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RUSSIAN LAW JOURNAL (RLJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *Russian Law Journal* is designed to encourage research especially in Russian law and legal systems of the countries of Eurasia. It covers recent legal developments in this region, but also those on an international and comparative level.

The RLJ is not sponsored or affiliated with any university, it is an independent All-Russian interuniversity platform, initiated privately without any support from government authorities.

The RLJ is published in English and appears four times per year. All articles are subject to professional editing by native English-speaking legal scholars. The RLJ is indexed by Scopus and ESCI Web of Science.

Notes for Contributors

The RLJ encourages comparative research by those who are interested in Russian law, but also seeks to encourage interest in all matters relating to international public and private law, civil and criminal law, constitutional law, civil rights, the theory and history of law, and the relationships between law and culture and other disciplines. A special emphasis is placed on interdisciplinary legal research.

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and must be submitted in English. The RLJ does not accept translations of original articles prepared in other languages. The RLJ welcomes qualified scholars, but also accepts serious works by Ph.D. students and practicing lawyers.

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Citations in footnotes must conform to *The Bluebook: A Uniform System of Citation*. A References section is required: entries must conform to the author-title system, such as that described in the *Oxford Style Manual*.

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Special Issue: Discovering Ukrainian Law

GUEST EDITOR NOTE ON THE UKRAINIAN LAW

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This issue of the *Russian Law Journal* is unusual. The Editorial Board decided for the first time to make a completely special issue, dedicated to the study of the law of a particular foreign jurisdiction, which is Ukraine. If this experience is recognized as successful, it is possible to start a good tradition which is to publish special issues dedicated to the law of individual states.

It is equally important that, unfortunately, the political events of 2014 led to a very obvious reduction in contacts and cooperation between Russian and Ukrainian academics. Rare attempts to create a platform for such contacts have caused a sharp negative reaction from the Ukrainian Ministry of Education. For example, the ministry criticized the initiative of the scientific foundation of the German automobile concern Volkswagen to provide grants for joint Russian–Ukrainian scientific projects. A great amount of applications by Russian–Ukrainian joint groups of scientists, submitted to that contest, clearly indicated that this ideology of blocking academic contacts is not shared by the academic community either in Ukraine or in Russia. However, there are really not enough permanent platforms that would unite Russian and Ukrainian legal scholars. Therefore, I did not have any hesitation when the *RLJ* editor-in-chief Professor Dmitry Maleshin kindly invited me to cooperate in the project on the journal's special issue on Ukrainian law. This is a very important, necessary, and timely initiative. As a person who has a total of 10 years of academic experience in both Russia and Ukraine, for me it was a great honor to be at the head of this serious joint Russian–Ukrainian academic project.

I do not hide the fact that the project of a special issue of the journal on Ukrainian law has faced certain difficulties. Several authors who first wrote to us about

the desire to participate in our competition for the publication of their articles, subsequently refused to participate in the contest with reference to the positions of the rectors of their universities. In Ukraine, the demand for scientists to publish in journals indexed in the Web of Science or Scopus databases is gradually beginning to be put forward. However, some potential authors informed us that, according to the decision of the rectors of their universities, publications in Russian academic journals indexed in WoS and Scopus will have issues with academic certification. The editorial board respects the positions of such scientists, since "the buck does not stop with them." The editorial board does not have any illusions in terms of the level of "academic freedom" in Ukrainian humanitarian studies and state-owned universities. Fortunately, in Russia such ideology is not supported, that is, the articles of Russian scientists published in Ukrainian scientific journals indexed in WoS and Scopus are evaluated and counted on general grounds.

On the Internet, it is easy to find, even in Russian translation, the famous speech by Hermann von Helmholtz, an outstanding figure in the academic world of the 19th century, "On the Academic Freedom of German Universities," spoken by him at the inauguration of the Rector at the University of Friedrich-Wilhelm in Berlin in 1877. He openly talks about the interference of the authorities in the affairs of universities. Specialists in the history of science are well aware that brothers Jacob and Wilhelm Grimm, famous throughout the world as storytellers, had serious problems with the authorities throughout the course of their careers, the latter considering the formers' views "not sufficiently loyal."

At the same time, the academic community did not defend them en mass. After all, many scientists by a kind of nature are conformists and gladly accept handouts from the authorities and are ready to comply with any instructions from the authorities. In the literature on the history of science in the 19th and 20th centuries, there are plenty of examples of the struggle of the authorities of different countries with "excessively free universities," "not enough politically loyal professors," examples which are not necessary to be provided in detail here.

Real life in universities is different from the ideal that Herman von Helmholtz described as "a free union of independent people, in which both professors and students were inspired by one interest only: the love of science, an alliance in which some tried to get acquainted with the treasures of spiritual development, abandoned by antiquity, and others – to inspire the new generation to the ideal aspirations that warmed their own lives – this was the beginning for universities, in its idea and features of an organization based on total freedom." However, the authorities, having begun to provide funds to the universities, actually conditioned them by interventions in the management of universities. As the story of the brothers Grimm testifies, the authorities in some situations fired not only those professors to whom they had initial claims, but also those professors who supported them.

I would like to hope that since the 19th century, something has changed for the better in this matter, and the Governments in both Ukraine and in Russia will not

consider scientists as public servants who should write only what is pleasing to the authorities.

Any reader will easily be convinced that the purpose with which we publish our special issue is not a discussion on geopolitical issues on international relations or an expression of criticism about the current Ukrainian authorities. Life is not black and white, and not a one-way street. We believe that in Ukraine there are very diverse changes every year, some of which are for the better, some for the worse. However, this is a problem commonplace around the world. Our aim is to maintain academic contacts between Ukrainian and Russian scientists, and open scientific discussion on complex issues of modern law.

During the contest, the editorial board tried to select those articles that described practical problems at a high scientific level, and proposed ways to solve them. We rejected drafts of articles of a purely theoretical nature, for example, exclusively on clarifying certain definitions in legislation without justifying a sharp practical need for such clarification.

In some aspects, domestic Ukrainian law is better than Russian, in some worse. I hope that there will be a normal "competition of legislations," when legal orders mutually borrow from each other what another legal order had gotten ahead. I tried to demonstrate this in my article about comparing the new Ukrainian and Russian legislation on consumer lending. I hope that the Russian legislator will eventually borrow some norms of the Ukrainian legislation on consumer lending, which are more successful than Russian ones, better ensure an equitable balance of interests between the debtor and the creditor, and vice versa.

In many jurisdictions, there are heated debates around the problem of legal ethics. It is clear that the defense attorneys have duties both to their client and to the court. At the same time, the control over the interpretation of these duties, and supervision over their compliance, is the competence by both the courts and the disciplinary chambers inside the bar. The article by Tetyana Vilchyk was lauded by the editorial board with a clear and precise exposition of different doctrinal approaches to the various duties of lawyers. At the same time, the article has the necessary level of visibility, practical significance, because it analyzes the actual law enforcement practice of the Ukrainian bar disciplinary bodies as well as court process for professional liability of lawyers.

A fairly common phenomenon in Eastern Europe in the last 30 years is the so-called "lustration," that is, the temporary professional disqualification of top level public servants, who served for the former government, before a radical change of power. In Ukraine in 2014, there was a radical change of power, which its supporters call a "revolution of dignity," and its opponents, "an unconstitutional *coup d'état*." Some of the employees of the former government were dismissed and professionally disqualified. The Constitutional Court of Ukraine has already been examining the case on the constitutionality of lustration for 3.5 years since spring 2015, but has not

made any decision. A fairly large number of cases of lustration from other Eastern European states were also considered by the European Court of Human Rights. The article demonstrates a highly professional analysis of these decisions. So, it is impossible to underestimate the importance of research, which at a high professional level was conducted by Oleksandr Yevsieiev an Iryna Tolkachova.

The focus of the study, which was carried out by the constitutional legal scholars Hryhorii Berchenko and Serhii Fedchyshyn is the constituent power. Issues of adoption, changes in the provisions of the Constitution by the people or on behalf of the people are extremely controversial and politicized in any country in the world. The advantage of the article is that the authors were able to avoid unnecessary politicization, deeply examining the subject of their research from doctrinal positions. The article also is of practical interest. First of all, because of the need for constitutional reform being already an important part of the debate during the presidential election campaign, concerning the elections which will be held in Ukraine in the spring of 2019. In a more particular aspect, the frameworks of influencing the text of the Constitution by the Constitutional Justices is of interest. Especially in conditions when several judges of the Constitutional Court of Ukraine were dismissed in 2014 by the new Ukrainian authorities for an "erroneous" interpretation of the provisions of the constitution. Now they are trying to recover via the European Court of Human Rights.

Finally, it is sometimes necessary to descend from very high constitutional vertices to the land itself. According to the editorial board, very practical articles on forensic methods are as important as articles on high constitutional matters. Especially if they take into account the trends of time, in particular, the active arrival of technology into jurisprudence. Perhaps, forensic science has always been the most technologically advanced legal science. We decided to publish a collaborative study by Larysa Arkusha and Nataliia Chipko about methods of committing and the investigation of fraudulent motor vehicle transactions. We sincerely wish all our readers never to become victims of fraud. But if this happens, we hope that the forensic methods developed by our authors will really help in the search for criminals, bringing them to criminal responsibility, and reimbursing the victims of property damage caused by the crime.

Last but not least, we express special gratitude to Richard Morgan and Vince Skowronski for their professional and laborious work on the proofreading of drafts, which we selected on a competitive basis for publication in a special issue of our journal.

ARTICLES

POLITICIZATION OF CONSTITUTIONAL RELATIONSHIPS IN THE CONTEMPORARY PERIOD IN UKRAINE

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The article examines the phenomenon of politicization of constitutional relations. In particular, three of its aspects are identified and investigated: the impact of social revolutions on the rule of law; the problem of lustration of state employees; and the deepening of the politicization of the judiciary. Social revolutions, including the Ukrainian 2013–2014 social revolution, are viewed as a concept that can have a decisive influence on the reform of the state mechanism and, in many ways, determine its future destiny. The lustration procedure, which is considered in the context of transitional justice – a scientific discipline that studies the functioning of justice in transitional democracies, undergoes special research herein. The classification of lustration according to various criteria is given. The article also shows the practice of a number of states whose judicial systems fall under the concept of political justice. A shocking conclusion is drawn that the percentage of acquittals in Nazi Germany for non-political crimes was higher than in modern Russia or Ukraine.

Keywords: lustration; political justice; social revolutions; judiciary in Ukraine; politicization of constitutional law.

Recommended citation: Oleksandr Yevsieiev & Iryna Tolkachova, *Politicization of Constitutional Relationships in the Contemporary Period in Ukraine*, 6(4) Russian Law Journal 8–36 (2018).

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Introduction

Recent years have brought many shocks that make it impossible to preserve academic detachment when analyzing the cruel events of reality. However, classification of the changes which are happening and happened in the sphere of constitutional law helps us to meet them with open eyes and understanding.

One of the most characteristic signs of our time is the politicization of constitutional relations and institutions, which increases year by year. Although it was only ever possible to completely separate oneself from politics in theory, recent events have so radically changed the previous course of state and legal life (not only in Ukraine, but throughout the world) that scientists have even started talking about a special type of transitional constitutionalism, which is mainly connected with the consequences of the social revolutions that have taken place throughout the world.

Revolution is too radical a transformation to consider the affected human material. It is as if a giant hand ruffles up constructions, pulls out millions of people from the boundaries of their usual day-to-day activity, but does not give freedom and immediately begins to enclose them in new forms. Therefore, it is more interesting to appeal to the experience of those states in which the transfer of state power has been carried out exclusively within the framework of constitutional and legal procedures for centuries (although there are also "surprises" here).

1. Social Revolutions as a Catalyst for the Politicization of State and Legal Life

The 2013–2014 revolution in Ukraine fits into a series of anti-regime actions that have swept much of the world over the past 15 years: the "Bulldozer Revolution" in 2000 in Serbia, the "Rose Revolution" in 2003 in Georgia, Maidan 2004 in Ukraine, the "Tulip Revolution" in 2005 in Kyrgyzstan, "Occupy Wall Street" in 2011 in the United States, the "Arab Spring" which continues to this day in the countries of the Middle East and North Africa… We could continue the list. Therefore, it is not surprising that these events are being collectively described as the fifth "wave of democratization," and a "global democratic revolution," in the western transitological literature.

American political scientist Samuel Huntington distinguished four main "waves" of democratization: the first began with the "spring of the people" in the middle of the 19th century and lasted until the "campaign against Rome" of Mussolini in 1922; the second began after World War II and resulted in the disintegration of the colonial system; the third commenced in 1974 when Salazar's dictatorship fell in Portugal (the "Carnation Revolution"); and finally, the fourth began with the crisis in the USSR-dominated socialist system and led to its collapse.[1] It appears that the people of the generation, to which authors of this research belong, who witnessed the fourth wave, have also witnessed a fifth wave of democratization. What are its results?

It should be mentioned that the Ukrainian Revolution of Dignity was not given such a name for nothing. Like any revolution, it is

> a way of being of a person in the world. The way of their self-transformation and transition to a new quality. The way of protection from decay in the environment created by them earlier, getting rid of the world which, having exhausted its creative potential, turned into an excessive burden, restraining progress towards a future to which a person is initially oriented.[2]

In fact, Euromaidan, especially in the first months after its victory, gave a real opportunity for participation by the widest sections of the population in governance of the state. The army was significantly reformed and volunteer battalions, which consisted of many courageous and patriotic people, were created.

Obviously, the Revolution of Dignity, as a complex political, legal and socio-psychological phenomenon, deserves a separate study. In the framework of this publication, we would like to consider the problem referred to exclusively from the point of view of the problem of human rights and, more precisely, that invisible competition (and sometimes close relationship) which appears between legitimate elections and various manifestations of people's anger that ultimately crystallize into a social revolution.

In academic literature, classification of social revolutions was developed long ago. Some authors distinguish four types of revolution: a revolution from below, a revolution from above, a combined coup and a palace coup. Others identify a revolution of masses, a revolutionary coup, a coup-reform and a palace revolution. Still others classify revolutions as a Jacquerie, a Millenarian rebellion, an anarchic revolt, a *coup d'état*, a Jacobin communist revolution and an armed mass demonstration.[3]

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[1] *Хантингтон С.* Третья волна. Демократизация в конце XX века [Samuel Huntington, *The Third Wave. Democratization at the End of the 20th Century*] 368 (Moscow: ROSSPEN, 2003).

[2] *Баталов Э.* Революция. Бунт. Переворот // Независимая газета. 22.03.2011 [Eduard Batalov, *Revolution. Revolt. Coup*, Independent Newspaper, 22 March 2011] (Oct. 2, 2018), available at http://www.ng.ru/scenario/2011-03-22/15_reforms.html.

[3] *Гавлин М.Л., Казакова Л.А.* Современные буржуазные теории социальной революции [Mikhail L. Gavlin & Liliya A. Kazakova, *Modern Bourgeois Theories of Social Revolution*] 41–53 (Moscow: Nauka, 1980).

A newer classification has been developed that is mainly based on realities of the Arab Spring: separate protest actions (Qatar, the United Arab Emirates), several notable anti-government protests (Saudi Arabia, Sudan, Iraq and Palestine), numerous anti-government protests (Oman, Mauritania), populous and protracted anti-government protests with separate violent clashes (Algeria, Kuwait), powerful anti-government protests with bloody clashes which shook power (Morocco, Jordan), civil war (Syria, Libya, Bahrain, Yemen) and, finally, a successful revolution (Tunisia, Egypt).[4]

Modern transitologists also succeeded in revealing various factors that led to anti-regime protests. The first indicator of internal conflicts is represented by the following set of factors: tribal and confessional heterogeneity of the country as well as the level of contradictions within the political elite. The second indicator, which characterizes the level of unemployment among young people and the proportion of people with higher education among them, includes three main components: youth unemployment, the proportion of unemployed youth in the general composition of adult population and the proportion of unemployed young people with a higher education.[5] The third indicator of stability of political regimes is a combination of two main factors: availability of tools for the transfer of power; and political order. The influence from outside on domestic political processes was chosen as an additional indicator of anti-regime protests.[6]

Boris Makarenko mentions that the main characteristic of "color" revolutions is that there is no change of social order under them and the change of elites is limited: power is transferred from one elite clan that dominated the system of power ("donetskiye") to some spontaneous coalition of other segments of the elite. As a result of such actions, the state system can only undergo partial changes aimed at limiting the possibilities for monopolizing power and creation of frameworks for the functioning of coalition power structures such as the 2004 constitutional amendments in Kyrgyzstan, reanimated ten years later, or an agreement on redistribution of powers between the president and the premier in Kyrgyzstan.[7]

New revolutionary authorities are inevitably faced with the question of constitutional and legal continuity.

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[4] *Исаев Л.М.* Политический кризис в арабских странах: опыт оценки и типологизации: Автореф. дис. … канд. полит. наук [Leonid M. Isaev, *Political Crisis in Arab Countries: The Experience of Evaluation and Typologization: Synopsis of a Thesis for a Candidate Degree in Political Sciences*] 17–22 (Moscow: IA RAN, 2013).

[5] *Коротаев А.В.* Социальные корни "арабской весны" // Рецепты Арабской весны: русская версия [Andrey V. Korotaev, *Social Roots of the "Arab Spring"* in *Recipes of the Arab Spring: Russian Version*] 100–101 (A.M. Vasiliev & N.I. Petrov (ed.), Moscow: Algoritm, 2012).

[6] *Id.* at 15–16.

[7] *Макаренко Б.* "Цветные революции" в контексте демократического транзита // Мир перемен. 2005. No. 3. С. 29–37 [Boris Makarenko, *"Colour Revolutions" in the Context of Democratic Transit*, 3 World of Change 29 (2005)].

> The new government is not a feudalist who strangled the enemy and inherited people and territories from him,

writes Leonid Golovko with reference to French constitutional law.[8] Consequently, if the constitutional and legal process is interrupted by revolution, then all its more local elements are interrupted, including, e.g. a ban on secession from Ukraine. If the constitutional and legal process has not been interrupted, we have to state that there has been a *coup d'état* in the country with all the ensuing criminal and legal consequences.

The great Russian-American sociologist Pitirim Sorokin drew attention to an interesting pattern: the periods of revolutions and uprisings in Athens and Sparta, Rome at the end of the Republic, in the Byzantine Empire, and in the history of England were not just periods of impoverishment but also starvation. The same may be said of the time preceding the French Jacquerie, the French revolutions, the peasant wars of Yemelyan Pugachev and, finally, the revolutions of 1905 and 1917.[9] That is why all revolutions are, as a rule, the revolutions of urban poor and oppressed peasantry. A peculiarity of revolutions of the 21st century is that their driving forces, as Alexander Obolonsky notes,

> became not the poorest, most deprived, but the most advanced bearers of civil self-consciousness. In a word, not proletarians, but mainly the middle class.[10]

A certain exception in this respect is, perhaps, Syria. From 2006 to 2011 about 60% of Syrian lands experienced an unprecedented drought. Mismanagement and waste of natural resources of the country led to a shortage of water and desertification of land. In some regions, drought led to the destruction of crops by 75%, and the livestock by 85%, which affected the lives of 1.3 million people. Back in 2009, long before the fighting, the U.N. and the Red Cross reported that, as a result of drought, about 800 thousand people lost their livelihoods. And, in 2010, according to a U.N. estimate, one million people were on the edge of hunger.[11]

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[8] *Головко Л.В.* Правовой статус Крыма // Великороссъ. 25.01.2015 [Leonid V. Golovko, *The Legal Status of the Crimea*, Velikoross, 25 January 2015] (Oct. 2, 2018), available at http://www.velykoross.ru/actual/all/article_1459/.

[9] *Сорокин П.А.* Человек. Цивилизация. Общество [Pitirim A. Sorokin, *Man. Civilization. Society*] 275 (Moscow: Politizdat, 1992).

[10] *Оболонский А.В.* Право на протест // Независимая газета. 21.05.2013 [Alexander V. Obolonsky, *The Right to Protest*, Independent Newspaper, 21 May 2013] (Oct. 2, 2018), available at http://www.ng.ru/ng_politics/2013-05-21/15_protest.html.

[11] Гражданская война в Сирии // Википедия [*Civil War in Syria*, Wikipedia] (Oct. 2, 2018), available at https://ru.wikipedia.org/wiki/Гражданская_война_в_Сирии.

Concerning Ukrainian realities, the main difference between the first and the second Maidan is that, if the first Maidan defended an emphatically legitimist style of political struggle, then the second made legal protest impossible and led to violence after the police had dispersed the student rally on the night from 30 November to 1 December 2013. In 2004, the final decision on recognizing the facts of electoral fraud and the legal consequences (a revote) was taken under a special procedure by the Supreme Court of Ukraine. Therefore, in the early 2000s an indispensable condition for successful "color revolutions" was the neutrality of the judiciary (that, by definition, is impossible under purely authoritarian regimes) as well as non-interference (or hidden sympathies for the opposition) on the part of the army or law enforcement agencies. It should be mentioned that such neutrality was not explained by a high level of democratic development, but by the pragmatic calculation of the judiciary and law enforcement, who, in a critical moment, realized the counterproductiveness, and even danger, for the country of any actions aimed at suppressing the opposition.

Among the CIS countries classified as hybrid regimes, Moldova appears to be the most likely platform for a new revolution. The parliamentary elections that took place in 2005 were marked by an active play at "color revolution" on the part of all three main participants (communists, nationalists and centrists).

Since that time, this country has been periodically shaken by political crises and mass protests. A number of other factors (revolutionary Ukraine, the existence of a conflict in the past – Transnistria, a relatively low standard of living and a significant percentage of the urban population having a higher education, etc.) make it a dangerous laboratory for new geopolitical experiments.

Azerbaijan and Kazakhstan are distinguished by the relatively high popularity of the current government and weak opposition, moreover, both countries have solid oil revenues that give the regime freedom of maneuver in mitigating the problem of "relative deprivation." In addition, as experience of anti-government demonstrations in Baku shows, the authorities can go on forcibly suppressing the "color revolution game." Meanwhile, we should take into account the steep drop in oil revenues in the last two years (Russians have a similar problem) that may lead to the necessity to revise the social contract between authorities and population. This, in turn, will lead to the fall of social standards, the slowdown of economic growth, the devaluation of the national currency and, as a consequence, just manifestations of people's anger.

A more impressive set of prerequisites for a "color revolution" can be found in Armenia: a poor country with relatively developed pluralism and experience of mass protests against election results. However, resumption of the conflict in Nagorno-Karabakh between this country and Azerbaijan may cause national mobilization and promote the achievement of domestic political consensus between the elites in the face of the threat of external aggression. This will help to slow down or even eliminate the growth of revolutionary sentiments in the society.

We can only note that the events of November 2013 – February 2014, like other "color revolutions," helped to reveal a gap in political institutions of our country and showed that politics concerns not only professionals but all members of the society. In our opinion, this is the main lesson of the Revolution of Dignity, the significance of which is imperishable.

2. Lustration: Ukrainian Realities; International Experience

There was a curious ritual in pre-Christian Rome: a man, involved in murder, incest or another crime, had to make a purgatorial sacrifice to the gods in the form of meat from a pig, sheep and bull according to the laws of that time. It was considered that, in such a way, a criminal got rid of moral filth. This ritual became known as *lustratio*, translated as "purgation by means of sacrifice."[12]

"Velvet revolutions" at the end of the 1980s in Central and Eastern Europe revived the interest in this forgotten practice. However, the term "lustration" became a system of measures used at transition to democratic governance and directed to exposing politically unreliable persons who had sullied themselves in cooperation with the criminal (and, first and foremost, communist) regime. In some countries, lustration was carried out comparatively gently (for instance, Bulgaria and Slovakia), in some countries, like Russia and Ukraine, it was not carried out at all, and, in some countries it was carried with a significant delay like the Polish lustration which only started in 1999. But the long and short of it is that all countries which passed through lustration tended to break with their totalitarian past, i.e. to leave "the path of dependence" on it. This is done not only to punish persons guilty of crimes committed by the regime but to make a point of having a certain stage of development and to progress beyond it.

Some models of lustration have been successfully used in the international and legal practice. The first type (Germany, the Czech Republic and Macedonia) was represented by the existence of two lists: a list of positions "protected" from unreliable elements and a list of grounds for considering a person an unreliable element. Therefore, a president of the country (the first list) could not be a person who had served in the KGB (the second list). The second type of lustration (Poland, Lithuania and Estonia) also has two lists, but their meaning differs. In this case the holder or contender for a "protected" position is obliged to declare whether he falls within the criteria of unreliability (for example, whether he cooperated with of the secret services of the previous regime). Persons who make a false declaration are

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[12] *Шевчук С.* Європейські стандарти обмеження люстраційних заходів: правовий аспект // Вісник Академії правових наук України. 2006. No. 2. С. 32 [Stanislav Shevchuk, *European Standards of Restriction of Lustration Measures: Legal Aspect*, 2 Bulletin of the Academy of Legal Sciences of Ukraine 32, 32 (2006)].

prohibited from "protected" positions. For instance, the Polish Minister of Finance, Zita Gilevskaya, lost her position because she concealed her cooperation with PRP state security bodies. Finally, lustration of the third type (Hungary) means exposure of unreliable citizens, making and publishing lists of them without any legal consequences for them.[13]

Lustration manifested itself in the Resolution of the Parliamentary Assembly of the Council of Europe 1096 (1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems. The resolution emphasizes that lustration measures "can be compatible with a democratic state under the rule of law if several criteria are met" (para. 12). These criteria are as follows: guilt (personal and not collective) must be proved in each individual case; the right to protection must be guaranteed as with the presumption of innocence and the right to a judicial review of the decision; various functions and objectives of lustration, namely, the protection of newly established democracy, and the criminal law, that is, the punishment of guilty people, should be supervised; also, lustration should have a tight time limit, both in the application period and in the period for which the inspection is carried out. More detailed criteria are explained in the report annexed to the PACE Resolution 1096 (1996), which contains guidelines for ensuring that lustration laws and similar administrative measures meet the requirements of a democratic state based on the rule of law. These guidelines were adopted to formulate a policy aimed at eliminating the legacy of the communist period, which ended in 1991. The basic principles of these guidelines can be applied with the necessary changes to the legacy of the Yanukovych regime.

After tragic events on the Maidan square in 2013–2014, Ukraine applied the said mechanism. Two lustration laws were quickly adopted – the Law on Renewal of Trust in Judicial Power of 8 April 2014 (hereinafter the Law on Lustration of Judges), and the Law on Government Cleansing of 16 September 2014, which concerns other workers of state apparatus. Their "zest" was that they combined different grounds for lustration, i.e. working in senior state posts during the presidency of Viktor Yanukovych ("automatic lustration"), and obvious discrepancies between expenses and incomes of officials under review and their communist past. However, the results of these innovations turned out to be more than modest. According to data of the Ministry of Justice, in October 2016 about 40 judges were dismissed under the lustration procedure. Altogether 936 officials were dismissed. Several thousand officials had left their posts voluntarily before the inspections began. These officials will not have access to state positions until 2024.

It is estimated by the Ukrainian "Respublika" Institute – a non-governmental organization which controls fulfillment of lustration legislation – that circa 80% of

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[13] *Бобринский Н.* Международные стандарты в области люстрации: реальность или благопожелание? // Сравнительное конституционное обозрение. 2015. No. 6. С. 15 [Nikolay Bobrinsky, *International Standards in the Field of Lustration: Reality or Benevolence?*, 6 Comparative Constitutional Review 13, 15 (2015)].

dismissed officials lost their positions because they were in senior positions during the presidency of Yanukovych, circa 15% lost their jobs because of property lustration and only 5% were dismissed under decommunization criteria (due to work in the CPSU, Komsomol or KGB).[14] As you can see, the figures are rather modest. They are so modest that some activists avail themselves of the opportunity to speak about the "breakdown of lustration."

It is also symbolic that, on 1 March 2016, the Higher Administrative Court of Ukraine considered impossible further punishment of judges who passed unlawful sentences on activists of Euromaidan. In the opinion of the representatives of the Higher Court, the Law on Lustration of Judges had a controversial formula, simultaneously stipulating one-year and three-year periods of limitation. The court preferred to limit the period of bringing to liability to one year.

The question is why? We will try to determine the main reasons.

Firstly, the Ukrainian Law on Lustration of Judges was adopted much later than in the majority of Ukraine's European neighbors: 27 years had passed since the disintegration of the Soviet Union. Therefore, it is no wonder that party functionaries, who preserved their power in 1991 and held it up to the beginning of the 2000s, left the political scene in 2014. So, there were actually no candidates for decommunization (except Lenin monuments). The exceptions were those persons who, at the end of the 80s and beginning of the 90s, studied at the higher educational establishments of the KGB system or worked there in junior positions, for instance, a lustrated servant of the Main Department of Internal Affairs of Kyiv, Mykola Serhienko, who started his career in the KGB as plumber.

Secondly, the focus of civil society's attention shifted to the annexation of the Crimea and then to combat operations, unleashed in summer 2014 at Donbas and continuing till the present moment. There is a persuasive version of events according to which Anti-Terrorist Operation was cunningly used by the powers that be in order "to pump over" to protest energy of Ukrainians from lustration and control over the regime of Petro Poroshenko to battle fields, from which many activists of Euromaidan were not fated to come back.

Thirdly, lustration did not occur due to the downfall of a communist dictatorship, but because of revolution in a country which was formally considered a democratic and law-governed one. Therefore, the new government had to prove that the old regime was actually an undemocratic one, and introduce a mainly artificial construction of "abuse of power" in order to justify lustration. This justification actually did not always seem persuasive, both in the eyes of the international community and in the eyes of the citizens. Especially when the position of international institutions is characterized by inconstancy.

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[14] Statistics taken from *Лёзина Е.* Украинская люстрация. Два года спустя // Вестник общественного мнения. 2016. No. 3–4. С. 175 [Evgenia Lyozina, *Ukrainian Lustration. Two Years Later*, 3–4 Bulletin of Public Opinion 170, 175 (2016)].

In the case of *Ždanoka v. Latvia*,[15] a decision was made by the European Court of Human Rights (ECHR) in 2004, the Court held that the applicant's rights had been violated since, though she was a member of CPSU during the disintegration of the Soviet Union, her removal from parliamentary elections on that basis was not justified since her actions did not threaten the constitutional order of Latvia after independence. However, two years later the Grand Chamber of the Court reviewed the primary decision with the opposite result: emphasis was placed on the concept of "democracy able to protect itself" and "the field of discretion" of states when establishing criteria of lustration. A judge from Slovenia Zupančič who voted against this decision gave the following explanation for the authorities' refusal to register candidature of Ždanoka:

> The reason for this denial was that Mrs Ždanoka had a real chance of being elected. So much for democracy.[16]

Finally, it cannot be forgotten that certain counteraction comes from the state apparatus itself, which does not feel any guilt. This reproach may be especially addressed to representatives of the judiciary: from the Constitutional Court which was unable during four years to reach a final verdict on whether the Law on Lustration of Judges is constitutional or not, to district courts which reinstated persons, liable for lustration, to office.

When analyzing Ukrainian lustration, one cannot help but touch on the contradictory and rather inconsistent position taken by the Venice Commission in relation to the Ukrainian Law on Lustration of Judges, in its "Interim" (approved on 12–13 December 2014) and "Final" (adopted on 19 June 2015) Opinions. The Interim Opinion stressed that the fact of the adoption of the Law under the pressure of protesters, as well as numerous procedural violations committed during the voting thereon in Parliament, raised doubts about the legitimacy of that Law and its compliance with the rule of law principle (paras. 13 and 14 of the Interim Opinion). In addition, the Venice Commission made an important conclusion that lustration measures were not the most appropriate means of combating corruption, which the new Ukrainian government has traditionally qualified as *conditio sine qua non* of the "Revolution of Dignity" 2013–2014 (para. 34 of the Interim Opinion). Repeated criticism from the commission also suffered from a lack of implementation of the principle of individual guilt in the Ukrainian Law on Lustration of Judges. The Interim Opinion stressed that the lustration of officials in many positions was implemented automatically as a result of only finding of certain persons in the corresponding positions, without realizing

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[15] *Ždanoka v. Latvia*, Judgment, No. 58278/00, 17 June 2004.

[16] *Ždanoka v. Latvia*, Judgment, No. 58278/00, 16 March 2006, Summary of the dissenting opinion of Judge Zupančič.

their actual guilt in the crimes of the Yanukovych regime (para. 67). Moreover, in the Interim Opinion, the commission noted that the responsibility for the lustration procedure should be removed from the Ministry of Justice and assigned to a specially created independent commission, with the active participation of civil society.

However, in its Final Opinion, the Venice Commission was no longer so categorical. In particular, it initially came to the conclusion that the 10-year period foreseen in the Law on Lustration of Judges was at odds with the requirement of the 1996 Guidelines on Lustration, in accordance with which (para. "g")

> disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated.

However, referring to the position of the Constitutional Court of the Czech Republic that "the determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question," the Venice Commission decided that, in Ukraine, some margin of appreciation should be left to the national authorities to determine the period for which lustration was required (para. 74 of the Final Opinion).

Furthermore, the Final Opinion was that the Ukrainian authorities argued that the five-year period of exclusion was not sufficient for some of the categories of lustrated positions because it corresponded with the usual length of a political term (parliamentary elections take place in five-year cycles). The period of exclusion could therefore end at the moment when the next parliamentary elections would be held, bringing about the risk of a political change. In the opinion of the Venice Commission, this argument was plausible. It was also noted that several of the countries of Central and Eastern Europe which resorted to lustration have opted for a period of disqualification longer than five years. This development suggested that the ten-year period of disqualification foreseen in the Law on Government Cleansing should not *per se* be seen as unreasonable and disproportionate (para. 76 of the Final Opinion).

Therefore, fulfillment of lustration in Ukraine is characterized by inconsistency and the absence of genuine political will, which also may be said of other reforms which have been expected from the new powers by the Ukrainian people for three years. At present, it is necessary to concentrate not only on fulfillment of full-scale lustration but on effective investigation of numerous new abuses. Otherwise, all this looks like modern populism.

From the legal point of view, populism (from the Latin *populus* – the people) is not of interest. Populism, *per se*, to a greater extent, is the domain of political scientists and political analysts. It is interesting how populism is significant for the constitutional and legal sphere. After all, populism, as Valery Zorkin aptly noted, is merely the manipulation of mass consciousness, using a completely natural human desire for well-being. More specifically, this manipulation, which is based on the

promise of a simple solution to complex problems, is addressed to the ordinary person. Populism intensifies at critical moments in history when active elites and existing political and legal institutions cannot cope with new challenges and are not able to solve problems facing people.[17]

Modern populism is represented by at least two varieties: right-wing populism (in the USA and EU countries) and left-wing populism (mainly in the countries of Southern Europe and Latin America) that of course does not mean that in traditionally "left" Latin America there are no right-wing populists, and in "right" America no group such as the New York Trotskyists. However, the dominant type of populistic consciousness in the capitalist world is still the market one, not the statist type, while, in Latin America, the situation is different.

According to market populism, it is necessary to return to the state of the "night watchman" (*laissez-faire*) or the "invisible hand of the market." The main idea of this kind of populism is the following: ensuring social and economic rights as they are currently understood means, in fact, to produce loafers; it reproaches the Obama administration for its insufficient attention to small and medium-sized business. It is important that the right-wing populist believes that the federal government should spend less money to help foreign countries and help only those ones that regularly support America in the international arena (isolationism). In some ways, the bearers of this ideology are undoubtedly right.

This ideology is considered populist because it offers not some impeccably designed plan of political and economic transformations but tends to solve all problems with the help of very simple, apparently obvious, but at the same time radical, decisions (like Donald Trump's promise to "build a wall at the border with Mexico"). However, later, during the very process of public administration, it turns out that real problems, as a rule, do not concern proposed radical solutions, primarily because of their complexity, lack of the necessary tools, including legal tools. As German researcher Frank Decker remarked ironically,

> as a rule, solutions to problems proposed by populists do not deserve to be called solutions.[18]

And then a dilemma arises before a populist politician: either to turn into a cheap demagogue, disguising his inability to cope with emerging problems with formidable

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[17] *Зорькин В.Д.* Конституционная идентичность России: доктрина и практика // Журнал конституционного правосудия. 2017. No. 4. С. 3 [Valery D. Zorkin, *The Constitutional Identity of Russia: Doctrine and Practice*, 4 Journal of Constitutional Justice 1, 3 (2017)].

[18] *Декер Ф.* Популизм как вызов либеральным демократиям // Актуальные проблемы Европы. Правый радикализм в современной Европе: Сборник научных трудов [Frank Decker, *Populism as a Challenge to Liberal Democracies* in *Actual Problems of Europe. Right Radicalism in Modern Europe: A Collection of Scientific Works*] 56, 67 (S.V. Pogorelskaya (ed.), Moscow: INION, 2004).

words, or take a more moderate path by means of becoming an average European centrist politician, who causes the voter disappointment.[19] Left populism, on the contrary, stipulates another extreme, calling for open revolutionary action for the sake of the "common good," fairer, as its ideologues believe, redistribution of national wealth for the benefit of the poor, limitation of the power of private monopolies (here they are in complete solidarity with right-wing populists) and so on. Let us dwell on these two types in more detail, paying special attention to the question of what their consequences for constitutional construction are.

It should be mentioned that, in the United States, the term "populism" first appeared in the 1890s as a result of a broad people's movement to create a third major political party, i.e. the Populist Party. Despite the fact that the populist movement lasted less than 10 years and that, by the end of the 19th century, the party had disintegrated, the importance of tasks, set by the movement, led to the stability of populist ideas and sentiments in the American public's consciousness. As American historian J. Hicks noted,

> the party itself did not survive, nor did many of its leaders, but Populist doctrines showed an amazing vitality.[20]

Subsequently, right-wing extremists, in fact, the same populists, only desperate and embittered, addressed the populist slogans and programmatic attitudes of American populists. The Ku Klux Klan, popular in the 1930s, preacher Charles Coughlin and Louisiana governor Huey Long (about whom Franklin D. Roosevelt said his legendary phrase "a plague on your two houses"), an ardent supporter of segregation, governor of Alabama George Wallace and the "hawk" senator Barry Goldwater prepared a solid ground for the rooting of certain values and attitudes in certain social strata of American society.[21] Donald Trump also had his forerunner – scandalous millionaire Ross Perot, who ran in the U.S. presidential election in 1992 as an independent candidate and scored a record 19% of the vote.[22]

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[19] Eric A. Posner, *Can It Happen Here?: Donald Trump and the Paradox of Populist Government*, University of Chicago Public Law & Legal Theory Paper Series No. 605 (2017) (Oct. 2, 2018), also available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2056&context=public_law_and_legal_theory.

[20] *Новинская М.И.* Что такое популизм? (популистская традиция в США) // Рабочий класс и современный мир. 1990. No. 2. С. 138 [Maya I. Novinskaya, *What is Populism? (Populist Tradition in the USA)*, 2 Working Class and the Modern World 138, 138 (1990)].

[21] *Борисюк В.И.* Правый экстремизм и партийно-политическая система // Политические партии США в новейшее время [Viktor I. Borisyuk, *Right-Wing Extremism and the Party-Political System* in *Political Parties of the USA in Contemporary History*] 246 (N.V. Sivacheva (ed.), Moscow: MSU Publishing House, 1982).

[22] *Антонова Л.А.* Итоги съездов двух партий // США: экономика, политика, идеология. 1992. No. 10. С. 60–62 [Lyudmila A. Antonova, *The Results of the Congresses of Two Parties*, 10 USA: Economy, Politics, Ideology 56, 60–62 (1992)].

It would be a serious mistake to equate populists with radical rebels, grouped in the 2016 elections around one of the candidates from the Democratic Party, i.e. Bernie Sanders. On the contrary, the populist, especially in the United States, often returns to the "old order." For this reason, Trump's pre-election rhetoric has always had a response from a part of the population that is nostalgic for former times.

To ensure that the promises of the current authorities in Ukraine do not resemble populism, concrete actions should be undertaken thereby as soon as possible.

Concerning lustration, we need not forget that it, together with hybrid courts, commissions on establishment of truth and other non-typical mechanisms of institutional transformation of the law enforcement function of the state, is an element of "transitional justice" or justice of the transitional period. This concept is used under fulfillment of transition from non-democratic governance and/or one burdened with war, to democratic governance and/or a state of peace. Therefore, it is not a coincidence that many elements of transitional justice, for example, courts with participation of foreigners (hybrid courts) are almost impossible in established, stable democracies, since they challenge normal legal regulation, breaking the principles of state sovereignty and non-discrimination, create a threat to the preservation of "institutional memory" in the state mechanism, etc. But during regime transformations in "partial democracies" (according to the terminology of Freedom House), to which Ukraine also belongs, they are an effective tool for introducing the principle of the supremacy of the law and the inevitability of further democratic development.

In this respect, vetting is not an exception. It is a system of measures, applied under political transformation and aimed at exposing persons who are not loyal to the new democracy, and also at limitation of access to public positions for such persons. It is necessary to emphasize that it is not a question of punishment of willful criminals who cooperated with the former regime (if there is a proof of crimes committed by them, measures of judicial, in particular criminal, responsibility should be applied), but disqualification of certain categories of state official only owing to the fact of their being in top-echelon government positions – as a rule, it is that power which was overthrown in the result of social revolution ("Velvet Revolution,""Euromaidan,""Rose Revolution," etc.). In the language of law, it is named "presumption of complicity of the organization's worker in serious human rights abuses committed by it." In other words, it is a question of almost exceptional political responsibility of officials of the state apparatus. This circumstance, without an understanding of which it is impossible to adequately assess the Law on Government Cleansing, should be emphasized because almost all constitutional submissions to the Constitutional Court stated that, due to lustration, a great number of people were put outside the law only because of their official position and without evidence of guilt in specific crimes. This is the very essence of lustration as an extraordinary institution of transitional justice.

Lustration may be compared with revolution: undesirable and unnecessary under the conditions of real democracy, qualified as a *coup d'état* with all known criminal

and legal consequences; revolution under the conditions of hybrid regimes may play a big positive role, open "the window of opportunities" for new social strata, improve the rating of the country in the world index of democratic development, etc.

As it is emphasized in the methodological guide of the U.N. Office of the High Commissioner for Human Rights that "[c]ontrol is the basis for practical activity," under post conflict and post authoritarian conditions, lustration may fill "a lacuna of impunity" – inability of the state to punish all criminals due to a lack of resources and legal limitations. In other words, this institute is a forced substitution of criminal prosecution, "a partial measure of non-criminal responsibility" which makes a "punitive treatment."[23] Therefore, it is notable that a range of outstanding politicians, humanists, contemporary human rights activists, including Vaclav Havel and Nelson Mandela, were categorical opponents to lustration, considering that all of us were responsible for what had happened.

It is significant that the main opponent of lustration is the International Labour Organization (ILO). It considers lustration prohibitions as illegal discrimination. Its position means that limitations of a general character, not connected with the peculiarities of a specific profession, contradict ILO Convention No. 111. The committee of experts of the ILO refuted the concept on which lustration prohibition is based: the more a man is associated with a past repressive regime, the less he deserves to work in a new democratic government.[24]

It should be taken into account (and we are convinced of this after studying international standards of limitation of lustration measures referred to in the PACE Resolution 1096 (1996) and the practice of constitutional courts of foreign states) that, in the contemporary world there are no single judicially obligatory standards acknowledged by the international community for conducting lustration. This is first and foremost connected with the diverse historical paths walked by countries before the introduction of lustration measures, the degree of cruelty of the political regime overthrown by revolutionary events (for example, it is difficult to compare the dictatorship of Ceausescu in Romania with the "gangster capitalism" of Yanukovych in Ukraine), legal traditions and mentality as a whole, reigning in this or that society. But separate attempts to create such standards have already been fulfilled by Professor Herman Schwartz in 1994 in his famous article "Lustration in Eastern Europe," some provisions from which were later used as a basis of the aforementioned PACE Recommendation.

The professor pointed out the following: 1) lustration of a definite circle of persons who earlier fulfilled management activity should be fulfilled exclusively on the basis

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[23] Инструменты обеспечения господства права в постконфликтных государствах: Проверка: основа для практической деятельности / Управление верховного комиссара организации объединенных наций по правам человека. 2006 [U.N. Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework (2006)] (Oct. 2, 2018), available at http://www.ohchr.org/Documents/Publications/RuleoflawVettingru.pdf.

[24] Bobrinsky 2015, at 20.

of law, corresponding with the national constitution and other laws but, in any case, not on the bases of administrative and other customs; 2) the lustration process should be managed by a specially created commission which consists of distinguished citizens who are proposed by the head of the state and approved by the parliament; 3) lustration may be applied only for elimination or considerable reduction of danger to which the subjects of lustration give rise as a result of usage of their position for further human rights abuses or to stop the process of democratization; 4) lustration may not be used for punishment or revenge; 5) a risk that persons liable to lustration may be blackmailed by this procedure cannot be considered a sufficient argument against lustration; 6) lustration should be aimed only at substitution of such positions in respect of which there are grounds for believing that a person may use them for the purpose of creating considerable threats to human rights or democracy, that is those positions in the bodies of state power through which state policy is developed and implemented, national security is provided, or positions in law-enforcement bodies, the security service, intelligence service, judicial power and the public procurator's office, which may be used for human rights abuses; 7) lustration cannot be applied to elective offices, since voters are entitled to vote at their discretion; 8) lustration cannot be applied to private sector or semi-private companies, establishments or organizations; 9) the process of lustration should be finished by 31 December 1996; 10) only those persons who were organizers, executors or accomplices in relation to serious human rights abuses may be deprived of the right to take certain positions; 11) nobody is liable for lustration purely by virtue of membership of an organization, or activity in favor of any organization which was considered to be lawful during the existence of such organization or fulfillment of such activity, or regarding personal views or beliefs; 12) lustration should not be applied to persons who were under 18 years of age at the moment of perpetration of the relevant actions; 13) in any case, a person should not be liable for lustration without provision of all guarantees of proper legal procedure, including the right to protection, the right to be familiarized with materials of the case and all evidence related thereto, the right to provide personal evidence, the right to open a trial if it is demanded by the subject of the accusation, the right to appeal to an independent judicial body, etc.[25] "The Schindler factor" should also be mentioned, i.e. lustration will not concern persons who purposely tried to mislead the security services by means of imitation of cooperation.[26]

Actually, this is, without exaggeration, more or less an inherently non-contradictory concept which can be considered to be a peculiar "catechism" of lustration standards, which has an exclusively advisory nature and is related to "soft" inter-

[25] Herman Schwartz, *Lustration in Eastern Europe* in *Transitional Justice. Vol. 1: General Considerations* 461, 476–482 (N.J. Kritz (ed.), Washington, D.C.: United States Institute of Peace Press).

[26] Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, University of Chicago Public Law & Legal Theory Working Paper No. 40 (2003), at 43 (Oct. 2, 2018), also available at https://chicagounbound.uchicago.edu/public_law_and_legal_theory/356/.

national law. In all other cases, attempts to elaborate the said standards without consideration of national context never led to success. Even the practice of the ECHR in this respect is not consistent. In the case of *Ādamsons v. Latvia*,[27] the Court stated that a disproportionate limitation of the right to free elections on the ground that a social group (former officials of the KGB) limited in passive elective law is "characterized by signs that are too general" and, consequently, "any limitation on voting rights for its members have to be based on an individual approach which allows mention of their actual behavior." At the same time, in the case *Ždanoka v. Latvia*, where the point was about removal from elections of the former CPSU member Ždanoka, the Court acknowledged prohibition on the basis of membership of a political organization (the Communist party) in order to be consistent with the European Convention. It was pointed out in the judgment that

> While such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.[28]

The issue of lustration criteria always arises for the new power carrying out lustration measures. Here are some possible approaches: either there is a set of formal criteria for prohibition referred to in legislation, for instance, membership of the governing party or the taking of certain positions during a clearly defined period of time, which, in turn, is an objective and easily proved fact and, therefore, the guilt of a lustrated person is not taken into account, as it was done in our country, or a more complicated attempt is made as to individual assessment of the degree of the official's involvement in the illegal practices of the former power and the motivation for such involvement. Bosnia and Herzegovina chose the latter way. However, in this case it is necessary to take into account, first of all, the limited state apparatus of this country since the entire population of Bosnia comprises less than 4 million people, secondly, lustration in this country was first and foremost directed at persons who committed war crimes during the 1991–1995 war in Yugoslavia, which can be more easily proved than corruption actions, professional incompetence, etc.

So, in the contemporary world, lustration is either excluded altogether due to being a discriminatory practice (ILO) or qualified as an instrument of assessment of a person's acceptability for state service on the basis of their personal characteristics, first and foremost, competence and honesty (U.N.), or it is understood as a way of

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[27] *Ādamsons v. Latvia*, Judgment, No. 3669/03, 24 June 2008.

[28] *Ždanoka v. Latvia*, *supra* note 16, para. 133.

overcoming a totalitarian past and protecting democratic order from its recurrence (European countries).

Now something should be said about specific provisions of the Law on Government Cleansing, which are challenged by applicants under the procedure of constitutional judicial procedure.

First of all, according to constitutional submissions, the model itself of conducting lustration, stipulated by the said law, is criticized. Three types of lustration have been applied around the world. The first type (Czech Republic, Germany, Lithuania in respect of former KGB officers, Latvia, Bosnia, Macedonia and Ukraine) stipulates the use of two lists, one of which includes positions and professions "protected" from disloyal elements (Art. 2 of the Law on Government Cleansing), and one containing grounds for considering persons to be such disloyal elements (Art. 3 of the mentioned Law). The second type (Poland, Lithuania and Estonia) stipulates the existence of two lists, but their content is a little different. In this case a contender for a "protected" position is obliged to disclose whether they are covered by the disloyalty criteria (for example, whether they cooperated with intelligence services of the former regime). For a false declaration there is liability which is characterized by a prohibition on taking "protected" positions. Finally, the third type of lustration (Hungary, Lithuania, Estonia and Slovakia) is aimed at exposing disloyal citizens, and making and publishing lists thereof without any consequences for them at all. Therefore, in the first case, lustration is a prohibition on certain persons taking certain positions, in the second case, obligatory declaration of personal data under threat of responsibility for false declaration, in the third case, official establishment and publication of facts about specific persons. The choice of this or that model of lustration *per se* relates to the exclusive competence of the legislator and is a question of political expedience, which, in its turn, is determined by a range of political, historical, social, economic, cultural and other factors, which one cannot influence by means of constitutional control.

Moreover, the constitutionality of part 4 of Article 3 of the Law on Government Cleansing relating to functionaries of the Soviet regime is disputed with regard to constitutional submissions. That is why the ambiguity of these provisions should be mentioned. On the one hand, it is recommended in the international documents to hold lustration measures during the first five years from the moment of overthrow of the communist regime but, on the other hand, an appropriate norm has appeared in Ukrainian legislation 23 years after the moment of proclamation of independence. Moreover, the Venice Commission noted that

> persuasive reasons of justification for lustration in respect of persons who were connected with communist regime have to be given.

In its Final Opinion concerning the Law on Government Cleansing of 19 June 2015, the Commission made a reference to the decision of the ECHR in the case of *Ādamsons v. Latvia* and reiterated that

> the measures of lustration are, by their nature, temporary and the objective necessity for the restriction of individual rights resulting from this procedure decreases over time… the need to use lustration measures with respect to the representatives of this regime, almost 25 years after its fall, seem controversial.

And further:

> It might well be that some of the representatives of the communist regime still constitute a threat to the democratic regime in Ukraine. Yet, this should not be presumed based simply on the position they held prior to 1991. Their behaviour and activities in the period posterior to that date should be taken into account as well.[29]

It is also necessary to take into account the legal position of the ECHR, stipulated in the *Ždanoka v. Latvia* case, which reads

> the fact that the impugned statutory measure was not introduced by Parliament immediately after the restoration of Latvian independence does not appear in this case to be crucial, any more than it was in… It is not surprising that a newly established democratic legislature should need time for reflection in a period of political turmoil to enable it to consider what measures were required to sustain its achievements.[30]

We consider that the argument *mutatis mutandis* may be used by the national Constitutional Court if it is concluded that the disputed provision is constitutional.

Moreover, in this judgment, the Court emphasized that

> the national authorities of Latvia, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order. Those authorities should therefore be left sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions…[31]

In its turn, the national authorities of Ukraine more than once demonstrated a negative attitude to the Soviet past, trying to remove it from the contemporary

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[29] European Commission for Democracy Through Law (Venice Commission), Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, Opinion No. 788/2014, CDL-AD(2015)012, Venice, 19 June 2015, para. 70 (Oct. 2, 2018), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2015)012-e.

[30] *Ždanoka v. Latvia*, *supra* note 16, para. 131.

[31] *Id.* para. 134.

political context. This is attested to particularly by adoption of the Law of Ukraine on Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of their Symbols, and also prohibition of the Communist Party of Ukraine by the Kyiv District Administrative Court, to which the state is entitled, regarding the concept of "armed democracy" (*see* judgment of the ECHR on the *Refah Partisi (the Welfare Party) and Others v. Turkey* case[32]). From this point of view, a prohibition on former officials of the Soviet regime taking up positions in today's Ukraine seems quite natural.

Doubts were also raised by applicants as to the constitutionality of part 3 of Article 1 of the Law on Government Cleansing, according to which, during 10 years from the day of entry into force of this Law, positions which are lustrated cannot be taken up by officials from the communist epoch or persons from the Yanukovych regime, who took high office during the Maidan events, and persons found guilty of corruption.

It is obvious that the 10-year period stipulated in the disputed Law contradicts the requirements of the PACE Resolution 1096 (1996), since

> Disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated.

At the same time, in 2001 the Constitutional Court of the Czech Republic pointed out that

> the determination of the degree of democracy's development in a specific country is a social and political question, but not a constitutional one.

Since the countries of Central and Eastern Europe underwent development in different ways and at different speeds after the 1990s, and the risk of a renewal of a totalitarian/authoritarian regime is more real in some of them, including Ukraine, then, in compliance with the opinion of Venice Commission (para. 74 of the Final Opinion of 19 June 2015),

> some margin of appreciation shall be left to the national authorities to determine the period for which lustration is required.

From this perspective, a 10-year period of disqualification may be considered quite constitutional, taking into account contemporary Ukrainian realities.

As we can see, during a constitutionality review of the Law on Government Cleansing, the Constitutional Court of Ukraine will have to choose one of two

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[32] *Refah Partisi (the Welfare Party) and Others v. Turkey*, Judgment, Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

mutually exclusive alternatives, both of which are constitutional and may be easily strengthened by the same convincing arguments. Therefore, when the body of Constitutional jurisdiction makes a final decision in this case, the personal professional position of every judge, their legal and, to some extent, political beliefs, and personal understanding of events in Ukraine which occurred over the last three years will have a decisive impact as never before.

3. Politicization of the Judiciary

The term "political justice," applied to one of the obvious tendencies of development of the judiciary in different historical periods of its existence, including constitutional justice, has been used in academic discourse for a relatively long time. Suffice to recall the work, which appeared in 1961 and became a classic, of Professor Otto Kirchheimer from Columbia University.[33] At approximately the same time, separate aspects of the said phenomenon were considered by Hanna Arendt, covering the trial, in Israel, of SS-Obersturmbannführer Adolf Eichmann, who was responsible for the "final solution to the Jewish question."[34] In these very works, there was first formulated a general definition of political justice as usage of judicial procedure for achievement of political goals. Considering the question in this way, the following trials were qualified as political ones: the trial of Socrates, the judicial proceedings against the royalists during the French Revolution, the trials of communists conducted in the Weimar Republic and, later, in Nazi Germany, including the process of arson of the Reichstag, the 1936–1938 Moscow Trials, etc.

Then came several other major works, written mainly with regard to Nazi Germany and Stalin's Russia,[35] after that the concept of "political justice" was firmly entrenched in global legal science, being today universally recognized by any expert in the field of judicial law and no longer requiring any special justification. There are conferences and round table discussions held on this topic; books and articles are being written,[36] but these are a matter of research of the meaning and content of the phenomenon, its limits and consequences, but not about the need to prove the existence of the phenomenon as such.

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33 Otto Kirchheimer, *Political Justice* 454 (Princeton, N.J.: Princeton University Press, 1961).

34 *Арендт Х.* Банальность зла [Hanna Arendt, *The Banality of Evil*] 328 (Moscow: Znanie, 2008).

35 Hannsjoachim W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* 326 (London: Tauris, 1989); Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* 350 (D.L. Schneider (trans.), Cambridge: Harvard University Press, 1991).

36 Klaus Bachmann et al., *When Justice Meets Politics: Independence and Autonomy of Ad Hoc International Criminal Tribunals* 404 (Frankfurt am Main: Peter Lang, 2013); Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* 197 (New York; Cambridge: Cambridge University Press, 2012); *Загретдинов В.* Конституционное орудие политической борьбы // Сравнительное конституционное обозрение. 2015. No. 5. С. 104–119 [Vasily Zagretdinov, *The Constitutional Instrument of Political Struggle*, 5 Comparative Constitutional Review 104 (2015)].

It seems that, in a few years, the concept of political justice will be as universally recognized in Ukraine, as in the West, and may even be considered banal. In this regard, it is enough to name two doctrinal articles of judges of the Constitutional Court of Ukraine, who analyze the influence of the political process on fulfillment of constitutional legal proceedings in our country.[37]

It is easy to notice that the term of "political justice" consists of two words. But if everything is more or less clear as regards "justice," then the best minds of mankind have been working over the definition of politics for more than one century.

We take, for a starting point, the classical definition given by Max Weber, who calls us to understand politics as "only leadership or influence on leadership by a political union, that is, in our time, by the state," and then defines the state itself as "the human community, which, within a certain sphere, (successfully) claims to monopolize legitimate physical violence," and finally concludes that politics is therefore

> the desire to participate in power or influence on the distribution of power... inside the state between groups of people that are a part of it.[38]

Thus, the main content of politics, the core of political activity, is the question of the conquest, retention and use of state power. It is obvious that a dialectical contradiction arises implicitly between politics in this sense and judicial power: on the one hand, the judicial power is integrated into the state mechanism and is an element of state activity and, on the other hand, its main purpose is precisely restriction of prerogatives of political branches of power, in other words, restriction of state arbitrariness.

Therefore, it is not a coincidence that a substantial part of Western literature does not consider judicial and political action as interconnected at all; they are described as separate ideal types: judicial action is defined as "normatively loaded," while political activity is "guided by interest"; judges are supposed to argue, while politicians bargain; court decisions are made by voting, while political decisions are based on the "majority principle."[39]

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[37] *Сліденко І.* Політизація конституційних судів: причини та наслідки // Вісник Конституційного Суду України. 2016. No. 6. С. 211–213 [Igor Slidenko, *Politicization of Constitutional Courts: Causes and Consequences*, 6 Bulletin of the Constitutional Court of Ukraine 211 (2016)].

[38] *Григорьев И.С.* Внутрисудебные институты как инструмент адаптации конституционного суда в процессе консолидации политического режима (на примере КС РФ): Дис. … канд. полит. наук [Ivan S. Grigoryev, *In-Court Institutions as an Instrument of Adaptation of the Constitutional Court in the Process of Consolidation of a Political Regime (Using the Example of the RF Constitutional Court): Thesis for a Candidate Degree in Political Sciences*] 26 (Moscow: National Research University Higher School of Economics, 2017).

[39] *Хованская А.* Политическая юриспруденция: постклассический анализ судебных решений и идея легитимности // Сравнительное конституционное обозрение. 2010. No. 1. С. 15 [Anna Khovanskaya, *Political Jurisprudence: Postclassical Analysis of Judicial Decisions and the Idea of Legitimacy,* 1 Comparative Constitutional Review 5, 15 (2010)].

When trying to discover a scientific analysis of the concept of "political justice," for example, in the newest U.S. literature (a kind of symbol of modern constitutionalism), a programmatic article, written by Professor Eric A. Posner of University of Chicago, immediately catches the eye.[40]

Posner defines political justice as an organization of judicial power in which the guilt of the subject and, as a consequence, the questions of their acquittal or conviction, are put in direct dependence on the political views and former political activity of the accused. In a traditional political process, a person is brought to responsibility (either explicitly or implicitly) because of their political beliefs that threaten the state or the government and the following measures are applied in respect of them: extremely broadly formulated law or law that is applied in exceptional cases or is applied severely, or provides a disproportionately severe punishment.[41]

It is symptomatic that elements of politicization of justice are seen even at the international level. The same Posner, whom it is difficult to accuse of sympathy for non-liberal models of rule, nevertheless directly considers the activity of the International Criminal Tribunal for the former Yugoslavia (hereinafter the ICTY) to be a political one, since

> the defendants were brought to responsibility because they were also political and ideological enemies of Western democracies.[42]

On the other hand, because of political considerations, subjects of international law can distance themselves from the institutions of international justice, as happened with the USA, which first joined and then withdrew its signature from the Rome Statute of the International Criminal Court, or with Ukraine, which also did not ratify the Rome Statute even in spite of the war in the Donbass.

In the most concentrated form, politics manifested itself in the activities of the ICTY. The matter is not about the trial of Serbian leader Slobodan Milošević, who seems to have really stood at the roots of those monstrous atrocities of which he was accused, and not even about the *Gotovina/Markać* case[43], which ended in complete justification for Croatian generals with whom the USA sympathized. Above all, the matter is about the attempts of the Prosecutor of the Tribunal, Carla Del Ponte, to initiate, in 1999, a lawsuit in connection with the bombing of Belgrade by NATO air forces, during which a significant number of civilian infrastructure objects were damaged and about 2,000 people died. Here is what she wrote about this in her memoirs:

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40 Eric A. Posner, *Political Trials in Domestic and International Law*, 55 Duke Law Journal 75 (2005).

41 *Id.* at 76.

42 *Id.* at 77.

43 *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 2012.

> No one in NATO prevented me from investigating bombing or accusations. But I realized quickly that it was impossible to conduct such an investigation: neither NATO nor the member states of this organization were willing to cooperate with us. We were denied access to documents. In addition, I found out that I had reached the boundaries of the political universe in which the tribunal was allowed to operate. If I went further in investigating NATO's actions, I would not only fail, but would also make it impossible for my service to continue investigating crimes committed during the wars of the 90s.[44]

Most often, political motives for judicial activity appear in three procedural forms: 1) in international justice; 2) in the case of transition from authoritarian to democratic rule and vice versa; and 3) in the case of intensification of the undemocratic regime, which becomes clearly repressive in nature. Technically, political justice is characterized by: a) the possibility for executive power to influence the process; b) the presence of a judicial body educated in the spirit of obedience; c) the administration of justice, most often in the face of genuine or perceived threat to the state system; and d) the possibility of judges in some cases that do not represent a significant interest for the authorities, to maintain a high degree of independence (for example, in Brazil in the era of the military dictatorship of 1964–1985, the death penalty was not applied at all, and the terms of imprisonment for political opponents of the regime were not excessively large).[45]

Another constituent feature of political justice is the selectivity of judicial repression, which initially manifests itself at the level of bringing to legal, most often criminal, responsibility for those actions that were either not previously punishable or were illegal but at the same time extremely popular practices, and then, at the trial stage, in the absence of genuine equality between the prosecution and the defense. Thus, during the period of the Weimar Republic, right-wing extremist criminals (including Nazis), who committed politically motivated murders like the killings of Clara Zetkin and Karl Liebknecht, often received minor punishments, while the Communists, who broke the law, were, for the most part, persecuted with ruthless cruelty.[46]

According to the judgment of the European Court of Human Rights of 23 February 2016 in the *Navalny and Ofitserov v. Russia* case,

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[44] *Дель Понте К.* Охота: я и военные преступники [Carla Del Ponte, *The Hunt: Me and the War Criminals*] 106 (Moscow: Eksmo, 2008).

[45] *Соломон-мл. П.* Суды и судьи при авторитарных режимах // Сравнительное конституционное обозрение. 2008. No. 3. С. 161 [Peter Solomon, Jr., *Courts and Judges Under Authoritarian Regimes*, 3 Comparative Constitutional Review 156, 161 (2008)].

[46] *Меллер Х.* Веймарская республика: опыт одной незавершенной демократии [Horst Möller, *Weimar Republic: The Experience of One Unfinished Democracy*] 150 (Moscow: ROSSPEN, 2010).

> The foregoing findings demonstrate that the domestic courts have failed, by a long margin, to ensure a fair hearing in the applicants' criminal case, and may be taken as suggesting that they did not even care about appearances. It is noteworthy that the courts dismissed without examination the applicants' allegations of political persecution which were at least arguable.[47]

Furthermore:

> It is obvious for the Court, as it must also have been for the domestic courts, that there had been a link between the first applicant's public activities and the Investigative Committee's decision to press charges against him. It was therefore the duty of the domestic courts to scrutinise his allegations of political pressure and to decide whether, despite that link, there had been a genuine cause for bringing him to justice. The same goes for the second applicant who had an arguable claim that he was only targeted as a vehicle for also bringing the first applicant into the orbit of the criminal case, a reason equally unrelated to the true purposes of a criminal prosecution. Having omitted to address these allegations the courts have themselves heightened the concerns that the real reason for the applicants' prosecution and conviction was a political one.[48]

Moreover, according to expert estimates, in 2014 there were 210 criminal prosecutions in Russia that contained a political motive; in 2015 there were 269.[49] The selectivity of justice in the system of political justice always goes hand in hand with the accusatory bias phenomenon, which first of all manifests itself in an insignificant percentage of acquittals. And the last pathology is inherent in Ukrainian Themis. Let us compare the number of acquittals in Nazi Germany, the true symbol of lawlessness, in respect of political criminals whom the Nazi judges were against from the very beginning, and in whose conviction the state power had a direct and immediate interest, with statistics of acquittals in independent Ukraine.

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47 *Navalny and Ofitserov v. Russia*, Judgment, Nos. 46632/13 and 28671/14, 23 February 2016, para. 116.

48 *Id.* para. 119.

49 *Панеях Э.* Суды и правоохранительные органы: репрессивное правоприменение // Политическое развитие России. 2014–2016: Институты и практики авторитарной консолидации [Ella Paneyakh, *Courts and Law Enforcement Agencies: Repressive Enforcement* in *Political Development of Russia. 2014–2016: Institutions and Practices of Authoritarian Consolidation*] 154, 166 (K. Rogov (ed.), Moscow: Foundation "Liberalnaya missiya," 2016).

Table 1: The Number of Acquittals by the People's Trial Chamber, 1937–1944[50]

Year	Number of Accused	Number of Acquittals, %
1937	618	8.4
1938	614	8.79
1939	470	8.5
1940	1,091	7.33
1941	1,237	5.6
1942	2,572	4.16
1943	3,338	5.42
1944	4,379	11.16

As we can see, during the period of the Third Reich, the percentage of acquittals never dropped below 4%. Moreover, even in 1944, during which the number of accused increased enormously in connection with the general tendency of increase of criminal and legal repression after the assassination attempt against Hitler on 20 July 1944, the number of acquittals reached an unprecedented 11%. And this is only for political crimes (the percentage of acquittals for ordinary criminality, to which the ruling elite was indifferent, was even higher)!

Let us turn now to the Ukrainian statistics.

Table 2: The Number of Acquittals in Ukraine, 2007–2014[51]

Year	Number of Accused	Number of Acquittals, %
2007	165,459	0.41
2008	168,300	0.33
2009	146,450	0.19
2010	168,800	0.2
2011	Statistics are absent	Statistics are absent
2012	161,400	0.2
2013	135,800	0.6
1st six months of 2014	54,300	0.8

[50] Koch 1989, at 132.

[51] The table was made by the authors using court statistics which are available on the site of the Supreme Court of Ukraine: www.scourt.gov.ua.

So, comments are superfluous. We can only hope that, after the overthrow of the Yanukovych criminal regime in February 2014, the situation in our country regarding the acquittal of innocent people will change for the better with time.

Another characteristic ploy, to which priests of political justice resort, is to give the law a retroactive effect. In other words, introduction of criminal liability for those acts that, at the time of their commission, were not recognized as criminal offences from a formal or legal point of view. It is curious that, most often, this method is used not by purely totalitarian regimes, but rather, on the contrary, during the transition to democratic rule.

In compliance with the judgment of 22 March 2001 in the case of *Streletz, Kessler and Krenz v. Germany*, the European Court of Human Rights formulated a dominant and legal position which reads:

> it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.[52]

At the same time, the Court pointed out that

> The broad divide between the GDR's legislation and its practice was to a great extent the work of the applicants themselves. Because of the very senior positions they occupied in the State apparatus, they evidently could not have been ignorant of the GDR's Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime that had been made internationally... Moreover, they themselves had implemented or maintained that regime, by superimposing on the statutory provisions, published in the GDR's Official Gazette, secret orders and service instructions on the consolidation and improvement of the border-protection installations and the use of firearms. In the order to fire given to border guards they had insisted on the need to protect the GDR's borders "at all costs" and to arrest "border violators" or "annihilate" them... The applicants were therefore directly responsible for the situation which obtained at the border between the two German States from the beginning of the 1960s until the fall of the Berlin Wall in 1989.[53]

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[52] *Streletz, Kessler and Krenz v. Germany*, Judgment, Nos. 34044/96, 35532/97 and 44801/98, 22 March 2001, para. 81.

[53] *Id.* para. 78.

Conclusion

In our opinion, the factors influencing the depoliticization of justice are:

– New socio-economic and political relations that should be reflected in the proceedings: prevalence of private interest over state interests, "privatization" of law up to its "romanization" (a return to the origins of Roman law, clear of ideology and politics);

– Internationalization of law and judicial procedures, the closer connection of the domestic legal system with international standards of fair justice;

– Improvement of modern technologies of legal proceedings, including mass introduction of electronic media of legal information (electronic registration of cases, posting court decisions on court websites), introduction of teleconferences in the process, especially at the cassation stage;

– Expansion of guarantees of independence of judges at the level of international standards, prompting the authorities to undertake at least some actions in this direction (for example, the ECHR judgment in the case of *Oleksandr Volkov v. Ukraine*[54]).

These and other factors fundamentally change the very paradigm of justice in the modern world. Social revolutions accelerate this transition, but they are not the main determinative factor, no matter how tempting it may seem. In the end, the judiciary itself is extremely conservative, complies with age-old rules and procedures, digesting, as Ukrainian experience shows, any social revolution. However, this is not to say that it may not be reasonably and professionally reformed.

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[54] *Oleksandr Volkov v. Ukraine*, Judgment, No. 21722/11, 9 January 2013.

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CONSTITUENT POWER: THE THEORY AND PRACTICE OF ITS IMPLEMENTATION IN UKRAINE

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The article researches the phenomenon of constituent power as a theoretical concept and the practice of its implementation in Ukraine. Constituent power is associated with the process of adopting a constitution and making amendments to it. A distinction is made between primary and institutional constituent powers. The constituent nature of the Constitution of Ukraine in the interpretation of the Constitutional Court of Ukraine is analyzed. The reasons why the Law "On an All-Ukrainian Referendum" was held invalid with regard to the constituent power of the people is considered. There is an inconsistency in the primary and institutional constituent powers' interpretation of amendments to the Constitution of Ukraine. The constitutional reform of 2004, the interference with this reform by the Constitutional Court of Ukraine in 2010 and its return by the parliament in 2014 are examined from the standpoint of the constituent power concept. It is concluded that a new constitutional reform, which would provide a clean slate, could be an acceptable solution in Ukraine. In the future, the text of the reformed Constitution should provide for clear mechanisms for amending the Constitution of Ukraine and the adoption of a new Constitution, which would necessarily include procedures for popular legitimacy.

Keywords: constituent power; popular sovereignty; the people; constitution; constitutional control; Ukraine.

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Introduction

The Constitution of Ukraine, adopted on 28 June 1996 remained unaltered for a long time.[1] However, a sufficiently long period of stability ended due to the adoption of the constitutional reform of 12 December 2004. Subsequently, the Constitution also changed in 2011, 2013 and 2016. However, it is the constitutional reform of 2004 that became the cornerstone of not only academic and theoretical discussions, but also resulted in two unprecedented resolutions by Ukrainian authorities, i.e. the Constitutional Court of Ukraine (the CCU) in 2010 and the Supreme Council of Ukraine (the Verkhovna Rada) in 2014. This was a case of "renewal" of the effect of the text of the Constitution of Ukraine, which was originally adopted by the decision of the CCU. The renewal of the 2004 reform took place due to a decision of parliament.

At the same time, the concept of constituent power is increasingly used as a certain precondition which is at the heart of the constitutional order on which the Constitution of Ukraine relies and which determines the further constitutional reform. However, there are quite large discrepancies in its understanding in practice.

The concept of constituent power is not only a real doctrinal prerequisite for theoretical developments, but also finds new roots in court decisions and is used to justify certain laws (e.g. the part of the Law "On the All-Ukrainian Referendum" which permits the adoption of a new version of the Constitution concerning the All-Ukrainian Referendum in response to popular demand). Similarly, the doctrine of constituent power was intended to consecrate the "renewal" of the text of the Constitution in February 2014.

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[1] Конституція України, прийнята 28 червня 1996 р., Відомості Верховної Ради України, 1996, No. 30 [The Constitution of Ukraine, adopted on 28 June 1996, Bulletin of the Verkhovna Rada of Ukraine, 1996, No. 30].

The ideas to convoke the constitutional assembly, constituents and the like, occasionally arise. The concept of the constituent power was, in one way or another, the basis for the functioning of the Constitutional Assembly, and then also for the constitutional commission under the President of Ukraine.

Consequently, the idea of further constitutional reformation, and even of a complete constitutional restoration, literally remains one of the key issues in modern legal discourse. That is why its effective implementation is possible only with a thorough understanding of the nature of the constitution and the theory of the constituent power that gives rise to it.

1. The Concept of Constituent Power as an Element of Modern Constitutionalism

First of all, let us start with the definition. As defined by Tamara El Khoury in the Max Planck Encyclopedia of Comparative Constitutional Law, *pouvoir constituant* (constituent power) is the power to establish the constitutional order of a nation.[2] The theory of constituent power played a key role in the development of the practice of constitutionalism. According to this theory, which specifies a more general theory of national sovereignty and, at the same time, is its original version, the constitution as the basic law is recognized as an act of the primary (constituent) power (*pouvoir constituant*), which belongs directly to the people and has the supreme legal force.[3]

"A legal theory of constituent power basically assumes that it is a legal power, which implies that the undoing power has a legal charter."[4] The theory of constituent power was thoroughly outlined by Emmanuel Sieyès, who first used the term in 1789. He emphasized that the state bodies qualified as the constituted "authorities" cannot amend the constitution as an act of the constituent power. As Volodymyr Shapoval states, this thesis is what resulted in the constitution not being changed often.[5]

The idea of an unlimited constituent power which belongs exclusively to the community of sovereign citizens and is brought into action at their discretion was widespread due to the theory of natural law, thanks to Pufendorf and Wolf, and its practical application is first found in the United States, and then in revolutionary France, along with its theoretical expression in the doctrine of the *pouvoir constituant*, where all state authorities originate and unite.[6] Constituent power has been a revolutionary

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[2] Tamara El Khoury, *Pouvoir Constituant*, Oxford Constitutional Law (December 2017) (Sep. 15, 2018), available at http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e709.

[3] *Шаповал В.М.* Сучасний конституціоналізм [Volodymyr M. Shapoval, *Contemporary Constitutionalism*] 28 (Kyiv: Yurinkom Inter, 2005).

[4] *The Oxford Handbook of Comparative Constitutional Law* 422 (M. Rosenfeld & A. Sajó (eds.), Oxford: Oxford University Press, 2012).

[5] Shapoval 2005, at 29.

[6] *Еллинек Г.* Общее учение о государстве [Georg Jellinek, *General Doctrine of the State*] 488–489 (St. Petersburg: Yuridicheskiy tsentr Press, 2004).

concept from the very beginning.[7] In the USA, the concept of constituent power is derived from the preamble of the U.S. Constitution, which begins with the words "We the People of the United States..."[8]

As Eduard Pontovich states, the establishment of the constitution of a state is bound to give birth to the idea of the existence of a permanent authority, which establishes and revises the constitution, of the people, a community of free and equal individuals. This power, which is supreme in the state, guarantees the inviolability of the rights of the individual since it determines the entire state system. Later, it received the name of the constituent power. This idea could not have originated before. The establishment of constitutions of the modern period and the establishment of the contract of free, equal individuals marked the destruction of the entire historical past. The establishment of a constitution meant, at the same time, the foundation of a new society and a new state, which thus acquired the principles of unity consisting of a community of equal individuals, a mechanical or arithmetic integer. A constitutional treaty does not become a contract between the authorities on the one hand and another civilian power on the other hand, but is the agreement between the people who establish the state power. This circumstance is already the reason for the emergence of the idea that the people should have authority to establish a constitution and the constituent power.[9]

At the same time, the concept of constituent power is not indisputable. The idea of a sovereign constituent power is not the first historical understanding of constitution making. The eclipse of this figure by the notion of the people as the constituent power had to do with four notions linked to the Modern Age, namely the concepts of the social contract, sovereignty, the people understood as the unity of the whole rather than a part of the population, and the separation of powers.[10] Moreover, according to Moris Oriu, the French experience diverted science from the theory of the constituent power. In addition, in his opinion,

> this concept in itself does not stand up to scrutiny, as well as the doctrine of the delegation of government. A nation, separated from their governing bodies, has no more institutional or governing competence. Therefore, the creation or revision of the constitution should be accomplished by regular governmental

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[7] Nico Krisch, *Pouvoir constituant and pouvoir irritant in the postnational order*, 14(3) *International Journal of Constitutional Law* 657 (2016).

[8] *See more The Paradox of Constitutionalism: Constituent Power and Constitutional Form* 375 (M. Loughlin & N. Walker (eds.), Oxford: Oxford University Press, 2007); Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* 320 (Oxford: Oxford University Press, 2016).

[9] *Понтович Э.Э.* Развитие конституции и учредительная власть [Eduard E. Pontovich, *Development of the Constitution and the Constituent Power*] 35–36 (Petrograd: Ogni, 1918).

[10] Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* 45 (Cambridge: Cambridge University Press, 2017).

jurisdiction. It can only be engaged to adhere to certain formalities for the celebration of constitutional laws.[11]

However, this idea did not find recognition in science and the concept of the constituent power continued its development.

According to Jean-Paul Jacqué, a constituent power is an assembly of bodies responsible for the development and revision of the constitution.[12] He distinguishes between primary and institutional constituent power.

The primary constituent power develops a constitution when there is no other acting constitution. Such a situation may arise either as a result of the formation of a new state, or as a result of a revolution that terminated the operation of the previous constitution.

In both cases, the primary constituent power is unconditional (*inconditionné*) when establishing a new legal order. The source of the primary constituent power is the political order (*ordre politique*), because the constituent power is the power of the fact embodied in its constancy and the ideas embedded in this power, due to which the constitution is developed. The primary constituent power and its legitimacy depend on the success of the revolution. The adoption of the constitution indicates the goals of the government and marks the ascent to power of a certain government on the basis of law. The adoption of the constitution means the disappearance of the primary constituent power, which, having fulfilled its tasks, clears a space for the institutional constituent power.

The institutional constituent power is established by the constitution; this power is charged with amendments of the constitutional act. In this role, it can only act in accordance with the constitutional act and must abide the restrictions contained in the constitution with respect to the procedure for revision of its content.[13]

The authoritative German scholar, Carl Schmitt, wrote about the primary constituent power, distinguishing between the sovereign and commissar dictatorship. It should be mentioned that Schmitt developed the doctrine of the guarantor of the Constitution, as well as the doctrine of sovereignty. He is the author of the statement that "the sovereign is the person who decides on the state of emergency."[14]

Distinguishing between commissar and sovereign dictatorships, Schmitt, in essence, speaks of two fundamentally different strategies of governing behavior in

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[11] *Opuy M.* Основы публичного права [Moris Oriu, *Foundations of Public Law*] 633 (Moscow: Communist Academy Publishing House, 1929).

[12] *Жакке Ж.-П.* Конституционное право и политические институты [Jean-Paul Jacqué, *Constitutional Law and Political Institutions*] 107 (Moscow: Yurist, 2002).

[13] *Id.* at 108.

[14] *Шмитт К.* Политическая теология [Carl Schmitt, *Political Theology*] 15 (Moscow: KANONPressTsB, 2000).

the context of *anomie*.[15] In sovereign and commissar dictatorships, the concept of dictatorship includes the idea of the status that should be provided by the activities of the dictator. Their legal essence lies in eliminating, in order to achieve the goal, legal barriers and obstacles which, in every respect, are an unhindered obstacle to the achievement of this goal. Similar to self-defense, dictatorship is never only a single action but a counteraction as well. Therefore, it assumes that the opponent does not adhere to those legal rules that the dictator considers to be decisive as a legal foundation. The *commissioner* dictatorship abolishes the constitution *in concreto* to protect the same constitution with its specific content. The same argument has been used for a long time (most often and insistently, by Lincoln): if the content of constitution is threatened, it can be secured by the temporary suspension of the constitution. The dictatorship can protect the constitution from destruction.[16]

From the point of view of the commissar dictatorship, the dictator's action must lead to a condition under which rights can be exercised, since any legal norm assumes a normal state as a homogeneous environment in which it exists. As a result, the dictatorship becomes a problem of a certain reality, but it does not cease to be a legal problem. The legal force of the constitution can be suspended, but the constitution itself does not cease to operate, because such suspension relates to a special case. The sovereign dictatorship, however, considers the existing system as on that can be eliminated by its action. It does not suspend the current constitution by virtue of its constitutional right which was established, but makes an attempt to create a condition allowing a constitution which would meet all its requirements to be enforced.[17] In fact, according to Carl Schmitt, a sovereign dictatorship is considered a constituent power.

As for Ukraine, the issue of the content and specific forms of the implementation of constituent power was the subject of a study by Ruslana Maksakova "Constitutional and Legal Problems of the Organization and Implementation of the Constituent Power in Ukraine."[18] According to Maksakova's criterion of implementation approaches, there are three distinct forms of constituent power: 1) revolutionary constituent power; 2) reformatory constituent power; and 3) functional institutional power. Elections,

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[15] *Подоксёнов Д.В.* Чрезвычайное положение и парадокс суверенности // Социосфера. 2013. No. 1. С. 61–63 [Dmitry V. Podoksyonov, *The State of Emergency and the Paradox of Sovereignty*, 1 Sociosphere 61 (2013)].

[16] *Шмитт К.* Диктатура. От истоков современной идеи суверенитета до пролетарской классовой борьбы [Carl Schmitt, *Dictatorship. From the Origins of the Modern Idea of Sovereignty to the Proletarian Class Struggle*] 156–157 (St. Petersburg: Nauka, 2005).

[17] *Id.* at 158.

[18] *Максакова Р.М.* Конституційно-правові проблеми організації та реалізації установчої влади в Україні [Ruslana M. Maksakova, *Constitutional and Legal Problems of the Organization and Implementation of the Constituent Power in Ukraine*] (Zaporozhye: Classic Private University Publishing House, 2012).

referenda, general meetings of citizens at their place of residence, local initiatives, public hearings, and the recall of a deputy are classified as constituent power by the scholar.[19] This is a rather broad approach to the interpretation of the constituent power. A broad understanding of the constituent power makes it synonymous with popular sovereignty. Not having a purpose to analyze all the described interpretations of the constituent power and the forms of its implementations, we shall only mention that such different approaches to the understanding of the constituent power, as well as references to it and its use in the state and legal system, do not contribute to the development of a consistent constitutional concept for reforming the Constitution of Ukraine.

Stanislav Shevchuk's position seems to be more reasonable. He states that constitutionalism, is based on the distinction between the constituent power of the people, who, by means of the exercise of their sovereignty, adopt a constitution which secures the freedom of individuals and guarantees the principle of "limited rule" which arises from the theory of a social contract, and the state's power, which in democracies is closely linked to the electoral power of the electorate.[20] We also agree with Myhailo Savchin, who defines constituent power as an order of organization and procedure for the confirmation of the constitution in accordance with the democratic and open principles of the implementation of the procedure for the adoption or revision of the Basic Law, which has the supreme legal force.[21]

We believe that the Ukrainian concept of the constituent power should be based on the works by Carl Schmitt, Jean-Paul Jacqué, Andrew Arato, András Sajó and other scholars and should be associated with the process of adopting a constitution and making legislative amendments to it.

2. The Nature of the Constitution of Ukraine as an Act of Constituent Power

The CCU declared (para. 2 of the Declaration of Intent of the CCU of 3 October 1997 No. 4-zp in the case of the constitutional filing of Oleksandr Leonidovich Barabash concerning the official interpretation of part 5 of Article 94 and Article 160 of the Constitution of Ukraine (on entry into legal force of the Constitution of Ukraine)):

> The Constitution of Ukraine, being the Basic Law of the State, is, by its legal nature, an act of the constituent power belonging to the people. The constituent power in relation to constituted authorities is supreme: it is in

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19 Maksakova 2012, at 436.

20 *Шевчук С.* Судова правотворчість: світовий досвід і перспективи в Україні [Stanislav Shevchuk, *Judicial Law-Making: World Experience and Perspectives in Ukraine*] 149 (Kyiv: Abstract, 2007).

21 Савчин М.*В. Конституціоналізм* і *природа конституції* [Myhailo V. Savchin, *Constitutionalism and the Nature of the Constitution*] 302 (Uzhhorod: Polygraphic Center "Lira," 2009).

> the Constitution of Ukraine that the principle of the division of state power is declared... and the principles of the organization of the established authorities, including the legislative one, are determined. The adoption of the Constitution of Ukraine by the Verkhovna Rada of Ukraine meant that the constituent power was exercised by the parliament.[22]

The connection of the Constitution of Ukraine with the concept of constituent power became possible due to the preamble of the Constitution ("The Verkhovna Rada of Ukraine on behalf of the Ukrainian people, the citizens of Ukraine of all ethnic groups... adopts this Constitution, the Basic Law of Ukraine") as well as positions of the CCU on this issue.

> The adoption of the Constitution of Ukraine by the Verkhovna Rada of Ukraine was a direct act of the sovereignty of the people, who only once authorized the Verkhovna Rada of Ukraine to do so. This is secured by part 1 of Article 85 of the Constitution of Ukraine, which does not authorize the Verkhovna Rada of Ukraine to adopt the Constitution of Ukraine, as well as by Article 156 of the Constitution of Ukraine, according to which the amendments bill to the sections establishing the principles of the constitutional order in Ukraine after its adoption in the Verkhovna Rada of Ukraine are to be approved by an all-Ukrainian referendum,

as subparagraph 1 of paragraph 4 to the Declaration of Intent of CCU of 11 July 1997 No. 3-zp states.[23]

The above is confirmed in the verdict of the CCU of 10 May 2005 (subparagraph 4.3: "When adopting the Constitution of Ukraine on 28 June 1996, the sovereign will of the people was mediated by the Verkhovna Rada of Ukraine"). In this regard, Yury Barabash asks why the Court expressed the firm belief that it was the people of Ukraine who authorized parliament to exercise their (people's) constituent power and authority.[24] The question is rather rhetorical.

Moreover, on the ground of this argumentation, in the above decision, the CCU declared that the Constitution of Ukraine entered into force immediately upon its adoption, without being published (official publication took place only 14 days after its adoption).

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22 Available at http://zakon5.rada.gov.ua/laws/show/v004p710-97.

23 Available at http://zakon3.rada.gov.ua/laws/show/v003p710-97.

24 *Барабаш Ю.Г.* Право визначення конституційного ладу народом України // Конституційна асамблея: політико-правові аспекти діяльності. 2012. No. 3. С. 4–12 [Yury G. Barabash, *The Right to Determine the Constitutional Order by the People of Ukraine*, 3 Constitutional Assembly: Political and Legal Aspects of Activity 4 (2012)].

Having no doubt in the legitimacy of the current Constitution, there is a question in this context – which power (primary or institutional) did the Verkhovna Rada use when adopting the Constitution of Ukraine? It turns out that it was primary power, but it acted on behalf of the people as the only legitimate national representative political body.

Also, according to the CCU (para. 21 of the Declaration of Intent of 26 April 2018 No. 4-p/2018),

> being a result of the exercise of the constituent power of the people, the Constitution of Ukraine, by establishing a procedure for amending it, determines the procedural limits for the exercise of power and the people themselves.[25]

Therefore, being by its nature the result of the implementation of the primary constitutive power, it regulates the institutional constituent power of the people.

As Yury Barabash rightly notes, the constituent power of the Ukrainian people as a constitutional phenomenon is only acquiring its distinct features.[26] At the same time, the concept of constituent power is not only a real doctrinal prerequisite for theoretical developments and the practice of rule-making, law enforcement and interpretation of the norms of law, but is sometimes understood superficially and used to substantiate rather debatable legislative provisions. In particular, this is a question of the statutory provision of the Law "On the All-Ukrainian Referendum," specifically the part which allowed the adoption of a new version of the Constitution at an all-Ukrainian referendum on the people's initiative, contrary to the constitutional language itself.

Moreover, let us take the liberty to put question the allegedly axiomatic nature of the implementation of the concept of constituent power in the current Basic Law. Questions arise in the analysis of its entire text, in particular, Article 5 of the Constitution, as well as Section XIII on amendments to the Constitution.

3. Institutional Constituent Power and the Constitution of Ukraine

3.1. Adoption of the New Constitution

On the one hand, Article 5 of the Constitution speaks of the exclusive right of the people to define and change the constitutional order, and on the other hand, in the

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[25] Available at http://zakon3.rada.gov.ua/laws/show/v004p710-18.

[26] *Барабаш Ю.Г.* Установча влада українського народу як конституційний феномен // Право України. 2009. №. 11. С. 79 [Yury G. Barabash, *The Constituent Power of the Ukrainian People as a Constitutional Phenomenon*, 11 Law of Ukraine 73, 79 (2009)].

text of the Constitution, there are no procedural provisions regarding institutional constituent power, that is, there is no mechanism for implementation of the people's right to determine the constitutional system, if the right to adopt a new constitution is meant by it. The CCU has had to respond to this question and it finally rendered a judgment declaring the present ability of citizens, at a referendum held at the people's initiative, to establish a new system of adopting the Constitution under a procedure which has to be outlined in the Constitution and laws of Ukraine (Decision of the CCU of 16 April 2008 No. 6- rp/2008).[27]

This order has never been reflected in the Constitution. At the same time, the appropriate attempt was made at the *de jure* level of the law. Certain statutory provisions of the Law "On the All-Ukrainian Referendum" of 6 November 2012 No. 5475-VI provided for the right to adopt a new constitution at a nationwide referendum held at the people's initiative.[28] Thus, part 2 of Article 15 states:

> By means of the all-Ukrainian referendum held at the people's initiative, the Ukrainian, people being the holders of sovereignty and the only source of power in Ukraine, are entitled to exercise their exclusive right to define and change the constitutional order in Ukraine by adopting the Constitution of Ukraine (the constituent power) as prescribed by this Law.

The legitimization of the corresponding procedure in the law was directly deduced from the concept of the constituent power. However, this Law was declared unconstitutional in accordance with the Decision of the CCU of 26 April 2018 No. 4-p/2018. The reason for its unconstitutionality was the violation of the procedure for the adoption of the law itself. Composing the rationale of the judgment, the CCU also referred to norms of substantive law, but all of these provisions concerned issues of unconstitutionality of norms regarding amendments to the Constitution of Ukraine. In the text of the decision there is no express reference to the unconstitutionality of the norm envisaging the possibility of adopting a new constitution of Ukraine at a referendum.

3.2. Amendments to the Constitution of Ukraine

With regard to amendments to the Constitution, a few questions arise when analyzing Section XIII, which is directly devoted to this procedure.

As recorded in the text of the Constitution, there is a clear procedure; according to which the Verkhovna Rada is chiefly responsible for amendments. Only amendment

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[27] Available at http://zakon0.rada.gov.ua/laws/show/v006p710-08.

[28] Закон України від 06.11.2012 No. 5475-VI «Про всеукраїнський референдум», Відомості Верховної Ради України, 2013, No. 44–45 [Law of Ukraine No. 5475-VI of 6 November 2012. On the All-Ukrainian Referendum, Bulletin of the Verkhovna Rada of Ukraine, 2016, Nos. 44–54].

of Sections I, III and XIII requires the people to participate directly (at a referendum). In this regard, the question is how this procedure relates to Article 5 of the Constitution, which refers to the people's right not only to determine, but also to amend the constitutional system. The aforementioned Law "On the All-Ukrainian Referendum" gave people the right to amend the Constitution at a referendum, without the participation of the Verkhovna Rada of Ukraine, but this provision was declared as contrary to Section XIII of the Constitution of Ukraine. As the CCU states (para. 21 of the Declaration of Intent of 26 April 2018 No. 4-p/2018),

> As a result of the exercise of the constituent power of the people, the Constitution of Ukraine, by establishing a procedure for amending it, determines the procedural limits for the exercise of power by the people themselves.[29]

We can also cite subparagraph 2 of the operative part of the Decision of the CCU of 27 March 2000 No. 3-rp/2000 (all-Ukrainian referendum at the people's initiative case).[30] The CCU stated that

> the issues approved by the all-Ukrainian referendum at the people's initiative, set forth in paragraphs 2, 3, 4, and 5 of Article 2 of the Presidential Decree "On the Proclamation of an All-Ukrainian Referendum at the People's Initiative," are obligatory for consideration and decision-making in the procedure established by the Constitution of Ukraine, in particular, its Section XIII "Amendments to the Constitution of Ukraine" and the laws of Ukraine.

In other words, the CCU practically made it impossible for the people to implement constituent power directly at a referendum by amending the Constitution of Ukraine; in the CCU's opinion, it should necessarily be mediated by the Verkhovna Rada of Ukraine by amending the Constitution of Ukraine in its Section XIII. Consequently, the recognition of the referendum as a way to implement constituent power in Ukraine is problematic, since the Constitution of Ukraine itself does not consider it necessary when making amendments to it (a referendum is only obligatory for Sections I, III and XIII).

At the same time, there is a question regarding whether the current procedure can be amended to comply with the concept of the constituent power as such. A distinction given by Georg Jellinek is quite interesting. In his opinion, in states with constitutions based on the constituent power of the people, – amendments are made either by a direct popular vote or by dissolution of the parliament chambers with another appeal to voters, discussion of revisions in special "audit" chambers

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[29] Available at http://zakon3.rada.gov.ua/laws/show/v004p710-18.

[30] Available at http://zakon2.rada.gov.ua/laws/show/v003p710-00.

or at conventions. In other states, various extraordinary forms of amendment are employed, among which the majority requirement plays an important role. Then, multiple voting to revise or vote in the subsequent one-on-one legislative meetings is often required.[31]

As stated, only Sections I, III and XIII of the Constitution of Ukraine require a direct popular vote when making amendments to them. The rest of the amendments do not stipulate a popular vote or the dissolution of the Verkhovna Rada. In this regard, attention should be drawn to the fact that the dissolution of the parliament is a mandatory stage in the amendment of many constitutions (e.g. in the Netherlands and Iceland). Therefore, it is worth supporting Yury Barabash in his view that such a procedure for constitutional reform is one of the most optimal[32] and should be considered for implementation during the reform of the current Basic Law.

4. Constitutional Reform of 2004

In practice, Ukraine faced the problem of constituent power when amendments to the Constitution took place with procedural violations in 2004. On 8 December 2004, the Verkhovna Rada of Ukraine adopted a Bill No. 4180 on amendments to the Constitution – the Law of Ukraine of 8 December 2004 No. 2222-IV "On Amendments to the Constitution of Ukraine" (hereinafter the Law No. 2222).[33] Thus, amendments to the Constitution of Ukraine are the first changes to be finally approved, since the adoption and entry into legal force of the text of the Constitution on 28 June 1996.

At the same time, experts and scholars drew attention to the fact that there were some procedural violations during the adoption of the abovementioned law when introducing amendments to the Constitution of Ukraine (i.e. the absence of corresponding preliminary findings by the CCU, block voting, and a lack of discussion). These violations were referred to in the Conclusion of the National Commission for Consolidation of Democracy and the Supremacy of Law of 27 December 2005 on compliance with the terms of the constitutional procedure when amending the Constitution of Ukraine in 1996 by adopting the Law of Ukraine of 8 December 2004 No. 2222-IV "On Amendments to the Constitution of Ukraine" and on the compliance with its provisions on the general principles of the Constitution of Ukraine of 1996 and European Standards.

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31 Jellinek 2004, at 511.

32 *Барабаш Ю.Г.* Державно-правові конфлікти в теорії та практиці конституційного права [Yury G. Barabash, *State and Legal Conflicts in the Theory and Practice of Constitutional Law*] 181 (Kharkiv: Pravo, 2008).

33 Закон України від 08.12.2004 No. 2222-IV «Про внесення змін до Конституції України», Відомості Верховної Ради України, 2005, No. 2 [Law of Ukraine No. 2222-IV of 8 December 2004. On Amendments to the Constitution of Ukraine, Bulletin of the Verkhovna Rada of Ukraine, 2005, No. 2].

Some experts pointed out a number of other violations that they believed were committed. Vsevolod Rechitsky argued that the amendments to the Constitution were adopted in conditions of public emergency,[34] which is prohibited by the Constitution itself. In the opinion of B. Futea's opinion, a U.S. federal court judge, despite the fact that the amendments to the Constitution of Ukraine did not formally relate to Chapters I, III and XIII, Article 5 of the Constitution stipulates that

> The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its bodies or officials.

Therefore, the procedure for revision of the Basic Law under all circumstances is to provide for the mandatory holding of a referendum as a way of ratifying a constitutional law passed by parliament.

Since the only body in Ukraine with constitutional jurisdiction is the CCU, an assessment of the arguments for violations when adopting amendments to the Constitution of Ukraine and providing these arguments with legal consequences could be made by means of verification of constitutionality of the law on amendments to the Constitution. At the same time, it should be noted that the exercise of constitutional legality control on amendments to the constitution has its own specific characteristics as compared with the exercise of such control over common laws, and the status of such laws as compared with common laws is often declared in the doctrine as being different from common laws passed by parliament.

In the legal doctrine and practice of the constitutional controlling bodies of different countries, two different approaches were formed. According to the first one, the constitutional controlling body is not empowered to verify the laws on amendments to the constitution. This position was set out in the Decision of the Constitutional Council of France on 26 March 2003 (*Décision n° 2003-469 DC du 26 mars 2003*).[35] The Constitutional Council declared that it can only pass a judgment in cases established by the constitution itself. At the same time, the law on amending the constitution has a special nature and is not a common law that is subject to constitutional control.

The opposite is to recognize laws on amending the constitution as being common laws and, thus, the constitutional controlling body has the right to verify their

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[34] *Речицький В.* Втілюючи принципи верховенства права: політико-правовий коментар положень Рішення Конституційного Суду України у справі про додержання процедури внесення змін до Конституції України // Вісник Конституційного Суду України. 2010. No. 6. С. 142–151 [Vsevolod Rechitsky, *Implementing the Principles of the Rule of Law: Political and Legal Comment on the Provisions of the Decision of the Constitutional Court of Ukraine in the Case of Adhering to the Procedure for Amending the Constitution of Ukraine*, 6 Bulletin of the Constitutional Court of Ukraine 142 (2010)].

[35] Available at https://www.conseil-constitutionnel.fr/decision/2003/2003469DC.htm.

constitutionality. An example of such an approach is the Decision of the Constitutional Court of Moldova of 4 March 2016.[36] The Constitutional Court of Moldova declared unconstitutional the procedure of amendments to the constitution adopted by the parliament 15 years ago to change the procedure of electing the president. The finding of the Constitutional Court referred to the restoration of civil rights for citizens to elect the president. This decision was criticized: the Constitutional Court cannot amend the Constitution. It has the right to make decisions on the constitutionality of less important laws than constitutional ones. After its adoption, any constitutional law becomes a part of the Constitution. And, in this case, according to the former Moldovan Ambassador to the U.N. and the Council of Europe, Alexei Tulbure, "the court has no authority to amend anything."[37]

Consequently, there are two approaches to the rights of the constitutional controlling body in terms of considering the laws to amend a constitution. A number of countries support this right, while others deny it. Moreover, as a rule, it depends on the activism or self-limitation of the constitutional court itself and stems from the practice of its activities and the legal doctrine of the country in question. Therefore, it is impossible to consider only one of the approaches as uniquely right.

In the case of Ukraine, the Constitution provides for preliminary constitutional control of the proposed law on amending the Constitution of Ukraine in compliance with Articles 157, 158. As for the next constitutional revision, there are no explicit provisions for eligibility or ineligibility in the CCU in such cases. Therefore, it is necessary to analyze the legal positions of the CCU on this issue, which are quite controversial.

First of all, it is worth mentioning the legal position of the CCU concerning its Decision of 11 March 2003 No. 6-rp/2003 in the case on the constitutional filing of a petition by 73 people's deputies in compliance with the Constitution of Ukraine for the right for the President of Ukraine to veto the Law of Ukraine "On Amendments adopted by the Verkhovna Rada of Ukraine to Article 98 of the Constitution of Ukraine" and its proposals:

> The fact is that the authority to amend the Constitution of Ukraine is exercised by the Verkhovna Rada of Ukraine by adopting laws... The procedure for

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[36] Hotărâre nr. 7 din 04.03.2016 privind controlul constituționalității unor prevederi ale Legii nr. 1115-XIV din 5 iulie 2000 cu privire la modificarea şi completarea Constituției Republicii Moldova [Decision No. 7 of 4 March 2016. On the Control of the Constitutionality of Some Provisions of Law No. 1115-XIV of 5 July 2000 on Amendments to the Constitution of the Republic of Moldova] (Sep. 15, 2018), available at http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=558&l=ru.

[37] Экс-посол РМ в Совете Европы: «Решение Конституционного суда – коварная игра Плахотнюка и попытка избежать протестов; КС не может вносить изменения в Конституцию» // Totul.md. 8 марта 2016 г. [Former Ambassador of the Republic of Moldova to the Council of Europe: "The Decision of the Constitutional Court Is an Insidious Play by Plakhotnyuk and an Attempt to Avoid Protests; The Constitutional Court Cannot Amend the Constitution," Totul.md, 8 March 2016] (Sep. 15, 2018), available at http://old.totul.md/ru/newsitem/1015020.html.

> the adoption of laws amending the Constitution of Ukraine by the Verkhovna Rada of Ukraine, as defined in Section XIII of the Basic Law of Ukraine, does not provide for a specific procedure for signing and promulgating such laws.[38]

Thus, the CCU refused to accept the specific legal nature of the laws on amendments to the Constitution, in particular their constituent nature. The CCU also refused to accept the fact that, in this case, the Verkhovna Rada of Ukraine does not exercise a legislative function, but implements the constituent power on behalf of the people, and that the law on the relevant amendments is an act of the constituent power of the people and therefore is not a common law. The fact of the recognition of the equal status of common laws and laws on amendments to the Constitution of Ukraine from the doctrinal perspective allowed establishment of the possibility of exercising the following constitutional control over them by the CCU in the same way as over the ordinary act of parliament.

Nevertheless, the CCU refused, by its Decision of 5 February 2008, to start proceedings in the case concerning compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Amendments to the Constitution of Ukraine," the Law of Ukraine "On Amendments to Section IV 'Final and Transitional Provisions,'" and the Law of Ukraine "On the Constitutional Court of Ukraine."[39]

At the same time, in another Decision – concerning the powers of the CCU of 26 June 2008 No. 13-rp/2008 – the CCU came to a different conclusion. According to its opinion, the Court is authorized to exercise the following constitutional control over the law on amending the Constitution of Ukraine after its entry into force. At this stage, the conceptual contravention of the positions of the CCU in its various decisions was first laid.

5. Decision of the Constitutional Court of Ukraine of 30 September 2010

The position of the CCU, set out in Decision of 26 June 2008 No. 13-rp/2008, found its logical development in Decision of 30 September 2010 No. 20-rp/2010 in the case concerning the compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine of 8 December 2004 No. 2222-IV "On Amendments to the Constitution of Ukraine" (on compliance with the procedure for amending the Constitution of Ukraine) (hereinafter Decision No. 20-rp/2010). The CCU declared the Law No. 2222 to be unconstitutional and, in subparagraph 4 of clause 6 of the Decision, it expressly stated that the recognition of the law as unconstitutional in connection with violation of the procedure for its consideration and approval, means

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[38] Available at http://zakon3.rada.gov.ua/laws/show/v006p710-03.

[39] Available at http://zakon3.rada.gov.ua/laws/show/va06u710-08.

the revival of the previous version of the norms of the Constitution of Ukraine, which were amended, supplemented and excluded by the Law No. 2222.

It is worth paying attention to the fact that the Constitution does not say anything about the "revival of the previous version of the norms of the Constitution of Ukraine," and this conclusion was made by the CCU on the basis of a similar procedure involving the revival of the operation of the versions of common laws. In this case, the text of the Constitution in force which by its nature differs from common laws and is the Basic Law as well as the act of the constituent power, underwent a modification while another version of its norms was restored as a result of a court decision, which is quite an extraordinary phenomenon.

The Venice Commission, in its special finding "On the Constitutional Situation in Ukraine" of 17 December 2010, conducted a detailed analysis of this situation, cautiously pointing out the risks caused by the decision of CCU, in particular pointing out that (para. 70):

> The activities of the main state bodies are currently based on rules changed by the court, and not on the rules which were amended by the Verkhovna Rada of Ukraine as a democratic legitimate body.

Having considered the two values – the legal procedure and the necessity to control its compliance and legal certainty as well as respect for the political legitimacy of the law on amending the Constitution adopted by the political representative body of the people, i.e. the Verkhovna Rada – the CCU actually determined the value of the necessity to observe the legal procedure as a priority and the amendments to the Constitution of Ukraine were invalidated due to technical issues.

At the same time a procedural violation was made since some of the amended norms had not been preliminarily verified by the CCU in compliance with Articles 157, 158 of the Constitution. The CCU, in its Decision No. 20-rp/2010, gave no evaluation to the amendments in accordance with Articles 157, 158 of the Constitution. Taking this fact into account, the question is: what was the purpose of authorizing the CCU to provide preliminary constitutional control? Relying on the fact that such control was not fully implemented preliminarily, disregarding its purpose and post factum evaluation of the amendments from the material side, that is, in accordance with Articles 157 and 158, the recognition of the entire law as unconstitutional was too formal.

Even Bohdan Futey, who emphasized the unconstitutionality of the adopted Law No. 2222, drew attention to the fact that the CCU had adopted a decision that was contrary to the other decisions adopted by the Court before, without indicating the influence of a new decision on its previous decisions. His remarks also concerned the legitimacy of elected governing bodies, appointed or created under the Constitution

by the amendments of 2004.[40] The decision also received numerous positive and negative judgments (Viktor Kolisnyk, Vsevolod Rechitsky[41]).

6. Restoration of the Text of the Constitution of Ukraine in 2014

Subsequently, the decision of the CCU was considered incompatible with the Constitution, and it was proposed to adopt the "Act on the Restoration of the Legitimacy of the Constitutional System in Ukraine" (by people's deputy Inna Bogoslovskaya). Such proposals became reality in the context of the political crisis when, on 21 January 2014, the Verkhovna Rada of Ukraine adopted the Law "On Restoring Some Provisions of the Constitution of Ukraine" (hereinafter the Law of 21 February 2014)[42], and on 22 February 2014 it adopted Resolution No. 750-VII "On the Text of the Constitution of Ukraine Last Revised or Amended on 28 June 1996, as Amended and Supplemented by the Laws of Ukraine of 8 December 2004 No. 2222-IV, of 1 February 2011 No. 2952-VI, and of 19 September 2013 No. 586-VII" (hereinafter the Resolution of 22 February 2014).[43]

It is interesting that in the abovementioned Resolution of 22 February 2014, in addition to the reference to the legal position of the CCU (Decision of 5 February 2008) and the Venice Commission (conclusion of 17 December 2010), the following logical chain was constructed:

– The Constitution of Ukraine is the act of the constituent power of the Ukrainian people;

– The parliament has exclusive powers to amend the Constitution of Ukraine as an element of the constituent power;

– The Verkhovna Rada of Ukraine is the exclusive body which is authorized with constituent power and this unquestionably makes it impossible for other bodies of state power or their officials to take any action regarding the amendment of constitutional norms.

As we see, in its argumentation, the Verkhovna Rada of Ukraine focuses on the concept of constituent power. Thus, the special nature of the laws on amendments to the Constitution, their constituent nature, is focused on. Correspondingly, the Constitution provides for a special procedure for the adoption of such laws within

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[40] *Футей Б.* Зауваження до рішення Конституційного Суду України від 30 вересня 2010 року // Права Людини в Україні. 16.11.2010 [Bohdan Futey, *Remarks on the Decision of the Constitutional Court of Ukraine of 30 September 2010*, Human Rights in Ukraine, 16 November 2010] (Sep. 15, 2018), available at http://khpg.org/index.php?id=1289922329.

[41] Rechitsky 2010.

[42] Available at http://zakon5.rada.gov.ua/laws/show/742-18.

[43] Available at http://zakon3.rada.gov.ua/laws/show/750-18.

the framework of the procedure for amendment of the Constitution of Ukraine – such amendments only may be introduced by the Verkhovna Rada of Ukraine.

However, while acknowledging the concept of the constituent power, the exclusivity of the powers of the Verkhovna Rada of Ukraine to amend the Constitution of Ukraine seems to be controversial. First, Section XIII itself provides for the holding of an all-Ukrainian referendum on approval of amendments to Sections I, III, and XIII of the Constitution of Ukraine. Secondly, in paragraph 4 of the Decision of the CCU of 16 April 2008 in the case of the constitutional petitions of the President of Ukraine on the official interpretation of the provisions of parts 2 and 3 of Article 5, Article 69, part 2 of Article 72, Article 74, part 2 of Article 94, and part 1 of Article 156 of the Constitution of Ukraine (the case on the adoption of the Constitution and laws of Ukraine in a referendum), it was declared that

> *the form of exercise of the constituent power by the people* is an all-Ukrainian referendum proclaimed by popular initiative upon the demand of not less than three million Ukrainian citizens who have the right to vote, provided that the signatures for its appointment are collected in at least two thirds of the regions and that there are at least one hundred thousand signatures in each region.

That is why the Verkhovna Rada of Ukraine, in its argumentation, trying to defend the exclusivity of its powers and insisting on the lack of corresponding powers in the CCU, opened a Pandora's box. This is because the emphasis on the special constitutive nature of the Constitution and laws on the introduction of amendments to it as acts of the constituent power may lead to entirely different conclusions than those which were made by the Verkhovna Rada itself.

The position of B. Futea, which we cited above, is an example of another view. Vsevolod Rechitsky adds that

> In February 2014, the Verkhovna Rada considered the decision of the Court [Decision No. 20-rp/2010] as a challenge to the Rada itself, interpreting the change of the form of government as an amendment of the "constitutional system." Alas! The parliament did the same, i.e. amending the constitutional system without a referendum, in 2004.[44]

The question is: what the constitutional system is and how to understand it in the context of Article 5 of the Constitution of Ukraine. It is possible that the Verkhovna Rada of Ukraine may make such amendments to the Constitution of Ukraine, which will affect the constitutional system (even if it is not Sections I, III and XIII) without

[44] *Речицький В.В.* Аксіоми конституціоналізму і Основний Закон України [Vsevolod V. Rechitsky, *Axioms of Constitutionalism and Basic Law of Ukraine*] (Sep. 15, 2018), available at http://www.ji-magazine.lviv.ua/2016/Rechyckyj_Aksiomy_konstytucionalizmu.htm.

violating the procedures. Instead, such amendments are the exclusive prerogative of the people and the Verkhovna Rada has actually usurped the power. Such an interpretation of part 1 of Article 5 of the Constitution is not excluded and can be admitted. That is, the absolute acquisition of the constitutive power by default by the Verkhovna Rada of Ukraine is not legally consistent and we must not forget about the constituent power of the people in its direct form.

Evaluating the argument for amending the constitutional order, it is worth emphasizing the ambiguity of the very concept of a "constitutional system," the uncertainty of the procedure and the procedure for its amendment as a norm, and the absence of a corresponding universally accepted doctrinal model. If we consider that, in 2010, the CCU amended the constitutional order and that it was amended unlawfully, what does this mean? Does it mean that the form of government has changed as a result of a decision of the CCU or only that a procedural aspect has been touched upon, or does it mean an unauthorized intervention has been made by the CCU with regard the text of the Constitution unrelated to the content of such intervention, in other words, assignment of authorizations, violation of the principle "only what is expressly permitted and provided" and the principle of the division of powers (procedural aspect)? Did the CCU interfere with the authority of the people (according to this logic, a referendum should be held)? Does it only mean that the alteration of the text of the Constitution could only be carried out by the Verkhovna Rada as the authorized body following the procedure specified in Section XIII of the Constitution, and in no other way? Consequently, the argument itself about the unlawfulness of amendment of the constitutional system by the CCU raises so many questions, answers to which tend to be ambiguous.

A CCU judge, Vyacheslav Ovcharenko, having been dismissed from the CCU by Resolution of the Verkhovna Rada of Ukraine of 24 February 2014 No. 775-VII, appealed against his dismissal in the Higher Administrative Court, which declared the decision of the parliament unlawful (Resolution of 18 June 2014 No. 800/119/14). This decision was revised by the Supreme Court of Ukraine (Decision of 2 December 2014 No. 21-302a14[45]), which rejected the judge's claim and declared Regulation No. 775-VII to be lawful. The Supreme Court not only confirmed that the dismissal of the judge conformed to legislation, but also assessed the material grounds for such a dismissal, namely the adherence to the judge's oath. The Verkhovna Rada considered the fact that the judge voted for the corresponding Decision No. 20-rp/2010 to be a violation of his oath. The motivation of the Supreme Court was based on the following:

> The Constitution of Ukraine does not authorize the Constitutional Court of Ukraine to invalidate a constitutional norm, regardless of the legal form in which it was set out.

[45] Available at http://reyestr.court.gov.ua/Review/44321854.

> In accordance with paragraph 1 of part 1 of Article 85 of the Constitution of Ukraine, the Verkhovna Rada of Ukraine is authorized to amend the Constitution of Ukraine within the scope of, and under the procedure provided in, Section XIII of this Constitution.
>
> By its Decision No. 20-rp/2010, the Constitutional Court of Ukraine... did not ensure the supremacy of the Constitution of Ukraine, amended it, violated the fundamental constitutional principle of democracy, amended the constitutional system of Ukraine, violated the constitutional principle of the distribution of the power and the legitimacy of existing state bodies, which resulted in their activities based on norms amended by the Constitutional Court of Ukraine, and not by the Verkhovna Rada of Ukraine as the duly authorized body.

The same judgment was taken with regard to the cases of judges Mikhail Kolos and Anatoly Golovin (Decision of the Supreme Court of Ukraine of 28 April 2015 No. 21-67a14[46] and Decision of the Supreme Court of Ukraine of 14 March 2018 No. P/800/120/14[47]). The Supreme Court has not announced the final judgment on the complaint of the judge Maria Markush yet (Decision of the Supreme Administrative Court of 26 June 2017 No. 800/162/14 was in her favor[48]). It is worth noting that judges Vyacheslav Ovcharenko and Mikhail Kolos filed lawsuits to the European Court of Human Rights, which transferred the same to the communication stage.[49]

It should be noted that the intervention of the Supreme Court in the position of the CCU, and evaluation of the decisions of the latter is unlikely to fall within the competence of the Supreme Court itself. Paradoxically since it interfered with the power of the CCU without having the right to appraise its decisions, the Supreme Court itself refers to the CCU exceeding its authority. The Supreme Court did not have the right to give such a judgment from the standpoint of correctness or incorrectness of the decisions of the CCU due to the fact that it (like all public authorities) is to act only on the basis, within the limits and in the manner provided by the Constitution and laws of Ukraine (Articles 6 and 19 of the Constitution of Ukraine). The powers of the Supreme Court do not contain the possibility to review and evaluate decisions of the CCU. Under the Constitution and the Law "On the Constitutional Court of Ukraine" its decisions are binding, final, and cannot be appealed. The Supreme Court can judge the legality of dismissal, but only on formal grounds. Here, the Supreme Court

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46 Available at http://reyestr.court.gov.ua/Review/44321854.

47 Available at http://reyestr.court.gov.ua/Review/73195164.

48 Available at http://reyestr.court.gov.ua/Review/67828732.

49 Applications Nos. 27276/15 and 33692/15 Vyacheslav Andriyovych Ovcharenko against Ukraine and Mykhaylo Ivanovych Kolos against Ukraine lodged on 20 May 2015 and 2 July 2015 respectively (Sep. 15, 2018), available at https://hudoc.echr.coe.int/eng#{"itemid":["001-161645"]}.

of Ukraine showed excessive activism which was not completely relevant (and likely unjustifiable). After all, it would have been possible to recognize the dismissal as legitimate and without getting into the substantive side of the decision of the CCU.

If the Supreme Court can call into question the legitimacy of any decision of the CCU, recognize the decision to be legal or illegal, why do we need any model for specialized constitutional control and the CCU as such? The question is rather rhetorical. As is rightly pointed out by Vsevolod Rechitsky:

> Not only investigators, prosecutors and judges of courts of general jurisdiction, but also the Ukrainian parliament, the Cabinet of Ministers, the President, local authorities and ordinary citizens of Ukraine can doubt (in the everyday sense of this word) the qualities of normative collegial decisions and conclusions of the Constitutional Court. All this, however, does not mean that they can ignore these decisions.[50]

It is worth noting that the Supreme Court of Ukraine affirmed the negative assessment of the Decision of the CCU of 30 September 2010 by the Verkhovna Rada of Ukraine. As for voting for other decisions (not related to the restoration of the text of the Constitution of Ukraine, in particular, No. 3-rp/2012 and No. 2-rp/2013), the Supreme Court of Ukraine had no claims against them. Judge Oleksandr Pasenyuk who was also dismissed by the Verkhovna Rada of Ukraine, but who did not take part in voting for the Decision of 30 September 2010 (Decree of the Supreme Court of Ukraine of 2 December 2014 No. 21-340a14[51]) was reinstated on protocolary grounds.

The fact of the matter is that one of the key problems of the dismissal of judges is a possible violation by the Verkhovna Rada of Ukraine of not just Ukrainian national legislation, but Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

In its judgment of 9 January 2013 in the case of *Oleksandr Volkov v. Ukraine*,[52] the European Court of Human Rights (ECHR) criticized the procedure of bringing judges to disciplinary responsibility by the parliament at parliamentary committees and plenary sessions, noting that the plenary session was not a proper place for consideration of the facts and law, the assessment of evidence and the theory. The ECHR criticized the role of politicians in the parliament which were not required to

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50 *Речицький В.В.* Чи можна довіряти конституційним суддям? // Українська Гельсінська спілка з прав людини. 08.03.2017 [Vsevolod V. Rechitsky, *Can I Trust the Constitutional Judges?*, Ukrainian Helsinki Human Rights Union, 8 March 2017] (Sep. 15, 2018), available at https://helsinki.org.ua/chy-mozhna-doviryaty-konstytutsijnym-suddyam-v-rechytskyj/.

51 Available at http://reyestr.court.gov.ua/Review/42246614.

52 *Oleksandr Volkov v. Ukraine*, Judgment, No. 21722/11, 9 January 2013 (Sep. 15, 2018), available at https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-115871%22]}.

have any legal or judicial experience to establish complex issues of fact and law in this case.

It is noteworthy that the Supreme Court tried to dismiss the applicability of this position of the ECHR with regard to the dismissal of judge Anatoly Golovin, emphasizing the political nature of the formation of a constitutional jurisdiction body and corresponding summary dismissal judgment of such judges.

In this case, however, it is not entirely clear why the summary dismissal procedure was not kept in accordance with the Ukrainian constitutional reform of justice in 2016. On the contrary, political subjects were deprived of the right to dismiss judges of the CCU before the scheduled date and this right was transferred to the CCU itself. In any case, all these arguments will be evaluated in the cases of the judges who appealed to the ECHR.

If, however, one were to ignore the argument about the amendment of the constitutional system and to try to appraise the constitutionality of the Law of 21 February 2014 without being bound by the reasons and arguments for such a restoration, as well as the position of the Supreme Court, then, from the formal point of view, it can be assumed that this Law was unduly adopted by the Verkhovna Rada of Ukraine, or rather, in the absence of the appropriate legal procedure. "The restoration of certain provisions of the Constitution" is not provided for in the procedures related to the amendments of the Constitution of Ukraine, which are set out in Section XIII of the Constitution of Ukraine, or in other legislative procedures. The Constitution of Ukraine does not provide for any amendments to the Constitution of Ukraine in the form of restoration of certain provisions of the Constitution, which were amended or declared as unconstitutional, or the corresponding powers in the Verkhovna Rada. In legal science, the existence of such a phenomenon as the restoration of the text of the constitution by the parliament is almost unknown, and there have not been any relevant theoretical developments in this regard.

According to Viktor Kolisnyk, the process of restoration of the Constitution of Ukraine which took place in February 2014, was dubious (as it did not comply with the procedure for making constitutional amendments provided for in Section XIII of the Constitution of Ukraine). The Basic Law of Ukraine does not provide the parliament with such powers, even by way of a one-off vote. The attempt to restore the constitutional system in a non-constitutional way, that is, in violation of the procedure for making constitutional amendments and going beyond parliamentary powers, cannot be justified or substantiated (including by "political" expediency, hard times, and reference to "good" or "noble" intentions).[53] As Serhii Riznyk states, the formal requirement, i.e. the necessity to follow the procedure for amending the

[53] *Колісник В.* Відновлення дії Конституції України та зміна форми правління як засіб поновлення конституційного ладу // Вісник Конституційного Суду України. 2015. No. 4. С. 104–105 [Viktor Kolisnyk, *Restoration of the Constitution of Ukraine and Change of the Form of Government as a Means of Restoration of Constitutional Order*, 4 Bulletin of the Constitutional Court of Ukraine 103, 104–105 (2015)].

Constitution of Ukraine, was substantially flouted when restoring the constitutional reform of 2004 because of the revolution in 2014.[54] This inclines us to recognize the primary constitutive power (according to Jean-Paul Jacqué) or the sovereign dictatorship (according to Carl Schmitt) in 2014.

Consequently, on the one hand, there are formal arguments in favor of the provision of non-compliance with the Law of 21 February 2014 and the Resolution of 22 February 2014 of the Constitution of Ukraine for procedural reasons. On the other hand, these acts are considered a manifestation of the constituent power of the people and are acknowledged as legitimate.

If we follow the formal approach, then, in the case of bringing the matter before the CCU, it would be logical to hold unconstitutional the revival of the text of the constitution by the parliament in 2014 and its revival (the new abolition of the 2004 reform) under the CCU decision. At the same time, this raises the same issues that arose in connection with Decision No. 20-rp/2010 that have already been cited in this article. The CCU will have to appraise the consequences of non-compliance with the legal procedure if it determines such legal procedure was violated when the text of the Constitution of Ukraine was restored by the Verkhovna Rada of Ukraine in 2014 and, as a result, to revive the effect of its1996 wording in a rather ambiguous way. This would logically follow from Decision No. 20-rp/2010.

Another solution is the acknowledgement of the legitimacy and constitutionality of the transformations in February 2014. Under this approach, the withdrawal of the CCU (by way of referring to the doctrine of the political issue) and refusal to start the proceedings in case of a relevant submission to it is also possible. However, the second approach can still be considered rather conditional. This is because the acknowledgement of the constitutionality of the transformations in 2014 or the corresponding withdrawal of the CCU unfortunately will not be able to completely sever the Gordian Knot of constitutional problems that currently exists.

Conclusion

In summarizing the research on constituent power in Ukraine, we can make a series of strategic conclusions.

Firstly, the very doctrine of constituent power in Ukraine should be based on the corresponding concepts, which are due to the emergence of constitutionalism in the world as such and revolutionary events, especially in France in the eighteenth century. We believe that the Ukrainian concept of constituent power should be based on the fundamental developments by Carl Schmitt, Jean-Paul Jacqué, Andrew

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[54] *Різник С.* Про нез'ясоване питання конституційності актів парламенту, прийнятих в умовах Революції Гідності // Вісник Конституційного Суду України. 2015. No. 6. С. 58–66 [Serhii Riznyk, *On the Issue of the Constitutionality of the Parliament Acts, Adopted Under the Revolution of Dignity Conditions*, 6 Bulletin of the Constitutional Court of Ukraine 58 (2015)].

Arato, András Sajó and other scholars and should be associated with the process of adopting the Constitution and making amendments to it. At the same time, the constituent government is simultaneously a scientific concept that explains and in some way legitimates corresponding public events. It is a question of division of the primary and institutional constituent power of the people. The primary constituent power is conceptually close to the sovereign dictatorship (according to Carl Schmitt). A broad understanding of constituent power and its mixtion with popular sovereignty appears to be insufficiently substantiated; but it should be referred exclusively to the adoption of the constitution and amendments to it.

Secondly, in practice, the doctrine of constituent power strongly influences the modern constitutional paradigm of Ukraine. It can be clearly stated that the legal doctrine in science, as well as the doctrine developed by the CCU, perceives the concept of constituent power. At the same time, there is a question regarding the actual implementation of the concept of constituent power in Ukraine, as opposed to its formal existence. It is a question of the nature of the Constitution itself as an act of constituent power, but it is still unclear what constituent power the Verkhovna Rada of Ukraine implemented – primary or institutional – and it adopted the Constitution. Similarly, the mechanisms of implementation of constituent power themselves in the Constitution of 1996 remain imperfect. We mean the relation between Article 5 of the Constitution and its Section XIII. There is absolutely no mechanism to implement the constituent power in the part of the adoption of the new Constitution. As for the introduction of amendments, there are some questions about the role of the people in this mechanism, as well as its improvement as a whole.

Thirdly, the practice of amending the Constitution of Ukraine has shown inconsistency in the interpretation of the primary and institutional constituent power. Here the constitutional reform of 2004, the interference with this reform by the CCU in 2010 and its return by the parliament in 2014 is meant. In 2004, critics noticed, in particular, the usurpation of the constituent power by parliament, by the CCU in 2010 and by parliament again in 2014. All three times it happened contrary to the procedures established for the implementation of the institutional constituent power. As you can see, in order to avoid such cases in the future, further doctrinal studies of constituent power are extremely necessary.

Fourthly, a new constitutional reform, conducted in compliance with the existing procedure, would be an acceptable solution in Ukraine; it would provide a clean slate and eliminate the trail of events of 2004, 2010 and 2014 from the text of the constitution. In the future, establishing the means of institutional constituent power implementation in the text of the reformed Constitution, namely, clear mechanisms for amending the Constitution of Ukraine and the adoption of a new Constitution, which would necessarily include procedures for popular legitimacy, would also be an important process.

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DUTIES OF A LAWYER TO A COURT AND TO A CLIENT

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The article provides a comparison of legislation of the United States, Australia, the EU and Ukraine regulating the legal status of a lawyer in the administration of justice mechanism, as well as an analysis the correlation of his duties to the court and to the client. The author recommends that a lawyer not act in a manner that best serves the interests of the client since this will put the course of justice and public confidence in the profession in a vulnerable position; attorneys have to inform clients that their duty to the court is of paramount importance. In case of improper performance of their professional duties, lawyers should be brought not only to corporate liability (disciplinary liability, which is established by the legislation of Ukraine), but also to the civil law (property) liability that is proposed to be established. It is necessary for Ukraine to introduce insurance institution against a lawyer's property liability as a means of minimizing the negative consequences for a lawyer, assuming such liability results from an error and such lawyer is obliged to compensate the harm caused to the client.

Keywords: lawyer; lawyer's duties to the court; lawyer's duties to the client; judiciary; ethics of the lawyer; relations between the lawyer and the court.

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Introduction

The international scientific doctrine does not give an explicit unambiguous answer to the question of whether a lawyer's priority should be his duty to a court or to his client. This article consists of an introduction and three parts. The first part examines the ethical relationship between judges and lawyers, and reveals the essence and significance of the duties of a lawyer to a court. The second part examines the duties of a lawyer to his client, as well as the problem of determining whether a lawyer's first duty is to the court or the client. The final part examines the problems of the lawyer's liability to a client, the concept of "legitimate interests of the client" and the effect of the immunity of the lawyer in different jurisdictions.

1. A Lawyer's Duties to the Court

There can be no rule of law without independent justice. Moreover, there is no rule of law without an independent legal profession. Regarding this, in his annual speech, former President of the Dutch Bar Association, Wille Beckers, said:

> A state in which rule of law prevails can only exist due to the existence of an independent judiciary and independent advocacy. Independent from each other. A judge, prosecutor and lawyer – each of them is responsible for their actions, but together they are responsible for the quality of justice based on the principle of "triple responsibility."[1]

[1] *Ван дер Пол Р.* Судді та адвокати в цивільному процесі: як стаття 6 Конвенції впливає на професійну взаємодію між суддями та адвокатами. Погляд голландських суддів // Precedent UA. 09.02.2015 [Ruth van der Pol, *Judges and Lawyers in Civil Procedure: How Does Article 6 of the Convention Affect Professional Interaction Between Judges and Lawyers. The View of the Dutch Judges*, Precedent UA, 9 February 2015] (Oct. 10, 2018), available at https://precedent.in.ua/2015/05/29/suddi-ta-advokaty-v-tsyvilnomu-protsesi-yak-stattya-6-konventsiyi-vplyvaye-na-profesijnu-vzayemodiyu-mizh-suddyamy-ta-advokatamy-poglyad-gollandskyh-suddiv/.

The Institution of Advocacy and judicial power are closely connected by their constitutional nature and socio-legal content. The constitutional right to professional legal assistance (Arts. 59 and 131-2 of the Constitution of Ukraine) rightly refers to the basic constitutional guarantees of the right to access to justice, which, in its turn, is an integral part of the right to judicial protection (Art. 55 of the Constitution of Ukraine). The latter's effectiveness is also largely stipulated by the level of legal aid provided by lawyers. The right to help from a professional lawyer is one of the procedural safeguards that promote a fair trial. It is not by chance that, under the amendments to the Constitution of Ukraine in 2016, the rules devoted to the Institution of Advocacy, are placed in Section VIII "Justice," emphasizing the role and significance of this human rights' protection institution and defining its role and place as an adjacent legal institution that acts in the mechanism of legal proceedings, along with other institutions. In the Strategy for Reforming of the Judiciary, Legal Proceedings and Related Legal Institutions for 2015–2020 the bar and the judiciary are recognized as equal and adjacent institutions promoting the activity of the judiciary.[2]

Recognition of the close relationship between the bar and the judiciary, and the implementation by lawyers of the right of everyone to professional legal assistance as necessary conditions for the purposes of protection of the rights and freedoms of the individual give rise to a whole number of issues of interaction between the bar and the court. These issues can be of both a legal and moral-psychological nature. In any case, the answer to them may be significant for the functioning and development prospects of both the advocacy and the court, and the definition of place and role of advocacy as one of the human rights institutions of society, which is simultaneously an integral part of the state mechanism for the administration of justice.[3]

Unlike Ukraine, in the legislation of the most countries of Western Europe, the place of advocacy and its relationship with the judicial system are determined quite clearly and unambiguously. The concept of advocacy in Germany is determined by the Federal law on Advocacy as an independent organization in the justice system.[4] In Articles 1 and 38 of the Code of Professional Ethics of the Attorneys of Greece of 4 January 1980 (Kodex Deontologias), the Institution of Advocacy is characterized as a "body of justice." In the Law of France No. 71-1130 of 31 December 1971 "On the Reform of Certain Judicial and Legal Professions" it is underlined that "lawyers are

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[2] Стратегія реформування судоустрою, судочинства та суміжних правових інститутів на 2015–2020 роки [Strategy for Reforming of the Judiciary, Legal Proceedings and Related Legal Institutions for 2015–2020] (Oct. 10, 2018), available at http://zakon2.rada.gov.ua/laws/show/276/2015.

[3] Tetyana B. Vilchyk, *Advocacy as a Human Rights Institution in the Mechanism of Legal Proceedings*, 2 European Reforms Bulletin 78 (2015) (Oct. 10, 2018), available at http://1201.nccdn.net/4_2/000/000/03f/ac7/European_Reforms_Bulletin_2015_2_full_pdf.

[4] Bundesrechtsanwaltsordnung vom 01.08.1959 (BGBl. I 1959 S. 565) (Oct. 10, 2018), available at https://www.gesetze-im-internet.de/brao/.

justice assistants."[5] Considerable attention to the legal regulation issues of a lawyer´s status is given in the legislation of Bulgaria where the lawyer`s activity is equated with the activity of judges, and, furthermore, lawyers have the right to initiate disciplinary prosecutions of violators of his professional rights. Therefore, in accordance with the Bulgarian Bar Act, the lawyer makes use of equal respect with judges and this is put into practice in the fact that interaction with him is the same as between a judge and the jurisdictional, administrative and other bodies of the country (Art. 10(1)).[6] It is quite possible to separate two areas of the relationship between judges and lawyers. On the one hand, these are relations derived from procedural principles and rules and which have a direct influence on the efficiency and quality of legal proceedings. On the other hand, it is a relationship that derives from the professional conduct of judges and lawyers and requires mutual respect for the roles played by both parties and a constructive dialogue between judges and lawyers.

In the recommendations set forth in Opinion No. 11 (2008) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions and it is noted that

> The standard of quality of judicial decisions is clearly the result of interactions between the numerous actors in the judicial system,[7]

including between judges and attorneys.

The relations between judges and lawyers should be based on a mutual understanding of the role of each of them, and on a mutual respect and awareness of each other's independence. Only under such conditions is it possible to achieve fair justice. In Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to Member States on Judges: Independence, Efficiency and Responsibilities, it is stated that

> The independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level.[8]

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5 Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques. Version consolidée au 17 octobre 2018 (Oct. 10, 2018), available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396.

6 The Bar Act of Bulgaria, published in the State Newspaper No. 55 of 25 June 2004, as at 14 July 2018 (Oct. 10, 2018), available at http://solicitorbulgaria.com/index.php/bulgarian-bar-act-part-1.

7 Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) to the Attention of the Committee of Ministers of the Council of Europe on the Quality of Judicial Decisions, CCJE(2008)5, 18 December 2008 (Oct. 10, 2018), available at http://www.courtexcellence.com/~/media/Microsites/Files/ICCE/CCJE.ashx.

8 Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, 17 November 2010, para. 7 (Oct. 10, 2018), available at https://rm.coe.int/16807096c1.

Recommendation Rec(2000)21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer, the Code of Conduct for Lawyers in the European Union, which are recognized as examples for the interpretation and application in national deontological norms, determine the complex of lawyer's duties, which can be divided into: duties to clients; duties to the court and other state bodies; duties to advocacy as a whole and other lawyers; and duties to society.[9]

Amongst those duties, the first two duties, the duty to the court and to the client, often conflict each other to the extent that they may place the lawyer in limbo especially in determining which duty prevails or is to be regarded as primary or the foundation of the other.

If the problems of the mutual relations between the lawyer and the client are more or less investigated in the national legal doctrine, then the problems of the mutual relations between judges and lawyers, which are very relevant at the moment, have not been studied sufficiently.

> Benjamin Cardozo, former Associate Justice of the U.S. Supreme Court, stated that "[m]embership of the bar is a privilege, burdened with conditions."
>
> For the advocate those conditions and responsibilities can be immense and often difficult to balance. As lawyers we are required to fulfill and balance our duties to the client, opposing counsel, to the administration of justice and to society.
>
> Central to our ethical responsibilities as advocates is that we must employ tactics that are legal, honest and respectful to courts and tribunals; we must act with integrity and professionalism. And we must do these things while maintaining what I would suggest is our overarching responsibility to ensure civil conduct in the advancement of our clients' interests.[10]

A lawyer's duty to the court is a fundamental obligation that defines a lawyer's role within the adversarial system. However, a lawyer's duties are not carried out in a vacuum. While facing financial and competitive pressures, lawyers must fulfill and balance their duties to the client, opposing counsel, the administration of justice and society.[11]

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[9] Recommendation Rec(2000)21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer, 25 October 2000 (Oct. 10, 2018), available at https://rm.coe.int/1680502fe8; Code of Conduct for Lawyers in the European Union, adopted at the Plenary Session of Council of Bars and Law Societies of Europe (CCBE) held on 28 October 1988 (Oct. 10, 2018), available at https://www.idhae.org/pdf/code2002_en.pdf.

[10] Graeme Mew, *Effective Advocacy Through Civility* (Oct. 10, 2018), available at www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Effective_Advocacy_Through_Civility_-_Mew_updated_new.pdf.

[11] Sani Rabi'u Bello Esq., *Ethics and Legal Professionalism in Relation to the Courts: A Panacea to Smooth Administration of Justice* (Oct. 10, 2018), available at http://www.unimaid.edu.ng/oer/Journals-oer/Law/Private%20Law/vol2-1/Doc%2014a.pdf. *See* discussion in Jordan Furlong, *Professionalism Revived:*

It is generally acknowledged that attorneys have a duty to a court, but the overall definition of these responsibilities is not an easy task. In 1998, the judge of the Supreme Court of Western Australia, David Ipp, wrote the revolutionary article "Lawyers' Duties to the Court," in which he made an attempt to define and put in order the duties of lawyers in court. Some, at first glance, separate manifestations of the duties of a lawyer in court have been classified by him according to the following general criteria:

> Do not abuse the trial; not to cause damage to justice; to do business efficiently and promptly. Recognizing the primacy of the lawyer's duties to the court does not mean that these duties of a lawyer relate to a particular judge, it is a tribute to the public interest in the administration of justice, and the duties of a lawyer in relation to the court act as the guarantor of proper administration of justice. Violation of the duties of a lawyer in court is unlawful behavior. Such behavior does not necessarily have to be unethical. On the other hand, unethical behavior may not necessarily be illegal.[12]

Otherwise, lawyer's duties have been set out by Robert Bell and Caroline Abela, who assert that the main responsibilities are as follows: 1) to be honest and attentive; 2) to act professionally and 3) to direct clients in the court proceedings so that it would make a contribution to public trust in justice.[13]

In a practical course for lawyers, Graeme Mew states that

> A lawyer's duty to the court entails three key duties:
> – to use tactics that are legal, honest and respectful to courts and tribunals; to act with integrity and professionalism while maintaining his or her overarching responsibility to ensure civil conduct; and
> – to educate clients about the court processes in the interest of promoting the
> – public's confidence in the administration of justice.[14]

International Principles on Conduct for the Legal Profession, adopted on 28 May 2011 by the International Bar Association state that

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Diagnosing the Failure of Professionalism Among Lawyers and Finding a Cure in *Tenth Colloquium on the Legal Profession: Professionalism: Ideals, Challenges, Myths and Realities* (Toronto, Ont.: Continuing Legal Education, Law Society of Upper Canada, 2008) (Oct. 10, 2018), available at https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/t/tenth_colloquium_furlong.pdf.

12 David Ipp, *Lawyers' Duties to the Court*, 114 Law Quarterly Review 63 (1998) (Oct. 10, 2018), available at https://auckland.rl.talis.com/items/7B55AF42-47A7-C0B6-1758-E9EE61365682.html.

13 Robert Bell & Caroline Abela, *A Lawyer's Duty to the Court* (Oct. 10, 2018), available at http://www.weirfoulds.com/files/11024_10167_CEA%20-%20A%20Lawyer's%20Duty%20to%20the%20Court.pdf.

14 Mew, *supra* note 10.

> A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.[15]

Western Australian Barristers' Rules of 5 October 2011 stated that

> (a) barristers owe their paramount duty to the administration of justice;
> (b) barristers must maintain high standards of professional conduct;
> (c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully and with competence and diligence;
> (d) barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues;
> (e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients.[16]

Pursuant to the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015,

> A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.[17]

According to Sir Gerard Brennan,

> the purpose of the lawyer in the trial is the proper administration of justice, and the purpose of the trial is to administer justice in accordance with the law. It is the basis of a civilized society.[18]

As pointed out in his speech at the seminar of the Victorian Bar Association, Justice Tony Pagone states that the administration of justice in the adversarial process depends to a large extent on the proper performance of the duties of lawyers in

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[15] International Bar Association, International Principles on Conduct for the Legal Profession, 28 May 2011, para. 5.1 (Oct. 10, 2018), available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C.

[16] Western Australian Bar Association, Western Australian Barristers' Rules, 5 October 2011, as at 23 February 2017, para. 5 (Oct. 10, 2018), available at https://www.wabar.asn.au/images/file/Western%20Australian%20Barristers'%20Rules%20(23%20February%202017).pdf.

[17] Legal Services Council, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, para. 3.1 (Oct. 10, 2018), available at https://www.legislation.nsw.gov.au/regulations/2015-244.pdf.

[18] Sir Gerard Brennan, *Strengths and Perils: The Bar at the Turn of the Century* in *The Byers Lectures 2000–2012* 1 (N. Perram & R. Pepper (eds.), Annandale, N.S.W.: The Federation Press, 2012).

court and the conduct of their affairs. The judge is unable to know in advance what witnesses will be called, which evidences should be prioritized, or which questions should be asked during a cross-examination. Decisions on issues that will necessarily affect the course of the trial and its duration will be assumed by a lawyer, not by a judge. The only thing that determines the role of a lawyer in court is his task of helping the court in the proper resolution of the dispute. It is in this sense that both the judge and the lawyer are jointly involved in the administration of justice. The duty of a lawyer in court, and the duty that he has before the client, is how the client's case is presented and explained to the person making the decision. The lawyer "is personally responsible for the conduct and presentation" of the case in court and "must exercise personal judgment upon the substance and purpose of statements made and questions asked." Judges rely on what is said to them by lawyers.

Therefore, Justice Tony Pagone has defined the nature of the lawyer's duties in the court as *common participation with judges in the cause of administration of justice*,[19] which is a revolutionary point of view for the national scientific doctrine.

The desire to win a case does not play any role in relation to liability before a court. In *Giannarelli v. Wraith*, the High Court of Australia pointed out that the role of a lawyer is not merely the representation of the interests of his client in the adversarial process, but also to help the court in the administration of justice in accordance with the law.[20]

The fact that the duty of a lawyer is to act within the law, helping the court to reach a proper resolution of the dispute in reasonable terms and in an effective manner, was recognized by courts in many court decisions.[21]

Though it is not easy to tell precisely which duty prevails over the other, in practice the majority of lawyers consider the duty to the client as supreme. That such an opinion is common among lawyers and scholars in Ukraine is partly explained by the peculiarities of the national legislation.

There is also a third position on this problem, which, on the one hand, is possible to agree with and, on the other hand, does not resolve practical questions for lawyers and does not give a clear answer to the question of its concrete application in this or that situation. The position proposes that *each duty complements the other as a composite of the general duty to the public and the primacy of either duty depends on the circumstances or context of each case.*[22] Thus, the decision of this issue is left to

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19 Tony Pagone, *The Advocate's Duty to the Court in Adversarial Proceedings*, Victorian Bar Ethics Seminar, 23 July 2008 (Oct. 10, 2018), available at http://classic.austlii.edu.au/au/journals/VicJSchol/2008/10.pdf.

20 *Giannarelli v. Wraith* [1988] 165 C.L.R. 543.

21 *See*, e.g., *D'Orta-Ekenaike v. Victoria Legal Aid* [2005] 223 C.L.R. 1; *Giannarelli v. Wraith*, *supra* note 20.

22 Vincent Mtavangu, *Balancing a Duty to the Court and the Client: A Dilemma in Legal Practice in Tanzania*, 4(2) Open University Law Journal 147 (2013).

the discretion of the lawyer, who again finds himself in an uncertain situation and can make a mistake.

Based on the study of foreign scientific doctrine, we are able to conclude that *the main duty of a lawyer before a court is promotion of the proper and efficient administration of justice*, which, in its turn, includes:

- *showing respect to the court and other participants of the process;*
- *assistance in using a limited court resource;*
- *inadmissibility of misuse of the process and misleading the court;*
- *directing clients in litigation in the interest of promotion public confidence in the judiciary and the administration of justice;*
- *drawing the judge's attention to the mistakes which he possibly made during the trial.*

Let us consider these duties of the lawyer according to the proposed classification.

1.1. Showing Respect to the Court and Other Participants of the Process

The law associated with contempt of court is meant to protect the rule of law and the institutional integrity of the administration of justice, not the personal esteem or dignity of a judge.[23]

Civility and public discourse lies at the heart of democracies around the world,[24] including in Canada, the U.S., the UK, Australia, and the EU.[25]

In Ontario, the Rules of Professional Conduct require that

> When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.[26]

The Ontario Court of Appeal stated that the court and counsel have a shared responsibility to maintain civility, both inside and outside the courtroom. In *Landolfi*

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[23] *Re Duncan* [1958] S.C.R. 41; *R. v. Gray* [1900] 2 Q.B. 36; *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73, at p. 93. *See* Paul M. Perell, *The Civil Law of Civility*, Chief Justice of Ontario's Tenth Colloquium on the Legal Profession, 28 March 2008 (Oct. 10, 2018), available at https://docslide.net/documents/papers-from-the-10th-colloquium-paul-perell-the-civil-law-of-civility.html.

[24] Kenneth Grady, *The Election, the Rule of Law, and the Role of Lawyers*, Seytlines.com, 17 November 2016 (Oct. 10, 2018), available at https://www.seytlines.com/tag/rule-of-law/.

[25] Eric Sigurdson, *Civility, Advocacy, and the Rule of Law: From Wall Street to Main Street, From the Boardroom to the Courtroom – Lawyer Civility Is Crucial in an Uncivil World*, Sigurdson Post, 30 June 2018 (Oct. 10, 2018), available at http://www.sigurdsonpost.com/2018/06/30/civility-advocacy-and-the-rule-of-law-from-wall-street-to-main-street-from-the-boardroom-to-the-courtroom-lawyer-civility-is-crucial-in-an-uncivil-world/.

[26] Law Society of Ontario, Rules of Professional Conduct, adopted by Convocation on 22 June 2000, effective 1 November 2000, r. 5.1-1 (Oct. 10, 2018), available at https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-5; *see also Groia v. Law Society of Upper Canada* (Supreme Court of Canada), 2016 O.N.C.A. 471, paras. 12, 13 (Oct. 10, 2018), available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17113/index.do.

et al. v. Fargione, the same Court stated that the trial judge has a responsibility to maintain civility in the courtroom.[27]

In *R. v. Felderhof*, the Court of Appeal also stated that uncivil behavior in the courtroom diminishes the public's respect for the court and for the administration of justice and thereby undermines the legitimacy of the results of the adjudication.[28]

The duty of lawyers to the court is important, if only because there are consequences for lawyers who fail to comply with them. The evidence for this is the possibility of lawyers being subject to punishment for contempt of court, and administrative, and even criminal, liability. However, disrespect does not necessarily apply to such actions for which responsibility is provided for by law.

It is pointed out in the legislation of Ukraine that the persons participating in proceedings address to the court with the words *Your honor* or *Respected court* (Art. 161 of the Civil Procedure Code of Ukraine[29], Art. 329(3) of the Criminal Procedure Code of Ukraine[30]). But these forms of address are only used in relation to judges during the administration of justice. There is no procedural compulsion established by the law that could be applied to a person who fails to use such forms of address or fails to address the judge at all. Also, the law does not specify the way to address a judge outside the courtroom.

Disrespect to a court in Great Britain and the United States is, as a rule, considered an action (act or omission), which directly or indirectly harms the normal course of the proceedings.[31] Disrespect to a court may be any intervention in the administration of justice: premature publication in the press, negotiations with the jury, pressure on parties and witnesses, inadmissible conduct in the court, or insubordination. For example, in Great Britain the Contempt of Court Act 1981[32] established the *strict liability rule*, according to which the person is responsible for interference in the administration of justice regardless of his intentions.

The establishment of responsibility for contempt of court is considered one of the conditions of the independence of the judge in the administration of justice.

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27 *Landolfi et al. v. Fargione* (2006), 79 O.R. (3d) 767 (Ont.C.A.), para. 101 (Oct. 10, 2018), available at https://www.canlii.org/en/on/onca/doc/2006/2006canlii9692/2006canlii9692.html.

28 *R. v. Felderhof* (2004), 68 O.R. (3d) 481 (C.A.), para. 83 (Oct. 10, 2018), available at http://www.osc.gov.on.ca/en/Proceedings_nr_20040419_osc-r-v-felderhof.htm.

29 Цивільний процесуальний кодекс України від 18.03.2004 No. 1618-IV [Civil Procedure Code of Ukraine No. 1618-IV of 18 March 2004] (Oct. 10, 2018), available at http://zakon5.rada.gov.ua/laws/show/1618-15.

30 Кримінальний процесуальний кодекс України від 05.04.2001 No. 2341-III [Criminal Procedure Code of Ukraine No. 2341-III of 5 April 2001] (Oct. 10, 2018), available at http://zakon5.rada.gov.ua/laws/show/4651-17.

31 *Гальперин М.Л.* Ответственность в гражданском судопроизводстве: актуальные вопросы теории и процессуальной политики [Mikhail L. Galperin, *Responsibility in Civil Judicial Proceedings: Topical Issues of Theory and Procedural Policy*] 55 (Moscow: Wolters Kluwer, 2011).

32 Contempt of Court Act 1981, c. 49 (Oct. 10, 2018), available at http://www.legislation.gov.uk/ukpga/1981/49.

On the other hand, the lawyer should not leave without giving attention to the violation of the law, the tactless and disrespectful attitude of the court and other process participants to his client, himself or the bar as a whole, and has to respond to the corresponding actions in the forms provided for by the current legislation and/or acts of the bodies of attorney self-government.[33] It is very important in the courtroom to maintain an atmosphere that would be based on mutual respect of the participants in the process, pleasant and open to free debate, exchange of opinions and points of view.

For the commission of actions by an advocate, which can be qualified by the court as a lack of respect by him, the liability is placed on the lawyer, established by law. In particular, Art. 185-3 of the Administrative Offences Code of Ukraine provides that

> contempt of court, which violates the guarantee of independence of judges or undermines the authority of justice, entails the imposition of a fine of fifty to one hundred and fifty times the non-taxable minimum income (currently 17 UAH).[34]

Ukrainian legislation regulating liability for contempt of court refers the decision on this issue to the discretion of the court itself, which does not exclude the possibility of abuse of this right. In addition, the national legislation not only fails to disclose the notion of "contempt of court" and does not mention its qualifying features, but does not provide a specific list of acts that can be regarded by the court as contempt of it. Therefore, one should agree that

> The possibility of the existence of such a broad interpretation of the concept of "contempt of court" and establishing severe sanctions for acts in which such disrespect is expressed is possible only where the principles of legality and the rule of law, equality and independence of the participants in the process will not be declarative, but will be observed by all participants in the process, among them by the judges.[35]

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[33] Правила адвокатської етики, затверджені Звітно-виборним з'їздом адвокатів України 2017 року 09.06.2017 [Advocate's Rules of Ethics, approved by the Reporting and Election Congress of Lawyers of Ukraine on 9 June 2017] (Oct. 10, 2018), available at http://unba.org.ua/assets/uploads/legislation/pravila/2017-06-09-pravila-2017_596f00dda53cd.pdf.

[34] Кодекс України про адміністративні правопорушення від 07.12.1984 No. 8073-X [Administrative Offences Code of Ukraine No. 8073-X of 7 December 1984] (Oct. 10, 2018), available at http://zakon3.rada.gov.ua/laws/show/80731-10.

[35] *Заборовский В.В*. Правовая сущность ответственности адвоката за проявление неуважения к суду по законодательству Украины // Сибирский юридический вестник. 2016. No. 3(74). С. 118 [Viktor V. Zaborovsky, *The Legal Essence of the Responsibility of the Lawyer for Disrespect to the Court According to the Legislation of Ukraine*, 3(74) Siberian Legal Herald 115, 118 (2016)].

The following case is significant: Judge Raymond Voet held himself in contempt of court and paid a $25 fine. During the prosecutor's closing argument during a jury trial in Ionia County 64A District Court, Voet's new touchscreen smartphone, which was in his shirt pocket, began to emit a noise. At the next recess, Voet held himself in contempt of court, fined himself $25, and stated on the record

> If I cannot live by the rules that I enforce, then I have no business enforcing these rules.[36]

Under Ukrainian legislation, contempt of court is not considered a crime but rather an administrative offence; in most foreign countries criminal liability is provided for the commission of such an offense. For example, contempt of court in Russia, expressed by insulting proceedings' participants, qualifies as criminally punishable (Art. 297 of the Criminal Code of the Russian Federation[37]).

At the same time, the qualification of this action causes certain difficulties in law enforcement practice. This is due, among other things, to the fact that the legislator describing, in Article 297 of the Criminal Code of the Russian Federation, the objective side of contempt of court, does not disclose specific methods of its commission. The term *insult* is used, which itself needs to be made concrete.[38] In practice, the difficulty arises in differentiation of contempt of court as a criminal action from other manifestations of contempt, liability for which is provided for by other branches of law, which is due to the vagueness of the legal regulation of this issue.[39]

The procedural legislation of Ukraine contains rules according to which the participants of the process, as well as other persons present in the courtroom, are obliged to unquestioningly comply with instructions of the presiding judge, observe established order in the court session and refrain from any actions that would be obvious contempt of court or established court rules (Art. 162(3) of the Civil Procedure Code of Ukraine, Art. 134(2) of the Code of Administrative Court Procedure

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[36] Judge Imposes Fine on Self for Cell Phone Mishap, Ionia Sentinel-Standard, 12 April 2013 (Oct. 10, 2018), available at http://www.sentinel-standard.com/article/20130412/NEWS/130419815.

[37] Уголовный кодекс Российской Федерации от 13 июня 1996 г. No. 63-ФЗ [Criminal Code of the Russian Federation No. 63-FZ of 13 June 1996] (Oct. 10, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_10699/.

[38] *Курсаев А.В.* Уголовно-правовая характеристика способов неуважения к суду (по материалам судебной практики) // Вестник Московского университета МВД России. 2016. No. 6. С. 69–77 [Alexander V. Kursaev, *Criminal and Legal Characteristics of Types of Contempt of Court (on the Materials of Judicial Practice)*, 6 Bulletin of Moscow University of the Ministry of Internal Affairs of Russia 69 (2016)].

[39] *Герасимова Е.В.* Преступление, предусмотренное ст. 297 УК РФ: проблемы расследования и установления вида ответственности // Тамбов: Грамота. 2016. No. 8(70). С. 47–50 [Elena V. Gerasimova, *The Crime Under Art. 297 of the Criminal Code of the Russian Federation: Problems of Investigation and Determination of the Type of Responsibility*, 8(70) Tambov: Gramota 47 (2016)].

of Ukraine,[40] Art. 74(4) of the Commercial Procedure Code of Ukraine[41]). Based on an analysis of these rules, one can come to the conclusion that for commission of any of the said actions (in particular, failure to comply with the instructions of the presiding judge), even in case of commission thereof for the first time, a lawyer can be brought to liability.

It should be kept in mind that application of administrative measures to a lawyer is not an obstacle to a court appealing to the regional qualification and disciplinary commissions for the purpose of disciplinary measures. As court practice shows, in most cases, when raising of the question of disciplinary liability of a lawyer with a relevant qualification and disciplinary commission, the courts point out that it was an action by the lawyer that prevented the execution of justice and has signs of contempt of court.

According to the data of the Unified State Register of Court Decisions of Ukraine[42] of 24 August 2018, from 2016 to 2018, 10 proceedings on administrative offences provided for in Art. 185-3 of the Administrative Offences Code of Ukraine were initiated against lawyers. Most of the decisions on these cases were reversed by the appellate instance (6), or sent for proper registration to the body that issued the resolution. In all cases, for the said period, the courts imposed an administrative penalty on the lawyers in the form of a fine in the amount of UAH 850 (RUB 2,030).

The most widespread ground for the termination of administrative proceedings against lawyers is the absence of any administrative offense being properly documented. For example, a judge of the city court of the Zaporozhye Region imposed a fine on a lawyer on the basis of Art. 185-3 of the Administrative Offences Code of Ukraine for "a manifestation of contempt of court." Specifically, the record indicated that the "lawyer did not react to the remarks of the presiding judge, and also violated lawyers' ethics, by way of which she manifested contempt of court." The lawyer appealed the resolution on imposition of a fine, and the court of appellate instance revoked it and closed the proceedings in the case in connection with the lack of the evidence of the offense. In its reversal of the resolution on imposition of a fine, the court pointed out the following: the violation of the procedure of the court session should have been specified, namely, how the failure to respond to the remarks of the presiding judge correlated with the offence set out in Art. 185-3 of the

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[40] Кодекс адміністративного судочинства України від 06.07.2005 No. 2747-IV [Code of Administrative Court Procedure of Ukraine No. 2747-IV of 6 July 2005] (Oct. 10, 2018), available at http://zakon5.rada.gov.ua/laws/show/2747-15.

[41] Господарський процесуальний кодекс України від 06.11.1991 No. 1798-XII [Commercial Procedure Code of Ukraine No. 1798-XII of 6 November 1991] (Oct. 10, 2018), available at http://zakon2.rada.gov.ua/laws/show/1798-12

[42] Єдиний державний реєстр судових рішень України [Unified State Register of Court Decisions of Ukraine] (Oct. 10, 2018), available at http://reyestr.court.gov.ua/.

Administrative Offences Code of Ukraine, which provides, in particular, such a form of contempt of court as "disobeying of the presiding person's instructions."[43]

Sometimes judges subject lawyers to administrative liability for contempt of court without legitimate reason. The head of the district court of the city of Dnipro has brought a lawyer to administrative responsibility for filming a court session on a mobile phone. The lawyer correctly pointed out that, according to Art. 11(4) of the Law of Ukraine "On the Judiciary and Status of Judges," persons present in the courtroom may make video and audio recordings in the courtroom using portable video and audio recorders without obtaining a separate court authorization, but taking into account the limitations established by law.[44]

As Oleksandr Drozdov, the chairman of the Higher Qualification and Disciplinary Bar Commission of Ukraine (HQDBC), stated:

> …often, client's interests conflict with the ethics of relations in a court session. Excessive perseverance and adherence to principle in defending the interests of the client by the counsel for the defense sometimes crosses the boundary and can be considered disrespectful by judges. The HQDBC has received a lot of complaints from judges in connection with this.[45]

As a rule, judges either complain about the lack of discipline of lawyers who does not appear in the court sessions or about their unsuitable behavior during the trial.[46]

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[43] Прояв неповаги до суду у випадку притягнення до адмінвідповідальності має бути конкретизований у протоколі та відповідати диспозиції ст. 185-3 КУпАП (Апеляційний суд Запорізької області від 6 грудня 2016р. у справі No. 316/1216/16-п) [Manifestation of the Disregard for the Court in the Case of Bringing to Administrative Responsibility Must Be Made Concrete in the Protocol and Comply with Article 185-3 of the Administrative Offences Code of Ukraine (Court of Appeal of the Zaporizhia Oblast of 6 December 2016 in the case No. 316/1216/16-p)] (Oct. 10, 2018), available at https://protocol.ua/ua/sud_proyav_nepovagi_do_sudu_u_vipadku_prityagnennya_do_adminvidpovidalnosti_mae_buti/.

[44] Суддя оштрафував адвоката за зйомку на засіданні // Українські Новини. 05.10.2016 [The Judge Fined the Lawyer for Filming at the Court Hearing, Ukrainian News, 5 October 2016] (Oct. 10, 2018), available at https://ukranews.com/ua/news/452930-suddya-oshtrafuvav-advokata-za-zyomku-na-zasidanni.

[45] *Слободян І.* Голова ВКДКА Олександр Дроздов: Судді створюють небезпечну практику, яка може вдарити по їхньому авторитету і гарантіям // Закон і Бізнес. 21.07–27.07.2018. No. 29(1379) [Ivan Slobodian, *Chairman of the HQDBC Oleksandr Drozdov: The Judges Create a Dangerous Practice That Can Influence on Their Authority and Guarantees*, Law and Business, 21–27 July 2018, No. 29(1379)] (Oct. 10, 2018), available at http://vkdka.org/golova-vkdka-oleksandr-drozdov-suddi-stvoryuyut-nebezpechnu-praktiku-yaka-mozhe-vdariti-po-jihnomu-avtoritetu-i-garantiyam/.

[46] *Гресь О.* Сім раз подумай, один – поскаржся // Закон і Бізнес. 31.03–06.04.2018. No. 13(1363) [Oleksandra Hres, *Think Seven Times, Complain Once*, Law and Business, 31 March – 6 April 2018, No. 13(1363)] (Oct. 10, 2018), available at http://vkdka.org/sim-raziv-podumaj-odin-poskarzhsya/.

In decisions of the European Court of Human Rights (ECHR) in cases *Kornev and Karpenko v. Ukraine*[47] and *Gurepka v. Ukraine*[48] it was stated that considering the severity of the punishment for the offense provided for by Article 185-3 of the Administrative Offences Code of Ukraine, it is not of no importance, it is criminal, in essence, and subject to the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

One should agree with the position that the legal regulation of the institution of contempt of court in each state, including in Ukraine, must be implemented taking into account the provisions specified in the ECHR judgment on the case *The Sunday Times v. The United Kingdom*,[49] where it is stated that

> …the aim of the law of contempt is not to make the judiciary immune from all criticism. Thus, it was hardly necessary to state in this connection, as does the judgment, that "the courts cannot operate in a vacuum."[50]

The ECHR has repeatedly pointed out that Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention) is applied to the lawyer's professional speeches which may be of a keen and even grotesque character with the aim of intensifying the figurativeness of his language and influence on the judges, but they should not cross the bounds of direct insults. The ECHR considers the conscientiousness of intentions, which has to be taken into account in evaluation of the facts of violation of the right to freedom of speech, as an important feature that makes it possible to separate permissible criticisms from inadmissible. In the case of *Čeferin v. Slovenia*, the ECHR recognized a fine for a lawyer for contempt of court by violation of the freedom of expression, and once again expressed the position on the necessity of maintaining a balance between protecting the authority of the judiciary and protecting freedom of speech. The ECHR drew attention to the fact that non-government officials, including lawyers, have a broader right to freedom of expression than civil servants (judges and prosecutors).

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47 Справа «Корнєв і Карпенко проти України» (Заява No. 17444/04) від 21.01.2011 [*Kornev and Karpenko v. Ukraine*, Judgment, No. 17444/04, 21 January 2011] (Oct. 10, 2018), available at http://zakon2.rada.gov.ua/laws/show/974_637.

48 Справа «Гурепка проти України (No. 2)» (Заява No. 38789/04) від 08.07.2010 [*Gurepka v. Ukraine (No. 2)*, Judgment, No. 38789/04, 8 July 2010] (Oct. 10, 2018), available at http://zakon5.rada.gov.ua/laws/show/974_565.

49 *The Sunday Times v. The United Kingdom*, Judgment, No. 6538/74, 26 April 1979.

50 *Cited by Заборовский В.В.* Значение правоприменительной практики Европейского суда по правам человека в аспекте реализации принципа пропорциональности в отношениях между адвокатом и судом // Журнал международного права и международных отношений. 2016. No. 3–4. С. 17–21 [Viktor V. Zaborovsky, *The Significance of the Law-Enforcement Practice of the European Court of Human Rights as Regards Implementation of the Principle of Proportionality in the Relationship Between a Lawyer and a Court*, 3–4 Journal of International Law and International Relations17 (2016)].

At the same time, the lawyer, taking into account his legal knowledge, should be more restrained in his right than a simple civil servant.[51]

So, proceeding from the above, on the conclusion can be made that the necessity of the legal implementation of the rules that provided the proper balance between the requirements to remain respectful to the authority of the judiciary and the necessity for the lawyer, within the limits of his powers, to perform the duties of the defender (representative) in the case. The necessity of observing this balance by all participants in the proceedings, including judges, should be considered as one of the main conditions for the proper administration of justice.

There are many other issues related to the ethical aspects of the relationship between participants in the trial, including lawyers and judges. But within the scope of this article we are only able to focus on some of them, which, based on the subject of our study, deserve the greatest attention.

Recently, due to the legal and judicial reform in Ukraine and the modernization of the judiciary, there have been numerous cases of criticism of court decisions by lawyers, including in the media. The desire to point out the weaknesses of the judiciary, the desire to improve the justice system, as well as possible other motives (the impact on the court of higher authority, PR for the lawyer) may be grounds for such criticism. However, most lawyers are well aware of the inadmissibility of commenting lawsuits before their entry into force. In connection with this, we consider it necessary to supplement the Advocate's Rules of Ethics of Ukraine with the following provisions:

> The lawyer should always have due respect to the court. In legal proceedings, the lawyer must cooperate fully with the court in order to promote the interests of justice. A lawyer shall not publish in the press, social networks or otherwise publicly to give assessment of a court's activity in a matter under consideration or assessment of a court decision that has been issued but has not yet entered into force. Court decisions that have entered into force may be commented on by lawyers, but not in such a way that such comments could be viewed by society as a discrediting the judiciary.

Such steps will allow lawyers to conduct a civilized dialogue with the judicial system on the changes that they consider necessary to carry out in the court system itself.

1.2. Assistance in the Use of Limited Court Resources

In the *Main-Road Property Group Pty* case, the Victorian Court of Appeal pointed out that, as a participant of the legal proceedings, a lawyer has to have obligations

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[51] *Čeferin v. Slovenia*, Judgment, No. 40975/08, 16 January 2018 (Oct. 10, 2018), available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180286%22.

to assist the court in the effective administration of justice. The court indicated the existence of significant public interest in the timely resolution of proceedings and the role of lawyer in promoting the most effective use of limited court resources. The court established that

> the legitimate interests of the client are usually best served by the concise and efficient presentation of the real issues in the case. Nevertheless, some clients have an interest in protracted legal proceedings. This cannot be given effect by lawyers if they are to act consistently with their duty the court.
>
> The Court in *A Team* also observed that the obligation is now more important than ever "because of the complexity and increased length of litigation in this age." Without this assistance from practitioners, "the courts are unlikely to succeed in their endeavour to administer justice in a timely and efficient manner."[52]

One of the peculiarities of judicial reform in Ukraine in late 2017 was the introduction of a new institution of inadmissibility of abuse of procedural rights. In accordance with the new legislation, the court is obliged to take measures to prevent the abuse of the procedural rights of the parties. In the case of abuse of procedural rights by a participant in court proceedings, a court shall apply measures established by law to such participant, among which the following measures of procedural compulsion may be taken: warning; removal from the courtroom; temporary withdraw of evidences for investigation by the court; the calling of a witness (only for a civil process); a fine (Art. 44 of the Civil Procedure Code of Ukraine, Art. 43 of the Commercial Procedure Code of Ukraine, and Art. 45 of the Code of Administrative Court Procedure of Ukraine). The above has the risk of stimulating another form of abuse of procedural law, i.e. from the side of the court, because it appears to avoid the consideration of "inconvenient" procedural issues and has an influence on the lawyers.

Abuse of rights is, firstly, only legal from the formal point of view; secondly, a casuistic way of clarifying the meaning of the term "unethical means" in the law does not cover all possible forms abuse; thirdly, the content of the concept of "obstruction of the lawful implementation of the process..." is not disclosed. From the point of view of the said shortcomings of the formulations, there is every reason to believe that, in the event of a dispute regarding the unethical and unlawful nature of the lawyer's actions, the arguments of the latter regarding the correctness of his position with reference to legal norms in which his rights are guaranteed may be outweighed. In addition, concepts used by the national lawmaker, i.e. "honesty" and "abuse of rights," are not such that they do not require additional interpretation, on

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[52] Marilyn Warren, *The Duty Owed to the Court – Sometimes Forgotten*, Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009 (Oct. 10, 2018), available at http://jca.asn.au/wp-content/uploads/2013/11/2009OriginalKeynoteAddress.pdf.

the contrary, they are multi-valued appraisal concepts. That is why, as it is rightly pointed out in the legal literature,

> for the correct use, it is necessary for the legislator to specify their content, taking into account existing legal practice and the relevant scientific researches.[53]

It is necessary to point out that the legislation and doctrine of other developed countries of the world, does not fully sole the said problem either.[54]

Lawyers have to be prepared to deal with various prejudices, for example with those prejudices affecting the exercise of the rights granted by the Convention, including the right to a fair trial. Attorneys have to convince judges to respond appropriately to such prejudices and, in accordance with the Convention and case law, whenever a lawyer makes reasoned claims under the Convention. Lawyers should keep an eye on the professional conduct of a judge in order to make sure of his impartiality and should express their opinion when they believe that this fundamental principle of the right to a fair trial is being violated.[55]

In our opinion, being an active participant in the process of law enforcement, and occupying an independent place in the mechanism of justice, the advocacy should perform an important function of professional and legal control over the provision of the constitutional rights and freedoms of the human being.[56] This thesis is confirmed also by international documents regulating the Bar Association sphere of activity. The Charter of Core Principles of the European Legal Profession defines the role of a lawyer as an indispensable participant of a fair trial, which not only serves the interests and protects the rights of his client, but also performs functions that include prevention of conflicts, providing conflict resolution in the further development of the law, as well as protection of freedom, justice and the rule of law.[57]

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53 *Полянський Т.Т.* Зловживання процесуальними правами: юридичні засоби попередженнята можливості їх удосконалення // Вісник Національної академії правових наук України. 2013. No. 3(74). С. 37 [Taras T. Polyansky, *Abuse of Procedural Rights: Legal Means of Notification and Possibilities for Their Improvement*, 3(74) Bulletin of the National Academy of Legal Sciences of Ukraine 31, 37 (2013)].

54 *Аболонин В.О.* Злоупотребление правом на иск в гражданском процессе Германии: Монография [Vadim O. Abolonin, *Abuse of the Right to Sue in Civil Procedure in Germany*: Monograph] (Moscow: Wolters Kluwer, 2009).

55 Ruth van der Pol, *supra* note 1.

56 *Вільчик Т.Б.* Адвокатура як інститут реалізації права на правову допомогу: порівняльно-правовий аналіз законодавства країн Європейського Союзу та України: Докт. дисс. [Tetyana B. Vilchyk, *Advocacy as an Institution for the Implementation of the Right to Legal Assistance: Comparative Legal Analysis of the Legislation of the Countries of the European Union and Ukraine: A Thesis for a Doctor's of Law Degree*] (Kharkiv, 2016).

57 Charter of Core Principles of the European Legal Profession, adopted at the CCBE Plenary Session held on 24 November 2006, at 7–8 (Oct. 10, 2018), available at https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf.

Ultimately, the lawyer is bound to assist the court in any way to ensure that it reaches a righteous, judicious and just decision. The lawyer's overriding and primary duty is to the court, which requires the lawyer to exercise proper administration of justice.

1.3. The Inadmissibility of Abuse of the Process and Misleading of the Court

If civility maintains the dignity of the profession and contributes to the continuation of a just society, to uncivil conduct, in contrast, impedes the goal of efficient conflict resolution, in turn, delaying or even denying justice.[58]

From the point of view of the judge, a lawyer's reputation for honesty is a powerful weapon in his favor.[59]

The main duties of a lawyer in court are also honesty and professionalism. Lawyers must do their utmost to promote the correct application of the law in the case. They should be frank in their answers and disclosure of information before a court, they should not mislead the court, not abuse the process or deliberately delay it. Sometimes, in practice, clients are interested in delaying litigation, but such a desire should not be fulfilled by lawyers for whom their duties to the court are of paramount importance. In the *Re Gruzman* case, it was pointed out that the duty required the lawyers to act honestly, frankly and competently, give independent judgment in litigation, and that their behavior should not be such that it seemed that there was abuse of the process. It is important to note that lawyers should not mislead the court, but should be frank in their answers and disclosure of information to the court. In short, lawyers ought to do everything they can to ensure that the law is applied correctly.[60]

The duty of a lawyer is to act within the law, helping the court to reach a proper resolution of the dispute within reasonable time and in an efficient manner. The Victorian Court of Appeal pointed out that as a participant of legal proceedings, a lawyer should have an obligation to assist the Court in the effective administration of justice. The duty of the lawyer not to mislead the court and not to give up "an unfounded shadow on the witness" is part of his duty to the court.[61]

It is said in Western Australian Barristers' Rules that

> A barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.

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[58] Kara A. Nagorney, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12(4) Georgetown Journal of Legal Ethics 815, 816–817 (1999), as cited in *R. v. Felderhof*, *supra* note 28, para. 83.

[59] James Douglas, *Lawyers' Duties to the Court*, Papua New Guinea Law Society, 4 September 2013 (Oct. 10, 2018), available at http://www5.austlii.edu.au/au/journals/QldJSchol/2013/61.pdf.

[60] *Re Gruzman; ex parte the Prothonotary* [1968] 70 S.R. (N.S.W.) 316, at 323 (Oct. 10, 2018), available at https://nswlr.com.au/view-pdf/70-SR-NSW-316.

[61] *Rees v. Bailey Aluminium Products Pty Ltd.* [2008] V.S.C.A. 244; 21 V.R. 478 (Oct. 10, 2018), available at https://jade.barnet.com.au/summary/mnc/2008/VSCA/244.

> A barrister must not deceive or knowingly or recklessly mislead the Court.
> A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading.[62]

The American Bar Association, in recommending model legal ethics rules in 1983, said lawyers should not expose lies by their clients in most out-of-court contexts, such as business transactions. But in court proceedings, the American Bar Association said, confidentiality must yield to lawyers' duty not to lie or knowingly let their clients lie to judges.[63]

Under the American Bar Association Model Rules of Professional Conduct the lawyer should first try to withdraw from the case. If the judge will not permit that, and the attorney believes the client has just committed perjury or is about to do so, the lawyer should inform the judge.[64]

At the same time, according to Allan C. Hutchinson,

> in the adversarial system, although deception is prohibited, there is a thin line between a commitment to deceive the other side and an unwillingness to help it.[65]

On the same point, Robert Bell and Caroline Abela argued that, while a lawyer does not need to assist an adversary in both contested and uncontested cases, he is permitted to be silent on certain matters; but he is not permitted to actively mislead the court.[66]

Nevertheless, it is very difficult if not next to impossible to draw a line on what are permissible and impermissible mistakes which may be taken advantage of by the lawyer when committed by his opponent:

The general understanding in the adversarial system is that lawyers do promote their clients' interests with the "maximum zeal" permitted by law, and are morally responsible neither for the ends pursued by their clients nor the means of pursuing those ends, provided both are lawful.[67]

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62 Western Australian Barristers' Rules, *supra* note 16, paras. 25–27.

63 Stuart Taylor Jr., *Legal Community and Top Court Debate Lawyer's Duty When Clients Lie*, The New York Times, 5 May 1985 (Oct. 10, 2018), available at https://www.nytimes.com/1985/05/05/us/legal-community-and-top-court-debate-lawyer-s-duty-when-clients-lie.html.

64 American Bar Association, Model Rules of Professional Conduct, adopted by the ABA House of Delegates on 2 August 1983 (Oct. 10, 2018), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

65 Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* 6 (Toronto: Irwin Law, 1999).

66 Bell & Abela, *supra* note 13.

67 Michael Wilson et al., *Stranded Between Partisanship and the Truth?: A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29(2) Melbourne University Law Review 448, 452 (2005).

Sometimes it whether you should disclose prior convictions of your client unknown to the prosecution becomes an issue. As a general principle, defense counsel owe no duty to disclose that information and should not do so unless instructed by a client who fully understands the consequences of the proposed disclosure. You are not entitled, however, to mislead the court by, for example, informing it that your client has no convictions when the client has been convicted previously.[68]

Currently, more and more clients, as well as lawyers, are punished for the improper behavior of lawyers. Like a glaring offer to give false testimony, the conscious creation of a misconception about the fact is another way for a lawyer to mislead the court. When a lawyer knows that a court acts on the basis of an erroneous assumption and actively supports a false presentation, the lawyer is guilty of misleading the court.[69]

The duty to the court may be summarized to include candor, honesty and fairness. Therefore, it is quite unprofessional and unethical for the lawyer to mislead the court by using deliberate falsehoods. Likewise, the lawyer is also enjoined to uphold justice and to protect the court's integrity.[70]

Lord Denning rightly emphasized that it is a mistake to suppose that a lawyer is the megaphone of his client to say what he wants.[71]

A lawyer is required to exercise independent judgment as an intermediary between the client and the decision maker, i.e. the court, and he is also personally responsible for the conduct and presentation of a case in court.[72]

Paragraph 5.3 of the Bangalore Principles of Judicial Conduct states that

> A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.[73]

The Code of Conduct for Lawyers in the European Union states that the lawyer must maintain due respect and civility in relation to the court.[74]

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68 James Douglas, *Lawyers' Duties to the Court*, *supra* note 59.

69 Bell & Abela, *supra* note 13.

70 Stephen Warne, *A New Advocates' Immunity Case*, The Australian Professional Liability Blog, 20 November 2010 (Oct. 10, 2018), available at http://lawyerslawyer.net/2010/11/20/a.

71 *Arthur J.S. Hall v. Simons* [2002] 1 A.C. 615. The same statement was also reiterated by Judge Mwalusanya as he then was in the case of *Khasim Hamisi Manywele v. Republic*, High Court of Tanzania at Dodoma, Criminal Appeal No. 39 of 1990 (Unreported).

72 Tony Pagone, *Divided Loyalties? The Lawyer's Simultaneous Duty to the Client and the Courts*, Monash Guest Lecture in Ethics, 20 November 2009, at 2, 13 (Oct. 10, 2018), available at http://worldlii.austlii.edu.au/au/journals/VicJSchol/2009/19.pdf.

73 Bangalore Principles of Judicial Conduct (2002) (Oct. 10, 2018), available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

74 Code of Conduct for Lawyers in the European Union, *supra* note 9, para. 4.3.

Therefore, in order to attain the objectives of legal proceedings, both lawyers and judges (as well as other process participants) should treat each other with respect.

1.4. Direction of Clients in Litigation to Act in the Interests of Promoting Public Confidence in the Judiciary and the Administration of Justice

Robert Bell and Caroline Abela consider that, along with other duties, attorneys should direct clients in litigations to act in a way that promotes public confidence in the administration of justice.[75] The latter rule is very important for Ukraine today, since its perception by the national legislator will increase the level of public trust in the judiciary.

A position on the role of a lawyer in the formation of public trust in the judiciary was expressed by the High Court of Australia in the judgment in the case *Giannarelli v. Wraith*: the efficiency of the administration of justice and the degree of public trust in the judiciary depend, to a great extent, on the honesty and credibility of the lawyers practicing in court. Their duty of honesty and justice is the quintessence of the role of the lawyer as a party to the lawsuit; the court and the public rely on it, regardless of whether such lawyer has any experience or not.[76]

In our opinion, it is advisable to amend the Advocate's Rules of Ethics of Ukraine to state that an attorney must not only personally show respect for the court, but also guide his client to do the same, directing him to promote public trust in the judiciary, which is very relevant in modern times in view of the stage of development of the national legal system.

1.5. Attorney's Attention to a Judge's Mistakes Made During a Trial

The well-known Latin saying, "*errare humanum est*" (to err is human), is also true of judges in the administration of justice. The reasons for judges' mistakes, however, may differ[77] (but this issue goes beyond our research).

Edward F. Barrett writes:

> We have no archangel on the bench. The jury is not drawn from a. venire of Cherubim or Seraphim. The litigants, their lawyers and their witnesses are not saints. The trial of a lawsuit is a very human thing.[78]

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75 Bell & Abela, *supra* note 13.

76 *Giannarelli v. Wraith*, *supra* note 20.

77 For more on this, *see Куйбіда Р.* Суддівська помилка: критерії розмежування зловживання (свавілля), недбалості та добросовісної поведінки: Аналітичний звіт, підготовлений в рамках Проекту Ради Європи «Підтримка реформи системи суддівської відповідальності в Україні» [Roman Kuibida, *Judicial Mistake: Criteria for Delimiting Abuse (Tyranny), Negligence and Good Faith Conduct: Analytical Report Prepared Within the Framework of the Council of Europe Project "Support for the Reform of the Judiciary System in Ukraine"*] 22 (Kyiv, 2015).

78 Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37(4) Notre Dame Law Review 479, 479 (1962).

Lawyers should assist the court in the administration of fair justice since, without such assistance, the courts are unlikely to be able administer it timely and effectively. Therefore, lawyers and judges should cooperate in order to ensure the fair administration of justice, which brings us onto the next duty of a lawyer: he must draw the judge's attention to mistakes that he may have made.

There is also a more categorical point of view on this:

> The first and most important thing justifying the existence of the Institution of Advocacy is the maximum level of effort made to avoid miscarriage of justice.[79]

In judicial practice, there are cases when an elementary mistake by a lawyer causes the same elementary miscarriage of justice.[80]

A judicial decision made with an obvious mistake that should not have been made by a person with the high status of a judge who has conscientious attitude towards the performance of his duties, may be considered to have been made as a result of negligence. The judge has no malicious intention to make a mistake in such a case or it is, at least, such intent is not obvious. So, some mistakes that, at first glance, are the result of negligence may actually be abusive. For example, the judge deliberately keeps silent about the rule of law, which should have been applied in order to declare a decision unjust but, at the same time, such decision appeared lawful. However, it may be impossible to prove abuse (willfulness) only on the basis of a court decision and case material. If the lawyer has not referred to such a rule of law as a result of ignorance, but the court knows it, but disregards it, it is difficult to prove that the "mistake" was made on purpose. A conscientious judge's mistake occurs in the case when a mistake has been permitted by the court, faithfully fulfilling its obligations.[81]

Lawyers should pay attention to the widespread cases of failures by courts to adhere to the practice of the ECHR, especially if it is available in the relevant country's language and even officially published, including such failures which are intentional. Such failure is revealed, for example, when misleading arguments ostensibly adhering to the position of the ECHR are used and are then refuted by the ECHR itself, when false claims are made about other court decisions, etc.

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[79] *Фіолевський Д.П.* Адвокатура: Підручник [Dmitro P. Fiolevsky, *Advocacy: Textbook*] 121 (Kiev: Alerta; Pretsedent, 2006).

[80] For example, the court dismissed the lawsuit, "since a five-year-old child cannot be responsible for the debts of the father testator." Of course, the lawyer thought the same, but did not pay attention to it. But, having become the owner of the house, the child became simultaneously the successor of the father as a debtor. *Cited by Ромовська З.В.* Суд і адвокат. Проблеми співпраці // Адвокат. 2013. No. 1(148). С. 9 [Zorislava V. Romovskaya, *Court and Lawyer. Problems of Cooperation*, 1(148) Lawyer 6, 9 (2013)].

[81] Kuibida 2015, at 22.

In most cases, proceeding from the interests of his client, the lawyer should pay attention to the judge's mistakes in the court session. But, in some cases, the lawyer must take into account the fact that this could result, for those present, in laughter or other disrespect towards the court and the judge. However, if such mistake was made in the court decision, the lawyer has the right to address to the same in an appeal or cassation appeal. A well-known Ukrainian lawyer gave the following debatable recommendation to younger lawyers:

> Do not demonstrate your competence in court if the situation does not require it, and do not show that you know something better than a court.[82]

If this is not an end in itself, and the client's interests are protected, then why not?

2. Duties of a Lawyer to a Client and Their Relationship with the Duties of a Lawyer to a Court

Lawyers owe clients many duties which overlap and occasionally conflict. The content of the duty to clients comes from a variety of sources, including case law, rules and commentaries, and academic writing.[83]

Taking into account that the lawyer is a participant in the process of administration of justice and, at the same time, fulfills duties connected with the private interests of his client, there is a need to differentiate between such possible situations when the protection of the interests of a separate individual can conflict with serving the law.

International documents take different approaches to the possibility of a lawyer being in conflict with duties to his client, if the interests of justice so require. For example, the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors points out that

> In the case of prosecutors, their duty is to investigate and prosecute all violations of human rights irrespective of who perpetrated them. In turn, lawyers must at all times carry out their work in the interest of their clients.[84]

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82 *Зейкан Я.П.* Захист у цивільній справі: науково-практичний коментар [Yaroslav P. Zejkan, *Protection in the Civil Case: Scientific and Practical Commentary*] 69 (Kiev: KNT, 2010).

83 Linda Plumpton & Peter Henein, *A Lawyer's Duties to Clients and Witnesses* (Oct. 10, 2018), available at https://www.advocates.ca/Upload/Files/PDF/Advocacy/InstituteforCivilityandProfessionalism/Duty_to_Clients.pdf.

84 International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No. 1, at 5 (Oct. 10, 2018), available at http://www.refworld.org/pdfid/4a7837af2.pdf.

The Code of Conduct for Lawyers in the European Union points out that

> A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend.[85]

In his decision on the *Giannarelli v. Wraith*, Judge Mason pointed out that

> The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary.[86]

In the same case, the Judge Wilson said that

> counsel could never be in breach of duty to the client by fulfilling the paramount duty.[87]

The problem of the relationship between duties of a lawyer to the court and his client is also widely discussed in contemporary foreign legal literature. In 1967, in the United Kingdom in the case of *Rondel v. Worsley* a decision was made, in which it was pointed out that an attorney had the most important duty to the court, to the standards of his profession, to the public, which often results in conflict with his client's interests.[88]

Lord Reid explained in this case that the lawyer has duty to the court, which is of paramount importance: a lawyer must ignore the most specific instructions of his client if they conflict with his duty to the court. It is a mistake to believe that he is the megaphone of his client, to say what he wants, or his instrument to do what he orders. He is not one of these things. He must be faithful to the highest goal. This is a matter of truth and justice.[89]

Developing this idea, Sir Gerard Brennan points out that in the performance of his professional duties, the lawyer receives not only a benefit but also bears a burden. The benefit is obviously, in particular, the possibility to make a career in law as one of the members of the legal profession. The burden lies in the foundation of the duty of the lawyer to obey the rule of law and assist the court in the administration of justice in accordance with the requirements of the law.[90]

Florentino Marabuto, analyzing the activities of Portuguese lawyers, states:

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85 Code of Conduct for Lawyers in the European Union, *supra* note 9, para. 1.1.

86 *Giannarelli v. Wraith*, *supra* note 20, at 556.

87 *Id.* at 572.

88 *Rondel v. Worsely* [1967] 3 W.L.R. 1666 (Oct. 10, 2018), available at http://www.e-lawresources.co.uk/Rondel-v-Worsely.php.

89 *Id*.

90 Brennan 2012, at 217.

> ...first of all, we must serve the interests of justice, as well as the interests of those who have entrusted us with the protection of their rights and freedoms.[91]

David Ipp points out that the duties of a lawyer in relation to a court are of primary importance, although there may sometimes be situations in which they are not consistent with the lawyer's duty with respect to his client.[92]

In his article on lawyer's ethics in Canada, Gavin MacKenzie says that

> The duty of a lawyer to a client and the duty of a lawyer to a court are of equal significance: In the United States the duty to the client is generally seen as the lawyer's primary duty, while in Britain the duty to the court is preeminent. In our rules, the two duties are given equal prominence – which may make ethical choices in advocacy more difficult in our jurisdiction.[93]

Consequently, in the UK, the duty of a lawyer to a court is the dominant duty. As mentioned above, the Australian legislator also has a clear and unambiguous position on the duties of a lawyer to a court and his client.[94]

The opposite opinion is followed by the national legislator. Thus, in Article 8 of the Advocate's Rules of Ethics of Ukraine it is pointed out that "priority of the interests of the client within the limits of legality is a principle the lawyer is obligated to observe in his professional activities" and in Article 43 "Observance of the Principles of the Independence of the Lawyer and the Priority of the Interests of the Client in the Relations of the Lawyer with the Court," the lawyer is advised to consistently observe the principle of priority of the interests of the client before all other interests and considerations connected with the relationship of the lawyer with the court.[95]

For many years, the legislation of Ukraine did not consider advocacy as an integral part of administration of justice and the legal status of a lawyer in court is still not recognized as an assistant of justice. Moreover, sometimes it is believed that when a lawyer performs his duties, he is in opposition to the court. Such a view cannot be considered legitimate, though it has its historical origins. (A detailed analysis of this issue is the focus of our other work.[96])

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91 Деонтология. Этико-юридические правила адвокатуры (адвокат Флорентино Марабуто) // Адвокат (газета). 2002. No. 11. С. 4 [*Deontology. Ethical and Legal Rules of the Bar (Lawyer Florentino Marabuto)*, 11 Lawyer 4 (2002)].

92 Ipp 1998.

93 Gavin MacKenzie, *The Ethics of Advocacy*, 27(2) The Advocates' Society Journal 26 (2008).

94 Western Australian Barristers' Rules, *supra* note 16, paras. 7–9.

95 Advocate's Rules of Ethics, *supra* note 33.

96 *Вильчик Т.Б.* Реализация конституционного права на правовую помощь адвокатурою стран Европейского Союза и Украины: концептуальний анализ: Монография [Tetyana B. Vilchyk, *Realization of the Constitutional Right to Legal Assistance by the Lawyers of the Countries of the European Union and Ukraine: Conceptual Analysis: Monograph*] (Kharkiv: Pravo, 2015).

At the Judicial Conference of Australia Colloquium (Melbourne, 9 October 2009) it was noted that attorneys must fulfill their duty as participants in legal proceedings, including the case when this duty conflicts with their duty to the client. Part of such a lawyer's duty is the necessity to inform the client that it (the duty) has paramount importance for the lawyer.[97] The latter provision seems very important for practical application. A lawyer informing a client of such duty can prevent many complicated situations between the lawyer and the client.

3. Responsibility of the Lawyer for Violation of His Duties

As it is noted by Peter J. Henning,

> A distinction must be drawn between the goal of the judicial system and the broader category of legal representation that incorporates the rules regulating how lawyers represent clients.[98]

The controversial responsibilities of a lawyer concerning a court and his client can result in claims against such lawyer and the possibility of his being brought to justice.

In the legal client–lawyer relationship, the weaker side is the client. For this reason, the legislation of most countries has established special conditions with regard to this relationship, in particular, the possibility that the client, at any time after entering the contract can refuse to exercise its terms and conditions, while the same is not possible for the lawyer, who has duties to comply with all terms of the concluded contract, as well as additional duties (observance of the lawyer-client privilege, professional rules, a prohibition of refusal to continue with case if the lawyer considers the position to be inconsistent and so on), as well as increased liability for the lawyer for non-fulfillment or improper performance of obligations.

Protecting the interests of the client, the attorney stands guard before the interests of law. The legislation of Ukraine establishes a clear boundary between admissible protection and inadmissible violation of official duties. A lawyer is prohibited from entering into an agreement on the provision of legal aid and he is obliged to refuse to execute the contract if the result intended by the client, or the means of achieving it, on which he insists upon, is illegal or contrary to the moral principles of society.[99]

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97 Marilyn Warren, *The Duty Owed to the Court*, *supra* note 52.

98 Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20(1) Notre Dame Journal of Law, Ethics & Public Policy 209, 209 (2006).

99 Закон України від 05.07.2012 No. 5076-VI «Про адвокатуру та адвокатську діяльність» [Law of Ukraine No. 5076-VI of 5 July 2012 "On Advocacy and Legal Practice"], Art. 28(1)(2) (Oct. 10, 2018), available at http://zakon.rada.gov.ua/laws/show/5076-17.

Lawyers cannot act against the will of their client (except when the lawyer is convinced the client is self-incriminating). Recently, a decision by the Supreme Court of Ukraine on inadmissible actions of a lawyer against his client was made.[100]

The legislation of the majority of countries provides for the civil and legal liability of lawyers on grounds of improper performance of the duties of a lawyer both in the judicial sphere and in the course of providing them with other professional legal services, having no connection with the conduct of the case in court.

In accordance with the new Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 in the United Kingdom, barristers' activities must be carried out on a contractual basis, and therefore the barrister is liable for a breach of contractual obligations. In addition, the client has the right, through the court, to demand that the guilty lawyer be brought to disciplinary responsibility and charged for all litigation expenses. As to solicitors, besides contractual liability (indemnification), they are charged with liability caused by the confidential nature of their relations with the client. Means of protection establish the right of justice: there is a presumption of "undue influence" from the side of the solicitor on the client.[101]

The civil-legal liability of the Spanish lawyer in connection with his professional activities is possible for a breach of contractual obligations as a result of neglect, omission or fraudulent acts thereby. Application to the lawyer of civil liability measures is regulated in detail in French legislation. The lawyer's liability in France is foreseen even for minor mistakes. The Law of France No. 71-1130 of 31 December 1971 does not leave any doubts in this regard: members of the Bar Association are responsible for negligence and mistakes made in the performance of their functions (Arts. 17-1 and 4) and the assessment of the lawyer's mistake is conducted by comparing the actions of the lawyer and a model lawyer.[102] Moreover, it does not matter whether the reason for the mistake is the incompetence of the lawyer himself or in the organization of office work and poor control over the work of staff. The size of liability is not limited to the cost of the object of the dispute and can exceed it.

In the United States, where, according to statistics, every fifth lawyer is sued for unfair performance of obligations during a year, the costs of professional liability insurance exceeds all other current expenses of lawyers, except for rent.

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[100] In the decision of the Supreme Court of Ukraine concerning inadmissible acts of a lawyer against his client of 21 June 2018 it is noted that the lawyer expressed a position that differs from the position of his client, it is inadmissible. *See* Верховный Суд признал недопустимыми действия адвоката, выступившего против клиента // Судебно-юридическая газета. 16.07.2018 [The Supreme Court Declared Inadmissible Actions of a Lawyer Who Spoke Against a Client, Judicial and Legal Newspaper, 16 July 2018] (Oct. 10, 2018), available at https://sud.ua/ru/news/sud-info/121790-verkhovnyy-sud-priznal-nedopustimymi-deystviya-advokata-vystupivshego-protiv-klienta.

[101] The Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 (Oct. 10, 2018), available at http://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/22.05.18-approved-contractual-terms-for-GDPR-pdf2.pdf.

[102] Loi n° 71-1130 du 31 décembre 1971, *supra* note 5.

The calculation of the size of the alleged losses is adopted in Anglo-Saxon law, in particular in the United States. Such a system is used in the civil law of France. However, German law permits the possibility of concluding agreements on restriction of the liability of a lawyer for mistakes made in the course of conducting of the case.[103] In case of violation by lawyer of laws, regulations, or professional norms, he is brought to disciplinary responsibility by a disciplinary board, which are created in each chamber of lawyers.

In accordance with the legislation of Ukraine, the contract on the provision of legal assistance is an arrangement whereby one party (lawyer, advocate's office, advocate association) undertakes to provide protection, representation or other types of legal assistance to the other party (client) on the terms and in the order specified by the contract, and the client undertakes to pay for the provision of legal assistance and the actual costs necessary for the performance of the contract (Art. 1(1)(5) of the Law of Ukraine "On Advocacy and Lawyer Practice"). Maksim Kravchenko rightly observes that, since the law contains obligations, there must be ways to ensure their implementation.[104]

Therefore, a contract for the provision of legal aid should provide for the responsibility of the parties for breach of their obligations. Such a rule will balance the position of its strong party – the lawyer – and serve as a guarantee of proper fulfillment of his obligations and the right to adequate legal assistance. It should be taken into consideration that the measures of the material responsibility of lawyers were enshrined still in the in tsarist Russia.[105]

A similar rule is provided by Law No. 63-FZ of 31 May 2002 "On Legal Practice and the Bar in the Russian Federation," according to which the essential terms of a lawyer's agreement with the client are, the size and character of the liability of the lawyer (lawyers) who accepted the assignment (Art. 25(4)(5)).[106]

In practice, it is not always easy to prove the guilt of a lawyer in violation of obligations under the contract on the provision of legal aid. The grounds for bringing to him to civil-legal liability are varied and give lawyer the possibility to prove the absence of at least one of them. Accordingly, if it is proven that at least one or more

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[103] Loi n° 71-1130 du 31 décembre 1971, *supra* note 5.

[104] *Кравченко М.В.* Звільнення адвокатів від цивільно-правової відповідальності за договором про надання правової допомоги // Часопис Київського університету права. 2015. No. 4. С. 188–191 [Maksim V. Kravchenko, *Exemption of Lawyers from Civil Liability Under the Agreement on Legal Assistance*, 4 Journal of the Kyiv University of Law 188 (2015)].

[105] Реформы Александра II [*Reforms of Alexander II*] 331 (O.I. Chistyakov & T.E. Novitskaya (comp.), Moscow: Yuridicheskaya literatura, 1998].

[106] Федеральный закон от 31 мая 2002 г. No. 63-ФЗ «Об адвокатской деятельности и адвокатуре в Российской Федерации» [Federal Law No. 63-FZ of 31 May 2002. On Legal Practice and Advocacy in the Russian Federation] (Oct. 10, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_36945/.

conditions for civil liability are lacking, it cannot hold legally.[107] Specifically, unless otherwise provided by law or a contract, the absence of the debtor's guilt discharges him from liability for breach of obligation. Significant in this context is the case of the disciplinary chamber of the Odessa Regional Qualification and Disciplinary Bar Commission, where it is established that the lawyer received from the defendant, who was in custody, information on a place where money could be found in his apartment and offered such money as a fee. The money was then brought to the cash desk, part of it was written off for the work performed, and part of it was subsequently withdrawn by the prosecutor's office. In fact, the lawyer inflicted damages to the client without justification for an encroachment on money that was not covered by the amount of work performed. However, the lawyer has shown that this amount of money was required as payment and was justified. The lawyer only received a warning.[108]

According to the analysis of the practice of the work of the HQDBC, the main complaints filed for the activities of lawyers are complaints on the failure of the lawyer to perform their professional duties, for receiving a fee without providing legal services or for providing an improper quantity or quality of services, for failure perform professional duties, in particular, failure to attend court sessions, for carrying out investigative actions and unworthy conduct in court, etc. In practice, claims often arise regarding the reimbursement of the clients of lawyer fees that were not worked for. As pointed out by the former chairman of the HQDBC, Valentin Zagariya,

> we are not a court, we cannot interfere in the civil law relationship between a client and a lawyer. As a rule, we refuse to satisfy such complaints.[109]

In our opinion, the Law of Ukraine "On Advocacy and Legal Practice" should consolidate not only norms of the corporate (disciplinary) but also civil-legal (property) responsibility of the lawyer. The consolidation of such responsibility of lawyers will help to strengthen the guarantees of individuals when implementing their constitutional right to legal assistance and increasing of the quality of the latter.

Lawyers' liability, in conjunction with lawyers' professional liability insurance, is the best guarantor of rights for citizens and legal entities who seek legal counsel for legal assistance.

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107 Kravchenko 2015.

108 Рішення дисциплінарної палати Одеської обласної кваліфікаційно-дисциплінарної комісії адвокатури від 4 лютого 1999 р. // Адвокат. 2000. No. 1. С. 52 [Decisions of the Odessa Regional Qualification and Disciplinary Bar Commission of 4 February 1999, 1 Lawyer 52 (2000)].

109 *Ким Ю.* Голова ВКДКА Валентин Загарія: Фактично ВКДКА формує практику правозастосування Правил адвокатської етики // Закон і Бізнес. 12.10–18.10.2013. No. 41(1131) [Yuliya Kim, *Chairman of the HQDBC, Valentin Zagariya: In fact, the Higher QDCA of Ukraine Forms Practice of Law Enforcement of the Rules of Advocacy Ethics*, Law and Business, 12–18 October 2013, No. 41(1131)] (Oct. 10, 2018), available at http://zib.com.ua/ua/42755-valentin_zagariya_faktichno_vkdka_formue_praktiku_pravozasto.html.

In the Code of Conduct for Lawyers in the European Union, it is stated that

> Lawyers shall be insured at all times against claims based on professional negligence.[110]

In Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification Was Obtained on an on-going basis, it is noted that, irrespective of the rules of professional ethics to which a lawyer is subject in his own country, he is obliged to follow the rules of the country in which he decided to practice.[111] The Directive contains the following provision:

> The host Member State may require a lawyer practising under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory. Nevertheless, a lawyer practising under his home-country professional title shall be exempted from that requirement if he can prove that he is covered by insurance taken out or a guarantee provided in accordance with the rules of his home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the competent authority in the host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State.[112]

Today, professional liability insurance is one of the international standards for advocacy, which is provided for in the legislation of many countries of the world.

Thus, under the system of professional liability insurance for German lawyers, individual insurance of lawyers is provided for by private insurance organizations.[113] The Law of France "On the Organization of the Profession of Lawyer" from 1991 also provides for the compulsory insurance of his professional civil liability. And

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[110] Code of Conduct for Lawyers in the European Union, *supra* note 9, para. 3.9.1.

[111] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification Was Obtained, 1998 O.J. (L 77) 36.

[112] *Id.* Art. 6(3).

[113] In the 60s of the last century, German scholars thoroughly investigated the lawyer's contract, including the terms of civil legal liability of a lawyer to a client, possible losses, signs of causation, etc. *See*, e.g., Rudiger Boergen, *Die vertragliche Haftung des Rechtsanwalts* (Berlin: Duncker & Humblot, 1968).

the insurance contract can be concluded by a specific lawyer, group of lawyers or a lawyer.[114] In the United States, each of the 52 states has its own insurance system, with individual insurance prevailing.[115]

The position that a lawyer should be insured against a claim in connection with a charge for improper performance of duties or for other acts committed by him in the process of a case consideration in a court, has been made in a number of court decisions (e.g. *Giannarelli v. Wraith* and *D'Orta-Ekenaike v. Victoria Legal Aid*).

According to the judgment of the ECHR in the *Graziani-Weiss v. Austria* case, compulsory insurance of liability of attorneys is considered non-negotiable in Strasbourg. Although the case itself does not directly concern the status of a lawyer, the following conclusion deserves attention:

> Before being admitted to practise, all lawyers shall be required to furnish proof to the Executive Committee of the Bar Association that they have taken out civil-liability insurance with an insurance company authorised to carry on business in Austria to cover any claims for damages that may be brought against them as a result of their professional activities. They shall maintain the insurance cover throughout the duration of their professional activities and shall furnish proof thereof to the Bar Association on request.[116]

Today, in Ukraine there is no law that directly affirms the insurance of professional activity of a lawyer in the form of voluntary or compulsory insurance. At the same time, in the Law of Ukraine "On Insurance," the list of forms of voluntary insurance is not exhaustive. This gives the theoretical possibility to speak about the insurance of professional liability of a lawyer. The necessity for this is justified as the presence of the interests of the client, who will be able to receive full reimbursement of the losses caused to him as a result of improper work of the lawyer and the lawyer as it should make easy the burden of possible property liability. The size of insurance payments for lawyers may depend, for example, on the level of their qualifications. Thus, French lawyers are obliged to undergo a refresher course and receive a certificate once every five years, and attorneys who do not have such certificates have to pay higher salaries (as compared with colleagues who have increased their qualifications) to insure their professional liability.[117]

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[114] Loi n° 71-1130 du 31 décembre 1971, *supra* note 5.

[115] *Стрэнг Р.* Практика страхования профессиональной ответственности адвокатов в США // Вестник адвокатской палаты Иркутской области. 2006. No. 10. С. 20–24 [Robert Strang, *Practice of Insurance Professional Liability of Lawyers in the USA*, 10 Journal of the Bar Chamber of the Irkutsk Region 20 (2006)].

[116] *Graziani-Weiss v. Austria*, Judgment, No. 31950/06, 18 October 2011 (Oct. 10, 2018), available at http://www.menschenrechte.ac.at/orig/11_5/Graziani-Weiss.pdf.

[117] Vilchyk 2016, at 304–305.

Among the risks that ought to be insured are: unintentional professional mistakes made during the performance of official duties; misinterpretation of legislation; failure to meet deadlines for filing complaints; essential errors during the registration or preparation of documents; failure to notify the client of the consequences of legal actions; unintentionally disclosing data that became known in connection with professional activity, including abdication of powers or dismissal.

The lawyer's duties as to the client should include providing assistance to the client in any lawful way and taking legal action to protect his interests. In this case, the lawyer's duty is to protect only the legitimate interests of the client (Art. 1 of the Law of Ukraine "On Advocacy and Legal Practice").

What should be understood as the legitimate interest of the accused? In the most general form, the defendant's legitimate interest consists primarily of being defended against the charge brought against him. In the late 19th century, Evgeny Vaskovsky wrote:

> Every defendant is interested in being justified and avoiding of punishment.[118]

In modern criminal and procedural literature, the view that the interest of the accused can be both legal and illegal is shared by many authors.[119]

At the same time, some authors proceed from the premise that legitimate interest does not contradict the law, and is supported and protected by law.[120] Others consider that interest expressed in subjective law is legitimate.[121] According to Mikhail Strogovich, the legitimate interest of the accused is an interest protected by legal means.[122]

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[118] *Васьковский Е.В.* Организация адвокатуры: Историко-догматическое исследование. В 2 ч. Ч. 1 [Evgeny V. Vaskovsky, *Organization of the Advocacy: Historical and Dogmatic Research. In 2 parts. Part 1*] 294 (St. Petersburg: P.P. Soykin's Printing House, 1893).

[119] *Смолькова И.В., Мазюк Р.В.* Законные, незаконные и процессуальные интересы обвиняемого в российском уголовном судопроизводстве // Криминологический журнал Байкальского государственного университета экономики и права. 2016. Т. 10. No. 1. С. 156–169 [Iraida V. Smolkova & Roman V. Mazyuk, *Legal, Illegal and Procedural Interests of the Accused Person in Russian Criminal Procedure*, 10(1) Criminology Journal of Baikal National University of Economics and Law 156 (2016)]; *see also Гладышева О.В.* Теоретические основы обеспечения законных интересов личности в уголовном судопроизводстве [Olga V. Gladysheva, *The Theoretical Basis of Ensuring Legitimate Interests of a Person in Criminal Court Procedure*] (Moscow: Yurlitinform, 2012).

[120] Вопросы защиты по уголовным делам: Сборник статей [*Protection Issues in Criminal Cases: Collection of Articles*] 43 (P.S. Elkind (ed.), Leningrad: Leningrad State University, 1967).

[121] *Шадрин В.С.* Обеспечение прав личности при расследовании преступлений [Viktor S. Shadrin, *Ensuring the Rights of a Person in Criminal Investigations*] (Moscow: Yurlitinform, 2000).

[122] *Строгович М.С.* О правах личности в советском уголовном судопроизводстве // Советское государство и право. 1976. No. 10. С. 73–81 [Mikhail S. Strogovich, *On the Rights of a Person in Soviet Criminal Court Procedure*, 10 Soviet State and Law 73 (1976)].

The literature describes the following illegal procedural interests of the accused: "use of false evidence"; "evading appearance before the investigator or the court"; "aspiring to obtain an acquittal, when being guilty, his crime having been fully exposed"; "receiving unreasonable and excessively mild punishment for the committed crime";"a false denial of the committed crime";[123] "the desire to use justice for slander, condemnation of a person who is knowingly innocent, or revenge for lawful actions";[124] "falsely accusing the other party."[125]

The procedural interests of the accused form a system in which the basic procedural interest is the purposeful attitude of the accused to achieving a final procedural decision in the criminal case. And this attitude is not always limited to the choice between the conviction and acquittal. The procedural interest of the accused can change at various stages of criminal proceedings, or even in the framework of a single stage, depending on the change in the procedural situation in the case and the factors affecting the target setting of the accused.[126]

A client will often provide his lawyer with certain information that is connected with the crime. This information can relate to a committed crime or to a crime that is still in the process preparation. In the case of a committed crime, the lawyer is not required to provide information to law enforcement authorities, despite the fact that this could contribute to the rule of law; otherwise the lawyer will act contrary to the legitimate interests of the client and his defense. In the second case (preparation of a crime) there is a dilemma: on the one hand, the provision of such information will promote the rule of law, but will contradict the interests of the client, discrediting the lawyer in the eyes of the client. In the second case, it appears that a lawyer is required to provide information about a crime that is being prepared, since he is thereby able to prevent its commission and protect the legal interests of others. Restrictions on the rights of citizens, who are potential clients of lawyers, are allowed in cases where their actions are aimed at violating numerous rights and legitimate interests of a wide range of people.[127]

In the legislation of Ukraine, as in most foreign countries, there is a special guarantee of the impossibility of putting pressure on a lawyer and the enforcement of his rights, which prohibits the prosecution of criminal or other liability of a lawyer

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123 *Цыпкин А.Л.* Очерки советского уголовного судопроизводства [Alter L. Tsypkin, *Essays of Soviet Criminal Court Procedure*] 18 (Saratov: Saratov University Press, 1975).

124 *Адаменко В.Д.* Охрана свобод, прав и интересов обвиняемого [Valery D. Adamenko, *Protection of the Rights, Interests and Freedoms of the Accused*] 171 (Kemerovo: Kuzbassvuzizdat, 2004).

125 *Шестакова С.Д.* Состязательность уголовного процесса [Sophia D. Shestakova, *Adversary Nature of the Criminal Trial*] 119 (St. Petersburg: Yuridichesky tsentr Press, 2001).

126 Smolkova & Mazyuk 2016, at 163.

127 *See* Tetyana B. Vilchyk, *Legal Professional Privilege: Controversial Implementation Issues in the European Union and Ukraine*, 4 European Reforms Bulletin 174 (2015).

or threatens to incur liability in connection with the exercise of the lawyer's activity in accordance with by law (Art. 14(1) of the Law of Ukraine "On Advocacy and Legal Practice").

At the same time, as regards recognition of the immunity of the lawyer from possible responsibility there is ambiguous jurisprudence. Mostly, it is a question of the possible liability of a lawyer for negligence in the performance of his professional duties, permissible both in relation to his duties in relation to the court and in relation to the client.

The doctrine of an advocate's immunity provides an advocate (whether a solicitor or a barrister) with immunity from any claims that may be brought arising out of the advocate's conduct of litigation. In the UK, the doctrine has been abolished.[128]

Absolute immunity in the court work of lawyers never had place in Canada, the United States, or the European Union.[129] Some states refuse to provide immunity to lawyers. For example, the ECHR made the conclusion that lawyers' immunity no longer is in force in New Zealand (*Lai v. Chamberlains*).[130] At the same time, some court decisions are resolved in favor of the lawyers and confirm the existence of the immunity of the lawyer. In a case on legal aid (*D'Orta-Ekenaike v. Victoria Legal Aid*), the court not only did not limit the legal sphere of the existence of the immunity of the lawyer, but rather expanded it and established a precedent for its application.[131] On 4 May 2016, in *Attwells v. Jackson Lalic Lawyers Pty Ltd.*, the High Court of Australia confirmed that the doctrine of advocates' immunity applies in Australia, however, the immunity applied only to advice that leads to, or is intimately connected with, the conduct of the case in court.

In a number of decisions of the Lord's Chamber of Great Britain, it was noted that, if the duty of a lawyer in relation to the court is no more than a duplication of his duty to his client, this does not pose any problem for a lawyer: he should simply fulfill his duty. However, where there is a conflict between duties, it is likely that the lawyer will have to make a choice which may result in a decision that conflicts with the wish of his client.[132]

The possibility of a client filing a complaint to a court regarding the actions of a lawyer may put a lawyer in a difficult position, especially in cases where the extent

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[128] High Court Reaffirms Advocate's Immunity in Australia, Meridian Lawyers (Oct. 10, 2018), available at https://www.meridianlawyers.com.au/high-court-reaffirms-advocates-immunity-australia/.

[129] *Barristers, Barrister's Duties in Court* in *Halsbury's Laws of England (Fourth Edition 2005 Reissue) Vol. 3(1): Bailment* (LexisNexis, 2005).

[130] *Chamberlains v. Lai* [2006] N.Z.S.C. 70 (Oct. 10, 2018), available at https://en.wikipedia.org/wiki/Chamberlains_v_Lai.

[131] *D'Orta-Ekenaike v. Victoria Legal Aid*, *supra* note 21.

[132] *Davies v. Stillman White Foundry Co.*, 163 A.2d 44 (R.I. 1960) (Oct. 10, 2018), available at https://casetext.com/case/davies-v-stillman-white-foundry-co; *Swinfen v. Lord Chelmsford* [1860] 5 H & N 890 (Oct. 10, 2018), available at https://www.studentlawnotes.com/swinfen-v-lord-chelmsford-1860-157-er-1436.

of his duty to the court may be a matter of disagreement from the side of the client. Thus, the potential for conflict between duties is relevant but far from being the dominant factor in assessing the need for inviolability (immunity) of a lawyer.[133]

At the same time, there is a need in the guarantees of observance of the rights of the defendant, who, in case of improper qualification of a lawyer or violation of his professional duties, may remain without effective protection of his rights at the fault of a lawyer, for example, when the latter, without any justifiable reasons, did not appear in court for representation of the interests of the client and the court retained the lawsuit without consideration.

Conclusion

Therefore, based on the legal nature of advocacy, the status of a lawyer as a participant in the process and an integral part of the administration of justice, the primary duty of the lawyer is to assist in the administration of justice. A lawyer's duty to the court prevails over his duty to his client since this is of paramount importance for the effective functioning of the judicial system.

Lawyers ought to fulfill their duty as participants in the proceedings, including in the case when this duty conflicts with their duty to the client. A lawyer as an intermediary between a client and a court and is obliged to observe two duties. Furthermore, a lawyer must strictly and independently execute his duty to his client as a means of achieving a balance between conflicting duties.[134]

Nevertheless, the primacy of either duty may depend on the circumstances or context of each case. This is because each duty complements the other as a composite of the general duty to the community or to the public. This explains why MacKenzie argued that a lawyer's duty to his client and duty to the court are equal. In the long run, violating the duty to the court in fact harms a client's interests.[135]

The lawyer, as an intermediary between the client and the court, is obliged to balance the two duties. Moreover, a lawyer has to exercise the duties scrupulously and independently of each other. Nevertheless, there is no doubt that balancing or reconciling the roles of lawyers as agents for clients and the general welfare of the legal system and the public sphere is highly complicated.

Consequently, the specificity and complex character of the duties assigned to the advocacy require the balancing of principles of serving of the lawyer in the interests of the individual client and the interests of society as a whole.

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133 *Arthur J.S Hall and Co. v. Simons and Barratt v. Ansell and Others v. Scholfield Roberts and Hill* [2000] U.K.H.L. 38 (20 July 2000) (Oct. 10, 2018), available at http://www.bailii.org/uk/cases/UKHL/2000/38.html.

134 Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns* in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* 42 (D.L. Rhode (ed.), Oxford: Oxford University Press, 2000).

135 Bell & Abela, supra note 13.

It is worthwhile for lawyers to inform clients beforehand that their duty to the court is of paramount importance to the lawyer in order that unexpected situations will not arise for the client in the course of proceedings and in order for the client to understand the limits of the permissible and possible actions of the lawyer. It is important for lawyers, their clients and the public to understand that the impartiality of the court decisions depends on lawyers fulfilling their duties as described above.

There is a clear boundary between permissible and reliable protection of and an unacceptable violation of official duties. An advocate has no right to pursue a case favorable to his client through illegal or immoral means. He should persist only in the lawful interest of the accused, which is that, in the course of judicial consideration, all the circumstances favorable to him were comprehensively, fully and objectively investigated and he was given the opportunity, with the help of a lawyer, to appeal against the charges and to present the circumstances and proof of his innocence or mitigating factors.

It is necessary for the legislation of Ukraine to provide not only the rules of corporate (disciplinary), but also civil (property) liability of a lawyer, which will contribute to strengthening the guarantees of individuals in the implementation of their constitutional right to legal assistance and improve the quality of the latter, as well as the introduction of the institution of property liability insurance lawyers as a means to minimize the negative consequences for an advocate that has occurred in error and who is obliged to compensate the harm caused to the client.

The conducted comparative analysis of the legislation provides an opportunity to formulate initial provisions that characterize the legal nature of the lawyer's duties to the court and to his client in a new way: the lawyer should assist the court in the cause of justice and efficiently using a limited court resource; lawyers should be frank in their responses and disclosure of evidences before a court; they cannot mislead the court; the lawyer should pay attention to any errors that may be made by the judge; lawyers should inform clients that their duty to the court is of paramount importance; they should direct clients in litigation in order to promote public confidence in the administration of justice. A lawyer should always maintain due respect for the court.

We consider that these introductory provisions are worthy of attention of the domestic legislator and should be taken into account both when introducing changes or adopting new legislation on advocacy and legal practice in Ukraine.

In addition, these initial provisions may be a subject for further discussion by the international community of lawyers and scholars, make a contribution to improving the efficiency of lawyers' activity in court and provide clearer legal regulation of the fulfillment of lawyers' duties, both to courts and to their clients.

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REGULATORY CHOICES OF RUSSIAN AND UKRAINIAN LEGISLATORS IN CONSUMER CREDITS: A COMPARATIVE PERSPECTIVE

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Russia and Ukraine have recently adopted complex statutes on consumer credit. Ukraine, unlike Russia, declared the aim of the new act, inter alia, harmonization of the legislation with international and EU standards. Prior to enactment, both countries had a fragmentary regulation of few aspects of consumer credit in general consumer protection laws. I consider peculiarities of the elimination of the contract disproportion of debtor and creditor rights in contracts on consumer credit under new Russian and Ukrainian regulations from a comparative perspective. EU law does not regulate some important issues covered by Russian and Ukrainian legislations, e.g. priority of payments. On the contrary, some useful concepts, which are applicable to consumer loans under EU law, like "linked credits," "open-end agreements" are absent in both Russian and Ukrainian laws. While comparing new Russian and Ukrainian consumer credit statutes, it is clear that in some aspects the Ukrainian one is pro-consumer, and in some other aspects the Russian one is more pro-consumer. Some provisions of both Russian and Ukrainian consumer credit statutes are very controversial and unclear; in some instances they could lead to debt slavery, so they must be corrected in the future.

Keywords: consumer credit; consumer rights; strong party to a contract; disproportion of rights of debtor and creditor; unilateral amendment of contract; termination of contract.

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Introduction

The article format allows studying the most important conceptual Ukrainian and Russian regulatory choices in consumer credit, leaving out some narrow technical aspects. The choice of the relevant issues and the exclusion of others are subject to the author's discretion. I largely excluded aspects related to informing of borrowers in order to focus on disproportion of contract terms and on the equalization of contract terms in their essence. However, I cover the problems of the informing of the consumer of the total cost of the credit, with a focus on its "ingredients," not to the technical issues of the informing of a borrower about them. I also will talk of informing of a borrower about variable interest rates, because in this case informing is firmly connected with a legal option to apply a new rate. In principle, the Constitutional Court of Ukraine underlines the importance of protection of the rights of citizens who take consumer credits in terms of such phases as contract conclusion and contract execution.[1]

Respective provisions of the legislation are presented in brackets. Unless otherwise stated, notes on Russian legislation imply the current version of the Federal law of 21 December 2013 No. 353-FZ "On Consumer Credit (Loan)" (entered

[1] Рішення Конституційного суду України від 10.11.2011 No. 15-рп/2011 [Constitutional Court of Ukraine, Legal Opinion under A.N. Stepanenko petition, No. 15-rp/2011, 10 November 2011] (Oct. 10, 2018), available at http://zakon.rada.gov.ua/laws/show/v015p710-11.

into force on 1 July 2014). Notes on Ukrainian regulation, unless otherwise stated, refer to the Law of 11 November 2016 No. 1734-VIII "On Consumer Lending" (entered into force on 10 June 2017). Notes on EU law refer to the Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC.

I believe it important to provide consumer credit statistics with three methodological reservations.

First, according to both Russian and Ukrainian laws, staff of central banks can accept consumer credits from their employer exclusively. Credits by central banks to their staff members are not disclosed in both Russia and Ukraine, but cannot change the general picture significantly due to insignificant volumes of such staff.

Second, the Russian Central Bank publishes official statistics of consumer credits issued by both banks and non-bank financial institutions, but an assignment of such consumer credits between mortgage and non-mortgage credits is disclosed for banks only. However, more than 98% of consumer credits in Russia are issued by banks. For both Russia and Ukraine I converted the sum of consumer credits issued in national currencies into Euro using the official central bank exchange rates on the relevant dates, so 1 January 2016, 1 January 2017 or 1 January 2018 respectively.

Third, the Russian non-bank financial institutions for credits in excess of 1 million Russian rubles (around EUR 14 000) do not disclose whether they are consumer or not. However, the portfolio of such undisclosed situations has never been above EUR 0.3 bln per year. I included all these undisclosed credits in my calculations, considering as nonessential the possible underestimation of the amount of the corresponding portfolio by EUR 0.3 bln in each year.

Table 1: Consumer Credit Market of Russia and Ukraine

	1 January 2016	1 January 2017	1 January 2018
1. Consumer credits portfolio of the financial institutions, Ukraine, total (mortgages + non-mortgages), EUR bln (1.1+1.2)	6.7	5.6	5.2
1.1. Consumer credits portfolio of the financial institutions, Ukraine, non-mortgages only, EUR bln	4.4	3.5	4.1
1.2. Consumer credits portfolio of the financial institutions, Ukraine, mortgages only, EUR bln	2.3	2.1	1.2

2. Consumer credits portfolio, both banks and non-bank financial institutions, Russia, total, EUR bln (2.1+2.2)	74.6	114.3	135.7
2.1. Consumer credits portfolio of the banks, Russia, total mortgages + non-mortgages, EUR bln (2.1.1+2.1.2)	73.6	113.0	134.1
2.1.1. Consumer credits portfolio of the banks, Russia, mortgages only, EUR bln	29.7	55.1	68.4
2.1.2. Consumer credits portfolio of the banks, Russia, non-mortgages only, EUR bln	43.9	57.9	65.7
2.2. Consumer credits portfolio of the non-bank financial institutions, Russia, EUR bln	1.0	1.3	1.6* *on 1 October 2017

Source: the National Bank of Ukraine,[2] the Central Bank of Russia, my calculations.

The data demonstrates the significant growth of the Russian relevant market over 2016–2017 as well as its come-down in Ukraine for the same period of time.

1. What Is Not a Consumer Credit?

Russian law (1) considers as a criterion for the consumer credit the lack of its connectedness with the commercial activity of the borrower. Ukrainian approach (1.11) is as follows: a consumer credit should not be connected with commercial, independent professional activities or with the execution of the obligations of an employee. Under EU law (3.a) a consumer credit should pursue the "purposes which are outside his trade, business or profession" as a borrower. That is why formally a loan borrowed by an advocate or a notary for the decoration of their offices will not be considered under EU and Ukraine law to be a consumer credit, whereas under Russian law it will be one. There is a problem of a "mixed use" existing as well. Imagine that a small entrepreneur bought a car using a credit. This car is used to take a child to kindergarten in mornings and back again in the evenings, while in the

[2] Official title of the Ukrainian central bank.

mid-day it is used for commercial purposes. Is this credit a consumer one? Actually, Ukraine and Russian courts in the absence of other criteria will take into account, whether an entrepreneur status was formally designated in the credit contract and the sale agreement. However, it is preferable to regulate this situation in the statutes in the future. Perhaps, the above-mentioned criteria of a "consumer credit" is partly obsolete and should be reviewed, because in the modern world lot of goods and services could be used for both commercial and non-commercial purposes.

The Ukrainian act and EU Directive (2.2) exclude some credits from the scope of regulation. By means of finding the closest equivalent, I made the respective table. Russia is not included in the table due to the conceptual absence in the Russian statute for these exceptions.

It is necessary to mention, that the presence of the credit in the column "EU" means the absence of the consensus among members of EU on the matter whether the EU level consumer protection should cover respective credits. It does not imply, that a type of a credit denoted in the table is never to be regarded as a consumer credit in some countries of the EU with the granting of consumer protection of the respective national legislations. The idea behind the Directive is to determine the minimal standard of the consumer rights protection, so it is not prohibited to expand such a standard on issues that are not covered by the Directive. For instance, provisions on credits can be applied to the credit agreements which are only partly aimed at financing a contract for the supply of goods or provision of a service (cl. 10 of the Directive). I also do not consider it important to immerse in the "borderline area," which is specifically loans with benefits for the specific categories of consumers, which are regarded to be consumer under very specific circumstances (2.5 of the Directive).

Table 2: Credits Are Not Regulated as Consumer According to the EU and Ukrainian Laws

Ukraine	EU
Credits that have to be repaid within one month	Credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable Deferred debit cards, under the terms of which the credit has to be repaid within three months and only insignificant charges are payable Credit agreements in the form of an overdraft facility and where the credit has to be repaid within one month. "Overdraft facility" means an explicit credit agreement whereby a creditor makes available to a consumer funds which exceed the current balance in the consumer's current account (3.d)

Not sanctioned in advance unforeseeable overdraft above the agreed credit limit amount (that is known in the EU law as overrunning)	_____
Credit agreements without interest (it is also prohibited to declare in the advertisement of the consumer credits on the interest-free character) (7.3)	Credit agreements where the credit is granted free of interest and without any other charges Credit agreements which relate to loans granted to a restricted public under a statutory provision with a general interest purpose, and at lower interest rates than those prevailing on the market or free of interest or on other terms which are more favorable to the consumer than those prevailing on the market and at interest rates not higher than those prevailing on the market Credit agreements where the credit is granted by an employer to his employees as a secondary activity free of interest or at annual percentage rates of charge lower than those prevailing on the market and which are not offered to the public generally
Credits for the operations with financial market instruments involving professional participants of the securities market	Credit agreements which are concluded with investment firms as defined in Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments (1) or with credit institutions as defined in Article 4 of Directive 2006/48/EC for the purposes of allowing an investor to carry out a transaction relating to one or more of the instruments listed in Section C of Annex I to Directive 2004/39/EC, where the investment firm or credit institution granting the credit is involved in such transaction
Credit agreements which are the outcome of a settlement reached in court	Credit agreements which are the outcome of a settlement reached in court or before another statutory authority
Credits within the framework of programs of state and municipal authorities	_____
_____	Credit agreements which relate to the deferred payment, free of charge, of an existing debt
Credit agreements involving a total amount of credit less than 1 minimal wage on the date of the conclusion of a contract (around EUR 110 now)	Credit agreements involving a total amount of credit less than EUR 200
_____	Credit agreements involving a total amount of credit more than EUR 75 000

Credit agreements included pawnshops, if the item of a pledge is transferred to the pawnshops for storage and the consumer is limited to that pledged item	Credit agreements upon the conclusion of which the consumer is requested to deposit an item as security in the creditor's safe-keeping and where the liability of the consumer is strictly limited to that pledged item
_____	Credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property
_____	Credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building
_____	Hiring or leasing agreements where an obligation to purchase the object of the agreement is not laid down either by the agreement itself or by any separate agreement; such an obligation shall be deemed to exist if it is so decided unilaterally by the creditor

It is interesting to note that the Russian statute considers interest-free loans as consumer credits (5.21 и 5.9.5-1). The table illustrates, that in Ukraine legislation actually implemented a lot of the EU Directive provisions. However, the Directive does not cover short-term loans (up to 3 months with insignificant charges). The Ukrainian legislator in a very strange way "converted" this construction of the EU altogether regarding all credits that have to be repaid in one month regardless of an interest rate. As a result, the poorest consumers who take payday loans with extremely high interest rates remained unprotected completely.

2. Mandatory Additional Contracts and Compulsory Payments to Creditors and Third Parties

Both Russian and Ukrainian statues authorize the creditor to issue a loan on the condition of purchase of some additional services for the creditor and/or third parties. In the EU this is called "combined offers" (cl. 22 of the Preamble of the Directive). In some other cases such services could be traded as optional, i.e. not mandatory, purchased at the will of a consumer.

Russian legal provisions on additional services are as follows:

a) A debtor should be thoroughly informed about them, *inter alia*, whether it is possible to refuse from purchasing the particular service or not (5.4.16; 5.9.9; 5.9.15; 7.2; 11.7);

b) Such services should be prescribed by the individual contract terms; it is prohibited to include them in general contract terms (5.7). Here the point should be made that according to the Russian statute every contract on a consumer credit

consists of two parts: a) general terms which are unified by a creditor for all contracts of such kind concluded with different consumers; b) an individual part, which is specific for every particular consumer. Both parts are drafted by a creditor as his offer and then must be accepted or rejected by the consumer. The very controversial issue is how far the creditor can differentiate individual contract conditions in practice, because the competition law de facto demands similar contract offers for similar consumers. There is no such structural division of consumer credit contracts in Ukraine.

I believe, that since systems of dividing contract clauses into "general clauses" and "individual clauses" exist in Russia, it a system of mandatory transfer of former to the repository of the Central Bank of Russia should be implemented. It is necessary first and foremost to credibly fix their content for every moment of the time. Particularly it is important under real current market circumstances, where in some banks such "general terms" do not exist under this heading and are in the form of the single document. In practice, they might be diversified in several very large and complicated documents titled as "Banking Rules," where they are mixed with other non-credit issues. Moreover, in reality they are not always presented to the consumer before the signing of the credit contract unless the consumer demands this directly. At the same time, in individual terms of credit contracts there is always a provision stating that a consumer had read all general terms and accepted them as well.

Another problem is the retroactive force of the general terms of a consumer credit agreement. Russian creditors amend them from time to time and automatically declare already existing debtors as adhered to the new general terms, which is not legal. On the other side, sometimes there should be an opportunity for creditors to amend general terms even for existing consumers, for example, for the elimination of the violations of consumer rights in the text of the general terms detected by the regulator. Apparently, such a retroactive amendment of general terms for existing borrowers should be subject to the individual authorization from the Central Bank of Russia. After such authorization, all amendments of general terms consistently should be deposited to the repository of the Central Bank of Russia;

c) While disclosure of such services, the right to refuse should be provided, *inter alia*, by conclusion of other agreements which a debtor is obliged to enter into due to the contract on consumer credit (7.2). In actuality, it is difficult to comprehend precisely what "other agreements" means in this context. Also, I will demonstrate in details below, that the consumer right to refuse additional services is limited;

d) The direct execution of a contract cannot be involved with an obligation of a debtor to pay for creditor services which are rendered entirely in the creditor's own interests and as a result of rendering such services no separate benefit is created for a debtor (5.19; 6-1.2.2). For example, Russian case-law states that a banking fee for opening and closing a loan account is illegal.

In Russia it is permitted to sell a "package" of credit and checking account, including the card one, but if so the opening and account operations directly related

to the repayment of a credit must be free of charge (5.17; 6-1.2.5). There is an internal contradiction in Russian statute: the latter pro-consumer provision (5.17) in case of credit cards use contradicts other provisions of the same statutes which allow fee for issue, servicing of an electronic means of payments during conclusion and execution of a contract on consumer credit, for suspension of operations with use of an electronic means of payment, other fees related to the use of an electronic means of payment (6.4.4; 6.6). I believe, that a credit card is simply a technical method of the access to the credit and accounts are only the technical way of recording of debt. That is why arguments of the Russian banks to justify charging fees about the legal difference between "opening and servicing of an account" and "opening and servicing credit cards" are unfounded. It is impossible to conduct credit card operations without account records, but this is just technique, nothing more. Unlike Russia, there is no such division in the Ukrainian law.

So, it is a mistake to think of credit card operations as something substantially different from account operations. I assess as a serious problem that Russian banks by manipulating these terms and contradictions in the legislation often charge fees for issuance and servicing of credit cards or impose conditions for exemption from this payment, e.g. requirement for the minimal amount of card payments in the sale points within a month. Since the credit card is necessary only for the use of a loan (for the use of personal savings a debit card is enough), fees for the issuance and servicing of credit cards in essence are fees for opening and servicing of a loan account. The latter are not legal.

It is important, that if a bank account, which is mandatory for a borrower to open, is used for the recording of a debt under a credit agreement, the debtor cannot demand the closure of the account until full repayment of his credit debt.[3]

Besides, the Russian statute requires from a creditor to ensure the opportunity for a borrower to repay the loan free in the area of the reception of the creditors' offer by a debtor, or in the area of the residence of the consumer determined in the consumer credit contract (5.4.12 и 5.9.8; 5.22). In reality, creditors usually offer free repayment of a loan by wire payment or by cash through ATMs or payment terminals. Repayment of a loan by cash through a cashier in the bank branch office often is an object of a fee. I believe that such fee is legitimate only if ATMs and payment terminals function in the respective branch and change is provided. If ATM and payment terminals do not function or do not provide change, then the fee for credit repayment through the cashier violates the rights of the consumer.

[3] Определение Верховного Суда Российской Федерации от 07.03.2017 No. 7-КГ16-6 [Supreme Court of the Russian Federation, *A.M. Sharunov v. Bank VTB 24*, No. 7-KG16-6, 7 March 2017] (Oct. 10, 2018), available at http://legalacts.ru/sud/opredelenie-verkhovnogo-suda-rf-ot-07032017-n-7-kg16-6/; Определение Верховного Суда Российской Федерации от 06.02.2018 No. 67-КГ17-26 [Supreme Court of the Russian Federation, *T.N. Ruzavina v. PAO Sberbank Rossii*, No. 67-KG17-26, 6 February 2018] (Oct. 10, 2018), available at http://legalacts.ru/sud/opredelenie-verkhovnogo-suda-rf-ot-06022018-n-67-kg17-26/.

The Supreme Court of Russia in the "Observation of Court Practice on Civil Cases Related with the Resolving of Disputes Arising Out of the Performance of Credit Obligations" of 22 May 2013 states (4.2), that the creditors requirement addressed to a borrower about prescription of the particular insurance company is not based on the law.

In my opinion, the Ukrainian approach to the additional chargeable fees is more pro-creditor in comparison with a Russian one. Ukraine legislation explicitly listed some examples of such legally chargeable fees (evaluation of all consumer assets for the assessment of credibility, evaluation of those assets which serve as a security for a loan; insurance; opening and servicing of a bank account; notarial or other additional collateral services) (20.2). The Ukrainian creditor could be entitled to make a purchase of additional creditor's or third parties' services as one of the conditions for the issuance of a loan (8.2.2; 9.3.7; 20.1). If in Russia, as it was stated above, the legislation at least has contradictions, the Ukrainian legislator clearly permitted all of them (8.2.2.) The latter in my opinion is not correct.

Besides, according to the Ukrainian regulation, a creditor for each of the additional services is entitled to create a list of at least three persons who can render such services, and in this case, a borrower is obliged to choose the service provider only from these closed lists. Only regarding a lack of such list, the borrower can make his own choice of the additional service provider (20.3; 20.4). If for some reason the contract on such services with "listed" third party will be terminated in the future, a borrower has to conclude another one with another "listed" service supplier within 15 days from the date of termination; otherwise, a creditor has a right to demand early loan repayment. To my mind, a more fair and competitive approach would be to permit a consumer the choice between insurers with a prescribed credit rating. A minimal credit rating can be stipulated by on the condition that at least 10 insurance companies in the country obtain such rating. Otherwise, there is a high probability of a creditor's prescription to the three insurance companies with overpriced services, beneficiaries of which are occurred to be beneficiaries of a creditor or at least to be "personally very friendly" with them.

Unlike Russia, the Ukrainian legislation does not differentiate creditor's rights in the sphere of additional contracts between insurance and the related other services of third parties. The Russian legislative approach highlights services of insurers among other third parties services. I name it "insurance or worse terms on the sum, duration, and the interest rate." The point is that a Russian creditor is not entitled to demand insurance as a mandatory requirement for the issuance of a loan. However, he has a right to offer the borrower a loan with insurance and "better" sum, duration, interest rate vs. a loan without insurance with worse sum, duration, interest rate. In different situations it might be economically more beneficial for the consumer to accept or reject insurance. In Russia, it is also permitted to conclude a consumer credit contract conditioned on the procurement of insurance in the future with

worsening of terms regarding the terms of a loan without insurance in the case of the borrower's failure to buy insurance (7.2;7.10; 7.11). So in the case of a 30-day delay of a borrower in the purchase of such insurance, a creditor also is entitled to terminate the credit contract and demand early repayment of a loan within a reasonable period of time, which cannot be less than 30 calendar days from the moment of sending to a borrower the respective notice (7.12).

3. Total Amount Payable by the Consumer

According to the EU law (3.h, 3.g, 3.l) "total amount payable by the consumer" means the sum of the total amount of the credit and the total cost of the credit to the consumer. In this context "total amount of credit" is actually a principal loan sum. "The total cost of the credit to the consumer" is actually the sum of all consumer payments, apart from a principal loan amount and notarial charges. Additional services (*inter alia*, insurance payments) can be included in the total cost of the credit to the consumer, if they are mandatory for the obtainment of a loan (*see* cl. 20 of the Preamble of the Directive as well). Apparently, that very flexible phrase can be explained by the lack of consensus among EU members on the matter of what kind of additional (insurance) services should be included and by the different practices of the EU member states.

In this line, I will start with differences in terminology. In the Russian law "total cost of a consumer credit" (called PSK) means an actual annual interest rate under the Ukrainian approach or annual percentage rate of charge (3.i) under the EU law. That is what is called in EU law as the "total amount payable by the consumer," in Ukraine as a "full value of a loan for a consumer," in Russia as a "total sum of borrower's payments within the period of duration of a contract on consumer lending determined on the basis of terms of a consumer credit contract acting on the date of conclusion of a consumer credit contract" (7.15). EU and Ukrainian wording looks more clear, because the concept of "an interest rate" is more visible, where the level of the interest rate is calculated.

In Ukraine "full value of a loan for a consumer" is a principal amount of the loan which is issued or can be issued to a consumer plus "general loan costs" (1.2). General loan costs include in essence all sums which a consumer must pay to a creditor and a credit intermediary with some stipulated by law exceptions (8.1; 8.3; 12.1.9). In particular, payments to all other third parties, excepted credit intermediaries, for example to insurers, must be disclosed by a creditor to a debtor in a written form, but not included in general loan costs, even if mandatory (8.2.2; 9.3.7). The latter, in my view, is incorrect.

Besides, in Ukraine there are two types of payments which are not included in general loan costs: a) penalties for the breach of a contract; b) payments for goods or services which a consumer is obliged to make regardless of the fact whether the

transaction was concluded at the borrower's own cost or on consumer credit cost (8.2.2.). Unfortunately, I do not fully comprehend what exactly is implied under the last option.

In the same line with Ukraine, in Russia penalties for the breach of a contract are excluded from PSK. According to Russian law, PSK includes all payments that a debtor should pay to a creditor or to third parties, except insurers and exclusions explicitly stated by the law. Insurance payments in different situations are included in or excluded from PSK, this issue is considered below in detail (6.4; 6.5).

Payments based on the requirements of a federal law are excluded from PSK. To my mind, it is incorrect. It's legal to use a part of consumer credit to pay taxes and fees directly connected with the main transaction for which a loan was issued. So it is unclear why such costs are excluded from calculations. Moreover, sum of local taxes connected to such transactions are included into PSK if a credit is a source of their funding.

According to the Russian legislation, PSK is also not included concerning:

a) Payments of a borrower for servicing a credit which are prescribed by the consumer credit contract if sum or/and date of payments hinge on a consumer's decision or his behavior. On the one side, I understand incentives for such a provision which is the impossibility to foresee such cash flow at the moment of the conclusion of a contract. However, this issue is controversial, since in many actual cases it is possible to evaluate and include in calculation of at least a possible minimum of such sums in the future. Moreover, the Russian statute offers such a methodological approach for financial calculations in some other situations (6.7);

b) Non-mandatory services which do not influence the obtainment of a loan and an interest rate of a loan, if a borrower can terminate them for a future time within 14 days after obtainment of a loan with a payment for services only for the days of actual use. Apparently, it implies additional guarantee of technical servicing of goods which are subject to purchase on the credit cost. To my mind, it would be more correct to include such sums in PSK, but to recalculate PSK in case of borrower's termination within 14 days of the cooling-off period;

c) Charges for currency exchange, the inclusion of a card in "a stop-list" and other costs for the borrower connected with the use of electronic means of payment. Obviously these exceptions cover credit card operations. This question has already been studied above. My serious concern is caused by the very wide formulation of "other costs of a borrower connected with the use of electronic means of payment."

Rules of insurance premiums are the following. Insurance premiums are included to PSK, excepting three cases:

a) If the beneficiary under the insurance contract is a borrower or his/her close relative;

b) If the subject of insurance is the preservation of an item of the pledge which secures repayment of a loan;

c) If dates of repayments under consumer credit contract are dependent on the conclusion or non-conclusion of an insurance contract.

I negatively assess all these three exceptions. To start with, I have never seen in real life the requirement to conclude an insurance contract in favor of a borrower or his/her close relative exclusively, because there is no sense in this for both for a creditor and a borrower. Usually, insurance contracts are in fact mixed. It means that they are concluded partly in favor of a creditor and partly in favor of a borrower as an additional beneficiary after the economic interests of a creditor are fully granted.

Some prevalent practical situations fall under all above-mentioned cases simultaneously. Let us imagine a consumer credit on a purchase of a car with a term of interest rate decrease in the case of a conclusion of the insurance contract. The primary insurant is a bank, but the borrower himself/herself is a secondary insurant for part of recovery that exceeds the balance of credit debt. The price of the car and the sum of insurance is EUR 10 000. As a result of a car accident with no fault of the borrower the car is entirely written-off, irreparable. The current balance of the borrower's consumer credit debt is EUR 6000. So the bank receives from the insurer EUR 6000, the consumer gets EUR 4000 respectively. It is unclear why insurance payments under such a loan are not included to PSK. Non-inclusion of insurance payment sums artificially decreases PSK in the eyes of the consumer. Moreover, since 24 June 2018 in new contracts regarding consumer lending secured by a mortgage, PSK will include the sum of an insurance premium paid by a borrower under a contract on insurance of the mortgage item (6.1.3). It is a correct approach. But it remains unclear why the same rule is not applied to all insurance payments.

4. Floating (Variable) Interest Rates

Both Russian and Ukrainian laws permit application of floating (variable) interest rates. Two important points should be considered here:

a) A correct calculation of a rate;

b) Informing a consumer about a new level of a rate as a condition for its application.

The Russian law prescribes that variables should be irrespective of circumstances depending on the creditor or persons affiliated with him, and publication in public sources regularly. A creditor has to notify a borrower on a change of this interest rate within 7 days from the beginning of the lending period of application of this new interest rate and send to the borrower a refreshed schedule of payments under a contract (5.4.8; 9.4; 9.5).

In June 2018 a new regulation is going to enter into force (5.9.5.1) which is to include in a credit agreement a notion on a change of a sum of costs in the event of increase of contracted floating interest rate by 1 percentage point starting with the second payment, on the closest date after a presumable date of a conclusion of a contract.

Ukrainian law requires a creditor to notify a borrower, a guarantor and all other people obliged under a contract about a change of a floating interest rate at least 15 days prior its application. There is an obligation to disclose an index in the office where a creditor renders services. According to the law, a calculation of a variable interest rate should provide an opportunity to calculate accurately the interest rate in any moment within the duration of a credit contract (9.3.4; 11.4; 11.5; also Art. 1056-1 of the Civil Code of Ukraine). There are established following rules as well:

a) A credit contract should include the maximum level of interest rate increase within a period of the contract;

b) A current index should be periodically, at least once in a month, published in mass media or disclosed through the public regular sources of information. A credit contract should include a note to the sources of information about the respective index;

c) An index should be based on objective indicators of the financial environment which gives an opportunity to define a market price of credit resources;

d) An index should be established by an independent organization with an acknowledged reputation on the financial market.

To my mind, Ukrainian regulation in this particular issue is better compared to the Russian one. In Ukrainian law such obligations as periods of notices, notification of borrower, guarantor and all others obliged under a contract are more "pro-consumer," and the mechanism of the index and interest rate determination is better elaborated. Shortcomings of both countries' regulation are: lack of any consumer opportunity to influence on the elaboration of index as well as a way of notice about changes of an index; an opportunity of a creditor to include very complex formulae of index calculation that are difficult to be comprehended by a consumer. Ideally, an index should include a number of variables fixed on the legislation level (e.g. the key interest rate of a central bank, inflation rate). Components and formulas of index and interest rate calculation should be subject to the agreement between associations of creditors and central banks.

5. The Full Prohibition of Some Consumer Credit Practices

Russian law prohibits three practices:

a) A transfer of a sum of a credit as a security (even partially) for a credit. Unfortunately, it is unclear, whether it is prohibited to transfer a sum of a credit for the security of the same credit, or other credits of the same creditor, or credits of other creditors. I believe, it would be also reasonable to explicitly prohibit the use of consumer credits for the financing of the initial payment of a borrower under a mortgage (including issued by other creditors) as mortgages without initial borrower payments at his own expenses are risky for a consumer and harmful for

the economy as a whole. Experts have reached consensus on the view that one of the reasons of the global financial crisis of 2008 was the decrease of requirements to the initial payment under a mortgage at the borrower's own expense;

b) A condition that in case of payment delay indebtedness will be paid by the way of refinancing without conclusion of a new contract. This rule is correct but insufficient. Permission of refinancing by conclusion of a new contract creates an essential risk of issuance for a new loan on materially worse conditions to a borrower. Besides, refinancing of a debtor by the same creditor artificially enhances banking balance sheets because bad credits magically turn into good credits, but in reality no improvements in the credit quality happens. That is why it is necessary to regulate refinancing by a more conservative way;

c) Conditions which oblige borrowers to use third parties services in connection with the execution of monetary borrower's obligations under a credit agreement for a separate payment. It has been already considered above.

Consumer credits in foreign currencies are prohibited according to the Ukrainian law (3.4). This prohibition is not absolutely new as it was introduced earlier, after the crisis of 2008. However, the Supreme Court interpreted this ban restrictively, authorizing some consumer credits in foreign currencies. The authors of the law clearly planned to fully remove the currency risks for the consumer. However, the ban's legislative technical flaws have led to the Supreme Court's finding that it is legitimate to express the consumer's obligations in the equivalent of foreign currency, if he or she repays in the Ukrainian national currency. So it is actually prohibited to use only foreign currency as a means of payment.[4]

Before fall 2008 it had been a widespread practice in Ukraine to lend in foreign currencies as their interest rate much was lower in comparison with the interest rate in the national currency, and currency exchange rate had been stable across 2000–2007. As a result of that crisis, devaluation of the national currency during 2008–2009 had occurred by 60%. This led to the increase of population indebtedness under consumer credits taken in foreign currencies by 60% calculated in the national currency. Even though in Russia there is no such prohibition, and the law has some regulatory stipulations concerning consumer credits in foreign currencies (5.4.17; 5.4.18; 5.9.5; 6.6), it should be mentioned that in Russia loans in foreign currencies are almost not issued now.

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[4] Постанова Верховного Суду України від 01.11.2017 No. 6-2864цс16 [Supreme Court of Ukraine, *X v. Kasa narodnoi dopomogi LTD*, No. 6-2864tss16, 1 November 2017] (Oct. 10, 2018), available at http://search.ligazakon.ua/l_doc2.nsf/link1/VS170732.html; also Постанова від 18.10.2017 No. 6-2024цс16 [Supreme Court of Ukraine, *Porsche Mobility LTD v. X*, No. 6-2024tss16, 18 October 2017] (Oct. 10, 2018), available at https://oda.court.gov.ua/sud1590/pravovipoziciivsu/6-2024cs16. Unlike Russia, the Supreme Court of Ukraine as usual does not disclose the surnames of natural persons who participated in its solved disputes.

6. Priority of Payments

Unfortunately, in both Ukraine and Russia, the great proportion of "debt slavery" cases is caused by mistaken legislation of the priority of payments rules. The second reason which is related to Ukraine only is the lack of the personal insolvency law in that country.

In case of the inefficiency of borrower's money to fully repay a loan the Russian legislation prescribes such priority of payments (20.5):

1) Arrears of interest;
2) Arrears of principal amount of a loan;
3) Penalties;
4) Interest for the current period of payments;
5) Principal amount for the current period of payments;
6) All other payments according to legislation or a contract.

Before 1 July 2014 there was another regulation of priority of payments for consumer credits according to the general provisions of Article 319 of the Civil Code of RF:

1) Creditor's expenditures for receiving an execution;
2) All interests;
3) The principal amount of a loan.

This order of phases remains now for commercial credits. The Civil Code of Russia remains silent on penalties. However, even for old time credits the case-law stated that the condition of consumer credit contracts where penalties should be paid first was illegal.[5] Subsequently, the Russian Supreme Court issued controversial interpretation.[6] In latter, the Supreme Court confirmed that penalties should be paid after the principal amount of a loan and interest. On the other side, the Supreme Court at the same time stated that a creditor could claim for the penalty without claiming for the principal amount and interest when the latter are overdue. It is unclear how these two positions of the Supreme Court combine with each other. If the priority of the principal amount is higher than the penalty, then any sum of collection should be directed to the payment of the principal amount of the loan and only after that to the penalty. Thus, in case of the execution of the resolution on the collection of penalties, there are two options: a) to breach Article 319 of the Civil

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[5] Постановление Верховного Суда Российской Федерации от 10.12.2014 по делу No. 307-АД14-1846 [Supreme Court of the Russian Federation, *Citibank v. Department of Rospotrebnadzor in St. Petersburg*, No. 307-AD14-1846, 10 December 2014] (Oct. 10, 2018), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ARB002&n=413954#09865301681944278.

[6] Постановление Пленума Верховного Суда Российской Федерации от 24.03.2016 No. 7 «О применении судами некоторых положений Гражданского кодекса Российской Федерации об ответственности за нарушение обязательств» [Resolution of the General Meeting of the Supreme Court of the Russian Federation No. 7 of 24 March 2016. On Court Application of Some Provisions of the Civil Code of the Russian Federation Concerning the Liability for the Breach of Obligations], para. 49 (Oct. 10, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_195783/.

Code of Russia or b) to redistribute the collected sum to repayment of the principal amount of a loan.

It is also important to consider that priority of phases of payments under the Civil Code of Russia is a default rule (it can be changed by contract), but priority under the new law on consumer credit is a mandatory rule. In my opinion, the new rule on priority of payments in comparison with the one prescribed by the Civil Code has both advantages and shortcomings for consumers. It is good for consumers that the principal amount of a loan got a higher priority than current interest; it is also reasonable, that enforcement expenditures of a creditor like legal fees were moved from the first phase to the last one. On the other side, it is unfounded that a penalty gets a priority over current (not overdue) payments for both interest and the principal amount.

Apparently, the Russian Government submitted to the Parliament a new bill (No. 287844-7), which is actually intended to return to the regulation of priority of payments for consumer credits to the rule of the Civil Code: the first phase is all interests; the second phase is all sums of principal amount of a loan; the third phase is penalty; the fourth phase is all other payments. However, under this regulation, the following issue can arise. Inside some phases both overdue and non-overdue sums are consolidated, for example, overdue and non-overdue sums of interests in the first phase. So it is unclear, what should be repaid first inside one particular phase if a payment of a borrower will be insufficient to full payment of the phase sums.

In Ukraine priority is the following (19.1):

1) Overdue principal amount and interests;

2) Current sum of a loan and current interests;

3) Penalties and all other payments.

Ukrainian approach is better than the Russian one in the issue that penalty is in the last phase. It is reasonable as well that principal amount (at least its overdue part) is in the first phase. On the other side, it is incorrect that both first and second phases contain two different in essence sums. It will inevitably lead to conflicts about what should be paid first inside the first phase in case of insufficient payments: the overdue principal amount or overdue interest (phase 1); the current sum of the loan or the current interest (phase 2)? It has already been noted above that it is methodologically incorrect to consolidate in one phase two different by nature sums. However, the Ukrainian legislator made the same mistake as the Russian one.

Unfortunately, the Ukrainian order of payments, as the Russian one, does not prevent new debts of consumer expansion even if it can actually be achieved. Also, a maximum interest ceiling matters. Indeed, in Ancient Rome, the law of which is often noted by scholars, interest could be paid before the principal amount, but there was a legislative threshold for interest rate (4–12% in different times and for different sorts of creditors). In the case of 6% or 8% interest per annum, I can accept a payment of interest before principal amount, but it's absolutely unacceptable for real Ukrainian and Russian markets where consumer credit interest is sometimes like 50%, 100% and

even more per annum. If so, the improper payment order, prescribed by the Parliament, leads to debtor slavery which could be avoided by the correction of the legislation.

So I believe, that diligent regulation should be prescribed in the first phase of repayment of the overdue principal amount to stop expansion of charge of interest; the second phase is not overdue principal amount of a loan to avoid initiating the charge of new interest; the third phase is current interests, then all overdue sums. Penalties should not be allowed as accrual of fines on interest, but it is permitted in both Russia and Ukraine now. The general principle of protection of consumer rights should be as follows: it is more important to preclude new debts, and then deal with older ones. There is nothing worse than when a consumer debt starts to grow astronomically only because of the legislator's fault.

7. Restriction of the Interest Rate

Russian law (6.8; 6.9; 6.10; 6.11) restricts the maximum interest rate for consumer credits, which should not exceed the market average interest rate under similar loans increased by a third. Technically it works like that: if the market average interest rate under the respective category of loans is 20% in the quarter 1, then the maximum permitted interest rate in the quarter 3 will be 26%. There is a technical time lag in one quarter due to the fact that the Central Bank of Russia needs some time to calculate average interest rate in the ended quarter. While the first days of the quarter 2 this information is not presented yet, still issuance of new loans on the market should not be stopped. Maximum permitted rates are calculated by the Central Bank of Russia separately for different sorts of consumer credits, technically there are several large tables. Differentiation is based on such parameters as loan sums ranges, credit term ranges, secured and non-secured credits, type of a creditor (there are 5 types of consumer creditors in Russia, calculations are made separately for each type based on 100 largest market companies of each type), goal of borrowing, use of electronic means of payments, existence of the credit limit scheme.

I believe in this context, there are no sufficient grounds for such criterion of differentiation as "use of electronic means of payments," because it does not impact on reasonability or justification of the interest rate.

From 1 June 2018, while calculations of the interest ceiling for consumer credits a new criterion will be applied, which is receiving by borrowers through account opened by his creditor of salaries, other regular payments, accrued in connection with the performance of employment duties, pensions, benefits and other social or compensatory payments. I have a controversial attitude to this new parameter because in the real current market situation receiving salaries on bank accounts does not impact or impacts little on the interest rate offered by the same bank. Each new parameter makes calculations more complex which are already heavy and difficult for understanding by borrowers without special financial skills. Besides, all thing being

equal, bank interest rates applied in Russian consumer credits now are much lower compared with other sort of creditors. Government should first of all fight against extreme interest rates of some non-bank creditors; this new parameter does not help it significantly. Consumers could win from the new regulation if banks will establish, for example, the sharp difference in interest rates between their clients who receive salaries/pensions on their bank account and for other clients. But it is not likely to occur as banks can do it right now if they want to, but this is not happening.

Based on analysis of the real Russian market situation, I suggest to introduce new parameters as "200% of the average market interest rate" as a substitute of existing "133% of the average market interest rate," but to harmonize it for all types of consumer creditors. If to cancel such parameters as "type of a creditor" and to calculate maximum interest rate uniformly, the new harmonized maximum rate will be closer to the actual "banking" one. It can be explained by the fact that the largest banks issue relatively more sums of loans compared to non-bank organizations. It is abnormal when now for some of consumer credits the interest ceiling is around 30% per annum now, but and for some others it is around 500% per annum. Moreover, the latter is related to payday loans for the poorest citizens.

The most sensible question is the activity of such types of Russian consumer creditors as so-called "micro financial organizations" (MFOs). Since there are very high-interest rates under short-term payday loans (sometimes more than 500% per annum), restriction of the new law based on the principle "133% of the market average market interest rate of the proper sort of creditors" did not help their consumers a lot, as extreme interest rates of such creditors remain legal. Amendments to the Russian Federal law "On Microfinance Activities and Microfinance Organizations" introduced new restrictions for this type of creditors only. The debt of their consumers in absolute figures should not be above some thresholds calculated as the principal amount multiplied by some coefficient and the overdue part of a loan multiplied by some coefficient. These coefficients prescribed by the federal law differ due to the moment of a conclusion of a credit agreement. The Central Bank of Russia reasonably pursues in the Parliament the policy of gradual reduction of such coefficients level. I think, that if the Central Bank of Russia chose such path of "coefficients based on sum of credit and sum of delay" instead of policy of cutting of permitted interest rates to the adequate level, then it would be nice to facilitate this process.

Speaking of the case-law, the Supreme Court of Russia fluctuates on the issue how better to protect consumers from extreme interest rates. Sometimes it acknowledges restriction of payments in the form of "coefficients" described above, therefore not interfering with interest rates.[7] Sometimes the Supreme Court interferes with an

[7] Определение Верховного Суда Российской Федерации от 06.06.2017 No. 37-КГ17-6 [Supreme Court of the Russian Federation, *MFO "Alex Invest" v. E.A. Smirnova*, No. 37-KG17-6, 6 June 2017] (Oct. 10, 2018), available at http://legalacts.ru/sud/opredelenie-verkhovnogo-suda-rf-ot-06062017-n-37-kg17-6/. In this case the credit agreement was concluded on 21 July 2015, at interest rate 1.5% per day.

interest rate by reducing it based on such considerations. Since high-interest rates under MFO's payday loans is explained by the short-term character of loans, they can be applied only to the very short period of time. So in the *LLC "Dostupno Dengi" v. D.V. Klygin* case[8] the Court ruled that as the consumer credit was issued at 730% per annum for 15 days, this extreme interest rate can be applied only for 15 days period regardless of the fact of delay. If charging of interests is permitted for the period of several months, as the creditor demanded, then there is no such attribute as the "short term." So for the following period starting from the 16th day from issuing the credit (it was actually the first day of delay), the Supreme Court cut interest rate to 17.53% per annum, based on the market average interest rates of banks under similar loans. This particular consumer credit contract was concluded on 27 June 2014, i.e. 4 days prior of entering into force the new Federal law "On the Consumer Credit (Loan)." However, that was not an obstacle for the Supreme Court to ground his ruling on this Law and apply the not prescribed by law correction of loan issued by the distinctive creditor.

In Ukrainian law, unfortunately, there is no regulation concerning the ceiling of the interest rate under consumer credit contracts.

8. Unilateral Refusal from a Loan Within the Cooling-Off Period

Based on the concept of the cooling-off period, both Russian and Ukrainian legislation authorize a consumer to refuse from the consumer credit contract within 14 days. Starting point is determined differently so from the date of receiving of money in Russia, from the date of the contract conclusion in Ukraine. Both countries have provisions, that require from a consumer who is exercising the right to refuse, to return a loan and pay interest for the actual period of its use. If a loan was issued for the specific goal, under the Russian law duration prolongs to 30 days. Probably it was taken from the EU law concept of "linked credit agreements" but the Russian consumer credit contract for specific purposes is not the EU linked credit agreements, because in the Russian concept there is neither a special partnership between consumer creditors and traders, nor consumer creditor's responsibility for the trader.

Likely, the concept of cooling-off period had more sociable value in the period when there was no opportunity for early repayment of a loan free or with a small fee after the expiration of the cooling-off period. Expanding the right of consumers on early repayment objectively decreased the practical value of the cooling-off period concept.

According to Ukrainian regulation, refusal from a credit agreement within the cooling-off period leads to the refusal from additional (collateral) services (15.5).

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[8] Определение Верховного Суда Российской Федерации от 22.08.2017 No. 7-КГ17-4 [Supreme Court of the Russian Federation, *LLC "Dostupno Dengi" v. D.V. Klygin*, No. 7-KG17-4, 22 August 2017] (Oct. 10, 2018), available at http://legalacts.ru/sud/opredelenie-verkhovnogo-suda-rf-ot-22082017-n-7-kg17-4/.

Russian law does not have such direct provisions. The Supreme Court decided that if the consumer terminates his credit contract, additional insurance obligations are terminated as well based on the general provisions of the Civil Code of Russia (Art. 988).[9] However, lack of clear rules on termination of contracts on additional services due to the termination of a credit contract is the obvious shortcoming of the Russian consumer law.

The Ukrainian law (15.6) excludes the right of a consumer to refuse from a loan agreement within the cooling-off period in two cases: a) the main agreement, for which a loan was issued, was a contract on rendering services and it has been already performed to the moment of the consumer refusal – it is quite a logical rule; and b) obligations under a consumer credit contract are secured by the notarized contract. The latter is definitely an absurd anti-consumer provision, which is impossible to accept for me, despite the fact that in a real market such contracts are as usual connected with real estate.

Overall, the expanding of consumer credit legislation on mortgages is a complex and controversial phenomenon. It requires additional study which is out of the scope of this article. Clause 14 of the Preamble of the EU Directive prescribes that

> Credit agreements covering the granting of credit secured by real estate should be excluded from the scope of this Directive. That type of credit is of a very specific nature. Also, credit agreements the purpose of which is to finance the acquisition or retention of property rights in land or in an existing or projected building should be excluded from the scope of this Directive. However, credit agreements should not be excluded from the scope of this Directive only because their purpose is the renovation or increase of value of an existing building.

Specific features of the immovable property are so sufficient, that for such sort of credits it was necessary to approve a special Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property and Amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010.

9. Early Repayment of a Loan After the Expiration of the Cooling-Off Period

Both Russian (11) and Ukrainian (16.1; 16.2; 16.3) legislation have provisions on the opportunity of consumers for early repayment of a loan partially or entirely.

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[9] Определение Верховного Суда Российской Федерации от 31.10.2017 No. 49-КГ17-24 [Supreme Court of the Russian Federation, *Regional Social Organization of Protection of Consumer Rights "Fort-Yust" of the Republic Bashkortostan in the name of G.V. Islamova v. Public JSC Bank VTB*, No. 49-KG17-24, 31 October 2017] (Oct. 10, 2018), available at http://vsrf.ru/stor_pdf.php?id=1603454.

In case of early repayment, a schedule of payments in both countries is subject to recalculation based on the new decreased principal amount of credit. Ukrainian legislation technically is more pro-consumer in this aspect compared to the Russian one, as it establishes absolute free of charge early repayment (16.3). Whereas in Russia a creditor can charge interests to the date of the regular current payment under a loan schedule buy no more than 30 days even if a borrower is ready to repay immediately (11.4; 11.5).

Before being taken info force the actual federal law in 2014, there was not an explicit provision for early repayment in the Russian parliamentary statutes. However, even for consumer credits issued in 2011, so the Supreme Court supported the consumer request addressed to the creditor to update a schedule of current payments as for early payment.[10]

Nevertheless, EU law authorizes some small fees for early repayment (16). Consumers of EU member states where high fees for early repayment had been permitted by national law (Cyprus) won from the new EU law, as the Directive *de facto* forced national legislators to reduce fees significantly. Also the consumers won if there had been specific conditions of charging fees if national legislation which became illegal due to the implementation of the Decretive (Austria). However, consumers of EU member states where early repayment fees had been prohibited at all (Poland, Latvia), lost because creditors were entitled to charge them. The Russian approach is the following. The consumer who wishes to early repay a loan is obliged to notify a creditor prior to repayment (up to 30 days) and pay interest for this period. This is similar to the approach adopted in Portugal. The latter is criticized by the experts of the EU who research the implementation of the Directive by national legislators.[11] However, it must be added that a lot of the Russian banks refused to charge early repayment fees from their borrowers.

10. Penalty

Both Russian and Ukrainian legislation restrict the sum of a penalty in legal relations on consumer credit.

Ukraine approach is the following (21.1). Penalty rate should not exceed the double key rate of the National Bank of Ukraine within the period of delay and also, in the absolute figures, should not exceed 15% of the overdue sum. Besides, all penalties for the breach of the one consumer credit contract, connected with a delay or not, should not in sum exceed 50% of the issued loan (principal amount).

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[10] Определение Верховного Суда Российской Федерации от 01.03.2016 No. 51-КГ15-14 [Supreme Court of the Russian Federation, *I.V. Shichenko v. Altai Department of the Open JSC Sberbank Rossii*, No. 51-KG15-14, 1 March 2016] (Oct. 10, 2018), available at http://www.garant.ru/products/ipo/prime/doc/71254772/.

[11] European Parliament, Implementation of the Consumer Credit Directive, Directorate-General for Internal Policies, Internal Market and Consumer Protection, IP/A/IMCO/ST/2011-15, January 2012.

In Russian consumer credits, penalty should not exceed 20% of annual interest charged from the overdue sum or, if a loan is interest-free, 0.1% per day charged from the overdue sum (5.21). The unclear issue is how to apply penalties for the breach of the consumer credit contract, which is different from its delay?

Earlier according to the both Russian and Ukrainian civil Codes the courts had a discretion to reduce a fine for delay if they found it extremely high. The problem was that the court used their power arbitrarily. In 2013 the Constitutional Court of Ukraine examined on merit the claim against the possibility of charging of extreme fines in consumer credits, and ruled that imposing of ceilings for the fines for violation of the civil contracts is the parliamentary discretion, moreover, the courts have the power to reduce them on a case-by-case basis.[12] However, the Parliament did not impose a sharp ceiling. The problem was the extreme distribution in opinions of different local judges about the fair level of fine for delay in consumer credits. Unfortunately, the Constitutional Court refused to solve it in 2013. It has been solved by the Parliament for new consumer credits issues since 10 June 2017, but remains unsolved for the older consumer credits.

Some Ukrainian creditors included in their consumer credits provisions which authorized two application simultaneous fines for the same delay: fixed fine for the fact of delay as such plus a fine proportional to the duration of delay. The Supreme Court found that illegal based on the general provisions of Article 61 of the Constitutional of Ukraine which prohibits double legal responsibility of the one sort of responsibility for one violation.[13] It is important to mention that both Russian and Ukraine legislations authorize in case of delay the accrual penalties on interest, not only on principal amount on credit. I consider that to be an extremely negative phenomenon.

In June 2018 in Russia it will enter into force some new specific rules concerning consumer credits secured by mortgage (5.9.5-1). Penalty rate for the delay under such type of a loan will be reduced to the ordinary key rate of the Central Bank of Russia at the date of entering into the respective contract, or 0.06% per day from the overdue sum in case of the interest-free consumer credit.

11. Overdraft

Ukrainian law differentiates a special type of a consumer lending contract which is overdraft for the period from 1 to 3 months or no first demand. Some general consumer

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[12] Рішення Конституційного суду України від 11.07.2013 No. 7-рп/2013 [Constitutional Court of Ukraine, Legal Opinion under D.O. Kozlov petition, No. 7-rp/2013, 11 July 2013] (Oct. 10, 2018), available at http://zakon.rada.gov.ua/laws/show/v007p710-13.

[13] Постанова Верховного Суду України від 11.10.2017 No. 6-1374цс17 [Supreme Court of Ukraine, *PAO Commercial bank Privatbank v. X*, No. 6-1374tss17, 11 October 2017] (Oct. 10, 2018), available at https://oda.court.gov.ua/sud1590/pravovipoziciivsu/6-1374cs17; also Постанова Верховного Суду України від 21.10.2015 No. 6-2003цс15 [Supreme Court of Ukraine, *Alex-Bank Ltd. v. X*, No. 6-2003tss15, 21 October 2017] (Oct. 10, 2018), available at http://search.ligazakon.ua/l_doc2.nsf/link1/VS150956.html.

guarantees are not applied to this contract, and a creditor has a right to demand a full repayment of such loan at any moment within a period established by a contract starting from the day of receiving the debtor of such notice from a creditor (3.3; 9.3.12; 12.4). In Russia there is not a similar specific legal concept. What kind of loans are considered to be of this type in Ukraine and why they are needed in Ukraine is unclear to me. My attitude towards this construction is negative. As I demonstrate below there is no equivalent in the EU law.

The EU Directive is not applied to some types of loans such as deferred debit cards, under the terms of which the credit has to be repaid within three months and only insignificant charges are payable (cl. 13 of the Preamble). But it does not correlate with the Ukrainian model, in the latter there is no such attribute as "insignificant charges."

There is a concept of specific credit agreements in EU law to which only some provisions of this Directive are applicable (cl. 11 of the Preamble). It is the overdraft facility and where the credit has to be repaid on demand or within three months (2.3) and credit agreements in the form of overrunning (2.4). It is true, that under these agreements consumer protection is relatively lower. However, unlike the Ukrainian approach, excepted demand loans, there is no right of a creditor to demand a loan repayment at any moment within a period established by a contract from the day of receiving such notice from a creditor.

Besides, the EU Directive has provisions concerning open-ended agreements which can be terminated through the simplified procedure. Indeed, in the real market many loans are very long-term (e.g. credit lines under credit cards). There is the logic behind regulation, which allows unilateral termination of a contract because parties should not be forever bound by it. EU law permits such termination: a) at the will of consumer with a notice of a creditor (a default rule is 1 month before the termination); b) at the will of a creditor if it is agreed in a credit contract with a notice of a consumer 2 months prior the termination (cl. 33 of the Preamble; 13.1, 13.2).

Moreover, a creditor under this contract can stop future lending if it is specified in a contract for objectively justified reasons. As examples of such reasons the Directive lists suspicion of an unauthorized or fraudulent use of the credit or a significantly increased risk of the consumer being unable to fulfill his obligation to repay the credit. The creditor shall inform the consumer of the termination and the reasons for it unless the provision of such information is prohibited by other Community legislation or is contrary to objectives of public policy or public security. So, open-ended agreements are the long-term agreements which can be terminated by a borrower and, under certain circumstances, by a creditor, the latter is also entitled to stop performance of new credit sums. But this balanced model differs a lot from the Ukrainian model of the unlimited right of a creditor to terminate a contract.

In this EU concept, the key idea of special tools of the consumer of credit lines rights' protection is crucial. Neither Russia, nor Ukraine has such special protection

in the sphere of credit lines. It would be reasonable to impose the new rule, that no less than 50% of a credit line is guaranteed, i.e. a creditor is not entitled to cut a credit limit more than by half if the borrower diligently performs his obligations. Similarly, it is necessary to regulate the issue under which circumstances and how a creditor can totally annul a credit limit?

12. Early Demand for Repayment of All Loan and Interest or Termination of a Contract in the Event of Borrower's Delay

Under the Russian law a creditor is entitled to demand early repayment of all sum of a debt and interest or termination of a contract if the borrower delays: a) for credits issued for up to 60 days – in case of 10 days delay with granting to a borrower at least a 10 day period for the repayment; b) for credits issued for more than 60 days this additional period shall be increased from 10 to 30 days. Besides, in the case of such long-term credits, one or more delays in total should be at least 60 days within the last 180 days (14.1; 14.2; 14.3).

Ukrainian law (16.4) entitles the creditor (if it is specified in a contract) to demand early repayment of a debt and interest in the case of a 1-month delay. As an exception, for mortgages or credits for the purchase of apartments, this term of delay shall be at least 3 months. A consumer should within a 30 day period from the date of receiving for a creditor a notice (60 days for mortgages and any other credits for the purchase of real estate), to repay at least the sum of delay. Ukrainian law prescribes that in case of consumer's breach of obligations to pay a loan and interest, a creditor also is entitled to claim damages (21.1). This provision is absurd and very dangerous. It is crucial to prohibit the consumer creditor's claim for damages above the sums of interests and penalties.

Overall, it is necessary to mention that both Russian and Ukraine legislations share such shortcoming as the lack of clear rules on at least one mandatory prolongation of current payments for borrowers, who met objectively difficult life situations, for instance, or became seriously sick or lost their jobs. Ultimately, it should be noted as well that in reality loans in Russia and Ukraine are often sold by creditors with a great discount up to 95% under circumstances when creditors do not make significant concessions to borrowers. That is why it is necessary to add to the legislation a new provision on the right of a borrower to know the discount on his loan in case of assignment of rights as well the right to repay such loan to a new creditor proportionally to the percentage of discount with addition to the sum of the reasonable profit of the new creditor.

Conclusion

While comparing new Russian and Ukrainian consumer credit statutes, it is clear that in some aspects the Ukrainian one is pro-consumer, and in some other

aspects the Russian one is more pro-consumer. Some provisions of both Russian and Ukrainian consumer credit statutes are very controversial and unclear; in some instances they could lead to debt slavery, so they must be corrected in the future.

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METHODS OF COMMITTING AND INVESTIGATION OF FRAUDULENT MOTOR VEHICLE TRANSACTIONS

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Having set the goal to investigate and analyze modern methods of committing fraudulent motor vehicle transaction, we systematize and classify them. Special attention is paid to systematizing data on the identity of scammers, organized criminal groups and victims. Methodological recommendations aimed to create computer psychological profiles of scammers involved in fraudulent motor vehicle transactions are offered. Empirical methods of investigation based on available historical information about the peculiarities of the methods of committing crimes in fraudulent motor vehicle transactions are developed herein. Application of such methods will increase the effectiveness of law enforcement institutions in detecting, preventing and investigating fraudulent motor vehicle transactions.

Keywords: methods of committing fraud; psychological profiles of scammers; fraudulent motor vehicles transaction; victim; methods of investigation; version.

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Introduction

The Ukrainian economy is faced with a multitude of problems. The comprehensive and effective resolution of these problems depends on the protection of property rights. Two factors, namely, the inefficient condition of the Ukrainian law-enforcement system and the reduction of the living standards of the overwhelming majority of population have led to an aggravation of the criminal situation and an increase in encroachments on others' property. This has resulted in various forms of widespread fraud (including in motor vehicle transactions). Taking into account the rapid development of the motor vehicles market, such crimes become more and more attractive to criminal groups developing sophisticated methods of criminal activity. Moreover, high profitability of criminal activity is a system-forming factor for organized criminal groups specializing in this field.

Although the statistics of the General Prosecutor's Office of Ukraine on recorded fraudulent activities shows a reduction in the number of registered crimes; this can be considered as a proof of the increasing level of latency with regard to the given category of crimes.[1] Meanwhile, such reports do not consider the specific features of motor vehicle transactions and do not reflect the objective situation due to the high latency of this category of crimes. Furthermore, this fact is supported by the analysis of media materials and by the study of public opinion regarding the effectiveness of law-enforcement agencies towards detection and investigation of this crime category. This leads to the reasonable conclusion that fraudulent activities in motor vehicle transactions are clearly linked to changes in Ukrainian and foreign legislation. This factor and others are the reasons for the decrease in detection of fraudulent activities. The increase in undetected fraudulent motor vehicle transactions is also

[1] According to the data of the General Prosecutor's Office of Ukraine, 47,142 scammers were registered in 2013; 41,963 in 2014; 45,904 in 2015; 46,019 in 2016; and 37,014 in 2017. 11,310 criminal proceedings were sent to court with an indictment in 2013; 8,775 in 2014; 8,154 in 2015; 6,379 in 2016; and 8,662 in 2017. *See* Офіційний сайт Генеральної прокуратури України [Prosecutor General's Office of Ukraine, Official website] (Oct. 13, 2018), available at https://www.gp.gov.ua/ua/stst2011.html?dir_id=110381&libid=100820&c=edit&_c=fo. For more details on the peculiarities and existing problems of the application of monitoring methods to determine the peculiarities of obtaining statistical data in Ukraine, *see*, e.g., *Гречанюк С.К., Сердюк П.П.* Состояние преступности против жизни и здоровья и против собственности в Украине // Всероссийский криминологический журнал. 2018. Т. 12. No. 1. С. 23–31 [Sergey K. Hrechaniuk & Pavel P. Serdiuk, *The State of Crime Against Life and Health and Against Property in Ukraine*, 12(1) Russian Journal of Criminology 23 (2018)].

a factor. Moreover such category of fraudulent activities is a category of crime that is committed, as a general rule, by highly professional criminals.

Analysis of relevant materials (documents issued by police authorities and other public bodies) shows that a large number of problems are faced in the course of investigation of these crimes.

At the same time, modern methods of committing fraudulent motor vehicle transactions, and the characteristic signs of single-player scammers and organized criminal groups, remain to be explored; investigation records (as a body of information available to investigators on committed crimes) and methods which are dependent on these records will be particularly important.

In order to determine the general features of the methods of committing fraudulent motor vehicle transactions and the resulting tactical features of detection and investigation, we research and systematize the current manifestations of fraudulent motor vehicle transactions and offer appropriate methods of investigation depending on the information available from law enforcement agencies on the specifics of fraudulent activities of this type.

1. General Theoretical Basis of Methods of Committing and Investigation of Fraudulent Motor Vehicle Transactions

Fraudulent motor vehicle transaction is not just a separate category of crimes; it is a profitable direction of illegal "business" for the organized criminal activity that provides the opportunity for significant gains with minimum financial inputs.[2]

Permanent criminal activity is a component of this type of the motor vehicle transaction. This criminal activity is connected with many sorts of motor vehicle transaction, e.g. purchase and sale, rent, and use of separate units, exercising separate actions where the motor vehicle is the important part. Moreover, this type of criminal activity permanently creates a corresponding criminal "market," i.e. criminal "market" of motor vehicles as a product which is allowed in civil transactions but implemented with violations of certain conditions; a criminal "market" for motor vehicles when transactions therewith are prohibited (e.g. selling motor vehicles which were obtained as a results of illegal acquisition of property); a criminal "market" for motor vehicles as product which is allowed in civil transactions (e.g. car services for replacement of spare parts; overcharging for the provided repair services, etc.); a criminal "market" for corrupt services which enables fraudulent activities to be committed.

It is worth mentioning that term criminal "market" has been used in scientific teaching for a long period of time,[3] but it has not been studied appropriately.

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[2] For more information on fraudulent activity as a separate type of organized criminal activity *see* Tiggey May & Bina Bhardwa, *Organised Crime Groups Involved in Fraud* (Cham: Palgrave Macmillan, 2018).

[3] *See*, e.g., *Ізовіта А.М.* Поняття та структурна характеристика кримінального ринку земель в Україні // Актуальні проблеми держави і права: Зб. наук. пр. Вип. 67 [Andrey M. Izovita, *The Concept and Structural Characteristics of the Criminal Land Market in Ukraine* in *Actual Problems of State and Law: Collection of Scientific Articles. Issue 67*] 619 (S.V. Kivalov (ed.), Odessa: Yuridicheskaya literatura, 2012).

However, as regards the development of criminal activities in this field, it is becoming more crucial and it often includes traditional methods of criminal activity.

In Ukraine and other CIS members, there is an academic discussion about the possibility of using a technical approach to determine the specific features of committing and investigation of a separate category of crimes which, as well as fraudulent motor vehicle transactions, are characterized by systematicity, organization and the application of professional skills.

Researching the technological side of criminal activity, Alexander Golovin wrote about the technological pattern typical for the crime mechanism,[4] and Nikolay Yablokov determined the technological level of criminal conduct as a detailed behavioral act.[5] Later, Yablokov offered to equate the terms "mechanism of criminal activity" and "methods of criminal activity" while characterizing the quality side of criminal activity. According to his opinion, a mechanism as an element of a forensic characteristic describes its sequencing, i.e. its technological side.[6]

In analysis of the scientific views towards the peculiarities of the use of the term "methods," which you can find in forensic literature of soviet and post-soviet countries, reveals an understanding of methods of committing fraudulent motor vehicle transactions as a set of agreed actions, methods and methods of criminal activity directed at selecting the object of criminality, the scene and the methods of committing the crime, using the results of criminal activity, organizing a counteraction to the detection and investigation that combines complexes of interconnected crimes and can be considered as systematic activity.

Relying on a systematic approach, we will outline the principles of the forensic technological approach, which should be understood as those conditions that determine the direction of the process of scientific knowledge, consisting of: 1) the reproducibility of methods, regardless of the personal qualities of the subject of activity and other conditions for its implementation; 2) the distribution of the whole and continuous process to interrelated procedures; 3) the coordinated and phased implementation of procedures aimed at achieving the desired result; 4) the unification of the implementation of the procedures included in the methods, which is an indispensable and decisive condition for achieving the planned results; 5) the presence of feedback.

In our opinion, research of the methods of fraudulent motor vehicle transactions provides a study based on the forensic characteristics of the peculiarities of fraudulent motor vehicle transactions taking into consideration the definition of the relationship with the subject of criminal assault, the scene of the crime, methods of

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[4] *Головин А.Ю.* Теоретические основы и актуальные проблемы криминалистической систематики на современном этапе развития криминалистики: Дис. … докт. юрид. наук [Alexander Yu. Golovin, *Theoretical Basis and Actual Problems of the Forensic Taxonomy on the Modern Development of Criminalistics: Thesis for a Doctor Degree in Law Sciences*] (Tula, 2002).

[5] Криминалистика: Учебник [*Forensic Science: Textbook*] (N.P. Yablokov (ed.), Moscow: BEK, 1995).

[6] Криминалистика: Учебник [*Forensic Science: Textbook*] (N.P. Yablokov (ed.), 3rd ed., Moscow: Yurist, 2005).

preparation, committing and concealment of fraudulent motor vehicle transactions, and characteristics of criminals and victims.

At the same time, it can be concluded that the methods of fraudulent activities in the sphere of motor vehicle transactions as a direction of criminal activity generally combines the complexes of interrelated crimes (directly fraudulent activities, a number of misdemeanors when using and installing corrupt connections with the purpose of committing and concealing fraudulent activities), and acquires the signs of systemic activity. One of the main factors in the existence of a complex of crimes as a system is the existence of such a link between crimes which unites them in a single chain of criminal behavior.

Under the functional orientation, the information technology model of fraudulent activities in the sphere of the motor vehicle transactions is the basis for the promotion of certain forensic versions and the identification of a typical range of persons involved in the commission of the crime, as well as the development of a methods model for detection, prevention and investigation. Meanwhile, the proposed methods are designed to investigate crimes which are well concealed.

It is also reasonable to consider the methods for detection and investigation of fraudulent activities in the sphere of motor vehicle transactions as a sequence of interrelated stages where the "analytical" stage is the forensic analysis of fraudulent activities based on their forensic characteristics and correlation links of its individual elements, taking into account the relevant situation; and the "effective" stage is the collection, by the subject of the application of these methods (investigator, employee of operational units or expert), of information about a specific fact of fraudulent activities by conducting tactical operations, the use of investigative (search) actions and specialist knowledge.

Researching the methods of investigation of fraudulent activities in the sphere of the motor vehicle transactions involves determining the specifics of the use of information about a specific crime by an investigator, an employee of operational units or an expert (subject of application of the specified methods) in identifying, preventing and investigating crimes by conducting tactical operations, conducting investigative (investigative) actions and applying specialist knowledge.

In our opinion, the use of the technological process to identify, prevent and investigate fraudulent activities in the sphere of the motor vehicle transactions is justified by the fact that this type of criminal activity is one of the directions of organized criminal activity but has purely theoretical significance.

2. Typical Methods of Committing Fraudulent Motor Vehicle Transactions

Information about typical methods of committing fraudulent motor vehicle transactions plays an important role in operational activity. Firstly, it forms the basis for the consideration of objective and relative factors, which formulate a method

of a previous or future case. Secondly, it provides for the fast detection of criminals and improves the comprehensiveness and promptness of the investigative process. It follows the argument that detection of one of these interrelated characteristics considering the method of commission the crime gives a possibility to generalize the method itself; that helps an investigator to detect complete trace of a crime and to link all information in an appropriate method. Furthermore, the characteristics of a method of committing a crime optimize the work of an investigator to find the criminal and to connect him/her to an organized criminal group.

A method of committing fraudulent motor vehicle transactions can be defined as a complex system of actions towards preparation, commission and concealment of consequences of this category of crime. We identify a complex of all criminal actions, in essence, starting from the appearance of intention to finalize criminal activity by concealment of consequences.

Quite often, fraudulent schemes for the purchase and sale of used cars under a power of attorney are used. This means that purchase of a car under a power of attorney without further registration of the technical passport can be used by the seller to get the car back to him/her or his/her heirs after his/her death. Moreover, it should be noted that if the buyer dies in case of purchase under the power of attorney, its enforcement power expires as well and the car must be returned to the original owner. There are financial risks in this situation, for example, if the car has been insured with a franchise, after the buyer receives the insurance premium, the seller can formally claim the franchise payment.[7]

Sometimes a scammer buys a used car without having enough financial means, paying a minimum deposit and writing a receipt for the rest of the payment; after he/she becomes the owner of the car he/she immediately sells the car and forgets to return the rest of payment to the original seller.[8]

A widespread scheme of fraudulent activities nowadays is the acquisition of cars through auto sales websites. Externally, the advertisements on these sites look like any other and include the official photo of the car in the showroom, the mark and model, year of release, list of options, and price. The price attracts attention because it is 30–50% below the market price. Sellers explain such a discount on the basis that the car is not new. These websites contain the offers of various models; usually not luxury because their target is a middle-income buyer. They usually contain advertisements for VAZ, ZAZ Sens, Volkswagen Polo Sedan, Hyundai Accent, Renault Logan and Ravon R2 cars. An analysis of the information contained in such advertisements shows that cars of the year of production offered for sale were not widely produced at the time of production. A characteristic feature of this

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[7] *See*, e.g., Шахрайства при купівлі та продажі автомобіля // Енциклопедія шахрайств та лохотронів [Fraud in Buying and Selling Cars, Encyclopedia of Fraud and Scams] (Oct. 13, 2018), available at http://history.lohotron.in.ua/avto-shahrajstvo/shahrajstva-pry-kupivli-ta-prodazhu-avtomobilja.

[8] *See*, e.g., *Id.*

scheme is that sellers communicate with customers only using the phone number indicated in the advertisement. In addition, sellers often characterize the object of sale as a car from the EU, which makes it impossible to inspect it and yet necessary to provide a prepayment in order to cover the costs of delivery from a warehouse located near the border of Ukraine. Prepayment is 10–20% of the cost of the car. The agreement is concluded by signing a contract; the buyer signs up to transferring the advance payment.[9] Quite often the contract is an agreement on the provision of information services and it will not say a word about buying a car. A separate sign of such websites is that customers do not have the opportunity to write a review on the information provided in the advertisement.[10]

Sometimes it is the buyer who commits fraud when purchasing a car. For example, a scammer calls the number stated in the advertisement on the website with the intention of buying a car. At the same time, he asks for the number of the card to which the money is to be paid. A person who introduces themselves as the bank's employee calls the seller to inform them that the money will be transferred; but the seller will not receive the money. Moreover, there is a chance that the seller will lose his/her money because the money may be withdrawn from the credit card without the consent of the cardholder.[11]

Another interesting scheme is fraudulent actions through advertisement on a website. The seller specifies a phone number on the answering machine where the advertisements are recorded. A lot of calls are made because the price is attractive, but every time a person listens to the recorded message on the answering machine, a certain amount of money is charged to that person's phone bill.

Sometimes the scammer offers to sell cars at a lower cost. At the same time, the buyer tries to arrange a deposit that must be transferred to an electronic wallet or make a payment in advance to a mobile phone account. The seller asks for this service from all persons interested in buying the same car.[12]

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[9] This method was used by scammers in 2018 in Lviv, Vinnitsya, Zhytomir, and Chernivtsi districts and caused affected 150 citizens of Ukraine to the tune of 7 mln UAH. *See* Мошенники продали украинцам несуществующих авто на 7 млн // Факты. 01.06.2018 [The Scammers Sold to Ukrainians Non-Existent Cars for 7 mln, Facts, 1 June 2018] (Oct. 13, 2018), available at https://fakty.ictv.ua/ru/lifestyle/auto/20180601-shahrayi-prodaly-ukrayintsyam-neisnuyuchyh-avto-na-7-mln/.

[10] *See*, e.g., В Україні новий вид шахрайства при купівлі авто // 24 канал. 28.11.2017 [A New Type of Fraud When Buying a Car in Ukraine, 24th Channel, 28 November 2017] (Oct. 13, 2018), available at https://24tv.ua/shahraystvo_pri_kupivli_avto_cherez_internet_v_ukrayini_n894900.

[11] *See*, e.g., Як розпізнати Інтернет-шахрая і повернути вкрадені з картки чи електронного гаманця гроші // Лохотрон в Україні: популярно про шахрайства та захист. 27.08.2015 [How to Recognize an Internet Scammer and Get the Money Stolen from the Card or E-Wallet Back, Scam in Ukraine: Popular About Fraud and Protection, 27 August 2015] (Oct. 13, 2018), available at http://lohotron.in.ua/2015/08/yak-rozpiznaty-internet-shahraya-i-povernuty-vkradeni-z-kartky-chy-elektronnoho-hamantsya-hroshi.

[12] *See*, e.g., Мошенничество при покупке и продаже автомобиля // Первая коллегия: Центр судебной защиты [Fraud in Buying and Selling a Car, First College: Center of Judicial Protection] (Oct. 13, 2018), available at http://opravdaem.ru/fraudulent/moshennichestvo-pri-pokupke-i-prodazhe-avtomobilya.

In addition, nowadays the acquisition of motor vehicles registered in European countries (especially, in the EU) is widespread due to a rather low cost. There are schemes for importing non-customs vehicles to Ukraine. This is regulated on the legislative level and this situation creates conditions for fraudulent activities. The essence of one of the schemes, for example, is that a Ukrainian citizen who wants to buy a non-cleared "cheap" car (amounts vary from 3 to 10 thousand dollars depending on the brand and condition of the car), appeals to the intermediary. He promises to register the car with a Lithuanian company (which, in fact, also belongs to scammers) and to bring it to Ukraine by proxy. Allegedly, the client can freely move around the country using this car. In addition to the cost of the car itself, the company asks for a payment for its intermediary services in the amount of $1,000. Sometime later after the transaction, scammers re-register the Lithuanian firm to another owner and after an "accounting audit" this car is not counted and another owner threatens to declare that the car was stolen. Having the data of the Ukrainian buyer, which he/she provides when buying a car, a certain legal company easily finds the driver; the company advises him to "settle everything peacefully and transfer the company's property for inspection at the service station and subsequent shipment to Lithuania." At the service station, it turns out that the car is in terrible condition, although it was ostensibly sold in an ideal condition. Thus the buyer is asked not only to return the car itself, but also to pay for its repair. Legally everything is correctly designed because a Lithuanian company has the right to demand its property to be returned, since there is no such thing as a "power of attorney for driving a car." Moreover, scammers do not need to call and make threats demanding the return the car and money for its repair. This scheme applies not only to cars on Lithuanian registration numbers, but in general to all non-cleared cars in Ukraine which were imported by intermediary firms.

Part of this scheme is the use of falsified official documents. In particular, we are talking about the posting the fictitious seals of foreign consulates in foreign passports of owners of non-customs cars from Europe who are Ukrainian citizens; these cars were allegedly on consular registration in European countries.[13]

Sometimes the criminals use the forged documents to sell cars – these documents were obtained by scammers as a result of illegal possession. In this case they are usually registered with frontmen from whom the criminals buy or take the passports for the duration of the scam. At the next stage, vehicles are resold on behalf of the same persons. Sometimes the car is stolen but the buyer is assured that the car was "sold" legally. In order to ensure the maximum level of reliability in the preparation of counterfeit documents, criminals try to use their connections with corrupt police officers.

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[13] *See*, e.g., На Львівщині викрили ділка, який організував схеми із нерозмитненими авто // ZIK. 15.07.2018 [A Criminal Who Organized Schemes with Non-Cleared Cars Was Identified in Lviv, ZIK, 15 July 2015] (Oct. 13, 2018), available at http://zik.ua/news/2015/07/15/na_lvivshchyni_vykryly_dilka_yakyy_organizuvav_shemy_iz_nerozmytnenymy_avto_607661.

In order to reduce the risk of exposure resulting from a review of records of missing vehicles, registration at service centers is carried out immediately after acquisition or using forged registration documents for the car body and engine numbers. The number is changed by one digit (3 is changed to 8, 1 is changed to 4, etc.), which prevents detection of inconsistencies in the vehicle registration certificate.

Legalization of stolen vehicles is carried out by its registration with the changed identification numbers according to forged documents in the relevant public bodies. For the purpose of legalization of stolen vehicles and their subsequent official registration, criminals purposefully establish contacts, organize mediation or directly collude with police or service centers, as well as steal or manufacture fictitious forms of registration documents. At the same time, the legalization of stolen vehicles using corrupt staff of service centers or police often occurs as a result of the latter committing the following illegal actions:

– Registration of a vehicle using documents that are questionable because of their authenticity or obvious signs of forgery;

– Registration of a vehicle on a list of missing vehicles;

– Registration of a vehicle for citizens who do not reside on the territory of the relevant administrative-territorial authority;

– Ignoring the requirements for compulsory sending of requests to the places of the previous registration of the vehicle;

– Deliberate distortion of data in inquiries concerning a vehicle;

– Illegal registration and removal of a vehicle;

– Rejection by the responsible officials of the established measures of storage of the security documents.

More often, professional car scammers have repair trucks for the maintenance of cars and use a certain "technique." Within a few hours, the car in this repair truck is dismantled and the metal parts of the car body with no numbers (roof, hood, bumpers, etc.) are forwarded to warehouses of auto parts or to another repair truck that use such "stolen by pre-order" details instead of buying new ones. The number of such operations is constantly increasing. This is explained by the fact that new spare parts cost more and their revenues are to be expected within a week or even a month. In addition, the labor costs in such repair truck are much higher. Warehouses that buy "stolen by pre-order" spare parts supply them very quickly (sometimes even for one day). After the specified actions this car can be sold in a car market or through a motor show at understated reduced price.

Scammers purchase cars at auctions where cars are sold after crashes and pretend that they have no damage. These auctions are organized to partially cover insurance payments. At the same time, it is officially stipulated that the vehicles are sold for spare parts or for restoration, but they are usually so damaged that repair would be unprofitable. Criminals buy such cars, take possession of a car of the same brand, replace identification numbers and other signs in it with those from the damaged car (which takes only a few hours), and then they register it as a recovered one. The profit from this operation is higher than from the sale of a car for spare parts.

It is worth noting that fraudulent actions dealing with the sale of motor vehicles is a method of concealing illegal possession of a motor vehicle registered in EU states. A vast majority of motor vehicles are stolen with the initial aim of transferring them to other states; which can be characterized as a high transnational component within this category of crime. This phenomenon depends on an insufficient supply on the markets of several states (this situation occurred in Western Europe in the 1990s when the borders between Eastern Europe states were opened). Today, stolen cars (especially, highly expensive cars) are transferred with aim of selling outside the state in which the crime was committed. For example, a car that was stolen in Germany is sold in the Middle East or neighboring countries (or Ukraine).

A majority of car thefts are committed by professional organized criminal groups with precise roles and responsibilities. An increased area of geographical access has a tendency to increase the crime and make criminals' actions, roles and responsibilities more sophisticated. We suggest that the quantity of detected motor vehicles with a fraudulent history depends on some factors: characters of operations, area of a state, supply of motor vehicles in the relevant market, place of a state on the globe, system of international communications, etc.

The fraudulent sale of cars by official or unofficial representatives of a particular motor vehicle model is performed through the use of:

– Poor-quality advertising (an unavailable model is advertised, the price of the car in the advertising does not include VAT, the advertising declares interest-free installment that turns out to be a loan);

– Manager's proposals to fix the price by prepayment, but actually the auto loan agreement is signed (at the same time, the manager spends a lot of time trying to persuade the buyer of the expediency of such a transaction);

– Actions aimed at selling used car under the guise of it being new (the car may have hidden defects, etc.);

– Calculation of the price in conventional units while the exchange rate in the car dealerships is always much higher than the official one;

– Actions aimed at masking the real contract (for the signature of the buyer, he is given several contracts, ostensibly copies, but the buyer reads only one and signs the rest signed without reading);

– Fraudulent actions when lending cars purchased (advantageous credit terms are offered and in fact the buyer must pay an additional commission for the bank's services, moreover, he is obliged to insure the car for the entire loan period);

– Actions aimed at the sale of a lien car can be seized to secure the transaction, etc.;

– Actions aimed at justifying the need to purchase a car with a more expensive bundle or with other bonuses (a set of tires, installation of alarm equipment, etc.).[14]

[14] *See*, e.g., Как обманывают в автосалонах // SafeCrow. 17.06.2016 [How They Deceive in Car Dealerships, SafeCrow, 17 June 2016] (Oct. 13, 2018), available at https://www.safecrow.ru/article/obman-pri-pokupke-avto-v-salone.

In addition to these schemes, informal representatives ("gray dealers") quite often understate the cost of the cars offered, although such a price may be due to a simple car kit. Gray dealers may also facilitate sales of cars that are received as a result of illegal possession or are not cleared. Gray dealers typically sell warranties for up to 10% of the total cost of the car.

A new trend we should mention is the organization of fraudulent activities by car companies on a global level. In 2015, there was a famous scandal at global level called "dieselgate" by the media. This year the researches from West Virginia University have tested American and European diesel cars to compare their compliance ecological standards. It resulted in overwhelming conclusion "Jetta" models exceeded standards by 15–35 times. Volkswagen pled guilty and acted in accordance with prosecutor of the Braunschweig decision.[15] As a result of such activity, the car concern sold 10.7 bln diesel cars with motors working on illegal software (senior executive Oliver Schmidt had taken to responsibility for criminal activity[16]). This story has a Ukrainian continuation – in the so-called "certificatesgate." Porsche Ukraine Ltd. that is an exclusive distributor of Audi, Volkswagen, SEAT in Ukraine, and sold 2800 diesel cars Golf SportWagen (Variant) made in Mexico. These cars were in high demand in Ukraine because of the low price rate on the market. But the price was conditioned by "made in Wolfsburg, Deutschland" record in the certificate. This "mistake" was identified after the car owners had registered them and paid relevant taxes.[17] Consequences of this criminal activity can influence the use of the cars by Ukrainian owners. The investigation is still pending.

In Ukraine, the car rental market is just becoming more active. Fraudulent schemes are gaining momentum. Rental cars are resold under fictitious documents or they are stolen. Among the clients are citizens of Ukraine who buy minibuses, off-road vehicles for travel and to provide a tourist service. Scammers find a person, give him/her money for hire and bail. The specified person rents a car, passes on a fake power of attorney (certified by a "private" notary) to a third party and the car simply disappears. Sometimes illegal seizure is carried out by clients without collusion (but this usually involves collusion with the employees of the rental company).

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[15] *See*, e.g., Немецкий концерн наказали за манипуляции с программным обеспечением дизельных двигателей // ТСН. 13.06.2018 [A German Firm Was Fined Because Of Manipulation with Program Data of Diesel Motors, TSN, 13 June 2008] (Oct. 13, 2018), available at https://ru.tsn.ua/svit/dizelnyy-skandal-v-germanii-oshtrafovali-volkswagen-na-1-mlrd-evro-1171020.html.

[16] *See* Бывший топ-менеджер Volkswagen получил семь лет по делу о дизельном скандале // ГОРДОН. 07.12.2017 [Former Senior Executive at Volkswagen Given 7 Years in Diesel Case, GORDON, 7 December 2017] (Oct. 13, 2018), available at http://gordonua.com/news/worldnews/byvshiy-top-menedzher-volkswagen-poluchil-sem-let-po-delu-o-dizelnom-skandale-220814.html.

[17] *Id.*; «Дизельный скандал»: В Украине продали 2800 машин «Volkswagen», которые незаконно прошли сертификацию // АНТИКОР. 26.05.2018 [Diesel Scandal: In Ukraine 2,800 Volkswagen Cars Were Sold with Illegal Certification, ANTIKOR, 26 May 2018] (Oct. 13, 2018), available at https://news.pn/ru/money/199867.

Furthermore, cars can be transferred to a pawnshop under forged documents or sent for dismantling.

Sometimes fraudulent actions involve the organization of economic activities of enterprises that provide car rental services. They fulfill contract conditions (for example, the car may not have a filled fuel tank, it may be damaged, require servicing, etc.).[18]

This scheme of fraudulent activities is possible to commit due to the corresponding requirement to carry out maintenance of the car every 10–15 thousand km (so-called planned maintenance), but at least once a year. In general, the "every year check" rule is conditional; it is used by the service stations to enforce visits to warranty maintenance stations. During the diagnostics, the mechanic checks the condition of the car and recommends parts (filter, oil, running gear, etc.) that need to be replaced. The mechanic will tell the customer that, for safety reasons, the customer cannot be present during the maintenance, and then the mechanic either fails to carry out any replacement or replaces spare parts with used spare parts. In addition parts can be installed, the quality of which does not correspond to the price stated in the calculation (original spare parts with codes and an emblem of the car brand are much more expensive than substitutes manufactured by other manufacturers).[19]

Another scheme is as follows: pedestrians simulate accidents using the mechanism of getting under the car with subsequent extortion of money by blackmailing and threats to apply to law-enforcement bodies.

Frequently conscientious drivers cut corners or brake on slopes, thereby creating the inability to avoid a collision. Scammers usually use previously damaged and used cars of famous brands such as BMW or Mercedes. After the collision with the car that triggered the accident, a scammer comes out and exerts psychological pressure on the driver, causes serious damage or even threatens the driver. Then he/she proposes leaving the current location to prevent the cars from being seen by the patrol police or for other reasons (drivers can claim that they do not have a driver's license or technical passport) and demands payment of a certain amount of money (usually $100–200 or several thousand UAH) in exchange for leaving peacefully and not calling the police. The reimbursement of the insurance company is not within the scope of criminals' interests because later they plan to blackmail other drivers, therefore, in such cases it is very important to act completely within the law (firstly, never leave the scene of an accident; secondly, as soon as a collision occurred, call the police without leaving the car and wait in the car; thirdly, to record (photograph) the state license plate of the other vehicle).

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[18] *See*, e.g., *Вергун Д.* В Украине развернули массовые мошенничества с прокатными авто // UBR. 13.06.2017 [Denis Vergun, *Mass Frauds Were Launched with Rental Cars in Ukraine*, UBR, 13 June 2017]. (Oct. 13, 2018), available at https://ubr.ua/market/auto/v-ukraine-razvernuli-massovye-moshennichestva-s-prokatnymi-avto-3845274.

[19] *See*, e.g., Типи шахрайства на СТО: Як уникнути? // UA-news. 02.06.2015 [Types of Fraud at the Motorway Service Stations: How to Avoid, UA-news, 2 June 2015] (Oct. 13, 2018), available at http://ua-news.in.ua/ekonomika/15549-tipi-shahrajstva-na-sto-yak-uniknuti.html.

There may be more complicated schemes. The driver may be pursued by a vehicle and requested to stop. After stopping, the driver of the motor vehicle leaves, examines the car, leaves his phone number on request and does not notice any damage continues to move. However, this scheme does not end there. The scammers continue the pursuit and again demand a stoppage of the motor vehicle and this time it turns out that the scammers' vehicle is damaged. And then threats and extortion begin. Under this scam the cars have already left the scene of an accident and therefore it is impossible to claim insurance compensation and there are additional arguments for psychological pressure on the driver. In addition, providing a phone number to scammers will mean that they can call and terrorize the victim and demand money or make threats in the future.[20]

In March 2017 the cyber police discovered and liquidated the group of auto scammers who sent out text messages telling the receiver that he/she had won a new Chevrolet. Short text messages with the beginning "Congratulations! You have won a car..." were received by a lot of people one or even several times. These text messages contained the numbers of "hot lines" and addresses of sites whose names were skillfully disguised as domains of well-known auto brands. After the calling such a number "the win was confirmed," but for its receipt it was necessary to deposit a certain amount into the account as a "tax on the prize." Clearly paying only a few percent of the cost of a new car is a rare good fortune. The scammers used people's trust. The scam was conducted on a highly professional level. The scammers had their own hardware: GSM gateways for mass mailing, a server station that hosted 67 phishing sites, about 12,000 SIM cards with phone numbers and these so-called "entrepreneurs" did not even have time to activate about 1500 numbers. A lot of bank accounts were used for the victims to transfer funds for "prizes." In total, this organized group, which was based in the Kharkiv Region, included 11 people, 3 of them were detained. Equipment and other means that scammers used to deceive citizens were seized, and the server with pages of fictional car dealerships was stopped.[21]

The Law of Ukraine "On Mandatory Liability Insurance of the Owner of a Motor Vehicle"[22] sets out, peculiarities of the insurance procedure, rights and duties of the parties, as well as specific cases for assignment of liability.

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[20] *See*, e.g., *Ромащенко И.* Як не потрапити у халепу і не стати жертвою шахраїв? // ЛІГА.Блоги. 01.04.2015 [Ivan Romashchenko, *How Not to Get into Trouble and Not to Become a Victim of Scammers?*, LIGA.Blogs, 1 April 2015] (Oct. 13, 2018), available at http://blog.liga.net/user/iromashchenko/article/17641.aspx.

[21] *See Новицький О.* Кіберполіція ліквідувала групу авто шахраїв, які розсилали SMS з «виграшами» // AUTO.RIA. 03.03.2017 [Ostap Novitsky, *Cyberpolice Eliminated a Group of Car Scammers Who Sent Out Text Messages with "Winnings,"* AUTO.RIA, 3 March 2017] (Oct. 13, 2018), available at https://auto.ria.com/uk/news/autolaw/231857/doigralis-kiberpoliciya-likvidirovala-gruppu-avtomoshennikov-rassyl.html.

[22] Закон України від 01.07.2004 No. 1961-IV «Про обов'язкове страхування цивільно-правової відповідальності власників наземних транспортних засобів» [Law of Ukraine No. 1961-IV of 1 June 2004. On Mandatory Liability Insurance of the Owner of a Motor Vehicle] (Oct. 13, 2018), available at http://zakon3.rada.gov.ua/laws/show/1961-15/print1510177503534526.

At the present moment, car insurance use in Ukraine is increasing and constantly being reformed due to various problems the resulting in a non-stable insurance environment and slow progress. Other factors can be defined as follows: non-obligatory character of examination of insurance an certificate by police (this clearly has an impact on the level of governmental control over compliance with legislation by car owners); a low level of knowledge of frequently changing legislation; distrust of the overall insurance system and insurance companies; a low level of paying capacity of car owners; the absence of informational campaigns on insurance and changes in the relevant market through the media, etc.

It is worth noting that, starting from 2018, paper insurance certificates are being replaced by electronic certificates; according to the opinion of public authorities this will make the examination by police easier and will reduce expenses on its issuance and maintenance. Moreover, a special procedure was introduced for drivers, it is called "EuroProtocol" and is aimed at documenting incidents using a mobile gadget with access to the internet.[23] We suggest that such ideas are forward-thinking, but there are various objective and subjective factors which will hamper incorporation (e.g. absence of constant access to the internet for part of the some population, part of the population finding mobile and other devices difficult to use, absence of licenses of the relevant applications, etc.).

These processes, as well as factors which became grounds for their incorporation, create favorable conditions for new types of fraud in the field of car insurance. These fraudulent activities in the field of motor vehicle insurance can be divided into two groups: committed by a) insurers and/or employees of insurance companies; b) insured persons and other persons for the purpose of obtaining an insurance payment. Therefore, in cases when drivers have an insurance called "avtokasko" for the purpose of obtaining insurance payments, the following schemes can be applied:

– The falsification of a car accident or the provision of false information about the consequences of a real car accident (virtually impossible without establishing corrupt relations with the police, since the insurance company requires the report of relevant authorities about the fact of an accident);

– The use of a look-alike false car, i.e. for cars with fake state number which does not belong to them. The real car can be damaged after an accident or by criminal activity. In parallel, a car accident is staged in order to receive an insurance payment;

– Concealment of damage to the car in a situation where the insurance premium is not paid (for example, when driving while intoxicated, etc.);

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[23] *Шевченко В.* Автогражданка в 2018 году. Что поменяется // Минфин. 09.01.2018 [Vladimir Shevchenko, *Car Liability Insurance 2018. What Will Change?*, Minfin, 9 January 2018] (Oct. 13, 2018), available at https://minfin.com.ua/2018/01/09/31818093/; Автострахування зі смартфонів за хвилину: вийшов оновлений сервіс штрафи // 5 канал. 22.06.2018 [Car Insurance from Smartphones in a Minute: The Updated Service Has Been Fined, 5th Channel, 22 June 2018] (Oct. 13, 2018), available at https://www.5.ua/suspilstvo/avtostrakhuvannia-cherez-smartfon-za-khvylynu-vyishov-onovlenyi-servis-shtrafyua-172226.html.

– Concealment of the real cost of diagnostic and repair work and an increase in expenses.[24]

There were separate cases of insurance being bought from two insurance companies (due to close cooperation between insurance companies).

Sometimes employees of insurance companies criminally conspire with customers of companies and they apply for insurance after the car was damaged and overestimate its price or steal it. Quite often, there are fraudulent activities associated with the formulation of fake insurance with the participation of employees of insurance companies in order to avoid payment of insurance premiums.[25]

This method is used not only in Ukraine but in other European countries as well. For example, in Eastern Europe there are many organized groups which regularly visit large European cities (i.e. Berlin, Hamburg, Brussels, Prague, Paris, and Budapest) where they engage in illegal possession of motor vehicles. Often they are assisted by car owners themselves (for an appropriate fee), handing out originals of car keys for criminals to make copies. Then they declare their car "stolen" and receive insurance compensation for the new car, to make additional money under this scheme.

Sometimes there are schemes for buying a motor vehicle with a bank loan. In this case, there is a necessity to make insurance for the vehicle and the illegal possession of the vehicle as one of the insurance cases. The owner of the vehicle conspires with an organized criminal group that has international channels for sending cars illegally obtained to other countries. These organized groups steal the vehicle, and pay the owner 20–30% of its value. After the statement of theft, the insurance company makes a payout and becomes a victim of fraudulent actions.

The above listed types of fraud involving motor vehicles are not exhaustive. Each method has its own characteristics depending on the place, object (type of vehicle), and the identity of scammers and victims.

3. Classifications of Fraudulent Motor Vehicle Transactions

In many academic works of well-known criminologists[26] it is noted that the improvement of methods of investigating certain types (groups) of crimes largely depends on the development of classification of crimes.

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[24] *See*, e.g., Четыре схемы мошенничества в автостраховании // Bigmir)net. 09.09.2011 [Four Auto Insurance Scams, Bigmir)net, 9 September 2011] (Oct. 13, 2018), available at http://auto.bigmir.net/autonews/autoworld/1511559-Chetyre-shemy-moshennichestva-v-avtostrahovanii.

[25] *See*, e.g., Страховой рынок Украины наводнен сотнями тысяч фальшивых полисов "автогражданки" // Факты. 19.05.2016 [Ukrainian Insurance Market Flooded with Hundreds of Thousands of False Motor Liability Policies, Facts, 19 May 2016] (Oct. 13, 2018), available at http://fakty.ua/216897-strahovoj-rynok-ukrainy-navodnen-sotnyami-tysyach-falshivyh-polisov-avtograzhdanki.

[26] *See*, e.g., *Журавель В.А.* Криміналістична класифікація злочинів: засади формування та механізм застосування // Вісник Академії правових наук України. 2002. No. 3(30). С. 160–163 [Volodimir A. Zhuravel, *Forensic Classification of Crimes: Principles of Mechanism Formation and Application*, 3(30)

In forensic science, a classification of fraudulent activities in general,[27] as well as a classification of fraudulent activities in the field of the motor vehicles insurance was offered,[28] but there is no classification of fraudulent activities in the sphere of motor vehicle transactions taking into account the specifics of methods of their execution.

According to the rules of logic, it is necessary to find the essential criterion (basis) for the distribution of objects into groups (classification). This criterion may be a quantitative or qualitative attribute common to objects with a need of distribution. In this case, for objects with need of classification, it is necessary to find exactly such a feature that would have a distinctive difference – quantitative or qualitative. This feature (characteristic) should be the most significant one to ensure the stability of the classification as a whole and for each of its patterns in the overall distribution system as a set of components.

As a rule, the basis of classification is the signs of objects or phenomena, and the purpose of classification determines the signs, which should be taken as a basis. A variety of goals causes the need to choose the basis of classification – various features – which entails different classification schemes or typologies of the same phenomenon. Thus, the problem of choosing the basis of classification is closely related to the problem of establishing the purpose for which this classification is given.

On the base of all the above mentioned arguments, we propose such classification of fraudulent activities dealing in the field of motor transport:

– The object of a criminal offense (a fraudulent activities) can be money or vehicles; the latter should be subdivided into light and freight, passenger and goods vehicles;

– Within the context of the crime: using the current conditions or using artificially created conditions;

Bulletin of the Academy of Legal Sciences of Ukraine 160, 160–163 (2002)]; *Тіщенко В.В.* Теоретичні і практичні основи методики розслідування злочинів: Монографія [Valery V. Tishchenko, *Theoretical and Practical Bases of the Methodology of Investigation of Crimes: Monograph*] 260 (Odessa: Feniks, 2007).

[27] *See*, e.g., *Мусієнко О.Л.* Теоретичні засади розслідування шахрайства в сучасних умовах: Монографія [Oleg L. Musienko, *Theoretical Foundations of Fraud Investigation in Modern Conditions: Monograph*] 20–36 (V.Y. Shepitko (ed.), Kharkiv: Pravo, 2009); *Мусієнко О.Л.* Теоретичні засади розслідування шахрайства в сучасних умовах: Дис. … канд. юрид. наук [Oleg L. Musienko, *Theoretical Foundations of Fraud Investigation in Modern Conditions: Thesis for a Candidate Degree in Law Sciences*] 24–37 (Kharkiv: Yaroslav Mudryi National Law University, 2007); *Пазинич Т.А.* Криміналістична характеристика шахрайств та основні положення їх розслідування: Дис. … канд. юрид. наук [Tetyana A. Pazinich, *Forensic Characteristics of Fraud and the Main Provisions of Their Investigation: Thesis for a Candidate Degree in Law Sciences*] 29–40 (Kharkiv: Kharkiv National University of Internal Affairs, 2006).

[28] *See Іщук І.В.* Початковий етап розслідування шахрайств у сфері страхування автотранспортних засобів: Дис. … канд. юрид. наук [Inna V. Ishchuk, *Initial Stage of Motor Vehicle Insurance Fraud Investigation: Thesis for a Candidate Degree in Law Sciences*] (Kiev: National Academy of Internal Affairs, 2010); *Боровских Р.Н.* Криминологические, уголовно-правовые и криминалистические проблемы противодействия преступлениям в сфере страхования: Монография [Roman N. Borovskikh, *Criminological, Criminal and Forensic Problems of Counteraction of Crimes in the Field of Insurance: Monograph*] 48 (Yu.P. Garmaev (ed.), Novosibirsk: Alfa-Porte, 2016).

– Depending on the scope of operation of motor transport, fraudulent activities can be divided into the following types: when a person rents a vehicle and, is in the process of using a rented vehicle; at the moment of registration of the right of ownership to a vehicle; in the process of customs clearance (taxation) of a vehicle; when moving a vehicle across the state border; in the course of implementation of motor transport insurance conditions; in the process of repairing a vehicle;

– By the number of fraudulent activities in the field of motor transport: single and serial;

– By the extent of the caused harm: those who caused significant material damage (part 2 of Article 190 of the Criminal Code of Ukraine); those who caused material damage (part 3 of Article 190 of the Criminal Code of Ukraine); those that caused material damage in especially large amounts (part 4 of Article 190 of the Criminal Code of Ukraine);

– By the level of professionalism of the perpetrator of a crime: committed by a "professional"; committed by an "amateur";

– On the territorial basis of the activity of a criminal group (organization): committed by a criminal group at an interstate level; committed by a criminal group at an interregional level; committed by a criminal group at a local level;

– By the number of persons who participated in the crime: sole; committed by a group of persons; committed by an organized criminal group; committed by a criminal organization;

– Depending on the availability and use of the possibilities of corruption: using corrupt links to ensure criminal activity and using corrupt links with an aim to avoid criminal liability.

Separately we should focus on the peculiarities of choosing a place, time and conditions for committing fraudulent activities in the sphere of motor vehicle transactions by the scammer, which is largely determined by their relative favorableness for the implementation of the scammers' intended fraud and the specifics of the method of fraudulent activities. The above analysis of the methods and conditions of committing fraudulent activities in the sphere of the motor vehicle transactions allows us to state that scammers are guided by the following criteria in the choice of the location of the crime:

– Location in this area of the property, which permanently or temporarily has value for a scammer and a possibility of a scammer to quickly and easily verify this (for example, temporarily or permanently functioning car markets);

– The presence in this area of favorable conditions for impact on the individual (victim);

– The possibility of establishing contact with the owner or person responsible for, or with access to, vehicles;

– The presence of favorable conditions for the effective use of various aids to mislead the victims (the presence of a service station or a mechanic);

– The alleged high level of "neutrality" of possible casual witnesses of fraudulent activities.

Facts of committing fraudulent activities in this category can be created artificially, taking into account the purpose of the criminal encroachment, the actor, personal characteristics of the victim.

The changing conditions of life, the introduction of new methodology, the internet, the newest computer systems for financial calculations, all allow us to form innovative schemes for establishing contact with victims at the preparatory stage of criminal activity (taking into account sources for obtaining and submitting relevant information about the object of the possible commission of a crime and the victim of a criminal offense), namely:

– Scammer (or group of scammers) – Victim (owner of a motor vehicle or cash) (visual contact);

– Scammers (or group of scammers) – Internet resource (website, blog, etc.) – Victim (owner of a motor vehicle or cash) (non-visual contact);

– Victim (the owner of a motor vehicle or cash) – Internet resource (website, blog, etc.) – Scammer (or a group of scammers) (non-visual contact).

Depending on the channel to bring a criminal to the victim or blocking beneficial fraudulent information methods, fraudulent activities can be subdivided into those committed: 1) at a personal meeting (direct contact); 2) using the media (television, radio, newspapers and magazines); 3) using means of telecommunication (in particular, mobile phones); 4) using internet resources; 5) using e-mail, as well as various combinations of the above channels.

By its nature, information may be divided into: a) absolutely false information; b) a combination of false information and true information; c) true information.

In more than half of cases, scammers skillfully supplemented, to a greater or lesser degree, true information with false information. Among the methods of using such a combination, it is necessary to distinguish: 1) "design" – the deliberate concealment of parts of the true information by replacing them with false information; 2) "selection" – a selective passage containing true and false information; 3) "distortion" – reduction, exaggeration and violation of portions of any constituent parts of true information.

Generally, the messages contain three components: 1) the message content (for example, the particulars of the offer for sale, the description of the vehicle, etc.); 2) the means of transmission (channel) of the message (telephone or e-mail for communication, etc.); 3) a person who reports (for example, with the aim of creating an image of confidence in the seller by offering a meeting, or transferring money after an overview of the vehicle).

Thus, by manipulating the information provided to the victim, the scammers count on their disorientation in the environment and the implementation of appropriate actions corresponding to the created presentation of the situation ("false

reality"). As a result, the victims are misled and voluntarily transfer their property to the offender, believing that he has the right to receive it.

Thus, using the classification (typology) of scammers used in forensic and other sciences,[29] persons who commit crimes in the field of motor vehicle transactions, can be divided by the following criteria:

1. Depending on the amount of committed fraudulent activities, crimes and availability of professional skills:

– One-time scammers who commit a crime under for personal gain (for example, with the aim of avoiding taxation during customs clearance);

– Professional scammers who commit fraudulent activities repeatedly and professionally (a type of criminal trade concerned with repeated commitment of fraudulent actions);

2. Depending on availability of specialist knowledge:

– Scammers, who have specialist knowledge (know about technical equipment and construction of a vehicle; are familiar with legal nuances of contracts; use resources on the internet to create specialized websites and to post advertisements);

– Scammers, who do not have specialist knowledge. They may involve a third party who has specialist knowledge;

3. Depending on the form of participation in a crime:

– Scammers, who participate in a crime personally and contact the victims themselves (for example, personal participation when concluding a contract of sale; scammers can give their passport (ID) or sign IOUs);

– Scammers, who do not contact victims personally or act through a representative (for example, selling of a car with the help of a secondhand dealer; use of internet-resources to imply sale of a vehicle that does not belong to a criminal in order to obtain money from victims);

4. With participation of legal entities in commitment of a crime:

– Scammers, who use legal entities created specially to commit a crime (these entities can be residents or non-resident);

– Scammers, who use real legal entities (these entities can be used with or without consent);

5. Depending on the amount (number) of participants:

– Single persons, who act alone;

– Scammers, who act as a part of an organized criminal group;

– Scammers, who act as a part of an organized criminal group which is part of a criminal organization;

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[29] *See Даньшин И.Н.* Криминологическая характеристика личности мошенников // Криминологические проблемы борьбы с преступностью [Ivan N. Danshin, *Criminological Characteristics of the Identity of Scammers* in *Criminological Problems in Combating Crime*] 18 (Kyiv: Kiev Higher School of the Ministry of Internal Affairs of the USSR, 1985); *Якимов И.Н.* Современные мошенничества // Административный вестник. 1925. No. 6. С. 36–39 [Ivan N. Yakimov, Modern Fraud, 6 Administrative Bulletin 36 (1925)].

6. Availability of corrupt ties:

– Scammers, who act using corrupt ties;

– Scammers, who only use corrupt ties to avoid criminal liability.

It is needed to research the individual features of the personality of the scammers and victims of fraudulent activities, taking into account the specifics of the field of motor vehicle transactions that affect the method, background and trace pattern. Also, psychological characteristics of the behavior of the victims, and the motives of their entry into contact with scammers have major forensics significance.

Forensic information about the identity of scammers and victims of fraudulent motor vehicle transactions is important for counteracting the crime itself and may be used in investigative and research activities.

The analysis of practical material shows that single criminals, organized criminal groups and criminal organizations are all involved fraudulent motor vehicle transactions.

We conclude that fraudulent motor vehicle transactions are committed by single persons as a one-off, even if it is committed by persons who have already been convicted of violent crimes. Perhaps criminals prefer to act by themselves, thereby reducing the probability of disclosure.

The study of the identity of scammers, as well as organized criminal groups, who operate in the field of motor vehicle transactions, evidence their professionalism, narrow specialization, wide outlook and knowledge of law. The majority of scammers are individuals with clever minds and strong imaginations, have the ability to persuade people, attract their interest and attention, and are able to use different circumstances to complete their criminal plan. These features allow them to feel like leaders in almost any circumstances. In our opinion, these criminal units pose a significant social threat, because crimes committed by them are carried out professionally and mainly include several criminal episodes over a long period of time.

One more important element of forensic science characterization of fraudulent motor vehicle transactions is characterization of an identity of a victim, which is mostly victimological. Often victims provoke fraudulent activities by themselves. In our opinion in order to study the behavior of a victim it is necessary to use criminological and psychological knowledge that can be used as a basis of scientific and methodological recommendations for counteracting fraudulent activities. It is important to note the fact that among victims of fraudulent activities there is huge number of persons who intentionally violate legislation that is capably used by scammers (for example, sale of a vehicle using a general power of attorney with the purpose of avoiding taxation or customs payments). This explains the high latency of fraudulent activities.

When studying forensic science's characterization of fraudulent activities, it is important to keep in mind that victims sometimes conceal crimes themselves. It is possible to expect this, when fraudulent activities evidences negative qualities of

victim's character (greed, gambling, etc.), and when detection of fraudulent activities would make him liable.

In order to increase the level of public awareness about the methods of committing fraudulent activities in the motor vehicle transactions used by scammers, the law enforcement agencies need to improve the effectiveness of interaction with the media through briefings, specialized permanent television projects, the creation of specialized websites, blogging,[30] etc.,[31] on which to conduct explanatory work with the population. In addition, the specified measures will create conditions for a prompt response to new challenges of scammers.

4. Methods of Detection and Investigation of Fraudulent Motor Vehicle Transactions

Detection, prevention and investigation of crimes in general and fraudulent motor vehicle transactions in particular should be examined as a consequence of the separate operations which make up this activity. It makes sense to attribute both the essence of operations and their consequences in the whole structure of forensic activity to the process of detection and investigation of the specified category of crimes.

One of the most important components in the process of counteracting fraudulent motor vehicle transactions is their detection and prevention with the means and possibilities of investigative activities.

It should be noted, that Rafail Belkin sticks to an opinion, that signs of crime can be detected by three methods: 1) by operative officers during investigative activities; 2) by individuals, representatives of different governmental and non-governmental organizations when conducting revision or other controlling activities, etc.; 3) directly by an investigator, prosecutor and court.[32]

While describing the features of the investigation of fraudulent motor vehicle transactions, it should be noted that the investigative situation is key. After analyzing the existing points of view in the forensic science regarding the essence and

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[30] *See*, e.g., Як не стати жертвою шахраїв при купівлі автомобіля // Гроші в кредит: новини світу банківських послуг [How Not to Become a Victim When Buying a Car, Money on Credit: News of the World of Banking Services] (Oct. 13, 2018), available at http://groshi-v-kredit.org.ua/yak-ne-staty-zhertvoyu-shahrajiv-pry-kupivli-avtomobilya.html; *Ткаченко О.* Як не стати жертвою шахраїв під час купівлі автомобіля // Перша. 19.03.2018 [Olga Tkachenko, *How Not to Become a Victim When Buying a Car*, Persha, 19 March 2018] (Oct. 13, 2018), available at https://persha.kr.ua/news/life/157502-yak-ne-staty-zhertvoyu-shahrayiv-pid-chas-kupivli-avtomobilya/.

[31] For more information *see*, e.g., *Булгакова Е.В.* Особенности расследования и предупреждение вымогательства и мошенничества, совершенных путем фальсификации обстоятельств дорожно-транспортных происшествий: Дис. … канд. юрид. наук [Elena V. Bulgakova, *Features of Investigation and Prevention of Extortion and Fraud, Committed by Falsification of Circumstances of Road Traffic Accidents: Thesis for a Candidate Degree in Law Sciences*] 167–171 (Volgograd, 2003).

[32] *See Белкин Р.С.* Курс криминалистики [Rafail S. Belkin, *Course of Forensic Science*] 480 (Moscow: Yurist, 1997).

significance of the investigative situation in the investigation of crimes, it can be concluded that there is no unified approach to understanding the concept, essence, content, fullness and types thereof.[33]

An analysis of the existing points of view in forensic science regarding the notion of an investigative situation makes it possible to understand the situation as an objective reality at a particular moment of a pre-trial investigation. In this reality, a pre-trial investigation of a criminal offense is shaped, under the influence of specific objective conditions, circumstances and activities of the subject of the investigation. It displays and contains information about the committed or prepared criminal offense under investigation, the conditions and circumstances of the investigation and other information which is needed to perform criminal proceedings. This allows the promotion of investigative leads, the choice of effective means and methods of investigation, and tactical decision-making. In our opinion, the investigative situation can be considered exactly as a kind of a model of investigation. Especially, if it is related to crimes in relation to which investigators have considerable practical experience. Fraudulent activity and types thereof could be related to such crimes.

Distinguishing the investigative situations allows the investigator to approach the investigation process in the most rational way. At the same time, the correct diagnosis of the initial situation allows information uncertainty to be eliminated using a typical forensic description of the crimes; proper classification of the situation, which leads to the correct choice of methodology, as well as rational sequential use thereof.[34].

The relevant tasks in the investigative technique are the construction of possible areas of investigation, depending on the specific circumstances of the investigation. No less important is the forecasting of possible developments, and the assessment of the probability and correctness of the onset of one or another result. It should be noted that it is impossible to create a technological model of investigation that would be able to adequately reflect the complexity of the most modeled activity without an information analysis of the activities on the detection and investigation of crimes.

The analysis of typical situations that arise at the initial stage of the investigation of fraudulent motor vehicle transactions showed that the investigator's program of activities is subject to common laws. This allows us to consider them within the framework of one methodology, and the allocation and streamlining of investigative situations that arise in the investigation of a fraudulent motor vehicle transaction to be carried out on an informational basis.

When analyzing materials about the fact of fraudulent motor vehicle transaction, an investigator can determine in what situation he is on the basis of available information. Assessments of the situation before the start of the investigation and in

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[33] *See*, e.g., Musienko 2009, at 97–108.

[34] *Зорин Г.А.* Теоретические основы криминалистики [Georgy A. Zorin, *Theoretical Foundations of Forensic Science*] 65 (Minsk: Amalfeya, 2000).

the course of its conduct are important stages of the investigator's work. Questions of decision-making in one or another investigative situation are related to the structuring of the source of information about it and the formation of many versions. As a result of the information obtained, the investigator forms a number of versions. Initial versions should be narrow enough to allow the investigator to continue to verify alternatives and determine which of the versions to check in the first place.

After the general versions are decided upon, more specific ones are presented. They are mainly related to the circumstances of the crime (versions of the organizers, the victims (involvement of the victim in other crimes, etc.), the circumstances of the commission (place (location within an individual region, or transnational crimes), etc.), time (the time of committing fraudulent actions is connected with the mode of work of the scammer or the availability of computer equipment, etc.), the mechanism of commission (the use of advanced methods, the psychological impact on the victim, etc.)). As a result of checking the proposed versions, the investigator deliberately shapes the mechanism of the situation and predicts possible methods of solving it.

An investigator needs to be able to adapt to any situation. This implies the possibility of prompt response, in the course of the investigation, to a change in the terms and conditions of the investigation. The essence of the adaptation is to change the organization of the investigation on the basis of not only *a priori*, but also current and predictive information in order to achieve and maintain a favorable investigative situation with a changing set of conditions for conducting an investigation. Selected methods of investigation may change in the process of receiving current information as a reaction to this incoming information, and, in predicting the development of an investigative action, the investigator may change the purpose of its conduct.

As a rule, the algorithms for detecting, disclosing and investigating crimes are of a "non-strict" nature. They provide not for a rigid sequence of elementary actions, but for "blocks" of actions that are the most effective in one or another situation. The algorithms developed by the investigator during investigations in these situations should not be as strict as a law for him. One of the opinions in the scientific literature proposes the need to create a computer program of investigator actions in a specific situation.[35]

Using records of investigative activities, it is possible to typify investigative situations that arise at different stages of obtaining information about the fact of committing fraudulent motor vehicle transactions on various grounds.

Thus, at the stage of checking information on the presence of signs of fraudulent motor vehicle transactions, the following investigative situations arise:

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[35] *Шепитько В.Ю.* Теоретические проблемы систематизации тактических приемов в криминалистике [Valery Yu. Shepitko, *Theoretical Problems of Systematization of Tactical Methods in Forensic Science*] 200 (Kharkiv: Grif, 1995).

– The available information allows us to make a final conclusion about the presence of signs of fraudulent motor vehicle transactions in the actions of an individual or a group of persons (the information is related to the method of committing fraudulent activities, the subject of a criminal offense, and data on the scammers and the victim (or victims));

– The available information does not allow us to draw a final conclusion on the signs of fraudulent motor vehicle transactions in the actions of an individual or a group of individuals (the information on the method of committing fraudulent activities, the subject of a criminal offense or the identity of a scammer and a victim is fragmentary and requires verification).

Depending on the correlation between the moment of detecting the signs of fraudulent activities and the time of the end of the attack, the following investigative situations can be distinguished:

– Signs of committing fraudulent activities in the area of motor vehicle transactions recorded at the stage of preparation;

– Signs of fraudulent activities in the area of motor vehicle transactions detected immediately after the fraud is committed;

– Signs of fraudulent activities lent motor vehicle transaction detected after a certain time after the fraud is committed.

This classification of investigative situations is important for the organization of the activity of law enforcement bodies in "hot pursuit." The time factor is important because the earlier the signs of committing fraudulent activities are discovered, the more opportunities to prevent the destruction of traces of a crime are available.

The scammer's use of the same methods in the course of committing a series of fraudulent activities in the area of motor vehicle transactions (may help to assess the possibility of committing such crimes in the future). The available information on the method and identity of the scammer shows that the scammer uses the same method in the course of a series of fraudulent motor vehicle transactions (this situation allows the actions of the scam to be determined without taking into account the number of already registered facts of committing fraudulent activities, for example, committing the investigated category of fraudulent activities using internet advertisements, or payout notices, etc.). The available information on the identity of the scammer and the method of committing fraudulent motor vehicle transactions allows one to assume the type fraudulent activities committed by the scammer (for example, if a scammer acts individually for his own benefit by committing fraudulent actions in order to obtain an insurance payoff, using his own motor vehicle, etc.).

The peculiarities of the method of committing fraudulent activities, as well as the characteristics of scammers in certain situations, allow computer algorithms to determine key factors in the investigation with a high degree of probability.

The program of investigative activities and measures should include: interrogation of the victim or his representatives, examination of witnesses (persons who have

information about the preparation, commission and concealment of Fraudulent Motor Vehicle Transactions, as well as persons who participated in the arrest and have important information); carrying out a search (at the place of residence, and elsewhere, if necessary) and the extraction of material evidence; exploration of the suspect; investigation of objects, documents, computer equipment (especially if the fraudulent activities involve the replacement of spare parts at a service station, etc.); review of the location of the event (especially if the fraudulent activities involve an plan aimed at obtaining insurance payments); a review of postal mail (and e-mail, social networking, etc.); questioning the suspect (suspects); presentation for the identification of the detainee at the place of commission of the crime (to persons who could observe actions on preparation of fraudulent activities); interrogating two or more persons whose evidence revealed contradictions;[36] search and detention of accomplices committing fraudulent activities in the area of circulation of vehicles (if there is information about fraudulent activities of an organized criminal group); implementation of certain secret investigative activities, such as withdrawal of information from transport telecommunication networks, withdrawal of information from electronic information systems (in order to investigate the personality of a suspect and predict his behavior during the investigation); use of forensic and operational search records; appointing the expertise; and using the media to identify other victims of fraudulent activities.

The above investigative activities should be aimed at: searching for and researching information relating to the preparation and committing of fraudulent motor vehicle transactions; detection and verification of the suspect's connections, as well as verification of the information received from the victim (to reveal signs of staging); and identifying the conditions and events that preceded the commission.

The program of investigative activities should be aimed at interviewing victims and witnesses, as well as organizing search and detention, and also further disclosure. It includes questioning the victim(s), questioning witnesses (especially those who may have relevant information about the location of a wanted person), interrogating two or more persons, reviewing the crime scene (if necessary and possible), and reviewing documents, objects, and computer equipment. In addition, a complex of operational and investigative measures should be taken within the limits of separate investigative activities which are aimed at research into suspects (withdrawal of information from

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[36] *See*, e.g., *Головкін С.В.* Криміналістична характеристика шахрайства відносно власності особи та її використання на початковому етапі розслідування: Монографія [Sergey V. Golovkin, *Forensic Characteristics of Fraud with Respect to the Property of a Person and Its Use at the Initial Stage of the Investigation: Monograph*] (Luhansk: Luhansk State University of Internal Affairs named after E.O. Didorenko, 2013); *Головкін С.В.* Криміналістична характеристика шахрайства відносно власності особи та її використання на початковому етапі розслідування: Дис. … канд. юрид. наук [Sergey V. Golovkin, *Forensic Characteristics of Fraud with Respect to the Property of a Person and Its Use at the Initial Stage of the Investigation: Thesis for a Candidate Degree in Law Sciences*] 85–167 (Kharkiv: Kharkiv National University of Internal Affairs, 2008).

transport telecommunication networks, withdrawal of information from electronic information systems, monitoring of persons who have information about the location of the wanted person, review and withdrawal of correspondence, etc.) with subsequent detention and identification by the victims after finding the location of the wanted person. It is also important to pay attention to the analysis of forensic and operational records, freezing of accounts and property in order to provide for pecuniary damage or call for an international search (if there is information about the movement of a person across the border) with the possible use of the media.

The mentioned situation may contain sufficient information about the scammer which might help to detain the scammer in the nearest future. It may also happen that the available information can be based on counterfeit documents provided by the scammers, which will complicate the process of locating the scammer and will change the components of the investigative situation.

The program of the investigative activities should be aimed at obtaining information about a scammer. The list of investigative activities and tactical operations is actually similar to the actions and tactical operations that are typical for the preliminary investigative situation, but they have a certain specificity. Particularly, the interrogations of the victim and witnesses are mostly of a repeated nature (the peculiarity of interrogation of the victim and witnesses is that they did not contact the scammer personally, only on the phone or on the internet (through social networks), therefore, they cannot describe his appearance). Therefore, the investigator can often only receive information about the conditions and the subject of communication during the interrogation process. Another operation is observing places where a scammer may possibly hide or places where a scammer can engage in further criminal activity (an auto-market, a car showroom, etc.). This might help to conduct interrogations and create photographic evidence with subsequent notification of the public through the media in order to obtain assistance in search of a scammer. Another aspect of investigative activities is taking all necessary measures to determine the location of the scammer, as well as places of sale of things obtained as a result of fraudulent actions (if these things had any individual characteristics).

Conclusion

Analysis of implementation of modern methods used in fraudulent motor vehicle transactions reveals a variety of methods, as well as a tendency to repeatedly use such methods in relation to this crime, especially multi-episode crime, as well as the conditionality of the choice of criminals of one method or another depending on the circumstances (place, time, conditions) under which the crime is committed.

Contemporary fraudulent motor vehicle transactions, in terms of scale and extent of losses incurred the level of organization and means of secrecy, objects of attack and methods of protection against persecution, qualitatively differs from the

previously traditional methods of fraudulent activities known to law enforcement institutions of Ukraine and forms original criminal "markets."

The proposed scientific development of the applied (tactical) typology of criminals (scammers) is extremely necessary since it will help solve the following issues: limiting the search area of persons who committed fraudulent motor vehicle transactions by establishing the basic parameters of the environment to which they belong; definition of the method of committing a crime of social/antisocial characteristics of the alleged offender/criminal, in particular, the features of his criminal experience; foreseeing of the probable behavior of the offender, e.g. choosing a method of concealing fraudulent actions, places where he prefers to spend time, selection of new objects for committing crimes, circles of persons with whom there can be a trusting relationship, verification of versions of the probability of a series of homogeneous and similar methods of actions in fraudulent motor vehicle transactions by one and the same person (group of persons).

The classification, as well as the available information about the identity of this category of scammers, as well as organized criminal groups, are important for operational and investigative units and allow for formulating methodological recommendations aimed at establishing the circle of people on which the investigation should initially be concentrated.

It is necessary to establish interaction between law enforcement institutions and the mass media in order to prevent fraudulent motor vehicle transactions. This will increase the level of public awareness about the emerging methods of committing fraudulent motor vehicle transactions, which are constantly being changed and improved by criminals.

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BOOK REVIEW NOTES

DIFFICULT SEARCH FOR TRUTH*

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The separation of Crimea from Ukraine provoked a wide scientific discussion in the West, in which Oleksandr Viktorovich Zadorozhnii, a professor at the University of Kiev, took an active part. The result of his efforts was the book under review published in Russian and English, which provides a detailed account of the arguments from the Ukrainian side.[1] The author was one of the Ukraine's most famous international lawyers. He graduated from the University of Kiev (the International Relations Department) and immediately after graduation began actively teaching and doing extensive research. In 1999, he became a President of the Ukrainian Association of International Law, and in 2003 was appointed the Head of the International Law Division at the International Relations Department of the University of Kiev. During 1990–1998 he was actively engaged in legal practice; in 1998–2006 he was a member of the Ukraine's Parliament (the Verkhovna Rada); and in 2006–2008 served as a vice-principal at the University of Kiev. Academic work, however, has always been his main priority. In the late years of his life, he published a number of works, presented several reports in Ukraine and abroad, and organized some conferences. On 12 May 2017, he passed away leaving a mark in the memory of all those who knew him.

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* Reviewed book: Oleksandr Zadorozhnii, *Russian Doctrine of International Law After the Annexation of Crimea* (Kiev: K.I.S., 2016).

[1] *Задорожный А.В.* Российская доктрина международного права после аннексии Крыма [Oleksandr V. Zadorozhnii, *Russian Doctrine of International Law After the Annexation of Crimea*] (Kiev: K.I.S., 2015); Oleksandr Zadorozhnii, *Russian Doctrine of International Law After the Annexation of Crimea* (Kiev: K.I.S., 2016).

I met him twice: in the spring of 2011 in Kiev (at a conference on the Russia–Ukraine relations); and in the spring of 2015 in Warsaw (at a conference on the Crimean issue). We had several discussions, the last of which was long and memorable. His personal qualities made a huge impression on me. He was a radiant person and a natural leader. Having an enormous charisma and inner strength, he easily attracted people. He enjoyed expressing his opinion and knew how to do it, and his interlocutors trusted his judgments without questioning. His talks were always full of openness, honesty, irony, humor, delicacy, respect, impartiality, reason, and restraint (the combination that is not often found in a scientific discourse). He possessed the best qualities of a Ukrainian and Russian intellectual and was a true patriot. His patriotism was manifested not as blind praising of everything Ukrainian, but as the understanding that his people were experiencing a historical tragedy and as a desire to help them going through this trial. I think, his departure from politics was not accidental: as a general rule, this kind of persons are rejected by the political elite. Despite the fact that I will further contest some of his views, I want to express my deep respect for this man. I am sure that most Russian experts on international law and politics feel the same way.

Zadorozhnii's work "Russian Doctrine" consists of three chapters, each dealing with a certain aspect of the conflict in Ukraine. In each of the chapters, the arguments of the Russian doctrine are analyzed and refuted. The first chapter considers the revolution (*coup d'état*) of 2013–2014. The *first* argument of the Russian doctrine in this regard is that the Ukrainians had no right to revolt against the regime of Yanukovych. The right to insurrection, however, is directly enshrined in the constitutions of many countries and the Universal Declaration of Human Rights of 1948 – as well as, indirectly, in the Constitution of Ukraine (Arts. 3, 5 et al.[2]). The Ukrainian people used this right on the basis that Yanukovych usurped the state power, encouraged corruption and police violence, restricted human rights, and unilaterally refused to sign an association agreement with EU.

The *second* argument of the Russian doctrine is that there was an armed *coup d'état* in Ukraine. However, until 20 January 2014, the protest was entirely peaceful; the authorities had a month and a half to reach a compromise but instead tried to disperse the Euromaidan. In late February 2014, Yanukovych and the opposition leaders concluded an agreement but at this point Yanukovych, while not being threatened, unexpectedly fled to Russia. Russia's attempts to refer to this agreement are inconclusive because its representative refused to sign this document (unlike the

[2] Art. 3 states: "The human being, his or her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value… The State is accountable to the individual for its actions..."; Art. 5 states: "…The people are the bearers of sovereignty and the only source of power in Ukraine… The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its bodies or officials. No one shall usurp the state power…"

representatives of Germany, France and Poland). The Constitution of Ukraine does not contain clear instructions on what to do if the president and the prime minister flee abroad. However, according to Article 102, the president is the guarantor of sovereignty, territorial integrity, constitution, and human rights; and the behavior of Yanukovych clearly undermined these values. The impeachment procedure (Art. 111) is too complex and rather politicized, and cannot be promptly carried out when necessary. In this critical situation, the Verkhovna Rada dismissed Yanukovych and his government and instead appointed new officials, thereby preserving the integrity of the state. The legitimacy of the new government was recognized by many states (including Russia).

The *third* argument is that the Ukrainian state disintegrated as a result of the *coup d'état*, and a new state was established. International law, however, does not recognize the concept of "disintegration of state" leading to "the creation of a smaller state," and Russian authors do not provide any exact criteria for defining such disintegration. Changing the government could not justify termination of the country's obligations given to another state, since the obligations are seen as related to the state as a whole, and not to its representatives. Besides, Russia cannot claim a radical change in circumstances because, according to Article 62(2) of the Vienna Convention on the Law of Treaties (1969), it cannot be claimed if a treaty establishes a boundary and if the change results from a violation committed by the claimant. Russian authors often refer to the deficiency of the Ukrainian statehood, ignoring the fact that the statehood of Kievan Rus was based on Ukrainian identity.

The *fourth* argument is that the West intervened in the internal affairs of Ukraine and organized the Euromaidan. This argument attempts to cover up the Russia's intervention that manifested in gas wars, economic blockade threats, support for separatists, etc. Before the flight of Yanukovych, the Western states recognized him as a legitimate president and did not demand his resignation. Not only did they not interfere in the affairs of Ukraine, they did not even use the means available to them in order to respond to human rights violations.

The second chapter deals with the annexation of Crimea. The *first* argument of the Russian doctrine is that Russia used force to protect its citizens and compatriots (the concept of protecting compatriots resembles the concept of humanitarian intervention). There are five criteria for legitimacy of protecting citizens abroad: the existence of a real threat or systematic and grave violations of rights, absence of peaceful means for settlement, exclusively humanitarian nature of the operation, proportionality, and limitations on the time and means. None of these criteria were met. There is no evidence of human rights violations in Crimea: the "White Paper" of human rights violations in Ukraine compiled by the Russian authorities reproduces rumors and does not mention any direct sources; Russia wanted to seize Crimea from the outset and began preparations during peaceful protests in Kiev. The conditions to be met for justifying humanitarian intervention are even stricter: only cases of

massacres, torture, etc. are seen as valid reasons. There was nothing of the kind in Crimea.

The *second* argument of the chapter two refers to the request for help made by the legitimate leaders of Ukraine and Crimea, Yanukovych and Aksenov. There are various arguments against this statement: firstly, the president of Ukraine has no right to ask for the deployment of foreign forces; secondly, at the time of the appeal, Yanukovych no longer had effective power; thirdly, the Crimean officials in principle were not authorized to contact foreign powers. Russia often states that the very fact of using force was not proven (no shots and victims); these consequences, however, do not constitute a necessary attribute of aggression (the main sign being the use of armed forces regardless of the consequences).

The *third* argument is that the events in Crimea represent a legitimate secession, and the subsequent entry of Crimea (in the capacity of an independent state) into the Russian Federation was therefore justified. However, international law does not provide for a general right to secession, allowing it only in the case of decolonization or occupation (this position was adopted by Russia itself in the Kosovo case). There are four conditions for lawful secession: the existence of a self-determining entity (people); exhaustion of the means for internal self-determination; extraordinary circumstances (violations of human rights, etc.); and non-engagement of a foreign state. In the case of Crimea, these conditions were not met. Firstly, the Crimeans are not a "people": apart from the Ukrainians, there are only three indigenous people living in Ukraine, namely Crimean Tatars, Karaims, and Krymchaks; while Russians are an ethnic minority (like Romanians, Hungarians, and Bulgarians). Secondly, the Crimea had a wide autonomy, satisfying all needs for the internal self-determination. Besides, no extraordinary circumstances took place. Ultimately, Crimea separated as a result of the Russia's actions. The referendum was only an attempt to make the occupation and annexation look legitimate.

The *fourth* argument is that Ukraine does not respect the principle of self-determination. This argument is at odds with the Russia's position on Kosovo, according to which secession is possible only in case of an unjustified attack that threatens the existence of the people. The allegations about massive violence against Crimeans and their exclusion from political communication are speculative, and are not supported by any evidence. Quarrels in the Parliament, criminal persecution of several politicians, and individual withdrawals from the parliamentary groups cannot be interpreted as an evidence of removal of the population of a certain region from national communications.

The *fifth* argument is that the events in Crimea are similar to those in Kosovo, the Åland Islands, the Island of Mayotte, etc.; in condemning the secession of Crimea, the West adopts a double standard policy. The Kosovo case, however, differs from the Crimean case in many respects. An indigenous people (Kosovo Albanians) resided in Kosovo, and the Serbian government subjected them to oppression,

resulting in an armed conflict. The international community was trying to resolve this conflict for many years; the indigenous people of Kosovo asserted itself as a result of self-determination; no state annexed Kosovo. In addition, in the 2010 Opinion of the International Court of Justice regarding Kosovo, it was indicated that the declaration of independence of Kosovo does not conflict with international law because international law does not contain any prohibitions of such acts. In doing so, the Court failed to interpret the right to self-determination, considering that this issue is beyond the scope of the initial request. Other comparisons are similarly inappropriate.

The *sixth* argument is that Crimea is a historical Russian territory, while its transfer to Ukraine in 1954 was contrary to the USSR constitutional provisions. This argument contravenes with the principles of territorial integrity, inviolability of borders, equality, and self-determination. International law does not recognize the concept of "historical" belonging, which otherwise would be the basis of various territorial claims. During its history, Crimea was owned by different states, while Russia annexed it only in the late 18th century. Moreover, most of the time it was a part of the Russian Empire, and not a part of Russia as a national state. The events of 1954 were caused by the deportation of 200 thousand Crimean Tatars to Central Asia, which led to economic chaos in the region. The decision to transfer Crimea was completely legitimate. When challenging the events of 1954, Russia simultaneously disputes the transfer of Ukrainian lands to it in 1919–1928 (areas near Belgorod and Starodub, Taganrog, and Eastern Donbass). In addition, Russia itself recognized the borders of Ukraine in a number of treaties.

The *seventh* and final argument of chapter two is that the 1994 Budapest Memorandum was a political document which did not contain any legal obligations. This memorandum, however, meets all criteria for being an international treaty, as provided in the 1969 Convention. It is an important element of nuclear disarmament system and contains guarantees of Ukraine's security given by the United States, the United Kingdom, Russia and China, received in exchange for Ukraine's renunciation of nuclear weapons. Most of its provisions were subsequently violated by Russia.

The third chapter is devoted to the armed conflict in the southeast of Ukraine (the Donbass). The *first* argument of the Russian authors is that there is a civil war in Ukraine, in which Russia does not take part. There are, however, numerous evidences that Russia fully controls both the Donetsk People's Republic (DPR) and the Lugansk People's Republic (LPR): its career officers carry out subversive activities in the region; it finances, supplies and prepares militants, and provides them political and informational support. Consequently, Russia is responsible for the actions of the DPR and LPR while its own actions can be qualified as aggression.

The *second* argument of the chapter three is that the Ukrainian antiterrorist operation (ATO) is an illegal operation unleashed by Kiev against the civilians. However, as early as in April 2014, the Donbass was inundated by the representatives

of the Russian special services which destroyed settlements, persecuted their opponents, etc. The ATO was announced only on 13 April 2014.

The *third* argument is that the DPR and LPR are subjects of international law. Such statements are intended to show that these puppet structures are independent, and Russia is not involved in the Ukrainian conflict. The DPR and LPR, however, do not meet the criteria set out in the 1991 Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union" and the Montevideo Test. They were created by unlawful use of force, are unable to fulfill international obligations, grossly violate principles of international law and human rights, encroach on the territorial integrity of Ukraine, and are generally unstable. In fact, they provide a cover to the Russian occupation.

The author of the book comes to the following conclusions: (1) Russian scientists carry out systematic work aimed at justifying Russia's actions and condemning Ukraine; (2) their arguments are not based on international law; (3) the change of government in Ukraine occurred within the framework of the constitution; Western states did not interfere in the affairs of Ukraine while Russia grossly violated international law; (4) the scientific level of Russian publications is low (not up to the standard): Russian authors do not refer to the relevant law, do not take the context into account, entirely fail to apply modern concepts, etc.; (5) Russia abandoned its initial ideas of non-interference, non-use of force and respect for the U.N. Charter; (6) the Russian official position contains a fundamental contradiction: while criticizing the position of the West regarding the Kosovo case, Russia is trying to replicate Western arguments; (7) all Russian authors are of the same opinion, making the same mistakes over and over again; (8) they reproduce the position of official authorities, perceiving it as an axiom and not bothering with checking the facts; (9) they appeal to the geopolitical speculations, such as a reference to "historical justice"; (10) alternatively, some of them use dubious new "approaches," such as a "peaceful annexation" or "disintegration of statehood"; (11) they refuse to analyze various aspects of the conflict, such as participation of the Russian forces in military operations in the Donbass; (12) Russian experts in public and criminal law, political science, history, sociology, economics, etc. are involved in the discussion, blurring clear norms of international law; (13) the Russian position is an expression of legal nihilism.

Sadly, most of Zadorozhnii's claims should be accepted. The overall level of the Russian doctrine is indeed quite low, and the reaction to the Ukrainian events is a good proof of that. These events did not give rise to any extensive discussion: the Moscow scientific circles *de facto* ignored them.[3] Only two of the leading scholars (Anatoly Kapustin and Oleg Khlestov) expressed their personal opinion; publications of the other authors were rather weak and did not cause much resonance. This passivity

[3] The scientific events held in 2014–2015 were by tradition devoted to general issues, for example, to "the role of international law in the context of globalization" (57th Annual Meeting of Russian Association of International Law, June 2014).

contrasts sharply with the attitude of the Western scientific centers, professional periodicals, and individual scholars. The Max Planck Institute (Germany), the Academy of Sciences of Italy, the University of Warsaw, and the American Association of International Law held conferences on the Crimean issue; the Heidelberg Journal of International Law devoted a special issue to it; one of the Polish centers published a collective monograph, etc.[4] In this regard, it is not surprising that the West qualifies the position of Russian scientists as legal nihilism.

Most of the arguments put forward by the Russian authors are, indeed, far from being supported by international law. Russia can scarcely refer to the need to protect its citizens and compatriots because there was no immediate threat to their rights. It cannot refer to the request of Yanukovych either, as he fled the country and effectively lost his presidential powers. Besides, the Kosovo case, indeed, differs from the Crimean case, and the Advisory Opinion of the ICJ does not address the issue of the right to self-determination. Also, the Budapest Memorandum is an international treaty. Finally, Russia can not dispute the events of 1954; the doctrine of reversion is not supported by international law because its application, quite simply, would lead to a global chaos.

In my opinion, the reunification of Crimea and Russia can be justified by the principle of self-determination only. In the articles written in 2014, I argued that the idea of general will should be taken into account when interpreting this situation. This idea was established by classics (Plato et al.), supported by Rousseau, and further developed by the historical school and some contemporaries. Its essence is simple: people should have an opportunity to participate in politics, and their interests should be taken into account by the government. From this point of view, the right to secession belongs to groups excluded from political communication who are not enjoying the protection of their government. Such exclusion often occurs as a result of a revolution, when individuals usurp power and break the social contract. This is what happened in Ukraine in early 2014. Zadorozhnii and a number of Western authors have provided a number of arguments against this position. *Firstly*, the idea of general will, being rather abstract and political, cannot be used in legal discussions. *Secondly*, the social contract in Ukraine was not broken: the Law on languages was not abolished, and the campaign against the Crimean population was not carried out. *Thirdly*, the Crimeans are not a people because they do not possess the required identity; while the Russian-speaking residents of Crimea are only a minority. *Fourthly*, the real reason for the secession of Crimea was the Russian intervention, which cannot be justified by the *coup d'état* in Kiev. I would like to provide some objections to these arguments.

International law is not static: it is formed on the basis of political theories and enforces them. Democracy, human rights, and international peace were originally abstract

[4] *See* 75(1) Heidelberg Journal of International Law (2015); *The Case of Crimea's Annexation Under International Law* (W. Czapliński et al. (eds.), Warsaw: Scholar Publishing House, 2017).

ideas; they became a part of positive law over time. The idea of general will, indeed, is used mainly in public law. The main concept of international law is sovereignty: the will of the government usually has a priority over the will and interests of the people. However, the domination of the sovereignty idea is not complete: in situations involving self-determination and secession, a positive right could evoke priority of the people will. The common characteristic of all these situations is the rupture of the connection between the sovereign and the people, i.e. "non-representation" of the people by the government (the protective clause of the Declaration on Principles). Such a rupture occurs when the government refuses to pursue policies that are in line with the values and interests of the population. It is not just about violations of rights or retreat from democracy; such interpretation would artificially narrow the idea of representation. It is more of the government's refusal (inability) to create and maintain a holistic, stable and harmonious community, i.e. an environment where human rights and democracy have a real (not merely formal) meaning.[5] Such a refusal is manifested in a sharp and dramatic change in language policy, historical symbols, geopolitical views, economic order, and other concepts that unite the nation (*res publica*). Recent history shows that this every time results in civil wars that end with ethnic cleansing or secession. Since international law cannot authorise ethnic cleansing, in such situations secession should be allowed. Of course, like many other theories, this theory is not sufficiently clear; therefore, its application requires the scholar to be especially careful and to have rather flexible views. In any event, the international community must condemn any cases of destruction of the social contract and show sympathy towards the affected groups. In relation to secession, it shall take a predominantly wait-and-see position, focusing more on the effectiveness criterion than on formal appraisals. In critical cases, the international community must intervene by ways of early recognition, applying collective sanctions, etc.

There are also arguments regarding *termination of the social contract*. In winter of 2014, President Yanukovych, his government, and the two leading parties (the Party of Regions and the Communist Party) were removed from power which passed to the Chairman of parliament and the new government. These events were accompanied by the illegal use of force and violations of the Constitution. Many Ukrainian authors see these events as a revolution (the Revolution of Dignity), while Russian authors talk about unconstitutional *coup d'état*. This issue often works as a stumbling block; however, it is secondary and covers a more important issue about the fate of the social contract. To find a solution to this problem, it is not enough to determine

[5] The well-known "paradox of Arendt" is that the rights proclaimed as belonging to a person as such acquire significance only in the political community: "The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice as rights of citizens is at stake, when belonging to a community into which one was born is no longer a matter of course…" (Hannah Arendt, *The Origins of Totalitarianism* 296 (New York: Harcourt Brace Jovanovich, 1968)).

the transformation of the power institutions or legal order; it is also necessary to determine what changes have occurred in the relationship of the state and the society, as well as between the different parts of the society. Indeed, something more significant than a violation of the Constitution occurred in Ukraine: there was a disintegration of the formerly united nation. This disintegration was caused by a policy showing that the values shared by one part of the Ukrainian society were unacceptable for the other part of this society. These values are the Russian language, Soviet past, communist ideology, cultural and economic incline towards Russia, and belonging to the Russian Orthodox Church. Those who shared these values were required to abandon them and adopt other concepts instead: the Ukrainian language, nationalist ideology, commitment to the European course of development, etc. These requirements became the main paradigm of the Ukrainian politics: they were stated by legislation, voiced in political statements, chanted at meetings, discussed in the media, etc. They were effectively an ultimatum: a political discussion involving equality of the opponents and an opportunity to openly discuss all points of view were not present; the supporters of the alternative position were declared traitors and enemies of the people. As the abovementioned requirements concerned the foundations of the national self-consciousness, they inevitably led to the termination of the social contract and provoked separatism. This allows to suggest, among other things, that the disintegration of Ukraine was a project, and the Euromaidan was a technology.

The argument that the population of Crimea is not a "people" refers to the positions of certain experts that determine a "people" by using objective criteria (ethnicity, language, etc.).[6] This point of view seems to be rather unpersuasive for the following reasons. *Firstly*, these criteria are about quantity not quality, and therefore they do not provide accurate means for making a conclusion. Since there is no people or nation that has always been completely independent and separate in terms of history, language, and culture, application of the aforementioned criteria involves a dispute regarding the degree of independence, which, in turn, inevitably includes a discretionary assessment and a constitutive recognition,[7] i.e. ultimately, the

[6] The report prepared by the UNESCO experts back in 1989 identifies the following features of a people: common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life (*See* International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO, Paris, 27–30 November 1989, SHS-89/CONF.602/7, para. 22 (Oct. 4, 2018), available at http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf).

[7] According to Crawford, the principle of self-determination is applied as a right after the subject of self-determination has been determined by States through the application of relevant rules. It applies to States, Non-Self-Governing Territories, areas whose inhabitants do not participate in the formation of the Government, and to other territories in respect of which self-determination is seen as an appropriate solution. Thus, it is all about constitutive recognition (James Crawford, *The Criteria for Statehood in International Law*, 48(1) British Yearbook of International Law 93, 108–109, 160–161 (1976)).

discretion of the great powers.[8] *Secondly*, the "objective approaches" do not take into account the fact that not only politics is the outcome of history but history also often results from politics. Unique and independent history and culture do not arise on their own; they result from political decisions, including decisions similar to those that were taken in Ukraine in 2014. The Crimeans were not a "people" as long as their values formed a part of the common Ukrainian culture, but they became a people when these values were rejected and stigmatized. This interpretation also flows from the Declaration on Principles which focuses on non-representation of a people, not on its objective features. *Thirdly*, these criteria do not take into account the aspiration for an independent political life, manifested in the political programs and at the referendums. If a group of people declares their individuality and the intention to live an independent political life, such a statement is a strong argument in favor of the existence of a "people" in itself because it cannot be made in the absence of the common identifying features.[9] *Fourthly*, the opinions of experts do not form a part of the positive law; they are not reflected in treaties and do not form *opinio juris*. In addition, these criteria were phrased quite a long time ago, before the events relating to disintegration of Yugoslavia and the USSR changed the paradigm of self-determination. Thus, the question of existence of a people should be shifted from the area of history to the field of active politics (if not entirely removed): if certain political actions and events destroy the national consensus and provoke a collective aspiration for secession, any group formed as a result of such destruction can be considered a people. Any other interpretation is *de facto* a licence for ethnic cleansing and discrimination.

The argument that *the real reason for the separation of Crimea was the Russian intervention* is not unquestionable. *Firstly*, Russia's actions can be justified by reference to humanitarian intervention and self-defense. The threat of civil war in Crimea was real, and only the intervention of Russia ruled out a scenario similar to the one realized in the Donbass. The absence of victims among the Crimeans did not necessarily mean that they would not occur in the future; the terrible events that took place in Odessa

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[8] For instance, Israeli authors insist that Palestinians are not an independent people, but a part of the Arab ethnos, and therefore do not have the right to have their own state (Elon Jarden, *The Israeli-Palestinian Conflict in International Law* in *Israel and a Palestinian State: Zero Sum Game?* 132 (A. Stav (ed.), Tel Aviv: Zmora-Bitan and ACPR, 2001); Robbie Sabel, *International Legal Issues of the Arab-Israeli Conflict: An Israeli Lawyer's Position*, 3(2) Journal of East Asia and International Law 407 (2010)).

[9] According to Turp, a people is a group of individuals who strive to determine their future. Common language, culture and religion play a role in the process of self-determination but the collective desire to live together is a more important indicator (Daniel Turp, *Remarks* in *Contemporary International Law Issues: Opportunities at a Time of Momentous Change: Proceedings of the Second Joint Conference Held in the Hague, The Netherlands, July 22–24, 1993* 63–64 (Dordrecht: Martinus Nijhoff, 1994)). The Opinion of the Arbitration Commission of the Peace Conference on Yugoslavia No. 2 of 11 January 1992 states that by virtue of the right to self-determination "every individual may choose to belong to whatever ethnic, religious or language community he or she wishes" (*Yugoslavia Through Documents: From Its Creation to Its Dissolution* 474–475 (S. Trifunovska (ed.), Dordrecht: Martinus Nijhoff, 1994).

on 2 May 2014 present an indirect proof. Also, the new Ukrainian government from the outset took a course to joining NATO which would make it impossible to maintain the Russian military base in Crimea. The preventive nature of these actions is what makes the Russian position vulnerable; however, the concept of preventive self-defense is supported by a number of authors and several states. The U.S. and UK used it in order to justify the invasion into Iraq, Israel relied on it to justify the occupation of Palestine, and the UK used it to justify the title in respect of the Chagos Archipelago. *Secondly*, when the disintegration of the Ukrainian state started in December 2014, the authorities of Crimea condemned the Euromaidan and expressed their support to the Yanukovych's course of action. At the end of February 2014, Yanukovych left Ukraine and the *coup d'état* took place. Thus, the actions of Russia a few days later were directed against the inefficient government which did not represent the whole population of the country. This fact can at least serve as a mitigating circumstance. *Thirdly*, the Russian intervention was a reaction to violations of *jus cogens* whose victim was a kindred people, and which had as its primary goal not the annexation of the territory but the creation of conditions for the Crimean people to freely determine their political future by way of a referendum.[10] The fact that it was accompanied by the use of force and the implementation of Russia's own plans certainly undermines this argument but does not completely remove it. The thesis regarding the historical bonds between Crimea and Russia, of course, cannot justify the title but it can justify Russia's special attention to the political status of the peninsula and Russia's concern for its population, especially when the statehood collapsed.

The proposed interpretations, while not being a part of the doctrinal mainstream, are allowed by the law in force. If a consensus was reached, they would have been accepted unconditionally (in the same way as earlier the extremely controversial interpretations of the events related to the dissolution of Yugoslavia and Kosovo's separation from Serbia were adopted). The lack of consensus, however, does not make these interpretations useless: they can be used in shaping Russia's foreign policy and thus may be gradually introduced into the legal discourse). Regardless of whether this approach will provide any benefits, it would solve the systemic problem of the absolute dominance of the *uti possidetis juris* principle, and lack of attention to the national issue when determining the boundaries of new states. This problem is rather acute: it is the source of most of today's conflicts; any attempts to resolve them *post factum* proved to be completely ineffective. One of the reasons is that international law is still pretty much law of elites (not peoples) and regulates issues related to statehood, "relying upon historical legal traditions that have become obsolete and incomplete."[11]

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[10] A similar mechanism of accession was used by the United States with regard to the islands of Micronesia: the trusteeship administered by the U.S. was ended by a referendum which led to the establishment of an association; in fact, these territories were annexed without granting political rights to their residents.

[11] Anthony Carty, *Philosophy of International Law* 92 (Edinburgh: Edinburgh University Press, 2007).

International law, like any other law, often limits social events, allocating certain facts and cutting off others for the purposes of legal qualification. This approach ensures the certainty of regulation and the promptness of reaction. However, it should be constantly evolving: the doctrine must continuously amend it in order to take into account the significant facts, ignoring which would make legal decisions conditional, temporary and inefficient. Refusal to do so not only has negative social consequences but also leads to the destruction of the law, which turns into a field for rhetorical exercises whose validity is no longer believed into by the participants themselves. In this regard, the lessons of the Ukrainian events are not limited to the national issue; other important aspects that require thorough analysis are the intervention of Western states, the struggle of the Ukrainian oligarchs for power, the degradation of the state institutions, the aggressive policies of IMF and EU, and the formation of unrecognized states and their legal orders.

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