European Journal of Law and Political Sciences

№ 1 2020

PREMIER Publishing

Vienna
2020

European Journal of Law and Political Sciences

Scientific journal

№ 1 2020

ISSN 2310-5712

Editorial office Premier Publishing s.r.o.
Praha 8 – Karlín, Lyčkovo nám. 508/7, PSČ 18600

Email: pub@ppublishing.org

Homepage: ppublishing.org

European Journal of Law and Political Sciences is an international, German/English/Russian language, peer-reviewed journal. It is published bimonthly with circulation of 1000 copies.

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Typeset in Berling by Ziegler Buchdruckerei, Linz, Austria.
Printed by Premier Publishing s.r.o., Vienna, Austria on acid-free paper.

Section 1. Agrarian law

https://doi.org/10.29013/EJLPS-20-1-3-9

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AS FOR THE OWNERSHIP RIGHT TO THE LAND OF THE UKRAINIAN PEOPLE

Abstract. The scientific approaches to determining the content of the legal structure of land ownership of the Ukrainian people have been analysed. It is proposed to consider the ownership right to the land of the Ukrainian people as a kind of public property, consisting in the domination of the territory bounded by the borders of the state for the purpose of satisfying the interests of the whole Ukrainian society, exercised directly by the Ukrainian people or bodies of state power or local self-government on its behalf.

Keywords: land ownership, Ukrainian people, referendum, land, and jurisdiction.

By virtue of the adoption of the Land Code of Ukraine on 25 October 2001, a moratorium on the alienation of agricultural land was introduced. It was a temporary measure that had been going on for all this time and would remain in force until the agricultural land circulation law came into force.

Due to the land reform and the adoption of Draft Law No. 2178-10 'On Amendments to Some Legislative Acts of Ukraine on the Circulation of Agricultural Lands' [1] by the Verkhovna Rada of Ukraine on 13 November 2019, the interpretation of the constitutionally enshrined concept of the ownership right to the Ukrainian people's land has become relevant.

Pursuant to Article 13 of the Constitution of Ukraine, land, its subsoil, atmospheric air, water and other natural resources that are within the territory of Ukraine, the natural resources of its continental shelf, exclusive (maritime) economic zone are objects of property of the Ukrainian people. The aforementioned constitutional provision raises a number of theoretical issues: what is the ownership right to the land of the Ukrainian people; what competences it includes; which means the concept of land as an object of ownership of the Ukrainian people; whether the Ukrainian people can be the entity of ownership in general and the entity of ownership right to the land, in particular; how are the powers of the Ukrainian people as the entity of the ownership right to the land different from those of the state authorities and local self-government bodies entitled to act for and on behalf of the Ukrainian people as entity of the ownership right to the land.

The aforesaid issues have been repeatedly addressed by scholars in various fields of law. The

positions of scientists on determining the content and essence of the ownership right to the land of the Ukrainian people should be grouped as follows.

The first position is to completely deny the ownership right to the land of the Ukrainian people.

Therefore, in the opinion of Professor M. V. Shulha the Ukrainian people as the owner of the land can be considered only in social and political aspect, and in the legal sense it is unlikely that the people own the specified natural resource [2, P. 79].

By denying the concept of the right to land of the Ukrainian people P.F. Kulynych stated heretofore that the constitution of any state, including the Constitution of Ukraine, is not only a legal document, but also a political and legal one that contains not only legal regulations, but also provisions of political or political-legal nature, that is why the constitutional the "land - property of the Ukrainian people" provision should not be qualified as a monopoly on land property, its exclusive ownership of a single entity, but as a declaration by the state of the intention to impose certain requirements (restrictions) on the acquisition of the Ukrainian people and implementation of land ownership by individuals and legal entities [3, P. 67]. According to the scientist, the aforementioned article does not regulate the question of land ownership and the best way to resolve the controversy over the property right is to amend the Fundamental Law on Removal of Article 13.

Professor V. M. Yermolenko also criticises the model of "ownership right to the land of the Ukrainian people. In his opinion people is an abstract concept, and in order to determine ownership, the land needs to be clearly defined by its entity. It is due to the fact that from a legal point of view, the entity of ownership must be clearly personified. Currently, the property of the Ukrainian people lies more in the moral plane, but at the same time it must be translated into legal and economic [4].

V. O. Kobylianskyi agrees with the aforesaid position. From his point of view in Article 13 of the Constitution of Ukraine, land is referred to as an object of ownership of the people. However, the right of ownership arises not only on the land, but only on the land plot, by virtue of the fact that under Article 79 of the Land Code of Ukraine, it is the object of the property right. As the property right can be registered only on the land plot and not on the land, the conclusion is that Article 13 of the Constitution of Ukraine is purely declarative [4].

A. M. Miroshnychenko refers Article 13 of the Fundamental Law to unsuccessful provisions. However, he states that the provisions provided for by the said article cannot be interpreted in relation to property rights in the same way that at the level of individuals and legal entities, territorial communities, the state is also the Ukrainian people as the entity of property rights. In his opinion, the ownership right to the land of the Ukrainian people is a general concept in relation to the property rights of the state and territorial communities - public-legal types of property rights. The property rights of the Ukrainian people can be represented either in the form of state or in the form of communal property, which does not in any way exclude the possibility of existence of property rights of citizens and legal entities, since part 1 of Article 13 of the Constitution of Ukraine does not use the formulation "object of exclusive property", instead, in Article 14 directly providing for the possibility of acquisition of land in the property of legal entities and individuals [5].

I. V. Zub considers the concept of ownership of the Ukrainian people constitutional and legal, which reflects the sovereignty of the state and the people of Ukraine over natural resources in the territory under the jurisdiction of the state of Ukraine. Therefore, this concept cannot be used directly in property relations [6].

In my opinion, it is inappropriate to consider the constitutional norm on the ownership right to the land of the Ukrainian people from the standpoint of classical civil theory. By strongly denying this construction, justifying the obligatory ownership of the land on the ownership of only one personified entity, scientists proceed from the interpretation of the es-

sence of the property right "one entity of property right – one object of ownership", do not take into account public and legal nature legal relations that develop around the ownership right to the land of the Ukrainian people. In addition, it is inappropriate to divide the provisions of the Constitution of Ukraine into normative and declarative ones by virtue of the fact that all provisions of the Fundamental Law have direct effect and are equally normative.

As for the second position of scientists, they should include authors who do not distinguish the Ukrainian people as an independent entity of ownership right to the land, but identify it with such an entity as the state. For example, civilians propose to recognize the Ukrainian people, along with the state, as an entity of state ownership and to consider it not as an independent form of property but as a form of the state ownership [7, p. 530–536].

At the same time S. O. Ivanov, I. V. Snitsar by studying the nature of the forms of property defined in the provisions of the Constitution of Ukraine, notes that if the state is an entity of the state ownership, territorial communities are entities of communal property, then what form of ownership belongs to such an entity of property rights as the Ukrainian people? Obviously, the property right of the Ukrainian people is not an independent form of property and is, by its nature, state property, the entity of which is the state of Ukraine. The scientists hereby conclude that the provisions enshrined in Article 318 of the Civil Code of Ukraine regarding the determination of the Ukrainian people as the entity of property rights is declaratory. Such a construction does not have a meaningful civil legal burden, since the real mechanisms for exercising the aforesaid right have not been developed in the classical civility sense [8, p. 122–123].

We believe that identifying the Ukrainian people as the entity of ownership right to the land and the state is not correct enough. The opinion of V. V. Nosik, who proposed a two-tier structure of the ownership right to the land, under which the property rights of the state, legal entities and citizens are derived from the property rights of the Ukrainian people, the entities of ownership right to the land at the highest level are citizens of Ukraine of all nationalities as Ukrainian people, and at the lower level entities of the property right are individuals and legal entities, the state, territorial communities as legal entities of private law [9, P. 223]. Scientific and legal approach of V. I. Semchyk on the relationship between the ownership right to the land of the Ukrainian people and the right of state ownership right to the land also proves that these are not identical legal categories. From his point of view, the Ukrainian people are the entity of ownership of all lands constituting the territory of a country delimited by a border from other states, to which the sovereignty of Ukraine extends, irrespective of the forms of ownership right to the land existing in the territory of Ukraine [10, P. 565].

The third position of scientists is to recognise the Ukrainian people as a full and independent entity of ownership right to the land.

In particular, V. I. Andreytsev distinguishes the property right of the Ukrainian people as an independent form of ownership along with the right of state, communal and private property (individuals and legal entities). The scientist considers the property of the Ukrainian people in the sovereignty-territorial aspect, as the exclusive owner, who has authority in particular to change the boundaries and, accordingly, the land as a territorial-spatial basis of the functioning of the state or the exercise of this power by legalised representative and other authorities of the state in accordance with the functions, delegated to them by the Constitution of Ukraine or a special law. The aforesaid natural resources form the material basis of Ukraine's sovereignty and ensure its social and economic development [11, P. 22].

Article 14 of the Constitution of Ukraine enshrined the provisions that proclaimed land the main national wealth, which is under the special protection of the state [12]. However, the Declaration on State Sovereignty of Ukraine stated that it is the people

of Ukraine who have the exclusive right to own, use and dispose of national wealth [13]. The importance of such an order determines the importance of land not only as a natural heritage of present and future generations of the Ukrainian people, but also that land is the main means of production in agriculture, the basis of national wealth, since the creation of gross domestic product of the state is primarily based on the use of this natural resource potential of land within the borders of Ukraine.

A. I. Khalota recognises the Ukrainian people as an independent entity of property rights, which, in the forms and limits defined by the Fundamental Law of Ukraine, may directly exercise the ownership, use and disposal of land, or may be exercised by state and the local authorities on its behalf [14, P. 206].

The authority of the Ukrainian people to own land is absolute and is unchanged and permanent. Private ownership right to the land by individual entities does not imply a loss of ownership of the land by the Ukrainian people, since the right of ownership of the people and the right of ownership of an individual are different in economic sense and the legal nature of the phenomenon. At the same time, the Ukrainian people own the land only under the title of ownership, and in this aspect the ownership of the Ukrainian people is exclusive [14, P. 206]. It means that the power of the Ukrainian people to own land cannot be limited by national or international legal acts.

In addition to the above, the exclusive right of the Ukrainian people to possession should be combined with the accessibility of every citizen to the natural resource. At the same time, public authorities should ensure the implementation of the social function of ownership of the Ukrainian people by adopting laws that would restrict restrictions on the acquisition of private land by individuals and legal entities, prevented the formation of latifundia or land fragmentation.

An important element in the content of ownership right to the land of the Ukrainian people is the right to use, the essence of which is revealed through the economic nature of ownership right to the land. It is the obligations of every member of society to comply with the requirements and rules of land use in order to ensure their efficiency and rationality in the operation thereof.

The competence of the Ukrainian people to dispose of land, which is conditioned by objective and subjective factors, has a special meaning. Although the Ukrainian people are entity to public law, they are not directly entity to property rights in civil relations. On behalf of the people, the rights of the owner are exercised by state authorities and local self-government. In view of the special aspect of the legal status of the Ukrainian people as entities of property rights, only the people can dispose, for example, of land as the territory of Ukraine by transferring part of the land to other states [14, P. 207].

By agreeing with the aforesaid position, we see the possibility of applying to the ownership right to the land of the Ukrainian people a triad of ownership rights – ownership, use, and disposal. However, the peculiarity of the exercise of the powers of the Ukrainian people is that the people exercise powers either directly in the form of a referendum, or the bodies of state power or local self-government exercise separate powers on behalf of the Ukrainian people.

As of today, the issue of introduction of market circulation of agricultural lands is an urgent one for our country. In view of the strategic nature of this natural resource and its enormous social importance, the lifting of the moratorium on the sale of agricultural land should be decided directly by the Ukrainian people, as the titular land owner in Ukraine in the All-Ukrainian referendum.

The All-Ukrainian Referendum, according to the Law of Ukraine 'On the All-Ukrainian Referendum' dated 6 November 2012 No. 5475-VI, is a form of unchallenged democracy in Ukraine, a way of exercising power directly by the Ukrainian people, which is to make (approve) citizens of Ukraine with decisions issues of national importance by secret ballot in the manner provided for by the law [15]. However, on 26 April 2018, the Constitutional Court of

Ukraine ruled that the above Law of Ukraine was declared unconstitutional and on the basis whereof the Law was repealed [16].

Therefore, the decision of the Constitutional Court of Ukraine has cancelled the possibility of holding referendums in Ukraine for the purpose of expressing the will of the people and legitimising the power decisions through the institute of direct democracy. There is a gap in the laws. Regardless of the regulations of the Constitution of Ukraine, which establish the possibility of holding referenda, there is no legislative regulation. That is why the legislative body is faced with the urgent question of drafting and adopting a new act that will be constitutional, democratic, meet European standards, and determine the legal basis, organization and procedure of holding referenda – a form of direct democracy, a way of exercising power directly by the Ukrainian people as a holder of sovereignty and sole source of power in Ukraine.

For the purpose of eliminating the gaps in the laws and regulate legal relations related to the initiation, appointment (proclamation), preparation and holding of an all-Ukrainian referendum under the provisions provided for by the Constitution of Ukraine, taking into account the practice of holding national referendums in Ukraine, creating a real possibility for the implementation of all resolutions, was drafted and submitted to the Verkhovna Rada of Ukraine the draft Law of Ukraine 'On the All-Ukrainian Referendum' dated 26 September 2019 No. 2182 [17], which is under consideration and revision. In view of the lack of legislative regulation of the will of the people to express their will on the issue of lifting the moratorium on the circulation of agricultural land, the state of the state under anti-terrorist operation in the east of Ukraine, the abolition of the moratorium on the sale of land can lead to speculation of the power holders.

Despite the fact that the Ukrainian people are constitutionally recognized as the entity of ownership right to the land, the exercise of this right, according to Article 14 of the Constitution of Ukraine, relies on the relevant bodies of state power and local self-government, which should act in the interests of the whole society. State and local self-government bodies exercise the rights of the landowner on behalf of the Ukrainian people, while maintaining the permanence and immutability of property rights within the territory of Ukraine. The powers of the aforesaid authorities are defined by the Constitution of Ukraine and other regulatory acts, but in general, their powers in relation to land concern only the exercise of the right to manage the said property.

The work of Professor V. V. Nosik, which most fully discloses the content of the powers and proves that the Ukrainian people is an independent entity of ownership right to the land that owns, uses and disposes of land within the territory of Ukraine. The author notes that the content of each of the powers has its own specificity, due to the public-legal nature of the ownership of the people on land. In particular, the right of ownership is based on the natural law of the Ukrainian nation on its territory and is absolute, unchanged, permanent, determining the legal regime of other natural resources; it cannot be restricted by any laws of Ukraine and at the same time it must be combined with the accessibility of every citizen to the right to use the land [9, p. 225–227].

Summarising the foregoing, we hereby finds as follows: The Ukrainian people are an independent entity of ownership right to the land, exercising their powers directly through a referendum or indirectly through state or local government bodies, which are obliged to act on behalf of the Ukrainian people on the basis of within the limits of powers and in the manner provided by the Constitution and regulations of Ukraine. Land as an object of property rights of the Ukrainian people has a special legal regime, but at the legislative level this concept has not found its foothold. Therefore, land as an object of property rights of the Ukrainian people should be considered as a natural resource, territorially limited by the borders of Ukraine, recognized as the main

national wealth, which is under special protection of the state, is the material basis of sovereignty and economic basis of independence of the state.

Furthermore, the constitutional consolidation of ownership right to the land of the Ukrainian people, as a legal phenomenon, should receive the proper constitutional and legal mechanism for its implementation, which would include a system of guarantees of the interests of the owner by virtue of the fact that today we see the separation of constitutional regulations from the real institution of the ownership right to the land of the Ukrainian people.

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Section 2. Administrative law

https://doi.org/10.29013/EJLPS-20-1-10-13

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SPECIAL PRINCIPLES OF CERTAIN PROCEDURES IN THE ADMINISTRATIVE-TORT LEGISLATION

Abstract. The article focuses on the fact that the basis of the qualification process of any administrative offense is its principles. The following was stated: the principles of administrative-legal qualification are not fixed today in either administrative legislation or in the theory of administrative-legal qualification. Therefore, the author proposed his own vision of the concept of "principles of administrative legal qualification".

Keywords: administrative-tort principles, qualification, administrative offenses, public order, public safety.

The meaning of administrative law principles during the process of the realization of administrative liability will mark the main basics of administrative and legal relationships connected to defining the administrative offenses, their qualification, bringing to administrative responsibility, the implementation of administrative and tort proceedings (proceedings on administrative offenses).

The basis of the qualification process of any administrative offense, whether it's an offense-like act similar to petty hooliganism, bringing a minor intoxicated or fortunetelling in public places, should be the main provisions of a dogmatic nature, which the qualification subject should be guided by during the qualification of an administrative offense.

Principles as a legal category have always been the main topic of research by specialists in the general theory of state and law (S. Alekseev, A. Petrushin, S. Pogrebnyak, O. Skakun, M. Zvik) and administrative law (V. Averyanov, Yu. Bityak, V. Zui, T. Kolomoets, V. Kolpakov), given their specific legal nature, role and importance for the development of jurisprudence. At the same time, each area of administrative law has both general principles and specific (special) principles that correspond to the scope of administrative and legal regulation. One of these areas is the administrative-tort sphere, the system of principles of which, including the principles of administrative offense proceedings, the understanding of which now needs to be rethought due to the rapid development of legislation and the science of administrative law and the lack of a textual representation of the first among the provisions of the normative -legal acts.

The principles of administrative qualification are not currently enshrined either in administrative law or in the theory of administrative qualification. Therefore, we consider it necessary to offer our vision of the concept of "principles of administrative

legal qualification" and define them as guidelines, principles and requirements that characterize the content of qualification of administrative offenses and are mandatory for subjects to comply with administrative and jurisdictional powers.

A detailed analysis of the current regulatory legal acts, in particular, the norms of the Constitution of Ukraine and administrative legislation (Code of Ukraine on Administrative Offenses (CUAO), Code of Administrative Procedure of Ukraine) of certain provisions of international legal acts that have been ratified by the Verkhovna Rada of Ukraine and form an integral part of Ukrainian legislation, and general principles of administrative law as a branch of law allowed us to propose a system of principles of administrative qualification ii. Such a system can include the following principles: legality; equality of citizens before the law; publicity; objectivity; exhaustibility; personalization completeness of administrative qualifications; resolving disputes in favor of the person whose actions are qualified; the inadmissibility of a double charge of an administrative offense; immutability; professionalism.

The principle of legality is that all information about an administrative offense, including reporting or obtaining evidence and information about unlawful encroachment on public order and public safety in another way, for example, in the process of patrolling, must be obtained exclusively by law. Otherwise, it cannot be taken into account when qualifying an administrative offense. The principle of legality also requires mandatory consideration of circumstances in which administrative liability is excluded (Part 2 of Art. 58 of the Constitution of Ukraine [1]. Thus, the actions of the offender must be qualified according to the norms of administrative law that were in force at the time the administrative offense was committed, without assuming qualification by analogy. So, apply the administrative norm prescribed by law.

The principle of equality of citizens before the law and the body (official making the qualification of an administrative offense) follows from parts 1 and 2 of Art. 24 of the Constitution of Ukraine: citizens have equal constitutional rights and freedoms and are equal before the law [1].

The principle of publicity of the qualification of an administrative offense is that the authorized bodies (officials) implement it officially, on behalf of the state. Only such qualifications will lead to legal consequences.

The principle of objectivity of the qualification of an administrative offense excludes the subjective assessment of the authorized body (official) that carries it out. When conducting qualifications, it is necessary to be guided solely by information about the circumstances of the case obtained in compliance with the principle of legality.

The principle of exhaustibility guarantees the qualification of an administrative offense under such a legal norm within the framework of the CUAO will finally describe its composition, with the obligatory condition of reference to the relevant part, paragraph, subparagraph of the applied article.

The principle of personalization requires the subject of qualification to conduct it, taking into account the features and individual characteristics of both each administrative tort and each personality of the offender, existing at the time of the administrative offense and in the implementation of administrative-legal qualifications.

The principle of completeness of qualifications ensures the need to take into account all, without exception, acts that a person committed. The application of which selective approach or qualification of a separate part of the committed acts is unacceptable.

The principle of resolving disputes in favor of a person whose actions qualify is directly enshrined in part 3 of article 62 of the Constitution of Ukraine, according to which evidence obtained illegally cannot form the basis of the charge, as well as the assumption [1]. So, when an authorized subject has doubts about the qualification of an administrative offense, he is obliged to interpret the latter only in favor of the accused.

The principle of the inadmissibility of a double charge of an administrative offense follows from Art. 61 of the Constitution of Ukraine: no one can be prosecuted twice for the same offense of the same type [1]. That is, an administrative offense encroaching on the sphere of public order and security cannot be qualified according to one norm of the CUAO, if before that, when carrying out a different qualification of an act of a person, a norm has already been defined that covers the above offense.

The principle of the immutability of qualifications protects against its arbitrary (unreasonable, unfounded) change. The grounds under which a change in qualification is allowed are: 1) the implementation of an error in qualification, which became a factor that led to incorrect qualifications; 2) changes in the circumstances of the case: the emergence of new or invalidation already established; 3) exposing the fact of knowingly incorrect qualifications, that is, the fact of abuse of a person who has been granted the right by the state to qualify administrative offenses in the field of public order and public safety.

The principle of professionalism is closely intertwined with the principle of publicity. The entities that carry out the qualification must have sufficient theoretical knowledge and professional skills for its implementation, since the legal consequences of conducting an official qualification in any case affect a person through the imposition of an administrative penalty for the offense. In addition, it is necessary to create an appropriate theoretical base in the form of methodological advice, clarifications, letters, etc., which will orient officials towards the implementation of the right qualifications and explain how to correctly resolve disputes in the qualification of administrative offenses in the field of public order and public safety.

The qualification of offenses in the field of ensuring public order and public safety has its own characteristics, which are reflected in the principles of its implementation. Among them, it is necessary to name the principles: timely and quick response to an administrative offense and the implementation of its qualifications; maintaining a stable balance of interests of the state, society and citizen; delimitation of administrative offenses in the field of ensuring public order and public safety from undifferentiated criminal offenses; the use, development and improvement of the methodological base for the qualification of administrative offenses in the field of public order and public safety; taking into account international experience in the implementation of the qualification of offenses in the field of public order and public safety.

The principle of timely and quick response to an administrative offense and the implementation of its qualifications must be respected in the process of identifying an administrative tort and consist of a quick and adequate qualification. In this case, the subject of qualification will be able to stop the offense and prevent its new commission and at the same time not violate the rights and freedoms of the offender. This principle is of particular importance in the field of public order and public safety, because both law and morality play an important role here: the subject of qualification, interacting with the offender in this process (at the place of the offense), must not only correctly qualify the offense, but and convey the negative consequences of qualification and, in general, the offense itself to the offender. Most of these offenses are committed in public places, and therefore their termination usually takes place in front of many people, the correct actions of the subject of qualification in such circumstances can be a good example of incorrect behavior for others and thereby prevent the emergence of new administrative offenses. Timeliness and speed of response to any administrative offense, encroaching on public order and public safety, due to the fact that the commission of such administrative offenses as: smoking tobacco in prohibited places (Art. 175–1 CUAO [2]); purchase of moonshine and other strong alcoholic beverages of domestic production (Art. 177 CUAO [2]); drinking beer, alcoholic, low alcohol

drinks in places prohibited by law or appearing in public in a drunken state (Art. 178 CUAO [2]); gambling, fortune telling in public (Art. 188 CUAO [2]) etc., an offender can easily hide his offense. For example, a cigarette can be thrown away, a bottle of alcoholic drink hidden, approximately the same situation occurs with gambling objects (cards, dice, etc.).

The principle of maintaining a stable balance of interests of the state, society and citizen. The establishment of public order and public safety is the task of the state, the implementation of which ensures the preservation of the interests of society as a whole and of each citizen separately, this is the basis for maintaining an appropriate standard of living in the country. Therefore, it is so important to maintain this relationship in the administrative qualification of offenses.

The principle of distinguishing administrative offenses in the field of ensuring public order and public safety from undifferentiated criminal offenses ensures the correct application of administrative legislation and the imposition of such sanctions that will meet the offense and thus contribute to the establishment of citizens' rights and freedoms.

The principle of the use, development and improvement of the methodological base for qualifying administrative offenses in the field of public order and public safety is substantiated by the importance of stability of such phenomena as public order and public safety, which allows maintaining an appropriate level of functioning of the state, interaction between the state and society and the sustainable development of the latter, which is ensured by including through the implementation of the correct qualification of offenses at the field. Given the fact that the theory of the administrative-legal qualification of offenses in the field of public order and public safety is not formulated and there are many unresolved questions about this topic, there is a need to approve a set of methods and theoretical provisions on this topic. This will become a powerful tool to ensure both public order and public safety.

The principle of taking into account international experience in the implementation of the qualification of offenses in the field of public order and public safety essentially follows from the previous principle. Considering the fact that Ukraine today has embarked on a path of major reforms that cannot but affect administrative activities and which are being implemented based on the international experience of successful countries in Europe and America, the process of qualifying administrative misconduct in the field of public order and public safety must comply with modern international standards, so that the "mechanism for qualifying administrative offenses" works in conjunction with the new reformed legislation.

The definition of the principles of administrative legal qualification, without exaggeration, plays a large role, since they not only form the basis for the development of rules for the search for the relevant norms of administrative law to be applied, but also are embodied in the strict qualification requirements of administrative offenses, deviation from which entails going beyond limits of the legal field. In the practical activities of the police, the observance of these principles will ensure the development of an algorithm for the actions of an official during the administrative-legal qualification, will reduce the number of cases of incorrect qualification of administrative offenses, and thus strengthen the rule of law in the state.

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Section 3. Arbitration process

https://doi.org/10.29013/EJLPS-20-1-14-17

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CROSS-BORDER INSOLVENCY IN THE RUSSIAN FEDERATION: ISSUES OF SELLING THE ESTATE OF A FOREIGN DEBTOR

Abstract. The article analyses the possibility of applying in the Russian Federation consolidated enforcement proceedings for the purpose of selling the property of the foreign debtor-insolvent instead of initiating insolvency proceedings.

Keywords: cross-border insolvency, insolvency, legal entity, debtor.

Under globalization and internationalization of business relations, the tendency for national companies to enter foreign markets has increased. However, in an economically unstable environment, this trend has a negative aspect in the form of increased cases of cross-border insolvency.

One of the main issues of insolvency, coupled with a transnational element, is the lack of uniform regulation of this phenomenon.

In the Russian Federation, regulation of cross-border insolvency is currently only limited by the provisions of Article 1 of the Law "On Insolvency (Bankruptcy)", which establishes national regulation of foreign creditors, as well as the possibility of recognition of foreign court decisions on insolvency. Therefore, the Russian legislation does not contain any procedural regulation of this legal instrument.

In turn, international practice, reflected in particular in the Regulation (EU) 2015/848 of the European Parliament and of the Council of the European Union on Insolvency Procedures of May 20, 2015 (hereinafter – Regulation (EU) 2015/848, the Regulation), has developed a regulation of cross-border insolvency based on two types of proceedings: main and secondary.

This approach is based on the model of modified universalism. This model suggests that the main insolvency proceedings may be supplemented by secondary (territorial) proceedings in other countries.

Under this approach, the main proceeding is commenced at the location of the debtor's centre of main interests, i.e. COMI standard is applied to determine the jurisdiction of the main proceeding – the insolvency proceeding is considered by the court of the State that is the centre of the main interests of the debtor.

Secondary proceedings are commenced at the location of the local enterprises of the debtor [5, P. 141]. Secondary insolvency proceedings are commenced in order to facilitate the main process, namely, the sale of the estate in the territory of the State in which the proceedings are opened, or insolvency estate.

This type of insolvency proceedings, which is aimed only at the sale of the estate, is not known under Russian law – it is impossible to file an applica-

tion for insolvency of any foreign legal entity estate located in the territory of Russia before a Russian court. At the same time, there are no legal obstacles for simultaneous satisfaction of claims of several creditors in the consolidated enforcement proceedings through the sale of such estate.

According to Article 34 of the Law "On Enforcement Proceedings", several enforcement proceedings initiated against one debtor of estate are united in a consolidated enforcement proceeding. Accordingly, consolidated enforcement proceedings are aimed at the sale of the estate of the debtor for the benefit of several creditors, which in essence is the sale of the estate of the debtor.

Taking into account the existence of such a procedure in the Russian legislation and the question whether it is necessary to include in the legislation of the Russian Federation the possibility to initiate proceedings against a foreign debtor aimed only at the sale of assets located in the territory of the Russian Federation or the possibility of opening a consolidated enforcement proceeding is sufficient.

In order to answer that question, it was necessary to find out what exactly constitutes a secondary proceeding in global law, in particular, Regulation (EU) 2015/848, one of the successful examples of transnational resolution of cross-border insolvency proceedings.

As noted earlier, the Regulation provides for the possibility of multiple insolvency proceedings against the same debtor. A main proceeding may be commenced by a court in an EU member State where the centre of the main interests of the debtor, namely the place where the debtor regularly manages its assets.

According to article 3 of the Regulation, where the debtor has an establishment in a Member State other than the State where the centre of its main interests is located, the courts of that State have jurisdiction to open a insolvency proceeding (secondary insolvency proceedings). The legal consequences of this procedure are limited to the assets of the debtor located in the territory of such Member State. Article 3 of the Regulation therefore limits the application of national law to the consequences of secondary insolvency proceedings, which are limited to the sale of the assets of the debtor, while secondary proceedings have no legal consequences arising from the status of insolvency with respect to the "fate" of the debtor himself.

This conclusion is consistent with the preamble of the EU Regulation. In fact, paragraph 23 of the preamble establishes that the main insolvency procedure opened in an EU member State in which the debtor has main interests, has a universal scope of application and aims to cover all assets of the debtor. Secondary procedures that may be opened to protect a variety of interests are limited only to assets located in the territory of the State of their opening. Accordingly, the provisions of the preamble are indicative of the property nature of secondary proceedings and therefore the consequences of such a procedure do not affect the status of the debtor.

However, paragraph 40 of the Preamble of the Regulation states that secondary proceedings may serve a variety of purposes beyond the protection of private interests: "Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, **or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings** (put in bold by the author) to the other Member States where the assets are located."

According to that preamble text, the commencement of secondary proceedings may also have the purpose of spreading the legal consequences of the insolvency of the debtor in the State where its estate is situated. At first glance, that provision suggests that secondary proceedings should be opened in case of difficulties in extending the effect of the decision resulting from the main insolvency proceedings. However, it is necessary to pay attention to the fact that such extension is necessary for the purposes of sale of property belonging to the insolvency estate of the debtor. In this regard, it should be said that the

secondary proceedings are aimed at selling the assets of the debtor, which are part of the insolvency estate, and ultimately have a purely property value for the insolvency procedure as a whole.

Secondary proceedings only complements main proceedings, which is of universal importance. Since the effects of the commencement of the proceedings primarily affect the ability of the debtor to sell and transact [4, p. 321], the Regulation is primarily concerned with the ability to effectively manage the assets of the debtor located in the territory of the State where the secondary proceeding is opened and with the protection of local creditors.

However, the decision made as a result of the secondary proceedings should not contradict the decision of the main proceeding. Article 34 of the EU Regulation, revealing the concept of the secondary insolvency procedure, says that "Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened". This provision points to the priority of the main proceedings that affect the debtor's status after the insolvency proceedings have been completed.

Since only the decision made in the main proceedings affects the debtor's status, the consequences expressed in the termination of obligations resulting from the declaration of insolvency of that person come from the moment the final decision in the main insolvency proceeding enters into force.

Under article 45 of the Regulation, any creditor is entitled to assert its claims in main and secondary insolvency proceedings. Explaining this provision, paragraph 63 of the preamble of the Rules states that any creditor whose residence is in the European Union right to lodge its claims to the debtor's property in every insolvency procedure to be conducted in the EU. At the same time, each creditor should be able to preserve all the assets obtained in insolvency proceedings, with the right to participate in the distribution of common assets in other insolvency proceedings only if the claims of creditors of the same line were satisfied in the same amount.

It follows from the above provisions of the Regulation that partial satisfaction of creditor's claims in the secondary procedure cannot serve as a ground for termination of the obligation. Since the said claim, along with the secondary proceedings, may be submitted to the register of creditors' rights of claim in the main proceedings, the obligation cannot be considered terminated before the claims of creditors in the main proceedings have been satisfied, including if the secondary insolvency proceedings are closed, because the debtor's estate has not been finally realized, unless otherwise provided by the applicable law.

Therefore, the advantage of insolvency proceedings is that local creditors obtain control over the part of the foreign debtor's property located in the commencement State. This enables creditors, in particular, to satisfy their claims in the manner prescribed by the law of their home country and then obtain satisfaction of the balance of claims from the remaining property of the debtor in the State of the main insolvency proceeding. In the absence of an opportunity to open insolvency proceedings in the Russian Federation for a foreign debtor, its assets, which could be used to satisfy the Russian creditors, may be used to satisfy the privileged claims included in the register in the state of personal law of such debtor. Accordingly, even in case of participation of Russian creditors in foreign proceedings, protection of their interests will be lower than that which could have been provided in the proceedings opened in the Russian Federation.

As to the consolidated enforcement proceeding, it does not give control over the debtor's assets, which distinguishes it from insolvency of part of the debtor's estate. Therefore, such a design could not protect the interests of local creditors, which was present in the event of the commencement of bankruptcy proceedings against the foreign debtor.

In addition, consolidated enforcement proceedings may exist irrespective of any public pro-

ceedings commenced in other States against the debtor. However, the commencement of bankruptcy of part of the debtor's assets is possible only if there is an insolvency proceeding concerning the same debtor in the State of the debtor's personal law, in order to ensure the unity of the debtor's legal status.

These circumstances indicate that the Russian Federation's consolidated enforcement proceedings alone are not sufficient to protect local creditors in a cross-border insolvency procedure. It is in order to protect the interests of creditors located in the territory of the Russian Federation that legislation needs to develop rules providing for the possibility of initiation of bankruptcy proceedings in Russia against a foreign debtor, the consequences of which will apply exclusively to assets located in the territory of the Russian Federation.

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Section 4. Civil procedure

https://doi.org/10.29013/EJLPS-20-1-18-22

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THE INSTITUTION OF UNWORTHY HEIRS IN THE LEGISLATION OF RUSSIA, AUSTRIA AND THE CZECH REPUBLIC (COMPARATIVE LEGAL ASPECT)

Abstract. The article analyzes the features of legal regulation of the institution of unworthy heirs on the example of comparative characteristics of the legislation of a number of countries (the Russian Federation, the Republic of Austria, the Czech Republic). The advantages and disadvantages of regulating these legal relations are revealed.

Keywords: unworthy heirs, debarment, intent, wrongfulness, forgiveness.

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ИНСТИТУТ НЕДОСТОЙНЫХ НАСЛЕДНИКОВ В ЗАКОНОДАТЕЛЬСТВЕ РОССИИ, АВСТРИИ И ЧЕХИИ (СРАВНИТЕЛЬНО-ПРАВОВОЙ АСПЕКТ)

Анотация. В статье проанализированы особенности правого регулирования института недостойных наследников на примере сравнительной характеристики законодательства ряда

стран (Российская Федерация, Австрийская республика, Чешская республика). Выявлены преимущества и недостатки в регулировании этих правоотношений.

Ключевые слова: недостойные наследники, отстранение, умысел, противоправность, прощение.

Институт недостойных наследников, как и многие другие институты наследственного права, зародился еще в период становления римского права и получил свое специфическое, уникальное развитие в каждой отдельной правовой системе. В данной работе нам хотелось бы обратиться к опыту таких стран, как Россия, Чехия и Австрия.

С введением в действие Части третьей Гражданского кодекса Российской Федерации (далее ГК РФ), институт недостойных наследников получил новый толчок в развитии, однако все равно недостаточно сильный, чтобы опередить наших зарубежных коллег в регламентации этого вопроса.

Данные правоотношения в России закреплены в статье 1117 ГК РФ, в которой указан перечень лиц и обстоятельств, в связи с которыми возможно применение правовых норм о лишении права наследования не по воле завещателя, а в силу закона. Это:

1) лица, совершившие умышленные противоправные действия, направленные против осуществления, предусмотренного законом или завещанием порядка наследования при условии, что они подтверждены в судебном порядке [1].

2) родители, лишенные и не восстановленные ко дню открытия наследства родительских прав, при наследовании по закону, когда наследодателями выступают дети;

3) если на лице лежали обязанности по содержанию наследодателя, и оно злостно уклонялось от их выполнения.

Следует обратить внимание, что в п. 1 – это лица «не имеющее права наследовать», а в п. 2 – «отстраненные от наследования».

Для гражданского законодательства Австрии также характерно наличие института недостойных наследников. Однако в отличие от ГК РФ, в Австрийском гражданском праве расширен круг лиц и обстоятельств, при которых могут наступить такие последствия. Данные положения отражены в Главе 8 Всеобщего гражданского уложения Австрии (далее ВГУ Австрии). Ими признаются граждане, которые:

1) против наследодателя совершили деяние, наказываемое в судебном порядке, которое может быть только умышленным и за которое грозит наказание в виде более чем одного года лишения свободы (§ 539) [2].

Если мы сравним данное положение с ч. 1 ст. 1117 ГК РФ, то увидим, что австрийский законодатель более детально урегулировал и конкретизировал вопрос о том, за какие именно умышленные противоправные деяния наследник может быть призван недостойным,– которые влекут лишение свободы более чем на 1 год, тем самым исключая возможность множественного толкования данной правовой нормы.

2) обманным образом склоняли или принуждали наследодателя к объявлению последней воли (§ 540), а также;

3)подавляли уже сформированную наследодателем последнюю волю, препятствовали в ее объявлении или изменении (§ 540), либо сорвали или попыталась сорвать ее осуществление (§ 540) [2].

Из трех вышеперечисленных положений мы можем увидеть, что по сравнению с ГК РФ, ВГУ Австрии предусматривает большее количество деяний, направленных против осуществления последней воли наследодателя.

4) в отношении супруга, зарегистрированного партнера, спутника жизни или родственников по прямой линии, братьев и сестер умершего и их детей, а также пасынков умершего совершили уголовное преступление, которое может быть

совершено только умышленно и грозит более чем годичным лишением свободы (ч. 1 § 541) [2].

Проводя параллель между данным положением и гражданским законодательством РФ, мы наблюдаем более широкий спектр лиц, которые могут стать недостойными наследниками. Это «спутники жизни», то есть лица, официально незарегистрированные в браке, но проживающие совместно,– «гражданский брак». По австрийскому гражданскому праву данные лица также выступают наследниками, однако с определенными ограничениями (например, когда отсутствуют все прямые наследники). Следовательно, к ним также могут быть применены нормы о недостойных наследниках. В гражданском праве РФ участие незарегистрированных в браке лиц в наследственных правоотношениях не предусмотрено (как и не предусмотрены так называемые «зарегистрированные партнеры»).

5) Причинили умершему предосудительным образом тяжкие душевные страдания (ч. 2 § 541) [2].

Аналогии данному положению ГК РФ не содержит.

6) в противном случае по отношению к умершему грубо пренебрегали своими семейными обязанностями, вытекающими из отношений между родителями и детьми (ч. 3 § 541) [2].

Схожая по смыслу норма, содержится в ч. 2 п. 1 ст. 1117 ГК РФ. Однако в отличие от австрийского права, российское толкует эту норму более узко, указывая не просто обязанности, вытекающие из отношений между родителями и детьми, а именно при лишении родителей родительских прав на момент открытия наследства.

При признании лица недостойным наследником, он не лишается в окончательном виде своих наследственных прав. Завещатель имеет право простить данные действия и восстановить своих наследников в наследственных правах [5, 42–43]. Данное положение характерно для законодательства обеих сравниваемых стран.

Потомки недостойного наследника (если мы говорим о наследовании по закону) призываются к наследованию вместо него (§ 542) [2]. Данное положение в гражданском праве РФ не предусмотрено, что является существенным упущением российского законодателя. Более того, согласно ч. 3 ст. 1146 ГК РФ при наследовании по праву представления дети недостойного наследника право наследовать не имеют. Другими словами, современный российский законодатель закрепил средневековое правило о том, что «сын за отца отвечает».

Таким образом, мы видим довольно значимые отличия в решении вопроса о недостойных наследниках по законодательству РФ и Австрийской республики. Во-первых, в Австрии расширен круг обстоятельств, в связи с наступлением которых лицо может быть признано недостойным наследником. Во-вторых, в ВГУ Австрии урегулирован более широкий круг лиц, признаваемых недостойными наследниками. В-третьих, в австрийском гражданском праве потомки недостойных наследников не лишаются права наследования и не несут тем самым ответственности за действия родителей.

В Чехии вопрос наследственного права урегулирован Главой 3Гражданского кодекса Чешской республики (далее ГК ЧР), согласно которому недостойным наследником может признаваться лицо, которое:

1) совершило действие, имеющее признаки умышленного преступления против наследодателя, его предка, потомка или супруга (§ 1481) [3].

Если сравнить данное положение с ГК РФ, то чешский законодатель в отличие от российского и австрийского, вводит еще одно лицо, против которого может быть совершено умышленное преступление – предок.

2) совершило недостойное действие, противоречащее последнему желанию наследодателя, в том числе хитростью обмануло или принудило, а также препятствовало к изъявлению последней воли (§ 1481) [3].

Данное положение регламентировано, как в российском, так и в австрийском законодательстве.

3)утаило, фальсифицировало, подделало или умышленно уничтожило последнюю волю наследодателя (§ 1481) [3].

В данном случае ГК ЧР расширяет круг противоправных действий, касающихся последней воли наследодателя. В ГК РФ и ВГУ Австрии такой конкретизации способов воздействия против осуществления последней воли наследодателя не предусматривается.

4) Если в день смерти наследодателя проходит бракоразводный процесс, начатый по инициативе покойного, на основании того, что супруг совершил действия, признаки которого подпадают под признаки насилия в семье, то супруг наследодателя исключается из права наследования в качестве законного наследника (ч. 1 § 1482) [3].

Данная норма отсутствует в законодательстве и Австрии, и России.

5)В случае если родитель был лишен родительских прав и обязанностей из-за того, что он злоупотреблял исполнением родительских прав и обязанностей или серьезным способом пренебрегал их выполнением, то он исключается из права наследственная после ребенка согласно наследственного правопреемства (ч. 2 § 1482) [3].

Положения о том, в каких случаях родители лишаются права наследования после детей, имеется и российском, и в австрийском гражданском праве. Однако именно ГК ЧР наиболее четко и конкретизировано расписывает, что именно служит основанием для этого. Так, в ВГУ Австрии, дано довольно расплывчатое понятие – нарушение обязанностей, вытекающих из отношений между родителями и детьми, а в ГК РФ просто указано обстоятельство лишения родительских прав вне зависимости от того, по какой причине это произошло.

Потомки недостойного наследника призываются к наследованию вместо него, если речь идет о наследовании по закону. Как уже было сказано ранее, данное положение в ГК РФ отсутствует, но имеется в ВГУ Австрии.

Применимо ко всем вышеперечисленным обстоятельствам, так же как по австрийскому и российскому гражданскому праву, чешским предусмотрена возможность восстановления в наследственных правах недостойного наследника при условии, что наследодатель простил ему данное действие. Необходимо обратить особое внимание на то, что является прощением и при каких условиях оно наступает. По законодательству РФ лишь завещатель может восстановить в наследственных правах лицо, которое до составления этого завещания было признано недостойным наследником на основаниип.1 ч. 1 ст. 1117 ГК РФ. При этом завещатель при принятии данного решения должен был знать о совершенных противоправных действиях и об умышленной форме вины недостойного наследника, однако, зная обо всем, тем не менее, завещать наследнику какое-либо имущественное право [4, 192]. А вот по законодательству Австрии и Чехии подобных разъяснений относительно того, при каких условиях может быть прощен недостойный наследник, не имеется – дается лишь общая фраза: «если умерший не признал, что простил его» (ВГК Австрии) и «когда ему данное действие наследодатель прямо простил» (ГК ЧР).

Подводя итог всему вышеизложенному, мы видим, что опыт в регулировании института недостойных наследников таких зарубежных стран, как Австрия и Чехия гораздо более богат и обширен по сравнению с опытом Российской Федерации.

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Section 5. European law

https://doi.org/10.29013/EJLPS-20-1-23-26

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TORPEDOKLAGE AS A KIND OF ABUSE OF THE PROCEDURAL RIGTS

Abstract. The work is devoted to the problem of the abuse of the procedural rights. The author considers one kind of the abuse of the procedural rights- Torpedoklage in the article. The notion and the characteristics of this legal phenomenon are given. The author analyses the impact of the given abuse of the procedural rights due to the common term of the case examination.

Keywords: arbitrability of the dispute, Torpedoklage, abuse of the procedural rights, delaying of the case examination.

The problem of abuse of procedural rights in court disputes is widely discussed not only in the context of national law, but also in the framework of international law, including the consideration of cross-border disputes. In the current legal situation on the territory of the European Union, one of the key problems is the long-term consideration of disputes by the courts, which is a consequence of only one of the parties to the legal phenomenon under consideration. The high level of judicial burden as well as the territorial remoteness of the disputing parties, their belonging to different legal systems, and a huge array of legislative acts, creates additional difficulties in the implementation of the rights and freedoms provided for by current legislation at the international level and the implementation of the principle of effective justice.

In accordance with the provisions of article 6 of the Convention for the protection of human rights and fundamental freedoms signed in Rome 4.11.1950 G., article 47 of the Charter of fundamental rights of the European Union, adopted in nice 07.12.2000 each person in the determination of his civil rights has the right to a fair and public hearing by an independent and impartial Tribunal established by law, within a reasonable time [1, 302; 2, 31].

At the international level, attempts have already been made to include provisions on the prohibition of abuse of procedural rights in the text of an international act [3, 10], but due to the lack of a clear understanding of the construction of abuse of procedural rights, this attempt has not been successful, despite the fairly well-developed legal structure, both at the regulatory level and in doctrine, of the prohibition of abuse of rights in substantive law.

Because of globalization and the expansion of international relations between subjects of economic activities, and also in connection with some legal

uncertainty, generating opportunities for abuse of rights in order to achieve goals of a particular subject of legal relations, which inevitably leads to imbalance the rights of the parties, the analysis and study of procedural abuses, and mechanisms to counter this negative legal phenomenon are undoubtedly relevant for modern legal science.

Law, as a valid, positive law, as a system of legal norms sanctioned and protected by the state, has a certain spiritual ideal basis in the form of a set of values embodied in it [4, 53].

In the General axiological aspect, which should be seen in every legal phenomenon, the concept of abuse of procedural rights is inextricably linked with such values as honesty, justice, integrity, trust [5, 112]. These values in procedural law form the basis of judicial proceedings, which is confirmed both in scientific texts and in procedural law. The essence of these ideas is well reflected in the concepts of "correct and timely consideration and resolution of civil cases" and "fair trial".

Creating such a structure of abuse of rights in procedural law that is both precise and specific, and at the same time the most general, without generating excessive casuistry, is a complex and contradictory process, in view of the complexity of various forms of behavior during the trial, which can be attributed to the manifestations of abuse of procedural rights.

The general idea of various conceptual models is that abuse of procedural rights refers to behavior that damages the above values, and is characterized as: 'unfair actions', 'violation of procedural rules', 'fundamentally unfair behavior' [6, 8].

The problem of abuse of rights in civil procedure is common not only in the legal validity of Russia but in the majority of the world's rule of law. The study of foreign legislation, doctrine and legal experience is a way of creating a resistance mechanism of various types of abuse of the procedural rights in national law.

Nemytina M. reasonably mentions: 'For more than 70 years we had been leaving in confined legal space and sincerely believed in soviet law being the best in the world. As a result-we are not acquainted with other legal systems and comparative jurisprudence. We relinquished the national experienced that has been accumulated for centuries during political and law institutes evolution. So the law tradition was interrupted. In conditions of one ideology supremacy we forgot how to use different approaches of science in conditions of multiple ideologies' [7, 188; 2, 9]. In accordance with above-stated, foreign countries experience study is a crucial and popular direction in modern law science.

In the period of acceptance the German code of civil procedure (1877) the problem of attribution of national and foreign courts competence was not significant. Consequently, the legislator did not attach the importance of the issue. The problem became valid only in the XX century in accordance with qualitative leap in the international trade relations development and migration [8, 143].

Despite the fact that there is a big quantity of decisions by court of higher jurisdiction and the Court of Justice of the European Union about competence of court, the jurisdiction questions and abuse of procedure rights during competent court and general litigation strategy identification questions are relevant nowadays. The relevance is related with growth of international, especially economic relations.

Torpedoklage is one of the most frequent types of abuse of procedural rights in European civil procedure [9, 2]. It is based on a claim directed in the foreign state court by a debtor have known that a creditor has reasons to create a claim against the debtor that will be accepted. The debtor claim to recognize the obligation breached by the debtor, invalid, delays litigation process. As foreign state court is not competent to consider such a claim, the debtor prolongs the legal dispute through artificial conditions creation when the dispute is triable in the foreign state.

Applying such a Torpedoklage to an incompetent court of a foreign state creates an obstacle to the creator legal claim to compel the debtor to perform the obligation in a competent court in accordance

with the current law for several years. As a result, such action of the debtor has a significant impact on the actual outcome of the case, which often makes it impossible to further execute the court decision.

In any case, this example is an expression of abuse of procedural rights by creating a situation in which the case becomes a subject to the jurisdiction of a foreign court. Thus, the rules of jurisdiction become artificially changed or created, and the jurisdiction of the case to a particular court is purposefully substantiated by deliberately creating conditions under which the case can be referred to the competence of the chosen court [10, 112].

The term Torpedoklage is not included in any state legislation [11, 208]. Notwithstanding the absence of term fixation in legislation, it is widely used in procedural literature due to various court practice existence. De facto, this is a kind of" blocking claim", which is widely used in European judicial practice. For the first time this term was used and described in detail by the Italian lawyer Mario Franzosi [12, 382]. When formulating this term, it draws a parallel between torpedoing ships and blocking the judicial process. The purpose of filing such a claim is to gain the maximum amount of time or to suspend the process for as long as possible, in order to create conditions for the impossibility of actual execution of the court's decision after its entry into force, or for the loss of the creditor's interest in its execution.

Torpedoklage must be distinguished from other types of abuse of procedural rights. Adverse consequences for the creditor are that when the debtor applies to Torpedoklage, the competent court cannot consider the Creditor's claim to compel the debtor to perform the obligation in view of the need to prevent parallel legal proceedings and the issuance of incompatible decisions by two or more courts at the same time, which are essentially mutually exclusive. Other possible cases of abuse of procedural rights in civil proceedings, in particular cases of claims filed by forum shopping, are not considered this type of abuse of procedural rights and are not considered in this article.

Summarizing, we note that claims for recognition of rights (including negative claims) are familiar to science since the time of ancient Rome. Meanwhile, in the light of the development of international relations and the search by participants of legal relations, especially economic ones, for ways to achieve the most favorable consequences in the event of conflict situations, forms of abuse are also developing, including through the adaptation of long-known procedural institutions in accordance with the needs of participants in economic turnover. In view of the above, we believe that the analysis of the legal experience of European countries in the field of countering procedural abuse, including Torpedoklage, will allow us to reach a new level in the fight against procedural abuse of parties in modern civil proceedings.

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Section 6. Corporate law

https://doi.org/10.29013/EJLPS-20-1-27-30

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THE ROLE OF CORPORATE SOCIAL RESPONSIBILITY IN THE BELT AND ROAD INITIATIVE

Abstract. This article examines the significance of Corporate Social Responsibility (CSR) in the context of the Belt and Road Initiative (BRI) executed by China. The general potential challenges faced by parties engaged in the BRI are analysed to reveal the opportunities for sustainable development.

Keywords: Corporate law, Corporate Social Responsibility, BRI, China.

Introduction

The Belt and Road Initiative (BRI) was announced by Chinese President Xi Jinping in 2013 [1, 2] as one of China's greatest international economic ambition, aiming at promoting economic development in Asia, Europe and Africa, which accounts for 64% of world population and 30% of world gross domestic product [2, 314].

The BRI is considered as a call for action in the context of economic, political and cultural exchange between different countries [3, 323] to ensure a free flow of economic factors, efficient allocation of specific resources, and deep integration of markets [4, 4]. Hence, the related policies and projects are targeted at facilitating education initiatives, knowledge cultivation, upgrading the working environment, providing jobs for unemployed youth, and ensuring sustainable development of the world economy.

Since the scope of BRI covers various countries, as well as the activities of specific companies on their territory, the consideration of the potential performance of the BRI cannot be separated from the implementation of the policy on Corporate Social Responsibility (CSR).

The implementation of CSR in the framework of the BRI has been considered in the context of engineering and construction enterprises [5, 1], infrastructure [6], international business and administration [7, 1].

However, in practice of developing economies, to truly benefit from Chinese investments under the BRI, it is crucial to be constantly involved in deploying practices on Corporate Social Responsibility at the enterprises accompanied by training, professional development [8, 8], and motivation of personnel.

From this, this article is aimed to reveal the importance of CSR for enterprises participating in the BRI and consider the potential challenges and problems to be faced by stakeholders on the way to the sustainable development of businesses.

The kernel of CSR in the framework of the BRI

The definition of CSR is an object of intensive discussions since it is associated with two contradictive positions. On the other hand, there is a neoclassical economy view highlighting the importance

of shareholder value maximization. On the other hand – the stakeholder view promoting the responsibilities of businessmen to society [9, 1].

As one of the most prominent concepts, CSR generally includes four dimensions, such as economics, law, ethics and philanthropy [10, 497].

CSR is targeted at improving the company's reputation, and development of business through establishing mutual relationships with stakeholders. Hence, the companies maintaining CSR practices are focused not only on gaining profits but on achieving social good and ecological stability. There is a need not only to ensure coordinated efforts by involved parties, such as companies, factories, etc. but their aspiration to voluntarily impose restrictions on themselves if their activities the positions of stakeholders.

As the BRI's success also depends on the significant challenges, such as labour relations and social and environmental concerns [11, 1], the consideration of CSR in the BRI's activities is crucial for mitigating risks and uncertainties.

In the framework of the BRI's projects, building a dialogue with stakeholders contributes to the integration of the company's activities with stakeholders' expectations and needs to achieve compliance on the relevant issues of projects implementation. As a result, the companies develop a positive and stakeholders-friendly environment through which it is possible to attain greater efficiency of business processes.

Thus, CSR is aimed at solving the existing problems, avoiding negative consequences of the company's activities, and introducing the idea of social responsibility to the company's strategy to provide the competitive advantages.

The mitigation of the risks based on the CSR programme

Local employment

Some experts highlight that "Chinese companies often fail to communicate with their host communities" [8, 151]. In general, the enterprises that can be characterized by lack of professional development policies, the reduced motivation of employees to work and ignoring the workers' opinion, are likely to be faced with strikes, loss of competitiveness and significant sanctions from the state and trade unions.

The BRI's projects would be exposed to the risks of insufficient motivation and, as a result, insufficient productivity of employees during projects implementation. With this regard, CSR can be used as a mechanism ensuring engagement with local communities working in favour of the BRI.

Focusing on the development of socially responsible companies meets the requirements of CSR and allows to provide the attractive working conditions for local population, opportunities for professional growth, and the formation of a corporate culture based on the humanitarian values.

Business reputation

It is undeniable that the reputational risks lead to the losses due to the negative attitude of stakeholders, namely customers, partners and investors to the company or its activities. As CSR improves an organization's reputation [12], its implementation during the BRI activities is essential to provide the improvement of financial stability and increased capitalization for shareholders. Furthermore, CSR has a positive and significant relationship with the corporations' financial performance measures [13, 44].

CSR affects the business success in a way that stakeholders firstly consider the entire range of risks related to the company they strive to invest in. Thus, the companies that are focused on CSR during the BRI realization should be interested in protecting the environment, supporting infrastructure, and creating sustainable relationships with the Indigenous communities if they are involved to maintain an excellent reputation.

Ecology

The ecological situation has significantly grown in importance in recent years. Some experts assume that along with a positive impact on the global economy and trade, the BRI "may also pro-

mote permanent environmental degradation" [14, 206]. The countries participating in the BRI are facing shared environmental issues such as climate change; desertification; air, water, soil, and ocean pollution, etc. [15].

The appropriate policies taken by the corporations concerning the current ecological situation may consider the introduction of state-of-the-art solutions and technologies to seize the potential on saving energy, water, soil and other resources and to reduce the waste level.

Conclusion

The BRI as an essential objective of the Chinese government is associated with a comprehensive structure of programmes, policies and measures to be implemented during the BRI's projects. With this regard, this article has considered the significance of CSR and related risks in the context of the BRI to facilitate the adaptation of participating countries to the new business environment.

Currently, the CSR would dramatically affect the results of business activities. The CSR-oriented BRI would take into account the interests and requirements of the stakeholders, namely employees, shareholders, authorities, clients, business partners, investors, local communities, etc. to attain stated objectives and ensure long-term benefits during the running business.

CSR as a company development strategy would contribute to the transparency of business processes, the formation of a positive business reputation of the company and loyalty of the employees and population as a whole.

Additionally, CSR may increase the investment attractiveness of the companies on the market.

In consequence, corporations following the BRI may use their experience and capabilities in the context of globalization and digitalization to achieve the best possible performance from their activities.

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Section 7. Criminal science

https://doi.org/10.29013/EJLPS-20-1-31-46

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CAN THE STATE OF BURUNDI JUSTIFY ITS REASONS FOR LEAVING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT?

Abstract. Some Africa states and the International Criminal Court (ICC) currently have a tumultuous relationship, which is attributable to the accusation that the Court is deliberately targeting Africans and African leaders for prosecution. For this reason, there has been an anticipated mass withdrawal from the Court's Jurisdiction of African states; though this has not yet happened. Burundi is the only state from the African continent which has withdrawn from the Court for that reason.

The focus on Burundi by the Court has been for alleged crimes against humanity committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017. It is viewed in the context of the internal violence which stemmed from those who opposed or were perceived to oppose the ruling party after the announcement, in April 2015, that President Pierre Nkurunziza was going to run for a third term in office.

The ICC' Statute has universal jurisdiction, amongst other international crimes; war crimes, crimes against humanity under which some of those alleged crimes committed by the leadership and state officials of Burundi, falls under. And within the Court's Statute is imbedded the principle of complementarity in which, it can only adjudicate upon such crimes where the state party is unwilling or unable to prosecute the alleged crimes. As Burundi has not demonstrated that it can or will prosecute the individuals who stand accused of such crimes, is the State's decision for leaving the Court justifiable?

Keywords: Burundi, International Criminal Court, Universal jurisdiction, Complementarity, Crimes against Humanity.

1. Introduction

Fatou Bensouda Prosecutor at the International Criminal Court, (ICC, the Court), an African, announced on 25 April 2016, that the ICC intends to open a preliminary investigation into acts of killing, imprisonment, torture, rape and other forms of sexual violence in Burundi, an African state [1]. Being on the verge of an ICC investigation, it would

potentially mean finding the political leadership of the country, including President Pierre Nkurunziza, guilty of the alleged crimes [2]. Consequently, Burundi decided to leave the jurisdiction of the ICC. It became the first country to leave the jurisdiction of the now 123 memberships, since the court was established in 2002. The effective date of Burundi's departure was 27 October 2017, more than a year since the announcement by the Prosecutor was made. Accordingly, the reason for Burundi's decision is based on the accusation that; the ICC is deliberately targeting Africans for prosecution.

Burundi's allegation could be viewed in the context of the current docket before the Court, (ten out of the eleven cases under investigations are from the African continent). This should lend credence to the accusation on a *prima facie* basis, at the very least. This may not be unconnected to the fact that the Court has initiated investigations and, in some instances, brought prosecutions against African leaders, such as; former Presidents Omar Al-Bashir of Sudan, Muammar Al-Gaddafi of Libya, Laurent Gbagbo of Cote d'Ivoire and current President Uhuru Kenyatta of Kenya. Including, current Vice-President William Ruto of Kenya, former Vice Presidents Jean -Pierre Bemba Gombo of Central African Republic, and Saif Al-Islam Ghaddafi, (*de factor* prime minister of Libya, at some point in time) [1]. However, the ICC on its part denies the allegations, insisting it is pursuing justice for victims of war crimes in Africa.

It should be noted that African states contributed significantly to the deliberations of the Rome statute in 1998 which established the ICC, of which currently, thirty- three (after the exit of Burundi) of the fifty-four African countries, are State Parties to the Treaty. Senegal was the first country to ratify the Rome Statute, whilst South Africa enacted laws conforming to the Rome statute within the first few years of the ICC being established [3]. Africa's enthusiasm and support for the ICC stems from the fact that, there was a large activist civil society, mostly in human rights, which had emerged since the 1990's, as the wave of democratisation swept the continent [4, 52–53]. Furthermore, the political inclination of most African states emerging out of dictatorship embraced the call to end impunity.

The ICC's has universal jurisdiction on the core crimes of; war crimes, crimes against humanity and genocide, and crime of aggression. Its principle of complementarity means it can only initiate investigations and prosecution of crimes within its jurisdiction where State Parties are unable or unwilling to do so [5]. Suffice it to say, the Court has not been oblivious to the African voices critical of its work. Hence, to smooth the ruffle feathers, Fatou Bensouda and other State Parties called for dialogue with the AU to allay those concerns. Though she restated that, she cannot take political considerations into account when considering investigations of cases due before the Court. This beleaguered relationship between Africa, and the ICC continues to be an existential one both for the ICC and the African continent, if not for anything, but because the allegation seems to question the effectiveness and legitimacy of the Court.

Considering the reason Burundi gave for leaving the Court, would the country's decision be justified? The aim of this article is to address that question.

This paper would be discussed in four parts. In the first part, it would follow the *travaux preparatoire* of the ICC. It would chart the ICC's course from the earlier ideas of addressing the question of impunity, to codifying international crimes with universal jurisdiction into a permanent international criminal court. It is aimed at capturing Africa's role in establishing the Court. In the second part, it would adumbrate the trigger mechanism of the Court, depicting how cases arrive at the ICC for investigations. The third part will be the discussion. It would express scientifically, both the cases currently being investigated and those under preliminary examination, in percentage terms, with a view to deducing whether it has been selective, by targeting; (a) African leaders, and, (b) focusing mainly on cases from Africa. The fourth part would conclude the paper, which should

determine whether Burundi has made the case for leaving the jurisdiction of the ICC.

2. The *Travaux Preparatoire* of the International Criminal Court

The formulation of the international criminal court could be traced to one of the founders of the Red Cross Movement, Henri Dunant, in Geneva in the 1860s, when he urged a draft statute for an international court [6, 2]. This initiative continued in 1872 when a permanent international criminal court was proposed to respond to the crimes of the Franco-Prussian War, tasked to prosecute breaches of the Geneva Conventions of 1864 and other humanitarian norms [6]. The Conventions are a series of international treaties concluded in Geneva between 1864 and 1949 for the purpose of ameliorating the effects of war on soldiers and civilians [7]. Two additional protocols to the 1949 agreement were approved in 1977 [7].

It was the Hague Conventions of 1889 and 1907 which represents the first codification of the laws of war in an international treaty, which included an important series of provisions dealing with the protection of civilian population [7]. Offences against the laws and customs of war, known as "Hague Law" because of their roots in the Conventions, were subsequently codified into the 1993 Statute of the International Criminal Tribunal of Yugoslavia [8], (ICTY) which would also be reflected in Article 8(2)(b),(e) and (f) of the Statute of the ICC [9].

Prior to that, the discussion to host a permanent International court after the proposal in Geneva, in the 1860s had to wait until after the First World War between 1914–1918. It only took off at the 1919 Treaty of Versailles, which was a peace treaty aimed at prosecuting German war criminals of World War I [4, 85]. At the conclusion of that war, the Allied and Associated powers, (Great Britain, France, Russia, and the United States), convened a Responsibility of the Authors of the War and on the Enforcement of Penalties, to inquire into culpable conduct by the Central Powers (Germany, Austria, Hungary, Bulgaria, and the Ottoman Empire) [4].

This peace treaty with the Germans provided for the prosecution of war crimes committed during the war and went so far as to lay down in Article 227, the responsibility of the German Emperor (Wilhelm II), for, "the supreme offence against international morality and the sanctities of treaties"[10, 317]. The same provision envisaged the establishment of a "special tribunal" composed of five judges (to be appointed by the USA, Great Britain, France, Italy and Japan, charged with prosecuting the Emperor [10, 318]. Emperor Wilhelm fled Germany and took refuge in The Netherlands, which refused to extradite him, chiefly because, the crimes he was accused of were not contemplated in the Dutch constitution [10].

As for the trials of other German military personnel alleged to have committed war crimes during World War I, no international court was set up, nor were they tried by the Allies, as had been envisaged in Articles 228–30 of the Versailles Treaty. However, some prosecutions did take place before a German court, the "Imperial Court of Justice", (*Reichsgericht* sitting in Leipzig)[10] in 1920. Thus, the attempt to establish some form of an international criminal justice, ended in failure.

Though draft statutes of an international criminal court were adopted by non- governmental organisations such as the Inter-Parliamentary Union, in 1925 and by scholarly bodies such as the International Law Association, in 1926 [10, 319]. But none of these, aimed at forming an international criminal court, led to anything concrete.

Despite these false starts, efforts in this direction continued by expert bodies such as the International Law Association of Penal Law, culminating in 1937, to the adoption of a treaty by the League of Nations [11], which contemplated the establishment of an international criminal court [12]. But this attempt again failed as there were not sufficient number of ratifying States, to enable the treaty to come into force [10, 318].

This was set to change immediately before the end of World War II in 1945, when in the Moscow

Declaration, of 1 November 1943, the Allies affirmed their determination to prosecute the Nazis for war crimes [7, 5]. But it was only in the summer of 1945, after the defeat of Nazi Germany, that the "Big Four" (The United Kingdom, France, the United States and Russia), convened the London Conference to decide by what means the world was to punish high ranking Nazi war criminals [10, 321]. The resulting Nuremberg Charter, on 12 July established the International Military Tribunal (IMT) to prosecute individuals for "crimes against peace", "war crimes", and "crimes against humanity". Two weeks before the conclusion of the London Conference on 26 July 1945, the "Big Four" issued the Potsdam Declaration announcing, their intention to prosecute leading Japanese officials for these same crimes [13, 107]. These efforts eventually culminated to establishing the International Military Tribunal for the Far East, (IMTFE).

The "Road to Rome" as described within the field of international criminal justice, leading to the Rome Treaty, gathered speed immediately after these two international tribunals (IMT and IMTFE), at the same time when the United Nations, (UN) was emerging from its predecessor, the League of Nations.

It should be mentioned that the end of World War II and the 1950 s, were characterised by much work done by a variety of international bodies in furtherance of this goal of creating a permanent international criminal court with universal jurisdiction of the core crimes. For example, the codification of International Criminal Law continued with the development of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the four Geneva Conventions of 1949 [14]. Pursuant to a request by the General Assembly on 21 November 1945 under Resolution 177/11, the International Law Commission (ILC) commenced the formulation of the principles recognised in the Charter of the Nuremberg Tribunal, to prepare a draft code of offences against peace and security of mankind [10, 323].

Meanwhile, the General Assembly of the UN also established a parallel committee charged with drafting the statute of an international criminal court, composing of Seventeen States [10, 9]. This body submitted its draft to the General Assembly in 1952 [15]. At the same time, the ILC made considerable progress on its draft code and actually submitted a proposal in 1954 [16]. But the General Assembly suspended its work on the draft, pending the sensitive task of defining the crime of aggression [10, 9]. By then, the political tensions associated with the cold war made progress on the international criminal court agenda virtually impossible [10, 9]. This was in part due to ideological differences and political disagreement of the type of crimes that would be under the subject matter jurisdiction of such an institution [6, 88]. Specifically, the definition of the crime of aggression.

During this period when there was a lull in activities towards establishing the permanent court, the ILC reminded the General Assembly that there was limited interest in an international code if there was not to be an international court charged with enforcing it [7, 11]. However, the UN general Assembly did not react until late in 1989, a few weeks after the fall of the Berlin wall [10]. During the intervening period, establishing the permanent court had always been on the UN's agenda, though little progress was being made in that direction.

During that year, negotiations to establish the ICC were triggered, by a proposal from sixteen Caribbean and Latin American states led by Trinidad and Tobago, supported by NGOs and some prominent academics, requesting the UN General Assembly to ask the ILC to resume work on the international criminal court in the context of attempting to provide jurisdiction of dealing with drug trafficking [17]. The matter was referred to the ILC, which prepared a Draft statute to the effect. This was discussed first by an Ad Hoc Committee, and then by a Preparatory Committee [7, 10]. These preparatory negotiations revealed profound divides within the international community on the subject of international criminal justice [18, XXIII]. Primarily, the creation of the permanent court would not only be

technically complex, but also politically sensitive as many States regarded the permanent court as a potential threat to sovereignty. Moreover, majority of states took the view that an international criminal court was not the best method of dealing with the problems of drug trafficking as this was difficult to investigate and prosecute [19, 41].

Whilst the draft statute of an international criminal court was being considered, conflicts were ranging on in the former Yugoslavia, and in Rwanda, Liberia, and Sierra Leone within the African continent. As the situation deteriorated in the former Yugoslavia, the UN Security Council on 22 February 1993, passed Security Council UNSC Resolution 872/1993, which effectively established the International Criminal Tribunal for Yugoslavia (ICTY) [20]. This was closely followed by the International Criminal Tribunal for Rwanda (ICTR) in 1994, under UN Security Council Resolution 955/1994 of 8 November 1994 [21], with primary jurisdiction. Subsequently, additional ad hoc tribunals were later established through various UN Security Council resolutions to respond to crimes committed in Sierra Leone, East Timor, Lebanon and Cambodia, to name but a few.

Just prior to establishing these two international tribunals, (ICTY and ICTR) the ILC in 1990 had already completed a report which was submitted to the 45th session of the UN General Assembly [10, 328]. Though the report was not limited to the drug trafficking question, it was nonetheless, favourably received by the General Assembly, which encouraged the ILC to continue its work. The ILC produced a comprehensive text in 1993, which was modified in 1994 [22].

The General Assembly in 1996, established a Preparatory Committee on the Establishment of an international Criminal Court, (PrepCom) [23]. After two years of discussion, in 1998, in its Sixth Committee, the General Assembly of the UN decided to convene an international diplomatic conference on the idea of creating a permanent international court [24]. This would later take place in Rome, between 15 June-17 July 1998.

During the deliberations, the PrepCom submitted to the Diplomatic Conference at Rome, a Draft Statute and a Draft Final Act consisting of 116 Articles containing in 173 pages of text with some 13000 words in square brackets, representing multiple options either to entire provisions or to some words contained in certain provisions [10, 329]. While no group of States acted as a monolithic bloc, there were several groupings of varying degrees of formality and organisation in the negotiations. One was the "Like Minded Group", (LMG), a group of 60 States with a shared commitment to an independent and effective court [10, 329]. Fourteen African countries were amongst these groups, and when the Rome Statute was finalized, forty one African states at the conference voted for it, Libya being the only country that voted against it [25, 65].

The African contribution and expectations of the Rome statute need not be over emphasised. Africa shared the profound hope, as expressed by South Africa's minister of justice at the Rome Conference that, 'the establishment of the ICC "would ultimately contribute to the attainment of international peace [25, 65]. Prior to the diplomatic conference, African countries made efforts to adopt a common position on the establishment of the International Criminal Court [26]. Those efforts led to different parts of the continent hosting several conferences and workshops. For instance, the Southern African Development Community (SADC) held a Regional Conference on the International Criminal Court in Pretoria in September 1997 and then again in June 1999 [26]. Senegal, in West Africa, also hosted an African Conference on the establishment of the International Criminal Court in February 1998 in Dakar. Where the participants adopted a declaration in which they affirmed their commitment to the establishment of the International Criminal Court and underlined the importance which the accomplishment of the Court would imply for Africa and the world community [27].

And on 17 July 1998, at the Headquarters of the Food and Agriculture Organisation of the United Nations in Rome, 120 States from around the world, including 32 from the African continent voted to adopt the Rome Statute effectively creating the International Criminal Court [7, VIII].

The relevance of Africa to the ICC, and *vice versa* has now been overshadowed by this fractious relationship, which lately bears upon Burundi's decision. It is against this back drop that it is relevant to understand, how the Court gets involved with cases it investigates and prosecutes.

3. Trigger Mechanism at the ICC

The cases which are within the primary jurisdiction of the Court have already been outline at the introduction of this article. The 'situations' at the Court are identified through one of the three modes or 'trigger mechanisms' set out in the ICC Statute: (a) Security Council referral (Article 13), (b) State Party referral (Article 14) and, (c) prosecutorial initiative or *propio motu* power of the Prosecutor, (Article 15) [28]. Security Council referrals is simply straight forward, in that under UN Security Council Resolutions, the Court is mandated to investigate and if possible prosecute such matters that are brought to the attention of the Court, through such UN resolutions.

In self- referral, cases are brought to the attention of the Court by the State Parties themselves, requesting for the Court's intervention. It is the prosecutorial initiative that needs some elaborating on, as it is the route through which the Prosecutor would directly initiate the investigation of alleged crimes. By this means, the case selection which has been mainly in Africa seems to somewhat supports the assertion that African states are being targeted.

First, (Reasonable Standard basis)- he/she must determine whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed, under Article 15(4). This is a relatively low evidentiary standard, in the sense that the information presented to the Chamber need not be conclusive and need not eliminate all other possible interpretations of the information. Instead, the Pre-Trial Chamber must be satisfied that a reasonable or sensible justification exists for the belief that a crime(s) within the ICC's jurisdiction is being or has been committed [29].

Secondly, (Complementarity Requirement) he/she must assess whether the case would be admissible in terms of Article 17 [29]. This involves examining whether the national courts are unwilling or unable genuinely to proceed with investigating the alleged cases.

Third (Gravity Requirement) – During this process, the Prosecutor conducts investigations regarding the seriousness of the alleged cases, to include how widespread the abuses were, and the number of victims involved. It is carried out by gathering and examining evidence, questioning persons under investigation and questioning victims and witnesses, for the purpose of finding evidence of a suspect's innocence or guilt. The Prosecutor must investigate incriminating and exonerating circumstances equally, requesting cooperation and assistance from States and international organisations, and sends investigators to areas where the alleged crimes occurred to gather evidence [29].

Fourth, (Interest of Justice requirement) When all of these are done, the prosecutor must then consider the 'interests of justice' [29].

The Pre-Trial Chamber would then hold confirmation hearing, at the end of which it may decide to confirm the charges, having determined that there are substantial grounds to believe that the person committed the alleged crimes, or, if not, to adjourn the hearing and request the Prosecutor to provide more evidence, to conduct further investigation or to amend a charge [30].

Finally, arrest warrants or summons to appear are prepared only when a case is nearly trial-ready in order to facilitate the expeditiousness of the judicial proceedings [30].

Non-parties to the ICC Statute ordinarily have no obligation to cooperate with the Court. The

ICC Statute is a treaty and treaties may not impose obligations (or rights) for non-parties (third states) without the consent of that state [31].

Suffice it to say, the Court is bound by rules and procedures rooted in the Statute which must be followed before any prosecution can be initiated for alleged crimes committed.

4. Discussion

As discussed earlier in the article, Burundi's decision may have been taken against the backdrop of an already strained relationship between the ICC, the AU and some African states. Primarily, the Court stands accused of focusing on cases mainly from African continent and African leaders. This could be traced back to 2004, just two years after the Court commenced its work, after it began prosecuting leaders from Africa. This is consequent upon the action of ICC's first Prosecutor, Louis Moreno Campo. Whilst acting upon the first self-referral case from the Central African Republic, (CAR), initiated prosecutions against Vice President Jean-Pierre Bemba Gombo in December 2004. The Court focussed on alleged war crimes and crimes against humanity committed in the context of the conflict in CAR since 1 July 2002 [1]. It opened its investigation 3 years later, in May 2007. He was later found guilty and sentenced on 21 June 2016 to 18 years imprisonment.

His case was accompanied by the announcement on 4 March 2009, that he (Prosecutor Ocampo) had issued an arrest warrant for the Sudanese President, Omar al-Bashir for war crimes committed in the Darfur region of Sudan. This matter was based upon a referral from the UN via UN Security Council Resolution 1593(2005) on 31 March 2005 [1].

Only a year later after the Ocampo announcement involving Al Bashir, on 31 March 2010, Pre-Trial Chamber II granted the Prosecutor's request to open an investigation *proprio motu* in the post-election violence in Kenya (2007–2008), in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009 [1].

This was again followed two years later, by another referral from the UN Security Council, through Resolution 1970 (2011) of Libyan President Muammar Ghadaffi on 26 February 2011 [1]. The focus was on alleged crimes against humanity committed in the context of the situation in Libya since 15 February 2011.

Nine months later, the Prosecutor was granted a *propio motu* request by the Pre-Trial Chamber III, on 3 October 2011, to commence investigations on Ivorian President Laurent Gbagbo, for the post elections violence in Cote d'Ivoire, between 2010–2011 [1]. From the above, one cannot help but notice that, these were all leaders from the African continent.

As already highlighted above, the prosecution of African leaders may have played a part in Burundi's decision. If that is correct, then there would have been no doubt in President Pierre Nkurunziza's mind, that he may be the next leader from the continent that could face prosecution at the Court. Would that then be the actual reason for withdrawing from the Court, believing that such a decision would stave off his and other officials from a possible future prosecution?

The allegations that the Court was targeting cases from Africa and African leaders, could be expressed scientifically. Accordingly, regarding the investigations the ICC had undertaken, the following deductions could be made, bearing in mind that at the time Burundi took its decision, 33 countries from Africa were State Parties to the Rome Treaty [1]:

a) 2 countries are by UN Security Council referrals; Sudan and Libya;

b) 5 countries are self- referrals; DRC (Congo) Mali, CAR, Uganda, and CAR II;

c) 4 cases are by the *propio motu* initiative of the Prosecutor; Cote d'Ivoire, Kenya, Burundi and Georgia (a non -African state);

d) 10 out of the 11 cases are from Africa: Uganda, Democratic Republic of Congo, Sudan, Central African Republic, Republic of Kenya, Libya, Cote d'Ivoire, Mali, Central African Republic II, Georgia, and Burundi;

e) African leaders investigated are 7 out of 26 cases.

(i) Presidents Omar Al Bashir (Sudan), Muammar Ghaddafi, (Libya) and Saif, Al- Islam Ghaddafi (*de facto* prime minister of Libya) -UN Security Council referral;

(ii) President Uhuru Kenyatta (Kenya) and Vice President William Ruto, (Kenya) and President Laurent Gbagbo, (Cote d'Ivoire)- *Propio motu* initiative of the Prosecutor;

(iii) Vice President Jean Pierre Bemba Gombo, (CAR) -self- referral;

The data in percentage terms, is presented as follows; $(y/11 \times 100)$; where y represents any of the 3 kinds of trigger mechanism, 11 is the sum total of cases before the court, and figure 100 is used to calculate the percentage.

Hence, the following would be arrived at:

(i) UNSC Resolutions referrals of African states (2 countries):

$$2/11 \times 100 = 18.18\%$$

(ii) Self- referrals (5 countries)

$$5/11 \times 100=45.45\%$$

(iii) Propio motu initiative of the Prosecutor (4 cases)

$$4/11 \times 100= 36.36\%$$

(iv) Leaders from the African continent

$$7/26 \times 100=26.92\%$$

(v) Cases from the African continent

$$10/11 \times 100=90.91\%$$

With regards to the 10 cases under preliminary investigations, (Afghanistan, Colombia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, The Philippines, Ukraine, and Venezuela), only 3 are from Africa. Percentage wise, it could be represented as follows:

$$3/10 \times 100= 30\%$$

From the foregoing, situations before the Court is presented as; 90.91 percent of the cases were from the African continent, 36.36 percent were by the *Propio motu* initiative of the Prosecutor, and 26.92 percent were cases involving leaders from the African continent. When one considers the cases under preliminary investigations, it translates to 30 percent from Africa.

It is here appropriate to highlight the role and response of some African leaders and States to the cases involving other African leaders which are being prosecuted at the Court.

Regarding the Sudan (Darfur) situation, at the time the arrest warrant was issued for President Al Bashir, some African States openly supported the ICC's decision, and some went to the extent of threatening to arrest him, should he travel to their countries. Though the mood has now somewhat softened, the initial support should not go un-noticed. As an example; The Sudan Tribune newspaper reported that, "The government of Botswana announced today that it will arrest Sudanese President Omer Hassan Al-Bashir if he visits its territory [32]. "On the contrary, South Africa defied the ICC when it allowed Al Bashir to quietly slip away from the country when he should have been arrested in July 2016. The inconsistent approach on the Al Bashir arrest warrant does not provide any clear indication as to unified position adopted by Africa on the issue of prosecuting head of states. To say the least, Al Bashir has travelled abroad on many occasions both within and outside Africa and has not been arrested even though his arrest warrant remains extant [33].

With the Libyan situation, during the deliberations at the UN Security Council, before Resolution 1970 (2011) was passed, it was unanimously adopted by the Council with African states voting in favour of the resolution; South Africa, Nigeria and Gabon sitting as Security Council members [34].

The Kenyan situation became a focus of the ICC because of post elections violence in Kenya. The country's leaders had agreed pursuant to a peace accord brokered by the former UN Sectary General Kofi Anan (an African) to end the 2007–2008 violence and that Kofi Annan should hand over an envelope containing the names of suspects from a government commission of inquiry for the atten-

tion of the Prosecutor at the ICC, for investigation and prosecution, if Kenya failed or was unwilling to prosecute those suspects whose names were on the list [4, 53]. Kenya refused to establish a local tribunal, thereby triggering the ICC's investigations [4, 53]. So in essence Kenya's case could be viewed as a quasi- referral [4, 53]. It became the first country in which the Prosecutor's *propio motu* power was exercised involving leaders from the African continent. However, during the trial, the ICC Prosecutor, on 5 December 2014, withdrew the charges against President Kenyatta, citing lack of evidence, because of the failure of the Kenyan state to cooperate with the Court by providing it with information required by the prosecution [35]. The case of his Vice President William Ruto was also terminated [36].

The situation of Cote d'Ivoire involving President Laurent Gbagbo, became the second country where the Prosecutor exercised his *propio motu* power involving a leader. She was urged on by the African Union itself to act on the situation [36]. Though it was alleged that because President Gbagbo was arrested by French troops, his arrest may have been orchestrated by the west. However, for the fact that the AU had urged his arrest, should be little grounds for African states to decry for being prosecuted.

Hence, it would be correct to arrive at the conclusion that African leaders themselves were complicit in the cases regarding other African leaders before the Court. They initially showed unflinching and unwavering support for their counterparts to be brought before the Court, and some still do. Having stated that, they should not escape responsibility for being hypocritical in their dealings not only with the Court but with other regional court as well, and when it comes to prosecuting their colleagues. For example, President Yoweri Museveni of Uganda, was amongst the first leaders to refer cases to the Court in the fight against the Lord's resistance army, which saw the ICC opening investigations in July 2004. During the announcement of the prosecutions both himself and the ICC Prosecutor shared the same stage at that point in time. However, he has now became a loud voice in criticising the ICC. During President Kenyatta's inauguration, in support of him, he has stated that, "I was one of those that supported the ICC because I abhor impunity. However, the usual opinionated and arrogant actors using their careless analysis have distorted the purpose of that institution" [37].

Also, when the ICC finally brought a member of the LRA, Ongwen, to trial, Museveni had turned on the "useless" court, criticising it of "western arrogance". He told Der Spiegel: "This is our continent, not yours" [38]. Controversially, earlier in 2011, Malawi had refused to arrest Al Bashir when he visited the Country. It was reported that Mr Bashir was welcomed by a military guard of honour when he arrived in the capital, Lilongwe, for a trade summit [39]. Malawi's Information Minister Patricia Kaliati told the BBC it was not her government's "business" to arrest him [39].

Only a year later for it to reverse its earlier position by refusing to host Al-Bashir for the AU summit in 2012, and threatened to arrest him if he attended over crimes Al Bashir committed against humanity in Darfur, as he is on the wanted list of the International Criminal Court [40]. Consequently, the AU meeting which was to be held in Malawi, was re-located to Addis Ababa.

One must also consider the case of former President Yahya Jammeh, of the Gambia who decided that his country would leave the jurisdiction of the Court effective on 10 November 2017 [41]. Sheriff Bojang, the information minister, had said in an announcement on state television that the court had been used "for the persecution of Africans and especially their leaders" while ignoring crimes committed by the west. This decision has now been reversed under the current President Adama Barrow when he took over from Jammeh in January 2017 [42].

In separate matters, Burundi in October 2017, has decided to leave the jurisdiction of the African Court on Human and People's Right. According to

the country's Justice Minister, Johnston Busingye, who told legal experts and human rights activists at the meeting that Rwanda withdrew from the declaration because it couldn't afford to let the court be a platform for Genocide convicts to launder themselves [43].

It seems an all too familiar story of African leaders not wanting to be held accountable. It has to be recalled that ending impunity and holding perpetrators accountable for their crimes is the central focus of establishing the ICC. This is abundantly clear when tracing its *travaux preparatoire,* since Henri Dunant in Geneva in the 1860 s, to when the ICTY in 1993 and the ICTR in 1994 were established.

Whilst accusations of the Court as targeting mainly Africans is being echoed by many from the African continent, one should not overlook the role of the UN Security Council itself in handling cases from Africa. It has been argued that the UN Security Council is not taking African leaders concern into consideration when it comes to referring cases. As Kamari et al writes, For its part, the UN Security Council also proved unwilling to address the concerns of African states. Despite numerous requests from the African Union, the Security Council refused to defer the prosecution of Al-Bashir and later to suspend the prosecution of the Libyan leader, Muammar Gaddafi [44]. This position again finds strength in the deferral request to the UN Security Council when the ICC decided to indict Uhuru Kenyatta and William Ruto, the President and Vice President of Kenya in March 2003. In the ensuing votes, seven voted in- favour of the deferral, whilst eight abstained [44]. Which failed in the referral request.

In 1998, during the campaign that brought Laurent Kabila to power in the Democratic Republic of Congo, it was alleged that several atrocities including crimes against humanity and systematic murder of Hutu refugees were committed by troops which were under the command of the Rwandan government [45]. A UN team mandated to investigate the allegations found that those crimes were in fact committed and recommended to the Security Council to refer the crimes to an international criminal tribunal. Nonetheless, the Security Council refused to take any steps on the matter [46].

As Stephen Lamony writes, "In many ways, the animosity of the AU to the ICC is more about problems with the UN Security Council than with the ICC itself" [47].

To be clear, Burundi's case before the ICC, stems from alleged international crimes allegedly committed during violence leading up to the country's elections in 2015, after President Pierre Nkurunziza announced he would seek a controversial third term mandate. This embroiled the country into conflict throughout 2016, with numerous cases of extrajudicial killings, enforced disappearances, and torture committed by security forces [48], which saw 500 people killed and at least 40,000 fleeing to neighbouring countries as refugees [49].

It is appropriate to hereby mention the principle of complementarity in the context of the Burundi situation, insofar as, when the *propio motu* initiative powers of the Prosecutor is exercised to initiate investigations. The principle is laid down in paragraph 10 of the Preamble as well as in Article 1 of the Statute (whereby the ICC "shall be complementary to national criminal jurisdictions"). The Court is authorised to exercise its jurisdiction over a crime, even a case concerning the crime is pending before national authorities, and thus to override national criminal jurisdiction, whenever: (i) the state is unable or unwilling genuinely to carry out the investigation or prosecution, or its decision not to prosecute the person concerned has resulted from its unwillingness or inability genuinely to prosecute that person [50].

There has so far been no report of any judicial undertakings by the Burundi authorities to investigate or prosecute those responsible for the alleged crimes., which are being investigated by the Court. Instead, the country has instituted a Truth and Reconciliation Commission, which as reported by Patrick Nduwimana, falls short of punishing the per-

petrators. He writes, "Burundi, locked in its worst political crisis since its civil war ended in 2005, has created a reconciliation commission that opposition parties say will shield the ruling party from accountability for past crimes" [51]. The report continues, "It is clear that current leaders want to promote impunity" [51].

In the absence of a judicial mechanism in which the alleged perpetrators are to be prosecuted by the Burundi authorities, and bearing in mind the alleged crimes are still being perpetuated, how can the country make the case for leaving the jurisdiction of the Court; as the Court is targeting cases from Africa? It is correct that the complementarity provision in the ICC statute's makes it necessary that the Court investigates the Burundi situation, if not, the victims would have no recourse to justice.

The lack of credible judicial institutions in Some African states may be responsible for some countries not being in the position to conduct such investigations and prosecutions. As Charles Charles Jalloh writes, "African states are likely to be the frequent users, or "repeat customers", for the Court because of a restively higher prevalence of conflicts and serious human rights violations and a general lack of credible legal systems to address them" [52]. Abdul Tejan Cole has expressed similar views. He says, "There are many reasons in favour of ICC's involvement in African situations; from the nature of the crimes and widespread systematic conflicts on the continent to a lack of capacity or willingness to hold perpetrators accountable, thereby providing redress to victims" [53]. Margaret M. de Guzman also contributed, "critics accuse the ICC of acting immorally by discriminating against Africa and Africans in deciding which situations to investigate and prosecute. The evidentiary basis for such claims is weak" [54]. Elise Keppler also ventures, "the characterization of the ICC as unfairly targeting Africans is not supported by the facts" [55].

This article argues that there are cases which have been dismissed by the Court due to lack of evidence or have deemed inadmissible. For example, in the Libyan situation referred to the Court by way of UN Security Council, involving Abdullah Al-Senussi, the Court deemed his case to be inadmissible. Another is that of Callixte Mbarushimana (DRC situation), where Pre-Trial I, declined to confirm the charges, he was released from custody and the case is now closed unless and until the Prosecutor submits new evidence. Additionally, the case of Abu Garda (Sudan), whose case was also not confirmed by the Pre-Trial Chamber, is now also considered closed. Another case in point involves Henry Kiprono Kosgey from Kenya. Judges declined to confirm the charges against Mr Kosgey on 23 January 2012. The above cited examples weaken the argument that the Court is targeting cases from Africa.

For the ordinary Africans, the ICC can be said to have strong support. Survivors and activists continue to exhort the Court to do more for the victims of mass crimes on the continent. As Shamiso Mbizvo writes, "from the DRC, to Sudan to the Central African Republic, to Nigeria, African citizens continue to demand more engagement by the ICC" He continues that ". For example, when the Prosecutor visited Kinshasa in March 2014, survivors of unspeakable sexual violence in the Eastern Congo appealed to her for more rather than less justice; they demanded more ICC intervention in the DRC" [6, 41]. Several African ICC members, Côte d'Ivoire, Nigeria, Senegal, and Tunisia – initiated a significant step in joining Botswana to expressly oppose the AU call for withdrawal from the Rome Statute, as Reported by Human Rights Watch in November 2016 [56]. Surprisingly, According to this Human Right Watch report, Cote d'Ivoire still supports the ICC even though their former President Laurent Gbagbo was prosecuted by the Court.

At the same time, African civil society has firmly and consistently raised its voice in response to attacks on the Court. More than 160 organizations based in more than 30 African countries have spoken out about the ICC's importance for Africa, and

the need for the court to receive adequate cooperation from states in response to the AU call for non-cooperation.

After Burundi's announced its withdrawal from the Court, in October 2016, the Minister of State, Minister of Justice and Human Rights of the Gabonese Republic, voluntarily referred a situation to the prosecutor of the ICC [57]. Earlier to that, the Central African Republic has for the second time referred itself to the ICC in May 2014 in the context of the on-going conflict in the country. And only recently on the 9 April 2018, Nigeria has once again reiterated its support for the ICC. These supports should be read in the context of the talked about mass withdrawal of African states from the ICC because the Court has lost credibility in Africa, -such mass withdrawal has not yet happened.

The Burundi authorities may have thought that leaving the Court means it would drop the investigations which it intends to undertake in the country's situation. It should be noted that two days prior to Burundi's withdrawal from the ICC's jurisdiction, Judges at the ICC's Pre-Trial Chamber III, noted that Burundi's obligation to cooperate with the investigation stands and covers any resulting proceedings, which could also consider alleged crimes from before 26 April 2015 or after the withdrawal if related to crimes allegedly committed while Burundi was an ICC member state [1]. It is envisaged that the ruling could deter other African countries that have threatened withdrawal, as it sends the strongest signal yet that any such move is unlikely to stop proceedings already undertaken by the court [58]. So far, this decision seem to worked, as no other country in the remaining 32 African State Party to the Rome Statute have followed the decision of Burundi, three years after announcing its decision in 2016.

5. Conclusion

Burundi's decision to withdraw from the jurisdiction of the ICC is based on the accusation that the Court is targeting mainly cases from Africa. This may well be correct on the superficial level as the data analysed from the Court records shows that indeed 10 out of 11 situations are from Africa, equating to 90.91 percentage. However, that alone is not incontrovertible evidence that Court is targeting Africans for prosecution.

In considering both the situations and cases before the Court, the following has been deduced; the *propio motu* initiative of the Prosecutor accounts for 36.36 percentage, from four countries,(Cote d'Ivoire, Kenya, Burundi, and Georgia), UN Security Council resolutions account for 18.18 percent from two countries(Libya and Sudan), whilst self- referral was from 5 countries (DRC (Congo), Mali, CAR, Uganda and CAR II) accounting for 45.45 percent. The data shows that the highest percentage of trigger mechanism is by self- referral and not from the direct *propio motu* exercise of prosecutorial power. Would that mean states which self -refer are targeting themselves? That is obviously is not the case. Rather, one should infer that those countries are seeking the Court's power to hold accountable those persons who have been alleged to have committed crimes which fall within the jurisdiction of the Court, with a view to addressing the issue of impunity. It is for the same reason that the *propio motu* power exercised by the Prosecutor must not be seen as it is targeting cases from Africa. With regards to the preliminary investigation, it must also be borne in mind that the *propio motu* power of the exercise of the preliminary investigation cases from the African states accounts for 30 percentage of the total, meaning the 70 percentage of the cases are outside Africa. By considering that account alone, it would not support the accusation that the Court targets Africans for prosecution.

The exercise of the propio *motu* powers of the Prosecutor must be seen in the context of the complementarity principle of the ICC statute. This power could only be exercised if the State Party is unable or unwilling to investigate and prosecute those persons alleged to have committed those crimes. Burundi has not demonstrated that it was willing to investigate

those crimes, hence, the Court would be abdicating its responsibility, if it had not carried out its obligations to investigate with a view to prosecuting the perpetrators of the alleged crimes.

Since Burundi declared its intention to withdraw from the Jurisdiction of the Court, other African states have come out in support of the ICC. No mass withdrawal has taken place and Gambia and South Africa, which had previously expressed such an ambition are now solidly in support of the Court. Other States such as Gabon and CAR (for the second time) have referred themselves to the Court As there have been cases before the Court which have been rendered inadmissible or have been withdrawn due to lack of evidence, if the Court was targeting cases from Africa, it would have been highly unlikely that such situations would have occurred. This should cast doubt on Burundi's accusation of the Court targeting cases from Africa. Considering all of these facts in their entirety, they do not support that Burundi has made the case that the Court is targeting cases from Africa for prosecution. In other words, Burundi's decision for leaving the Court cannot be justified.

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Section 8. International law

https://doi.org/10.29013/EJLPS-20-1-47-53

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SOLUTIONS TO ENSURE SAFETY ON FIRE PREVENTION AND FIGHTING MEETING THE PROMOTION FOR THE SUSTAINABLE DEVELOPMENT OF URBAN AREAS IN VIETNAM

Abstract. Sustainable development of cities is the goal of each country. In order to contribute to promoting sustainable development, ensuring fire prevention and fighting is a big issue nowadays, it is necessary to pay attention to investment, research and comprehensive construction of systematic and comprehensive solutions in terms of organization and engineering. The paper focuses on clarifying theoretical issues on ensuring safety in urban fire prevention and fighting; analyze and assess the current situation of fire prevention and fighting in urban areas in Vietnam today; Since then, propose technical and organizational solutions to ensure safety in fire prevention and fighting, contributing to the sustainable development of urban areas in Vietnam.

Keywords: urban; fire prevention and fighting; Vietnam.

1. Problem statement

Along with the common development of countries in the region and the world, especially the strong impacts from the 4th industrial revolution in recent years, Vietnam has gradually changed markedly. The political security has been stable, the economy has many positive changes, inflation is controlled at a low level, … has attracted domestic and foreign investors to build and develop. The appearance of urban areas in Vietnam is becoming more and more innovative, the speed of urbanization is rapid, the urbanization rate in 2018 is estimated at 38.4% with 811 types of urban centers [1], new urban areas, and amusement parks, entertainment centers, theaters, cinemas, markets, trade centers, public works, high-rise and super-high-rise buildings, underground constructions, etc. have been built day by day, contributing to the more and more crowded cities, especially in big cities like Hanoi, Ho Chi Minh City, Da Nang, Hai Phong, … In parallel with that development, the potential for fire and explosion is getting higher and higher and more complicated, the rate of big fires causing serious damage increases. According to the Government Report, from July 2014 to July 2018, the whole country occurred 13,149 fires, killing 346 people, injuring 823 people, property damage estimated at 6,524.8 billion VND and 6,462 hectares of forest [1]. Therefore, proposing solutions to ensure fire safety in urban areas to promote sustainable development is always a big problem for not only Vietnam but also a difficult problem for countries in the region and around the world.

2. Theoretical issues to ensure safety in urban fire prevention and fighting

Urban areas are densely populated areas and mainly operate in non-agricultural economic areas, and are political, administrative, economic, cultural or specialized centers, with roles to promote socio-economic development of a nation or a territory or a locality, including the inner city and suburbs of the city; inner towns and suburbs of the town; town [3]. The concept above shows the overarching all aspects of the population density, economy, politics, culture, society, … of a city, besides, the concept of urban also emphasizes "Urban areas play a role in promoting socio-economic development of a nation or a territory or a locality". Thus, it shows the position and importance of ensuring requirements and conditions for sustainable development of the city, in which ensuring fire prevention and fighting safety is one of the requirements and important conditions which should be concerned, focused.

Safety of fire prevention and fighting is a combination of all organizational measures, technical and technological solutions to eliminate and limit the possibility of arising fire; create favorable conditions for proactively rescuing people, properties, fight spread and fight fires promptly and effectively when a fire occurs. In essence, ensuring fire safety is the application of organizational and technical and technological measures to prevent, limit and eliminate the possibility of a fire. such as rescuing people, saving properties and effectively putting out fires, contributing to minimize the damage caused by fire and explosion. With this approach, it can be understood that "ensuring the safety in urban fire prevention and fighting is a combination of all organizational measures, technical solutions in urban construction management and planning in order to eliminating and limiting the possibility of arising fires; create favorable conditions for proactively rescuing people, properties, fight spread and fight fires promptly and effectively when a fire occurs". Thus, ensuring the safety of fire prevention and fighting in the urban area is the proposal of measures to organize and manage activities on fire prevention and fighting in urban areas; solutions on infrastructure, traffic, water sources for fire fighting, distances to ensure fire prevention and fighting between works, distances between works and roads to ensure safety for fire engines, aerial ladders to operate; … In other words, ensuring the safety of fire prevention and fighting in the urban area is effectively implementing measures on organization and management; technical and technological solutions in the field of fire prevention and fighting.

The measures to organize and manage the fire prevention and fighting in that urban area are the planning of the network of fire and rescue force; effective implementation of such aspects as: advising work, proposing the development of leadership documents, directives of competent state agencies in the field of fire prevention and fighting; propaganda, training, professional fostering, inspection and examination; approval of designs, pre-acceptance test of fire prevention and fighting; international cooperation, technology transfer in the field of fire prevention and fighting … The technical and technological solutions are those in the planning of distance, traffic, water sources, electric systems, communications, which ensure good service for fire prevention and fighting; solutions to prevent fire spread to houses and works, production technology lines; … To effectively implement the above contents, it is necessary to determine the completion of the legal system, standards and technical regulations on fire prevention and fighting efficiently, appropriately and synchronized legal basis is one of the key and decisive conditions, especially it is even more meaningful in the context of the industrial revolution 4th.

3. Current situation of fire prevention and fighting in urban areas in Vietnam today

The country now has 63 provincial-level administrative units, 713 district-level administrative units (72 provincial cities, 49 districts, 47 towns, 545 districts) and 11,161 communal-level administrative units (1,602 wards, 608 town, 8,951 communes); 02 special-

grade cities, 19 grade-I urban centers, 24 grade-II urban centers, 45 grade-III urban centers, 97 grade-IV urban centers, and 624 grade-V urban centers; the country's population as of now about 97 million people. According to the Government Report between 2014–2018, there have occured 3,287 fires, killing 87 people, injuring 206 people, and damage of property worth VND1,631.2 billion and 1,615 hectares of forest. On average, there are 09 cases of fire, killing or injuring 01 person everyday, the property damage is estimated at 4.4 billion dong and 5.3 hectares of forest [1]. The data of damage caused by fire and explosion shows that the number of deaths and injuries in urban areas is still high, and great damage to property.

Being aware of the meaning and importance of ensuring fire prevention and fighting safety for socio-economic sustainable development in urban centers, the Party, the State and the Government are very concerned, often pay leadership and direction to this work. In the period of 2014–2018, the Government has issued 09 Decrees and 02 Resolutions related to the work of fire prevention, fighting and rescue; The Prime Minister has issued 05 Decisions, 03 Directives, 11 Official Telegraph and guiding documents; Ministries and branches within their management have developed and issued 24 Circulars to guide the implementation of the legislation on fire prevention and fighting, issued many directives and hundreds of messages, guiding documents, directing this work; The provincial Party Committee, City Party Committee and People's Committees of provinces and cities directly under the Central Government have issued 845 guiding documents on fire prevention and fighting; provincial departments and agencies have issued 6,547 documents (of which, provincial police issued 5,950 documents, official dispatches to guide and direct local authorities at all levels to carry out fire prevention, firefighting and rescue) [1]. The issued documents have contributed to guiding and directing the implementation of the provisions of the law on fire prevention and fighting, promptly solving difficulties, problems and emerging problems in prevention local fire and fighting, contributing to improving the effectiveness of fire and explosion prevention.

In terms of management, the organization of the implementation of the provisions of the legislation on fire prevention and fighting has also gained encouraging results. Propagation, dissemination and education of laws and knowledge on fire prevention and fighting have been strengthened, with innovations in content, form and measures of organization and implementation. In the period of 2014–2018, 62,320 articles were organized and published; broadcast 3,173 reports and documentaries on fire prevention and fighting; issued 308,997 banners, slogans and 4,025,005 flyers, recommended; print copies and release 7,296 tapes and CDs to propagate about ensuring fire prevention and fighting; propaganda, training on fire prevention, fighting and rescue were 149,732 sessions for 7,419,778 turns of participants [1]. The approval, approval and acceptance of fire prevention and fighting and the promulgation and implementation of technical standards and regulations on fire prevention and fighting have generally been strictly implemented. In the 2014–2018 period, the ministries, branches and localities have approved hundreds of socio-economic development projects and urban planning in their localities; the approval process of schemes and projects has paid attention to contents related to fire prevention and fighting. The Fire Prevention and Fighting Police Force has reviewed and approved the design of fire prevention and fighting for 58,504 projects and constructions; organize fire prevention and fighting acceptance for 29,230 projects and constructions [1]. Through the approval, the investor and the consulting agency have been requested to adjust the design solution to ensure safety conditions for fire prevention and fighting, promptly repairing hundreds of thousands of violations and shortcomings right away from designing, construction, contributing significantly to saving money and time during project implementation. The system of national technical regulations and standards for fire prevention and fighting appraisal and acceptance is basically quite complete, contributing

to creating a basis for investors and consultancy units, the governing body in making design solutions for fire prevention and fighting. The inspection, examination and handling of violations of the law on fire prevention and fighting are strictly carried out, thereby contributing to eliminating thousands of potential fire hazards. Good prevention results in an effective protection of two to three times the amount of assets saved from fires; that is not to mention the effectiveness in preventing fires at the facility; … Logistics and vehicle management have enlisted the attention of investment and support of all levels, sectors and organizations and individuals at home and abroad. Maintain and strictly implement the provisions of the law on organizing the implementation of bidding, procurement, asset management and settlement of projects and funding sources. Thereby, the fire prevention and fighting work has been strengthened, contributing to ensuring social order and safety, preserving the peaceful and happy life of the people, effectively serving the cause of economic development – society of the country.

In addition to the above-mentioned results, there are some limitations and shortcomings as follows: Regarding the system of legal documents, standards and regulations on fire prevention and fighting: There are no specific regulations on the conditions for ensuring the safety of fire prevention and fighting for housing types that people change their purpose to combine with living and production, trading and lack of regulations on ensuring security safety on fire prevention and fighting for traditional trade villages. Some new types of facilities have appeared recently but there are no standards, technical regulations on fire prevention and fighting such as mini apartments, multi-storey buildings, super-high-rise buildings, oil refineries, …; Regarding the leadership, direction and organization of the implementation of the provisions of the law on fire prevention and fighting: This work in some units and localities is not really drastic, thorough and still shaped. awake; has not focused on checking, supervising, reviewing and summarizing experiences from implementing a number of provisions of the Law amending and supplementing a number of articles of the Law on fire prevention and fighting [4], Decree No. 79/2014 / ND –CP [2] has not been implemented by units and localities because the local funding is still difficult; violations of regulations on safety conditions on fire prevention and fighting are quite common, but detection and handling are still limited and insecure. The responsibilities of heads of agencies, organizations and establishments in ensuring safety conditions for fire prevention and fighting are not high; the guidance and handling of loopholes and shortcomings in fire prevention and fighting for establishments failing to ensure fire safety conditions meet with difficulties due to the responsibilities of many levels, many branches; Regarding the assurance of conditions in service of fire fighting: infrastructure on fire prevention and fighting is still inadequate. Water supply for fire fighting is seriously lacking in many urban areas. The network of fire prevention and fighting police teams in charge of the locality is still small, so it has significantly reduced the effectiveness of fire fighting. The division of responsibilities among agencies and units involved in the management of public fire-fighting water supply systems is unclear, specific and overlapping, so many places are degraded and not repaired or remedied timely.In many large urban areas, many residential areas are located in alleys, deep alleys, the construction density is thick, so it is not guaranteed traffic, water sources for fire fighting; …

These limitations and shortcomings have many causes, including subjective causes: awareness of the responsibility for fire prevention and fighting work of a number of Party Committees, and the right to regulate in urban areas and the heads agencies, organizations and establishments are still limited. The propaganda, dissemination and education of laws are not effective, the quality and forms of propaganda are not abundant and diverse awareness of a part of people also overlooked fire safety measures in their daily life as well as in production and business; the promotion of the power of both the political system and the whole society in fire prevention and fighting has not met the

requirements and tasks; coordination mechanism between levels and branches is not really tight; activities of the Steering Committees of fire prevention and fighting at all levels are not high efficiency; a number of legal provisions on fire prevention and fighting are slowly implemented; the review and supplement of standards and technical regulations on fire prevention and fighting are still slow; attention has not been paid to building mechanisms and policies to encourage socialization in the investment in equipment and means of fire prevention and fighting. Objective causes: infrastructure conditions in urban areas are still inadequate and lack of uniformity, especially the planning of traffic systems, water sources, communication and information in service of fire fighting. Climate change continues to increase the risk of fire and explosion, especially forest fires; some regulations of the law on fire prevention and fighting are not appropriate to the practical situation or not uniformly agreed with the legal documents in the relevant fields.

4. Forecast and solutions to ensure safety in fire prevention and fighting in urban areas in Vietnam

In the coming years, the socio-economic situation continues to grow, the pace of industrialization, modernization, rapid urbanization, the number of projects, construction works, means of transport, demand energy, gas and chemical use will continue to soar; The increase in population and population density in urban centers, especially in big cities, will continue to be factors that directly affect the situation of safety assurance in fire prevention and fighting in the municipality. Unsafe situation in using electricity at households, production and business establishments, especially petrol, gas and chemical businesses, etc. will cause a high fire if there are not available drastic solutions. The situation of fire and explosion is expected to continue to be complicated in the old and long-standing residential areas, especially the type of houses which are both used for living and combined with small businesses and services. Markets, trade centers, condominiums, high-rise buildings, industrial parks, petrol and oil facilities, petroleum, industrial explosives, airports, crowded facilities, forests, constructions key points of culture, tourism, … are still objects that need to be focused on to prevent and prevent big fires. In addition, climate change, especially in droughts and dry spells, will continue to be the factors leading to fire risks, especially for forests. This shows that there is a need for more drastic participation of all levels, sectors and local authorities in ensuring fire safety in urban areas.

In this situation, in order to ensure the safety of fire prevention and fighting, contributing to promoting the sustainable development of urban centers in Vietnam in the coming time, it is necessary to strictly and effectively carry out the following contents:

Organizational and managerial measures:

– Enhance the role and responsibility of the Party committees and authorities in urban areas, the Fatherland Front, ministries, departments and branches in leading and directing the implementation of ensuring the safety of fire prevention and fighting. In particular, continue to effectively implement the Directive No. 47-CT / WT dated June 25, 2015 of the Party Central Committee's Secretariat on fire prevention and fighting, mobilizing the power of the whole political system and the entire people on the task of fire prevention and fighting, rescue and salvage. Periodically reviewing, evaluating and reviewing the implemented results, thereby drawing lessons to improve them more and more. When directing ministries, branches and urban centers to formulate socio-economic development planning schemes, attention must be paid to the technical planning on fire prevention and fighting such as: traffic, water sources, land fund for fire prevention and fighting teams and teams, communication systems, … and funding for fire prevention and fighting activities.

– To take measures to create a drastic change in the propagation, dissemination and education of laws and knowledge about fire prevention and fighting so that each cadre, party member and people of the people's class voluntarily abide by and implement themselves current regulations of law on fire prevention and

fighting. Improving content, renewing forms, measures and methods of propagation to raise awareness of laws, knowledge and skills on fire prevention and fighting, equipping people with real knowledge and skills necessity, especially knowledge of fire prevention; escape skills, initial use of firefighting equipment and devices; integrate knowledge and skills on fire prevention and fighting and rescue in curriculum, extracurricular activities in schools and educational institutions suitable for each discipline and level of study.

– Direct the ministries, branches and urban centers to promptly advise on the elaboration, amendment, supplementation and promulgation of new standards and technical regulations related to the field of fire prevention and fighting; local technical regulations on fire prevention and fighting for a number of special types of facilities of each municipality; stipulate regimes and policies to support forces engaged in fire prevention and fighting and rescue operations commensurate with the nature and task requirements; adopt specific policies to encourage and motivate people of all strata to participate in fire prevention and fighting activities;

– To plan and build networks and contingent of officials performing the state management of fire prevention and fighting increasingly regular, elite, master the professional knowledge and skills in fire prevention and fighting. In particular, in the context of the fourth industrial revolution has had strong impacts on all aspects of socio-economic life in urban areas in Vietnam, including fire prevention and fire fighting. Typically, the construction of smart cities, green cities, etc. Therefore, it is necessary for the Fire Prevention and Fighting Police force to continuously study and improve their professional qualifications and skills, access to advanced scientific and technical achievements from countries around the world in the field of fire prevention and fighting to research and apply them to suit the socio-economic development context in urban centers in Vietnam;

– There should be a clear coordination mechanism, assigning specific tasks between the fire prevention and fighting police force with the concerned ministries, departments and branches and participants in the field of fire prevention and fighting. fire fighting. The new organizational structure of the Ministry of Public Security, including the Fire Prevention and Fighting Police Force, has changed a lot, so that the state management of fire prevention and fighting is effective, the close coordination is, methodical, systematic, clearly defined and decentralized work among the relevant stakeholders is one of the decisive factors. In order to do that, it is necessary to promulgate a coordination mechanism that is uniform in form, content, measures and methods of organization of implementation and must be agreed to be issued in writing.

Technical and technological solutions:

– Regarding the technical infrastructure planning on fire prevention and fighting in urban centers, it is necessary to:

+ There is a close coordination between the fire prevention and fighting police force and the agency tasked with urban planning and development. Especially, the issues and contents of planning are related to ensuring the safety of fire prevention and fighting. The technical network of fire prevention and fighting in urban areas is a decisive factor, which has important implications directly to the effectiveness of fire prevention and fighting, which is the transport system, the source of water, communication, … The uniformity, modernity and covering the entire urban area of the above systems will make an important contribution in minimizing human and property damage caused by fire and explosion. out;

+ Focusing on reviewing, repairing and maintaining the technical infrastructure systems which have been invested to ensure that they are always in good working condition. Planning a new technical infrastructure system for fire prevention and fighting in urban areas has not been planned, ensuring that the technical infrastructure system for fire prevention and fighting is uniformly, uniformly and completely covered. set area of the municipality.

– Regarding technical and technological solutions to prevent the spread of fires and big fires at home, works and production technology lines:

+ For buildings and constructions, when being built and in use, it is necessary to: use the highest level of incombustible and uninflammable substances and materials in lieu of inflammable substances and materials; limiting the amount of flammable substances and properly arranging them; isolation of dangerous fire and explosion environment; prevent the spread of fires; use structures with fire resistance levels suitable to the fire and explosion hazard levels of the work;

+ For production technology lines, it is necessary to select: technological lines which produce little or no danger of fire and explosion; appropriately arrange technological equipment, use automatic devices to adjust pressure, temperature … so that the technological process ensures safety when operating; solutions to ensure safety for the process of operating, maintaining and repairing production technology machines and equipment.

Conditions to ensure effective implementation of fire prevention and fighting in the following urban areas:

– System of legal documents, standards, national technical regulations, local technical regulations in fire prevention and fighting, ensuring full, uniform and uniform from the Central to local;

– Stepping up the socialization of fire prevention and fighting, effectively taking advantage of funding sources for the investment, equipment and construction of the fire prevention and fighting police force to ensure unity and approval. modern rules and requirements to meet the requirements set out in the new situation;

– Enhance international cooperation, especially the exchange and technology transfer in the field of fire prevention and fighting. In particular, technologies in the fourth industrial revolution are opportunities and opportunities for fire prevention and fighting police force to apply to their practical work as applications on Robots in managing, detecting and preventing fires from occurring; fire fighting robots, search and rescue in the fire and under the water;

– Ensuring that the contingent of officials engaged in the planning work, the ministries of the fire prevention and fighting police force have full capability, professional skills, knowledge of foreign languages and information technology; be capable of researching scientific and technological advances and practical applications in the field of fire prevention and fighting in Vietnam.

5. Conclusion

Solutions to ensure safety in fire prevention and fighting in urban areas are one of the important contents contributing to promoting the socio-economic sustainable development of the country. Effective implementation of the above solutions will contribute to minimize fires, explosions and damage caused by fires and explosions in urban areas. At the same time, the consistent, systematic implementation and assurance of conditions for organizing the implementation of solutions is a decisive factor to the effectiveness of the work of ensuring fire safety. urban areas, contributing to raising the effectiveness and efficiency of state management of fire prevention and fighting.

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Section 9. Political institutes, processes and technologies

https://doi.org/10.29013/EJLPS-20-1-54-57

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CHALLENGES OF IDENTITY IN THE INFORMATION EPOCH: GLOBAL VS LOCAL

Abstract. Information epoch is characterized by systemic transformations in different spheres of public life. The article considers questions connected to formation of value content of identities and challenges, which are manifested in contradictions of global and local levels of their realization. It is determined that information and communication technologies (ICT) can be "digested" by public practices and interaction technologies according to their needs and purposes. Most of social schemes remain the same as in industrial epoch. The author analyzes what value meanings in formation of identities contribute to stabilization in political sphere and social adaptation as a whole.

Keywords: identity, politics, information epoch, globalization, personality, social interaction.

Indisputable expectations of Western European person for creative and transformative possibilities of the mind and for its realization in the effective search for truth – science, became close to the dreamy horizons in the middle of the twentieth century. The appearance of computer technology and Internet have added new qualities to people's existence. However, euphoric attitudes for quick positive gifts of new era have not come true. Today, it is becoming more common that information and communication technologies (ICT), unfortunately, can be "digested" by social practices and interaction technologies according to their needs and attitudes. Researchers are thinking about that, perhaps, society itself, conditions of its development, axiological meanings which it chooses, determine vector not only of development of technology, but, above all, their implementation. M. Castells, A. Toffler, J. Naisbitt, T. Friedman, Z. Bauman, U. Beck, A. Giddens and others are thinking about the problem of diversity of social forms, which are under the influence of processes of information and globalization are involved in a single, universal by technical and technological indicators, space.

Socially, the impact of local, elitist community of people, who are mostly involved in using and benefiting from ICT is becoming clearer. Most of this "elite club" is involved in the phenomenon of network society and it is concentrated in developed countries, while in the rest of the world, according to M. Castells, the logic of network society is based largely on

the old axiological principles of profit. The elite community identifies and incorporates into its structures the most useful social segments, leaving outside a large percentage of periphery's population. Tendencies of formation of elite with a global identity are being revealed, which are defined by so-called "digital divide" (M. Castells) and widens this gap [1, 285].

The fundamental contradiction of modern world order consist in that global transformations in vector of information society formation have affected a smaller part of planet's population. Nearby, communities of people can exist as autarchic which are at different levels and stages of development: information, industrial and, even, traditional (neo-feudal). The lag in this area makes problematic the chances of "peripheral" countries in the future to take a worthy place in the world community. The quick updating of the information and technology base by producing countries is increasingly deepening the international disbalance in favor of maintaining world dominance in post-industrial regions. Accordingly, world public opinion is formed under the leadership of leading countries, which creates the basis for the necessary response to volitional decisions in the field of establishment of the world order, justifying the division of the world into the New North and New South.

In the bowels of developed society, a conflict of new quality is developing and it is not less dangerous than conflicts that are well-known. The "intellectual class", new "upper class", which develops and assimilates knowledge, is less needed "lower" class and increasingly oriented towards post-material values. It is impossible to disagree with the opinion of Ukrainian professor Sergey Shergin that such situation is "a way to the" "war against everybody", in which, as "we know, there are no winners" [2, 5].

Major urban centers, global kinds of activities and highly educated social groups are involved in internet-enabled global networks, while most regions are excluded from them. ICT-driven economy and information system (primarily the Internet) have joined to the trajectory of development with limited choice. Moreover, interests and ideology of elites is based on valid Eurocentric model of development, excluding possibilities of finding and implementing of alternative forms (less techno-intensive, less productive, without improvement of materials and technologies, but closer to history, culture, natural conditions and, accordingly, are able to satisfy more countries which lifestyles and worldviews are lagging behind historically continuous mainstream). That is, a digital gap has occurred between societies (even individuals, regions, governmental institutions and firms) which have material and cultural prerequisites for existence within the limits of information world and those who don't have to or do not want to adapt to quick changes. Today, segments that do not satisfy requirements of logic of development of information civilization can at any time be excluded and replaced by connecting to the network interaction of others, more successful and aggressive players. There is a consolidation in the network of those segments that are the most successful, adaptable and creative. The downside of the new era is marginalization, fragmentation of societies and state institutions, formation of a new elitist identity of global character.

At a time when a person clearly identified himself in the space-time continuum, components of identity were traditional factors – place of living, family, socio-professional affiliation, nation, state. Identities gradually became more complex concerning level of coexistence integration; there was a crisis of traditional identity models. Today, a new type of human coexistence integration is occurring, connected to new technologies and processes of globalization. This manifests itself in strengthening of abstraction's level in the formation of identity (planetary global scale). Large volumes of information, rapid changes, interaction with the world diversity lead to increased uncertainty and, consequently, lack of self confidence of the person in his or her future. Space and time, as important dimensions of human existence, are significantly losing their meaning in the online communication system. The world, according to

Bauman, became unknown incompletely [3]. The world has lost clearly defined decision centers, or centers of action, which logic of influence can be predicted, understood and, accordingly, forecasted. Today, there are a lot of "centers of action", and they acting uncoordinated. Today, the world is still continuing the globalization trend, while at the same time losing common rules, clear identities, and dependence of processes in certain countries on appropriately defined spatial decision-making centers.

Identity challenges, in our view, have ambivalent character. On the one hand, this is an increase in level of abstraction in the formation of identity (planetary global scale). However, on the other hand, as T. Friedman argues, the world has become "flat", revealing itself in the disruption of old hierarchies and equalizing the playing field. "Wherever we cast our eyes, hierarchical structures everywhere are either forced to withstand the pressure from below or transform themselves, gluing from vertical structures more horizontal, that more answering to model of equal cooperation" [4]. The information society is characterized as a world of "weightlessness", a world in which the possibilities of communication are endless, but these opportunities, which bring people together in "timeless space" on-line, require a selective approach to communicative interaction.

The role of the individual and his responsibility increased along with opportunities for self-expression. At the same time, the importance of interpersonal relationships has increased in the sense of social interaction aimed at maintaining shared identities. W. Dyzard defined information policy not simply as a further development of classic content of politics, but as another dimension of it. This is due to the fact that new technologies facilitate communication between individuals and facilitate consensus among different political forces. Economic-driven new networks can go beyond government and business services to the consumer sector, government and private sector will work together to further development of information society. The cooperation of all public agencies has great importance for stability in the information age [5, 40–41].

Problems of political individualization as an important dimension of politics of the new day were considered by such authors as J. Naisbitt and C. Leadbeater. J. Naisbitt who determines that tendencies of decentralization and regionalization underlying political individualization have intensified. Their meaning is that the old development strategies based on the satisfaction of interests of authorities (some of its centers) are inferior to the new ones, oriented primarily to the satisfaction of citizens' interests, individual efforts of interaction of which intensively form new centers of power, locally diffuse kind [6, 164–165]. According to C. Leadbeater, the embodiment of utopian idea of self-government acquires a decisive character in the information age [7, 224]. This is made possible by access to information previously available only to government agencies. Moreover, thanks to new ICT, people are given the opportunity to resolve issues by themselves without regulatory intervention by the state. Thus, along with political individualism, when individual responsibility and mood on particular interests grow, conditions are created for new forms of political collectivism: from pressure groups to mutual aid networks. We are talking about a certain social mutualism as a form of social interaction that involves mutual assistance, in which each party benefits from each other. This state is based on social recognition of person's place in hierarchy that is built within communities.

So, today it is extremely important to have a high ability to select and assimilate information, make quick decisions, and therefore a person as a subject of creative communication comes to the fore. The world has become boundless and at the same time narrowed down to a small point in the plane dimension of what a person is. The picture of the world today absorbs what has been worked out by previous generations, but thanks to ICT, at the information stage, when a network society occurred, there

is a return to person as the center of the universe. Man no longer dissolves in the boundlessness of the universe, and can harmoniously combine, according to G. Skovoroda, macrocosm of the universe and the microcosm of individual human being. Results of use of ICT depend on humanization of human interaction, its openness, informality (without pre-established preferences, rules and hierarchies), selection of axiological meanings, development of human abilities.

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Section 10. Criminal law and criminology

https://doi.org/10.29013/EJLPS-20-1-58-61

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CHANGES IN GERMAN CRIMINAL LAW TERMINOLOGY: MURDER, DEFAMATION, OFFICIAL SECRETS

Abstract. The article analyzes the problem of defining the terms "murder", "defamation", "official secret" by the German legislation. The analysis of the approach of the legislator to new interpretation, influence of these changes on the existing legislation is made.

Keywords: Bundestag, murder, defamation, official secret.

Amendments to the terms of the German Criminal Code are currently under discussion in Germany, resulting in revisions to the national Criminal Code. In 2015, for example, the issue of intentional and unintentional homicide was widely discussed. In this article we would like to draw attention to the history of this issue, to the ways of solving the problem, proposed by the deputies of the Bundestag during its meetings in the second half of 2015 [1].

The terminology in use at present time was introduced in 1941. It classified that anyone who "kills a human being out of murderous intent, to satisfy sexual desires, out of greed or otherwise base motives, insidiously or cruelly, or with means dangerous to the public, or in order to commit or cover up another crime…" will be punished, on the basis of paragraph 211 of the Criminal Code, by life imprisonment as a murderer. According to paragraph 212 of the Criminal Code, an unintentional murderer will be deemed to be someone who has killed a person unintentionally.

The wording adopted before 1941 stated that the facts of the murder were considered under the Criminal Code of the German Empire of 1871. It wrote: "whoever deliberately kills a human being if this person has committed an intentional murder will be punished by death". In considering cases of murder, the empire legislator was guided by the Prussian Criminal Code of 1851. Its 175th paragraph read: "whoever kills a human being intentionally and deliberately shall be punished by death." Conscious murder without intent was punished by hard labour (life-long under paragraph 176 of the Prussian Criminal Code, and at least 5 years – paragraph 212 of the German Empire Criminal Code). And "intent" was understood in the sense of cold calculation, not caused by a state of emotional disturbance. In this aspect, we can say that the 1941 article introduced

an important differentiation between murder and unintentional murder [1].

The understanding of murder, in 1941, differed from other typical crimes of criminal law at that time. Paragraph 211 of the Criminal Code introduced the personal illegality of the act "…the murderer was to be punished by life imprisonment" in order to define not the act itself but the perpetrator ("the murderer is the one who…"). Such a definition of personal wrongfulness of the act was not a novel of 1941. For example, the Prussian Common Law of 1794 already stated: "Paragraph 806. Whoever, with malice, inflicts injury on another person, takes such an act as to result of which death must come as a consequence, and by doing so actually kills that person, is punished by the sword as a murderer", "Paragraph 826. Whoever commits murder by prior intent shall be punished by means of the breaking on the wheel as a murderer". In the nineteenth century, there was a refusal to distinguish between the criteria of "intent" as a distinguishing feature of murder, introduced in 1941. Perhaps the experience of Swiss criminal law was used here. In 1894, it was stated: "Article 52: Anyone who intentionally kills a person will be punished with 10 to 15 years of imprisonment. Murder by a criminal out of murderous intent, out of greed, with particular cruelty, cunning, or by means of poison, explosives, or fire, or in order to commit or cover up another crime… is punishable by life penal servitude."

Contemporary criticism of the 1941 legislation is based, first, on the fact that the punishment by life imprisonment is too severe. According to lawyers, the courts could not to impose the penalty of life imprisonment, in cases where the crime was undoubtedly carried out, but from the true circumstances of the crime there is a special motive – for example, "killing a domestic tyrant". Secondly, the case described above and related facts characterizing the perpetrator as a biological type were typical for National Socialism. Following the Alliance 90/The Greens initiative (18/5214), the federal government initiated a reform concerning the treatment of murder as a delict. In its report of June 29, 2015, the commission of experts appointed on that occasion proposed: to replace the terms relating to types of perpetrator in articles 211 and 212 of the Criminal Code with "violent acts". The commission voted in favor of maintaining the characterization of murder as an act committed with lowly motives. It proposed that the motive for murder should be supplemented by the following elements: murder committed on the basis of sexual, ethnic or other origin, sexual identity or orientation, racist motivation, faith or religious belief. According to the members of the commission, this would distinguish between these delicts and the crimes (primarily domestic) previously provided for in criminal law.

Speaking about changes in the regulation of official secrets, first of all we should consider the changes concerning the current German Criminal Code (StGB) [1].

Paragraph 93 deals with criminal offences relating to treason and threats to external security. The emphasis is on special protection of "state secrets" [1]:

§ 203 criminalizes the violation of "private secrets" and Section 15 of the special part of the Criminal Code introduces appropriate sanctions for these violations. At the same time, "private secrets" are defined as secrets of private life and the secret area of privacy [1].

§ 353b criminalizes the violation of "official secrets". Section 30 of the special part classifies these violations as a criminal offence [1].

This approach dates back to 1936, when § 353b was amended accordingly on 2 July 1936 [2].

According to the new amendments of 2019, it is interesting to formulate the definition of "secret" in paragraph 353. Secrets are facts known only to a limited group of individuals and are subject to secrecy. Based on this interpretation, the concept of "official secrets" is also deduced. Official secrets are the facts which became available to the offender exactly due to their membership in an authority or institution / or in the performance of their official duties [3].

In order to determine the secret necessity (i.e. what can be classified as official secrets from official duties and procedures and what cannot be classified as official secrets), provisions of the administrative order – (internal) administrative regulation are most often used. General secrecy is determined by the Federal Civil Servants Act (05.02.2009) – § 67, paragraph 1. Paragraph 2 of the sixty-seventh paragraph of the Act excludes obvious facts of administrative activity of an employee from the list of official secrets. Approximately the same regulation can be deduced from the analysis of § 37 (paragraphs 1, 2) of the Law Concerning the Status of Career Civil Servants (of 17.06.2008).

Paragraph 10 of the Personnel Representation Law (15.03.1974), for example, states that secrecy does not apply to numerous bureaucratic issues and procedures.

The most important criterion for classifying a fact as a breach of official secrecy is their danger to important public interests. The concept of "important public interests" takes into account the fact that not any public interest is sufficient, but only the qualified one. The qualified public interest, as we understand it, is only one that has a relevant judicial precedent.

On 19 June 2019, a draft of Criminal Code Amendment Act was submitted to the Bundestag. The amendments concerned the criminal protection of the European Union and its symbols against defamation.

Defamation is the dissemination of defamatory information that may not be defamatory, or disgrace in the press; an act known in criminal law as a crime close to libel but distinct from it by two characteristics:

Defamation is the disclosure of any shameful facts in the press, whereas libel can be committed either in the press or in words (in public) or in writing.

In defamation, the criminal element is the disclosure of shameful information in the press itself, regardless of its correctness, while libel is always regarded as the disclosure of knowingly false information.

In this form, defamation was a means of restricting press freedom, not only against the latter's invasion of citizens' privacy, but also against exposing in the press the wrong actions of officials. With regard to officials, a defense was allowed against accusations of defamation by pointing to the truth of the disgraceous circumstance disclosed in the press concerning the official activities of the disgraced person. However, the accused could defend themselves only by presenting written evidence, which was almost impossible. In order to limit objections with references to written evidence, the circle of officials was interpreted restrictively; the law recommended to the court that, even in the case of submission of written evidence confirming the correctness of the information about the official announced, the accused should be released from defamation charges and still be punished on the charge of insult.

The authors of the draft law believe that German criminal law does not sufficiently protect European Union symbols such as the flag and anthem. The draft law should provide the law enforcement agencies of the country with sufficient means to strongly counteract defamation.

Currently, foreign symbols (such as the flag and state emblem) are protected by Article 104 of the German Criminal Code. For example, paragraph 1 introduces a penalty of up to 2 years' imprisonment (or a fine) for such actions. Article 104, however, only covers defamation against the flag of a foreign country. Paragraph 2 of Article 90 (A) of the Code also provides similar protection for the flag of Germany. EU symbols, on the other hand, are not protected by the country's criminal code.

Interestingly, according to the text of the draft law, there are cases of defamation against the "hung" flag of a foreign country or a symbol of Germany in court practice.

As it is known, by special orders of the federal government, EU flags should be hung when marking federal buildings, which are also (sometimes) objects of slander.

As a proposal, it is demanded to supplement the current legislation with a norm criminalizing libel

against the EU anthem and flag. The penalty is proposed to be 3 years' imprisonment or a monetary fine. The new provision should apply not only to a completed act, but also to an attempted act [4].

If the Bundestag passes the draft law, the changes will be included in Article 90, paragraph C of the Criminal Code.

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https://doi.org/10.29013/EJLPS-20-1-62-68

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THE FORMATION OF CRIMINAL LIABILITY FOR A CRIME UNDER ART. 139 OF THE CRIMINAL CODE OF UKRAINE FROM THE 1800S UP TO THE PRESENT

Abstract. The article examines the issues of the formation of criminal liability for a crime under Art. 139 of the Criminal Code of Ukraine from the 1800 s up to the present. Several normative acts which are related to the subject of our research were analyzed.

Keywords: failure to render assistance to a sick person, medical professional, criminal liability, doctor, punishment, Medical statute.

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СТАНОВЛЕНИЕ УГОЛОВНОЙ ОТВЕТСТВЕННОСТИ ЗА ПРЕСТУПЛЕНИЕ, ПРЕДУСМОТРЕННОЕ СТ. 139 УК УКРАИНЫ С 1800 ГОДА ПО НАСТОЯЩЕЕ ВРЕМЯ

Аннотация. В статье исследуются вопросы становления уголовной ответственности за преступление, предусмотренное ст. 139 УК Украины с 1800 года по настоящее время. С этой целью был проанализирован ряд нормативных актов, относящихся к предмету нашего исследования.

Ключевые слова: неоказание помощи больному, медицинский работник, уголовная ответственность, врач, наказание, Врачебный устав.

Постановка проблемы. Вопросы, касающиеся становления уголовной ответственности за преступление, предусмотренное ст. 139 УК Украины с 1800 года по настоящее время имеют важное значение для науки уголовного права, а также для законотворческой деятельности.

Анализ последних исследований и публикаций. На сегодня проблема становления уголовной ответственности за преступление, предусмотренное ст. 139 УК Украины с 1800 года по настоящее время не нашла своего должного освещения.

Цель статьи: состоит в выяснении становления уголовной ответственности за преступление, предусмотренное ст. 139 УК Украины с 1800 года по настоящее время.

Основные результаты исследования. Впервые юридическое право на жизнь было закреплено в Декларации независимости США 4 июля

1776 года, когда было провозглашено равенство всех людей, право на жизнь, свободу и личное счастье [1, С. 167]. Ст. 25 Всеобщей декларации прав человека от 10 декабря 1948 закрепляла право каждого человека на медицинский уход и необходимое социальное обслуживание [2].

Медицинские работники имеют этические обязательства и профессиональный долг действовать в лучших интересах пациента в любое время [3].

С целью анализа исторической и уголовно-правовой точек зрения существенных количественных и качественных характеристик формирования уголовной ответственности за преступление, предусмотренное ст. 139 УК Украины («Неоказание помощи больному медицинским работником») на этапах развития украинской государственности и общества с 1800 года по настоящее время, считаем нужным применить, предложенную В. К. Матвейчуком, периодизацию формирования уголовного законодательства [4, С. 28–51]. Первые четыре периода, в контексте предмета нашего исследования, были проанализированы нами ранее [5, С. 22–26].

Пятый период (с XVIII века.– до начала XIX века) называется «Под имперской властью» [4, С. 37]. Уложение о наказаниях уголовных и исправительных 1845 года было утверждено Указом Императора Николая I № 19283 «Высочайше утвержденное Уложеніе о Наказаніяхъ Уголовныхъ и Исправительныхъ» от 15 августа 1845 [6, С. 598]. Это одна из первых попыток составления систематического сборника уголовных законов в России, относящихся к самому началу XIX века [7, С. 686]. Данный документ имел несколько редакций: 1857 года, 1866 года и 1885 года [7, С. 687].

В Российской Империи уголовная ответственность медицинских работников в случае неявки по приглашению больных или лиц, нуждающихся в помощи предусматривалась, в частности, статьями 1084, 1085 и 1997 Уложения о наказаниях уголовных и исправительных 1845 года [6, С. 802, 955], позже статьями 872, 873 и 1522 Уложения о наказаниях уголовных и исправительных в редакции 1885 года [8, С. 86, 168]. Изучая Уложение о наказаниях уголовных и исправительных 1845 года, можно увидеть дублирование норм в статьях 1084 и 1997 [6, С. 802, 955].

Основное различие между статьями 1084 и 1997 Уложения о наказаниях уголовных и исправительных 1845 года состояло в том, что ст. 1084 квалифицировала как преступление неявку врача, оператора, акушера, фельдшера, повивальной бабки и т.п. «…по приглашенію больныхъ…» для оказания им помощи «…безъ особыхъ законныхъ къ тому препятствій…» [6, С. 802], а статья 1997 – неявку врача, акушера, фельдшера, повивальной бабки к больным или роженицам, «…требующимъ ихъ помощи…», «…безъ особыхъ законныхъ къ тому причинъ…» [6, С. 955]. В то же время санкция ч. 1 ст. 1997 определяла: «…наказаніямъ, въ статье 1084 сего Уложенія определеннымъ…», хотя и предполагала ч. 2 ст. 1997, при условии «…если при томъ они знали объ опасности больнаго, родильницы или новорожденнаго младенца…», более серьезное наказание в виде ареста от семи дней до трех месяцев, то есть санкция зависела не от наступления последствий, а от субъективной стороны преступления [6, С. 955].

Шестой период (конец XIX в.– начало XX века) [4, С. 43]. Принятое в 1885 году Уложение о наказаниях уголовных и исправительных [8, С. 1–270] содержало аналогичные нормы из предыдущего Уложения 1845 года [6, С. 598–1010], которые касались преступления неоказание помощи больному медицинским работником.

Существенный вклад в процесс упорядочивания юридической деятельности в сфере здравоохранения внес систематизированный правовой документ Врачебный устав (в редакциях 1857 г., 1892 г., 1905 г.), который входит в состав XIII тома Свода законов Российской империи [9, С. 450]. Основу Врачебного устава составляла инструкция для врачебных управ, которая была

разработана в 1797 году С. С. Андреевским, с изменениями и дополнениями, внесенными последующими законодательными актами [9, С. 450]. Врачебный устав состоял из трех книг: первая книга – «Учреждение врачебные» содержит статьи об организации медицинской службы, ее центральных, а также местных органах; о правах, обязанностях врачей и другого медицинского персонала; об экзаменах, которые дают право занимать медицинские должности; о контроле лечебных учреждений, изготовлении и продаже медикаментов и прочее [9, С. 450].

Во второй книге Врачебного устава – «Уставъ Медицинской Полиціи» статьи касались обязанностей различных учреждений в борьбе с инфекционными заболеваниями и эпизоотиями, санитарному надзору за качеством и продажей продуктов питания, прививок от оспы, карантинов и др. Третья книга Врачебного устава – «Уставъ Судебной Медицины» вмещала в себя статьи о правилах проведения судебно-медицинской экспертизы [9, С. 450].

Во Врачебном уставе книге первой «Учрежденія Врачебныя» Разделе I «О местномъ врачебномъ управленіи» Главе второй «О врачебномъ управленіи въ уездахъ и городахъ» в третьем отделении «О обязанностяхъ врачей» ст. 54 указано, что каждый практикующий врач обязан по приглашению больных явиться для оказания им помощи, а ст. 55 отмечает, что врач обязан явиться по приглашению повивальной бабки к роженице, если отсутствуют законные препятствия для этого, и оказывать помощь роженице до окончания родов [10, С. 184].

Указом Императора Николая II № 22704 «Высочайше утвержденное Уголовное Уложеніе» от 22 марта 1903 года [11, С. 175–274] был утвержден новый уголовно-правовой акт царской России – «Уголовное Уложеніе» 1903 года [12, С. 725]. Данный документ был издан в годы подъема революционного движения в России, накануне первой русской революции, когда революционные выступления рабочих, а также крестьян показывали, что в России назревает и приближается революция [12, С. 725]. Издание данного документа было вызвано тем, что действующее «Уложеніе о наказаніяхъ уголовныхъ и исправительныхъ» не могло уже более выполнять возложенные на него задачи по борьбе помещичье-буржуазного правительства с революцией, которая надвигалась [12, С. 725]. «Уголовное Уложеніе» 1903 года содержало 687 статей, из которых на общую часть приходилось 72 статьи; особая часть состояла из 36 глав [12, С. 725].

Ст. 497 главы XXV «Объ оставленіи въ опасности» Уголовного Уложения 1903 года указывала, что «Виновный въ неисполненіи правилъ, установленныхъ законом или обязательнымъ постановленіемъ, объ оказаніи помощи больному или находящемуся въ безсознательномъ состояніи наказывается:

арестомъ на срокъ не свыше одного мѣсяца или

денежною пенею не свыше ста рублей.

Если сей проступок учиненъ, безъ уважительной причины, практикующимъ врачемъ, фельдшеромъ, повивальною бабкою или больничною прислугою, коимъ было извѣстно опасное положеніе больнаго или родильницы, то виновный наказывается:

арестомъ на срокъ не свыше трехъ мѣсяцевъ» [11, С. 243].

Седьмой период длится от начала XX в. до 1991 года и получил название «Украина в советский период» [4, С. 45]. В начале 1920-х годов на территории Украины в условиях масштабных эпидемий не хватало достаточного количества медицинского персонала, и Всеукраинский революционный комитет издал постановление «О привлечении к трудовой повинности лиц медицинского персонала» от 7 февраля 1920 года для обеспечения населения страны медицинской помощью и борьбы с эпидемией сыпного тифа [13, С. 18]. Согласно постановлению СНК УССР

«Об отмене трудовой повинности для медперсонала» от 8 августа 1922 данная трудовая повинность была отменена [14, С. 536].

Постановлением Всеукраинского Центрального Исполнительного Комитета от 23 августа 1922 года «О введении в действие Уголовного Кодекса УССР» было решено объединить все карательные постановления в Уголовный Кодекс с целью защиты революционного правопорядка и рабоче-крестьянского государства, а также обеспечения твердых основ революционного правосознания [15, С. 5]. Для установления единства уголовного законодательства всех Советских Республик основу Уголовного кодекса УССР составлял Уголовный кодекс РСФСР [15, С. 5]. Ст. 165 подразделения 3 «Оставление в опасности» главы V «Преступления против жизни, здоровья, свободы и достоинства личности» УК УССР 1922 года имела следующую редакцию: «Неоказание помощи больному без уважительной причины со стороны лица, обязанного ее оказывать по закону или по установленным правилам, карается –

принудительными работами на срок до одного года

или штрафом до 500 рублей.

Отказ медицинского персонала в оказании медицинской помощи, если он заведомо мог иметь опасные для больного последствия, карается лишением свободы на срок до двух лет» [15, С. 52].

17 апреля 1924 Постановлением СНК УССР был утвержден первый базовый акт, который устанавливал квалификационные требования к занятию медицинских должностей и определял правовой статус медицинских работников – «О правилах, регулирующих профессиональную работу медперсонала» [16, С. 212–220]. Арт. 1 данного документа указывает, что к медицинскому персоналу принадлежали лица, получившие квалификацию врача, врача одонтолога или зубного врача, акушерки, фармацевта, помощника врача, брата или сестры (медицинских), массажиста [16, С. 212]. Врачи могли заниматься медицинской практикой, а также занимать административные должности в медицинской сфере, и, по согласованию с администрацией, врачи получали право иметь именную печать, на которой указывалась их квалификация [16, С. 215]. Согласно арт. 6 указанного документа, медицинские работники обязаны оказывать неотложную медицинскую помощь любому лицу и являться по вызову больного или третьих лиц для оказания помощи при отравлении, ранении, удушении, кровотечении и т.д. [16, С. 213–214].

8 июня 1927 Центральным Исполнительным Комитетом Украинской ССР был утвержден Уголовный кодекс УССР [17, С. 1]. Ч. 1 ст. 160 УК УССР предусматривала уголовную ответственность за непредоставление или отказ в оказании помощи больному без уважительных причин со стороны лица, которое обязано эту помощь оказывать по закону или по специальным правилам, ч. 2 данной статьи предусматривала уголовную ответственность за те же действия, если они заведомо могли иметь опасные для больного последствия [17, С. 49].

Статья 100 главы VIII «Основные права и обязанности граждан» Конституции УССР 1937 года закрепляла право граждан УССР на материальное обеспечение в старости, в случае болезни, а также потери трудоспособности, которое обеспечивалось бесплатной медицинской помощью трудящимся, развитием социального страхования рабочих, служащих, в частности, предоставлением в пользование трудящимся обширной сети курортов [18, С. 23].

28 декабря 1960 Законом Украинской Советской Социалистической Республики был утвержден Уголовный кодекс Украинской ССР, который вступил в силу с 1 апреля 1961 [19].

С принятием нового УК Украинской ССР в 1960 году в главе III «Преступления против жизни, здоровья, свободы и достоинства личности» ст. 113 предусматривала уголовную ответственность за непредоставление помощи

больному лицом медицинского персонала [20]. За неоказание помощи больному лицом медицинского персонала, без уважительных причин, которое обязано ее оказывать в соответствии с установленными правилами, если ему было заведомо известно, что это может причинить тяжелые последствия для больного, была предусмотрена уголовная ответственность в виде исправительных работ на срок до двух лет или общественного выговора (ч. 1 ст. 113 УК УССР), за совершение того же деяния, если оно повлекло тяжелые последствия для больного, была предусмотрена уголовная ответственность в виде лишения свободы на срок до трех лет (ч. 2 ст. 113 УК УССР) [20].

Законодатель определял как обязательный признак объективной стороны данного преступления возможность наступления тяжких последствий для больного, которые медицинский работник как субъект преступления, должен был предвидеть.

15 июля 1971 был принят, а 1 октября 1971 вступил в силу Закон УССР «Об охране здоровья» [21]. Данный нормативный акт регулировал общественные отношения в области охраны здоровья населения Украинской ССР [21]. Статья 3 Закона УССР «Об охране здоровья» определяла право граждан Украинской ССР на охрану здоровья, в частности, данное право обеспечивалось бесплатной квалифицированной медицинской помощью, которая гарантировалась государственными учреждениями здравоохранения; расширением сети учреждений для лечения и укрепления здоровья граждан; проведением широких профилактических мероприятий; развитием и совершенствованием техники безопасности и производственной санитарии; особой заботой о здоровье подрастающего поколения, включая запрещение детского труда, не связанного с обучением и трудовым воспитанием; мерами по оздоровлению окружающей среды; развертыванием научных исследований, направленных на предотвращение и снижение заболеваемости, на обеспечение долголетней активной жизни граждан [21].

Восьмой период (с 1991 года – до нашего времени) [4, С. 51]. Проект Уголовного кодекса Украины № 1029 от 12 мая 1998 года, был разработан рабочей группой Кабинета Министров Украины [22] и проект Уголовного кодекса № 1029–1 был подготовлен группой ученых во главе с В. М. Смитиенко и внесен на рассмотрение Верховной Рады Украины народным депутатом И. М. Пилипчуком [23]. Неоказание помощи больному медицинским работником в данных проектах было оценено по-разному.

Ч. 1 ст. 134 проекта УК Украины № 1029 предусматривала ответственность за неоказание без уважительных причин помощи больному медицинским работником, который обязан, согласно установленным правилам, оказать такую помощь, если ему заранее известно, что это может иметь тяжелые последствия для больного [22]. За неоказание помощи больному медицинским работником было предложено предусмотреть наказание в виде штрафа от семи до пятнадцати необлагаемых минимумов доходов граждан или лишением права занимать определенные должности или заниматься определенной деятельностью на срок до пяти лет, или исправительными работами на срок до двух лет [22]. Ч. 2 ст. 134 проекта УК Украины № 1029 предусматривала ответственность за то же деяние, если оно повлекло смерть больного, оставленного без помощи, или иные тяжкие последствия, а также было предложено предусмотреть наказание в виде ограничения свободы на срок до четырех лет или лишения свободы на срок до трех лет с лишением права занимать определенные должности или заниматься определенной деятельностью на срок до трех лет или без такового [22].

При обсуждении проекта УК Украины № 1029 было рассмотрено несколько позиций по вопросу уголовной ответственности за преступление неоказание помощи больному медицинским работником [22].

Были учтены предложение о дополнении названия статьи 134 проекта УК Украины № 1029 словом «работником» от народного депутата Украины В. Г. Кочерги, а также рекомендация о замене в санкции ч. 1 ст. 134 проекта УК Украины № 1029 словосочетание «от семи до пятнадцати» на размер штрафа «до пятидесяти» необлагаемых минимумов доходов граждан от народного депутата Украины В. П. Нечипорука [22].

5 апреля 2001 года Верховная Рада Украины приняла новый Уголовный кодекс [24], который стал первым уголовным кодексом именно независимой Украины, в частности, УК Украины 1960 года не отвечал в значительной степени не только потребностям общества и государства, но и современной теории уголовного права [25]. В настоящее время уголовная ответственность за преступление неоказание помощи больному медицинским работником предусмотрена ст. 139 УК Украины.

Выводы:

1. На основании проведенного исследования можно прийти к следующим выводам, что в историческом аспекте наблюдается тенденция к усилению наказаний за преступление неоказание помощи больному медицинским работником.

2. Исторический аспект и современное состояние проблемы позволил сформулировать современную формулировку ст. 139 УК Украины.

3. Данное направление исследования дает основания утверждать о несовершенстве положений ст. 139 УК Украины «Неоказание помощи больному медицинским работником».

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