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Legal certainty in law enforcement through the prism of ECtHR decisions

Правова визначеність у правозастосуванні крізь призму рішень ЄСПЛ

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Abstract

The problems of legal certainty and legal uncertainty are growing significantly in the field of lawmaking and law enforcement. Thus, the threatening consequences of this are the weakening of the rule of law around the world and the growing number of Ukrainian citizens applying to the European Court of Human Rights (ECtHR). The article traces the brief genesis of the principle of "res judicata", emphasizes the various manifestations and forms of legal certainty, and clarifies two groups of requirements for it. In the study, the main attention is paid to the peculiarities of legal certainty in the field of law enforcement. The article is aimed at determining the features and requirements of the principle of legal certainty in court proceedings based on analysis and generalization of ECtHR decisions. It is substantiated that in the generalized form the elemental composition of the principle of certainty in law enforcement includes: requirements for interpretation (in particular, judicial) of normative legal acts and separate norms; legality of resolving legal conflicts and eliminating gaps in current legislation; stability of court decisions; unity of judicial practice. The case law of European judicial institutions in matters of legal certainty is characterized by the position that the problem should be resolved in each case taking into account the facts of the case, their analysis in terms of identity, the relationship between them, as well as their

Анотація

Проблеми правової визначеності та правової невизначеності значно зростають у сфері правотворчості та правозастосування. Таким чином, загрозливими наслідками цього є послаблення верховенства права в усьому світі та зростання кількості громадян України, які звертаються до Європейського суду з прав людини (ЄСПЛ). У статті простежено короткий генезис принципу «res judicata», наголошено на різноманітних проявах і формах правової визначеності, з'ясовано дві групи вимог до нього. У дослідженні основну увагу приділено особливостям правової визначеності у сфері правозастосування. Метою статті є визначення особливостей та вимог принципу правової визначеності у судовому процесі на основі аналізу та узагальнення рішень ЄСПЛ. Обґрунтовано, що в узагальненому вигляді елементний склад принципу визначеності у правозастосуванні включає: вимоги до тлумачення (зокрема, судового) нормативно-правових актів та окремих норм; законність вирішення правових колізій та усунення прогалин у чинному законодавстві; стабільність судових рішень; єдність судової практики. Практика європейських судових інституцій у питаннях правової визначеності характеризується позицією, що проблема має вирішуватися в кожному конкретному випадку з урахуванням фактів справи, їх аналізу з точки зору тотожності, зв'язку між ними, а також їх схильність, поєднання стійкості й

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proneness, a combination of stability and dynamism, general and special. Research methods used by the authors of the article include analysis, synthesis, induction, deduction, comparative-legal, formal-legal and logical-legal methods.

Keywords: Rule of Law, Law Enforcement, Legal Certainty, Legal Uncertainty, Court Decisions.

динамічності, загального й особливого. Методи дослідження, які були використані авторами статті, включають аналіз, синтез, індукцію, дедукцію, порівняльно-правовий, формально-юридичний і логіко-юридичний методи.

Ключові слова: верховенство права, правозастосування, правова визначеність, правова невизначеність, судові рішення.

Introduction

The global spread of the COVID-19 pandemic, the imposition of quarantine measures by governments of different states, varying degrees of legal certainty, violate the requirements of legality, proportionality, non-discrimination, limiting the scope and content of human rights, and ultimately reducing the rule of law. That is why the unprecedented restrictions on human rights and strict quarantine measures taken by the governments of many countries have been challenged in the constitutional jurisdictions of several countries (including Bosnia and Herzegovina, Northern Macedonia), which in their decisions focused on the introduction of only those measures that are legal, proportionate, necessary, non-discriminatory, had a specific purpose and duration (Horodovenko, Bondar, & Udovyka, 2021). Under such conditions, the study of legal certainty in law enforcement is relevant, has practical and theoretical significance, because, since the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms, legal certainty has become a universally recognized principle of international law. The case-law of the European Court of Human Rights is implemented in various legal forms.

The urgency of the study is strengthened by the implementation of the Association Agreement between Ukraine and the EU and the constitutionally enshrined European vector of development of the Ukrainian state, which requires understanding and adequate application of European law, streamlining law enforcement practices under European legal standards, because, as scholars rightly point out, the application of the law is the second factor after lawmaking, which significantly affects the nature and purpose of legal regulation. Law enforcement is designed to ensure the implementation of legal norms into real-life processes, taking into account the specifics of a particular situation (Guiwan, 2017a). Of particular importance in this sense is the judicial implementation of the law.

The purpose of the proposed work is to determine the features and requirements of the principle of legal certainty in the judiciary based on the analysis and generalization of ECtHR decisions.

Theoretical Framework or Literature Review

The spread of the COVID-19 pandemic inevitably increases threats and challenges in the areas of security, law and order, justice, human rights, and the rule of law. The weakening of the rule of law over the past two years can be seen in more than half of the world's countries, as evidenced by the 2021 WJP Rule of Law Index. According to the index, 84.7% of the world's population (6.5 billion people) live in countries where the rule of law is declining. The most complex problems are in the following areas: restrictions on the powers of governments, public participation, freedom of thought and expression, freedom of assembly, equality of rights, and non-discrimination (World Justice Project, 2021).

For Ukraine, which has been in a state of hybrid war for the last seven years, the problems of the rule of law and human rights are becoming especially relevant and acute. Over the last decade, there has been an increase in the number of Ukrainian citizens applying to the European Court of Human Rights for violations of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. of the four countries with the largest number of appeals sent to court – 4271. For comparison, in 2018, this figure was 3207, in 2019 – 3991. In 2018, there were 7267 such cases (12.9%), in 2019 – 8827 (15%) (ECHR, 2020). The most common violations are: cruel or inhuman treatment; the right to liberty and security; fairness of the trial; terms of consideration; non-execution of decisions. As of August 30, 2021, according to Bot & Partners, Ukraine has moved from 3rd to 4th place among the countries with which the ECHR is most often sued with 1,140 appeals. The third place was taken by Poland – 1517 appeals. The main reasons for Ukrainians' appeals to the European

Court of Human Rights are unfair trials, inhumane treatment of prisoners, violations of the right to liberty, and the right to peaceful enjoyment of possessions (OpenDataBot, 2021). In this context, the principle of legal certainty is important, which, in our opinion, should be considered as part of the principle of the rule of law and the legal system. As Ognevyuk (2017) rightly points out, legal certainty sets out requirements for law enforcement based on respect for human rights and effective mechanisms to protect them from unlawful state interference. However, despite the importance of this concept, to date, it has not found normative consolidation and interpretation in Ukrainian legislation. At the same time, it is inexpedient to absolutize the certainty of legal regulation, because the variability of social conditions, the permanent development of social relations, and the emergence of new relations lead to the fact that certainty loses its absolute character, acquires signs of fictitiousness. Reflecting on legal certainty as a property of legal regulation, Rabinovich emphasizes that this category is always characterized by one degree or another, and is the object of quantitative and qualitative measurement, which in practice results in its relative nature (Rabinovich, 2017). Therefore, the principle of legal uncertainty is also meaningful for law enforcement, which characterizes the dynamic aspect of the law, and provides flexibility and efficiency in regulating certain social relations.

Works by Guiwan (2017b), Ognevyuk (2017), and Pogrebnyak (2009), devoted to the analysis of recent research and publications, show that the study of certain aspects of the principle of legal certainty.

Simultaneously, the analysis of Ukrainian scientific sources convincingly showed that the problem of legal certainty is the subject of scientific understanding primarily, within the theory of law and science, judicial, and law enforcement agencies. Some aspects have been the subject of research in constitutional, civil, and administrative law. Instead, in foreign sources, along with general theoretical aspects, researchers pay considerable attention to industry issues of legal certainty, they are devoted to numerous scientific publications. The intensification of research on legal certainty over the past three years is largely due to the adoption of a number of regulations and changes in current legislation in connection with the spread of the COVID-19 pandemic, which was marked by legal uncertainty (Wolters Kluwer Editorial Staff, 2021). The subject of a wide scientific discourse of foreign scholars is the question of the transformation of ideas about legal certainty and the rule of law (Fenwick, Siems, and Wrbka (2017), Gardner (2012), Carlin (2012)), the connection between legal certainty and legal values (Lifante-VidalIs (2020), Janderová and Hubálková (2021)), human rights Barak (2010), Beazley (2020), legitimate expectations and strategies of states in a pandemic (Brown, Grogan, and Beqiraj (2021)), antitrust law, economic and financial activities (Portuese (2020), Tapia-Hoffmann (2021)), the spread of international terrorism (Greene (2017), Bekele (2021)). It is widely believed among foreign scholars that legal systems should allow those who obey the law to predict people's behavior and institutional reactions, as well as prevent the arbitrary use of state power against them (Lifante-VidalIs, 2020), and legal certainty is a key factor in economic growth. At the same time, it is necessary to take into account the legal certainty, that excessive emphasis on this concept may create some tension with other, perhaps important considerations, especially legal flexibility Wrbka (2016). These scientific positions of foreign scholars coincide with the views of Ukrainian scholars and can be a methodological basis for interpreting the relationship between legal certainty and legal uncertainty.

The dynamism of public relations and Ukraine's efforts to become an equal member of the international community, European integration of political and legal development, as well as the need to build a just legal order in the face of global challenges and threats, determines the relevance of further research taking into account the scientific positions of foreign scholars.

Methodology

The authors of the study used a number of general and special methods to conduct the study in the most effective way. As for the general methods of cognition, including such common methods as analysis, synthesis, induction, deduction, we will not dwell on them due to the fact that they are well known and do not require special attention. As for special methods, among which it is worth mentioning the comparative-legal method, the formal-legal method and the logical-legal method, we will analyze them in more detail.

In particular, the comparative legal method consists in comparing different state and legal systems, institutions, categories in order to identify features of similarity or difference

between them. As a result of the comparison, the qualitative state of the legal system as a whole or individual legal institutions and norms is established. The comparative legal method allowed researchers to find out all the characteristic features of such legal categories as legal certainty and legal uncertainty. The specified method made it possible to fully characterize the principle of legal certainty and to investigate the peculiarities of its application in practical activities.

The formal-legal (normative-dogmatic) method is traditional for legal science and constitutes a necessary degree in the scientific knowledge of law, as it allows studying the internal structure of the state and law, their most important properties, classifying the main features, defining legal concepts and categories, establishing methods of interpreting legal norms and acts, to systematize state-legal phenomena. Its essence is that the subject of research in this case is law in its purest form - its categories, definitions, signs, structure, constructions, legal technique. Formal and legal. the method among other special methods can with the greatest reason be called special, since it is used exclusively in the study of law. Using this tool, the authors of the article investigated the actual content of the category of legal certainty and clarified the differences in the application of this principle in various areas of law enforcement.

Logical-legal method - includes means and methods of logical study and explanation of law and is based on forms of thinking and laws of formal logic. The use of logical means in the study and explanation of law allows to avoid contradictions in the construction of legislation, to build a logically consistent and thus effective system of law, to harmonize positive law with the requirements of natural law, and finally, to correctly and competently apply legal norms. The mentioned method allowed the researchers to carefully analyze the judgments of the ECtHR from the point of view of the application of the principle of legal certainty, and to draw conclusions regarding the areas of improvement of the activities of the ECtHR in the studied context.

Results and Discussion

Analysis of scientific sources convincingly shows that some provisions relating to the principle of legal certainty, in a generalized form were contained in the Laws of King Hammurabi. In particular, in Art. Article 5 of the Code states that a judge who rendered a decision in a case and then changed it is deprived of the right to administer justice and must pay the amount of the claim in twelve times (Hammurabi, 2002). The finality of the decision was recognized as important.

However, this concept was substantiated in detail in the provisions of Roman law, devoted primarily to procedural issues of justice, the institution of judicial decision, the provision of an appeal system and the grounds for revocation of judicial acts. Thus, in the Roman process, legal certainty was manifested in the establishment of the following requirements: determination of procedural deadlines, the deadline for the administration of justice; coercive reason and responsibility for non-appearance in court; norms that provided for bail or other security for appearance in court, liability for obstruction of appearance in court. These restrictions and requirements were designed to ensure stability in the field of substantive legal relations, the certainty of the legal status of the participants in these relations, as well as the fairness and finality of the trial.

In addition, the principle of «res judicata», which emerged within the institution of judicial decision, was important for the development and practical provision of legal certainty. Thus, Justinian's Digests state that «a case in which a court decision is rendered is one in which the judge's statement puts an end to the dispute: what is achieved by award or acquittal». At the same time, the binding force of the sentence was based on the praetorian edict «condemnatus, ut pecuniam solvate» – the convict should pay the specified amount – and was protected by a lawsuit to enforce the judgment (Kofanov, 2002). Thus, the principle of «res judicata» has its roots in Roman law, although it was not considered as an independent principle and was not interpreted in its modern sense. It was embodied in certain legislative acts. Without going into the genesis of the components of the principle of legal certainty, which is the subject of a separate scientific study, we note that since ancient times the institute «res judicata» provided stability and certainty of both material and procedural relations, and later was the basis of the modern concept of legal certainty. For a long time, the «res judicata» institute has formed the core of the principle of legal certainty.

With the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms, legal certainty has become a universally recognized principle of international law, which ensures predictability and security for

human beings. Despite the above, this act does not contain any normative consolidation of the relevant principle, nor its specific definition, nor a clear normative content. Interpretation of legal certainty is consistently carried out in the case-law of the European Court of Human Rights (hereinafter – ECtHR, the Court), which emphasizes that «a rule cannot be considered» a law «if it is not formulated with sufficient clarity so that the citizen himself or if it is needed, with professional help could predict with a degree of probability that can be considered reasonable in these circumstances, the consequences which the specific actions can lead to» (European Court of Human Rights, 1992). The assessment of legal certainty and the statement of its violation takes place always, taking into account the circumstances of the case.

It is necessary to take into account the fact that the principle of legal certainty is inherently related to the principle of protection of trust, which, in particular, assumes the confidence of citizens that their legal position will remain stable and will not deteriorate in the future; publicity of public authorities; stability of legislation; respect for the state to the «legitimate expectations» of citizens. As rightly noted in the scientific literature, public confidence in the judiciary is «woven» into the mechanism of state power, and in times of crisis of state and social development comes to the fore, becomes an indicator, a criterion for evaluating its activities and, at the same time, an attribute of progressive legal development» (Udovika, & Novoselova, 2021). Under such conditions, legal certainty permeates the entire mechanism of state and legal development.

We share the opinion of scholars that legal certainty belongs to the complex concepts of legal science, which determines the multiplicity of theoretical approaches to its understanding. In addition, given its dynamism, transformation in light of the emergence of new relationships, and the development of legal thought, it can be argued that this legal phenomenon is multifaceted (Pogrebnyak, 2009).

Legal certainty has various manifestations and forms of existence. Thus, Pogrebnyak (2009) points out that the content of the principle of legal certainty consists of two main groups of requirements – requirements for regulations and requirements for their application (requirements for enforcement). Given that the requirements for the rule-making process are not included in the subject of this study, we consider it necessary to pay attention to the second group of requirements to which the researcher refers:

1) regulations must be complied with;
2) there must be a practice of clarifying (concretizing) their content;
3) there must be a practice of uniform application of the law, and;
4) court decisions must be final and binding and enforceable.

Analyzing the existing research, it can be noted that in generalized form, that legal certainty is often understood as: the principle of judicial activity and the requirement for judicial decisions; an integral part of the principle of the rule of law, the main purpose of which is to ensure the stability of the legal status of the person, the predictability of legal norms; the independent fundamental principle of the legal system, which ensures the stability and effectiveness of law in general (Ognevyuk, 2017). In our opinion, the latter position is the most reasonable, because a detailed study of the manifestations of legal certainty in the legal regulation of various social relations and the functions it performs, suggests that it went far beyond the rule of law and is not limited to regulatory requirements to the legal acts or court decisions.

It should be noted that compliance with the requirements of legal certainty in law enforcement is inherently associated with compliance with the requirements of legal certainty in lawmaking (requirements for the rule of law) and the requirements for the certainty of the powers of public authorities. This is confirmed by the case-law of the European Court of Human Rights, which reveals the essence of the principle of legal certainty through three main components: requirements for discretionary powers of public authorities; requirements for the legislative process; requirements for court decisions.

The requirement of certainty in the application of legal norms is embodied, first of all, in the unity of judicial practice, which is that courts must make the same decisions under the same factual conditions in similar cases. Thus, the ECtHR finds a violation of the principle of legal certainty in cases where the court makes contrary decisions on the limits of the law in similar legal situations, and the higher judicial body does not resolve these contradictions in its practice or contrary decisions are made by the highest court. Simultaneously, the criteria for assessing differences in judicial make up three main points:

the materiality and duration of differences; the existence in the national legislation of a mechanism for their elimination; the fact of application of these mechanisms (European Court of Human Rights, 2011). However, despite the importance of harmonization of case law, the European Court does not deny its development and compliance with the criteria of proper law enforcement in the case of its validity and taking into account the dynamics and logic of legal relations.

The requirement of certainty in the application of legal norms is closely related to the unambiguity, accuracy, and clarity of the official interpretation of certain norms and regulations. This principle is directly related to the requirements for rule-making techniques. In particular, in The Sunday Times v. The United Kingdom The Court stated that a rule cannot be considered a «law» until it has been formulated with a sufficient degree of precision to enable a citizen to relate his conduct to it; in this case, the person must be able, including using the necessary advice, to anticipate, to a reasonable degree in the particular circumstances, the consequences that an action may have. However, such predictability does not have to be absolute, as the law must be able to adapt to changing circumstances (European Court of Human Rights, 1979). In this case, the objective uncertainty inherent in the law is eliminated by interpreting and specifying the legal requirements that are the task of practice.

A special role in legal certainty is played by the legality of resolving legal conflicts and eliminating gaps in existing legislation. Thus, the ECtHR in Baranowski v. Poland points out that legislative gaps and practices based on them that are not based on a legal provision or a court decision violate the principle of legal certainty (European Court of Human Rights, 2000). In addition, gaps in law and conflicts not caused by competition from legal norms lead to imbalances in legal regulation in general and significantly complicate the law enforcement process, which, in turn, reduces the legal effect of such norms and their inability to adequately, effectively and fairly regulate legal relations. In the process of law enforcement practice, the elimination of such uncertainty occurs through interpretation, including judicial, defective rules in resolving specific disputes, as well as by applying the analogy of rule and analogy of law.

Given the subject of this study, we consider it necessary to analyze in more detail the requirements for judicial decisions as an element of legal certainty which, in our opinion, directly reveals the nature and purpose of legal certainty in law enforcement, as stability of relations effectiveness of the judicial system.

In this context, Guiwan (2017a) correctly points out that the court is the mediator in possible conflicts between public authorities and the citizen, the last resort in case of acts or officials of public authorities' arbitrary actions against individuals. Implementing limited law-making functions in the course of consideration of specific cases and adaptation of the legal norm to the situation, the courts ensure the ability of legal acts to serve as a regulator of public relations. In this sense, legal certainty as a universal principle of law acquires significant substantive features due to the specifics of legal relations that arise in the procedural sphere.

Traditionally, most scholars have identified the requirement of certainty of judicial decisions with the Roman principle of «res judicata». Thus, Guiwan (2017b) notes that this category is rightly considered as equivalent to the finality of the court decision that has entered into force, and guarantees the invariability of the established status of the parties to the dispute.

Substantiating the synonymy of legal certainty with the principle of «res judicata», supporters of this view appeal to the case-law of the European Court of Human Rights. In particular, in paragraph 61 of the judgment in the case of Brumarescu v. Romania, the Court notes that the principle of legal certainty is one of the fundamental aspects of the rule of law, which requires that, in case of a final judgment, it be beyond doubt and be irreversible (res judicata) (European Court of Human Rights, 1999). This view has been confirmed by the Court in some other cases (European Court of Human Rights, 2003b).

At the same time, it should be noted that the idea of «res judicata» and legal certainty, despite their close relationship, are not identical. Considering the historical aspect of the formation of the concept of «res judicata», we can conclude that at first, it did not have the meaning that modern scientists put into it: the literal translation of this term means «decided case», and the practical embodiment was that after the decision (sentencia) was made the subject matter was considered resolved. We share the opinion of Rekhtina (2013), who emphasizes that the concept of «res judicata» ensured the functioning of the court decision, and some of its elements were manifested, including as a result of the finally resolved case. In particular, such a

decision precluded a retrial both in the negative aspect, as it became the basis for exepcio rei judicata (preclusive effect) and in the positive, because there was no need for further litigation on issues that have been resolved (prejudicial effect).

In modern science, the principle of res judicata is considered in two senses:

– in the narrow – the presence of a final judicial act, which entered into force and decided the case on the merits, which eliminated the contradiction or other uncertainty of the relationship;
– broadly – the principle of judicial procedure, which establishes that the end of the dispute by making a decision and its entry into force has the consequence: exclusivity – reconsideration of the same dispute is not allowed; indisputability – further appeal of the decision in the general order is prohibited, and review is allowed only in certain circumstances; enforceability – the court's decision must be enforced. In this interpretation, res judicata should be considered as a sectoral principle of legal certainty.

Res judicata acts as a defined status of the final judicial act, which is not subject to re-examination in the absence of exceptional circumstances. However, any violation of res judicata is a violation of the principle of legal certainty, as it results in uncertainty of the legal status of the subjects who are parties to the case. In particular, Judge H.L. Rozakis in a dissenting opinion in the judgment in Brumarescu v. Romania points out that in cases where the legal system gives the court the right to make final decisions and then allows them to be overturned in subsequent proceedings, not only does legal certainty suffer, but the very existence of the court is called into question because, in fact, it has no authority to finally resolve the legal issue (European Court of Human Rights, 1999). Thus, in our opinion, the identification of the principles of legal certainty, including judgment, and res judicata is incorrect, as the latter should be considered as a procedural aspect of legal certainty, which means the finality of judgments. It is worth noting, that legal certainty is a broader category, which includes not only the stability of judicial acts but also the requirements for their content, presentation techniques, logical structure, and motivation.

Analysis and generalization of the case-law of the European Court of Human Rights gives grounds to conclude that the legal certainty of court decisions is considered by him in two aspects:

- substantive – requirements addressed to the decision itself as a consequence of law enforcement activities: clarity, lack of contradictions, motivation. Thus, the Court draws attention to the fact that, following the principle of the proper administration of justice, decisions of courts and tribunals must set out the reasons behind these decisions. Even though national courts have a certain discretion in choosing the arguments in a particular case and accepting the evidence provided by the parties, the judiciary is obliged to justify its actions, and indicate the reasons for its decisions (European Court of Human Rights, 2003a). However, the qualitative degree of motivation may depend on the nature of these decisions, the variety of arguments, and the peculiarities of legal systems, laws, and customs. In addition, decisions that deviate from the existing case-law of the respective state require better justification;
- stability of the decision – this group of requirements includes: a ban on requiring a review of the final decision only for reconsideration and obtaining a new decision; review cannot be a covert form of appeal, and the presence of opposing views in the case cannot be grounds for review; prohibition of cancellation of the final decision, which has binding legal force, by the higher court, including at the request of a public official (European Court of Human Rights, 2003b). Simultaneously, European practice is based on the fact that the finality of a court decision involves establishing and resolving the factual side of the case, resolving a legal dispute between the parties, and is not related to its entry into force within the meaning of national law.

However, given the universal, comprehensive, and fundamental nature of the principle of legal certainty, it would be incorrect to limit its content solely to the consequences of a judicial act or the requirements of clarity of a procedural rule. Legal certainty as a procedural status is a much broader category that requires a proper assessment of the legal status as a whole, an understanding of the conditions and consequences of the exercise of certain rights, powers, or responsibilities. These requirements constitute an internal aspect of legal certainty in the procedural sphere, without which it is

impossible to ensure the fairness of judicial activity and the stability of court decisions.

Despite the significance of the principle of legal certainty for the regulation of public relations, including in the process of law enforcement, no less important in this activity is the opposite phenomenon – the principle of legal uncertainty. In the scientific literature, it is widely believed that certainty and uncertainty are integral features of legal regulation, interconnected and interdependent categories that establish boundaries between each other, capable of direct and reverse transformation, bipolar in some manifestations, are both qualitative properties and specific through legal regulation and absolute certainty is unattainable due to some factors, among them – the openness of the language, which formulates the rules of law, their generality, the inability to predict in advance all the real situations. However, the absolutization of legal certainty, often to the detriment of other fundamental principles of law, is traditional for modern legal science. In this situation, uncertainty is mentioned in connection with it at best as a defect in lawmaking, which, in our opinion, is incorrect.

We share the opinion of those scientists who believe that uncertainty is as natural and objective as certainty. Moreover, these two categories, which are inherently opposite, are in unity and linked by mutual transitions, since uncertainty is objectively inherent in the law. Given the dynamics of social development, international expansion, including legal cooperation, as well as the convergence of legal systems, its importance in legal regulation is also subject to further transformations. Given this, we consider it necessary to dwell in more detail on the study of legal uncertainty as a positive feature of law and its manifestations in law enforcement activities.

For law enforcement, the interpretation of legal uncertainty as a bipolar phenomenon acquires special meaning, because in this case uncertainty can act as a positive phenomenon that can act as one of the effective means of legal regulation. In particular, it is uncertainty that allows for individual regulation, and provides an opportunity for reasonable judgment, taking into account the dynamics of social relations. In this case, the uncertainty of the rule of law allows taking into account the peculiarities and dynamics of social relations at a particular stage of their existence, to ensure flexibility and accuracy of legal regulation. According to The Sunday Times v. The United Kingdom law must be able to keep up with changing circumstances (European Court of Human Rights, 1979).

Summarizing and systematizing the provisions on legal uncertainty as a positive feature of the law, we can conclude that it manifests itself in the following forms:

1) principles of law – as the basic ideas of law, designed to reflect in general the laws of public life, to establish them on the content of the law, as well as to adapt legal norms to the dynamics of social development;
2) evaluative concepts – such constructions give the subjects of law enforcement certain freedom in the interpretation of the legal norm by the possibility of filling the term with its content, depending on the actual situation. Under the right conditions, valuation concepts define legal certainty and regulatory strength, facilitate the adaptation of legal norms to the specific circumstances of the case, give legal regulation flexibility, and, as a consequence, act as a means of transition from uncertainty to certainty. At the same time, the "oversaturation" of legislation with evaluation categories, lack of stable and consistent practice of their interpretation complicates the law enforcement process, leads to contradictory court decisions in similar situations, legal conflicts, violates the unity of case-law and reduces the level of protection of human rights and freedoms
3) reason – an intellectual mechanism, a way of human thinking in terms of a certain choice of opportunities for the desired result. At the heart of this activity is a phenomenon of uncertainty that needs to be overcome. Thus, discretion is an objectively existing and socially justified legal phenomenon that ensures the transition from uncertainty to certainty. Its importance as a regulator of public relations is also pointed out by the European Court, which emphasizes that it is impossible to achieve absolute certainty in the wording of the normative act, and attempts to consolidate it will result in excessive law. At the same time, national law must define with sufficient clarity the scope, limits, and manner of exercise of discretion to provide citizens with the minimum level of protection to which they are entitled (paragraphs 32-33 of the judgment in Domenichini v. Italy) (European Court of Human Rights, 1996);• element of contractual regulation – the property of uncertainty is often used in the conclusion of contracts that serve as a means

of achieving flexibility and accuracy of legal regulation;

4) element of constitutional justice – in the activities of constitutional jurisdiction, which, according to Rabinovich (2017), is essentially «political jurisprudence», legal uncertainty creates space for political regulation and balance of divergent social interests through some tools of legal technique, in particular, the choice of ways of interpreting the Constitution, the means used in its course, taking into account the peculiarities of law enforcement practice. The main feature of legal uncertainty in this area of legal relations is its evaluative nature, dependence on the situation and political interests, that are at the center of the dispute, and its presence or absence can be both real and imaginary.

Conclusions

1. Thus, the principle of legal certainty has deep historical roots. Its origin and content are associated with the development of Roman law and the establishment of the rule of res judicata, which meant the finality and immutability of court decisions. With the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms, legal certainty has become a universally recognized principle of international law, which, given the dynamic development of the Convention and the case-law of the European Court of Human Rights, has become multifaceted. The most meaningful approach to defining the essence of legal certainty is to understand it as a component of the rule of law and an independent fundamental principle of the legal system, as such an understanding of this category is not limited to its formal manifestations and reflects the specific impact of this principle on various areas of legal regulation and practical implementation of regulations, including law enforcement.
2. The variety of forms of existence and manifestations of legal certainty determines the multiplicity of views on its content. In generalized form, the elemental composition of the principle of certainty in law enforcement includes requirements for the interpretation (in particular, judicial) of regulations and individual rules; legality of resolving legal conflicts and eliminating gaps in current legislation; stability of court decisions; unity of judicial practice. The essential content of this principle has significant differences in different areas of law, in particular, procedural, due to the specifics of legal relations governed by them. The key aspect that reveals the essence and purpose of the principle of legal certainty in law enforcement is the requirements for court decisions. The implementation of the principle of legal certainty in procedural activities takes place in various legal forms. In civil proceedings, the idea of legal certainty is manifested in the system of appeals and the grounds for the review of judicial acts that have entered into force. In criminal proceedings, legal certainty implies predictability and clarity of its course, consequences, the legal status of its participants, as well as other persons whose rights and legitimate interests are affected. The case law of European courts – both the Court of Justice and the ECtHR – in this regard is controversial, characterized by a variety of approaches to addressing the legality of liability for complex offenses. The ECtHR assumes that this problem must be resolved in each case, taking into account the facts of the case, and analyzing them in terms of identity, the relationship between them, and their proof.
3. The categories of legal certainty and legal uncertainty are in a dialectical relationship, complement each other, set the boundaries of each of them, and, as a result, in the dichotomy provide flexibility and efficiency of legal regulation. Legal uncertainty, as a positive feature of the law, depends on several factors and allows for individual regulation, providing flexible and reasonable judgment in law enforcement.

Bibliographic references

Barak, A. (2010). Proportionality and Principled Balancing. Law & Ethics of Human Rights, 4(1), 1–16. https://doi.org/10.2202/1938-2545.1041

Beazley A. (2020). Contagion, containment, consent: infectious disease pandemics and the ethics, rights and legality of state-enforced vaccination. Journal of Law and the Biosciences, 7(1), 1-10. https://doi.org/10.1093/jlb/lsaa021

Bekele, H.K. (2021). Problem of Defining Terrorism under International Law: Definition by the Appeal Chamber of Special Tribunal for Lebanon as a Solution to the Problem. Beijing Law Review, 12, 619-630. DOI: 10.4236/blr.2021.122033.

Brown, A., Grogan J., & Beqiraj J. (April 17, 2021). Rule of law as a Perimeter of

Legitimacy for COVID-19 Responses. VerfBlog. In https://verfassungsblog.de/rule-of-law-as-a-perimeter-of-legitimacy-for-covid-19-responses/

Carlin, R. E. (2012). Rule-of-Law Typologies in Contemporary Societies. Justice System Journal, 33(2), 154–173. https://www.tandfonline.com/doi/abs/10.1080/0098261X.2012.10768009

ECHR. (2020). Analysis of statistics. https://echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf

European Court of Human Rights (ECHR) (2001/07/10). Judgment in the case of "Avşar v. Turkey". Recovered from http://hudoc.echr.coe.int/fre?i=001-59562.

European Court of Human Rights (ECHR) (1979/04/26). Judgment in the case of «Sunday Times v. The United Kingdom». In http://hudoc.echr.coe.int/eng?i=001-57584

European Court of Human Rights (ECHR) (1991/04/17). Judgment in the case of «Olsson v. Sweden». In https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20OLSSON%20v.%20SWEDEN%20(No.%202)\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57788%22]}

European Court of Human Rights (ECHR) (1996/11/15). Judgment in the case of «Domenichini v. Italy». In http://hudoc.echr.coe.int/eng?i=001-58073

European Court of Human Rights (ECHR) (1999/10/28). Judgment in the case of «Brumarescu v. Romania» (application № 28342/95). In http://hudoc.echr.coe.int/eng?i=001-58337

European Court of Human Rights (ECHR) (2000/03/28). Judgment in the case of «Baranowski v. Poland» (application № 28358/95). In http://hudoc.echr.coe.int/eng?i=001-58525

European Court of Human Rights (ECHR) (2003/07/01). Judgment in the case of «Suominen v. Finland» (application № 37801/97). In http://hudoc.echr.coe.int/eng?i=001-94141

European Court of Human Rights (ECHR) (2003/07/24). Judgment in the case of «Ryabykh v. Russia» (application № 52854/99). In http://hudoc.echr.coe.int/eng?i=001-61261

European Court of Human Rights (ECHR) (2011/10/20). Judgment in the case of «Nejdet Şahin and Perihan Şahin v. Turkey» (application № 13279/05). In http://hudoc.echr.coe.int/eng?i=001-107156

Fenwick, M., Siems, M., & Wrbka, S. (2017). The Shifting Meaning of Legal Certainty in Comparative and Transnational Law. Oxford: Hart publishing. https://www.bloomsburycollections.com/book/the-shifting-meaning-of-legal-certainty-in-comparative-and-transnational-law/the-state-of-the-art-and-shifting-meaning-of-legal-certainty

Gardner, J. (2012). Law as a Leap of Faith: Essays on Law in General. Oxford: Oxford University Press. ISBN-13: 9780199695553. https://doi.org/10.1093/acprof:oso/9780199695553.001.0001

Greene, A. (2017). Defining Terrorism: One Size fits all? International and Comparative Law Quarterly, 66(2), 411-440. https://doi.org/10.1017/s0020589317000070

Guiwan, P.D. (2017a). Legal certainty of law enforcement according to European principles. Journal of Kyiv University of Law, 3, 276-281. http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&IMAGE_FILE_DOWNLOAD=1&Image_file_name=PDF/Chkup_2017_3_62.pdf

Guiwan, P.D. (2017b). Legal certainty as an integral part of the rule of law. Almanac of International Law, 17, 11-21. http://nbuv.gov.ua/UJRN/amp_2017_17_4

Hammurabi. (2002). Pandect. Ihttp://thales2002.narod.ru/chammuratext.html

Horodovenko, V., Bondar, O., & Udovyka, L. (2021). Justice in the Covid-19 era Through the Prism of Judicial Power. Ius Humani Law Jounal, 10(1), 51-72. https://doi.org/10.31207/ih.v10i1.270

Janderová J., & Hubálková P. (2021). Legal Certainty – Protected Values and Partial Objectives: The Case of the Czech Republic. CEPAR Central European Public Administration Review, 18(1), 63-82. https://doi.org/10.17573/cepar.2021.1.03

Kofanov, L.L. (2002). Digests of Justinian. Moscow: Statute. ISBN 5-8354-0103-5. https://acortar.link/6GsRdC

Lifante-VidalIs, I. (2020). Legal Certainty a Formal Value? Jurisprudence, 11(3), 456-467. https://rua.ua.es/dspace/bitstream/10045/110391/5/Lifante-Vidal_2020_Jurisprudence_preprint.pdf

Ognevyuk, G.Z. (2017). Legal certainty as a legal category. Bulletin of the Ministry of Justice of Ukraine, 10, 32-35. In http://nbuv.gov.ua/UJRN/bmju_2017_10_13

OpenDataBot. (August 30, 2021). Ukraine is one of the three countries most often tried in the European Court of Human Rights. https://opendatabot.ua/analytics/european-court

Pogrebnyak, S.P. (2009). Fundamental principles of law. Kharkiv: Yaroslav the Wise National University of Law. https://pravo.studio/prava-derjavi-teoriya/osnovopolojni-printsipi-prava-avtoreferat.html

Portuese, A. (November 30, 2020). Antitrust, Innovation, and Legal Certainty: What the German Legislative Proposal Tells. Information Technology & Innovation Foundation. https://itif.org/publications/2020/11/30/antitrust-innovation-and-legal-certainty-what-german-legislative-proposal

Rabinovich, S. (2017). Legal uncertainty in acts of constitutional proceedings: pro et contra. Ukrainian Journal of Constitutional Law, 1, 44-49. https://www.constjournal.com/pub/1-2017/pravova-nevyznachenist-aktakh-konstytutsiinoho-sudochynstva-pro-contra/

Rekhtina, I. V. (2013). The origins of the principle of legal certainty (res judicata) in the legislation of ancient Rome. Questions of modern jurisprudence, 27, 71-79. https://cyberleninka.ru/article/n/istoki-printsipa-pravovoy-opredelennosti-res-judicata-v-zakonodatelstve-drevnego-rima

Tapia-Hoffmann, A.L. (2021). Legal Certainty and Central Bank Autonomy in Latin American Emerging Markets. Berlin: Springer. https://link.springer.com/book/10.1007/978-3-030-70986-0

Udovika, L.G., & Novoselova, V.V. (2021). The nature and content of trust in the judiciary in Ukraine through the prism of world experience. Legal Bulletin, 4, 127-142. http://yurvisnyk.in.ua/v4_2021/19.pdf

Wolters Kluwer Editorial Staff. (2021). COVID and Taxpayer Certainty Acts of 2020: Law, Explanation and Analysis. Berlin: Wolters Kluwer. ISBN: 9780808055921

World Justice Project. (2021). Rule of Law Index. https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021

Wrbka, S. (2016). Comments on Legal Certainty from the Perspective of European, Austrian and Japanese Private Lawn. Legal Certainty in a Contemporary Context, 1, 9-32. https://link.springer.com/chapter/10.1007/978-981-10-0114-7_2