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ЗМІСТ

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SECTION 1

CURRENT ISSUES OF CONSTITUTIONAL AND LEGAL STATUS OF HUMAN AND CITIZEN

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CONSTITUTIONAL REGULATION OF CIVIL MARRIAGE IN ISRAEL

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Summary

The purpose of this paper is to review the history of the constitutional regulation of marriage and divorce in British mandate Palestine and the state of Israel from 1918 on. Israel was subject to British rule (mostly under a mandate of the League of Nations) from 1918 to 1948, and was called Palestine at the time. In 1948 some of this territory claimed its sovereignty as an independent state called Israel. The paper will highlight the different constitutional norms and procedures that govern the field of family law in British mandate Palestine and the state of Israel from the beginning of the British mandate to this day.

The paper is based upon historic scrutiny of the legislation of British Palestine and the state of Israel in the field of family law, analyzing the law in accordance with the historic developments in the region. The results of this scrutiny are that from 1948 to the third decade of the 21st century, the Israeli legislator has repeatedly acted to prevent the constitutional regulation of civil marriage, preserving the archaic millet system, an Ottoman system of marriage within religious communities, that was the basis of the British mandate's regulation of marriage and divorce in Palestine. But as much as the original millet arrangement was enacted by the British as a voluntary system, it was given new and compulsory features by the Israeli legislator, all the while avoiding a comprehensive constitutional regulation of Israeli family law.

The paper concludes that a constitutional regulation of civil marriage is probably not possible in Israel, due to the political inability to reach an agreement between religious and secular Jews in Israel. But this did not prevent the Israeli legislature from fundamentally changing the British mandate constitutional arrangement, leaving behind a patchwork of improvised legislation that violates the basic civil rights of Israeli citizens.

Key words: British mandate on Palestine; constitutional regulation of marriage; Israel; Family Law; millet system.

1. Introduction

The subject of this article is the constitutional regulation of civil marriage in the State of Israel; or rather the denial of the constitutional possibility for the legal regulation of civil marriage, theoretically possible until the mid-1980s.

The existing system in Israel for regulating personal status matters (a term mainly referring to matters of marriage and divorce) is a product of the previous regime that ruled the territory of Palestine before the establishment of the State of Israel on the

larger part of this territory – the British Mandate on Palestine.

The system, enacted by the British authorities in 1922 in the «Palestine Order in Council» (POiC) divides the residents of Israel into separate religious communities – Jews, Moslems, several Christian denominations, Druze, and Bahais. These communities have jurisdiction over their members' matters of personal status and settle these matters in religious courts according to their personal religious law. Thus, a Jew can marry a Jew according to Jewish law and divorce in a Jewish court according to Jewish law, a Moslem can marry a Moslem according to the Sharia and divorce in a Sharaite court, etc. Intermarriages are not possible as most personal religious laws do not recognize them. Likewise, if one is not a member of one of the 14 specified religious communities, one cannot legally marry or divorce in the state of Israel.

This is a rigid system, not allowing for the legal regulation of marriage of many Israeli citizens – those who wish to marry a person not of their religion, those who are subject to ritual marriage prohibitions of their religion, such as the prohibition of a male member of a priestly clan (Cohanim) to marry a female divorcee in Jewish law, or those who do not belong to a recognized Religious Community. Accordingly, the British arrangement was a voluntary and softened arrangement, leaving a theoretical constitutional possibility for arranging civil marriage in various cases. When the State of Israel was established, the Israeli legislature left the British arrangement in this field intact.

In 1950, when the Israeli Parliament, the Knesset, tried to enact a constitution and reached a deadlock, a partial constitutional arrangement was adopted. The Israeli constitution, it was determined, will be enacted in chapters called «Basic Laws». The enactment of these basic laws has not ended to this day, more than seventy years after the establishment of the state in 1948. In a state of constitutional uncertainty, the Israeli legislature felt free to change the British arrangement as he willed. The arrangement was thus turned from a voluntary arrangement into a coercive one, and the theoretical constitutional possibility for civil regulation of marriage was abolished.

This became a serious problem when hundreds of thousands of citizens of the former USSR immigrated to Israel at the end of the last century. Many of them had the right to immigrate to Israel under the «Law of Return». This law enables those of Jewish origins to immigrate to Israel and become Israeli citizens if they so wish. However, Jewish ethnic roots do not guarantee being «Jewish» according to Jewish law, as it only takes into consideration the maternal lineage. Thus, a person whose father is a Jew and whose mother is not will be eligible for Israeli citizenship according to the «Law of Return», but will not be considered a part of the Jewish Religious Community, and thus the arrangement of such persons' marriage was not possible under the existing legal arrangement. An improvisation known as the «Spousal Covenant Law» provided a partial and problematic solution to this problem.

This paper will briefly review the history of the constitutional regulation of marriage and divorce in mandate Palestine and Israel from 1918 on – The creation of the Religious Community Arrangement in the «POiC» in 1922, the amendment intended to allow civil marriages in 1939, the adoption of the system by the young State of Israel in 1948, and the way the Israeli legislator repeatedly acted to prevent the regulation of civil marriages since.

I would argue that a constitutional regulation of civil marriages is probably not possible in Israel, for the same reason the Israeli constitution was never fully formalized, due to the political inability to reach an agreement between religious and secular Jews in Israel. But this did not prevent the Israeli legislature from fundamentally changing the «POiC» constitutional arrangement, leaving behind a patchwork of improvised legislation that violates the basic civil rights of Israeli citizens.

2. British mandate era.

The modern political entities, the state of Israel and the Palestinian Authority were until 1918 a part of the Ottoman Empire. These territories were taken over by the British army in the First World War and consequently subjected to a British mandate by the League of Nations in 1922. The British ruled these territories as a unified political entity until 1948.

Upon their arrival to these territories in 1918, the British found a complex system of tribunals and courts that dealt with various areas of life according to different sets of laws. Among other courts, different religious communities (some Jewish communities and a plethora of Christian sects) operated autonomous religious courts, with certain jurisdiction over the members of these communities regarding some fields of family law, inheritance, and sacred communal property (such as the Moslem Waqf). Sharia courts, operating parallel to these courts, had much wider jurisdiction.

The complex structure of the court system in Palestine was the result of historical development over the long history of the Ottoman Empire, which ended with the British occupation (Rubin, 2011). Whether this system created an organized Ottoman «millet system» (Millet – in Ottoman Turkish: ملت. This word is interpreted in the legal and historiographical discourse as an autonomous religious community, usually within the framework of the Ottoman Empire) granting jurisdiction over matters of «personal status» to different religious courts is a matter of some controversy (Amir, 2016; Braude, 2014; Kermeli, 2012). For the sake of clarity, this article will regard the marriage and divorce

arrangement in British mandated Palestine as a novel British arrangement, disregarding its possible Ottoman roots.

In August 1922 the British has enacted the «POiC», a legal instrument for the mandated territories, which served as a kind of constitution during the mandate period. It is this legal instrument, parts of which are still valid in Israel today, that shaped the so-called British millet system.

The «POiC» was not a constitution, as it was not enacted by the representatives of a sovereign people, but dictated by a colonial ruler, residing on a far-away island, King George V, King of the United Kingdom, the British Dominions and Emperor of India. However, it had some of the formal characteristics of a constitution. It determined the structure of government, including the structure of the legal system, the mechanism of legislation, the various courts and tribunals and their jurisdiction, and even such matters as the official languages.

Although it was probably drafted at the Colonial Office, the «POiC» was presumed to be a product of the king's consultation with his Privy Council, and as such a norm higher than regular legislation. Primary legislation in mandate Palestine was called «an ordinance» and was enacted by the British High Commissioner of Palestine. The «POiC» was considered the source of the High Commissioner's authority to issue ordinances. Even after the establishment of the state of Israel, the Israeli Supreme Court ruled that an ordinance that contradicts an article of the «POiC» is not valid (Yossipof vs. Attorney General, 1951). The «POiC» was the closest thing to a constitution in mandate Palestine except for the Mandate of Palestine itself.

The «POiC» was a long and detailed document, regulating every facet of the administration of the mandated territories. Among its other arrangements, it detailed the arrangement of religious communities, that had jurisdiction over the personal status affairs of their members.

The basis of the arrangement is a list of 'matters of personal status' in which Jurisdiction was given to religious courts. Before the enactment of the «POiC» the term 'personal status' was not defined, and the jurisdiction of religious courts did not relate to it.

These are the main arrangements, laid out in the «POiC», concerning personal status and religious courts –

Article 47 of the «POIC» granted the civil district courts residual jurisdiction in matters of personal status. These matters were listed in article 51 as «Marriage Or Divorce, Alimony, Maintenance, Guardianship, Legitimation And Adoption Of Minors, Inhibition From Dealing With Property Of Persons Who Are Legally Incompetent, Successions, Wills And Legacies, And The Administration Of The Property Of Absent Persons. » (a somewhat different list is listed in article 52 of the POiC regarding Moslem courts). During the decades the list was shortened by Israeli legislation granting civil courts jurisdiction over most elements in the list, but its core element – matters of marriage and divorce – remained untouched to all courts – Jewish Christian and Moslem.

Articles 53 and 54 granted Jewish and Christian religious courts sole jurisdiction in matters of marriage and divorce, alimony and wills, and granted these courts parallel jurisdiction vis-a-vis the civil district courts over other matters of personal status, depending on the consent of the involved parties. Article 52 applies an equivalent arrangement to Moslem courts.

The effect of these articles was that Jews, Christians, and Moslems, belonging to a closed list of recognized religious communities, will settle matters of personal status in the religious courts of their communities according to their personal law, that is – the religious law of each community.

When enacted, the «POiC» didn't include a list of the religious communities. The list was finalized in 1939 in the form of an appendix to the «POiC». The list of communities included nine Christian denominations – different variations of Roman-Catholic and Orthodox Christianity – and the Jewish community. The Moslem community has not been listed, but in fact, Moslem courts were recognized by the authorities and were referred to explicitly in the «POiC». Although the legislator ignored the Moslems in this list, the Moslem community was recognized as a Religious Community in all respects.

From the beginning of its operation, the system was inflicted with two flaws – the will of large Jewish communities to escape the jurisdiction of the formal Jewish Religious Community for various religious, political, and ideological reasons, and the fact that for various reasons some citizens were left without a formal Religious Community (the Druze community was not recognized until the 1960's, and Druze Palestinian subjects had to use the Moslem Sharaite court as their religious tribunal. The Russian-Orthodox Church is not recognized to this day. Protestant churches are not recognized, except for the Evangelic-Episcopal Church, which has a small following of several thousand Arab-Israeli citizens. This church was recognized in the early 1970s. Larger Protestant denominations are not recognized). These two issues have since created tensions and ongoing problems.

The Jewish Religious Community was organized under an umbrella organization called «Knesset Israel». This mandate era institution is not to be confused with the Israeli parliament, bearing the same name. The word «Knesset» (in Hebrew – תסנכ) is used in Jewish sources to indicate a legislative body since the age of the second temple. «Knesset Israel» was an organizational framework for Jewish religious and polit-

ical institutions, which included an elected leadership, and was the official organizational framework of the Jews in Palestine during the British Mandate. In 1928, regulations were published to regulate its actions and its membership registry. The Chief Rabbinate acted within this framework, and operated the courts of the Jewish community. However, any tribunal consisting of three rabbis could adjudicate personal status, if it could be approved by the Chief Rabbinate that the judgment was given in accordance with the Jewish Law (Sheftelowich, 1941, p. 8).

«Knesset Israel» was a voluntary organization. A Jewish Palestinian subject could choose whether to register to «Knesset Israel» or not. Large population groups preferred, for various reasons, not to join this organization. The ultraorthodox movement «Agudat Israel», had its members retire from «Knesset Israel» enmasse, and pretend to manage its own courts (Harris, 2002, p. 37).

This situation, in which many Jews didn't belong to the Jewish community created four types of citizens who couldn't regulate their affairs within the system. This is one of the major distortions created by the system, that exists to this day. Israeli scholar Baruch Bracha lists the types of these citizens as follows (Bracha, 1971, p. 169):

A. Lacking religion.

B. Belonging to a religion that has no formal organization, such as Buddhists.

C. Belonging to a religion that has no recognized community, such as various kinds of Protestants.

D. People belonging to a religion with a recognized community who withdrew from it, or did not join it.

Bracha's classification ignores the ethnic character of the system. The term Religious Community is formal, and the system in fact regulates ethnic division (Amir, 2014). For this reason, and because the division indeed roughly matched the ethnic divisions in Palestine at the time, the second and third classifications did not constitute a real problem, and the first classification posed a problem of modest dimensions up to the great immigration wave from the former USSR in the 1990s. But the fourth class was deemed a real problem, that only worsened over the years.

As the tragic events of the 1930s and 1940s unfolded, and the illegal immigration of Jews into Palestine increased, updating the «Knesset Israel» registry became an impossible task, as illegal Jewish immigrants tended not to register in formal registries. This fact, combined with the retirement of the ultraorthodox from «Knesset Israel» meant that a very large percentage of the Jewish population was not a part of the formal Jewish Religious Community, arranged by «Knesset Israel». These unorganized Jews had to regulate their matters of personal status in the civil courts, outside the religious tribunal system. These courts discussed matters of personal status according to the personal law of the litigant, that is according to Jewish law. This situation, in which Christian British judges ruled in complicated Jewish law matters, was perceived as problematic by judges and litigants alike.

This state of affairs led to an interesting amendment to the «POiC». In 1939 Article 65 A of the «POiC» was enacted, stating as follows:

Provision may be made by ordinance for the Celebration, dissolution and annulment of marriages of persons neither of whom is a Moslem or a member of a Religious Community and for the granting by the Courts of orders or decrees in connection with the marriages of such persons or their dissolution or annulment.

This amendment, which supposedly enabled the legislator to introduce a course of civil marriage and divorce for those outside the framework of a Religious Community, required a change in legislation. The «POiC» was a constitutional norm, and the amendment could only enable legislation establishing civil marriage and divorce. To implement such a change an ordinance had to be enacted by the High Commissioner. In the last decade of the British mandate, from 1939 to 1948, the British, fighting the Second World War while trying to manage the violent Arab-Jewish conflict and an armed revolt against their own rule, did not have the initiative to enact a law of civil marriage.

3. The Israeli era

The British mandate on Palestine came to an end in 1947-8, as the declining British Empire, weakened by the Second World War, being forced into a decolonization process, was not able to control the Arab-Jewish conflict in the mandated territories. UN resolution 181 divided the territory into an Arab state and a Jewish state in November 1947. The mandate was terminated in May 1948. Following the Arab-Jewish war that followed the collapse of the mandate, the state of Israel was founded on a large part of the once-mandated territory of Palestine.

One of the first legislative acts of the young state was to accept all former British legislation. Article 11 of the «Law and Administration Ordinance» provided that the law that was in effect in the Mandate period, including the «POiC», would remain in effect in the state of Israel.

The «POiC» was a legal instrument for ruling a colony, and could not serve as a constitution for an independent state. In the 1949 elections, a legislative and constituent body was elected, named «Knesset» (not to be confused with the now-defunct «Knesset Israel»). It set out to draft a constitution. However, it soon become very clear that the big cleavage that divided the Israeli public (and still does, to this day), between secular and religious Jews would make the

drafting of a constitution impossible. In 1951, Knesset Member Yizhar Harari suggested a compromise – the constitution will be accepted in parts, called «Basic Laws». Thus, it would be possible to constitutionally regulate vital aspects of government, such as the status of the Knesset, the government, or the President, and indefinitely postpone the constitutional regulation of problematic subjects like the separation of church from state, or civil marriages. This compromise was accepted, and is known as «the Harari decision» (Navot, 2007, p. 35). Many Basic laws were enacted since, yet a full constitution, regulating all aspects of civil and public life never materialized. The sensitive subject of the marriage legal regime and the Religious Community Arrangement was never regulated by a basic law. The relevant articles of the «POiC» remained in force to this day.

The «POiC» lost its semi-constitutional status when the state was founded, and the British monarch no longer had authority in the new state. The Knesset had the authority to amend or nullify articles of the «POiC» and most of its articles were subsequently replaced with original Israeli legislation. However, the articles that constituted the Religious Community Arrangement remained in force.

Soon it became clear that for the Jews, who became after the 1948 war the majority of the population of Israel, the arrangement was no longer possible to implement. Those registered in «Knesset Israel» were now a minority. In the early years of Israel's independence, the majority of Its Jewish population consisted of persons who were not members of «Knesset Israel», either because they have retired from the outset, or because they immigrated to Israel and didn't register. These people were not subject to the judgment of the millet Rabbinical Court system, creating a legislative and practical loophole that was hard to bear. This problem was exacerbated when the Knesset decided, in February 1949, on the disintegration of «Knesset Israel». It was just a technical step. The registry was not updated since 1944. Due to the mass immigration of Holocaust survivors to Israel, and even a bigger wave of immigration of Jews from Arab countries in Israel's early years, within a few years the majority of Israel's Jewish citizens were never registered in «Knesset Israel».

At this stage, the Israeli legislator could turn to one of two ways. As article 65A of the «POiC» remained valid, one possible way was to establish an institution of civil marriage. This would enable those not registered in a recognized Religious Community a civic institution in which to arrange their matters of personal status. The other way was to coerce its Israeli citizens to belong to a Religious Community according to their ethnicity.

None of these two options was obvious. In 1951 the Supreme Court ruled in the Yossipoff case (Yossipof vs. Attorney General, 1951) that article 65A of the «POiC» sets the legal ground for civil uniform personal status arrangement for those not belonging to a recognized Religious Community, but implementing such an arrangement will require additional legislation. The court thus recognized that the first way is legitimate, should the legislator choose to follow it. The Yossipoff case did not engage the core issues of the question of civil marriage but rather dealt with the validity of the law articles relating to bigamy. The statements regarding article 65A were obiter dicta, and yet, at this early stage of Israel's legislative arrangements, when the state was controlled by the secular socialist «MAPAI» party, turning to a course of enacting an arrangement of civil marriage seemed possible.

The Israeli legislator has decided to choose the second path. On May 12th, 1953 the Israeli government brought before the Knesset a bill intended to remedy the situation created by the cancellation of «Knesset Israel» and create a new Jewish Religious Community whose members, «Jews in Israel» (a term not implying voluntary registration) would settle their affairs of marriage and divorce in the Rabbinical Court system according to Jewish law. The bill was eventually accepted on April 9th, 1953 as Rabbinical Courts Jurisdiction (Marriage and Divorce) Law. The essence of the law is in these articles:

1. Matters of marriage and divorce of Jews in Israel being nationals or residents of the state shall be under the exclusive jurisdiction of Rabbinical Courts.

2. Marriage and divorce of Jews shall be performed in Israel in accordance with Jewish religious law.

3. When a suit for divorce has been filed in a Rabbinical Court, whether by the wife or by the husband, a Rabbinical Court shall have exclusive jurisdiction in any matter connected with such suit, including maintenance for the wife and for the children of the couple.

Since 1953 the law has undergone several changes. All changes left intact the principle that «Matters of marriage and divorce of Jews in Israel… shall be under the exclusive jurisdiction of Rabbinical Courts. »

The Religious Courts Law enforces religious marriages upon a largely secular population and places the most important needs of these citizens in the sensitive field of family law under the control of the religious foundation of the Chief Rabbinate who is in control of the Rabbinical Court system. This is an arrangement no religious politician in Israel would ever give away.

The Rabbinical Courts Law was a minor revolution that changed the voluntary nature of the British system into a strict, compulsive, ethnical-based order. Resetting the ground rules for the Jews has given the system as a whole a rigid frame, which also affects the non-Jewish citizens subject to the system.

The British legislator saw fit in enacting article 65A of the «POiC», to create a conceptual framework that would allow civil marriage for those unwilling to register to a Religious Community. The Israeli legislator made belonging to a Religious Community into a compulsory matter not dependent on the will of the citizen, and his self-definition. From 1953 on, this matter was determined by the clerics in one's ethnical group. Following the enactment of the Rabbinical Courts Law, the Knesset enacted in 1963 the Druze Religious Courts Jurisdiction Law, taking a similar approach, and Article 4 of that law stated that subject to the court's jurisdiction are «Druze Israeli citizens or residents». Enforcing the arrangement on these two significant populations gave the whole arrangement a rigid character, and took away any flexibility it might have had.

The enactment of the Rabbinical Courts law did not eliminate the possibility of using Article 65 A to create an institution of civil marriage. There still existed some citizens, albeit not many, labeled «Devoid of Religious Affiliation» who would benefit from such a law. But the demographic reality of the first decades of Israel roughly matched the ethnic division existing when the «POiC» was enacted, because although the 1948 war reduced the number of Arabs in Israel, and consequent massive Jewish immigration turned the Jews into a large majority, still it could roughly be stated that up to 1990, the inhabitants of Israel were Jews, Moslems, Druze, Roman-Catholic and Greek-Orthodox Christians. The community of those «Devoid of Religious Affiliation» was at the time small and ineffectual.

Other distortions and problems inherent in the millet system, such as the large number of those who could not marry under the existing system despite belonging to a Religious Community such as mixed couples, have created a large number of alternatives to the system's arrangement, used with relative ease. These alternatives include the «Yeduim Batsibur» arrangement, a kind of institutionalized common-law marriage, and the «Cyprus marriage», in which the state recognizes marriages committed abroad between Israeli citizens, an arrangement adopted by the Israeli Supreme Court in the Funk-Schlezinger case of 1963. The alternatives give couples most of the rights given to those married within the millet system, thus creating a simple and convenient solution also for those «Devoid of Religious Affiliation». Thus, for several decades, the problem did not become a serious problem that must be immediately addressed.

And yet, the closed nature of the system, based on rigid ethnic categories, called for the closure of the theoretical door article 65A has left open. In the early 1980s, the Israeli Ministry of Justice initiated a comprehensive legislative process aimed at establishing Israeli law on original Israeli legislation and trying to cleanse the law from dependence on foreign sources. Among other steps taken, the Knesset enacted in 1984 the Abolition of Archaic Laws Law, which annulled Ottoman and British statutes that appeared to be archaic. This law also abolished Article 65A of the «POiC».

The bill for the Abolition of Archaic Laws was proposed by the Israeli government. When referring to article 65A, the bill laconically stated that «Article 65A gives the power to make law provisions for the divorce of foreign nationals. This provision is superfluous since independence». This was obviously an incorrect statement, whether according to the language of Article 65A, or the Israeli court rulings that followed its enactment. There is no telling how deeply the 1984 legislators inquired into the legal situation before canceling article 65A, and if any of them was aware of the misstatement in the bill. However, the door leading to civil marriage in Israel was closed in 1984, several years before the great wave of immigration from the former USSR brought to Israel a million new citizens, eligible for citizenship according to the secular Law of Return, but not Jewish according to Jewish religious law, that has different criteria for being Jewish. Tens of thousands of these were thus labeled «Devoid of Religious Affiliation», and could not marry or divorce within the millet's framework.

This situation has created a problem that the legislature had to address. A radical change in the system was politically out of the question. The inclusion of immigrants in any category other than «Jewish» within the system, such as the creation of the «Russian-Orthodox Religious Community», would also have missed the goal. The immigrants from the former USSR were brought to join the hegemonic sociocultural Jewish group, of which they considered themselves a part, whatever their formal religious affiliation may be. Categorizing them anywhere else within the system would identify them as belonging to a lower group within the social hierarchy, those who are «not Jewish». The need for a solution became urgent as the number of those unable to marry within the existing system increased, and accordingly, their political power in the Knesset, in the final decade of the 20th century and the first decade of the 21st century.

4. The Spousal Covenant

Upon realizing the extent of the problem, The Knesset has begun a complex legislative process aimed at solving the problem of those «Devoid of Religious Affiliation», who suddenly turned from being a marginal minority into a large population group with substantive political influence. The procedure, lasting about a decade, started with a general statement about creating an institution comparable to civil marriage, and changing

the system radically while creating an alternative arrangement to the millet system. But a typical Israeli political upheaval led to moderating this radical move and ended with a partial arrangement regarding only a small fraction of the population. The law, enacted in 2010 was named the Spousal Covenant for Those Devoid of Religious Affiliation Law.

The law creates a new legal status, contractual in its nature, separate from marital status. By law, a person who is «Devoid of Religious Affiliation» (defined in article 1 of the law as one «Who is not Jewish, Moslem, Druze, or a Christian») can engage in a Spousal Covenant, defined as «…a contract between spouses to live together and cohabit». This status is not marriage. It is a contractual framework awarding the spouses a limited number of the many rights and benefits awarded to married couples. A Spousal Covenant Registry was established to register couples «Devoid of Religious Affiliation» engaging in the Spousal Covenant. Article 14 of the Law reassures that «…this law does not affect marriage and divorce laws and the jurisdiction of the religious courts according to any law».

The desire to distinguish between marriage and the Spousal Covenant is reflected in many articles of the law, which weaken the strength of the bond created by the Spousal Covenant, give those couples lesser rights than married couples, and try to give the Spousal Covenant an entirely different character from that of marriage. Such is the waiting period required for adoption or surrogacy (Article 13 (c) (1)), the fact that the Spousal Covenant does not grant rights under the citizenship and entry into Israel laws (Article 13 (c) (2)) or the authority given to the court under article 11 (d) of the Spousal Covenant Law to dissolve the partnership according to one spouse's request.

It seems that the law is far from solving the problem of those «Devoid of Religious Affiliation», if only because of the provision that they can only engage in Spousal Covenant with each other. The law creates, in effect, a kind of new millet, the Religious Community of those «Devoid of Religious Affiliation». These, like the rest of the religious communities, can legally couple only among themselves.

It seems the Spousal Covenant provides a limited solution to a limited problem. Official statistics (Spousal Covenant Registry Statistics, 2020) reveal that up to 2021, during the decade of the law's operation, only 138 Spousal Covenants were registered, a very small number when compared to the five digits number of those «Devoid of Religious Affiliation».

The Spousal Covenant is not marriage and does not constitute a worthy model for future enactment of civil marriage law in Israel if ever the political situation will enable such enactment. The legislator has differentiated this institution from marriage in many ways, keeping the Spousal Covenant inferior to marriage in many aspects.

5. Conclusion

The constitutional regulation of the sensitive area of family law and religious denominations requires one of these two – wide public consent or dictation from a colonial ruler. The current arrangement was dictated by a colonial ruler. The «POiC» was not the result of an agreement between religious denominations, ethnic communities, or religious and secular groups. It was the result of a decision made in a distant colonial center that ruled the periphery. This kind of regulation is no longer possible in Israel, an independent and sovereign state. But it turns out that regulation based on broad consensus is not possible in the State of Israel, due to the deep rift between the religious and the secular, making the possibility of constitutional arrangements on matters of religion and state impossible.

A constitutional arrangement that is by nature difficult to change. When the Religious Community Arrangement lost its constitutional status with the establishment of the State of Israel, the possibility of relying on a mere parliamentary majority to change it became real. Thus, the arrangement lost its original character, due to legislation that is not constitutional in nature, the Rabbinical Courts Law, whose adoption or amendment requires a parliamentary majority and not broad public consent. Thus, the arrangement is often changed, in legislation and case law, in order to deal with challenges arising from being outdated and archaic, and the product is a patchwork of legislation, which does not meet the needs of the citizens of the State of Israel. When it comes to the Religious Community Arrangement, strengthening the religious system that does not tolerate civil arrangements is the way the Israeli legislature takes time and again.

There's no telling what would have happened had article 65A of the «POiC» remained in force when the wave of immigration from the former USSR came to Israel in the early 1990s. It surely gave a constitutional framework for creating a foundation of civil marriage, giving a better, more powerful tool than the Spousal Covenant for easing the suffering of tens of thousands of citizens who are labeled 'Devoid of Religious Affiliation'. The legislator chose to eliminate this option in 1984 when article 65A was abolished.

The state of Israel is 74 years old. For three quarters of a century the Israeli legislature has refrained from constitutionally regulating the most sensitive areas of citizens' lives, leaving regulation to the coincidences of a passing parliamentary majority on specific questions. It is time for the people of Israel to decide to deal with the problem and to give family law appropriate constitutional regulation, designed to cater to the needs of citizens of a culturally and religiously heterogeneous state, including, rather than excluding, those who fail to fit the narrow patterns of the current Religious Community Arrangement.

Bibliography:

1. **רימא, ג'** (2014). ילארשיה טפשמב תיתדה הדעה רדסה. הקיטילופ *הקשילופ* ינתא ווימו הטילש לש וונגנמכ 23, 46–72

2. **רימא, ג'** (2016). סירבדמ ונחנאשכ סירבדמ ונחנא המ לע. טפשמ ירקחמ – טלימה לע, 30, 677–706.

3. **Braude, B.** (2014). Foundation Myths of the Millet System. *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society,* 56–86. Boulder CO: Lynne Reiner.

4. **הכרב, ב'** (1971). ־ום תיתד הדע ירסח לש ישיאה סדמעמ. תרכומ תיתד הדע ירסח לש ישיאה סדמעמ תרכ.

5. ד"פ ז"י, 142/63 ג"ה, סינפה רש 'נ רגניזלש קנופ 225 (1963).

6. **ר, סיראה.** (2002 חסיהב תוצמחהו תוירוטסיה תויונמדזה תמקה תעב ילארשיה טפשמב ירבעה טפשמה לש ובוליש לע – תעדה לארשי לש הכרד תישארב הנידמו תד :רשגה ירבע ינש הנידמה, 21–55.

7. ונשונש סיניד לוטיבל קוח תעצה (1981).

8. סיינבר ויד יתב קוח (וישוריגו ויאושינ) (1953).

9. סייזורדה סייתדה וידה יתב קוח (1963).

10. תד ירסחל תויגוזה תירב קוח (2010).

11. תובשה קוח (1950).

12. ונשונש סיניד לוטיבל קוח (1984).

13. **Kermeli, E.** (2012). The Right to Choice: Ottoman, Ecclesiastical and Communal Justice in Ottoman Greece. *The Ottoman World* , 347–361. London: Routledge.

14. **Navot, S.** (2007). *Constitutional Law of Israel.* The Hague: Kluwers Law International.

15. Palestine Order in Council (1922).

16. להנימו קוח תדוקפ (1948).

17. **Rubin, A.** (2011) *The Ottoman Nizamiye Courts: Law and Modernity.* New-York: Palgrave MacMillan.

18. **Sheftelowich, E. E.** (1941). Jewish Family and Inheritance Law and its Use in Palestine. Tel-Aviv: Olympia Edition.

19. סיטפשמה דרשמ – גוזה ינב תנמא משרמ תוקיטסיטס ילארשיה (2020). URL: https://www.gov.il/he/departments/publications/reports/september-2020.

20. 'נ חופיסוי, הלשממליטפשמה ץעויה, א"ע. 112/50, 5 P.D. 482 (1951).

References

1. **Amir, G.** (2014). Hesder ha-eda ha-datit ba-mishpat ha-Israeli ke-manganon shel shlita u-miyun etni [The institution of religious community in Israeli jurisprudence as a mechanism for ethnic sorting and control] *Politika* 23, 46–72. [in Hebrew].

2. **Amir, G.** (2016). Al ma anachnu medabrim ksheanachnu medabrim al ha-milet [What we talk about when we talk about the millet]. *Mehkarey Mishpat – Bar-Ilan Law Review*, 30, 677–706. [in Hebrew].

3. **Braude, B.** (2014). Foundation Myths of the Millet System. *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society,* 56–86. Boulder CO: Lynne Reiner. [in English].

4. **Bracha, B.** (1971). Ma'amadam ha-ishi shel hasrey 'eda datit mukeret [The personal status of those lacking a recognized religious community] *Iyuney Mishpat* [Tel-Aviv University Law Review] 1, 156–180. [in Hebrew].

5. Funk-Schlezinger v. Minister of the Interior, HJC 142/63, 17 PD 225 (1963). [in Hebrew].

6. **Harris, R. (2002).** Hizdamvuyot historiyot vehachmatzot behesach ha-da'at – al shiluvo shel hamishpat ha-'ivri bamishpat ha-Israeli be'et hakamat ha-medina [Historic opportunities and accidental misses: regardint the integration of Hebrew jurisprudence in Israeli law in the first decades of Israel] *Shney every ha-gesher: dat umedina bereshit darka shel Israel* [Both sides of the bridge: state and religion in the beginning of Israel], 21–55. [in Hebrew].

7. Hatza'at Hok le-Bitul Dinim she-Noshanu [Bill for the abolition of archaic laws] (1981) [in Hebrew].

8. Hok Batey Din Rabaniim (Nisuin Vegirushin) [Rabbinical courts jurisdiction (marriage and divorce)] (1953). [in Hebrew].

9. Hok Batey ha-Din ha-Datiyim ha-Druziyim [Druze religious courts jusisdiction law] (1963). [in Hebrew].

10. Hok Brit ha-Zugiyut Lehasrey Dat [Spousal covenant for those devoid of religious affiliation law] (2010). [in Hebrew].

11. Hok ha-Shvut [The law of return] (1950). [in Hebrew].

12. Hok le-Bitul Dinim she-Noshanu [Abolition of archaic laws law] (1984). [in Hebrew].

13. **Kermeli, E.** (2012). The Right to Choice: Ottoman, Ecclesiastical and Communal Justice in Ottoman Greece. *The Ottoman World*, 347–361. London: Routledge. [in English].

14. **Navot, S.** (2007). *Constitutional Law of Israel.* The Hague: Kluwers Law International. [in English].

15. Palestine Order in Council (1922). [in English].

16. Pkudat sidrey shilton u-mishpat [Law and administration ordinance] (1948). [in Hebrew].

17. **Rubin, A.** (2011) *The Ottoman Nizamiye Courts: Law and Modernity.* New-York: Palgrave MacMillan. [in English].

18. **Sheftelowich, E. E.** (1941). Jewish Family and Inheritance Law and its Use in Palestine. Tel-Aviv: Olympia Edition. [in English].

19. Spousal Covenant Registry Statistics – Israeli Ministry of Justice (2020). Available from: https://www.gov.il/he/departments/publications/ reports/september-2020.

20. Yossipof v. Attorney General, C.A. 112/50, 5 P.D. 482 (1951) [in Hebrew].

КОНСТИТУЦІЙНЕ РЕГУЛЮВАННЯ ЦИВІЛЬНОГО ШЛЮБУ В ІЗРАЇЛІ

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Анотація

Метою цієї статті є огляд історії конституційного регулювання шлюбу та розлучення в Палестині під британським правлінням та державі Ізраїль з 1918 року. З 1918 по 1948 рік Ізраїль перебував під британським правлінням (здебільшого під мандатом Ліги Націй) і в той час називався Палестиною. У 1948 році частина цієї території заявила про свій суверенітет як незалежна держава під назвою Ізраїль. У статті буде висвітлено різні конституційні норми та процедури, які регулюють сферу сімейного права в Палестині під британським правлінням та державі Ізраїль від початку британського правління до сьогодні.

Стаття ґрунтується на історичному дослідженні законодавства Британської Палестини та держави Ізраїль у сфері сімейного права, аналізуючи законодавство відповідно до історичних подій у регіоні. Результати цього дослідження полягають у тому, що з 1948 року до третього десятиліття 21-го століття ізраїльський законодавець неодноразово вживав заходів для запобігання конституційному регулюванню цивільних шлюбів, зберігаючи архаїчну систему міллета, османську систему шлюбу в релігійних громадах, тобто основа регулювання шлюбу та розлучення в Палестині під Британським правлінням. Але незважаючи на те, що первісна домовленість міллета була прийнята британцями як добровільна система, ізраїльський законодавець надав їй нові й обов'язкові особливості, уникаючи при цьому комплексного конституційного регулювання ізраїльського сімейного права.

У статті робиться висновок, що конституційне регулювання цивільного шлюбу, ймовірно, неможливе в Ізраїлі через політичну неспроможність досягти згоди між релігійними та світськими євреями в Ізраїлі. Але це не завадило ізраїльському законодавчому органу докорінно змінити конституційний механізм британського правління, залишивши позаду клаптик імпровізованого законодавства, яке порушує основні громадянські права ізраїльських громадян.

Ключові слова: британське правління щодо Палестини; конституційне регулювання шлюбу; Ізраїль; сімейне право; система міллета.

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CONSTITUTIONAL HUMAN RIGHT IN THE CONTEXT OF THE COVID-19 CHALLENGE

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Summary

The purpose of the article is research the interaction between human rights and measures to protect public health in the face of new legal challenges posed by COVID-19 through the disclosure of key legal standards to combat pandemic threats; study of the problem of restriction of the constitutional right to peaceful assembly and mass events; to analyze aspects of the implementation of the constitutional right to education in a pandemic crisis and the issue of restriction of freedom of movement. The article examines the interaction between human rights and measures to protect public health in the face of new legal challenges posed by COVID-19 through the disclosure of key legal standards to combat pandemic threats; study of the problem of restriction of the constitutional right to peaceful assembly and mass events; to analyze aspects of the implementation of the constitutional right to education in a pandemic crisis and the issue of restriction of freedom of movement.

The author's methodological analysis included a number of philosophical, general scientific and special scientific methods. In particular, the method of comparative jurisprudence was used to analyze the experience of a number of countries in allowing the restriction of human rights. The comparative method contributed to the generalization of knowledge in the field of medicine, law, public administration, psychology, etc. Synergetic aimed at the binary nature of legal reality and uncertainty in a pandemic crisis.

The positions of scientists and institutional international bodies on the legitimacy of restrictions on human rights are represented, the position is motivated by a casual dimension. The author reveals the key standards of counteracting pandemic threats, special attention is focused on the problem of restricting the constitutional right to peaceful assembly and mass events. The difficulties of realization of the constitutional right to education in the conditions of pandemic crisis are pointed out and also questions of legality and non-discrimination in the field of freedom of movement are raised.

An analysis of the experience of a number of countries has shown that in most countries, the rules of exclusive action allow for restrictions on human rights or certain deviations from the general mechanism of their implementation in times of health threats and/or national emergencies. However, in accordance with international law, as well as constitutional law in democracies, such measures must be necessary, proportionate and reasonably linked to legitimate public aims.

It is stated that state anti-epidemiological measures deprive citizens of the opportunity to properly exercise their constitutional rights, including the right to peaceful assembly, mass events, the right to education, and freedom of movement. Please note that the introduction of measures to prevent diseases that threaten public health should be exclusively for this purpose and should be motivated by critical necessity and not by political motives and interests. Restrictions must pursue a legitimate aim, demonstrate the exact nature of the threat and be proportionate according to that aim. This should demonstrate the direct and immediate link between the implication and the threat.

The conclusion states that the restrictions imposed by the application must comply with strict proportionality tests. Restrictions should not be too broad, they should be the least intrusive.

Key words: pandemic crisis, constitutional human rights, public health, right to peaceful assembly, mass events, right to education, freedom of movement.

1. Introduction

The 2019 coronavirus infection (COVID-19) caused by the SARS-CoV-2 virus poses a global threat to human life and health. As of November 7, 2021, the WHO has registered more than 249 million confirmed cases and more than 5 million deaths (WHO, 2021a). However, the pandemic also causes a transformation of social and legal reality. Law is changing as a social regulator of human relations, but its leveling and deviation cannot be explained solely by the purpose of protecting public health. And as Grietje Baars, the professor at The City Law School, City, University of London, points out, «even though the world suddenly looks very different from the beginning of the pandemic, the Law and the State remain relevant.» (Baars, 2020, p. 216)

There are constitutional restrictions of human rights in order to take preventive measures. Common restrictions to varying degrees were imposed on individuals, groups, communities, cities, or even entire regions. These restrictions contradict ab initio civil and human rights. These measures, which are now widely implemented in many regions and countries of the globe, have raised new ethical questions (Chia T., Oyeniran O.I., 2020). For the most part, scientists arguing that ambiguity as to the scope of the right to liberty in Article 5 of as narrow an interpretation of Article 5 as possible. (Greene, 2020). However, to resolve the issue by simply narrowing the rights is illegal. Therefore, the task of the constitutional legal doctrine of nowadays is to analyze the transformation of legal practice in the context of global challenges and determine the optimality of limited rights and legitimacy of state measures of a preventive nature.

Specialists in various fields of law, including G. Baars, T. Chia, O.I. Oyeniran, A. Greene, A. E. Yamin, R. Habibi, A. Kecojevic, C.H. Basch, M. Sullivan, N.K. Davi, S.K. Brooks, R.K. Webster, L.E. Smith, L. Woodland, S. Wessely, have dealt with legal issues of public health. However, the new threats posed by the pandemic necessitate additional scientific analysis.

The purpose of the article is to conduct a study of the interaction of human rights and measures to protect public health in the face of new legal challenges posed by COVID-19. The main tasks of the author are to disclose key legal standards for counteracting pandemic threats; study of the problem of restriction of the constitutional right to peaceful assembly and mass events; to analyze aspects of the implementation of the constitutional right to education in a pandemic crisis and the issue of restriction of freedom of movement.

2. Key standards for counteracting pandemic threats

The national measures that the state will take to overcome the problem in order to protect public health are important. Therefore, comprehensive international and national guarantees for the latest global challenge are also important.

In this regard, on April 14, 2020, WHO adopted a COVID-19 Strategy update which stipulates that each country must implement a comprehensive set of measures appropriate to its capabilities and situation in order to slow down the transmission of the virus and reduce COVID-19 related mortality, with the ultimate goal of achieving and/or maintaining a stable level of low virus transmission or the absence of new cases of infection. Appropriate strategies at the national and regional levels should compare measures to reduce direct mortality associated with COVID-19, indirect mortality associated with health system overload and disruption of other priority medical and social services, and minimize hazardous and long-term negative consequences for health and well-being due to the socio-economic effect of certain retaliatory measures (WHO, 2020).

According to WHO regulations, «detection of cases of the disease, isolation, testing and providing care, contact tracking and moving to quarantine are important elements of a comprehensive strategy for localization of foci of infection and anti-epidemic measures» (WHO, 2021b).

Due to the COVID-19 pandemic, various countries have introduced a number of measures to protect the health of the population, as well as social measures, including keeping a safe distance, temporary closure of educational institutions and enterprises, quarantine in different geographical areas and restrictions on movement. In accordance with the changes in the epidemiological picture at the local level, the country is making adjustments to appropriate measures.

In Ukraine, in addition to constitutional norms and sectoral codified acts, there is the Law of Ukraine «On Protection of the Population from Infectious Diseases» (About the seizure of the population from infectious diseases, 2000), which defines a set of measures authorized by public authorities to minimize the spread of a pandemic.

Therefore, it is generally important to understand the following key aspects. International medical rules, obligatory for all 196 WHO member states, are clearly aimed at reducing the spread of the disease by minimizing barriers to travel and trade and respecting human dignity, human rights and fundamental freedoms in the event of a health care crisis. In practice, this means that key international standards and human rights values are necessary in all circumstances: non-discrimination on the basis of gender, socio-cultural, ethnic, religious and other characteristics; state provision of basic necessities; state support of public health, equality and fairness of limited resources, democracy and communication with civil society.

In most countries, the norms of exclusive action allow for restrictions on human rights or certain deviations from the general mechanism of their implemen-

tation in times of health threats and/or national emergencies. However, in accordance with international law, as well as constitutional law in democracies, such measures must be necessary, proportionate and reasonably linked to legitimate public aims (Yamin, Habibi, 2020).

It is not enough for any government to simply say that it is doing what is necessary or effective. The essence of human rights and democracy – is that the power is in the hands of the people. Governments must be able to provide adequate and transparent justification for the measures taken. Involving individuals and communities is important for effective management of the spread of the disease.

We believe it is necessary to focus on a number of human rights that have been restricted as a result of the necessary public health measures to combat COVID-19, but we note that much more rights are restricted than specified in this study.

3. Problems of restriction of constitutional law for peaceful assemblies and mass events

Such a right is not an absolute right and may be limited. However, this requires a good legitimate reason. This fundamental principle of the rule of law is reflected in the ECHR, namely: Articles 8, 9, 10 and 11 provide for interference with fundamental rights where it is necessary for a democratic society to protect health. In addition, Article 15 of the Convention also provides for the possibility of derogating from certain rights.

Article 39 of the Constitution states that «citizens have the right to assemble peacefully, without weapons and to hold gatherings, rallies, marches and demonstrations….» The free exercise of this right is one of the preconditions for the normal functioning of a modern democratic state, as it is a form of direct democracy and plays an important role in the formation of civil society in Ukraine. However, it has not only a political but also a social context, as communication between people provides different kinds of recreational and social human needs.

Outbreaks identified for today have mainly occurred in clusters of patients who became infected as a result of close contact, in the family or at individual events, characterized by crowds. Therefore, the restriction of this right is motivated and normatively justified.

Mass events include activities that involve gathering people in a specific place for a specific purpose over a period of time and that may place an undue burden on the planning and response system in the country or community that conducts them. In the context of COVID-19, mass activities are those that are accompanied by large crowds of people at the venue for a certain period of time and that can contribute to a more intensive spread of COVID-19, as well as create an additional burden on the health care system.

Mass events are not exclusively recreational; they can affect the psychological well-being of many people (such as religious activities), encourage health-promoting behaviors (such as sports competitions), and are of great socioeconomic importance to communities.

Practical considerations and recommendations for religious leaders and confessional communities in the context of COVID-19 issued by WHO on April 7, 2020 call for ceremonies and rituals if needed and if possible, remotely/virtually instead of large-scale events; to hold cult, educational or public events with the personal presence of participants, on condition of a comprehensive risk assessment, as well as compliance with the requirements of central and local health authorities (WHO, 2020 b).

Considering the issue of the restoration of mass events should be based on the results of a thorough risk assessment, for example, in accordance with WHO recommendations for mass events in the context of COVID-19, which take into account both risk factors associated with the event and the ability of organizers to mitigate their influence (WHO, 2020 c).

4. Implementation of the constitutional right to education in a pandemic crisis

This right is key and universal for everyone, and is now enjoyed by 1.75 billion children and young people worldwide (Czerepaniak-Walczak, M., 2020, 58).

The right to education is a constitutional human right, in the Basic Law of our state it is defined in Art. 53 and according to the Decision of the Constitutional Court of Ukraine it should be understood as «the human right to acquire a certain amount of knowledge, cultural skills, professional orientation, which are necessary for normal life in modern society» (Decision of the Constitutional Court of Ukraine from the certificate, 2004).

This is the third school year in terms of limited access to education. The pandemic posed a real threat to the realization of this right to all persons of school and senior age, as all educational institutions at different levels received serious quarantine restrictions on the actual educational process. The most important measures for preparation, preparedness and response in connection with COVID-19 (interim recommendations) indicate that decisions to close, partially close or reopen educational institutions should be made on the basis of risk assessment and taking into account the need to continue the educational process and the health interests of students, teachers, staff and the local population and should help prevent a new outbreak of COVID-19 at the local level (WHO, 2020d).

Problems with the realization of the right to education are characteristic at any level. And while schoolchildren have problems mostly with access to information and the learning process, students have a wider range of problems. Currently available studies have shown that through COVID-19, college and university students have experienced mental health problems.

Psychological problems include feelings of anxiety, depression and stress, and they occur due to restricted movement, social distancing and quarantine. In the United States, studies have reported that higher levels of anxiety, depression, and stress have been reported to affect students' focus on their learning (Kecojevic etc., 2020). At the same time, it has been proven that universities and stakeholders should implement measures to mitigate the effects of COVID-19, but in general in most countries legal policy in education does not take measures to improve the mental health of pupils and students, which negatively affects academic performance and student success (Mudenda, 2021).

National policy is important here. Let's turn to the experience of China. On February 5, 2020, at the initiative, the «Guidelines for the organization and management of online teaching in higher education institutions in the period of prevention and control of the epidemic» was continued (Ministry of Education of P.R. China, 2020). Management requires national and local governments to encourage colleges and universities, along with the rest of society, to participate in the joint implementation of online education. In addition, the Ministry of Education requires that new online courses should be of the same quality as previous full-time courses. It requires that the workload of teachers in conducting online courses should be recognized as equivalent to the workload of a teacher in conducting face-to-face courses; it also encourages students to study independently online. The Ministry encourages universities to conduct multidimensional assessment of learning and to take proper account of student achievement on the Internet.

Higher education systems responded promptly to these activities, within a few months 22 large online curriculum platforms were opened, 24,000 online courses for higher education institutions to choose, including 1,291 national skill courses and 401 experimental national virtual simulation courses, covering 12 undergraduate programs and 18 higher professional programs (Wang, 2020).

Education is not a privilege. As one of the most important human activities, it should (even must) be guaranteed and provided by the state. It is the responsibility of the state to ensure respect for the right to education and to create the conditions for its exercise, including exceptional, unforeseen circumstances. Therefore, it is important that the right to education is not limited, it should be noted that it should receive the latest forms of implementation, usually through distance learning, but the basic standards of education should remain unchanged.

5. Restrictions on freedom of movement

The constitutional content of the right to freedom of movement is that a citizen can decide at his/her own discretion which places to visit and how long to stay there. The pandemic has stopped social communication in real life, practically implementing it in the field of online, as modernized technologies help people in times of social backwardness. The governments of most countries have taken unprecedented measures due to the normative rule of «staying at home», i.e., self-isolation (except for Belarus, Sweden and Japan). In some places, the WHO and some countries (China) use the term «blocking» (The 2019-2020 Novel Coronavirus, 2020).

The initial measures to restrict freedom of movement were very radical. According to the decision of the National Security and Defense Council «On the procedure for crossing the state border of Ukraine in the outbreak of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2», which is put into effect by the President of Ukraine on March 17, checkpoints across the state border of Ukraine for air, rail and bus services will be closed for two weeks [14]. Subsequently, this period was extended.

However, this position differs from the WHO recommendations, which do not recommend imposing any restrictions on travel or trade in countries facing COVID-19 outbreaks.

The International Institution points out that «based on the available evidence, it can be generally concluded that the imposition of restrictions on the movement of people and goods during health emergencies is in most cases not an effective measure and may divert resources from other measures. Moreover, restrictions can lead to disruptions in the delivery of necessary assistance and technical support, disrupt the activities of economic entities and have negative socio-economic consequences for the countries affected by them. However, in some circumstances, measures to restrict the movement of people may have a temporary positive effect, in particular, if the area does not have active communication with foreign countries and is insufficiently prepared to respond to the outbreak» (WHO, 2020e).

Such a measure deprives the right to stay outside the place of stay (residence), except for personal needs, such as the purchase of food and medicine, urgent needs, work, in some countries – sports. Self-isolation causes inability to see loved ones, loss of rights, «loss of routine and reduced social and physical contact with others, often provoking fear, frustration and detachment from the rest of the world, which upsets participants. This disorder is exacerbated by the inability to participate in normal daily activities, such as the purchase of basic necessities, etc.» (Brooks atc, 2020).

The problem here is the reasonableness of the measures taken by the state and their compliance with real threats. Forced self-isolation should be distinguished from such a measure as quarantine. Quarantine, in essence, involves the isolation or restriction of mobility of people who came from other countries or suffered from this infectious disease. In this scenario, infected by COVID-19 are isolated from uninfected individuals, and this isolation usually occurs in a hospital. With the

help of quarantine, we can prevent the spread of the disease from person to person in order to break the chain of transmission. Researchers point to the benefits of quarantine: the isolation of individuals in the group of reported cases will avoid a significant number of uncontrollable diseases and deaths[1] (Wilder-Smith, 2020).

At the same time, the reference to complete isolation or self-isolation directly violates human rights. The problem is not only discrimination against the right to movement, but also the ability to communicate and engage in social activity. Even before the pandemic, reports showed that many older people were already more socially isolated and lonelier than the rest of the population. Numerous studies and reviews have shown that social isolation and loneliness have a serious impact on older people's mortality, their physical health and functioning (e.g., heart disease, diabetes, mobility, daily activities) and their mental health (depression, anxiety and decreased cognitive abilities) (Social isolation and loneliness in older adults: opportunities for the health care system, 2020; Courtin, Knapp, 2017).

The measures are often discriminatory and unequal. For example, in Bosnia and Herzegovina, older people were not allowed to leave their homes for several weeks (Cerimovic, Wurth, Brown, 2020). In the United Arab Emirates, people over the age of 60 were not allowed into shopping malls or restaurants after they reopened after a period of isolation. Similarly, in the Philippines, people over the age of 60 are prohibited from using the four Manila subway rail systems after they have resumed work for everyone else (Subingsubing, 2020).

6. Conclusions and prospects for further exploration

Paternalism involves the restriction of liberty in order to protect or promote the best interests of that person; giving priority to wider societal consequences than individual rights. The human right to health includes the protection and prevention of contact with diseases. This contributes to the fact that long-term interests take precedence over short-term ones. Public health policy, which focuses primarily on health outcomes at the population level, can thus subordinate people's interests and rights to the common good. Given this, there seems to be an informal consensus that human health takes precedence over human rights.

State anti-epidemiological measures deprive citizens of the opportunity to properly exercise their constitutional rights, including the right to peaceful assembly, mass events, the right to education, and freedom of movement. Please note that the introduction of measures to prevent diseases that threaten public health should be exclusively for this purpose and should be motivated by critical necessity and not by political motives and interests. Restrictions must pursue a legitimate aim, demonstrate the exact nature of the threat and be proportionate to that aim. This should demonstrate the direct and immediate link between the expression and the threat.

In addition, the restrictions imposed by the application must comply with strict proportionality tests. Restrictions should not be too broad; they should be the least intrusive.

One more thing. Implemented measures to restrict human rights should be carried out for a limited period and, if necessary, in a safe and humane manner. Although the need for human survival precedes the rights of the individual, the balance between individual rights and public health needs, cannot be neglected.

The transformation of social reality is taking place in all spheres. This article presents only a small list of changes in the institution of human and civil rights and freedoms. It requires further analysis of such rights as the right to work, the right to protection against discrimination on health grounds, the right to free elections and many others.

Bibliography:

1. WHO (2021) *Weekly epidemiological update on COVID-19 – 9* Edition 65. 9 November. URL: https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19---9-november-2021.

2. **Baars, G.** (2020) Writing in the time of coronavirus London *Review of International Law*, 8 (1), 211–222 doi:10.1093/lril/lraa014.

3. **Chia, T. & Oyeniran, O.I.** (2020) Human health versus human rights: An emerging ethical dilemma arising from coronavirus disease pandemic *Ethics Med Public Health*, 14. doi: 10.1016/j.jemep.2020.100511.

4. **Greene, A.** (2020). Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If not Now, When? *Forthcoming, European Human Rights Law Review*. April. URL: https://ssrn.com/abstract=3593358.

5. WHO (2020a) *COVID-19 Strategy update* URL https://www.who.int/publications/m/item/covid-19-strategy-update.

6. WHO.(2021b) *Critical preparedness, readiness and response actions for COVID-19* (Interim Guidance). URL https://www.who.int/publications-detail/critical-preparedness-readiness-and-response-actions-for-covid-19.

7. *Про захист населення від інфекційних хвороб (2000)* Закон України № 1645-III. URL: https://zakon.rada.gov.ua/laws/show/1645-14#Text.

8. **Yamin, A. E. & Habibi, R**. (2020) Human Rights and Coronavirus: What's at Stake for Truth, Trust, and

[1] Wilder-Smith, A., Freedman, D. O. (2020). Isolation, quarantine, social distancing and community containment: pivotal role for old-style public health measures in the novel coronavirus (2019-nCoV) outbreak. *Journal of Travel Medicine*. 27 (2), 1–4. Doi: 10.1093/jtm/taaa020

Democracy? *Health and Human Rights. URL: https://www.hhrjournal.org/2020/03/human-rights-and-coronavirus-whats-at-stake-for-truth-trust-and-democracy/*.

9. WHO (2020b) *Practical considerations and recommendations for religious leaders and faith-based communities in the context of COVID-19: interim guidance.* URL: https://apps.who.int/iris/handle/10665/331707.

10. WHO (2020c) *Considerations in adjusting public health and social measures in the context of COVID-1.9* URL: https://apps.who.int/iris/bitstream/handle/10665/332079/WHO-2019-nCoV-Adjusting_PH_measures-Mass_gatherings-2020.1-eng.pdf.

11. **Czerepaniak-Walczak, M.** (2020) Respect for the Right to Education in the COVID-19 Pandemic Time. Towards Reimagining Education and Reimagining Ways of Respecting the Right to Education *The New Educational Review*, 62, 57–66. DOI: 10.15804/tner.2020.62.4.05.

12. *Рішення Конституційного Суду України (2004)* у справі № 1-4/2004 про доступність і безоплатність освіти URL: http://zakon5.rada.gov.ua/iaws/show/v005p710-04.

13. WHO (2020d) *Critical preparedness, readiness and response actions for COVID-19.* URL: https://www.who.int/publications/i/item/critical-preparedness-readiness-and-response-actions-for-covid-19.

14. **Kecojevic, A, Basch, C.H, Sullivan, M & Davi, N.K.** (2020) The impact of the COVID-19 epidemic on the mental health of undergraduate students in New Jersey, cross-sectional study. *PLoS ONE*, 15(9).

15. **Mudenda**, S. (2021). Coronavirus disease 2019 (COVID-19) and its psychological impact on the Bachelor of Pharmacy Students at the University of Zambia. *Academia Letters*, 837. doi.org/10.20935/AL837.

16. **Ministry of Education of P.R. China** (2020). Guidance on the Organization and Management of Online Teaching in the Higher Education Institutions During Epidemic Prevention and Control Period. URL: http://www.moe.gov.cn/jyb_xwfb/gzdt_gzdt/s5987/202002/t20200205_418131.html.

17. **Wang**, **Y**. (2020). How does the Chinese education system cope with the virus outbreak challenge? China Daily, 18 February. URL: https://news.cgtn.com/news/2020-02-18/China-s-online-learning-sector-thrives-amid-epidemic-ObnQfU8hfW/index.html.

18. The 2019–2020 novel coronavirus (severe acute respiratory syndrome coronavirus pandemic: A joint American college of academic international medicine-world academic council of emergency medicine multidisciplinary COVID-19 working group consensus paper. (2020). *Journal of Global Infectious Diseases*,12 (2), 47–93.

19. WHO (2020e) *Updated WHO recommendations for international traffic in relation to COVID-19* outbreak URL: https://www.who.int/ith/2019-nCoV_advice_for_international_traffic-rev/ru/.

20. **Brooks S.K., Webster R.K., Smith L.E., Woodland L., Wessely S., Greenberg N. & Rubin G. J.** (2020). The psychological impact of quarantine and how to reduce it: rapid review of the evidence. *The Lancet*. 395, 912–920. doi: 10.1016/s0140-6736(20)30460-8.

21. **Wilder-Smith, A. & Freedman, D.O.** (2020). Isolation, quarantine, social distancing and community containment: pivotal role for old-style public health measures in the novel coronavirus (2019-nCoV) outbreak. *Journal of Travel Medicine*. 27 (2), 1–4. Doi: 10.1093/jtm/taaa020.

22. *Social isolation and loneliness in older adults: opportunities for the health care system*. (2020). Washington (DC): National Academies Press. URL: https://www.nap.edu/catalog/25663/social-isolation-and-loneliness-in-older-adults-opportunities-for-the.

23. **Courtin, E & Knapp, M.** (2017) Social isolation, loneliness and health in old age: a scoping review. *Health Soc Care Community*, 25(3), 799–812. https://doi.org/10.1111/hsc.12311.

24. **Cerimovic, E, Wurth & M, Brown, B**. (2020) *Bosnia and Herzegovina's coronavirus curbs on children and older people are ill-conceived*. In: Balkan Insight [website]. Sarajevo: Balkan Investigative Reporting Network. URL: https://balkaninsight.com/2020/04/02/bosnia-andherzegovinas-coronavirus-curbs-on-children-and-older-people-are-ill-conceived/.

25. **Subingsubing**, **K.** (2020) LRT, MRT ban for elderly, moms-to-be under GCQ. In: Philippine Daily Inquirer [website]. Manila: Inquirer.net. URL: https://newsinfo.inquirer.net/1271069/lrtmrt-ban-for-elderly-moms-to-be-under-gcq.

References:

1. WHO (2021) *Weekly epidemiological update on COVID-19 – 9* Edition 65. 9 November. URL: https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19-9-november-2021 [in English].

2. **Baars, G.** (2020) Writing in the time of coronavirus London *Review of International Law*, 8 (1), 211–222 doi:10.1093/lril/lraa014 c. [in English].

3. **Chia, T. & Oyeniran, O.I.** (2020) Human health versus human rights: An emerging ethical dilemma arising from coronavirus disease pandemic *Ethics Med Public Health*, 14. doi: 10.1016/j.jemep.2020.100511 [in English].

4. **Greene, A.** (2020). Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If not Now, When? *Forthcoming, European Human Rights Law Review*. April. Available from: https://ssrn.com/abstract=3593358 [in English].

5. WHO (2020a) *COVID-19 Strategy update*. Available from: https://www.who.int/publications/m/item/covid-19-strategy-update [in English].

6. WHO.(2021b) *Critical preparedness, readiness and response actions for COVID-19* (Interim Guidance). Available from: https://www.who.int/publications-detail/critical-preparedness-readiness-and-response-actions-for-covid-19 [in English].

7. *Pro zakhyst naselennya vid infektsiynykh khvorob [On protection of the population from infectious diseases]* (2000). No 1645-III. vailable from: https://zakon.rada.gov.ua/laws/show/1645-14#Text [in Ukraine].

8. **Yamin, A.E. & Habibi, R**. (2020) Human Rights and Coronavirus: What's at Stake for Truth, Trust, and Democracy? *Health and Human Rights*. Available from: https://www.hhrjournal.org/2020/03/human-rights-and-coronavirus-whats-at-stake-for-truth-trust-and-democracy/ [in English].

9. WHO (2020b) *Practical considerations and recommendations for religious leaders and faith-based communities in the context of COVID-19: interim guidance*. Available from: https://apps.who.int/iris/handle/10665/331707 [in English].

10. WHO (2020c) *Considerations in adjusting public health and social measures in the context of COVID-19*. Available from: https://apps.who.int/iris/bitstream/handle/10665/332079/WHO-2019-nCoV-Adjusting_PH_measures-Mass_gatherings-2020.1-eng.pdf [in English].

11. **Czerepaniak-Walczak, M.** (2020) Respect for the Right to Education in the COVID-19 Pandemic Time. Towards Reimagining Education and Reimagining Ways of Respecting the Right to Education *The New Educational Review*, 62, 57–66. DOI: 10.15804/tner.2020.62.4.05 [in English].

12. Rishennya Konstytutsiynoho Sudu Ukrayiny (pro dostupnist′ i bezoplatnist′ osvity) [Decision of the Constitutional Court of Ukraine (on accessibility and free education) (2004). No 1-4/2004. Available from: http://zakon5.rada.gov.ua/iaws/show/ v005p710-04 [in Ukrainian].

13. WHO (2020d) *Critical preparedness, readiness and response actions for COVID-19*. Available from: https://www.who.int/publications/i/item/critical-preparedness-readiness-and-response-actions-for-covid-19 [in English].

14. **Kecojevic, A., Basch, C.H, Sullivan, M. & Davi, N.K.** (2020) The impact of the COVID-19 epidemic on the mental health of undergraduate students in New Jersey, cross-sectional study. *PLoS ONE*, 15(9). [in English].

15. **Mudenda, S**. (2021). Coronavirus disease 2019 (COVID-19) and its psychological impact on the Bachelor of Pharmacy Students at the University of Zambia. *Academia Letters*, 837. doi.org/10.20935/AL837. [in English].

16. **Ministry of Education of P.R. China** (2020). *Guidance on the Organization and Management of Online Teaching in the Higher Education Institutions During Epidemic Prevention and Control Period*. Available from: http://www.moe.gov.cn/jyb_xwfb/gzdt_gzdt/s5987/202002/t20200205_418131.html. [in English].

17. **Wang**, **Y.** (2020). How does the Chinese education system cope with the virus outbreak challenge? China Daily, 18 February. Available from: https://news.cgtn.com/news/2020-02-18/China-s-online-learning-sector-thrives-amid-epidemic-ObnQfU8hfW/index.html [in English].

18. The 2019-2020 novel coronavirus (severe acute respiratory syndrome coronavirus pandemic: A joint American college of academic international medicine-world academic council of emergency medicine multidisciplinary COVID-19 working group consensus paper. (2020). *Journal of Global Infectious Diseases*,12 (2), 47–93. [in English].

19. WHO (2020e) *Updated WHO recommendations for international traffic in relation to COVID-19* outbreak. Available from: https://www.who.int/ith/2019-nCoV_advice_for_international_traffic-rev/ru/ [in English].

20. **Brooks S.K., Webster R.K., Smith L.E., Woodland L., Wessely S., Greenberg N. & Rubin G.J**. (2020). The psychological impact of quarantine and how to reduce it: rapid review of the evidence. *The Lancet*. 395, 912–920. doi: 10.1016/s0140-6736(20)30460-8. [in English].

21. **Wilder-Smith, A. & Freedman, D.O.** (2020). Isolation, quarantine, social distancing and community containment: pivotal role for old-style public health measures in the novel coronavirus (2019-nCoV) outbreak. *Journal of Travel Medicine*. 27 (2), 1–4. Doi: 10.1093/jtm/taaa020 [in English].

22. *Social isolation and loneliness in older adults: opportunities for the health care system*. (2020). Washington (DC): National Academies Press. Available from: https://www.nap.edu/catalog/25663/social-isolation-and-loneliness-in-older-adults-opportunities-for-the [in English].

23. **Courtin, E. & Knapp, M.** (2017) Social isolation, loneliness and health in old age: a scoping review. *Health Soc Care Community*, 25(3),799–812. https://doi.org/10.1111/hsc.12311. [in English].

24. **Cerimovic, E, Wurth, M. & Brown, B.** (2020) *Bosnia and Herzegovina's coronavirus curbs on children and older people are ill-conceived*. In: Balkan Insight [website]. Sarajevo: Balkan Investigative Reporting Network. Available from: https://balkaninsight.com/2020/04/02/bosnia-andherzegovinas-coronavirus-curbs-on-children-and-older-people-are-ill-conceived/ [in English].

25. **Subingsubing, K.** (2020) LRT, MRT ban for elderly, moms-to-be under GCQ. In: Philippine Daily Inquirer. Manila: Inquirer.net. Available from: https://newsinfo.inquirer.net/1271069/lrtmrt-ban-for-elderly-moms-to-be-under-gcq [in English].

КОНСТИТУЦІЙНІ ПРАВА ЛЮДИНИ В УМОВАХ ВИКЛИКУ COVID-19

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Анотація

Метою статті є дослідження взаємодії права людини та заходів захисту здоров'я населення в умовах нових правових викликів зумовлених COVID-19 через розкриття ключових юридичних стандартів протидії пандемічним загрозам; дослідження проблеми обмеження конституційного права на мирні збори та масові заходи; проаналізувати аспекти реалізації конституційного права на освіту в умовах пандемічної кризи та питання обмеження свободи пересування.

Авторський методологічний аналіз включав низку філософських, загальнонаукових та спеціально наукових методів. Зокрема метод порівняльного правознавства застосовувався для аналізу досвіду низки країн щодо допущення обмеження прав людини. Компаративний метод сприяв узагальненню знань у сфері медицини, права, громадського управління психології тощо. Синергетичний спрямував на бінарність правової реальності та невизначеність в умовах пандемічної кризи.

Репрезентовані позиції науковців та інституційних міжнародних органів щодо правомірності обмеження прав людини, мотивовано позицію казуальним виміром. Автором розкрито ключові стандарти протидії пандемічним загрозам, окрему увагу сконцентровано на проблемі обмеження конституційного права на мирні збори та масові заходи. Вказано на труднощі реалізації конституційного права на освіту в умовах пандемічної кризи а також піднято питання правомірності та недискримінації в сфері свободи пересування.

У статті відображено, що більшості країн нормами виключної дії допускаються обмеження прав людини чи певні відступи від загального механізму їх реалізації у період загрози охорони здоров'я та/або при національних надзвичайних ситуаціях. Однак відповідно до міжнародного права, а також конституційного права у демократичних державах, такі заходи мають бути необхідні, пропорційні та розумно пов'язані з законними суспільними цілями.

Констатовано, що державні проти епідеміологічні заходи позбавляють можливості громадян належним чином реалізувати свої конституційні права, зокрема право на мирні збори, масові заходи, право на освіту, можливість свобода пересування. Звертаємо увагу, що введення заходів запобігання хвороб, що загрожує громадському здоров'ю винятково має стосуватися зазначеної цілі та повинно бути мотивовано критичною необхідністю, а не політичними мотивами та інтересами. Обмеження повинні переслідувати законну мету, демонструвати точну характер загрози та бути пропорційними цій меті. Це має продемонструвати прямий і безпосередній зв'язок між виразом і загрозою.

У висновку зазначено, що обмеження, встановлені заявою, повинні відповідати суворим тестам на пропорційність. Обмеження не повинні бути занадто широкими, вони повинні бути найменш нав'язливі заходи.

Ключові слова: пандемічна криза, конституційні права людини, громадське здоров'я, право на мирні збори, масові заходи, право на освіту, свобода пересування.

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CHALLENGING DOMESTIC VIOLENCE UNDER NATIONAL AND INTERNATIONAL LAW: JUDGING THE INNUMERABLE LEGAL VIOLATIONS UNDERMINING THE PROTECTION OF WOMEN'S CONSTITUTIONAL RIGHTS IN CAMEROON

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Summary

The notion of violence especially on the rights of women has been plagued with lots of plausible euphoria jeopardizing the initial rational and objective of the human rights placement, that of ensuring that everyone should be treated with respect and fundamental dignity. The situation has become appalling and frustrating as women encounter violations on their various status and rights, making them becoming subjects of ridicule. Willing to ensure the recognition and protection of women, Cameroon has adopted a series of international, regional and national laws aiming at ensuring a safe and secured environment for the protection of women rights and status. Regardless of the various measures set by the country, the notion of domestic violence appears to be more of a pandemic than a curable substance as issues of women protection are concerned.

This article is of the opinion that the concept of domestic violence in Cameroon is accelerating as most women are still treated as an object of commodity in the eyes of many. There is a continuous violation of women rights especially in aspects of sexual violence and discriminatory practices meted on women. This situation has become worrisome, as many question the future of women rights in Cameroon as issues of sexual violence escalate, thus affecting tremendously the prestigious status to be occupied by women in the society. In answering the above question and hypothesis, there will be the need to evaluate the domestic violence environment in Cameroon by questioning the complexities in the country on issues related to combatting domestic violence, and examining the way forward.

It is convenient and an established scourge beyond all reasonable doubt that, the singularity of sexual violence continues to be a hard nut to crack notwithstanding all the remarkable efforts put in place by the government of Cameroon in ensuring its fight. we continue to experience aspect of violations and abuses on the women right making those harmful practices meted on the women to be turned an unrealistic atmosphere. To this set, it is advisable that more efforts, mechanisms and methods should be invested by the government of Cameroon to establish a favorable climate and environment in the protection and preservation of women rights and status in the country.

Key words: battling, sexual violence, Cameroonian law, violations, women rights.

1. Introduction

Women in many society are treated as some commodities and sometimes susceptible as to what they represent. Notwithstanding the modern conception and advancement, women continue to be treated inhumanely, unsympathetically and callously, and this has affected both their status and rights acquired in the society. Several human Rights instruments, amongst which, the Universal Declaration of Human Right 1948, the Convention on the Elimination of all Forms of Discrimination Against Women, MAPUTO Protocol, African Charter on the Welfare of the Child, and hosts of others have condemned the illegal practices experienced by women on the international scene which has portrayed devastating impact and effect on the status they represent in the society. Regardless of the laudable efforts initiated and set by these instruments, the rates of violation of women rights are increasing and rampant. The international community continue to experience violation done on women rights, examples being, Female Genital Mutilations, Sexual Harassment, Voluptuous Abuses, Rape, widow practices and many other harmful practices. These inhuman, violent and unredeemable practices experienced by women on the international scene are not exempted in Cameroon. Cameroon as a State of Law, dedicates great efforts in certifying that women anguishing from the effects of violence should be protected. In exercising these efforts, the country has ratified a series of international,

regional and even sub-regional laws combating violence done to women. Cameroon's dedication in this fight is even more observed in the enactment of National laws such as the Constitution, the Penal Code, Labor Code, Civil Status Registration Ordinance, Civil Code and many others. However, it is surprising despite of the various laws initiated in Cameroon, there exist to date no concrete and concise particular law handling matters of domestic violence. The absence of such peculiar law has created a huge impact on women status as we continue to experience an increasing violence on women in the country. The situation of child marriage, Female Genital Mutilation, Breast Ironing, Widow Practices, Property Discrimination, continue to be a nightmare in the country irrespective of the efforts introduced by competent authorities like the State through its ministries, NGOs, Civil Society, and other Women Rights Advocate Group advocating for the elimination and eradication of all forms of violence done to women. These efforts and contributions have been ignoring as it has produces little to no interest in matters relating to women rights and status. There is no doubt that, issue of violence is not only experienced in Cameroon. Indeed, the international Community continues to be affected in this capacity. The question posed is in ascertaining whether this continuous silent crime done to women can be eradicated? Will women in their status and rights experience security on their established identity? In its entire ramification, the story of violence experienced by women will be an unacceptable forum to say without terror that the women will be free from bondage of violence on their various statuses. This is really an oblivious hallucination.

Women violence is a deeply rooted problem that exists in every country in the world. In a report, Amnesty International indicated that: Violence in the home is a truly global phenomenon. The figures may vary in different countries but the suffering and its causes are similar around the world. According to World Bank figures, at least 20 per cent of women around the world have been physically abused or sexually assaulted. Official reports in the USA say that a woman is battered every 15 seconds and 700,000 are raped every year. In India, studies have found that more than 40 per cent of married women reported being kicked, slapped or sexually abused for reasons such as their husbands' dissatisfaction with their cooking or cleaning, jealousy, and a variety of other motives. At least 60 women were killed in domestic violence in Kenya in 1998-99, and 35 per cent of women in Egypt reported being beaten by their husbands. For millions of women the home is not a haven but a place of terror (Broken bodies, shattered minds Torture and ill-treatment of women, 2001).

For the most part, nevertheless, the international community has yet to create operational legal standards that will exclusively address the problems and intricacies experienced by the fight against domestic violence. Notwithstanding this unfortunate emptiness, the rights of battered women may be asserted under international and regional human rights conventions that are legally binding upon ratifying states. The International Bill of Human Rights comprised of the Universal Declaration of Human Rights (1948) the International, Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) sets forth general human rights standards that victims of domestic violence may invoke against their state of citizenship. That is, battered women who have exhausted all domestic remedies and who still find that the State has failed to adequately address their grievances, may hold the State liable if that State is a party to the above instruments. The same can be done under the Convention on the Elimination of All Forms of Discrimination Against Women together with its Optional Protocol (1999), and under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984). Likewise, regional instruments may offer protection for battered women. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969) together with the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994), and the African Charter on Human and Peoples' Rights (1981) are the major regional human rights documents invoked for victims of domestic violence.

The most critical failing of the institutions discussed below is the lack of adequate enforcement. That is, while some of the international and regional courts are capable of rendering binding decisions, the ultimate responsibility lays with the States' Parties to the various conventions to implement these decisions. Domestic violence is one of the numerous forms of violence against women that have been identified worldwide. The United Nations defined the term «violence against women» in a 1993 Declaration as «any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life». The Declaration further notes that violence against women can occur within the family or within the general community and that it may be condoned or perpetrated by government officials. Article 2 stating that violence in the family may include battery, sexual abuse, and marital rape while violence in the general community may include rape, sexual harassment at work, and trafficking in women. Having included domestic violence as a form of violence against women, the United Nations further explained that, the term 'domestic violence' is used to describe actions and omissions that occur in various relationships.

Cameroonian laws also have provisions that protect human rights. Firstly, the Constitution of Cameroon of 18 January 1996 in its preamble mentions a good num-

ber of human rights under the Universal Declaration on Human Rights and especially those to the African Charter on Human and People's Rights.

All persons shall be equal before the law part 1 article 1(1), the citizens shall have equal right to vote at the age of 20 years and above article 2(3) no person shall be subjected to torture, cruel inhuman and degrading treatment, the State shall guarantee all citizens of either sex their rights and freedom, no person shall be arrested on ground of origin, religious, philosophical or political opinion or believe subject to public order. The Penal Code in art 278 states that no person is entitled to torture, physical and moral integrity, it also protects the right to life. It also states that serious injury caused by assault art 279, Slight Injury art 281, Simple Injury art 280 are punishable except in cases of self-defense if provided by the law. The Civil Status Registration Ordinance subjected to law No 2011/011 of 6 May 2011 amending and completing some provisions of Order No 81/02 of 29 June 1981 on the organization of the civil status registration and various aspects relating to the physical person in section 77(2) , states that upon the death of the husband, the heir to the husband has no right to control the widow on how to dispose her husband's property, she can remarry after the 180 days of widowhood without laying hands or claims on the husband's property. The Civil code ordinance 81/02 of 29 June 1981 in its article 65 states that consent to marriage shall not be obtained through force, threat or abuse. Women are given the right to initiate divorce justified by adultery or domestic violence art 229–246. Thus the law protects women rights.

The Penal Code also prohibits forced marriages and punishes the offender with imprisonment and a fine art 356 of the 1981 law. It also punishes sexual harassment from six months to one-year imprisonment and a fine of 100,000FRS and punishes sexual assault from to an imprisonment from 5 to 10 years.

In article 277/01 of the 2016 law sexual harassment, female genital mutilation is punishable from 10 to 20 years' imprisonment and a fine and such penalty may increase for the recidivist and if it led to the death of the victim (Southern Cameroon High Court Laws, 1955, section 27).

In Cameroon, the important attention given to local traditions has affected women so badly in that traditions don't give as much protection as modern equality laws. The Constitution upholds the principle of gender equality but there are several obstacles to gender equality. Beside the fact that there are rules relating to women's legal status reflecting social attitude affecting the human rights of women, such laws have direct impacts on women's ability to exercise those rights, regarding the legal context of the family life. Cameroon laws affecting women's socio-economic status, access to education, to labor market, and politics contribute to violence against women and their access to redress and reparation. In customary laws, the judges are mostly men and they believe that women live to respect their decisions. They can have many wives, mistresses and even commit adultery yet the customary law does nothing. With such acts, they tend to foster inequality and promote men domination thus leading to suppression of the women, the degrading their status prejudice to her position and property. Domestic violence whether it is perpetrated by private or state actors constitutes a violation of human rights (Coomaraswamy R., 2003, p. 13). It is the duty of the State to ensure that there is no impunity for perpetrators of such violence.

2. Analyzing the Various Legal Uraemia Scrupling Combatting Domestic Violence in Cameroon

There is no doubt that the State of Cameroon has initiated laudable efforts in ensuring that issues of domestic violence are waned and even eradicated in the country through its countless laws and instruments may they be international, regional, or domestic. The situation gets appalling and frustrating as the female gender continues to experience gross violations of its fundamental rights and status, thus making the various legal instruments of an absolute questionable character. The question one will need to ask is to ascertain and find out the real problem on the legal platform that has made issues of domestic violence more of a pandemic than an epidemic with the possibility of being curable of all ailments and misfortune. This is a real twisting euphoria difficult to handle.

I-The discrepancy in various legal instruments.

The tendency is that there are so many instruments illustrating and combatting matters and issues of violence against women at the international, regional and Cameroonian level. We have a plethora of these instruments in all areas. Take a good look at the international level where we have the 1948 Universal Declaration of Human Right, the 1966 international Covenant on Civil and Political Right, the International Covenant on Economic, Social and Cultural Right 1966, the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention Against Torture, the Convention on the Right of the Child and a host of others international laws to which Cameroon has not only signed but equally ratified. Even at the Regional level, we have the African Charter on Human and People's Right, the Convention on the Welfare of the Child and even the Maputo Protocol in which all are dealing with violence against women and the need for States in respecting these laws and provisions set[1].

[1] Regional instruments in which Cameroon has duly signed and ratified and binding in its laws.

Looking also at the domestic level, many laws and instruments have been enacted like the Cameroon Constitution, Penal Code, Civil Code, Labor Code, Civil Status Registration Ordinance, Southern Cameroon High Courts Law and a series of proliferated laws in dealing with issues of domestic violence or violence against women. We are not saying that those laws are not essential, they are, and are commendable and recommendable efforts of the State of Cameroon in setting beautiful laws and legal initiative in handling violence of women. The 1996 Constitution equally provides that all duly ratified instruments signed and ratified by Cameroon, takes priority over domestic laws (article 45 of the Cameroon Constitution stipulates that duly ratified treaties takes precedents over national or domestic laws.). Our main worry here is that these laws are just so numerous, rendering its application and enforcement confusing and questionable, as there exist no situation of effectiveness and competence, as the laws expect Member States to respect and execute, and failure will amount to breach of fundamental rights and instruments. Maybe the State of Cameroon was signing and ratifying all these instruments without understanding their implications in dealing with violence on women rights and protection. It will always be impracticable to use all these laws that deal with women violence to combat situations of violence and abuse of women rights at all levels.

We cannot and will never refuse or question the fact that the objective and responsibility of the Cameroonian Government in issues of human right protection is in ensuring that violence against women should be combatted and even eradicated. The problem we are having now is the provision and existence of too many laws and instruments which will rather destroy the whole combatting process as the law enforcement officers will be confused as to which law should be applicable. It is the beautiful intention of the laws to create and ensure that violence against women should be combatted and even eradicated as it constitutes violation of the fundamental rights, status and dignity of the womanhood. The diversified nature of different laws and instruments in combatting violence against women in Cameroon has made it difficult for the State of Cameroon to combat violence on women. Fantastic, great and plausible in the existence of all these laws on violence against women, but the problem we are facing is rather at the stage of recognition and application.

Worst of them, lies on the fact that these laws or instruments do not have the same connotations and meanings making it difficult and complex in handling cases of domestic violence or violence on women in general. Handling cases of violence on women is not as easy as we can imagine, talk less of combating, and when a standard law cannot be determined, it becomes more complicated. Violence on women is an issue complex in nature and of questionable character as it encloses a wide range of understanding to the society and the world at large. It is becoming more complicated when looking at the numerous instruments put in place in combatting this silent crime in Cameroon. All of these instruments provided in combating violence on women are inconsistent, diverse, and indifferent in their application and appellations, rendering the fight of these crimes cumbersome, worrisome and even impossible.

The Pathetic Scattering of Legal Instruments for the Promotion and Protection of the Rights of Women and Children.

Notwithstanding that there are discrepancies in the laws handling violence on women in Cameroon due to its numerous position, or instruments in protecting and promoting women and children rights, these laws in all its embryos are pathetic and frustrating. It seems as if regards or recognition is not given to these categories of persons. Human rights problems are not only limited to children and women rights in the world as it concerns other categories of persons. The situations of women and children rights instruments are exaggerated and confusing. Every law wants to prove that they handle issues relating women, to the extent that we do not even understand if it is the same issues they are dealing with. Women violation and violence requires to be given optimum attention by everyone, it is not in scattering laws here left and right that we are going to understand that there is the need to combat this violence. The manner in which laws are scatter is worrisome and questionable.

The State of Cameroon has brought this problem to itself by taking laws everywhere just in the need to combat violence made to women. Let us face facts here! When dealing with combatting violence done on women and children, it is not something that we are begging the government to do, it is the responsibility of the government in ensuring that these vulnerable categories of persons in the society should be given that adequate protection through the enactment of credible laws and mechanisms for protection. It appears from an appreciation of the situation on the fields that even in the next 100 years, it will be difficult for the said government to combat this silent crime affecting seriously the status and rights of these categories of persons. The laws that were supposed to be organized and positioned to handle these plagues of violence done on women is in their own essence confused and problematic. It will be impossible and practically difficult in solving a given problem especially those affecting women and children in a scattered manner.

Cameroon itself is confused on it when combating violence done to women and children as at one-point reference is made to the Universal Declaration on Human Right, on another point they refer to the Convention on the Elimination of all forms of discrimination done on the women, the Maputo Protocol, the Con-

vention on the Right of the Child and a Host of other laws. At the Cameroonian level, we have the Penal Code taking care of criminal matters; the Labour Code is also there, Matrimonial Causes Act 1973, Civil Status Registration Ordinance, Civil Code, and many others. These laws and instruments are really scattered and pathetic to an extent that rendering protection and promotion of female and children rights is difficult. Why could these laws not be harmonizing to save the interest at hand? What difference that violence on women and children have that should be scatter in this manner? We all know the initial difficulty that one may face when handling issues dealing with violence done on women and children in our society, lots of problems and harmful practices are meted on these categories of persons making it questionable.

When we start mixing and scattering laws here and there, how do we expect in combating this common problem that is experienced everywhere in which handling and solving it is not an issue of immediate responsiveness. The laws and instruments in Cameroon handling issues of domestic violence should be responsible and organized if they really want to combat this tribulation done on women and children in Cameroon. We are not refusing or denying in any way that these laws should not exist, for they really occupy a place in every society that wants to be prospective and developed in situation of protection and promotion of human rights especially those pertaining to women and children rights. Our problem or worry here is in the manner in which the laws are disperse and disband, making it difficult for combating to really take place in the domain of women and children rights. Cameroon should bear with us that the system of our laws is the problem they are facing in handling cases related to combating violence done on women as a whole.

The Problem of Harmonizing Domestic Legislation with International Legal Instruments.

There has been complains in the manner in which instruments and laws have been scattered here and there in issues related to combating domestic violence in Cameroon. Others are complaining about the discrepancies in the instruments on Violence on Women in Cameroon. The question we should be asking is regarding the determination of what have been done domestically in handling this pandemic tackling women and children rights in Cameroon. The State of Cameroon has established a series of proliferated laws, legal provisions, and institutions having overlapped mandates in various documents regarding the protection of women and children rights in its territory. Despite the available laws, international instruments have remained the main instruments that should be used by this State in regulating the treatment of women and children within the State. With all these laws, for a long period, women have continued to experience oblivion and obsoleted practices done on their fundamental human right and status.

Women and children in Cameroon continue to experience aspects of violence, discrimination, and illegal practice on their womanhood which has become of questionable character. Blames in it all should not be apportioned on all these laws that the State of Cameroon has enacted and established on issues related to women violence. Our main problem and concern here is establishing whether all these laws from civil, labor, criminal, customarily and otherwise are adopted in a way that complies with those prescribed by international instruments to which Cameroon is a party and signatory. Take for example we have the main law governing children rights on the international scene that is the Convention on the Right of the Child principal instrument on children rights. Having good laws and instruments on our national laws that deal with children right, there is no conformity as to that related to international law.

Cameroon has failed to create a comprehensive legal regime that protects victims and holds perpetrator accountable. The supposed family law that was drafted in 1997 to address issues of domestic violence has not yet been adopted. Even with those laws and instruments that are existing in the country in handling issues of violence done on women are not even harmonized to correspond with prescription stipulated by international law. We see aspects of laws on women rights in different instruments in the country. At a point in time, there is the Penal Code, Labor Code, Matrimonial Causes Act, Civil Status Registration Ordinance, and others that gave their own different interpretation on what will amount to violations on these women rights which in no way corresponds with those on the main instrument dealing with women's rights.[1] The situation becomes even precarious and devastating in laws dealing with children rights. Looking at the Convention of the Rights of the child which try in providing a definition on what will amount to child, by stating that anyone below the age of 18 will be considered as a child (Article 1 of the Convention of the Right to a Child defines a child as anyone under the age of 18).

Looking at article 52 of the Civil Code which provides that the minimum age of a girl to get married is 15, and the boys 18 becomes contradictory. Here looking at the convention on the rights of a child provides that any marriage celebrated where the girl is below the

[1] We are talking here of the Convention on the Elimination of all forms of Discrimination Against Women being the lone international Instruments dealing with women right in which Cameroon has signed and ratified. This instruments makes provision on the manner its expect State to handle treatment given to women, and even goes further in stipulated the various rights of women in which every State should observe and respect.

age of 18 will be considered as force marriage which needs to be cancelled and considered as violation on the right of a girl child. It becomes worrisome when Cameroon has signed and ratified this Convention on the Rights of the Child and is still unable to draft its laws in conformity with those of the Convention. This is just one of the difficulties encountered which has made the fight difficult. There are lots of other cases and circumstances like that of labor relationship where the Labor Code as obscure and obsolete as it is does complies to the international prescription placed and welcomed by the provisions of the International Labor Organization in which Cameroon equally is a signatory and party to.

There are lots of violations and abuses of female worker's rights in Cameroon because the country has failed in meeting up the standard put in place by international legal instruments on issues related to employment and treatment of workers. We are not saying that the country should totally use the provisions of the international laws and instruments on their domestic maneuver and recognition, but we believe most of these international instruments are like a standard and model that every country that wants to protect and promote human rights should use as a guide and mirror. Combatting is not something we just sit and accomplish without a guide, in which the State of Cameroon has failed in its various commitments when issues of violence against women are concerned. There is a lot a country stands to gain when respecting the provisions of international laws and dispositions in which the same country has signed and ratified. The lack of harmonization of domestic laws to that of international prescription has really been a threat to combatting the crime in question. It will be difficult in combatting violence against women if domestic legislations do not cooperate with those of international law as it is always from laws and instruments that a country will be inspired in forming its own laws and regulations.

The Mixed Application of Legal and Regulatory Provisions by Societal Actors.

There is always a mixed or confusing understanding when dealing with legal and monitoring mechanisms used by the so called community or social actors when dealing or treating issues related to violence on women. They failed to understand that the laws are there to establish that there is a need to combat violence done on women. The provision of the law is just a theory that needs implementation on the side of the social actors or community sponsors on women rights. Therefore, it becomes the responsibilities and duties of these social actors by reminding the State that it is their obligation and duty to ensure that provisions of the legal instruments in which they are not only signatory but equally ratified should be respected. What these entire social actors need is to provide for the regulatory provisions which need to be provided. It is really essential that the regulatory provisions cannot exist without those of the legal provisions, but when mixing the two of them it becomes confusing and cumbersome. What we need most especially is the regulatory provision as to what should be done in combatting or handling issues related to violence done on women as a whole. When reference of both concepts is done at the same time it becomes confusing, so it should be independently. The social actors should be more interested in the respect and enforcement of the law by the State rather than talking on both legal and regulatory provisions. The laws are there, and in need of regulatory frameworks for existence. At this point in time, what the actors should rather be talking about is on the regulatory frameworks by ensuring that the provisions stipulated down in the relevant legal instruments stated down by the State of Cameroon should be respected and enforced. Emphasizing on the regulatory provisions of the law is more important than having a look as to legal provisions even though both of them are important when dealing with combatting violence against women. The diversified application and both the legal and regulatory provisions have made combatting this offence or crime to be difficult or hectic.

The Coexistence of Written Law and Custom.

The tendency is that violence on women has been stipulated in series of laws ranging from legal to customary. In every given society, there are two laws which are written and customary laws that govern that society. The same situation or scenario exists in Cameroon where there are present written laws (the most important one to emphasis on is the 1996 Constitution which is consider as the highest law of the law which other laws have their inspirations) spelled out in relevant legal documents such as the constitution, labor code, criminal code, civil status registration order and others. The fact that issues of customary laws have been existing for a very long time and the practice has been carried out by the people; the existence of written laws to check elements of customary law becomes questionable. Even though the provision of Section 27 is clear as to these customs that are incompatible with the written laws of the land should be questionable as it is consider as repugnant to natural justice, equity and good conscience. These written laws in the country have been considered by many as a threat to the existing customary practices. It is not really a bad issue of mentioning the laws that deal with violence against women whether these laws are written or customary. But when dealing with aspects of combatting, we believe laws should be used separately. What the State should be doing to these communities who are so indented to these harmful practices is by telling the people about the ills and consequences that the eradication of these harmful practices will have on the status and right of the women rather

than talking about the law. The custom or tradition is the bone of contention here and not the law where those combatting should lay emphasis on.

Combatting and suppressing these harmful practices that affect the status and right of the women is a complex and complicated issue that needs lots of precaution in handling. It becomes the responsibility of the State to ensure to fight them even though eradication will be impossible. The existence of the laws on violence should be used diligently in its application and one should be used differently from the other. The law laid down (the positive law or the lex lata) must be separated from the laws as it ought to be (natural law or otherwise known as the lex feranda) when dealing with issue of combatting. There can never be a proper correlation between the written laws and customary laws when issues of combatting are concerned. The mixing up and coexistence of the legal text and customary law will be confusing and demanding sometimes.

The Reluctance of the Judicial Actors.

The problem sometimes is not at the level of identifying, discrepancies and complex nature of the laws that deals with domestic violence. The most difficult issue is at the level of those who are supposed to enforce and implement these laws put in place by the legal text. They hesitate and even sometimes are unwilling in ensuring that the laws should be implemented. Most of them do not even see the necessity of intervening on issues related to the family as they believe the family is the most important unit or organ of the society that need maximum protection and safety, and they believe the dispute between the spouses can be resolve amicably rather than pushing the offender of the violence which in most cases is the husband. The issue of rape that is provided in our Penal Code which talks of punishing the rapist for an imprisonment term of five to ten years is a fallacy when dealing with issues related to marital rape. We know that issue of sexual intercourse is one of the duties attached to couples after the solemnity or celebration of the marriage, and under no circumstances should this right be violated and a refusal to consummate the marriage can be consider a valid ground for the granting of a divorce. The family being unique should be protected by everyone including the law enforcement officers. If those who are supposed to ensure that those who commit this crime on women, are the same people who are reluctant in solving or handling the problem, then there is a serious problem and which will automatically have an impact on combatting.

The victims of the rape incident or other related violent will always be affected as the judicial actors become reticent to its combat. The laws have provided room or circumstances in order for those who commit that violence on women to be punishable, and it thus left for the judicial actors like the court, law officials and other enforcement officer in ensuring total application on the legal texts and laws, but every day we see cases of female violations being ignored and even avoided by these officers. This reluctant nature or aspect of domestic violence actions by the judicial actors constitutes a discouraging aspect of most of the women who do not even see the need of reporting cases of violence to these actors as they know that nothing will be done concerning them, and thus continuous violations. We believe the judicial actors should be capable of doing what they are vested by the law when issues of domestic violence are concerned. A criminal is a criminal whether it is the husband or wife. There is the need to impose on them punishment in case of violence on the woman. What about the situation where the actors of the judiciary are men, it makes it difficult for implementation and combatting.

Most men believe that women are property (customary law position of the law as to property rights which sees women as property and according to this law a property like woman cannot own a property), and how can property own a property, and because of this the judicial officer's loos at women as inferior thereby finding it difficult to provide a solution to the existing problem faced by women. The issue of adultery provided for in Section 361 of the Penal Code as Criminal is insignificant when it comes to the law enforcement officials. They still have the conception that man by nature or from the origin are polygamist, and committing adultery on the part of the man or husband is but normal which needs not to over emphasize. The provision itself is problematic as it provides that for the men to be punished for the act of adultery, the act should have been committed in their homes or elsewhere habitually. This is falsified and pushed environment for the supposed law enforcement officers to violate the law. The law says for adultery to be committed elsewhere, it must be habitual as to the men. So when women report cases of adultery to the judicial actors, they are reluctant in the context of this provision and sometimes even ignore the law as they claim that they cannot be proof of adultery since having direct evidence as to adultery is always difficult.

The lack of litigation

The problem of litigation or issue of lawsuit are absent or even lacking when dealing with issues related to domestic violence or violence on women. How many women who are victims of domestic violence will be confident in bringing actions against their husbands sometimes the women who file complains turn to withdraw due to further violence and some even refuse that the case should not be taken to court. Limited file cases and withdraw might cause be as a result of the fear to be mock by other women in the family or other family member or friend. Sometimes pursuing a case is too

expensive and the process is too long. This tends to discourage them.

Victims sometimes show the center to be weak and that it can only recommend, does not take effective decision and a means of enriching themselves. For example, overheard a conversation between staff of a withdraw case by the complainer that is a victim file a complaint and later withdraw it due to threat. Since the victims are afraid of been mocked, they prefer to keep quiet thereby leading to an increase in domestic violence since the perpetrator knows the partner cannot file a complained. How will the law even entertain or even show possible actions in handling violence against women cases when there no existence of lawsuit by the victims of the violent. They women are complaining everyday about the abuse done on them or the violation of their rights as a woman by their supposed husband who exerts assault on them, but they lack the courage to prosecute their husband.

They believe that marriage is a sacred institution which needs to protect at all cost, so bringing or taking an action against their husbands will constitute a breach of confidence of upholding this prestigious institution. They prefer to bear and die in silence even when they are aware that they are victims of violence from their husbands. Some even stay and refuse to report abuse cases for the sake of their children as they think it is their responsibility to protect their children against public mockery and insults. There is also the aspect that women in the rural areas have little or no knowledge about the existence of the center and other NGOs that they can complain to. It is very difficult of the center to go into the remote areas to educate the population there about human rights and women's rights in particular. Women who have knowledge about the center are afraid to lay their complaint because of the fear of violating their traditions.

This fear causes them to remain quiet and live in pains. This problem of unawareness is due to the fact that since many communities are inaccessible and no service van to go to such areas makes the people remain ignorant of the fact that domestic violence is a crime against humanity. They continue to live in violence and do not see anything wrong in it since they have no ideal of it been considered as a crime under Cameroonian laws. Combatting violence or domestic violence on women is a difficult and pragmatic unrealities that will be a nightmare on the part of the law to handle as most of the victims of the violence are women who in most cases find it difficult in reporting cases of violence. Most traditions in Cameroon do not consider rape between husband and wife. This is because they believe that the husband has the right to have intercourse with the wife as he wishes. The wife is seen as a property as does not belong to the husband alone but to the whole family. With all this out cade traditions, the center finds it difficult to change the mentality of the people. Women who are victims of domestic violence cannot even file a complained or return to their father's house. Reasoning being that tradition forbids return of bride price and as a taboo. Some of these women are even afraid of being punished by the custodian of their traditions. All this makes things difficult for us to experience complete combatting or suppression of the crimes on them. Those that even disclosed it are still afraid. The fear in them makes them to make a request of not disclosing it to anyone.

We believe the law will not force these women in bringing actions against their husbands' in case of abuse or violence, they women or the supposed victims are those suffering from these plagues or violent on their right, but how many of them have that courage to bring actions against their husbands. They believe that they owe that obligation to be submissive and respect their husband as they consider them as the sole provider of the family, bringing or reporting cases of violence against them will make them to be deprived of the privileges that they acquired. It thus the fundamental human right of the women to be treated humanely as the law gives and maintain their position and status that they occupied, they should be bold enough in bringing or reporting cases when face with abuse or violations of their rights and status by their husbands, they law official are they to help them combat this crime by punishing those who violates or abuses their right and status. But it will difficult in handling this issue of combatting violence if cases of violence or abuses are not reported. It was not by chance the Universal Declaration of Human Right 1948 it its article 2 talks about that it is the responsibility of everyone to respect the dignity of all regardless of their genetic characteristics. Cameroon has recognized this right in its preamble by ensuring that fundamental human right are respected in which those pertaining to women are not an exception. We believe that issue of reporting cases by women should rather be an obligation not that of helping them since the law gives room for this.

The infelicities and inconsistencies surrounding the Cameroon Penal Code

There are lots of infelicities and discrimination when dealing or having a deep inside on the Cameroon Penal Code when analyzing issues related to violence on women, for they are highly discriminatory making difficult in combatting this dangerous pandemic worse than even the corona virus plaguing the world today. When having an understanding of some of the provisions of the code, one becomes confuse and question whether the so called violent against women will ever be at the finishing lane. Glaring examples of these are those referred to adultery and abortion.

Talking about the concept of adultery, there is lots of controversies surrounding its understanding when

dealing with women right protection and status. Taking a good look at the provision of the penal Code in its Section 361 which provides that adultery is systematically if committed by a woman, but is only punishable when committed by a man if it is habitual or takes place in the matrimonial home.Taking a good look at this provision it is against punishing the crime of adultery when committed by the husband as emphasis is made as to the circumstances where the sexual intercourse of the husband will amount to adultery. The law has to use the word habitual elsewhere and in sex in the matrimonial home to amount to adultery when they really know that it will be difficult for the husband to admit adultery. It therefore means that if this husband commits adultery just once, it will not be a valid ground for the wife to bring an action against the husband for adultery. The law has provided an exception to what will amount to adultery, meaning that the women will continue suffering violence and threat from the husband whenever issues of adultery are brought up.

The law also emphasize that the adultery case must take place on in the matrimonial home, what about sexual intercourse carried out by the spouse outside the matrimonial home, this mean that it will not amount to adultery? The situation becomes even more complicated in establishing the crime of adultery in case of customary marriages. On what ground can a spouse bring an action against the husband under customary law. There is no evidence that the wife can institute since it will difficult to proof adultery and the fact that customary law allows or encourages the husband to marry as many wives as he think fit. The man or husband will never feel guilty of adultery, unless the sexual intercourse occurred with another man's wife.

There will always be that defense by the husband that his extra marital relationship with a single woman is that he intends to marry her. It will concretely be difficult for the wife to bring an action for adultery against the husband for infidelity only in the case where the husband abandons her. The situation here is even that it is difficult to proof adultery using a direct witness, as it because practically difficult to see the husband and another wife other than his wife on the matrimonial home or elsewhere committing adultery. Most part of the law depends on some circumstances presumed which in its all cannot amount to adultery.

The situation of abortion is also a serious problem preventing and slowing down the aspect of violence of men in the country. The Cameroon Penal Code is complicated and confusing when dealing with the offence of Abortion. As rightly started under Section 337 of the code provide that:

«(1) any woman procuring or consenting to her own abortion shall be punished with imprisonment from fifteen days to one year or with fine from five thousand to two hundred thousand francs or with both such imprisonment and fine.

(2) Whoever procures the abortion of a woman notwithstanding her consent shall be punished with imprisonment from one hundred thousand to two million francs».

It admits or permits abortion only when such abortion is criminalized and applicable if the mother's life is in danger or if pregnancy is the result of rape. This is really confusing as we are aware that issue of abortion is a complex issue, placing only two circumstances in which abortion should not be punishable is questionable. There are so many reasons why some women will want to commits abortion as it becomes a threat on their status and right. What about the situation where the woman is being abandon by the person who impregnated her and is in the running.

The law has not considered the trauma psychological, emotional, and physical that this woman will go through before setting the ground for criminalizing abortion. The law fails in understanding other circumstances that can affect the woman status or right in cases of abortion. The same law is talking about killing of a fetus to amount to abortion. The question one need to position here is in determining at what period of the pregnancy it will amount to killing the fetus or baby. We are not in any way encouraging the concept of abortion of a woman, for we understand, abortion in its very origin is consider as to be illegal as many considered it a sin. Our worry here is for the legislation or law in understanding that combating violence on a woman is complex issue that needs to be defining beyond all reasonable doubts to be handling. There are some circumstances that the abortion might be caused as a result of the violent done on the spouse by the partner. There should be some modifications of Section 339 of the Penal Code to put more visibility on what is meant by severe danger to the mother's life particularly because the woman health is not only physical. There can be the inclusion of important issues like the severe fetal malformations incompatible with life, incest and the reduction of administrative procedure attached to Section 339 of the Code.

Even the situation of rape is still a problem affecting combatting violence on women. The fact that marital rape or the so called spousal rape is the act of sexual intercourse with one's spouse without the spouse's consent, having sexual intercourse with the spouse without consent will amount to rape. This marital rape in all its implications is considered in most instances as domestic violence and sexual abuse. The common law rule of marital rape exemption is based in the cultural view that marriage makes a woman part of her husband's property, so that forced sexual intercourse is but a husband making use of his property. Taking a good base in the case of Achu vs. Achu inglis J in the Court of Appeal South West Region held that: Customary law does not countenance the sharing of property especially landed property, between husband

and wife on divorce. The wife is still regarded as part of the husband's property.

That conception is underscored by the payment of dowry on marriage and on the refund of same on divorce. Looking at the situation from the dictum above, once the marriage price has been paid by the husband; it therefore reduces the wife to a property. If the notion or concept that characterized a human being(wife) to become a property of another, then the notion of bringing an action for marital rape will be futile and unnecessary. The husband will not need as to customarily to be petition for rape when it concerned its property being the woman. Right from the day the day that the marriage is celebrated, the woman has given herself to the husband as a living sacrifice in which she must be available at all time the husbands' desires sexual intercourse, bringing an action for rape is useless. The Penal Code has talk of criminalizing rape in its Section 296 of the Code by punishing any person who by physical or moral violence forces a woman, including an adolescent to have sexual relations with him. We are not saying that rape is a good thing that should not be criminalized, but we are dealing with marital rape or rape in matrimony it is extremely difficult to bring an action against the husband for rape.

The situation becomes provocative as per the provision of Section 297 of the penal Code which prevents prosecution of rape when marriage has been freely consented to both parties, and the assaulted woman was over the age of puberty during the offence. I believe this is discriminatory and encouraging the phenomenon of rape since the perpetrator knows that he can rape the woman and consented to get married to her and criminal proceeding against him will be discontinue. The issue here is that rape is rape, and when the fact or elements of rape once established should be punishable rather than giving instances where the rape will not amount to a criminal act. How then can we experience combatting when the law is encouraging or giving an opportunity to the rapist to be free from criminal responsibilities? How then can we establish consent in this kind of marriage celebrated where we all know that the initial reasons for the celebration of the marriage derives from the rape incident? The bone of contention here is that it will be difficult for the law or law enforcement officials to really have a proper or effective means of combatting when dealing with the offence of sexual violence on the woman. Neglecting certain fundamental aspect of the offence means that combatting will becomes a total fiasco and disaster, and this will render combatting or eradication difficult. The Cameroon Penal Code being the watchdog in handling or criminalizing issues of rape or violence against women is entangled with heaps of infelicities and lacunae's in which relying on it as a tool in combatting or handling issue of violence is questionable. The situation is not only with the penal code; even other areas of the laws has still become questionable in matters relating to domestic violence.

The complexities of the Civil Code

Controversially and inexplicable is an aspect that is defying and affecting our Civil Code from its French inception in matters relating to violence especially on women. It becomes confusing when some basic issues cannot be handled, and overweighing pendulum is exercised on the woman status and right within a given society. A glaring example or illustration here can be examined in the domain of marriage as to parties. The code provides in its Article 52 that the minimum age for marriage is 15 years for the girls and 18 years for the boys. We are knowing that as to the definition provided by the 1989 Convention of the Right of the Child in which Cameroon is not only a signatory but has ratified the said convention, provide in its Article 1 as follow: «any person who is below the age of 18».

This becomes contradictory as per the Civil Code which has already fixed the marriage age of women. Even though the same code provides in its Article 49 that girls under 18 are not required to marriage, parental consent is sufficient. This is not a good ground at all in the country as it has really given birth to early or forceful marriage since the law gives the parents the opportunity in pushing their children to marriage before the prescribed day of the law. The code has to follow the provision as provided by Article 1 of the Convention of the Child which is considered as the ship anchored instrument of children right in the country. The law was not foolish in established the minimum age for girls to get married at the age of 18. The law believes that children at that age are still considered as dole incalpax and lack certain faculties to under the concept of marriage (the situation of sound mind, sound memory and sound understanding is very instrumental for there to be a valid celebration of a marriage. The absent of these three elements in the celebration of a marriage will render the Marriage ceremony null and void) or contract in which she is entering into. This situation of the law has really encouraged early marriage and making it difficult to combat or put an end to these barbaric practices in the country. We find the practices recurrent and practicable in our country like in the Northern part of the country where they believe it is common to give their girl children for marriage at the tender age. The problem here even though a long practice tradition, our laws has also encouraged its practices, making it difficult for there to be its elimination and even suppression.

Even the fact that the law gives the husband the right to choose which matrimonial regimes to applicable in the marriage agreement is a serious problem. According to the Cameroon Civil Code in its Article 70 which entails that if no choice is made as to the regime of marriage, and then the couple is married under com-

mon law which allows polygamy and community of marital property. So even the law accepts encouraging polygamy, and then they want to combat violence, difficult. The situation here is that even if the husband is for the monogamous regime, it doesn't stop the husband to be polygamous as we know the general adage that; «all Africans by nature are polygamous.»

The husband is and will always be considered to be the head of the family; he also has the sole right to determine the family domicile and, in the interest of the household and the children, may prevent his wife from taking employment. This situation becomes rebellious and sarcastic, as we all know how it can ridicule the woman to nothing since the husband has absolute authority over their wife by depriving them for some privileges and advantages that she may derived from, he thinks that he is the sole contributor of the family, and the wife is not in any best position to provide for the family depriving her own fundamental right as to the right to work which is established in many international human right and convention that Cameroon has signed and ratified. The code in its entirety and realities gives much power to the husband who can violate her right at any time desired. Even the fact that women are deprived to full use and enjoyment of property is a serious problem, for the husband has the right to administer communal marital property, thereby giving him the right to sell or mortgage the couple's property without his wife's consent. Article 1421 and 1428 is a good example of the Code depriving the women from using the matrimonial property. It continues by saying that only the husband has the right to sell or mortgage the matrimonial property, the wife has no right as to the property of the matrimonial home as she herself is considered as a property, and how can a property own a property. All these provisions are contradictory to our Cameroon constitutions especially in its preamble which provide for equal right to all irrespective of the status, sex, language, nationality in question. Both sexes have the right in enjoying the fundamental human right, and the right to property is not an exception.

It is really shameful in our country that there are no specific laws have been enacted to prohibit violence against women or domestic violence. There are no laws prohibiting traditional harmful practices, and female genital mutilation (FGM) and the practice of breast ironing persist in parts of the North and the South-West of the country.

Although the government report states that Cameroon's body of laws including the Constitution embodies the principle of equality between men and women, there is no legal definition of discrimination provided for by any law. The embodiment of the principle of equality in the preamble of the 1996 Constitution as amended in April 2008 is not sufficient enough to meet with the standards required by CEDAW, because discriminatory laws and practices still prevail. CEDAW is not yet incorporated into national laws. Article 45 of the Constitution states that duly approved or ratified treaties and International Agreements shall, following their promulgation, override national laws. This statement does not confer any rights or redress. Enforcement is therefore weak, since criminal sanctions have to be enacted into law before becoming applicable.

Adjusting and establishing a potential climate for a prospective protection and recognition of women rights

The problem of domestic violence is real and unavoidable with it increase proliferating the polluting the Cameroonian society. The issue here is not just looking as the female pandemic drone damage of democratic and legal society, something needs to be done in remedying this deadly plague that have affected the daily lives of womanhood so as to have a rest and pleasing future for these women undergoing violence in all domains of activities. We know that it will be difficult in eradicating and combatting this violence once and for all, but the question is what should really be done in reducing its rate of existence in the society. We believe there are certain categories of persons in the society who are supposed to be cling as they have those responsibilities in dealing with issue of domestic violence as they are implicated and involved in its increase and constant abuse.

It there becomes the responsibility of the Cameroon government to ensure the promulgation of laws for the recognition of the rights of women, and combating domestic violence should be enforcing with proper measures put in to place to ensure the better promotion and protection of women's rights. This is because most of our laws are not put in practice and the laws combating domestic violence are ineffective. So for the government to enforce and make this laws effective she has to adopt certain measures, mechanisms, and policies that will jettison discriminations against women by implementing awareness programs to segment the population, religions and traditional rulers. It is always the responsibility of the government in ensuring that its citizen's rights and wellbeing should be of prime importance to them, and this can only be done by seeing to that the various measures used in combatting domestic violence should be effective. They have enacted a series of enacted laws I their various national laws disposition, those laws are really credible and outstanding, but that is not the rationale of the law to be a beautiful pendulum, these laws must be implemented to see that violence are taking care of. And the only way this can be done is by putting into place concrete measures for implementation.

Observing at the constitution of Cameroon, many international laws and foreign laws have been ratifying and signs by Cameroon but they are not effectively

implemented. This lack of implementation is really a problem that is affecting these women right and status in the society. The problem we are facing increasing the rate of domestic violence in the society, remains level of implementation, we mean effective implementation. There is so much sentiment and emotional attachment when it comes to implementation. There should not be any pity of the law when dealing with issues of domestic violence face by the victim. The law enforcement officers and the judiciary are sometimes rendering less importance to issues related to violence on women especially domestic violence, and that has become a serious pandemic in the eyes of the law making it difficult to combat at this stage. The rampant and increase nature of the violence was due to the negligence of the so called law enforcement officers. Most of them mocked at the women who suffered from this violence considering it as but serious.

The reform of the normative framework aimed at harmonizing domestic laws with international and regional legal instruments ratified by Cameroon is a beautiful scenario for the government of Cameroon. Laws on domestic violence are so dispersed and scatter, and this makes it more difficult. The several names given by the law to these crimes becomes an issue of questioning. There so many instruments on domestic violence in Cameroon, from the constitution, labor code, penal code, civil status registration ordinance, customary laws, and a host of others. It is not having all these laws that will prevent the public to be aware that they are domestic violence. I believe a harmonization of the laws that will even conform to those prescribed by international law and instruments will a laudable initiative on the part of the government. It is shameful and surprising that a state like Cameroon has no law or instrument on domestic violence, making it difficult to combat. There should really be reforms on the part of the laws on domestic violence.

The implementation of the platform for joint intervention in the fight against gender-based violence will equally be appreciated. Issue of violence cannot be realizing by a single stakeholder on domestic violence. All the stakeholders in the country dealing with domestic violence should be able in establishing or creating a platform where discussion of domestic violence will be done by proposing measures and mechanisms that will be used in combatting. We believe this will go a long way in issue related to combatting violence. The enhancement of the dissemination of the national strategy to fight against gender-based violence is great and laudable. The government also engage every ten years an action plan in achieving its goals and activities. This is a great initiative, but there is a problem of enhancement and dissemination. Howe many people in the society are aware of these action plans of the government? I believe majority of the population are not aware of this action plan. Even if they are aware, it is limited to only a given category of persons. Everybody is supposed to be active in the supposed plan of action of domestic violence as it is a common plague and pandemic affecting the society in one way or the other.

Conclusion

The problem of domestic violence is real and unavoidable with it increase proliferating the polluting the Cameroonian society. The issue here is not just looking as the female pandemic drone damage of democratic and legal society, something needs to be done in remedying this deadly plague that have affected the daily lives of womanhood so as to have a rest and pleasing future for these women undergoing violence in all domains of activities. We know that it will be difficult in eradicating and combatting this violence once and for all, but the question is what should really be done in reducing its rate of existence in the society. We believe there are certain categories of persons in the society who are supposed to be clinging as they have those responsibilities in dealing with issue of domestic violence as they are implicated and involved in its increase and constant abuse. Though the state of Cameroon has done so much in eradicating domestic violence against women, some malpractices such as breast ironing, FGM, sexual harassment, physical violence and more still exist. In the cause of carry out their mission of protecting and promoting women's rights, they face a lot of roadblocks ranging from inadequate funds, personnel, unawareness, lack of a service car to carry out their activities and many more. Even though so many laws have been put in place to protect human rights and women's rights in particular, women are still victims of domestic violence. This continues to place threat on the socio-economic situation of the country since the respect of human rights and that of women is indispensable. Therefore, we suggest that credible recommendations should be taken into consideration and acted upon so that a better human rights culture can be implemented. Recommendation like the promulgation of laws for the recognition of the rights of women, and combating domestic violence should be enforce with proper measures put in to place to ensure the better promotion and protection of women's rights, participation of women in certain activities in the country, he creation of more training, professional schools and even inserting programs in school curriculum that will be used to educate the general public on the effects of domestic violence and other legal instruments to protect women and end violence.

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References:

1. *Broken bodies, shattered minds Torture and ill-treatment of women* (2001). Act Amnesty International. 40/001/2001 https://www.amnesty.org/en/wp-content/uploads/2021/06/act400012001en.pdf [in English].

2. *Universal Declaration of Human Rights* (1948), G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 [in English].

3. *International Covenant on Civil and Political Rights* (1966), Dec. 16, 999 U.N.T.S. 171 [in English].

4. *International Covenant on Economic, Social and Cultural Rights* (1966), Dec. 16, 999 U.N.T.S. 171. [in English].

5. *Optional Protocol to the Convention on the Elimination of Discrimination Against Women* (1999), Oct. 6, 2131 U.N.T.S. 83. [in English].

6. *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (1984), Dec. 10, 1465 U.N.T.S. 85 [in English].

7. *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), Nov. 4, 213 U.N.T.S. 222 [in English].

8. *American Convention on Human Rights* (1969), Nov. 22, 1144 U.N.T.S. 123 [in English].

9. *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* (1994), June 9, 33 I.L.M. 1534. [in English].

10. *African Charter on Human and Peoples' Rights* (1981), June 27, 21 I.L.M. 58. [in English].

11. *Declaration on the Elimination of Violence Against Women (*1993), G.A. Res. 48/104, U.N. GAOR, 48th Sess., art. 1, Supp. No. 49, at 217, U.N. Doc. A/48/49 [in English].

12. *Constitution of the Republic of Cameroon* (1996), adopted on 18 January. URL: www.ilo.org/dyn/natlex/docs/ELECTRONIC/43107/97788/F-2103476279/CMR43107%20Eng.pdf [in English].

13. *Penal Code of the Republic of Cameroon* (2016), adopted on 12 July 2016, № 2016/007. URL: https://wipolex-res.wipo.int/edocs/lexdocs/ laws/en/cm/cm014en.html [in English].

14. *Civil status registration* (1981): Ordinance no. 81-02 of 29 June. URL: https://www.equalitynow.org/discriminatory_law/cameroon_the_civil_ status _registration_ordinance_no_81_02_of_29_june_1981/ [in English].

15. **Coomaraswamy, Radhika** (2003). Special Rapporteur on violence against women, Report to the Commission on Human Rights, UN Doc. E/CN.4/2003/75 [in English].

БОРОТЬБА З ДОМАШНІМ НАСИЛЬСТВОМ ЗГІДНО З НАЦІОНАЛЬНИМ ТА МІЖНАРОДНИМ ПРАВОМ: РОЗГЛЯД НЕЗЛІЧЕННИХ ЮРИДИЧНИХ ПОРУШЕНЬ, ЯКІ ПОРУШУЮТЬ ЗАХИСТ КОНСТИТУЦІЙНИЙ ПРАВ ЖІНОК У КАМЕРУНІ

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Анотація

Уявлення про насильство, особливо щодо прав жінок, викликало велику кількість правдоподібної ейфорії, що ставить під загрозу початкову раціональність і мету закріплення прав людини, тобто забезпечення того, щоб до кожного ставилися з повагою та фундаментальною гідністю. Ситуація стає жахливою та такою, що розчаровує, оскільки жінки стикаються з порушенням їхнього статусу та прав, через що вони стають об'єктами насмішок. Бажаючи забезпечити визнання та захист жінок, Камерун прийняв низку міжнародних, регіональних і національних законів, спрямованих на забезпечення безпечного середовища для захисту прав і статусу жінок. Незалежно від різноманітних заходів, які вживає країна, поняття домашнього насильства здається радше пандемією, ніж засобом, що піддається лікуванню, коли йдеться про захист жінок.

У цій статті йдеться про те, що концепція домашнього насильства в Камеруні прискорюється, оскільки більшість жінок все ще розглядаються як об'єкт товару в очах багатьох. Відбувається постійне порушення прав жінок, особливо в аспектах сексуального насильства та дискримінаційних практик щодо жінок. Ця ситуація викликає занепокоєння, оскільки багато хто ставить під сумнів майбутнє прав жінок у Камеруні, оскільки проблеми сексуального насильства загострюються, що надзвичайно впливає на статус, який

мають займати жінки в суспільстві. Відповідаючи на вищезазначене запитання, виникає потреба оцінити середовище домашнього насильства в Камеруні, поставивши під сумнів складність у країні питань, пов'язаних із боротьбою з домашнім насильством, і досліджуючи подальші дії.

Поза будь-якими розумними сумнівами, унікальність сексуального насильства продовжує залишатися міцним горішком, незважаючи на всі зусилля, докладені урядом Камеруну для забезпечення боротьби з ним. ми продовжуємо стикатися з порушеннями та зловживаннями правами жінок, що створює нереалістичну атмосферу для цих шкідливих дій щодо жінок. До цього набору доцільно, щоб уряд Камеруну доклав більше зусиль, механізмів і методів для створення сприятливого клімату та середовища для захисту та збереження прав і статусу жінок у країні.

Ключові слова: бойові дії, сексуальне насильство, закон Камеруну, порушення, права жінок

SECTION 2
CONSTITUTIONALISM AS MODERN SCIENCE

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THE ROLE OF LEGAL CONCLUSION OF THE SUPREME COURT IN PROVIDING THE LAW PRINCIPLE

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Summary

The purpose of the article is the determination of the role of legal conclusions of the SC in providing the principle of legality. For implementation of this purpose the following tasks were performed: 1) justification of the thoughts that the legal conclusions of the SC in the modern conditions are characterized by the numerous number of signs of court precedent; 2) proving the constantly increasing role of legal conclusions of the SC in providing of the implementation of the principle of legality; 3) determination of the expanded content of the principle of legality based on the obligation of the subjects of authority to take into account the legal conclusions of the SC in their activity.

During the study of the topic of the article, the author analyzed the works of scientists who pay attention to the study of the role and significance of legal conclusions of the Supreme Court in the activities of subjects of power as N. Zozulia, O. Kibenko, M. Sambor, M. Shumylo and others. Some questions connected with the determination of the role of legal conclusions of the Supreme Court in ensuring the unity of judicial practice, were investigated by the author of this article when compiling the "Compendium of Legal Positions of the Supreme Court for lawyers" and developing the content part of the analytical and legal system ZakonOnline (Kibenko, 2022). Nevertheless, in modern legal science there is still a list of unsolved issues in the sphere of the role definition of legal conclusions of the Supreme Court in providing of the principle of legality.

Based on the conducted research, it is concluded that it is established by the law the obligation for all courts and subjects of authorities to consider (apply) legal conclusions of the SC allows to confirm that such approach causes the expanded application of the principle of legality, as the norm of law in fact cannot exist separately from the SC case law (its legal understanding) and the subject of authorities cannot have own approach to understand of this or that norm of law.

Key words: legal position, court precedent, judicial practice, legal conclusions, stability of judicial practice, administrative procedure.

1. Introduction

According to the parts 5 and 6 of Article 13 of the Law of Ukraine On the Judiciary and Status of Judges, conclusions on the application of legal norms set forth in judgments of the Supreme Court shall be binding on all power holders who apply in their activities a regulatory act containing the relevant legal norm; conclusions on the application of legal norms set forth in judgments of the Supreme Court shall be taken into account by other courts when applying such legal norms.

From the content of these legal orders it is seen that legal conclusions regarding the application of the norm of law set out in the judgments of the SC shall be taken into account not only by the courts of all instances and

the SC itself during the application of the relevant provisions of the Law but by all power holders. Moreover, the obligation of taking into account the legal conclusions of the SC according to the above said provisions of the Law concerns exactly the power holders, at the same time the legislator regarding the judges used the term «shall be taken into account» interpreted as a recommendation but not an obligation. Nevertheless, the judgment made by the judge without the conclusion of the SC must have strong arguments and appropriate motivation which would be understandable to an outside observer, ordered and based on the provisions of the Constitution of Ukraine.

The important part in the context of a researched problem are the provisions of part 2 of Article 65 of the Law of Ukraine On Civil Service according to which the disciplinary offence of the government official is in particular the making of decision by the government official that contradicts the law or conclusions regarding the application of the appropriate norm of law set out in the judgments of the SC regarding which the court made a separate ruling.

Thereby, the obligation for applying the conclusion of the SC becomes the continuation of the principle of legality whereas the norm of law (law or other normative legal act) in fact cannot exist separately from the SC case law (its legal understanding) and the subject of authority can't have his own (different from legal conclusion of the SC) approach to understand this or that norm of law.

To confirm such conclusion, it is advisable to provide the provisions of Articles 4 and 6 of the Law of Ukraine On the Administrative Procedure according to which the principles of the administrative procedure is in particular the Rule of Law including legality. Herewith the last principle except other means an obligation of the conclusions about the application of norms of the law set out in judgments of the SC for all administrative authorities (Executive Authority, Authority of the Autonomous Republic of Crimea, Local Government, their official, other subject authorized to perform the functions of the public administration according to the law) who are applying in their activity the normative legal act containing the appropriate norm of the law.

Thereby the lack of knowledge of the role of legal conclusion of the SC in providing the principle of legality, the absence of one scientific approach for understanding of nature of the conclusions of the SC stipulate the relevance of the scientific research of the role and meaning of legal conclusions of the SC in providing the principle of legality.

2. Role of legal conclusions of the SC in providing of the constancy and uniform case law

In the justification of the thought that the legal conclusion of the SC in the modern conditions is characterized by the numerous number of signs of court precedent, the constantly increasing role of legal conclusions of the SC in providing of the constancy and uniform case law being one of the elements of the rule of law is testified.

In particular, according to the paragraphs 1 and 5 of the Conclusion of the Consultative Council of European Judges (CCJE) No. 20 (2017) dated November 10, 2017. The Role of Courts with Respect to the Uniform Application of the Law, the similarity and unity of the law application stipulate the general obligation of the law (legality), provide the principle of equality before the law and also under the legal certainty and predictability being the integral components of the rule of law. In the state guided by the Rule of Law, the citizens are reasonably waiting for being treated as all others and for being able to rely on the previous court judgments in similar cases and thereby the citizens can predict legal consequences of their acts or omissions.

By the paragraphs 6 and 7 of this Conclusion of the Consultative Council of European Judges CCJU No. 20 (2017) it is stipulated that repeated court decision-makings which contradict each other, can create the situation of the legal uncertainty causing the reduce of the trust to the court system whereas this trust is an important element of the state guided by the principle of the rule of law («Vincic and others v. Serbia», application No. 44698/06 and others). The unity of the law application stipulates the trust of citizenship to the courts and improves the public opinion regarding the justice and law.

If the parties understood their positions in advance, they even could decide not to apply to the court; precedents or established court case law which are establishing clear, consecutive and reliable rules can reduce the need of court involvement to resolve the disputes; if there is a possibility to refer to the previous court decisions approved in the similar cases in particular by the higher courts, the appropriate cases could be considered more effectively. Precedents are in principle obligatory *de jure* and considered to be proper source of the law (The Role of courts with respect to the uniform application of the law, 2017).

One of the reasons of establishment of the Institution of the Conclusions of the SC in Ukraine and its approaching to the court precedent is called the need of resolution of instability problem of the case law that is the main defect of the domestic proceedings (Legal positions of the Supreme Court as a basis of constancy and uniform case law, 2017).

It is important that according to the procedural law of Ukraine, taking into account the previously formulated legal conclusions of the SC is demanded from both courts of lower instances and the SC itself.

In this regard, O. Kibenko points out the existence of vertical action of the precedent: taking into account the legal conclusion of the SC by other courts (providing the unity within the court system) and horizontal action of the precedent: obligation of legal conclusion of the SC for the SC itself (providing the unity within the SC itself) (Kibenko, 2019).

The court knows the law and it is inseparably connected with the main function of the cassation court – to provide the constancy and uniform case law, and therefore the SC is obliged to take into account all its conclusions independently of their meaning in cassation claim and accordingly the time formation of the SC.

3. Theoretical and practical aspects of the development and formation of the Institute of Legal Opinions of the Security Court

The obligation of the SC systematically take into account its conclusions confirmed by the provisions of Article 346 of the Code of Administrative Proceedings of Ukraine, under which the court considering the case in cassation proceeding consisting of the panel of judges transfers the case for consideration to the chamber containing such panel if this panel considers as necessity to derogate from the conclusion regarding the application of the legal norm in similar legal relations set out in previous desicion of the SC consisting of the panel of judges of the same chamber or consisting of the such chamber.

The court considering the case in cassation proceeding consisting of the panel of judges or chamber transfers the case for consideration to joint chamber if this panel or chamber considers as necessity to derogate from the conclusion regarding the application of the legal norm in similar legal relations set out in previous decision of the SC consisting of the panel of judges of the same chamber or consisting of the such chamber.

The court considering the case in cassation proceeding consisting of the panel of judges, chamber or joint chamber transfers the case for consideration to the Great Chamber of the Supreme Court (GC SC) if such panel (chamber, joint chamber) considers as necessity to derogate from the conclusion regarding the application of the legal norm in similar legal relations set out in previously desicion of the SC consisting of the panel of judges (chamber, joint chamber) of other cassation court.

The court considering the case in cassation proceeding consisting of the panel of judges, chamber or joint chamber transfers the case for consideration to the GC SC if such panel (chamber, joint chamber) considers as necessity to derogate from the conclusion regarding the application of the legal norm in similar legal relations set out in previous judgment of the GC SC.

The case is subject to be transferred for the consideration to the GC SC when the party of the case appeals the court judgment on the basis of the breach of the rules of subject matter jurisdiction except cases if in particular the GC SC has already set out in its judgment the conclusion regarding the issue of subject matter jurisdiction of the dispute in similar legal relations (The Code of Administrative Proceedings of Ukraine, 2005).

Similar provisions are in Article 302 of the Code of Commercial Procedure of Ukraine, Article 434-1 of the Criminal Procedure Code of Ukraine and Article 403 of Civil Procedure Code of Ukraine.

Given norms of law in fact determine the order of derogation from previously formulated legal positions of the SC, hierarchy of the legal conclusions of the SC and also confirm that in acting procedure law of Ukraine unlike previous acting one (by 2017) the right to initiate the derogation from legal conclusion of the SC is given only to the SC; such possibility for courts of first and appeal instances is absent.

Last ones can in order determined by the Article 290 of the Code of Administrative Proceedings of Ukraine apply with the application to the SC for consideration by it as a court of first instance of exemplary case if in proceedings of one or several administrative courts there are typical administrative cases the quantity of which is determined by the expediency of the exemplary judgment. Though the transfer of the typical case for consideration to the SC as exemplary one is not the option of derogation from the legal position of the SC however in order of resolution of exemplary case the SC forms legal conclusion being asked in fact by the lower-ranking courts. It is typically that the Institute of exemplary case provided only in administrative proceedings.

At the same time in commercial and civil procedures the right of court is provided by the application of the party of the case and also by own initiative to stop the proceedings of the case in particular in the case of the consideration of the court decision in similar legal relations (in other case) in cassation order by the chamber, joint chamber, GC SC (clause 7 of the part 1 of the Article 228 and clause 11 of the part 1 of the Article 229 of the Code of Commercial Procedure of Ukraine, clause 10 of the part 1 of the Article 252 and clause 14 of the part 1 of the Article 253 of the the Civil Procedure Code of Ukraine). Such provisions are in clause 5 of the part 2 of the Article 236 of the Code of Administrative Proceedings of Ukraine.

Regarding the order of derogation from the legal positions of the SC it is necessary to note that in the Conclusion of the CCJU No. 20 (2017) there is information on numerous differences between general and continental systems of the law regarding the issue whether only the court of the same or higher level can overcome the precedent or any court including the courts of lower instances can deviate from the case law if such deviation is ordered.

In this regard it is appropriate to mention the provisions of the part 5 of the Article 13 of the Law of Ukraine On the Judicial System and Status of Judges dated July 7, 2010 (lost its force except separate pro-

visions on the basis of the Law No. 1402-VIII dated June 2, 2016), under which the conclusions regarding the application of the norms of law set out in the judgments of the Supreme Court of Ukraine are taken into account by other courts of general jurisdiction under the application of such norms of law; the court has the right to derogate from the legal position set out in the conclusions of the Supreme Court of Ukraine simultaneously giving the appropriate motives.

Therefore, in the Law of Ukraine On the Judicial System and Status of Judges dated 2010 there was a direct pointing to the right of courts independently to derogate from the legal position of the Supreme Court of Ukraine providing the appropriate motivation.

In acting Law of Ukraine On the Judiciary and Status of Judges the courts of first or appeal instances were taken the possibilities to derogate from the legal position set out in the judgments of the SC and the Supreme Court of Ukraine considering the certain case providing the appropriate motives (Zozulya, 2018).

The absence of such provision in acting Law can testify that the demand regarding the taking into account of the legal conclusions of the SC regarding the application of appropriate norm of law for courts is close to be obligatory.

Researching the question of obligation to take into account the legal conclusions of the SC by all courts including the SC itself it should be noticed that between legal conclusions of the SC there is some hierarchy.

In particular, in court case law there was made a constant approach to determine the hierarchy of the legal positions of the SC consisting of different panels, chambers or joint chamber between legal positions of cassation courts and also cassation court consisting of the SC and GC SC.

So, in the Judgment dated February 13, 2019 in the case No. 130/1001/17 on the basis of the analysis of the positions of the Articles 346 and 347 of the Code of Administrative Proceedings of Ukraine, the SC specified that conclusions contained in the judgments of the panel of judges of cassation court prevail over the conclusions of the panel of judges of cassation court, the conclusions of joint chamber – over the conclusions of the chamber or panel of judges of cassation court, and the conclusions of the GC SC – over the conclusions of joint chamber, chamber and panel of judges).

Besides, the GC SC in particular in Judgments dated January 30, 2019 in the case No. 755/10947/17 and dated November 10, 2021 in the case No. 825/997/17 specified that despite of whether all positions are listed containing the legal position from which the GC SC derogated the courts during the resolution of the same disputes shall take into account exactly the last legal position of the GC SC.

Speaking otherwise in the case if the chamber, joint chamber or the GC SC having the appropriate case to be transferred makes the conclusion about the necessity to derogate from the legal position before the formulated SC, so it is specified in the judgment how the norm of law must be applied and the legal position is pointed out from which the derogation is performed. Herewith despite of whether all judgments are listed which contain the legal position for the derogation from which the case is transferred it is considered that such derogation is performed from the legal position set out in different decrees of the GC SC and the SC. In the future, during the resolution of the same disputes the courts have to take into account exactly the last legal position of the chamber, joint chamber or the GC SC.

Current conclusion applied by the SC, in particular in the judgments dated December 18, 2019 in the case No. 804/937/16, dated March 16, 2020 in the case No. 1.380.2019.001962, dated February 11, 2021 in the case No. 240/532/20, dated February 25, 2021 in the case No. 580/3469/19, dated April 6, 2021 in the case No. 640/14645/19 and dated May 18, 2022 in the case No. 160/5259/20.

It is confirmed that the conclusions of the Supreme Court of Ukraine have the legal force of the conclusions of the GC SC by the provisions of sub-clauses 8 of the clause 1 of the Section VII of the Transitional Provisions of the Code of Administrative Proceedings of Ukraine, under which it is established that the changes to this Code come into force with the consideration of such peculiarities: court considering the case in cassation order consisting of panel of judges or chamber (joint chamber) transfers the case for consideration to the GC SC if such panel or chamber (joint chamber) considers as necessity to derogate from the conclusion in similar legal relations set out in previous Judgment of the Supreme Court of Ukraine.

The same provisions are set forth in the sub-clause 7 of the clause 1 of the Section XI of the Transitional Provisions of the Code of Commercial Procedure of Ukraine and in sub-clause 7 of the clause 1 of the Section XIII of the of the Transitional Provisions of the Civil Procedure Code of Ukraine.

Determining the legal status of the conclusions of the Supreme Court of Ukraine, M. Shumylo pays attention to the question of legal power and obligation of the legal positions of this court in temporal dimension after the beginning of work of a new SC. The scientist points out the existence of such statuses of legal positions of the Supreme Court of Ukraine: supported SC, overcome (the derogation is made) SC, positions formed in the judgments of the Supreme Court of Ukraine in cases where the dispute arose and was solved on the basis of inactive law for today, self-derogation of the GC SC from the legal conclusions used for making the derogation from the legal position of the Supreme Court of Ukraine (Shumylo, 2020, p. 48-49).

At present there are absent statistic data regarding the number of legal positions of the Supreme Court of Ukraine accepted by the SC and gradually implemented

in its practise or those the derogation was made from. M. Shumylo gives appropriate data for the period from the December 15, 2017 to the end of 2020 specifying that the GC SC adopted 117 judgments containing 73 derogations from the legal positions of the Supreme Court of Ukraine, with 15 of them to be in administrative proceedings, 15 – in commercial proceedings, 2 – in criminal proceedings and 41 – in civil proceedings (Shumylo, 2020, p. 49).

In this regard the Judgment is mentioned of the GC SC dated September 1, 2020 in the case No. 216/3521/16-ц, where the methods are differentiated under which the legal positions of the Supreme Court of Ukraine stop being the source of the law namely: 1) passive method when they lost their legal power in accordance with the change of legal regulation (determination); 2) active method when the positions of the Supreme Court of Ukraine are overcome by the GC SC (the derogation is being performed) about what it will be discussed next.

Besides the Judgment of GC SC dated September 4, 2018 in the case No. 823/2042/16 has the summarized conclusion about the basis of the derogation, they are: 1) defectiveness of the judgment (set of judgments) meaning: a) defects of form (technical and legal) of the judgment (ambiguous, mutually exclusive, unclear forming, inconsistency of reasoning and operative parts of judgment); b) defects of essence (content filling) of judgment (fallibility, unreasonableness); c) failure to perform (inefficient option of protection) the judgment; 2) the change of social context.

According to the legal power of legal conclusions of the Supreme Court of Ukraine M. Shumylo makes the conclusion that in the case if the SC accepted the legal positions of the Supreme Court of Ukraine, so such acceptance is necessary to be considered as a new legal conclusion of the SC and in the future to apply exactly it; in the case if the GC SC performed the derogation from the legal conclusion by which previously the legal position of the Supreme Court of Ukraine was overcome, so such positions by itself do not recover their legal power as they are overcome; the GC SC must form own legal conclusion that can be agreeable with legal position of the Supreme Court of Ukraine but it will be a new one and made by the GC SC (Shumylo, 2020, p. 53).

Therefore, legal conclusions of the Supreme Court of Ukraine take the separate place in the hierarchy of the legal conclusions; they can be included in the position having the power of legal conclusion of the GC SC. It is important that the conclusions of the High Administrative Court of Ukraine, High Commercial Court of Ukraine and the High Specialized Court of Ukraine with the consideration of civil and criminal cases do not have such power that is also confirmed by the absence in this courts previously the status of classic court of cassation instance (the SC).

4. Legal conclusions of the Supreme Court as an inseparable element of the principle of legality in decision-making by subjects of power

On the importance of the meaning of legal conclusions of the SC in legal system of Ukraine and performance by them the role of the court precedents also the fact is pointing out that the knowledge of legal positions of the SC and ECHR is a demand required for the candidates on the position of judge and all judges taking the qualification assessment.

In particular, according to the part 3 of the Article 78 of the Law of Ukraine On the Judiciary and Status of Judges, the qualification examination shall be conducted as follows: a candidate for judicial office takes a written anonymous test and anonymously completes a written practical assignment in order to identify his/her level of knowledge, practical skills and abilities in the application of law and conducting a court hearing.

By the part 2 of the Article 85 of this Law it is provided that the examination is a main method to establish the compliance of judge with the criteria of the professional competence and is being taken in the form of anonymous testing and performing of the written practical task with the purpose of testing the knowledge level, practical skills and ability to apply the law, ability to perform the justice in appropriate court and with appropriate specialization (On the Judiciary and Status of Judges, 2016).

According to the paragraphs 2 and 3 of the Regulation On The Procedure And Methodology for the Qualification Assessment, Indicators of Compliance with the Qualification Assessment Criteria and Means of Their Determination, approved by the Decision of the High Qualification Commission of Judges of Ukraine No.143/zp-16 dated November 3, 2016, the knowledge level in the sphere of law including the level of practical skills and abilities in appliance the law are assessed (established) by testing in particular of the knowledge of legal positions of the SC and knowledge of ECHR case law.

The ability and skills of the conduction of court hearing and making the court judgment are assessed (established) by testing in particular the ability clearly and understandably formulate and produce the legal position (legal conclusion) in the court judgment (Regulation On the Procedure and Methodology for the Qualification Assessment, Indicators of Compliance with the Qualification Assessment Criteria and Means of Their Determination, 2016).

On the other hand, according to the paragraphs 5, 10, 11 and 14 of the Provision for the Procedure of Taking a Test and the Methodology for Its Assessment during Qualification Assessment of a Judge approved by the Decision of the Higher Qualification Commission of Judges of Ukraine No. 144/zp-16 dated November 4, 2016, during the selection on the position of the

judge of the SC the candidate has the right during the performance of the practical task to produce the project of legal position of the SC; testing questions must contain the questions for testing the knowledge level in the sphere of law including the level of practical skills and abilities in appliance the law in particular the knowledge of legal positions of the SC and knowledge of ECHR case law; totality of testing questions is a testing base containing questions in particular from established SC case law; practical task shows the ability and skills of conduction of court hearing and making the court judgments in particular the ability clearly and understandably formulate and produce the legal position (legal conclusion) in the court judgment (Provision for the Procedure of Taking a Test and the Methodology for Its Assessment during Qualification Assessment of a Judge, 2016).

Therefore, legal conclusions of the SC became the integral element of the principle of legality whereas their consideration during the application of norm of law in similar disruptive legal relations by the courts of all instances is obliged. Simultaneously, the obligation regarding the application/performance/control of the performance of legislative acts only with legal conclusions of the SC spreads also on the power holders.

Such conclusion is based in particular on the analysis of provisions of the Articles 4 and 6 of the Law of Ukraine On the Administrative Procedure, according to which the principles of administrative procedures are the rule of law including legality; the principle of legality means that administrative authority performs administrative proceedings exclusively on the basis within the authorities and by the method provided by the Constitution of Ukraine, this Law and other laws of Ukraine and also on the basis of international agreements, agreement for obligation is given by the Supreme Council of Ukraine and also applies other normative legal acts approved by the appropriate Government Authority, Authority of the Autonomous Republic of Crimea, or local government body on the basis within the authorities and by the method provided by the Constitution of Ukraine and the Law

This provision of the Law is an important one taking into account the determination (the Article 2 of this Law) of the administrative authority covering by it all Executive Authority, Authority of the Autonomous Republic of Crimea, Local Self-Government, their officials, and also other subjects authorized to perform the functions of the public administration according to the law.

Also it is important to recall the Article 4 of the Law of Ukraine On Administrative Services, according to which the government policy in the sphere of providing the administrative services is based on the principles of the rule of law including the legality and legal determination.

Similar provisions are contained in the Article 3 of the Law of Ukraine On Local State Administrations, according to which local government administrations act on the basis in particular of the rule of law and legality and according to the Article 13 of this Law with awareness of the local government administration within limits and forms provided by the Constitution of Ukraine and the Laws of Ukraine containing the questions resolution of providing the legality and also the citizen rights, freedom and legal interests protection.

Besides, the Article 4 of The Law of Ukraine On Local Self-Government in Ukraine the local government in Ukraine is performed on the principles of people's power and legality, and the Article 38 specially determines the power of authorities of the local self-government regarding the legality providing.

In that regard some scientists put emphasis on the existence in Ukraine the systematic problem of failure to consider by the subjects of authorities the legal conclusions of the SC.

As an example of such failure M. Sambor provides the activity of officials of departments of Pension Fund of Ukraine who realizing the illegality of their actions keep breaching the social rights of pensioners, veterans, reducing the amount of their pensions, making them repeatedly to apply to the court branch of authority, though the range of questions – recalculation of pensions, establishing of its amount according to the law, etc., are already resolved in the court order; the court judgments are performed one time; available exemplary cases, court precedents of the SC do not become a pointer for the activity and usage of appropriate judgments in similar cases by the public officials of public administration authorities (Sambor, 2022, p. 127-128).

5. Conclusions

Performed research in this article gives the basis to make next conclusions.

1. Established by the law the obligation for all courts and subjects of authorities to consider (apply) legal conclusions of the SC allows to confirm that such approach causes the expanded application of the principle of legality (unfailing to compliance by all subjects of private and public right of acting laws in Ukraine, sub legislative acts and legal conclusions of the SC), as the norm of law (law or other normative legal act) in fact cannot exist separately from the SC case law (its legal understanding) and the subject of authorities cannot have own (different from legal conclusion of the SC) approach to understand of this or that norm of law.

2. The importance of legal conclusions of the SC in legal system of Ukraine and their role as the court precedents is demonstrated as follows: 1) the obligation to take into account legal conclusions of the SC by the courts of all instances including the SC itself during the dispute resolution in similar legal relations; 2) deprivation of the courts of the first or appeal instance to

have the opportunity during the consideration of certain case providing appropriate motives to derogate from the legal position set out in judgments of the SC; 3) actual binding of the right to initiate by the party of causational consideration of the case in the SC till the provident in causational claim the circumstance of absence of legal conclusion of this Court, failure to take into account already existing conclusion of the SC by the court of appellate instance or the necessity to derogate from legal conclusion of the SC; 3) legislative formulation of special order of the derogation from legal conclusions of the SC in particular transferring the case for the consideration to the chamber, joint chamber or the GC SC; 4) establishment of obligation to consider of legal conclusions of the SC by the subjects of authorities during the application by them in their activity the norms of law regarding which there is already formed legal position of the SC; 5) providing a requirement for candidates for the position of judge and all judges undergoing qualification assessment, to knowledge of the legal positions of the Supreme Court and the ECHR, as well as the ability to apply and form them.

3. In the system of legal conclusions of the SC is formed four hierarchy levels: 1) conclusions of the GC SC (and similar to them according to legal power conclusions of the Supreme Court of Ukraine) prevail over the conclusions of joint chamber, chamber and panel of judges; 2) conclusions of joint chamber – over the conclusions of the chamber or panel of judges of cassation court; 3) conclusions contained in judgments of the court chamber of cassation court – over the conclusions of panel of judges of cassation court; 4) conclusions contained in decrees of the SC approved by the panel of judges.

4. Commonly known principle of procedural law jura novit curia (the court knows the laws) is integrally connected with the main function of the court of cassation instance – to provide the constancy and unity of case law, and therefore the SC after the opening of cassation proceedings is obliged to take into account all its conclusions regardless of their mentioning in cassation claim and according to the time formation of such legal conclusions of the SC.

5. The courts of first and appeal instances do not have the possibility independently to derogate from legal conclusions of the SC, instead the Code of Administrative Proceedings of Ukraine established the Institute of exemplary case giving the right to the administrative courts considering cases that have the signs of being typical to apply to the SC with the application to consider one of such cases as exemplary; in such case the courts can stop the proceedings in all other cases till the completion of consideration by the SC of exemplary case; in administrative, commercial and civil procedure provided the right of court by the application of the party of the case and also by own initiative to stop the proceedings of case in particular in the case of consideration of court judgments in similar legal relations (in other case) in cassation order by the chamber, joint chamber, the GC SC.

Bibliography:

1. ***Про судоустрій і статус суддів*** (2016): Закон України No 1402-VIII. URL : https://zakon.rada.gov.ua/laws/show/1402-19#Text.

2. ***Про державну службу*** (2015): Закон України No 889-VIII. URL: https://zakon.rada.gov.ua/laws/show/889-19#Text.

3. ***Про адміністративну процедуру*** (2022): Закон України No 2073-IX. URL: https://zakon.rada.gov.ua/laws/show/2073-20#Text.

4. https://uba.ua/ukr/news/8269.

5. ***Кібенко, О*** (2022)***. Відступ Великої Палати Верховного Суду від існуючих правових позицій: процедура, підстави, проблеми***. URL: https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/Kibenko_%2007_12_2020.pdf.

6. ***Про роль судів у забезпеченні єдності застосування закону*** (2017). ***Висновок Консультативної Рада європейських суддів (КРЄС)*** No 20 (2017). URL: https://supreme.court.gov.ua/userfiles/media/opinion_20_UA.pdf.

7. Vincic and others v. Serbia, 44698/06 (ECHR, 2010). URL: https://hudoc.echr.coe.int/eng?i=001-95959.

8. ***Правові позиції Верховного Суду як основа сталості та єдності судової практики.*** (2017). ***Українське право***. URL: https://ukrainepravo.com/scientific-thought/legal_analyst/pravovi-pozitsii-verkhovnogo-sudu-yak-osnova-stalosti-ta-dnosti-sudovoi-praktiki-/?print=Y.

9. ***Кібенко*****, О** (2019). Механізми забезпечення єдності судової практики: інфографіка від судді ВП ВС. ***Судово-юридична газета***. URL: https://sud.ua/ru/news/sudebnaya-praktika/137889-mekhanizmi-zabezpechennya-yednosti-sudovoyi-praktiki-infografika-vid-suddi-vp-vs.

10. ***Кодекс адміністративного судочинства України*** (2005). № 2747-IV. URL: https://zakon.rada.gov.ua/laws/show/2747-15#Text .

11. ***Зозуля*****, Н.** (2018). ***Чи обов'язково судам враховувати правові позиції ВСУ і хто може від них відступати: теорія та практика. Українське право***. URL: https://ukrainepravo.com/scientific-thought/legal_analyst/chy-obov-yazkovo-sudam-vrakhovuvaty-pravovi-pozytsiyi-vsu-i-khto-mozhe-vid-nykh-vidstupaty-teoriya-t/?month=04&year=2020.

12. ***Постанова Верховного Суду (***2019). No 130/1001/17. URL: https://reyestr.court.gov.ua/Review/79957847.

13. ***Постанова Великої Палати Верховного Суду*** (2019). No 755/10947/17. URL: https://zakononline.com.ua/court-decisions/show/79834955.

14. ***Постанова Великої Палати Верховного Суду*** (2021). No 825/997/17. URL: https://reyestr.court.gov.ua/Review/101241002.

15. ***Постанова Верховного Суду*** (2019). No 804/937/16. URL: https://reyestr.court.gov.ua/Review/86459468.

16. ***Постанова Верховного Суду*** (2020). No 1.380.2019.001962. URL: https://reyestr.court.gov.ua/Review/88305171.

17. ***Постанова Верховного Суду*** (2021). No 240/532/20. URL: https://reyestr.court.gov.ua/Review/94840192.

18. ***Постанова Верховного Суду*** (2021). No 580/3469/19. URL: https://reyestr.court.gov.ua/Review/99657294.

19. ***Постанова Верховного Суду*** (2021). No 640/14645/19. URL: https://reyestr.court.gov.ua/Review/96543587.

20. ***Постанова Верховного Суду*** (2022). No 160/5259/20. URL: https://reyestr.court.gov.ua/Review/104361332.

21. ***Шумило*****, М.** (2020). ***Правові висновки касаційного суду:*** inter praeteritum et futurum. ***Підприємництво, господарство і право***, 12, 47–54.

22. ***Постанова Великої Палати Верховного Суду*** (2020). No 216/3521/16-ц. URL: https://reyestr.court.gov.ua/Review/91644731.

23. ***Постанова Великої Палати Верховного Суду*** (2018). No 823/2042/16. URL: https://reyestr.court.gov.ua/Review/77969515.

24. ***Положення про порядок та методологію кваліфікаційного оцінювання, показники відповідності критеріям кваліфікаційного оцінювання та засоби їх встановлення (***2016): ***рішення Вищої кваліфікаційної комісії суддів України***. No 143/зп-16. URL: https://old.vkksu.gov.ua/userfiles/doc/poriadok_ta_metod.pdf.

25. ***Порядок проведення іспиту та методика встановлення його результатів у процедурі кваліфікаційного оцінювання*** (2016): ***рішення Вищої кваліфікаційної комісії суддів України.*** No 144/зп-16. URL: https://old.vkksu.gov.ua/userfiles/doc/poriadok_ispitu.pdf.

26. ***Про адміністративні послуги*** (2012): Закон України No 5203-VI. URL: https://zakon.rada.gov.ua/laws/show/5203-17#Text.

27. ***Про місцеві державні адміністрації*** (1999): Закон України No ***586-XIV. URL:*** https://zakon.rada.gov.ua/laws/show/586-14#Text.

28. ***Про місцеве самоврядування в Україні***: Закон У***країни*** No 280/97-ВР. URL: https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text.

29. ***Самбор*****, М.** (2022). ***Захист економічних інтересів держави шляхом дотримання прав і свобод людини з боку суб'єктів публічної адміністрації та використання останніми судових прецедентів за принципом людиноцентризму та законності у діяльності цих органів. Адміністративна юстиція в Україні: проблеми теорії та практики***: з***бірник тез доповідей П'ятої Міжнародної науково-практичної конференції. Київ: «Компанія «ВАІТЕ».***

References:

1. *Pro sudoustriy i status suddiv [On the Judiciary and Status of Judges]* (2016). No 1402-VIII. Available from: https://zakon.rada.gov.ua/laws/show/1402-19#Text [in Ukrainian].

2. *Pro derzhavnu sluzhbu [On Civil Service]* (2015). No ***889-VIII.*** Available from: https://zakon.rada.gov.ua/laws/show/889-19#Text [in Ukrainian].

3. *Pro administratyvnu protseduru [On Administrative Procedure]* (2022). No ***2073-IX.*** Available from: https://zakon.rada.gov.ua/laws/show/2073-20#Text.

4. https://uba.ua/ukr/news/8269.

5. **Kibenko, O** (2022). Vidstup Velykoyi Palaty Verkhovnoho Sudu vid isnuyuchykh pravovykh pozytsiy: protsedura, pidstavy, problemy [Retreat of the Grand Chamber of the Supreme Court from existing legal positions: procedure, grounds, problems]. Available from: https://supreme.court.gov.ua/userfiles/media/ new_folder_for_uploads/supreme/Kibenko_%2007_12_2020.pdf [in Ukrainian].

6. *Pro rol' sudiv u zabezpechenni yednosti zastosuvannya zakonu [The Role of courts with respect to the uniform application of the law]* (2017). Vysnovok Konsul′tatyvnoyi Rada yevropeys′kykh suddiv No 20 (2017). Available from: https://supreme.court.gov.ua/userfiles/media/opinion_20_UA.pdf [in Ukrainian].

7. Vincic and others v. Serbia, 44698/06 (ECHR, 2010). Available from: https://hudoc.echr.coe.int/eng?i=001-95959 [in English].

8. Pravovi pozytsiyi Verkhovnoho Sudu yak osnova stalosti ta yednosti sudovoyi praktyky [Legal positions of the Supreme Court as a basis of constancy and uniform case law] (2017). *Ukrayins'ke pravo [Ukrainian Law]*. Available from: https://ukrainepravo.com/scientific-thought/legal_analyst/pravovi-pozitsii-verkhovnogo-sudu-yak-osnova-stalosti-ta-dnosti-sudovoi-praktiki-/?print=Y [in Ukrainian].

9. **Kibenko, O** (2019). Mekhanizmy zabezpechennya yednosti sudovoyi praktyky: infohrafika vid suddi VP VS [Mechanisms of Providing the Uniform Case Law: infographic from the judge of the GC SC]. *Sudovo-yurydychna hazeta [Court and legal newspaper]*. Available from: https://sud.ua/ru/news/sudebnaya-praktika/137889-mekhanizmi-zabezpechennya-yednosti-sudovoyi-praktiki-infografika-vid-suddi-vp-vs [in Ukrainian].

10. *Kodeks administratyvnoho sudochynstva Ukrayiny [The Code of Administrative Proceedings of Ukraine]* (2005). № 2747-IV. Available from:

https://zakon.rada.gov.ua/laws/show/2747-15#Text [in Ukrainian].

11. **Zozulya, N.** (2018). Chy obov″yazkovo sudam vrakhovuvaty pravovi pozytsiyi VSU i khto mozhe vid nykh vidstupaty: teoriya ta praktyka [Courts to Take Into Account the Legal Positions of the Supreme Court of Ukraine and Who Can Derogate from Them: Theory And Practice]. *Ukrayins'ke pravo [Ukrainian Law]*. Available from: https://ukrainepravo.com/scientific-thought/legal_analyst/chy-obov-yazkovo-sudam-vrakhovuvaty-pravovi-pozytsiyi-vsu-i-khto-mozhe-vid-nykh-vidstupaty-teoriya-t/?month=04&year=2020 [in Ukrainian].

12. *Postanova Verkhovnoho Sudu [Judgment of the Supreme Court] (*2019). No 130/1001/17. Available from: https://reyestr.court.gov.ua/Review/79957847 [in Ukrainian].

13. *Postanova Velykoyi Palaty Verkhovnoho Sudu [Judgment of the Great Chamber of the Supreme Court]* (2019). No 755/10947/17. Available from: https://zakononline.com.ua/court-decisions/show/79834955 [in Ukrainian].

14. *Postanova Velykoyi Palaty Verkhovnoho Sudu [Judgment of the Great Chamber of the Supreme Court]* (2021). No 825/997/17. Available from: https://reyestr.court.gov.ua/Review/101241002 [in Ukrainian].

15. *Postanova Verkhovnoho Sudu [Judgment of the Supreme Court]* (2019). No 804/937/16. Available from: https://reyestr.court.gov.ua/Review/86459468 [in Ukrainian].

16. *Postanova Verkhovnoho Sudu [Judgment of the Supreme Court]* (2020). No 1.380.2019.001962. Available from: https://reyestr.court.gov.ua/Review/88305171 [in Ukrainian].

17. *Postanova Verkhovnoho Sudu [Judgment of the Supreme Court]* (2021). No 240/532/20. Available from: https://reyestr.court.gov.ua/Review/94840192 [in Ukrainian].

18. *Postanova Verkhovnoho Sudu [Judgment of the Supreme Court]* (2021). No 580/3469/19. Available from: https://reyestr.court.gov.ua/Review/99657294 [in Ukrainian].

19. *Postanova Verkhovnoho Sudu [Judgment of the Supreme Court]* (2021). No 640/14645/19. Available from: https://reyestr.court.gov.ua/Review/96543587 [in Ukrainian].

20. *Postanova Verkhovnoho Sudu [Judgment of the Supreme Court]* (2022). No 160/5259/20. Available from: https://reyestr.court.gov.ua/Review/104361332 [in Ukrainian].

21. **Shumylo, M.** (2020). Pravovi vysnovky kasatsiynoho sudu: inter praeteritum et futurum [Legal Conclusions of the Cassation Court: inter praeteritum et futurum]. Pidpryyemnytstvo, hospodarstvo i pravo *[Enterprises, economy and law]*, No 12, C. 47–54. [in Ukrainian].

22. *Postanova Velykoyi Palaty Verkhovnoho Sudu [The Judgment of the Great Chamber of the Supreme Court]* (2020). No 216/3521/16-ц. Available from: https://reyestr.court.gov.ua/Review/91644731 [in Ukrainian].

23. *Postanova Velykoyi Palaty Verkhovnoho Sudu [The Judgment of the Great Chamber of the Supreme Court]* (2018). No 823/2042/16. Available from: https://reyestr.court.gov.ua/Review/77969515 [in Ukrainian].

24. *Polozhennya pro poryadok ta metodolohiyu kvalifikatsiynoho otsinyuvannya, pokaznyky vidpovidnosti kryteriyam kvalifikatsiynoho otsinyuvannya ta zasoby yikh vstanovlennya [Regulation On The Procedure And Methodology for the Qualification Assessment, Indicators of Compliance with the Qualification Assessment Criteria and Means of Their Determination]* (2016): rishennya Vyshchoyi kvalifikatsiynoyi komisiyi suddiv Ukrayiny [Decision of the High Qualification Commission of Judges of Ukraine]. No ***143/зп-16. URL:*** https://old.vkksu.gov.ua/userfiles/doc/poriadok_ta_metod.pdf [in Ukrainian].

25. Poryadok provedennya ispytu ta metodyka vstanovlennya yoho rezul′tativ u protseduri kvalifikatsiynoho otsinyuvannya [Provision for the Procedure of Taking a Test and the Methodology for Its Assessment during Qualification Assessment of a Judge] (2016): rishennya Vyshchoyi kvalifikatsiynoyi komisiyi suddiv Ukrayiny [Decision of the Higher Qualificational Commission of Judges of Ukraine]. No 144/зп-16. Available from: https://old.vkksu.gov.ua/userfiles/doc/poriadok_ispitu.pdf [in Ukrainian].

26. *Pro administratyvni posluhy [On Administrative Services]*. No 5203-VI. Available from: https://zakon.rada.gov.ua/laws/show/5203-17#Text [in Ukrainian].

27. *Pro mistsevi derzhavni administratsiyi [On Local State Administrations]*. No ***586-XIV.*** Available from: https://zakon.rada.gov.ua/laws/show/586-14#Text [in Ukrainian].

28. *Pro mistseve samovryaduvannya v Ukrayini [On Local Self-Government in Ukraine]*. No 280/97-VR. Available from: https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text [in Ukrainian].

29. **Sambor, M.** (2022). Zakhyst ekonomichnykh interesiv derzhavy shlyakhom dotrymannya prav i svobod lyudyny z boku sub″yektiv publichnoyi administratsiyi ta vykorystannya ostannimy sudovykh pretsedentiv za pryntsypom lyudynotsentryzmu ta zakonnosti u diyal′nosti tsykh orhaniv [Protection of State Interests by Complying the Rights and Freedoms of Person from the Perspective of Public Administration Bodies and Their Usage of the Court Precedents under the Principle of Human Centrism and Legality in Their Activity]. *Administratyvna yustytsiya v Ukrayini: problemy teoriyi ta praktyky [Administrative Justice in Ukraine: Theory and Practice]*: zbirnyk tez dopovidey P″yatoyi Mizhnarodnoyi naukovo-praktychnoyi konferentsiyi. Kyyiv: «Kompaniya «VAITE». [in Ukrainian]

РОЛЬ ПРАВОВОГО ВИСНОВКУ ВЕРХОВНОГО СУДУ У ЗАБЕЗПЕЧЕННІ ПРИНЦИПУ ЗАКОННОСТІ

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Анотація

Метою статті є визначення ролі правового висновку Верховного Суду у забезпеченні принципу законності. Для реалізації цієї мети були виконані такі завдання: 1) обґрунтовано думки про те, що правовий висновок ВС у сучасних умовах характеризується значною кількістю ознак судового прецеденту; 2) доведено постійно зростаючу роль правових висновків ВС у забезпеченні реалізації принципу законності; 3) визначено розширений зміст принципу законності, що ґрунтується на обов'язку суб'єктів владних повноважень враховувати правові висновки ВС у своїй діяльності.

Під час дослідження теми статті автором було проаналізовано праці науковців, що приділяють увагу вивчення питання ролі та значення правових висновків ВС у діяльності суб'єктів владних повноважень як Н. Зозуля, О. Кібенко, М. Самбор, М. Шумило та ін. Деякі питання, пов'язані із досліджуваною темою, застосування правових висновків ВС у забезпеченні єдності судової практики, досліджувалися автором цієї статті при укладанні «Збірника правових позицій Верховного Суду для адвокатів» та розробки контентної частини аналітично-правової системи ZakonOnline. Проте у сучасній правовій науці залишається низка нерозкритих питань у сфері визначення ролі правових висновків Верховного Суду у забезпеченні принципу законності.

На основі проведеного дослідження робиться висновок, що встановлений законом обов'язок для всіх судів та суб'єктів владних повноважень враховувати (застосовувати) правові висновки ВС дозволяє стверджувати, що такий підхід зумовлює розширене застосування принципу законності, оскільки норма права фактично не може існувати відокремлено від практики ВС (його праворозуміння), а суб'єкт владних повноважень не може мати власного підходу до розуміння тієї чи іншої норми права.

Ключові слова: правова позиція, судових прецедент, судова практика, правові висновки, сталість судової практики, адміністративна процедура.

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INCLUSIVENESS OF CREATION PROCESS OF CONSTITUTION IN GEORGIA

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Summary

It is very difficult and practically impossible to create the best and most complete constitution. The Constitution is a document created by humans and not by the gods, and just like its creators, this document itself cannot be perfect. There are undemocratically adopted constitutions in the world, but there are no authoritarian constitutions adopted democratically. However, the conditions for drafting and adopting the Constitution can have a great impact on the content of the Constitution.

Constitution is a legal act or set of legal acts adopted by a supreme body of state power or through a referendum, has the highest legal force and regulates the foundations of the organization of society and the state, the basic principles of the relationship between the individual and the state. Both the concept of the Constitution and the history of its development clearly show its special importance in the preservation and development of the state and society.

The aim of the presented article is to review the process of creation of Constitution in Georgia, to study the main specifics and obstacles during the process and to analyze the results which has a direct influence on Political, Economic and Social development of State.

The main methodology used during the research is desk research using historical and legal analysis of the given situation in1990s in Georgia, the challenges that Georgia has after the independence and the main basis and fundamentals for further development of Georgian Constitutionalism.

Based on research study, authors have identified the main issues that were left out from the content of constitution, that are not only important for democratic states, but has the main influence on creation of democratic governance in country. One of the mentioned issues is the defining of Territorial Structure, which is of vital importance for Georgia. The final part of the article is concentrated on the steps that should be taken for the discussion of issues concerning territorial structure, including the different ethnic groups in the debate for solving current left out, but important issues within the constitution.

Key words: Georgia, constitution, administrative division of state, transitional democracy, developing countries.

1. Introduction

The constitution is a living organism. It is a future-oriented document based on past experience, but focused on regulating the present. The Constitution is the supreme law of the country and, unlike ordinary legislation, it embodies the fundamental choice of the country and its people, the basis of political and social life.

The Constitution is the business card of the state, it clearly reflects the image of each state. The constitution reflects the internal organization of the country and specific cultural peculiarities. The twentieth and the beginning of the twenty-first centuries are undoubtedly an exceptional period of Georgia's short history. Historically speaking, in a relatively short period of time,

Georgia acquired and lost its independence, was a quasi-subject of the Soviet Union's quasi-federation for 70 years, managed to escape the socialist regime and restore its independence. Then, Georgia suffered indirect and unconcealed attacks by Russia and occupation of its territories, endured a military coup, civil war and violent internal conflicts with separatists regimes. The Constitution is the starting point of any legal system and the last, decisive document ... The supremacy of the Constitution as a legal norm must be guaranteed by legal, technical means. As Walter Clark says, The Constitution did not fall from heaven to become the object of fetish and worship (Clark, 1898, p.12). Creating a constitution is an experiment, a test, the result of which will always be different from what was intended and what was expected.

State constitutions are best understood with reference to their historical roots. A review of the history of Georgia's constitutions provides a synopsis of the political, economic, and social history of the state. Georgia's constitutional history also illustrates the various methods by which a constitution may be written or revised.

The first edition of constitution adopted in 1995 consisted of a preamble, 9 chapters and 109 articles. The preamble emphasises the new constitution's high respect for «Georgian nation's centuries-old state traditions and the basic principles of the 1921 Constitution» (Jikia, 2015, p. 19). It can be stated that despite the legal inheritance from the Constitution of the first Republic of Georgia, there are number of alterations made in the 1995 Constitution. Some of the changes took place due to the reality of that period and some due to certain dominant political powers and ideology (Jikia, 2015, p. 20).

Since 1995, Constitution of Georgia was amended several times and all the changes were made after the new Political Power came into force. Therefore, it can be concluded that most changes were made based on Political motives rather than legal perspectives. In this article we will focus on the elaboration and adoption of the Constitution of Georgia.

2. Preconditions for creating the Constitution of Georgia

After Georgia regained its independence, the country operated without constitutional law for several years. (The revised constitution of 1978 was in force during the rule of Zviad Gamsakhurdia), after that the constitution of 1921 was restored, formally the legislation was in force until August 24, 1995, provided that they did not contradict the principles of the constitution of 1921. However, Opinions and interests were influential, while existing contexts and focus on the needs of citizens (or groups of citizens) were hardly heard. The declared position of the government created after the coup to restore the 1921 Constitution was a practically unattainable goal. This was undoubtedly a lucrative political move, however, it was impossible to implement. The 1921 constitution provided a different state arrangement, which is why the decision to create a new constitution was finally made. At the same time, the 1995 constitution was drafted largely under the influence of Eduard Shevardnadze. In the process of drafting the constitution, «the constitution was written and we studied the constitution together, both students and professors». Consequently, the sharing of international experiences played a crucial role. In the process of working on the 1995 constitution, constitutionalists often made direct connections with academia in different countries to take into account the assessments of international experts on the draft constitution. The positive assessments of the international community were crucial in the aftermath of the constitutional reforms.

The process of working on the basic law of the Georgia started in 1993 and took almost two years. The State Constitutional Commission, established in 1993 (Resolution N65 of March 23, 1993), consisted of 118 members, including lawyers as well as public and political figures and, of course, members of parliament. In compiling the list of members of the commission, attention was paid to the fact that the members of the commission included representatives of all factions, territorial units and national minorities. As a result, the State Constitutional Commission consisted of persons with and without a title. This period was going on in an unquenchable wind-fire, there was a turmoil of passions as well. Since the end of March 1993, a large-scale attack was carried out on the capital of Abkhazia, Sukhumi, by our occupying country – Russia. As a result, Sukhumi fell in September 1993 (Babek, 2001, p. 20). Since that, and as a result of the collapse of the Soviet Union, our country is in transition. A common Challenge in developing and transition countries is legal reform which requires good knowledge of legal, political, social and economic conditions of the recipient country. But legal reform alone can do nothing if legal norms are not enforced in practice.

The current Constitution of Georgia was adopted on August 24, 1995. Its adoption can be confidently attributed to the authoritative influence of Andras Sajo, who helped overcome the «Constitutionalism of fear» (Babek, 2012, p. 13). In the 90s, Georgia faced many challenges. It was a period when the sense of the rule of law and consequently the sense of the usefulness of the main law, the constitution, was suppressed and eroded in society when the machine gun and the gunman decided [political] issues and not the constitution and constitutional records. This event showed the public that you can have a constitution that would be turned upside down. Consequently, the Constitution itself is just a

simple sheet of paper. It is crucial that the Constitution is recognized and enforced equally by all citizens today and in the future, which naturally takes a long time.

The process of constructing a free and democratic, European-style system of government founded upon the Rule of Law, began in Georgia during the time of the Democratic Republic (1918–1921). This was embodied through the Constitution of 1921 which, for the first time, recognized certain inalienable human rights and freedoms, including: equality before the law; the abolition of capital punishment; the right to privacy; women's suffrage; the freedoms of expression and assembly; and the rights of ethnic minorities. Additionally, the Constitution ensured other universally recognized rights that were not expressly defined within the text, but could nevertheless be derived from the wide-reaching principles recognized within the constitutional framework. It is precisely these principles that the current Constitution (in effect since 1995) continues to build upon, in order to «recognize and protect universally recognized human rights and freedoms as eternal and supreme values» and ensure «the people and the state shall be bound by these rights and freedoms as directly acting law» (Babek, 2011, p. 24).

The path of independence is the unwavering will of the Georgian people leading to establish a democratic, free state (National Strategy for the Projection of Human Rights in Georgia, 2014–2020). It is also undeniable that the principle of democracy and the rule of law does not have a tradition similar to that of the Western constitutional states in post-communist countries, which is certainly welcome.

Various conferences, seminars were organized by the Secretariat of the Commission in 1993–1995 to study the problems in depth and take into account the experience of other states, and received effective assistance from well-known foreign specialists and the Venice Commission. By the end of 1994, there were 13 drafts of the Constitution of Georgia (Republic of Georgia) in the Constitutional Commission (Lawrence, 1994, p. 21). In addition to the projects prepared by the commission, the following were presented:

- The political organization «Voice of the Nation»;
- National Independence Party of Georgia;
- Tbilisi State University, International Law and Young Constitutionalists of the Faculty of International Relations The group;
- The Republican Party of Georgia;
- Society for the Protection of Workers Interests;
- People's Party of Georgia;
- Georgian Young Front Association Young Lawyers;
- Commercial Bank of Georgia «Aisi»;
- Communist Party of Georgia;
- Union of the Children of God of Georgia;
- Alexander Shushanashvili (initiative project);
- Union of Citizens of Georgia (The beginnings of the constitutional history of Georgia).

The Constitutional Commission (and later the Parliament) worked constructively and coordinated on issues related to constitutional principles, fundamental rights, judicial issues and some other issues, but the debate became heated, sometimes confrontational and irreconcilable when the issue was horizontal (form of government) and Referred to vertical (form of territorial arrangement). On July 2, 1995, by 64 votes versus 4, the State Constitutional Commission adopted the draft constitution, and on June 3, 1995, it decided to submit it to Parliament, thus completing its historic mission. Both forms of state power enacted by the Constitutional Commission proved unacceptable to parliament: first Georgia's territorial «federal principles» were removed from the draft, then (at the suggestion of the Georgian Reformers' Union). At 5:50 pm, the Parliament of Georgia adopted the Constitution of Georgia by 159 votes to 8 (10 deputies did not take part in the voting) in the so-called Imeli building (Adoption, promulgation and amendments of Constitution of Georgia, FAOLEX Database).

On August 29, 1995, when the adoption of the Constitution should have been noted, a loud explosion rocked the area around the Imeli building in central Tbilisi. On this day, Eduard Shevardnadze escaped the first terrorist act against him (Arakelian, Nodia, 2005, p. 8). Despite all the above, on September 17, 1995, members of the State Constitutional Commission and the Parliament of the Republic of Georgia signed the official text of the Constitution in the hall of the Government Palace, where in 1991 the Supreme Council of the Republic of Georgia proclaimed the Act of Restoration of Independence (The beginnings of the constitutional history of Georgia).

3. Confrontational and irreconcilable problems related to the Constitutional principles for the arrangement of the Government

The separation of powers is a set of guidelines for the arrangement and functioning of the state which rules out arbitrariness on the part of the rulers and anarchy on the part of the governed (Demetrashvili, Jibgashvili, Khmaladze, Nalbandov, Ramishvili, Usupashvili, 2005, p. 6). Specific aspects of the doctrine of the separation of powers were much discussed as early as the times of the Greek philosophers. John Locke and Charles Montesquieu developed the notion further, while the legal formalization and institutionalization of the idea is connected to the era of the great revolutions. Since then, almost all non-communist constitutions see the separation of powers as the main principle for arranging the government, though the constitutions of different countries use different versions of this principle. Under the classical model of the separation of powers, power is divided between three branches of government – legislative, executive and judicial. The classical model of separation of pow-

ers, as well as its practical application have undergone certain structural and content-related changes over time. As Andras Sajo said: «There are many different forms of the separation of powers and the formation of the government. Each of them has the right to existence, provided that the ways of limiting freedom are rules out or avoided» (Sajo, 2020).

The main Characteristics of Georgia's government are defined by the Constitution adopted in 1995, namely by:

– The preamble were the people of Georgia express their strong will to establish a democratic social order, economic independence, a social and legal state, to guarantee universally recognized human rights and freedoms;

– The form of political order of Georgia is a democratic republic (Constitution of Georgia, Article 1, 1995);

– The people are the sole source of state power in Georgia. State power is only exercised within the framework of the Constitution. Power is exercised by the people through referenda, through their representatives and through other forms of direct democracy. No individual or group of individuals has the right to seize or unlawfully take state power. State power is exercised and based upon legal state principles;

– The state recognizes and defends universally recognized human rights and freedoms as eternal and supreme values. The people and the state are bound by these rights and freedoms as well as by current legislation for the exercise of state power.

Dozens of articles, dedicated to the implementation of these fundamental provisions, define the model of the government and enable to discuss the branches of the government, the extent of the division and separation of powers and the types and effectiveness of checks and balances.

4. Issues left out

Apart from the issue of territorial arrangement in the 1995 Constitution, there was no issue left out of consideration. The omission of this issue in the constitution was caused by the current situation in the country. While adopting the Constitution in 1995, it was impossible to determine the territorial arrangement and its regulation was postponed for future. Georgia managed to adopt the new Constitution on the 24th of August, 1995 which greatly contributed to the stability of the country. But the Constitution failed to determine the territorial structure of the state. The new Constitution was limited to only a general phrase about this important issue and postponed its regulation for the future. The major reason for this postponement in the future was the situation of that period in the country and the necessity for the adoption of the Constitution. Such decision was the optimal solution to this situation as the new Georgian State was established, the reform process under the Constitution began and at the same time status quo was maintained. The determination of the territorial structure of the state extended for a longer period, which emerged the difficulties in the Country's public and political life. That is why it is essential to start this process in respect to Abkhazia, and generally, the adoption of the substantiated concept on the territorial arrangement by the Government (Lezhava, 2020, p. 457). Nowadays, it is inevitable for the Government of Georgia to determine its position for the problem of Abkhazia as well as the significant question of the future territorial arrangement of the Country. The Constitution of Georgia made the decision in favor of decentralized federation state. This means that the conception of the future territorial arrangement of Georgia shall be based on the principles of the territorial decentralization of the state. On the first stage of decentralization it is recommended to grant the status of administrative territorial units to the regions of Georgia; Abkhazia, as it is the only homeland of the Abkhaz, who have important contribution to the establishment of the Georgian state, should have some special status, different from all others. At the same time, we should take into consideration the experience of other states. The constitutional and legal definition of any territorial model of the state is based on the history, and the political and legal development of this state (Lezhava, 2020, p. 459).

Constitutional law also recognizes a decentralized and centralized federation. The federation can be both symmetrical and asymmetrical also. The subjects of the symmetrical federation enjoy equal rights in relations with the federal government; however, equality is not absolute. In the countries of asymmetric federalism, its subjects have a different constitutional-legal status. In addition to federation subjects (units) with equal rights, there are other territorial units in the Asymmetric Federation. In any case, when choosing a future model of territorial arrangement of Georgia, I consider it inevitable to establish the principle of asymmetry (Gogiashvili, 2020).

Therefore, by taking into consideration the current territorial, ethnic and political problems in Georgia and in regard with the analysis of Articles 3 and 4 of the Constitution, one of the real ways and methods for the problem resolution I consider it inevitable for Georgia to establish the asymmetric principle and should be excluded the typical unitary form from the perspective versions of territorial arrangement of the country (Lezhava, 2020, p. 449).

By starting the discussions on federalism Georgia will start negotiations and find a compromise with regions supporting the decentralization. All this will greatly encourage the negotiation process and support the solution of the problem of our country's territorial integrity (Kublashvili, 2004).

Unfortunately, since 1993, in almost all state constitutional commissions, discussions on issues such as the territorial arrangement of the state, the idea of a bicameral parliament in Georgia, the perspectives of local self-government, etc., have been mercilessly cut short.

The important component of the problem of the general optimal organization of the power is the issue of territorial self-government. The local self-government is based on the subsidiarity principle: the power shall be exercised on that level of authority which is the closest to the citizens. The existence of real self-government requires availability of three main elements:

- Administrative decentralization – transfer to the self-government as much power as it can implement;
- Political decentralization – election of local self-government bodies and granting them the right of independent decision-making within their own terms of reference;
- Fiscal decentralization – providing to the self-government the financial resources necessary for implementation of its authority (Demetrashvili, Demetrashvili, 2021, p. 276).

Historically, the administrative-territorial division of Georgia has represented two levels: first, local level (city, town, village, settlement) and second, regional level (area, district). After disintegration of the Soviet Union, despite radical changes that had place in many spheres of public life of Georgia, the soviet administrative-territorial system has not been practically changed.

As a result, today we have written in the Constitution that we are a united, indivisible state. But we have two autonomies:

– Adjara – based on the national territorial system and self-government principles Adjara shall obtain the powers attributed to the autonomy which shall be – special, delegated by the state, or provided by a separate law.

– Abkhazia and Tskhinvali Region – Abkhazia and former South Ossetian autonomous district shall have special statuses which shall be determined in the process of political solution of the existing problem along with their names.

The issue of active political participation of minorities, including an in-depth discussion of the issue of Adjara autonomy, was associated with separatism and threats. Even the issue of minority political participation has raised fears in both majorities and minorities.

5. Conclusion

Countries around the world have undergone a transformation and emerged as a state governed by the rule of law, with a high legal culture and governed by the rule of law. Despite some progress, this process is quite painful and not infrequently unsuccessful in Georgia. The essential and primary goal of drafting constitutions and political reforms is, for the most part, to seize power, establish inclusive and deliberative mechanisms, and uphold high human rights standards. Unfortunately, however, over the last 30 years, constitutional and political reforms in Georgia have had a greater interest in the redistribution and retention of power by the ruling parties.

Explanations to stay out of the political spotlight often contribute to the rarity of in-depth and thorough discussions in academia and public spaces. In the rarity of such discussions, however, there is a narrow consensus among experts that special and positive mechanisms for the political participation of non-dominant groups are acceptable only in post-war and post-conflict countries. In fact, various studies have shown that the use of such mechanisms is often an essential and proven method of eliminating sharp power asymmetries, inequalities and injustices, regardless of whether there has been any experience of war or conflict in the country.

It is clear that long and inclusive discussions on this issue, including the involvement of non-dominant ethnic groups, would better illustrate the goals of constitutional and political reform on the one hand, and the new dimensions of the challenges of non-dominant groups on the other. However, in parallel with the expulsion of the interests and needs of the majority of the population from the process of political and constitutional reform, the problem of double exclusion of non-dominant ethnic groups is obvious.

To summarize, to date, since the acquisition of independence, a substantial rethinking of the political participation of non-dominant ethnic groups in Georgia has not taken place, despite the formal record of equality in the Constitution. These often reinforce the exclusion of non-dominant ethnic groups in Georgia in the wake of policies of expulsion of the state language and minority languages into administrative administration at all levels of public life, policies of sharply poor and unequal education for non-Georgian students, and divisive discourses.

Bibliography:

1. Adoption, promulgation and amendments of Constitution of Georgia, FAOLEX Database. URL: https://bit.ly/3tBdJ5r.

2. არაკელიან, ა., ნოდია, გ. (2005). კონსტიტუციური პოლიტიკური რეფორმის პროცესი საქართველოში, სომხეთსა და აზერბაიჯანში: პოლიტიკური ელიტა და ხალხის ხმები, თბილისი.

3. **Babek, W.** (2001). *Verfassungsgebung in Georgien, Ergebnisse internationaler rechtlicher Beratung in einem Transformationsstaat*, Berlin.

4. **Babeck, W., Fish, S., Reichenbecher, Z.** (2012). *Rewriting a constitution: Georgia's shift towards Europe, with an introduction by Avtandil Demetrashvili, Chairman of the State Constitutional Commission*, Tbilisi.

5. **Clark, W**. (1898). The Revision of the Constitution of the United States. *American Law Review.* Vol. 32.

6. საქართველოს კონსტიტუცია24/08/1995. https://matsne.gov.ge/ka/ document/view/30346?publication=36.

7. დემეტრაშვილი, ა., ჯიბგაშვილი, ზ., ხმალაძე, ვ., ნალბანდოვი, ა., რამიშვილი, ლ., უსუფაშვილი, დ. (2005 წ.). საქართველოს მთავრობა ცენტრალურ დონეზე: ბალანსი მის ფილიალებს შორის, თბილისი.

8. დემეტრაშვილი, ა., დემეტრაშვილი, ს. (2021 წ.). საქართველოს კონსტიტუციური სამართალი, თბილისი.

9. გოგიაშვილი, გ. (2000 წ.). შედარებითი ფედერალიზმი, გამომცემლობა «ინტელექტი», თბილისი.

10. **Jikia, M.** (2015). Legal and Political Aspects of Constitutional Changes in Georgia, Journal of Constitutional Law, *Association of Research on Constitutional Law*. Vol. 4, Issue 8.

11. **Lawrence, L.** (1994). Compromises on Georgian Constitutional Drafts, Chicago [in English].

12. ლეჟავა, ბ. (2020). მოსაზრებები საქართველოს ტერიტორიული მოწყობის სამომავლო გეგმებზე. პოლიტიკური მეცნიერების ღია ჟურნალი, ტ. 10, № 3.

13. კუბლაშვილი, კ. (2004 წ.). საქართველოს მომავალი ტერიტორიული მოწყობის ძირითადი პრინციპები, სახელმწიფო კონსტიტუციური ორგანიზაცია, გამომცემლობა «მერიდიანი», თბილისი.

14. National Strategy for The Projection of Human Rights in Georgia, 2014–2020. URL: https://bit.ly/3izf72c.

15. 1993 წლის 23 მარტის № 65 დადგენილება სახელმწიფო საკონსტიტუციო კომისიის შექმნის შესახებ.

16. **Sajo, A.** (2020). From Militant Democracy to the Preventive State. URL: https://bit.ly/3usk1TZ.

17. საქართველოს კონსტიტუციური ისტორიის დასაწყისი. URL: https://bit.ly/35aml9Q.

References:

1. Adoption, promulgation and amendments of Constitution of Georgia, FAOLEX Database. Available from: https://bit.ly/3tBdJ5r [in English].

2. **Arakelian A., Nodia G.** (2005). *Constitutional Political Reform Process in Georgia, in Armenia and Azerbaijan: Political Elite and Voices of the People [K'onst'it'utsiuri p'olit'ik'uri repormis p'rotsesi sakartveloshi, somkhetsa da azerbaijanshi: p'olit'ik'uri elit'a da khalkhis khmebi*], Tbilisi [in Georgian].

3. **Babek, W.** (2001). *Verfassungsgebung in Georgien, Ergebnisse internationaler rechtlicher Beratung in einem Transformationsstaat [Constitution-making in Georgia, results of international legal advice in a transition state*]. Berlin [in German].

4. **Babeck, W., Fish, S., Reichenbecher, Z.** (2012). *Rewriting a constitution: Georgia's shift towards Europe, with an introduction by Avtandil Demetrashvili, Chairman of the State Constitutional Commission*, Tbilisi [in English].

5. **Clark, W**. (1898). The Revision of the Constitution of the United States. *American Law Review*. Vol. 32 [in English].

6. Constitution of Georgia [Sakartvelos K'onst'it'utsia], 24/08/1995. https://matsne.gov.ge/ka/document/view/30346?publication=36 [in Georgian].

7. **Demetrashvili, A., Jibgashvili, Z., Khmaladze, V., Nalbandov, A., Ramishvili, L., Usupashvili, D**. (2005). *Government of Georgia on the Central Level: The Balance between its Branches. [Sakartvelos mtavroba tsent'ralur doneze: Balansi mis pilialebs shoris]. Tbilisi* [in Georgian].

8. **Demetrashvili, A., Demetrashvili, S.** (2021). *Constitutional Law of Georgia [Sakartvelos K'onst'it'utsiuri samartali]*. Tbilisi [in Georgian].

9. **Gogiashvili, G.** (2000). Comparative Federalism [Shedarebiti Pederalizmi,]. Publishing House «Intellect», Tbilisi [in Georgian].

10. **Jikia, M.** (2015). Legal and Political Aspects of Constitutional Changes in Georgia, Journal of Constitutional Law, *Association of Research on Constitutional Law*. Vol. 4, Issue 8, [in English].

11. **Lawrence, L.** (1994). Compromises on Georgian Constitutional Drafts, Chicago [in English].

12. **Lezhava, B.** (2020). Considerations on the Future Plans of Territorial Arrangement of Georgia [Mosazrebebi sakartvelos t'erit'oriuli mots'q'obis samomavlo gegmebze]. *Open Journal of Political Science [P'olit'ik'uri metsnierebis ghia zhurnali]*, Vol. 10, № 3. [in Georgian].

13. **Kublashvili, K.** (2004). *Main Principles of Georgian Future Territorial Arrangement [Sakartvelos momavali t'erit'oriuli mots'q'obis dziritadi p'rintsip'ebi]*. State Constitutional Organization. Publishing House «Meridiani», Tbilisi [in Georgian].

14. National Strategy for The Projection of Human Rights in Georgia, 2014–2020. Available from: https://bit.ly/3izf72c [in English].

15. esolution № 65 of March 23, 1993 on the establishment of the State Constitutional Commission [1993 ts'lis 23 mart'is № 65 Dadgenileba sakhelmts'ipo Sak'onst'it'utsio K'omisiis shekmnis shesakheb.] [in Georgian].

16. **Sajo, A.** (2020). From Militant Democracy to the Preventive State. Available from: https://bit.ly/3usk-1TZ [in English].

17. The beginnings of the constitutional history of Georgia [Sakartvelos k'onst'it'utsiuri ist'oriis dasats'q'is]. Available from: https://bit.ly/35aml9Q [in Georgian].

ІНКЛЮЗИВНІСТЬ ПРОЦЕСУ СТВОРЕННЯ КОНСТИТУЦІЇ В ГРУЗІЇ

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Анотація

Створити найкращу і найповнішу конституцію дуже важко і практично неможливо. Конституція – це документ, створений людьми, а не богами, і як і його творці, сам цей документ не може бути ідеальним. У світі є конституції, які прийнято недемократично, але немає авторитарних конституцій, прийнятих демократично. Однак умови розробки та прийняття Конституції можуть мати великий вплив на зміст Конституції.

Конституція – правовий акт або сукупність правових актів, прийнятих вищим органом державної влади або шляхом референдуму, має вищу юридичну силу і регулює основи організації суспільства і держави, основні принципи взаємовідносин особи, і держава. І сама концепція Конституції, і історія її розвитку яскраво свідчать про її особливе значення у збереженні та розвитку держави і суспільства.

Метою представленої статті є огляд процесу створення Конституції в Грузії, дослідження основних особливостей і перешкод під час процесу та аналіз результатів, які безпосередньо впливають на політичний, економічний і соціальний розвиток держави.

Основна методологія, яка використовується під час дослідження, – це доктринальне дослідження з використанням історичного та правового аналізу ситуації в 1990-х роках у Грузії, викликів, які постали перед Грузією після здобуття незалежності, а також фундаментальної основи та умов для подальшого розвитку грузинського конституціоналізму.

На основі дослідження автори визначили основні питання, які залишилися поза увагою змісту конституції, які є не лише важливими для демократичних держав, а й мають основний вплив на формування демократичного врядування в країні. Одним із згаданих питань є визначення територіального устрою, що є життєво важливим для Грузії. Заключна частина статті зосереджена на кроках, які слід вжити для обговорення питань, що стосуються територіальної структури, включаючи різні етнічні групи в дебатах для вирішення поточних питань, які залишаються поза увагою, але які є важливими в рамках конституції.

Ключові слова: Грузія, конституція, адміністративний поділ держави, перехідна демократія, країни, що розвиваються.

SECTION 3

CONSTITUTIONAL AND LEGAL PRINCIPLES OF ORGANIZATION OF ACTIVITY OF STATE AUTHORITIES AND LOCAL GOVERNMENT

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UKRAINE – A CANDIDATE FOR JOINING THE EU: CURRENT CHALLENGES OF THE COURT SYSTEM

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Summary

Purpose. The scientific article is devoted to the study of the current state of the judicial system in the conditions of martial law, as well as the analysis of the challenges of the judicial system in connection with Ukraine's acquisition of the status of a candidate for EU accession.

Research methods. The methodological basis of the scientific article is a complex of general scientific and special scientific methods of cognition, the application of which made it possible to reveal the essence of the proposed problem. The method of analysis and synthesis, modeling, axiomatic and systematic methods of scientific knowledge was used.

Results and conclusions. Today, in the conditions of the military invasion of Russia, the judicial system of Ukraine has the following features. Among them are the following: in settlements where court buildings have already been destroyed or hostilities are still ongoing, the implementation of judicial proceedings has become impossible (this problem was partially solved by changing territorial jurisdiction, creating «back-up copies» of documents in court cases, holding court sessions in a remote format); the judicial system still receives funding, and 50% of the judges' salaries are given to the needs of the Armed Forces, however, there are no special funds with capital investments for construction/repair/restoration; there is a problem with the evacuation of judges from temporarily occupied territories; there are isolated cases of collaborators among the representatives of the judicial corps. Among other things, with regard to the judicial system as a whole: there is a problem of excessive workload of judges, which results in rather long proceedings; and the considerable length of tender procedures is also a problem.

Most recently, Ukraine received the status of a candidate for EU membership. However, it should be understood that in order to obtain full membership, maximum efforts should be made to meet European standards. The judicial system should also be properly modernized, first of all, in the aspect of strengthening the independence of judges, eliminating corruption, as well as strengthening the trust of Ukrainian society and the international community in the judicial system of Ukraine as a whole. Ukraine must become attractive for investors, and this is impossible if there are concerns about the existence of conditions for the proper implementation of the right of business to judicial protection, as well as consideration of the case by a competent court in a reasonable time.

Key words: judicial system, martial law, Ukraine, EU, Supreme Council of Justice, Ethics Council, Constitutional Court of Ukraine.

1. Introduction

Our latest judicial reform began in 2016 in connection with the introduction of amendments to the Constitution of Ukraine in the area of justice and the adoption of the qualitatively new Law of Ukraine «On the Judicial System and the Status of Judges» in the same year. Today, in the conditions of the military invasion of Russia, the judicial system of Ukraine has the following features. Among them are:

1) In settlements where court buildings have already been destroyed, or hostilities are still ongoing, the administration of justice is impossible. This problem was partially solved by changing the territorial jurisdiction. Therefore, despite the war, the judicial system today works and is actually located in those settlements where there are no hostilities. The Unified Register of Court Decisions functions properly, thanks to which the materials of court cases are stored in electronic form. Also, «backup copies» of such materials were created, and, in fact, according to the authorities, the server is safe. Again, there are no difficulties with conducting court hearings in a remote format.

2) Despite the consequences of the military invasion, the judicial system still receives funding, and 50% of the judges' salaries are given to the needs of the Armed Forces. However, again, there are no special funds with capital investment for construction/repair/restoration.

3) There is a problem with the evacuation of judges from temporarily occupied territories. Now this issue is being actively resolved, along with other, no less important problems. Of course, many judges and their families still managed to evacuate.

4) Unfortunately, among the representatives of the judicial corps there are isolated cases of collaborators. Relevant bodies are working to bring them to justice – counterintelligence, SBU, prosecutor's office.

5) Judges are subject to mobilization, they do not have armor. As of today, more than 150 judges and employees of the court apparatus have been mobilized to the Armed Forces, and more than 70 people are in the ranks of the territorial defense (Smyrnov A., 2022).

Among other things, with regard to the judicial system as a whole: there is a problem of excessive workload of judges, which results in rather long proceedings; and also the problem is the considerable length of tender procedures.

We would also like to separately note that «The State Judicial Administration of Ukraine together with the EU Project «Law-Justice» launched a joint special project «Courts in conditions of war» (2022). Information about courts under occupation, memories of judges and court staff, information about assistance, volunteering, stories of resistance, losses and achievements will be published on the website of the State Security Service of Ukraine in the section «Work of courts in wartime». Such an idea is supported in society, we must remember our difficult and thorny path to victory.

2. Requirements of the European Commission to Ukraine

Most recently, Ukraine received the status of a candidate for EU membership. However, it should be understood that in order to obtain full membership, one should do a lot of work, make maximum efforts in order to meet European standards. Of course, the judicial system should also be properly modernized, first of all, in the aspect of strengthening the independence of judges, eliminating corruption, as well as strengthening the trust of Ukrainian society and the international community in the judicial system of Ukraine as a whole.

A number of important requirements are demanded from Ukraine: reform of the KSU; judicial reform; anti-corruption reform; implementation of the anti-oligarchic law; amendments to the legislation on national minorities; fight against money laundering, etc.

Ukraine is already preparing a so-called «road map» for the implementation of such requirements. We have every chance to implement the recommendations given to us quickly and efficiently. For example, such countries as Slovakia and Finland, which had similar problems as ours, were able to fulfill similar requirements in 3 years. At the end of 2022, the European Commission must provide a conclusion on whether we have coped with all the tasks set before us.

The restart of the High Qualification Commission of Judges, the High Council of Justice, and eventually the Constitutional Court of Ukraine is being prepared. The last challenge, as of today, from the point of view of modern analysts, is the most serious (Kolomiiets, 2022).

3. Directions of reforming the Supreme Council of Justice

Regarding the Supreme Council of Justice, it should be noted that in July 2021, the Verkhovna Rada of Ukraine amended the law «On the Supreme Council of Justice», which created a new independent body – the Ethics Council, which should assess the integrity of all candidates for the Supreme Council of Justice, and must also conduct a one-time evaluation of all current members of the VRP for their compliance with the criteria of professional ethics and integrity. Despite the state of war and the unstable situation in the country due to the aggression of the Russian Federation, the Ethics Council has already conducted interviews with current members of the VRP, and also continued conducting interviews with

candidates for additional staffing of the VRP to the authorized composition. Further, the Ethics Council can recommend to the subjects of appointment – the President, the Verkhovna Rada and congresses of judges, lawyers, scientists, prosecutors – to appoint 10 or more members of the 33 candidates to the VRP. The appointment of exactly 10 candidates for the positions of members of the VRP will make the body authoritative and unblock the procedures for dismissal, removal of judges and consideration of disciplinary complaints. For this, the law should be amended to allow appointing entities to appoint all candidates recommended by the Ethics Council to all available vacant positions during martial law.

Such an order will fully comply with the Constitution of Ukraine and the goal of judicial reform: only honest candidates recommended by the Ethics Council will be included in the Supreme Administrative Court, which will ensure the effectiveness of the initiated judicial reform, which is important for the successful European integration of Ukraine (Danylenko, 2022).

4. Procedure for competitive selection of judges of the Constitutional Court of Ukraine

In accordance with the norms of the current legislation, judges of the Constitutional Court of Ukraine are appointed by the president, the parliament and the congress of judges. Although the Constitution stipulates that the selection of judges of the Constitutional Court takes place on a competitive basis, the procedure currently prescribed in the law does not provide for a real competition. Each subject of appointment formally conducts its own «competitions», which, however, do not ensure verification of candidates for compliance with the requirements of the Constitution and do not guarantee that the best candidate will become a judge of the KSU. The current procedure allows for the appointment of politically dependent persons who, being judges of the Constitutional Court, instead of protecting the Constitution and human rights, protect the interests of their political patrons, therefore the procedure for selecting judges must be changed immediately. The following changes are planned:

1) Delegation of candidates and formation of the composition of the Court by the assembly of retired judges of the first composition of the Court and international organizations is proposed.

2) The list of candidates, in turn, will be formed by the qualification committee on the basis of the competition committee. This list will be updated every year.

3) The President of Ukraine, the Parliament and the Congress of Judges appoint candidates from the list.

4) Judges of the Constitutional Court of Ukraine will be directly elected by two-thirds of the votes of the Unified Qualification Commission, regardless of who appoints the candidate from the list.

Requirements for the qualification commission: 9 members, citizens of Ukraine, compliance with all the requirements of a KSU judge except for age. The first composition is approved by the Meeting of retired judges of the first composition of the KSU (appointed by judges in 1996), except for those who are members of political parties, have a representative mandate or hold a public service position; in the future, the Qualification Commission will appoint its members independently according to the principle of co-optation – «introduction of new members (or candidates) to any elected body without holding additional elections» (Akademichnyi tlumachnyi slovnyk, 2022).

Competition for the Constitutional Court of Ukraine will take place at least once a year, regardless of the availability of vacancies; the qualification commission will approve the list of candidates whom the president, the parliament and the congress of judges will be able to appoint as judges of the Constitutional Court of Ukraine; a candidate recommended by the Qualification Commission is on the list of candidates for 5 years and can be appointed a judge during this period; after the expiration of the term, he can take part in the competition again (Prozora protsedura pryznachennia suddiv Konstytutsiinoho Sudu, 2022).

5. Conclusions

Finally, we note that Ukraine must meet the key Copenhagen criteria to join the EU. These are three permanent categories – democracy, rule of law and market economy (Kolomiiets, 2022). Ukraine must become attractive for investors, and this is impossible if there are concerns about the existence of conditions for the proper implementation of the right of business to judicial protection, as well as consideration of the case by a competent court in a reasonable time.

Bibliography:

1. **Смирнов, А.** (2022). Як працює судова система в умовах війни? URL: https://www.dw.com/uk/yak-pratsiuie-sudova-systema-ukrainy-v-umovakh-viiny/a-61294651.

2. Робота судів в умовах війни – спецпроєкт «Право-Justice» та ДСА України (2022). Пресслужба ДСА України. URL: https://dsa.court.gov.ua/dsa/pres-centr/news/1281410/.

3. **Коломієць, Д.** (2022). Україна — ЄС: що ми маємо зробити у статусі кандидата і коли можливий вступ в Євросоюз. URL: https://suspilne.media/253476-ukraina-es-so-mi-maemo-zrobiti-u-statusi-kandidata-i-koli-mozlivij-vstup-v-evrosouz/.

4. **Даниленко, Т.** (2022). Вступ до ЄС: яких змін у судовій системі очікують від України І як створити ефективний захист прав та свобод громадян. URL: https://mind.ua/openmind/20243458-vstup-do-es-yakih-zmin-u-sudovij-sistemi-ochikuyut-vid-ukrayini.

5. Кооптація. Академічний тлумачний словник. (2022). URL: http://sum.in.ua/s/kooptacija.

6. Прозора процедура призначення суддів Конституційного Суду. (2022). URL: https://dejure.foundation/prozora-protsedura-pryznachennia-suddiv-ksu.

References:

1. **Smyrnov, A.** (2022). Yak pratsiuie sudova systema v umovakh viiny? [How does the judicial system work in wartime?]. Available from: https://www.dw.com/uk/yak-pratsiuie-sudova-systema-ukrainy-v-umovakh-viiny/a-61294651 [in Ukrainian].

2. Robota sudiv v umovakh viiny – spetsproiekt «Pravo-Justice» ta DSA Ukrainy [The work of courts in conditions of war – a special project of «Pravo-Justice» and the State Security Service of Ukraine]. (2022)/ Pressluzhba DSA Ukrainy. Available from: https://dsa.court.gov.ua/dsa/prescentr/news/1281410/ [in Ukrainian].

3. **Kolomiiets, D.** (2022). Ukraina – EU: shcho my maiemo zrobyty u statusi kandydata i koly mozhlyvyi vstup v Yevrosoiuz [Ukraine – EU: what we should do in the status of a candidate and when accession to the European Union is possible]. Available from: https://suspilne.media/253476-ukraina-es-so-mi-maemo-zrobiti-u-statusi-kandidata-i-koli-mozlivij-vstup-v-evrosouz/ [in Ukrainian].

4. **Danylenko, T.** (2022). Vstup do YeS: yakykh zmin u sudovii systemi ochikuiut vid Ukrainy I yak stvoryty efektyvnyi zakhyst prav ta svobod hromadian [Joining the EU: what changes in the judicial system are expected from Ukraine and how to create effective protection of the rights and freedoms of citizens]. Available from: https://mind.ua/openmind/20243458-vstup-do-es-yakih-zmin-u-sudovij-sistemi-ochikuyut-vid-ukrayini [in Ukrainian].

5. Kooptatsiia. Akademichnyi tlumachnyi slovnyk. [Co-optation. Academic explanatory dictionary] (2022). Available from http://sum.in.ua/s/kooptacija [in Ukrainian].

6. Prozora protsedura pryznachennia suddiv Konstytutsiinoho Sudu. [A transparent procedure for appointing judges of the Constitutional Court] (2022). Available from: https://dejure.foundation/prozora-protsedura-pryznachennia-suddiv-ksu [in Ukrainian].

УКРАЇНА – КАНДИДАТ НА ВСТУП ДО ЄС: АКТУАЛЬНІ ВИКЛИКИ СУДОВОЇ СИСТЕМИ

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Анотація

Мета. Наукова стаття присвячена дослідженню сучасного стану роботи судової системи в умовах воєнного стану, а також аналізу викликів судової системи у зв'язку із набуттям Україною статусу кандидата на вступ до ЄС.

Методи дослідження. Методологічною основою наукової статті є комплекс загально-наукових та спеціально-наукових методів пізнання, застосування яких дозволило розкрити сутність запропонованої проблематики. Було використано метод аналізу та синтезу, моделювання, аксіоматичний та системний методи наукового пізнання.

Результати та висновки. Сьогодні в умовах військового вторгнення росії судова система України має свої особливості. Серед них такі: у населених пунктах, де судові будівлі уже знищено, або ще тривають бойові дії, унеможливлене здійснення судочинства (цю проблему було частково вирішено шляхом зміни територіальної підсудності, створення «бекап-копій» документів судових справ, проведення судових засідань у дистанційному форматі); судова система все ж отримує фінансування, а з заробітних плат суддів віддають 50% на потреби ЗСУ, однак, жодних спеціальних фондів з капітальними інвестиціями на будівництво/ремонт/відновлення немає; є проблема з евакуацією суддів з тимчасово окупованих територій; серед представників суддівського корпусу є одиничні випадки колаборантів. Серед іншого, щодо судової системи в цілому: є проблема надмірної завантаженості суддів, що має своїм наслідком досить тривалий розгляд справ; також проблемою є значна тривалість конкурсних процедур.

Зовсім нещодавно Україна отримала статус кандидата на вступ до ЄС. Однак, слід розуміти, що для того, аби отримати повноправне членство, слід прикласти максимально зусиль для того, аби відповідати європейським стандартам. Судова система теж повинна бути належним чином модернізована, у першу чергу, в аспекті посилення незалежності суддів, ліквідації корупції, а також зміцнення довіри українського суспільства та міжнародного товариства до судової системи України в цілому. Україна повинна стати привабливою для інвесторів, а це є неможливим, якщо будуть побоювання щодо наявності умов для належної реалізації права бізнесу на судовий захист, а також розгляду справи компетентним судом у розумні строки.

Ключові слова: судова система, воєнний стан, Україна, ЄС, Вища рада правосуддя, Етична рада, Конституційний Суд України.

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MODELS OF THE BAR`S INSTITUTE ORGANIZATION IN EUROPEAN UNION AND CENTRAL ASIA: A COMPARATIVE LEGAL STUDY

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Summary.

This article aims to reveal the main models of implementation of the bar in the European Union and Central Asia. As some of European Union's neighboring countries are about to embark on EU accession negotiations, they are looking to reform their justice systems to align them with EU standards.

The article provides a comparative legal characteristic of the organization models of the advocate self-government bodies in the European Union and Central Asia countries from the point of view of compliance with international standards of Bar's independence. The authors have identified typical violations of the independence of lawyers' self-government bodies by the executive bodies of state power in Central Asian countries, shown the degree of their influence on protecting human rights and freedoms, and formulated recommendations aimed at overcoming existing violations'.

Advocate self-government should be considered as a manifestation of the principle of independence of the Bar. Since the definition of «independence» is used in a narrow legal sense, it should be understood exclusively as a known measure of legal freedom, free discretion in actions within the boundaries outlined by law. With regard to the Bar, the term «independence» should be interpreted in the context of Recommendations Rec (2000) 21 to the Committee of Ministers to member states on the freedom of exercise of the profession of a lawyer as «freedom of the profession from any undue restrictions, influences, pressure, threats or interference, direct or indirect, from any side or for any reason.

By «independence of the Bar» we mean such a legal status of the bodies of the advocates' community, established by law, which allows them to autonomously and independently from improper interference solve issues of their internal organization, as well as other tasks defined in the law, that is, to exercise self-government.

Key words. Organization of the Bar, self-government models of the Bar, independence of the Bar, the Bar of the European Union, the Bar of the Central Asian countries, guarantees of advocacy, international standards of the profession of advocate

1. Introduction

The independence and self-regulation of advocates are essential in ensuring the rule of law in any jurisdiction. The advocacy has guarantees of independence in every democratic state governed by the rule of law. The 1990 UN Principles on the Role of Lawyers, the Charter of Core Principles of the European Legal Profession, the Code of Conduct for European Lawyers, and other international documents declare the legal profession's independence and self-government as defining values. Although advocacy in the modern world is carried out on the principle of self-organization of advocates and advocacy communities, there are few countries in the world where advocates are fully self-regulating without any supervision, guidance, or restrictions from other sources, such as the executive, legislative or judicial branches of government. In legal theory, the question of the most acceptable forms of organization of the advocacy is highly controversial.

History has proven that law and lawyers (law and lawyer) become the most important element for a society, in any part of the world where the community is located. The public is unlikely to be able to live well without the presence of law and lawyer. Advocates are a noble, noble and honorable profession (officium nobile), in carrying out their professional duties, advocates must hold fast to the laws and codes of ethics of advocates (Nuna M., Kodai D.A., Moonti R.M., 2020).

2. Theoretical framework or Literature Review

In legal theory, the question of the most acceptable forms of organization of the legal profession is very controversial. A lot of works have been devoted to the problems of the organization and activities of the Institute of the Bar, including in the EU countries, in particular, by such scientists as: A. Boon, N. Bakayanova, T. Vilchyk, Alice Woolley, A. Dekhanov, S. Kucherov, A. Ragulin, Roger Smith, Rene Kassen, M. Kiku, M. Kuzins, F. Reagan, I. Yartykh, etc.

However, a special comparative legal study, which would be devoted to the study of the organization of lawyers' self-government bodies in European and Central Asian countries, has not been carried out at present. Therefore, based on the above, this topic of the article seems relevant and original.

3. Methodology

The material used for the scientific research was international documents, national legislation of the countries of the European Union and Central Asia, including the new strategy in relations with the countries of Central Asia, adopted by the Council of the European Union, as well as the researches of scientists involved in the organization and activities of the Bar, its relationships with government agencies, the principles of its organization and activities. The article uses comparative legal, historical, analytical, statistical and other methods of scientific research.

4. Results and discussion

One of the basic, necessary elements of the legal status of an advocate is the guarantees of his professional activity. In legal literature, they are considered as a means of effectively exercising the powers of the lawyer, since «whatever amount of rights, even the largest, would be possessed by a particular participant in the process, without the corresponding guarantees, it will be just a declaration» (V. Zaborovskyy, S. Buletsa, Y. Bysaga, V. Manzyuk, 2020).

According to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana in 1990, lawyers have the right to form and be members of independent professional associations that represent and defend their interests, and contribute to their continuing education and training. Professional organizations of advocates have broad powers and often take an active part in the regulation of advocacy and the implementation of state policy in the field of protecting the rights and legitimate interests of the individual. However, it is not enough to fulfill an important condition for the correct organizational design of the Bar's institution, no less important is the issue of real ensuring the independence of the self-government body from state authorities and persons performing executive and administrative functions. The legal profession's independence is a fundamental principle characterizing the legal nature and status of the advocacy, enshrined in the legislation of many countries, constituting the foundation of the rule of law, the main guarantee of the observance and protection of human rights. The Council of the European Union (EU) has approved a new strategy for relations with the countries of Central Asia. The framework for EU relations with the region depends, inter alia, on their willingness to reform, strengthen democracy, human rights, the rule of law, and the independence of the courts.

The fulfillment of these conditions is impossible without improving the organization and activities of bodies designed to protect human rights, among which the Bar occupies the central place.

It should be noted that the advocate profession is characterized by a lower degree of formalization a nd normative assignment of the form of expression in a legal case and regulation of conduct, especially

its moral and ethical component, as well as relative independence and independence from state policy, than, for example, in the case of a judge, prosecutor or investigator. This specificity of the activity of the studied specialty may give rise to a feeling of permissiveness and impunity among its representatives, who are not distinguished by law – abiding and stability of moral principles and, accordingly, lead to professional deformations (Grammatikov V., 2020).

5. Terminology issues

First of all, it is necessary to address the terminological issues of the research topic. By «organization of the institution of the Bar,» we mean the legal and organizational structure of the Bar, created for the effective implementation of the tasks assigned to it. With the help of organizational structures, both the advocates' activity itself is carried out directly, and legal, social, and other guarantees of this activity are provided, including the protection of advocates from illegal actions and interference in the Bar's activities by the state. The organizational structure (system) of the institute of the Bar, in turn, means the totality of self-government bodies, advocates' formations, public associations of advocates, and diverse connections between them, ensuring the integrity of the Bar as a human rights institution, the preservation of its fundamental characteristics under various internal and external changes (Vilchyk T.B., 2015).

The essence of professional self-government lies in the fact that advocates do not have any outside power over themselves and are subject only to the single will of their professional class and the advocacy profession's rules. That becomes possible only after the creation of the Bar as a separate and self-governing human rights organization (Paniiko Yu., 2002).

Self-government in explanatory dictionaries means «the independence of any organized social community in the management of its own affairs». If «independence of an advocate» means the ability of a lawyer to freely, at his own discretion, based on his inner conviction and within the limits of his authority, to provide professional legal assistance to his client, then by self-government in the bodies of the Bar we propose to understand such a form of organization of its activities that allows to freely at its own discretion and within the limits of its powers granted by law, to manage its own business.

6. Interaction of the Bar with state institutions

As noted in the Basic Principles on the Role of Lawyers adopted by the Eighth UN Congress, regardless of their structure, Bar associations should be institutionally independent of government, other executive authorities, and external sources of influence, and such independence should be protected both at the level of law and in practice. The Singhvi Declaration states that professional self-government bodies must have not only a well-developed structure but also sufficient powers, which must be effectively implemented in such a way as to ensure the independence of the legal profession, uphold the honor, dignity, high moral qualities, competence, ethics and norms of behavior of advocates, as well as to protect their role in society (paragraph 99).

The Bar's independence is determined not only by its ability to resolve internal issues independently but also by the nature of relations with state institutions. The Bar's independence is a state of balance between the interests of this institution and the state, corresponding to the highest constitutional value – ensuring human rights. This independence can be limited only in the interests of adequate performance of professional duty by an advocate and in the interests of justice within limits arising from the principles of professional ethics and procedural legislation (Vilchyk T.B., 2014).

However, the principle of the independence of the Bar provided by law usually does not have an unambiguously understood normative consolidation in terms of the delineation of powers to manage the advocacy between the state and the Bar and makes it possible to change and/or apply the law arbitrarily (Pospelov O.V., 2008). Moreover, the Bar cannot be absolutely independent and has never been so in view of the fact that the most important mechanism of external control of the Bar by the state is its inalienable right to create a legislative framework that advocates, advocates' formations and corporate governance bodies are obliged to observe.

According to Yale University professor, attorney Alice Woolley, there is no crucial problem with state interference in advocates' activities; the only problem is that this state intervention is of a unique nature. Analyzing the work of advocates' associations, the author points out that the latter exercise the powers provided by law and are subject to judicial control if they exceed these powers. Also, advocates are subject to obligations arising from other rules provided for by law, as well as court decisions.

It should be noted that the problems of interaction between the Bar and the state or the so-called «theory of management of the Bar« are insufficiently studied in modern science. Scientists note the dual nature of this management – corporate (self-government) and state (Yartykh, I. S., 2007). The authors mainly devote their research to the role and importance of the Bar in the judiciary (Vilchyk T., 2018). We noted in our works that, based on the legal nature of the Bar, the status of an advocate as a litigation participant and an integral part of the administration of justice, the primary duty of an advocate is to assist in the administration of justice. To carry out its functions, the Bar must have the same independence as the judiciary, which is vital for the fair administration of justice, the strengthening of democracy, and the rule of law.

Bar as a professional institution best meets the needs of society to secure the right to legal aid under international standards. However, the improvement of the legal aid sphere should not lead to a narrowing ofthe

institution of representation as such and the personal involvement of legal persons in court cases (Bakaianova N., Svyda O., Demenchuk M., Dzhaburiya O., Fomina O., 2019).

Historical experience shows that the Bar has been under state control for a long time. And now, the rudiments of state guardianship have been preserved in most countries of the world. They are also typical (in terms of recruiting the Bar, control of disciplinary practice) also for Western democracies. Thus, the state executive and judicial authorities of the European Union's leading states (France, Germany, etc.) usually have significant powers to control the formation of Bar associations, their disciplinary and even fee-based practice. In the EU countries, this control is external in nature and presupposes a certain state intervention in the internal affairs of Bar's self-government bodies (Dekhanov S.A., 2011). As for the organization of the legal profession on the territory of the post-Soviet space, as evidenced by the historical experience, the legislators of 1864 had to consult foreign patterns for the creation of the new institution, the bar. Two different systems of representation function in Western Europe: one is used in England, France, and Belgium, the other in Germany and Austria (Kucherov S., 1956).

Simultaneously, the organizational unity of advocates is essential not only from the perspective of public control over their activities but also from the point of view of protecting their professional interests. After all, it is no secret that in the face of a clash of economic interests, political opponents' interests, the advocates who represent them also become targets for pressure. In such a situation, «United we stand, divided we fall" and only a professional corporation of advocates can protect the interests of an advocate» (Dekhanov S.A., 2010). Back in 1902, M. Vinaver noted that «the independence of the Bar will always be a refuge for every citizen against anger and assault by the authorities, against unjust persecution. Everything can be feared when it is destroyed; nothing is scary if it holds on and knows how to instill respect» (Vinaver M.M., 1902).

7. Models of advocates self-government in the European Union countries

The Bar Corporation provides a clear example of self-government. In the countries of the European Union, as we noted in our previous works, there are various models for organizing the self-government of the Bar. The most common is the classical model, in which membership in the Bar is associated with membership of the Bar Chamber. Such a structure operates on the basis of the principle of corporate governance, under which part of the powers of a member of the chamber is delegated to management bodies. The activities of advocates are carried out on the basis of the charter of the organization, membership in which, and payment of membership fees are mandatory. A person who is not a member of a professional organization of advocates does not have the right to practice as an advocate. This model is followed by Spain, the Netherlands, Belgium, France, Italy, Greece. The second model is characterized by the fact that chambers are formed on a territorial basis and unite all advocates included in the list on the territory of a particular federal state. The jurisdiction of each chamber of advocates extends to the territory of the federal state for which this chamber was founded, as well as to all advocates included in the list of this chamber of advocates. Austria is a typical example of this model. The self-government of the Bar in Germany includes the mandatory features of both models.

The next model provides for self-government of the Bar through associations and unions. For example, the Bar Association in Sweden, the Bar Association in Switzerland. The fourth model assumes the implementation of management through judicial Inns, the last one – management with the legal community's help (Great Britain). Switzerland (Bar Association), Sweden (Bar Association) can also be referred to this model with certain reservations. All these models, except for the model that provides for the self-government of the Bar through associations and unions, are united by the fact that membership in the chamber, collegium, judicial Inna is mandatory.

Depending on the number of professional advocates' organizations, the model of a single professional organization and several professional organizations' model should be distinguished. The most widespread and popular model is the one professional organization model. In small countries, there is one national organization of advocates; in large countries, the structure of bar associations includes local (regional) associations. The list of countries with the model of a single professional organization includes Cyprus, Turkey, Sweden.

The membership in the bodies of advocate self-government can be both voluntary and generally obligatory, and in some countries, there is a combination of these two principles (for example, Germany). By the nature of the functioning of self-government bodies and the degree of separation of powers between the Bar and the state, we single out the etatist model and the model of a self-governing corporation with elements of state control (Anisimov V., Kudrina Ye., 2017). The etatist model assumes that the Bar is part of the state apparatus. Thus, the Norwegian Bar Association is not a self-governing corporation. The management and supervision of advocacy in Norway is carried out by a special government body (Advocate Licence Committee), and the Ministry of Justice has the final say on the revocation of licenses.

The chambers of advocates in Austria and Germany are merged into the Federal Chambers of Advocates, which, being corporations of public law, act as a body of indirect state administration since control over the activities of the advocates' corps in Germany is carried out directly by the state represented by the executive bod-

ies. The main body of advocates' self-government in the Austrian Chamber is the Plenary Session of the members of the Chamber. The main functions of the Chamber of advocates are representation, protection of the professional, social, and economic interests of advocates who are in the register of the Chamber of advocates. Of particular interest are such functions of the Committee as submitting legislative proposals and opinions on bills, reports on the state of justice, as well as on shortcomings and proposals related to justice on the territory of the federal state, for which the Bar Association was established (Anisimov V., Kudrina Ye., 2017).

There are two types of advocates' associations in Germany: The Federal Bar Association (Bundesrechtsanwaltskammer) and the German Bar Association (Deutscher Anwaltverein). Regional chambers of advocates (regionale Rechtsanwaltskammer) are the backbone of advocates' self-government in Germany. Each advocate is mandatory a member of one of them. The German Bar Association (Deutscher Anwaltverein – DAV) is, in contrast to the Federal Chamber of Advocates, a voluntary professional association

Thus, in Germany, there is a combination of compulsory and voluntary membership in the Bar. The advocacy in Germany is based on a combination of state control (represented by the Ministry of Justice and the Supreme Land Courts) over advocacy with the self-government of bar associations in chambers that have such self-governing bodies as the board, presidium, and General meeting of members of the chamber (Berufsrecht der Anwaltschaft).

Like other European countries, the Bar in the Republic of France is based on a combination of state control functions (represented by the Supreme Courts) over advocacy with an apparent organizational coherence of advocates within each collegium. The Italian Bar acts under the control of state bodies (represented by the Ministry of Justice, higher courts) in the form of a self-governing corporation with developed centralized structures and the only self-government bodies: The Council of the Order and the General Meeting of Members (G. Vitiello, 2004).

By the nature of the legal regulation of the organizational and functional foundations of self-regulatory advocates' organizations, a public law model of a advocates' corporation and a private law model of a advocates' corporation are distinguished. The countries of the public law model are Germany, Austria, the Netherlands, and others.

8. Models of advocates self-government in Central Asian countries

Two models of bar management in Central Asian countries should be distinguished. The first model is the classic one, in which membership in the Bar's bodies is associated with membership in the Chamber of Advocates. Such a structure is based on corporate governance principles, where the members themselves are the source of rights and powers, some of which they delegate to the advocates' management bodies. A person who is not a member of a professional organization of advocates cannot obtain the right to practice law. The Republic of Uzbekistan adheres to this model.

According to the legislation of the Republic of Uzbekistan, the Bar is a legal institution that includes independent, voluntary, professional associations of persons engaged in advocacy and individuals engaged in private advocacy. As follows from the Uzbek legislator's definition, the Bar includes both associations of advocates and advocates themselves. In its content, this definition is close to the doctrinal definitions of the institution of the Bar in Europe, where the term Bar covers both all persons recognized as advocates under the laws of this country and an organization of advocates that has a legal basis and its own competence (Dekhanov S.A., 2010).

The second model is characterized by the fact that membership in the bar is associated with compulsory membership in the bar association. At the same time, the bar performs a double role. On the one hand, it is the governing body (self-government) of the advocacy. On the other hand, it is an organizational and legal form of advocacy. This model is followed by the Republics of Turkmenistan, Tajikistan, and Kazakhstan. Thus, the Union of Advocates of the Republic of Tajikistan is a single, independent, non-governmental and non-profit professional organization based on the compulsory membership of advocates of the Republic of Tajikistan (Articles 1, 37 of the Law of the Republic of Tajikistan «On the Bar and advocacy»).

Usually, the main body of advocate self-government in Central Asian countries is the collegial body (Congress, Association, Council, Collegium, Committee). The bar of the Kyrgyz Republic occupies a unique position. The current law on the advocacy of the Kyrgyz Republic does not envisage either a collegium of advocates or a chamber of advocates as a self-governing body of the advocacy and, consequently, the creation and functioning of a unified bar association. Following Article 5 of the Law «On the Bar of the Kyrgyz Republic and Advocacy» of 2014, there are only two governing bodies: The Congress of Advocates and the Council of Advocates, as well as commissions (audit, qualification). In general, characterizing the Law adopted in 2014, it should be noted that it raised the status of the advocate's community, giving it independence and at the same time established the civil liability of advocates, including to persons whom they provide legal assistance.

The unified system of self-government of the Bar in the Republic of Uzbekistan is formed by the Chamber of Advocates along with its territorial departments, which is a non-profit organization based on the compulsory membership of all advocates of the Republic of Uzbekistan (Article 121 of the Law «On the Bar»). At the same time, a license to acquire the status of an advocate in Uzbekistan is issued by the Ministry of Justice

of the Republic on the basis of decisions of the relevant qualification commissions (Article 31 of the Law).

As for the maintenance of registers of advocates and advocates' associations, then, as in the EU countries, in Central Asia such registers are usually operated by the bodies of advocates' associations (for example, the bar associations – in France, Spain, Italy, Czech Republic, Hungary, Sweden, Finland, the Republic of Uzbekistan), or executive authorities in the field of justice (for example, in Norway, Turkmenistan, Tajikistan), or judicial authorities (partly, in Germany).

9. The issues of the independence of advocate in Central Asian countries

The legal profession's independence is a principle enshrined in the legislation of each of the five Central Asian states. In practice, however, the organization of the legal profession in these states has institutional weaknesses, which imply both weak internal governance and insecurity from outside pressures in the face of which bar associations can be passive and to which they are readily amenable (report of the International Commission of Jurists (ICJ),2010). The legal profession's independence is primarily influenced not by the fact that the state body issues licenses to lawyers but by the fact that it revokes them at will. Thus, the Law of the Republic of Kazakhstan «On advocacy» provides for the activities of the authorized state body in the field of legal assistance, which defined in Art. 1 of the Law as a «central executive body that ensures the organization of legal assistance, as well as control over its quality», which has relatively broad powers to manage the bodies of the Bar (Art. 23 of the Law). Following Part 1 Article 39 of the Law, the personal composition of the commissions for attestation of persons applying for advocacy and the rules of their work are approved by orders of the Minister of Justice of the Republic of Kazakhstan. And under the Rules for the provision of public services, «Issuance of a license to engage in advocacy» dated 28.05. 2020 this service is provided by the Ministry of Justice of the Republic of Kazakhstan.

In the Republic of Tajikistan, a Qualification Commission is created under the Ministry of Justice of the Republic to resolve the issue of obtaining and terminating the status of an advocate, as well as conducting certification of advocates (Article 13 of the Law «On the Bar and Advocacy»). In accordance with Article 20 of the Law «On the Bar of the Kyrgyz Republic and advocacy «the decision on admission to the qualification exam is made by the Ministry of Justice of the country, and the qualification exam itself is conducted by the qualification commission under the Ministry of Justice of the Kyrgyz Republic (Article 21 of the Law). This body decides on the suspension, revocation of the license, and termination of the license for the right to practice law (Article 22 of the Law) and maintains the state register of advocates (Article 23). As noted in the report of the ICJ mission in relation to this republic, at the initial stage of the creation of the Bar, such influence from the outside and the participation of third parties is necessary, but in the long term, it is crucial for the Bar to become a sufficiently strong institution that can organize the legal profession free from undue influence from outside, whether from government bodies or private individuals (report of the International Commission of Jurists (ICJ),2010).

Thus, licensing is actually an additional link in the admission process to an advocate's profession, which creates additional obstacles for persons wishing to practice law. Moreover, since the licensing process is controlled and managed by the state and is mostly not regulated by the draft law, it actually undermines or even denies the guarantees of independence and objectivity in admission to the profession that are embodied in the certification process. We agree with the opinion of the UN Special Rapporteur on the Independence of Judges and Lawyers that licensing systems operated by government agencies are contrary to international standards for the independence of the legal profession (Report, UN Doc A/71/348, 2016). The licensing function should belong to the bar association, not a government agency, and the license should be issued automatically upon successful completion of the certification exam. On the other hand, the licensing authority should be entitled to refuse to issue a license only on very narrow, well-defined technical grounds, an exhaustive list of which should be contained in the law (for example, incomplete or incorrectly submitted documents).

Before the 2008 reform in Uzbekistan, the legal profession operated under a legal regime similar to that of the Kyrgyz Republic. The Bar Association of Uzbekistan acted as a public association and did not have certain powers to manage the advocacy community, nevertheless it was a representative organization with a highly developed structure and local branches in each of the regions, which were part of the republican association. However, as a result of the 2008 reform, the independent Bar was actually abolished, and a structure was created, the head of which is appointed and dismissed directly by the Ministry of Justice, which makes this system an anomaly both in Central Asia and among all CIS countries. Thus, the Chamber of Advocates' chairman is elected by the Conference of the Chamber of Lawyers on the proposal of the Ministry of Justice of the Republic of Uzbekistan from among the members of the Board of the Chamber of Advocates elected by the Conference. Early withdrawal from the office of the Chairman of the Chamber of Advocates is also carried out on the proposal of the Ministry of Justice of the Republic of Uzbekistan (Articles 12-1, 12-3 of the Law). According to the country's advocates, the judicial authorities actively interfere in the activities of the advocacy of Uzbekistan, violating the internationally recognized principles of the independence of the advo-

cate's profession and self-government of the advocate's community (ICJ Mission Report,2015).

In addition, there are a number of cases of interference in the management of the Bar in Central Asia by the executive authorities. Thus, the UN Human Rights Committee, in its Concluding Observations on the periodic report of Tajikistan submitted on the basis of the International Covenant on Civil and Political Rights, concluded that advocates «are subject to outside interference, in particular from the Ministry of Justice». One of the cases of excessive pressure reported by advocates took place during the first Congress of Advocates in September 2015, when the Ministry of Justice demanded that advocates elect a Chairman suitable to the executive authorities of Tajikistan. This case can be considered an example of interference with the independence of the legal profession, in violation of the UN Basic Principles on the Role of Lawyers (ICJ Mission Report,2015).

Bar associations should be completely independent of government and other executive authorities. This independence must be protected both in law and in practice. As noted in the ICJ recommendations, it is necessary to put an end to any form of direct participation of the executive in the governing bodies of the Bar in order to ensure the independence of the profession following international standards: to put in place guarantees of protection against the informal, indirect and unjustified influence. However, bar associations' independence from the government does not exclude their cooperation with governments on relevant issues. UN Basic Principles recognize that such cooperation is often necessary to ensure sufficient and equal access to legal services, and to enable advocates to advise and assist clients, without undue interference, in accordance with the law, recognized professional standards and ethical norms (ICJ Recommendations, 2016).

To strengthen the independence of the advocacy and its authority in society, it is necessary to inform the population that it is the advocacy called upon to represent and defend the interests of citizens, including in relations with state bodies. As noted by the vice-president of the Federal Chamber of Lawyers (BRAK), Dr. Ulrich Wessels, the society should support advocates since it is they who are interested in independent advocacy, to whose members you can always apply for protection. When citizens understand that it is advocates who are their representatives, they can ensure the observance of their rights, they will demand that politicians and the state strengthen the independence and improve the quality of advocacy (Ulrich Wessels,2016).

10. Conclusions

1. In the EU countries, professional organizations of advocates have broad powers and often take an active part not only in the regulation of advocacy but also in the implementation of state policy in the field of legality and human rights. Depending on the number of professional advocates' organizations in the EU countries, a model of a unified organization of advocates' self-government and a model of several professional advocates' organizations have developed. Membership in these organizations can be either voluntary or generally binding. The model of a unified professional organization of advocates is the most common.

2. State control over an advocates' association is observed in almost all European countries. If this control can be characterized as minimal, not having a significant impact on the degree of protection of the rights and legitimate interests of citizens of these countries, then concerning the Central Asian countries, we should talk about stricter state control and interference by the state in the management of the advocacy.

3. The balance of relations and the principle of non-interference in the work of the Bar's institution takes place in some countries such as the Republic of Italy, the Czech Republic, Finland, Norway, and Kazakhstan.

4. The structure and degree of autonomy of bar associations in Central Asian countries vary. The peculiarities of the system of organization of the Bar in Central Asian countries include the following:

– in Central Asian countries, where the functions regulating admission to the profession and initiation of disciplinary proceedings against advocates are carried out or controlled by the executive authorities or with their participation, the independence of the advocacy seems questionable;

– among the countries of Central Asia, in terms of state control over the system of advocates' self-government bodies, Kazakhstan occupies a special place, where an independent and relatively strong self-governing bar association was created. In contrast, the reform of the legal profession in Uzbekistan in 2008 resulted in the replacement of independent advocates' associations with an organization fully controlled by the government;

– the current law on the advocacy of the Kyrgyz Republic does not envisage either the collegium of advocates or the chamber of advocates as a self-governing body of the advocacy and, consequently, the creation and functioning of a unified bar association;

– despite the existence of advocates' self-government bodies, which independently decide the issue of admission to the advocates' profession, licensing issues in many countries are the competence of state authorities. The only Central Asian state where licensing issues have been transferred to the self-governing body of the advocacy is the Republic of Uzbekistan.

5. The advocacy organization in Central Asian countries needs to ensure its independence following international standards. Such independence must be established both at the level of legislation and in practice.

6. The licensing function should belong to the bar association, not a government agency, and the license should be issued automatically upon successful completion of the certification exam. The licensing authority should be entitled to refuse to issue a license only

on very narrow, well-defined technical grounds, an exhaustive list of which should be contained in the law.

7. To strengthen the independence of the legal profession and its authority in society, it is necessary to inform the population that it is the advocacy that is called upon to represent and defend the interests of citizens, including in relations with the state bodies.

Bibliography:

1. **Анисимов, В.Ф., Кудрина, Е.Н.** (2017). Классификация моделей организации адвокатуры. *Вестник Югорского государственного университета*. 1-2 (44), С. 87–92.

2. Bakaianova, N., Svyda, O., Demenchuk, M., Dzhaburiya, O., & Fomina, O. (2019). Advocacy of Ukraine under constitutional reform. *Amazonia Investiga*, 8(22), P. 574-579. URL: https://amazoniainvestiga.info/index.php/ amazoniaarticle/view/805.

3. **Деханов, С.А.** (2011). *Адвокатура в Западной Европе: опыт и современное состояние* (дис. … докт. юрид. наук: 12.00.11 – судебная власть, прокурорский надзор, организация правоохранительной деятельности, адвокатура»). Москва, 383 с.

4. **Деханов, С.А.** (2010). Анализ законодательства, регулирующего организацию и деятельность адвокатуры в Средней Азии. URL: http://naukarus.com/analiz-zakonodatelstva-reguliruyuschego-organizatsiyu-i-deyatelnost-advokatury-v-stranah-tsentralnoy-azii.

5. **Vitiello, G.** (2004). Ordinamento e Deontologia Forense. *Dalla Officina Grafica Iride*. Napoli, 2004.

6. **Grammatikov, V.** (2020). Problems of deformation of professional legal consciousness in modern Russia (as exemplified in advocacy). *Amazonia Investiga*, *9*(26), 254-262. URL: https://doi.org/10.34069/AI/2020.26.02.29.

7. **Kucherov, S.** (1956). The Legal Profession In Pre- and Post- Revolutionary Russia. *The American Journal of Comparative Law*. Volume 5, Issue 3, P. 443-470. URL: https://academic.oup.com/ajcl/article/5/3/443/2586691? searchresult=1.

8. **Nuna, M., Kodai, D.A. & Moonti, R.M.** (2020). Code of Ethics and the Role of Advocates in Providing Legal Aid to the Poor. *Indonesian Journal of Advocacy and Legal Services*. 1(2), P. 259-274. DOI: 10.15294/ijals.v1i2.35986.

9. **Панейко, Ю.** (2002). *Теоретичні основи самоврядування*. Львів: Літопис, 2002. 196 с.

10. **Поспелов. О.В.** (2008). *Формы адвокатских образований*: автореф. дис. .... канд. юрид. наук: спец. 12.00.11). Москва, 2008. 30 с.

11. **Zaborovskyy V., Buletsa S., Bysaga Y. & Manzyuk Vasyl** (2020). Compliance of guarantees of professional activity of ukrainian advocate with international standards of profession of advocate. *The Lawer Quarterly*. Vol 10, No 2. URL: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/404.

12. **Vilchyk, T.** (2018). Duties of a Lawyer to a Court and to a Client. *Russian Law Journal*. 6(4), P. 62–99.

13. **Вільчик, Т.Б.** (2014). Реалізація принципу незалежності професійної діяльності адвокатів у взаєминах з державною владою. *Вісник Академії адвокатури України*. Т. 11, No 2, С. 63–74.

14. **Вільчик, Т.Б**. (2015). Системи органів адвокатського самоврядування в країнах Європейського Союзу: Італія, Німеччина, Франція. *Право та інноваційне суспільство*. 2 (5). URL: http://apir.org.ua/wp-content/uploads/2015/12/Vilchyk.pdf.

15. **Винавер, М.** (1902). *Очерки об адвокатуре*. С.-Пб.: Кн. скл. тип. М. М. Стасюлевича, 224 с.

16. **Яртых, И. С.** (2007). *Адвокатура и гражданское общество: монография*. Ульяновск: Обл. типография «Печатный двор». 335 с.

References:

1. **Anisimov, V.F., Kudrina, Ye.N.** (2017). Klassifikatsiya modeley organizatsii advokatury [Classification of models of the organization of advocacy]. *Vestnik Yugorskogo gosudarstvennogo universiteta*. 1-2 (44), C. 87-92. [in Russian].

2. Bakaianova, N., Svyda, O., Demenchuk, M., Dzhaburiya, O., & Fomina, O. (2019). Advocacy of Ukraine under constitutional reform. *Amazonia Investiga*, 8(22), P. 574-579. Available from: https://amazoniainvestiga.info/index.php/amazoniaarticle/view/805 [in English].

3. **Dekhanov, S.A**. (2017). Advokatura v Zapadnoy Yevrope: opyt i sovremennoye sostoyaniye [Advocacy in Western Europe: experience and current state] (Doctor's thesis). Moskva. [in Ukrainian].

4. **Dekhanov, S.A.** (2010). Analiz zakonodatel'stva, reguliruyushchego organizatsiyu i deyatel'nost' advokatury v Sredney Azii [Analysis of the legislation regulating the organization and activities of the bar in Central Asia.]. Available from: http://naukarus.com/analiz-zakonodatelstva-reguliruyuschego-organizatsiyu-i-deyatelnost-advokatury-v-stranah-tsentralnoy-azii [in Russian].

5. **Vitiello, G.** (2004). Ordinamento e Deontologia Forense. *Dalla Officina Grafica Iride*. Napoli, 2004. [in English].

6. **Grammatikov, V.** (2020). Problems of deformation of professional legal consciousness in modern Russia (as exemplified in advocacy). *Amazonia Investiga*, *9*(26), 254-262. Available from: https://doi.org/10.34069/AI/2020.26.02.29 [in English].

7. **Kucherov, S.** (1956). The Legal Profession In Pre- and Post- Revolutionary Russia. *The American Journal of Comparative Law*. Volume 5, Issue 3, 443-470. Available from: https://academic.oup.com/ajcl/article/5/3/443/2586691? searchresult=1 [in English].

8. **Nuna, M., Kodai, D.A. & Moonti, R.M.** (2020). Code of Ethics and the Role of Advocates in Providing Legal Aid to the Poor. *Indonesian Journal of Advocacy and Legal Services*. 1(2), 259-274. DOI: 10.15294/ijals.v1i2.35986 [in English].

9. **Paneyko, YU.** (2002). *Teoretychni osnovy samovryaduvannya [Theoretical foundations of self-government]*. L′viv: Litopys, 2002 [in Ukrainian].

10. **Pospelov, O.V.** (2012). Formy advokatskikh obrazovaniy [Forms of lawyer formations] (Extended abstract of Candidat's thesis). Moskva. [in Russian].

11. **Zaborovskyy V., Buletsa S., Bysaga Y. & Manzyuk Vasyl** (2020). Compliance of guarantees of professional activity of ukrainian advocate with international standards of profession of advocate. *The Lawer Quarterly*. Vol 10, No 2. Available from: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/404 [in English].

12. **Vilchyk, T.** (2018). Duties of a Lawyer to a Court and to a Client. *Russian Law Journal*. 6(4) [in English].

13. **Vil′chyk, T.B.** (2014). Realizatsiya pryntsypu nezalezhnosti profesiynoyi diyal′nosti advokativ u vzayemynakh z derzhavnoyu vladoyu [Implementation of the principle of independence of the professional activity of lawyers in relations with the state authorities]. *Visnyk Akademiyi advokatury Ukrayiny*. T. 11, No 2 [in Ukrainian].

14. **Vil′chyk, T.B.** (2015). Systemy orhaniv advokat·s′koho samovryaduvannya v krayinakh Yevropeys′koho Soyuzu: Italiya, Nimechchyna, Frantsiya [Systems of self-governing bodies of lawyers in the countries of the European Union: Italy, Germany, France.]. *Pravo ta innovatsiyne suspil'stvo*. 2 (5). Available from: http://apir.org.ua/wp-content/uploads/2015/12/Vilchyk.pdf [in Ukrainian].

15. **Vinaver, M.** (1902). Ocherki ob advokature [Essays on advocacy]. S.-Pb.: Kn. skl. tip. M. M. Stasyulevicha [in Russian].

16. **Yartykh, I. S.** (2007). Advokatura i grazhdanskoye obshchestvo: monografiya [Advocacy and civil society: monograph]. Ul'yanovsk: Obl. tipografiya «Pechatnyy dvor» [in Russian].

МОДЕЛІ ОРГАНІЗАЦІЇ ІНСТИТУТУ АДВОКАТУРИ В ЄВРОПЕЙСЬКОМУ СОЮЗІ ТА ЦЕНТРАЛЬНІЙ АЗІЇ: ПОРІВНЯЛЬНО-ПРАВОВЕ ДОСЛІДЖЕННЯ

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Анотація

Дана стаття має на меті розкрити основні моделі впровадження інституту адвокатури в Європейському Союзі та Центральній Азії. Оскільки деякі країни-сусіди Європейського Союзу збираються розпочати

переговори про вступ до ЄС, вони прагнуть реформувати свої системи правосуддя, щоб привести їх у відповідність зі стандартами ЄС.

У статті подано порівняльно-правову характеристику моделей організації органів адвокатського самоврядування в країнах Європейського Союзу та Центральної Азії з точки зору відповідності міжнародним стандартам незалежності адвокатури. Авторами визначено типові порушення незалежності органів адвокатського самоврядування з боку виконавчих органів державної влади в країнах Центральної Азії, показано ступінь їхнього впливу на захист прав і свобод людини та сформульовано рекомендації щодо подолання існуючих порушень.

Виявом принципу незалежності адвокатури слід вважати адвокатське самоврядування. Оскільки визначення «незалежність» вживається у вузькому правовому сенсі, його слід розуміти виключно як відому міру юридичної свободи, вільного розсуду в діях у межах, окреслених законом. Стосовно адвокатури, термін «незалежність» слід тлумачити в контексті Рекомендацій Rec (2000) 21 Комітету міністрів державам-членам щодо свободи здійснення професії адвоката як «свободу професії від будь-які необґрунтовані обмеження, впливи, тиск, погрози чи втручання, прямі чи непрямі, з будь-якої сторони чи з будь-якої причини.

Під «незалежністю адвокатури» мається на увазі такий встановлений законом правовий статус органів адвокатської спільноти, який дозволяє їм самостійно та незалежно від неправомірного втручання вирішувати питання своєї внутрішньої організації, а також інші завдання, визначені в закону, тобто здійснювати самоврядування.

У теорії права дуже дискусійним є питання про найбільш прийнятні форми організації адвокатури. Проблемам організації та діяльності інституту адвокатури, в тому числі в країнах ЄС, присвячено чимало праць, зокрема такими вченими як: А. Бун, Н. Бакаянова, Т. Вільчик, Е. Вуллі, А. Деханов, С. Кучеров, А. Рагулін, Роджер Сміт, Рене Кассен, М. Кіку, М. Кузінс, Ф. Рейган, І. Яртих та ін.

Проте спеціального порівняльно-правового дослідження, яке було б присвячене вивченню організації органів адвокатського самоврядування в країнах Європи та Центральної Азії, на даний час не проведено. Тому, виходячи з вищесказаного, ця тема статті видається актуальною та оригінальною.

Незважаючи на те, що адвокатська діяльність у сучасному світі здійснюється за принципом самоорганізації адвокатів та адвокатських спільнот, є кілька країн у світі, де адвокати повністю саморегулюються без будь-якого нагляду, керівництва чи обмежень з інших джерел, таких як виконавча, законодавча чи судова гілки влади. У теорії права питання про найбільш прийнятні форми організації адвокатури є досить дискусійним.

Ключові слова: Організація адвокатури, моделі адвокатського самоврядування, незалежність адвокатури, адвокатура Європейського Союзу, адвокатура країн Центральної Азії, гарантії адвокатської діяльності, міжнародні стандарти професії адвоката

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