МІЖНАРОДНЕ ПРАВО ПРАВ ЛЮДИНИ

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TEMPORARY PRINCIPLES OF ORGANIZATION OF FAIR TRIAL

Summary. This article is devoted to the research of the topical issue of temporal certainty about the organization of justice. An assessment of general international approaches to ensuring this element of the rule of law as part of a fair trial is provided. It is emphasized that legal certainty is defined as the legal impact on public relations, which structurally includes two main stages: the creation of optimal legal requirements and their direct implementation. It is established that the requirements for regulations arising from the principle of legal certainty relate not only to law-making, but also manifest themselves at the stage of law enforcement. In other words, these requirements concern: certainty of legislation, certainty of powers and certainty of court decisions. In this context, one of the requirements applied by European legal institutions to national justice is to ensure the adaptation of the behaviour of a particular entity to the normative conditions of legal reality, protection from arbitrary interference by the state, confidence in their legal status. They are included in the content of the concept of legal certainty, which allows a person to confidently plan their actions. To do this, legal norms must be clear and aimed at ensuring the predictability of situations that arise in certain legal relations mediated by law. In the temporal aspect, the defining elements of legal certainty are such manifestations as the inviolability and irrevocability of acquired legal rights; legality of expectations – the right of a person in his actions to rely on the sustainability of existing legislation; the irreversibility of the law and the impossibility of applying the law to a person who could not know about its existence. Therefore, the rule of predictability of law in a particular situation is associated with the stability of law-making and law enforcement. The paper presents specific decisions of the European Court of Human Rights aimed at resolving issues of temporal certainty in law enforcement.

Particular attention is paid to such an element as the requirement of mandatory publication of regulations, as a result of which the norms adopted by public authorities cannot be applied to persons who are not informed about it.

Key words: time certainty, legal expectations, prescription.

Formulation of the problem. Quite often, as practice shows, national courts do not ensure the right of a party to a full and reasoned decision in his case. Meanwhile, the European Court of Human Rights (ECtHR) emphasizes that the right of access to a court includes the right to a fair decision in a case. One of the elements of a fair trial and the rule of law is legal certainty. The rule of law stipulates that the actions of public authorities should be limited to pre-established and announced rules, which, in particular, make it possible to provide for coercive measures to be applied by government officials in a given situation. Taking into account this approach, a person can confidently plan their actions [1, p. 90].

Analysis of recent research and publications. In scientific works, this principle is evaluated differently. Some researchers do not recognize the above legal framework. These scholars point to the lack of grounds for recognizing the principles of law not only the idea of "legal certainty", but also the more general idea of "rule of law", because they, if they really exist, only within the potential of a fruitful scientific concept [2, p. 46]. Yet most scholars take the opposite view, assessing legal certainty as an inherent component of the rule of law. At the same time, some of them perceive this phenomenon very narrowly, as requirements for the content of the normative act and its unambiguous application in the process. However, despite the efforts of these scientists to evaluate the commented principle in a narrowed format – only in its procedural meaning [3, p. 52–53], most scholars agree that legal certainty as a legal principle has several interrelated aspects, which ensures its general legal nature. In particular, it is emphasized that privacy is an eclectic concept that combines a variety of requirements for the quality of law and law enforcement practice [4, p. 14–16].

Such doctrinal differences are explained by the fact that the Convention for the Protection of Human Rights and Fundamental Freedoms does not provide a clear definition and normative content of the phenomenon currently being studied. Therefore, in the scientific study of the issue, first of all, the case law of the European Court is analyzed, which gives the legal certainty a fairly broad interpretation. Thus, the meaning of the term "legal certainty" is currently used is the result of the interpretation of the Convention by the European Court, the acts of which are the source of Ukrainian law. In fact, the essential interpretation of the content of legal certainty by the Court is not unambiguous given its evolutionary knowledge of the text of the main provisions of the Convention. But the ECtHR has consistently sought to combine the requirements of legal certainty with the requirements of the principle of legal certainty. The European Court points out that the purpose of the latter, which, like legal certainty, is "one of the most important components of the rule of law and the rule of law" [5, p. 7], the protection of a person's confidence in the reliability of their legal position. The

subject of research in this work is a set of international and Ukrainian legal acts, court decisions that ensure the proper application by national law enforcement agencies of the principle of legal certainty in specific cases. In this regard, the focus will be on the temporal manifestations of this phenomenon. Proposals will be made for the appropriate adjustment of practical approaches in the research area. The implementation of this task is **the purpose of this work**.

Presenting main material. Article 6 of the Convention for the Protection of Human Rights and Fundamental Rights stipulates that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law to decide on his civil rights and obligations. As we can see, in the civil law sphere, the legal configuration of this rule includes such elements of the right to judicial protection as fairness of justice, legality of the law enforcement body, timely consideration of the case, the right to an independent and impartial court, publicity of the process. At the same time, the European institutions pay serious attention to the practical application of the rule of legal certainty in the administration of justice. Thus, the European Commission for Democracy through Law (Venice Commission) stated in the Rule of Law Report that one of the components of the rule of law is legal certainty: it requires that legal norms be clear and precise and aimed at ensuring that situations and legal relations remain predictable [6, p. 46].

The ECtHR has repeatedly emphasized in its decisions, including against Ukraine, that the principle of legal certainty is an integral, intrinsic element of the rule of law. Certainty in the administration of justice requires unambiguous enforcement. This, in turn, requires ensuring systemicity and consistency in the activities of national courts, adequate adaptation of the latest legal requirements to specific social relations that arise and develop in the state. Therefore, the contradictory and unequal application and interpretation of national law, which is often carried out by Ukrainian courts, is of concern to the European Court and, in the latter's position, is unacceptable [7, § 79]. In its decisions, the Constitutional Court of Ukraine also refers to the principle of legal certainty, emphasizing that it is a necessary component of the principle of the rule of law.

Thus, legal certainty is one of the conditions for the effective operation of the principle of the rule of law [8, p. 38], and ensuring the implementation of the requirements of the principle of legal certainty in its broadest sense is the key not only to the effective implementation and protection of human rights, but also a significant improvement of the mechanism of the state. At the same time, the interpretation of legal certainty in our legal science largely coincides with the ideas about its content of foreign judicial institutions and jurists [9, p. 45–46]. The principle of legal certainty is most studied as a set of requirements for the organization and functioning of the legal system in order to ensure primarily a stable legal position of the individual by improving the processes of law-making and law enforcement [10, p. 54]. However, the content of the principle of legal certainty is not limited to the requirements for regulations. In jurisprudence, it is mainly considered in a broader aspect and covers such manifestations as the

inviolability and irrevocability of acquired legal rights (vested rights); legitimacy of expectations (legitimate expectations) – the right of a person in their actions to rely on the permanence of existing legislation, and hence – the irreversibility of the law and the impossibility of applying the law to a person who could not know about its existence (non-retroactivity) [11, p. 128–129]. It is through these elements of the currently studied principle that the importance of temporal factors in consolidating the real content of legal certainty is manifested. Thus, certain procedural requirements concern the mandatory promulgation of regulations, the prohibition of their retroactive effect, the sequence of law-making, providing sufficient time for changes in the system of legal relations, in the event of a change in the law or the adoption of a new, reasonable stability of law. In this sense, the term "stability" means "stability, stability, immutability".

Based on this, legal certainty implies that the system of existing legal requirements must remain stable, at least for a long period. This means that each rule must be sufficiently clear, such that it can be interpreted unambiguously. At the same time, of course, we are talking about the certainty of the external manifestation of the legal norm, not its essential nature, as the definiteness of the latter directly follows from its very nature as a measure of freedom for all subjects of law [12, p. 5–6]. Legal certainty in the form of stability of relations is manifested at the level of law enforcement, where it ensures the stability and invariability of court decisions. In other words, the principle of legal certainty guarantees the stability of final court decisions. Unfortunately, Ukrainian courts do not always follow this approach. An example of an incorrect decision is the case No. 553/3161/16-ts, which was considered by the Leninsky District Court of Poltava [13]. The fact is that the court of first instance, deciding to dismiss the person in the lawsuit, justified it by two factors. The first is that the claim for recognition of the right to leave is unfounded. The second is that the plaintiff applied to the court with an omission of the statute of limitations applicable to claims in labour disputes. Such a decision is downright illiterate. After all, as indicated in the current civil law acts and relevant documents of higher courts, the simultaneous application of the argument that the claims are unfounded and the expiration of the statute of limitations is incompatible. These are mutually exclusive grounds for a court decision, and such wording is such that it openly violates the principles of legal certainty.

In fact, according to the first part of Article 261 of the Civil Code of Ukraine, the statute of limitations applies only in the presence of a violation of a person's right. And the violation can occur only if the plaintiff has a subjective right. That is, the statute of limitations will begin (and therefore may end) if the defendant has violated the substantive law due to the person. Therefore, before applying the statute of limitations, the court must find out and indicate in the court decision whether the right or legally protected interest of the plaintiff, for the protection of which he appealed to the court. If such rights or interests are not violated, the court rejects the claim on the grounds of its unfoundedness. And only if it is established that the right or legally protected interest of the person is really

violated, but the statute of limitations has expired and a statement was made by the other party in the case, the court rejects the claim due to the expiration of the statute of limitations – in the absence of good reasons omission.

This is clearly stated in the decision of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases of January 23, 2013 in the case No. 6-44041св12. In particular, it states that paragraph 4 of the decision of the Plenum of the Supreme Court of Ukraine of November 6, 1992 № 6 (as amended) "On the practice of labour disputes" explains to the courts that if a month or three months is missed without good reason, the claim may be dismissed on these grounds. Thus, it is possible to refuse a claim due to a pass without good reasons for going to court only if the claim is substantiated. In case of unfoundedness of claims at omission of term of the address to court in the claim it is necessary to refuse groundlessness of claims.

Thus, the court that considered the commented specific case had to determine which of the legal grounds – the groundlessness of the claim or the expiration of the statute of limitations is a valid basis for dismissal of the claim in the case. Because, given the mutual exclusivity of these grounds (the beginning and subsequent end of the statute of limitations means that the claim was justified, the right really belonged to the plaintiff and was violated by the defendant), they cannot coexist in the court decision. In fact, the local court found in accordance with Ukrainian law that the right claimed by the plaintiff did belong to him, had been violated by the defendant through his non-recognition and challenge, and the plaintiff's claims had since become statute-barred, expired at the time of filing the lawsuit. In such circumstances, the waiver of the claim "on the groundlessness of the claim" is excluded. Therefore, the decision not only contradicts the current legislation of Ukraine, but also common sense. Meanwhile, the circumstances that led to the denial of the claim and specified in the court verdict are quite significant, as in some cases they lead to the emergence of new legal relationships. It is very important for the parties to the obligation on what grounds the lawsuit was rejected. When this happened due to the lack of a substantive right to claim, then such an obligation did not exist at all. The refusal to satisfy the requirements with the expiration of the statute of limitations does not terminate the protection obligation and only means that it can no longer be enforced. That is, the debtor and the creditor continue to have a certain material relationship, the latter may require enforcement, including the application of measures of operational coercion in the future, because such sanctions are not subject to the statute of limitations.

As we can see, national courts often do not adhere to the principle of legal certainty in the administration of justice. As a result, we receive incomprehensible and ambiguous decisions, which violates the rule of certainty and effectiveness of court verdicts and the right of a person to receive a reasoned final decision in his case. The issue here is not so much the deliberate disregard for the rights of the individual in the proceedings as the low level of legal knowledge of many Ukrainian judges. It is no secret that the level of qualification of many representatives of Themis does not currently meet professional requirements. Therefore, today

there are no prospects for optimism regarding the reduction of the number of complaints against the state of Ukraine to the European Court of Human Rights.

The stability of law-making and law enforcement, some researchers associate with the rule of predictability of law in a particular situation. It includes the following provisions of temporal content: the absence of retroactive effect of the act; invalidity of an act that has not been properly published; justified expectations, which provides for the possibility of amending legal acts after prior notification of those to whom the new rules are addressed; clarity and intelligibility of the law for those to whom it applies; statute of limitations, according to which it is impossible to demand the recognition of a legal act as illegal or to demand the fulfilment of some obligations when a long time has passed since their entry into force [14, p. 60]. Other scholars also emphasize the use of time criteria in the implementation of the principle of legal certainty. They divide this principle into two sub-principles: 1) the impossibility of retroactive effect of the legislation, except in cases when the legislative goals cannot be achieved in any other way, provided that the principle of protection of legitimate expectations is observed; 2) protection of legitimate expectations, while expectations are recognized as legitimate if they are reasonable, i.e. meet the real expectations of the "careful person" [15, p. 42]. European legal institutions (Court of Justice of the European Union) in their practice also repeatedly emphasize the importance of the provision of legitimate expectations in the sense of the principle of legal certainty (the case of A. Racke GmbH & Co. v Hauptzollamt Mainz (1979)] [16].

Thus, the principle of legitimate expectations is an integral part of the principle of legal certainty. It is that when a person is convinced of achieving the intended result, acting in accordance with the rule of law, the protection of these expectations must be guaranteed. In this case, certain criteria must be met to implement this principle. As already mentioned, protection of expectations is provided only when they are lawful. In addition, only those legitimate expectations that belong to prudent and prudent subjects are protected. An important aspect of the concept of the principle of legal certainty is the mechanism according to which the law has no retroactive effect. The European Court of Human Rights postulates it as one of the necessary elements of this principle [17, para. 30]. As a general rule, the law should be forward-looking. It is considered that the retroactive effect of legal prescriptions contradicts this principle, as subjects of law must know the consequences of their behaviour, in particular, in the construction of civil relations, otherwise it negatively affects the rights and legitimate interests of the individual. Therefore, this approach ensures the realization of the inalienable right of a person to be sure that his proper behaviour after some period will not lead to a deterioration of the legal status. However, as the ECtHR points out, the retroactive application of a rule is allowed in exceptional cases, for example, when the goals to be achieved require it and respect for the legitimate expectations of the individual is ensured.

Meanwhile, the use of legal acts as a justification for court decisions, which are not valid in time, has today become a serious problem of national justice.

Ukrainian judges, without hesitation, often apply legal acts that are either irrelevant to the case because they did not exist at the time the dispute arose or never came into force at all. Therefore, we must state that our courts often do not take into account this sub-principle of the impossibility of retroactive effect of a legal act in time, carrying out "retrospectively" the application of certain regulations. This is most typical of normative acts of a local nature, when judges cannot or do not want to analyze in detail the time of publication and publication. For example, on February 14, 2014, the Lubny City Council of Poltava Region approved the "Procedure for determining and compensating the territorial community of the city of Lubny represented by the Lubny City Council for damages caused as a result of violation of land legislation" (hereinafter – the Procedure). At the same time, the local self-government body imposed sanctions on individual land users provided for in this procedure starting from 2011. And Ukrainian courts, despite the victims' appeals to them for protection, ignored both the Constitution and the basic legal principles of a fair trial, refusing to defend and turning a blind eye to these problems with the law [18]. Taking into account the provision of the law and Part 4, Clause 2.17 of the Resolution of the Plenum of the HECU No. 6 of May 17, 2011 "On some issues of the practice of litigation arising from land relations" to disputed relations should be applied exactly the wording of the act on the date of such legal relationship. Therefore, the Order cannot apply to relations that took place before its adoption. However, the commercial courts for some reason used this document to regulate the relations that took place before its adoption, which is a violation of the law.

Another necessary element of the principle of legal certainty is the requirement of mandatory promulgation of regulations (non obligat lex nisi promulgata). Its main purpose is to ensure that none of the rules adopted by public authorities can be applied to those who are not informed about it. According to the decisions of the European Court of Human Rights, "the law must be adequately accessible and the citizen must have the opportunity to be guided in the circumstances in which legal norms apply to the case" [19]. Indeed, presuming that citizens know the laws, the state must do everything necessary to bring regulations to their attention. This ensures compliance with the rule of predictability of legislation and guarantees the inadmissibility of unforeseen changes to it.

Thus, a prerequisite for the entry into force of legal acts is the fact of their public disclosure. The publication of local regulations issued by local governments, other state or public institutions is especially relevant in this regard, because the mandatory precondition for the entry into force of such acts is the fact of their public publication. In Ukrainian courts today, there is absolutely no practice of the law enforcement body checking whether a certain document has been made public, and therefore whether it has entered into force and when it took place. Of course, in this regard, the highest judicial authorities of the state have repeatedly given certain recommendations. Thus, in paragraph 7 of the resolution of the Plenum of the Supreme Court of Ukraine of November 1, 1996 No. 9 "On the application of the Constitution of Ukraine in the administration of

justice" it was proposed to draw the attention of the courts to the fact that according to Part 2 of Art. 57 of the Constitution are invalid, and therefore, those laws and other normative legal acts that determine the rights and obligations of citizens that have not been brought to the attention of the population in the manner prescribed by law may not be applied. This means that a court decision cannot be based on unpublished regulations.

But, unfortunately, the issue has not moved from the deadlock. Meanwhile, local authorities and local governments are producing an increasing variety of mandatory provisions, rules of conduct and other normative acts that determine the legal status of the population. At the same time, almost none of them was promulgated in the manner prescribed by law. As an example, we will mention the Procedure already mentioned in this paper, approved by the Lubny City Council of Poltava region on February 14, 2014 and investigated in the case No. 917/2333/15. This document has never been properly published, and, nevertheless, has been positively assessed by the commercial courts of Ukraine. In fact, it is the subject of power who must provide the law enforcement authority with evidence of disclosure, and imposing such an obligation on a citizen is unacceptable. And failure to provide relevant evidence should be considered as unproven fact of the validity of the document (in other words, the invalidity of the act is presumed). In any case, such invalid legal documents cannot be used as a basis for a court decision.

From the study we can draw some **conclusions.** Legal certainty is becoming an increasingly important and significant factor in law-making and law enforcement processes. Numerous decisions of the European Court of Human Rights against Ukraine, which directly indicate the state's non-compliance with this principle, allow us to qualify the commented legal idea as a fundamental and independent phenomenon. At the same time, neither the legislator nor, moreover, law enforcement agencies are concerned about the introduction of effective mechanisms for implementing the principle of legal certainty. This leads to different understandings and interpretations of legal norms, making unreasonable and ineffective court decisions, to different applications. Lack of certainty in the activities of state and judicial authorities regarding the provision, observance or exercise of the rights and freedoms of a particular person can have negative consequences and lead to arbitrariness. Therefore, this principle must be enshrined in law, while clearly defining its essence, real content and responsibility for non-compliance in court proceedings. It is also necessary to enshrine in law a broad understanding of this principle, which also includes its temporal manifestations, studied in this paper.

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Гуйван П. Д. Часові засади організації справедливого судочинства

Анотація. Ця стаття присвячена науковому дослідженню актуального питання про темпоральну визначеність в організації судочинства. Надана оцінка загальних міжнарод-

них підходів до забезпечення цього елементу верховенства права як складової частини справедливого суду. Наголошується, що юридична певність визначається як правовий вплив на суспільні відносини, що структурно включають у себе дві основні стадії: створення оптимальних правових приписів та їхню безпосередню реалізацію. Встановлено, що вимоги до нормативних актів, які випливають з принципу правової визначеності, стосуються не лише правотворчості, а проявляються також на етапі правозастосування. Інакше кажучи, ці вимоги стосуються: визначеності законодавства, визначеності повноважень та визначеності судових рішень. У цьому контексті однією з вимог, які застосовують європейські правові інституції до національного правосуддя, є забезпечення адаптації поведінки конкретного суб'єкта до нормативних умов правової дійсності, захисту його від свавільного втручання з боку держави, впевненості у своєму правовому становищі. Вони виходять із змісту поняття правової визначеності, що забезпечує можливість особи впевнено планувати свої дії. Для цього правові норми повинні бути чіткими та спрямованими на гарантування прогнозованості ситуацій, які виникають у тих чи інших правовідносинах, що опосередковуються правом. У темпоральному аспекті визначальними елементами правової визначеності є такі прояви, як непорушність і нескасовуваність набутих законних прав; законність очікування – право особи у своїх діях розраховувати на сталість наявного законодавства; незворотність закону й неможливість застосування закону до особи, яка не могла знати про його існування. Отже, з правилом про передбачуваність права в конкретній ситуації пов'язується стабільність правотворення та правозастосування. В роботі наведені конкретні рішення Європейського суду з прав людини, спрямовані на врегулювання питань часової певності у правозастосуванні. Окремо приділена увага такому елементу, як вимога обов'язкового оприлюднення нормативно-правових актів, у результаті чого норми, які приймають державні органи влади, не можуть застосовуватися до осіб, не поінформованих про них.

Ключові слова: часова визначеність, законні очікування, давність.