

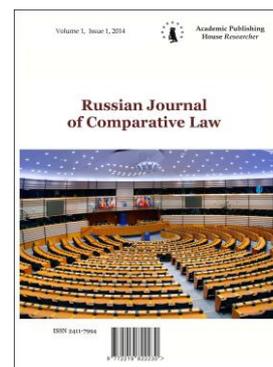
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## Theoretical and Practical Aspects of Human Rights Monitoring

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### Abstract

In the scientific article was investigated theoretical and practical aspects of human rights monitoring. It was found that monitoring of the legal system is a key aspect of analysis in the field of human rights. Legal monitoring participates in the implementation of almost all functions of the legal system: integrative, regulatory, enforcement, communication, legal incentives, provide a uniform legal space of the state, international legal cooperation.

Monitoring of the legal system is a key aspect of analysis in the field of human rights. It is impossible to control all the practical aspects, especially in relation to individual cases. Monitoring the investigation of cases requires the application of the methodology is beyond the scope of control over individual cases as isolated cases. It is necessary to identify human rights violations in a particular case and to provide personal protection.

In our opinion, the legal system monitoring should also be aimed at identifying patterns and trends in violations of international standards. For example, to assess the conformity of national legislation with international human rights, it is necessary to perform and daily practice in litigation. The right to a fair trial, access to treatment and to justice, the independence of the judiciary and the proper administration of justice are the basis of a fair and effective justice system. Monitoring the justice system can be directed primarily on the criminal justice process, particularly at the initial stage.

As a result of the monitoring of human rights, should develop recommendations on ways to effectively address the problems faced by the justice system. For example, with the reform in the field of law and policy to create and develop the institutions, including accountability mechanisms, the provision of remedies, training and capacity building, administrative and logistical support, resource allocation, etc.

**Keywords:** legal monitoring, human rights, legal system, legal norm, legal act, rule of law, justice, freedom, international humanitarian law, assessment.

### 1. Introduction

In modern attempts to control and assess the legitimacy and justice, there is a significant fragmentation. Therefore, innovative approaches needed to eliminate legislative gaps and bring Ukraine closer to international standards of respect for human dignity, freedom, democracy, equality, the rule of law and human rights.

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The conceptual clarity of legal monitoring strengthened by the introduction of fundamental constitutional values and principles (freedom, equality, an effective system of justice, access to justice, etc.) into the legal and political system.

## 2. Materials and methods

In the scientific works of foreign and Ukrainian scientists there is a lack of unified approaches to understanding the phenomenological basis for monitoring human rights, the way it is understood and interpreted. It seems advisable to focus on the theoretical and applied aspects of monitoring human rights, as well as to clarify the essence of legal monitoring as an element of the legal system of society and its role in ensuring the quality and effectiveness of law.

This problem was reflected in the scientific research of foreign scientists: R. Jegard, Z. Kmechak, J. Madej, M. Novitski, N. Sazhienko, J. Tlembaeva, Z. Fialova, etc. Ukrainian scientists are also working on the issues of legal monitoring: T. Antsupova, Yu. Gradova, O. Zaichuk, V. Kosovich, O. Kopilenko, N. Onishchenko, I. Shutak and others.

The article based on the analysis of scientific literature on the legal monitoring of the Russian Federation, the United States, the EU, Kazakhstan and Ukraine. In the process of research, a set of general scientific (analysis and synthesis, logical, etc.) and private-scientific (system analysis, comparative-legal, etc.) methods of theoretical research were used.

## 3. Discussion

Protagoras's thesis "Man is the yardstick of all things" has become a testament to the person's comprehension of one's own value, significance and contribution to the universal. Humanism is manifested here not in the search for ways to freedom, not in the definition of the transcendental origins of man, but in the search for harmony, symmetry, orderliness, expediency.

Ideas of human rights go back to ancient times. Already in the Code of Hammurabi (XVII century BC) it is mentioned that the tsar is the basis of power, justice, protection of the weak from abuse by the strong. The Greek Sophists and Stoics professed natural freedom, equality of people and the superiority of natural law over the camp. Roman thinkers, in particular, Cicero and Seneca, followed the idea of natural law. In ancient Rome, the fundamental right to a fair trial was born, and in Act XII of the Tables from 449 BC. There is a record of the prohibition of the use of the reverse right. A lot of modern thinkers pay attention to the devaluation of human rights in the modern world. Human rights again cause lively debate and debate (Madej, 2014 : 11).

Violation of human rights in certain cases may be the result of an isolated incident or the conduct of specific participants, for example, a corrupt judge or an indifferent the Internal affairs officer. In order to identify systemic problems that require attention or reform, it is necessary to monitor a number of cases and establish trends and characteristics in order to draw general conclusions on the functioning of the system and make recommendations for comprehensive reforms.

The Ukrainian legislator is increasingly using the term "legal monitoring", in particular, after the simultaneous ratification of the Association Agreement between Ukraine and the EU on September 16, 2014 by the Verkhovna Rada of Ukraine and the European Parliament. According to the Agreement, the stage of legal monitoring and evaluation, which is practically absent today, should be strengthened by clear mechanisms for general current and final evaluation of the legal system and provide free public access to information (Onyshhuk, 2015 : 78).

In Ukraine, the issues of legal monitoring at both the theoretical and practical levels are developed by specialists of the Institute of Legislation of the Verkhovna Rada. Among the main tasks of the Institute, in accordance with the Decree of the Chairman of the Verkhovna Rada of Ukraine No. 770 of August 4, 2003 "On Approval of the Regulations on the Institute of Legislation of the Verkhovna Rada of Ukraine and Its Structure", is the organization of monitoring the effectiveness of the current legislation and forecasting the consequences of its application.

Legal monitoring is necessary to ensure the rule of law, the rights and freedoms of citizens, to improve the quality of political and legal decisions, to open the law-making activities, to reduce the level of contradictory legislation, to streamline the activities in the field of lawmaking, to provide a single legal space for the state, and to improve the effectiveness of law enforcement practice.

Special attention, in our opinion, deserves foreign experience in conducting legal monitoring.

Kazakh specialists take into account a number of shortcomings of the current normative legal acts, which require elimination primarily through legal means. In accordance with the

Methodological recommendations for conducting legal monitoring of the normative legal acts and preparation of the concept of normative legal acts projects of the Ministry of Justice of the Republic of Kazakhstan, the subject of legal monitoring are: the identification of contradictions, collisions and gaps between the norms of the law of various normative legal acts; change or abolition of archaic norms; redundancy or insufficiency of legal regulation of public relations; duplication of norms; Analysis of norm-application, norms of declarative nature; the recognition of acts as invalid; development of new projects; Certain violations of legislative practice, legal techniques; Editorial weaknesses; Non-authentic text and the like ([Metodicheskie rekomendacii](#)).

In addition, the Concept of the legal policy of the Republic of Kazakhstan for the period from 2010 to 2020, approved by the Decree of the President of the Republic of Kazakhstan dated August 24, 2009, No. 858, states that "the development of the system of scientific expertise will help solve the task of drafting normative legal acts that are up-to-date and Prospects for the development of society and the state" ([Tlembaeva, 2012: 42](#)).

It seems that such an experience could be useful in Ukraine.

Justice and the rule of law are indispensable principles for the existence of the European Union (hereinafter referred to as the EU), which influence the policy of the EU and its instruments. A vivid example of the importance of justice is the expansion of policies, which focuses on legal monitoring and assessment of the level of justice and the rule of law in the candidate countries. The EU policy is based on the existence of a common understanding of justice and mutual trust, the ability of each national system to achieve and maintain high standards of justice and the rule of law.

Domestic law can be defined primarily through the instrumental (regulatory, regulatory) subsystem of the legal system. This understanding is set forth in Art. 2 of the European Convention on Nationality (1997), where domestic legislation is disclosed through the main sources (forms) of law. It includes "all kinds of provisions of the national legal system, including the constitution, laws, decrees, decrees, case law, customary rules and practices, as well as rules that come from international treaties and are binding.

On the eve of Poland's accession to the EU, as a result of cooperation between the Office of the Committee for European Integration and the Governmental Law Center, "Recommendations on policy in the field of legislative technology" were developed and published. The recommendations contain a set of rules and advice to ensure the effectiveness of European Union law in Polish law. The creation of national legislation, after accession to the EU requires compliance with certain rules and responsibilities arising from belonging to this particular organization. European communities are developing within the framework of international law, in which the principles of efficiency, solidarity, devotion and unity are realized ([Wytyczne polityki legislacyjnej i techniki prawodawczej: 7](#)).

International humanitarian law (IHL) and human rights for a long period remained separate branches of law. Depending on the state of international relations, the application of human rights law was related to the state of peace between states, and the international humanitarian law of armed conflict ("jus in bello") was associated with the state of war. The basis for this provision was the traditional assumption that the so-called human rights law refers to issues related to the attitude of the state to its citizens, as well as to persons residing on its territory. The central goal of international humanitarian law is the protection of citizens or representatives of hostile states/communities in times of armed conflict ([Przybysz, 2010 : 70](#)).

In 1998, the third intergovernmental working group on the right to development was established on the basis of Commission on Human Rights resolution 1998/72 and the decision of the United Nations Economic and Social Council. The Working Group meets once a year and reports to the Human Rights Council and the UN General Assembly.

The mandate of the working group on the right to development includes monitoring and analysis of progress made in the realization of the right to development, as enshrined in the Declaration on the Right to Development, both internationally and nationally.

In 2001, at the 29th ordinary session in Tripoli (Libya), the African Commission on Human and Peoples' Rights adopted a Resolution on Freedom of Expression in Africa, which encouraged the establishment of a mechanism to facilitate the examination and monitoring of adherence to standards of expression, to investigate violations and develop recommendations for the Commission itself and Member States.

In 2002, the Commission adopted the Declaration of Principles on Freedom of Expression in Africa, which enshrined the most important standards in this field, such as equal opportunities in exercising the right to freedom of opinion, the right to access to information and the duty of the public authorities to provide information.

The European Committee for Health (CDSP) has prepared recommendations for the governing body of the CE – the Committee of Ministers. For example, the following recommendations were adopted: Recommendation CM/Rec (2010) 11 on the impact of genetics on the organization of health services and training of health workers; Recommendation CM/Rec (2010) 6 on good governance in the health system; Recommendation CM/Rec (2009) 3 on the monitoring and protection of human rights and the dignity of persons with mental disorders; Recommendation Rec (2008) 1 on the inclusion of gender differences in health policy, and others.

With a view to systematizing and codifying the European electoral heritage, the Council of Europe, while encouraging the adoption of the Code of Reference Standards for Referenda (Venice, October 13-14, 2006, March 16-17, 2007), also hoped to design a tool Cooperation with other international institutions whose activities are aimed at ensuring the conduct of democratic elections and the procedure for their monitoring. These international institutions include, in particular, the Office for Democratic Institutions and Human Rights of the OSCE, as well as the Association of Heads of Election Commissions of Central and Eastern Europe.

In the Strategy for the Effective Implementation of the Charter of Fundamental Rights of the European Union (Brussels, 19 October 2010), the European Parliament and the Council of Europe have proclaimed monitoring compliance with basic human rights in the Union as one of their priorities for the future in the field of justice, freedom and security. Respect for fundamental rights is subject to in-depth monitoring by the court and is an important component in the construction of the EU. During the legislative process, the proposals of the European Commission in the legislative act can be amended.

The European Council in the Stockholm program calls on EU institutions and member states to ensure that legislative initiatives are consistent with fundamental human rights throughout the legislative process by making more effective use of the methodology for systematic and rigorous monitoring of compliance with the European Convention on Human Rights as enshrined in the Charter of Fundamental Rights of the European Union ([Strategy](#)).

In 2012, on the initiative of the Ombudsman for the Rights of the Child and the Ministry of Social Affairs of Estonia, the monitoring of the rights of the child and parenthood organized for the first time. The main objective of the monitoring is to map the public awareness of the rights of the child, as well as to analyze the positions and problems in the issues of raising children and supporting paternity, taking into account the prospects of both children and adults. For this purpose, data were collected from both the adult population and children.

The first survey was conducted in the period 01.03.2012 - 18.03.2012 within the Omnibus survey conducted by Turu-Uuringute AS. 1,000 people aged 15 to 74 who interviewed questions related to parental responsibilities and the rights of the child were interviewed. The data were weighed and the results by sex, age and region (Northern Estonia, Northeast Estonia, Western Estonia, Central Estonia, Southern Estonia) were presented. In 2013, the project "Monitoring the validity and reliability of the findings and provisions on the placement of persons applying for refugee status in protected premises and in custody for the purpose of removal" was financed and implemented in Poland from the funds of the Stefan Batory Foundation ([Sieniow, 2013: 3](#)).

An important aspect of monitoring human rights is the monitoring of freedom of conscience and religion. The European Court of Human Rights has repeatedly cited the very clear in article 9 of the European Convention on Human Rights: that freedom of thought, conscience and religion is one of the foundations of a democratic society. Religious pluralism is inseparably linked with a democratic society that has been formed over the centuries ([Gerhard, 2010: 79](#)).

The rule of law is a multifaceted concept, which consists of eight planes: 1) responsibility before the law; 2) access to information; 3) independence of the judiciary; 4) the effectiveness of the judicial system; 5) respect for fundamental rights; 6) effective implementation of laws; 7) access to justice; 8) absence of corruption ([Gramatikov, 2012 : 2](#)).

The control of legal systems is the analysis of institutions and the system as a whole, in order to consolidate good practices, eliminate shortcomings and problems. Control is an instrument, not an end in itself. Its importance is reflected in the integrity and consistency of information, accuracy

and depth of analysis, as well as in the relevance and practical applicability of the recommendations ([Monitoring pravovyh system](#)).

Thus, legal monitoring is an important condition for the effective functioning of the legal system. The purpose of monitoring is to bring the legal system in line with the law, including with applicable international and regional norms, and to promote compliance with the principles of the rule of law. International and regional norms provided for in treaties or other instruments and other norms that provide for legitimate criteria for assessing progress towards the creation, restoration or strengthening of the justice system in post-conflict environments. As for the UN, the universal applicable rules adopted under its auspices serve as a normative basis for activities aimed at supporting justice and establishing the rule of law ([Monitoring pravovyh system](#)).

Fundamental principles exclude discrimination, equal treatment, in particular: access to justice; Fair treatment of victims; Access to judicial remedies and/or reparation in accordance with the law; Treatment in accordance with domestic law; Fair nature of the substantive and procedural aspects of the proceedings; Prevention of impunity for crimes provided for by international law; Independent and impartial justice ([Rule-of-law : 5](#)).

Violation of rights in certain cases may be the result of an isolated incident or the conduct of specific participants, for example, a corrupt judge or an indifferent ATS officer. In order to identify systemic problems that require attention or reform, it is necessary to monitor a number of cases and establish trends and characteristics in order to draw general conclusions on the functioning of the system and make recommendations for comprehensive reforms ([Prospective Evaluation Methods](#)).

In recent decades, monitoring assessment has become an important element in the legislative practice of many countries. Concerning institutionalization, procedural and organizational arrangements can be distinguished. Procedural measures are, for example, evaluation clauses (obligations to carry out a forward-looking and retrospective assessment) or an obligation to prepare periodic reports. Organizational arrangements concern the creation of special bodies or services responsible for monitoring the assessment of legislation. Such bodies or services can be established within different ministries (decentralized decision), in one separate ministry (centralized decision), within the framework of parliamentary services or as autonomous bodies (for example monitoring office or court). They can independently assess the impact of legislation or empower external experts ([Prospective Evaluation Methods](#)).

It is necessary to pay special attention to monitoring the implementation of law (laws and other regulatory legal acts). Unfortunately, until this day, civil servants, deputies and citizens turn to the law only when it is necessary to receive a privilege, or in cases of obvious violations of the law. Therefore, the most important task of each structure (state, economic, etc.) is to ensure the operation of the law and other regulatory legal acts.

#### **4. Results**

Monitoring of the legal system is a key aspect of human rights analysis. It is impossible to control all practical aspects, and especially with regard to individual cases. Monitoring the investigation of cases requires the application of a methodology that goes beyond the control of individual cases as single cases. It is necessary to identify violations of human rights in a specific case and provide individual means of protection.

As a result of the monitoring of human rights, recommendations should be made on how to effectively solve the problems faced by the justice system. For example, through legal and policy reform, establish and develop institutions, including accountability mechanisms, legal remedies, training and capacity-building, administrative and maternal.

#### **5. Conclusion**

In our opinion, monitoring of the legal system should also be aimed at identifying patterns and trends in violations of international standards. For example, to assess the compliance of national legislation with international human rights, it is necessary to analyze daily practice in court cases. The right to a fair trial, access to treatment and fair justice, the independence of the judiciary and the proper administration of justice underpin a fair and efficient justice system. Monitoring of the justice system can be directed, first of all, to the criminal justice process, in particular at the initial stage.

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