of Uzbekistan, an administrative court deal with cases that ask to recognize the decision or it's part invalid, or an action (inaction) to recognize illegal. Due to this cases on the revoke of decisions of their officials are not in jurisdiction of administrative court[5].

– Comment on the case № 2 –

It is true that applicant J.S. failed to form his legal sue. However, it is too technical to state that revocation differs from invalidity in sense of citizen. CAL sets only the litigation on invalidity of certain administrative acts or actions. There is no type of sue on revocation of administrative act in CAL. Respectively, it would be proper not to refuse in acceptance of complaint motivating that administrative court has no jurisdiction on such cases.

Case № 3

Sharopov, born on July 22, 1959, applied to the Pension Fund for an old-age pension for reaching retirement age. However, Sharopov was sent a letter dated June 2, 2017, No BT130-1001-1529, signed by the head of the city department of the Pension Fund. Although the period of employment from 1979 to 1997 was recorded in the employment record book, but due to the fact that the documents confirming the length of service in these periods were not kept in the archives and in the organizations themselves, and salary information for these periods was not provided It was stated that the above-mentioned employment activities will not be included in the length of service.

The claim was satisfied by the decision of the court of first instance, and the response letter of the head of the city branch of the Pension Fund dated June 2, 2017, No BT130-1001-1529, was declared illegal.

However, in the manual named "Judicial practice on administrative cases" edited by Supreme court regarding this case, it is noted that "the court made a mistake in finding the response letter of the head of the city branch of the Pension

[5] URL: http://sud.uz/ (accessed on 10.02.2020). [In Uzbek]

Fund dated June 2, 2017, No BT130-1001-1529, illegal. Because this letter is not a document with legal consequences. Therefore, such letters should not be considered valid or illegal by the court[6].

– Comment on the case № 3 –

It should be noted that according to the Regulation on the procedure for appointment and payment of state pensions, approved by the Cabinet of Ministers of the Republic of Uzbekistan on September 8, 2011 No 252, Pension Fund under the Ministry of Finance of the Republic of Uzbekistan on restoration (restoration) of previously suspended (suspended) pension payments in accordance with the established procedure placing of the district (city) department foresees the application. In the example above, it can be seen that a citizen has applied with a content such as a pension appointment, recalculation of the pension amount.

Based on the content of paragraphs 4, 7, 8, 116, 120, 121 of the Regulation approved by the Cabinet of Ministers of the Republic of Uzbekistan dated September 8, 2011 No 252, it can be said that a citizen submits an application for a pension to the relevant department of the Pension Fund and also receives the relevant final decision from this body. In this case, the citizen does not enter into a direct legal relationship with the pension commission. It can also be said that the commission is an internal body of the Pension Fund Department. Accordingly, it is difficult to recognize that the commission is an independent body.

Most importantly, from the point of view of the citizen, the application was submitted directly to the competent administrative body, ie the Department of the Pension Fund, and the relevant response was provided by this body. Second, it is possible to recognize the existence of an external subject-oriented legal relationship between the citizen and the Pension Fund Department. Third, the Department of the Pension Fund is the competent state body for pension appointments, so applications are submitted directly to this body, not to the commission. Relevant decisions are made on the basis of the authority of the authorities. Fourth, in this case, it can be seen that the refusal to award the relevant pension affects the certain rights and legitimate interests of the citizen, that is, there is a certain legal consequence. Fifth, the case is considered to be individual (specific), as it concerns the case of citizen A. Sharopov. Hence, the reply letter of the head of the city branch of the Pension Fund No BT130-1001-1529 dated June 2, 2017 is an administrative act and can be appealed in court to find it invalid. In our opinion, the court should consider the content of the complaint in this case and make a legal assessment of the legality or illegality of the administrative act expressed in the reply letter of the head of the city branch of the Pension Fund dated June 2, 2017 BT130-1001-1529. Relevant decisions are made on the basis of the authority of the relevant body. Fourth, in this case, it can be seen that

[6] See.: Administrative court practice / Edited by I. Alimov. Tashkent : Complex Print, 2018. P. 19–21. [In Uzbek]

the refusal to award the relevant pension affects the certain rights and legitimate interests of the citizen, that is, there is a certain legal consequence. Fifth, the case is considered to be individual (specific), as it concerns the case of citizen Sharopov. Hence, the reply letter of the head of the city branch of the Pension Fund No BT130-1001-1529 dated June 2, 2017 is an administrative act and can be appealed in court to find it invalid. That is why, the court had to consider the content of the complaint in this case and make a legal assessment of the legality or illegality of the administrative act expressed in the reply letter of the head of the city branch of the Pension Fund dated June 2, 2017 BT130-1001-1529.

Regarding Uzbekistan legal practise, it is difficult to see a general trend, however, from the analysed cases and published casebooks, it can be concluded that courts have limited options of remedy and the only option is filing the *appeal on recognition of the invalidity of the acts of state bodies (or officials)* in administrative courts. If the appellant fails in constructing his (her) claim, the result is that the court refuses the consideration of appeal. Furthermore, new adopted APL is not actively implemented in judicial practice. Concept of administrative act mentioned in APL weakly used by courts.

This outcome leads us to the research analysis of Kühn and gives weight to the idea of path dependence as a reason for the present problems. In Uzbekistan, courts are still formalist and it is still true that "judges employ arguments of the plain meaning of a statutory text and present their analysis as a sort of inevitable logical deduction from this text" (Kühn, 2011: 75). The reason for that is that the judges are bound by statutes (for example, Article 15 of the CAL of Uzbekistan) and they must observe enacted laws (Kühn, 2011: 118). Courts do not consider their role as being to ensure respect for the *right to access to the courts* and guarantee constitutional rights and freedom. In other words, Courts are not conscious of protecting constitutional rights and freedoms of citizens. It seems that it is not the court's function but rather, it is the procuracy's function to protect the rights and freedoms of citizens provided by the Constitution and statutes.

Besides, such tendency is also caused by legal education. Modern Uzbekistan legal education is still different from many American, European as well as Continental law faculties. For example, the Ministry of Higher Education of Uzbekistan maintains control over the curriculum in law faculties. Both in Uzbekistan and Russia, few "analytical studies of case law" can be found. Emphasis is still given on "memorization rather than on the ability to think and analyse". While law school students are not educated and "trained in legal argumentation", "the statutory interpretation is not a subject of study at law faculties" (Kühn, 2011: 130-135). In this regard, Kühn argues that even in socialist law, it was accepted that judge-made law and any supplementary interpretations done by judges was assumed to be harmful, or, at best, suspicious (Kühn, 2004: 542-543). One of the reasons of this problem comes from a lack of sufficient knowledge of legal professionals, scarcity of comprehensive and fundamental research at law schools, an absence of law textbooks and updated

casebooks, very limited access to court practise and insufficiency of legal trainings on administrative litigation and administrative law in general.

What is the reason behind the inability of the judges to interpret law? It can be concluded from Kühn's analyses that the main reason is that the concept of law is different in post-Soviet countries. Law still tends to consist of acts enacted by parliament and administrative authorities. It is accepted that legal principles deducible from statutes and judge-made law cannot be a source of law. That is why it seems that there is no need for analytical legal thinking and interpretation of legislative acts for judges (Kühn, 2011: 132-134). From the Soviet period, it is still widely accepted that statutes are revised as soon as it is considered necessary and there is no necessity for judge-made law (Kühn, 2011: 142-143).

One more reason for textual positivism in Uzbekistan is that law review articles "almost never cite domestic case law" and do not analyse systematically case law regarding certain legal issues. Similarly, a court's decisions or Supreme Court resolutions are based on quotation of statutes and other legally binding sources of law, "reference is almost never made to law review articles", or legal books of prominent scholars (Kühn, 2011: 144-145).

Nevertheless, it should not lead the reader to think that government of Uzbekistan is not conscious about those on-going problems. Government is trying to introduce some legal reforms that are giving hope for change in the near future. For instance, government became more and more conscious about these sets of problems. In this context, recent decrees of the new elected President of the Uzbekistan Sh. Mirziyoyev are very progressive. These decrees aim to further improve the system of legal education and introduces new methods of analytical legal education as well as case study[7].

5. Hopes for change: recent transformations

The problems analysed above are mostly rooted in the Soviet past. Yet, there are not only problems, but also there some hopes for change.

New administrative law reforms: changes in legal system

New elected President of the Uzbekistan Sh.Mirziyoyev started to build New Uzbekistan and introduced several administrative law reforms according to the Strategy Action 2017-2021[8]. As a result of this there were introduced administrative court system, adopted Concept of administrative reforms[9].

On June 1, 2017, the Presidential Decree of the Republic of Uzbekistan proposed

[7] Resolution of the President of the Republic of Uzbekistan dated 28.04.2017 No PP-2932 "On measures to fundamental improve the system and increase the efficiency of personnel training at the Tashkent State University of Law".[In Russian]

[8] Decree of the President of the Republic of Uzbekistan dated 07.02.2017, No. UP-4947 "On the Strategy for Action for the Further Development of the Republic of Uzbekistan". [In Russian]

[9] Decree of the President of the Republic of Uzbekistan dated 08.09.2017 No. UP-5185 "On approval of the concept of administrative reform in the Republic of Uzbekistan" (National Database of Legislation, 12/11/2019, No. 06/19/5892/4134). [In Russian]

the formation of administrative courts of the Republic of Karakalpakstan, regions and the city of Tashkent, district (city) administrative courts, as well as the formation of a judicial board on administrative matters of the Supreme Court of the Republic of Uzbekistan, which adjudicates administrative disputes arising from public law relations, as well as cases of administrative offenses[10]. The relevant changes were made to the Constitution of the Republic of Uzbekistan[11], the Law of the Republic of Uzbekistan "On Courts", the Civil Procedure and Economic Procedural Codes of the Republic of Uzbekistan[12], providing for the formation of administrative courts.

In addition, at the beginning of 2018, the Law "On Administrative Procedures" (hereinafter referred to as LAP[13]) and the Code of Administrative Litigation of the Republic of Uzbekistan (hereinafter referred to as CAL[14]) were adopted[15], which, without exaggeration, basically meet international standards (Jörg Pudelka, 2015: 63).

Reforms regarding administrative justice are going to be one of the important one in near future also. The Presidential Decree dated 02.03.2020 No UP-5953 announced to abolish administrative offense case litigation from the administrative courts and handle administrative offence case's litigation to the criminal courts[16].

Since the Soviet period, the administrative offence system has been settled as a main part of administrative law. However, if we look from the point of Western countries, we see that administrative justice is not a system centring on the punishment of misconduct, but it is about abolishing unlawful administrative acts.

Even today, some Uzbek scholars equate the administrative offence system and administrative justice or at least argue that the administrative offence system is one part of administrative law (Alimov and Solovyova, 1998: 214; Hojiyev and Hojiyev, 2006: 536; Hojiyev, 2010: 204).

[10] Decree of the President of the Republic of Uzbekistan dated 21.02.2017 No UP-4966 "On measures fundamental improve the structure and increase the efficiency of the judicial system of the Republic of Uzbekistan". [In Russian]

[11] Law of the Republic of Uzbekistan dated 06.04.2017 No ZRU-426 "On Amendments and Additions to the Constitution of the Republic of Uzbekistan". [In Russian]

[12] Law of the Republic of Uzbekistan dated 12.04.2017 No ZRU-428 "On Amendments and Additions to the Law of the Republic of Uzbekistan" On Courts ", Civil Procedure and Economic Procedural Codes of the Republic of Uzbekistan". [In Russian]

[13] Law of the Republic of Uzbekistan dated 08.01.2018 No ZRU-457 "On Administrative Procedures", enter into force from 10.01.2019. [In Russian]

[14] Law of the Republic of Uzbekistan dated 25.01.2018 No ZRU-462 "On Approval of the Administrative Litigation Code of the Republic of Uzbekistan", enter into force from 01.04.2018. [In Russian]

[15] Of course, it is too early to say that the Uzbekistan's APL is one of the foremost, since the analysis of this law shows that the APL can be attributed to the first generation of laws on administrative procedures. See for generation of laws on administrative procedures.: (cf. Javier Barnes, 2010: 342-343).

[16] Decree of the President of the Republic of Uzbekistan dated 02.03.2020 No UP-5953 "On the State Program for the Implementation of the Action Strategy for the five priority areas for the development of the Republic of Uzbekistan in 2017-2021 in the Year of the Development of Science, Education and the Digital Economy" (National Database of Legislation , October 16, 2017, No 03.03.2020, No 06/20/5953/0246). [In Russian]

In this regard, it is quite common in post-Soviet countries to think that citizens are allowed to appeal against the administrative penalty that was imposed after disobedience against a certain administrative act, rather than directly appeal to the court against the administrative act prior to an administrative penalty. This is why it is quite difficult to develop administrative justice without changing the misperception in the understanding of administrative offences as a part of administrative justice in both countries.

Importantly, the recent reforms taking place in Uzbekistan give big hope to develop administrative justice without including administrative offence cases. It is a positive move in the context of post-Soviet countries that administrative justice is becoming separated from traditional Soviet administrative offence cases[17].

The above reforms and legislative changes created the basis for a major breakthrough in administrative law in the Republic of Uzbekistan. Many scientific discussions and proposals on the development of administrative law have not yet seen their practical implementation[18]. The legislative reforms carried out over a short period of time brought these long-awaited ideas to life. But it must be borne in mind that with the adoption of the relevant laws it is impossible to achieve a major breakthrough in the development of modern administrative law in the Republic of Uzbekistan. Legal doctrine, practice and education also should accept these changes.

Here is another rare example from judicial practice where APL is used in some extend.

Case № 4.

The applicant of the ANOR LLC JV appealed to the court with the defendant in the Tashkent city hokimiyat on invalidating the decision of the Tashkent city hokim dated May 27, 2019 No 763 to cancel paragraph 8 of the appendix to the decision of the Tashkent city hokim for No 85 dated January 18, 2018 and assign the responsibility to the hokim of the city of Tashkent to make a decision to cancel the decision No 763 dated May 27, 2019 and uphold the decision of the hokim of Tashkent city No 85 dated January 18, 2018 in the previous edition.

As seen from the case materials, the decision of the hokim of the city of Tashkent dated January 18, 2018 for No 85 of SAVDO LLC allocated a building located next to the non-residential premises at the address: Tashkent city, Mirabad district,

[17] The existence of the procuracy supervision is also one of the factors that make administrative justice difficult to reform in Uzbekistan. Currently, both the procuracy and the administrative courts try not to give up their jurisdiction on controlling administrative bodies. Consequently, the introduction of legal reforms in administrative justice meets difficulties and even open resistance because they may cause a loss of control over administrative bodies in favour of either the procuracy or the administrative courts. In that regard, it would be logical if the rules (article 46 of CAL) allowing the participation of the prosecutor in administrative litigation were liquidated in near future.

[18] See.: J. Nematov, 2014 (№ 259): 247-275; J. Nematov, 2015(№ 261):195-224; J. Nematov, 2015(№ 263): 323-356; J. Nematov, 2016 (№ 267): 161-192; J. Nematov, 2016 (№ 268): 247-269; J. Nematov, 2017 (№ 271): P.127-155; J. Nematov, 2014 (№ 2): 2-32; J. Nematov, 2019: 31–54; J. Nematov, 2018: 29-38; J. Nematov, 2020: 42–51.

Mirabad str., 27/10, with adjoining territory (Liter 0001, 0002) as compensation for a building demolished for state and public needs.

Based on agreement No 427 of February 15, 2018 between "SAVDO" LLC and the Department for the use of buildings and structures of the Tashkent city hokimiyat, as well as the above-mentioned decision of the Tashkent city hokim, buildings located near house No 27/10 along Mirabadskaya street on an area of 0.3000 hectares under a single cadastral number 10110102020590000l-letter 0001 is a one-story building with a total area of 342 sq.m., and letter 0002 is a one-story building with a total area 91.0 sq.m. transferred to the ownership of SAVDO LLC, about which a certificate was issued for TS 0351191.

According to the contract of sale dated June 11, 2018, concluded between LLC SAVDO and JV LLC ANOR, the specified object was sold to JV LLC ANOR.

Further, on May 15, 2019, the Tashkent city prosecutor's office protested the cancellation of paragraph 8 of the decision of the Tashkent city governor No 85 of January 18, 2018, regarding the allocation of the building located next to the non-residential premises at the address: Tashkent city, Mirabad district, Mirabad street, 27/10, with an adjacent territory (Liter 0001, 0002).

In pursuance of this protest, on May 27, 2019, the hokim of the city of Tashkent adopted decision No 763 to satisfy the protest of the prosecutor of the city of Tashkent and the cancellation of paragraph 8 of the annex to the decision of the hokim of Tashkent city No 85 dated January 18, 2018.

As seen from the case materials, by the decision of the Tashkent city hokim No 763 dated May 27, 2019, the protest of the Tashkent city prosecutor on the cancellation of paragraph 8 of the appendix to the decision of the Tashkent city hokim No 85 dated January 18, 2018 was satisfied.

The reason for the cancellation of paragraph 8 of the appendix to the decision of the hokim of Tashkent city No 85 dated January 18, 2018 indicated that the area of the building located next to the non-residential premises at the address: Tashkent city, Mirabad district, Mirabad street, house No 27/10 is 440 sq.m., which did not pass state registration in the State Enterprise "Land Management and Real Estate Cadaster Services" of Tashkent. In addition, the allocated building did not have an adjacent territory. When allocating the building with the adjacent territory, it was not taken into account that there was no adjacent plot to the building in the given territory, the area of the allocated land plot was not indicated, and the underground facility "bomb shelter" was located on the border of the building. Thus, when allocating a building with an adjacent territory, the requirements of the Regulation "On the procedure for the provision of land in settlements for urban planning, design and registration of construction projects, as well as acceptance for operation of objects", approved by the Resolution of the Cabinet of Ministers of the Republic of Uzbekistan, were violated dated February 25, 2013 No 54 and Resolution of the Cabinet of Ministers of the Republic of Uzbekistan dated August 22, 2008 No 189 "On measures for further improving the procedure for the provision of land in the city of Tashkent and their intended use".

Disagreeing with the above decision of the hokim of the city of Tashkent, the applicant appealed to the court with this statement.

During court litigation it was stated that, in accordance with the letter of the Emergency Management Department of the city of Tashkent dated April 8, 2018 No 730, SAVDO LLC is forbidden to dismantle buildings located above the bomb shelter due to the fact that construction work can lead to the destruction of the integrity of the bomb shelter.

According to the Consolidated Expert Opinion of the Tashkent City Branch of the State Unitary Enterprise "Urban Planning Expertise" under the Ministry of Construction of the Republic of Uzbekistan dated May 1, 2019 No 311, the location near the bomb shelter being built does not create any obstacles for construction that does not touch the borders of the shelter[19].

– Comment on the case № 4 –

Above mentioned example, you can also consider applying the principle of trust protection. The public interest is not to erect a building near the bomb shelter. The interest of the addressee is to maintain the validity of the administrative act and to obtain fair compensation in cases of cancellation of the administrative act.

However, from the above it can be stated that "the location next to the bomb shelter under construction is not creating any obstacles to construction that does not touch the borders of the bomb shelter".

Consequently, the question of the application of part 9 of Article 59 of the APL may not be considered.

The next issue is the issue of bad faith. In this case, it can be stated that there are no signs of dishonesty according to the Article 59 of the APL.

Therefore, it can be assumed that the preservation of an administrative act that does not contradict the public interest that did not entail the fault of the addressee complies with the rules of article 59 of the APL.

6. Conclusions

This article discussed the legal problems of administrative litigation in modern Uzbekistan. In conclusion, it should be mentioned that administrative litigation remains one of the most problematic issues of administrative law. There still exist vast loopholes and unnecessary remnants of former Soviet theory and law in modern legislation. This situation requires changes of perception of scholars first; then necessary reforms should be held.

It should also be concluded that establishing procedural rules is not enough to solve the problems regarding administrative litigation in modern Uzbekistan[20].

[19] The decision of the court of appeal of the Tashkent city administrative court of 11/06/2019 (Extract). [In Russian]

[20] In this regard, Khvan's urge is very important. "Certainly, the system of administrative courts can become a guarantee of providing the public rights of citizens and at the same time to legitimacy of actions of executive bodies only in that case when accomplishment of justice will be in reality (in practice) independent and competence." See.: (L.B. Khvan, 2011: 67.)

First of all, legal education should be reformed in a way which favors protecting rights and freedoms of citizens and legal entities. Further emphasis should be given to analytical case law study, based on legal argumentation and statutory interpretation. Through the analysis of this article, it is hoped that changes in legislation would guarantee timely and fair access to justice.

Current Uzbekistan's government is doing much in that regard. There are many ongoing reforms in the sphere of administrative law and policy. More and more legal guarantees are being given to business activities. For example, the recently adopted law "On administrative procedure" and Code on Administrative litigation of Uzbekistan, the future liquidation of the trial of administrative offence cases from the jurisdiction of the administrative courts by the end of 2020 initiated by the government gives hope for the future development of administrative law in Uzbekistan.

Based on this, it should be emphasized that the development of the theory of administrative law in Uzbekistan is important. In particular, the need to maintain the relationship between theory and court practice through constant analysis of court decisions in the field of administrative law, the importance of training legal personnel based on case study of researching administrative court decisions, the importance of developing substantive administrative law, and developing new areas of positive administrative law.

In that sense, not only the legislature and practicing lawyers, but also administrative law scholars should be more active in establishing and developing theories and educating law school students in the spirit of analytical legal thinking, legal argumentation and interpretation of legislative acts. Last but not least, the role of international donor organizations and partner universities is enormous in this process. Conducting joint comparative research, publishing textbooks, organizing conferences, workshops and trainings can facilitate interactive dialog, inspire all concerned actors and eventually lead to the overall improvement of access to justice and development of business activities and entrepreneurship, in Uzbekistan.

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ТРАНСФОРМАЦІЯ РАДЯНСЬКОГО АДМІНІСТРАТИВНОГО ПРАВА: ТЕМАТИЧНЕ ДОСЛІДЖЕННЯ СУДОВОГО РОЗГЛЯДУ АДМІНІСТРАТИВНИХ АКТІВ В УЗБЕКИСТАНІ

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Судовий захист від окремих та нормативних актів державного управління в Узбекистані залишається складним. Однією з головних причин цієї проблеми виступає тривале поширення в правовому мисленні та юридичній практиці ідей та моделей радянського стилю. Стаття описує проблеми юрисдикції, які виникають під час спроб подолати радянську спадщину шляхом розробки правового захисту в адміністративних питаннях, та аналізує стратегії покращення цієї ситуації. Ключовими факторами є всебічний і гармонізований розвиток адміністративної процедури та адміністративного судового процесу у галузі законодавства і те, що можна назвати «конституціоналізацією» правового мислення, теорії та викладання – повага до цінностей, закріплених у Конституції, таких як верховенство права та доступ до судового захисту від державного управління – у галузі юридичної науки. Узбекистан – хороший приклад того, як іноземні партнери та донори міжнародної правової допомоги можуть зміцнити ці фактори.

У роботі досліджено (1), якою мірою відбулася відмова від радянського мислення щодо судового розгляду адміністративних актів або наскільки воно все ще функціонує в сучасному Узбекистані, та (2) якими є точки трансформації судового розгляду. Загалом я стверджую, що радянське мислення щодо судового розгляду адміністративних актів значно змінило законодавчий рівень в умовах нового режиму Узбекистану, проте правові реформи досі не приймаються юридичною практикою, доктриною та юридичною освітою.

Першим кроком до аналізу цих тверджень є опис основних характеристик та правових реформ судового розгляду щодо адміністративних актів, прийнятих у радянський період (розділ II). У розділах III та IV аналізується сучасна правова система та судова практика Узбекистану. Наприкінці я окреслюю нещодавно вжиті кроки для впровадження деяких реформ у сфері судового розгляду адміністративних актів в Узбекистані (розділ V).

Ключові слова: адміністративне судочинство радянського стилю, адміністративний судовий процес, адміністративна процедура, юридична освіта, Стратегія Дій в 2017–2021 роках, адміністративні суди, юрисдикція, тематичне дослідження / кейс-стаді, текстовий позитивізм, суддівське правотворення.

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 (англійською або німецькою):

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 повинна бути така структура: Мета, Методи, Результати та Висновки. Обсяг анотації: мінімум – 300 слів, максимум – 350 слів. До анотації обов’язково додають 5–10 ключових слів.

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 українською і англійською (якщо статтю подано німецькою 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 повинна бути така структура: Мета, Методи, Результати та Висновки. Обсяг анотації: мінімум – 300 слів, максимум – 350 слів. До анотації обов'язково додають 5–10 ключових слів.

Посилання на літературу подаються у тексті тільки в круглих дужках:

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 (английский или немецкий язык):

название;

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

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

расширенная аннотация и ключевые слова. В аннотации должна быть такая структура: Цель, Методы, Результаты и Выводы. Объем аннотации: минимум – 300 слов, максимум – 350 слов. К аннотации обязательно добавляют 5–10 ключевых слов или словосочетаний.

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.

5. Указывается на украинском и английском языке (если статью подано на немецком языке):

название;

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

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

расширенная аннотация и ключевые слова. В аннотации должна быть такая структура: Цель, Методы, Результаты и Выводы. Объем аннотации: минимум – 300 слов, максимум – 350 слов. К аннотации обязательно добавляют 5–10 ключевых слов или словосочетаний.

Ссылки на литературу даются в тексте только в круглых скобках:

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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Technical requirements for article composition:

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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 (English or German):

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

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expended summary and key words. The summary consists of the following obligatory structure: Purpose, Methods, Results and Conclusions. Summary volume: minimum – 300 words, maximum – 350 words. After the summary, it is necessary to add 5–10 key words or phrases.

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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.

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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.

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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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;

extended summary and key words. Summary has to contain: subject of research, methodology, goal and conclusions of research. The minimum volume of summary is 350 words.

References to the literature are given in the text only in parentheses:

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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