

06/21

# ReOS

**Recht der Osteuropäischen Staaten**

# Recht der Osteuropäischen Staaten (ReOS)



**Recht der Osteuropäischen Staaten (ReOS)** – scientific journal of legal sciences founded by University of Göttingen (Germany) with the purpose of knowledge sharing between Western and Eastern Europe.

## *Publisher:*

Prof. Dr. **Thomas Mann (Begr.)**, Institut für Öffentliches Recht, Lehrstuhl für Verwaltungsrecht, Georg-August-Universität Göttingen

## *Editorial board:*

Prof. Dr. **Toma Birmontienė**, Professorin am Laboratorium für Menschenrechte, Institut für öffentliches Recht, Mykolas-Romeris-Universität (Litauen)

Prof. Dr. habil. **Sabina Grabowska**, University of Rzeszow (Polen)

Prof. Dr. **Thomas Mann (Begr.)**, Institut für Öffentliches Recht, Lehrstuhl für Verwaltungsrecht, Georg-August-Universität Göttingen

Prof. Dr. habil. **Joanna Marszalek-Kawa**, Nicolaus Copernicus University (Polen)

Prof. Dr. **Roman Melnyk (Schriftleitung)**, Hochschule des Rechts („School of Law“) der M. Narikbayev KAZGUU Universität (Kasachstan)

Dr. jur. **Bernhard Schloer**, DAAD-Langzeitdozent, Nationale Taras-Schewtschenko-Universität Kiew (Ukraine)

Dr. **Agne Tvaronaviciene**, Postdoc am Laboratorium für Mediation und nachhaltige Konfliktlösung, Institut für öffentliches Recht, Mykolas-Romeris-Universität (Litauen)

Dr. iur. **Azamat Egamberdiev**, Dozent des Lehrstuhls für Staatsrecht und Staatsverwaltung der Tashkenter Staatlichen Juristischen Universität beim Justizministerium der Republik Usbekistan

## Partners



Netzwerk Ost-West



Rechtsdialog.org

[www.uni-goettingen.de/reos](http://www.uni-goettingen.de/reos)

06/2021

ISSN 2199-6245

# ReOS 06 / 2021

## Inhaltsverzeichnis

Scientific approaches to comprehending the category of law and order <i>Baryska Yana, Popovych Tereziia</i> .....	4
Foreign experience in the application of precautionary measures in criminal proceedings against minors: a comparative analysis of the United States, Great Britain, France and Ukraine <i>Danylenko Anastasiia</i> .....	10
Procedural order for consideration of a case in simplified claim proceedings <i>Epanchintsev Oleksiy</i> .....	17
Criminological analysis of individual determinants of crime <i>Zabarniy Maksym</i> .....	23
The main directions of interaction of local executive authorities and local self-government with the National Police of Ukraine <i>Zabozhchuk Oksana</i> .....	30
Peculiarities of examination execution at the place of event investigating intended killings staged like suicides <i>Karpova Anna</i> .....	38
Legal regulation of vertical agreements and vertical restraints in post-Soviet countries: Ukraine, Russia, Georgia, Kazakhstan <i>Ladychenko Viktor, Kravtsova Iryna</i> .....	46
The legal nature of marital testament: comparative law analyzes <i>Mykhayliv Mariya</i> .....	54
“Child’s right to an open future” as a legal phenomenon <i>Omelchenko Olha</i> .....	62
On the principles of legal formation and implementation of state policy of foreign investment in Ukraine <i>Puzanova Galyna</i> .....	68
Features of conducting covert investigative actions during pre-trial investigation of criminal offenses under Part 2 of Art. 255-1 of the Criminal Code of Ukraine <i>Tkachenko Serhii</i> .....	77
Readability of regulatory legal act and ways of its guaranteeing: notes to scientific discussion <i>Chekhovych Tetiana</i> .....	85

## **Scientific approaches to comprehending the category of law and order**

### ***Baryska Yana***

*Candidate of Juridical Sciences,*

*Assistant Professor of the Department of Theory and History of State and Law*

*Uzhgorod National University, Ukraine*

*<https://orcid.org/0000-0001-5382-7974>*

### ***Popovych Tereziia***

*Candidate of Juridical Sciences,*

*Assistant Professor of the Department of Theory and History of State and Law*

*Uzhgorod National University, Ukraine*

*<https://orcid.org/0000-0002-8333-3921>*

The research is devoted to the analysis of the essence of legal order as a category of theoretical and legal science. In particular, different approaches to understanding the concept of legal order are revealed, in this regard, the works of domestic and foreign scholars are analyzed. The authors emphasize that it is the pluralistic understanding of law that has opened up opportunities for a new, broader perception of a number of categories of legal theory, including the category of legal order. On the other hand, globalization processes, a new wave of which began after the Second World War and continues to this day, highlight the need to delineate, define the essence of such spatial forms (slices) of legal order as national, supranational and international.

It is noted that common in the views of legal theorists is the understanding of the legal order as a certain result, the state of social relations, which reflects the order of legal reality organized by legal means. The state, represented by the institutions of public power, on the one hand, plays a key role in ensuring legal order, and on the other hand, is itself a manifestation of legal order. It is concluded that the legal order is part of the legal reality, a necessary condition for the existence of a modern state-organized society. In this case, the essence of the rule of law is revealed, at least in its properties such as systemic, normative, hierarchical, provided by the state or international legal institutions.

In addition, the generalization of scientific approaches to the concept of legal order allows to define it as part of legal reality, which includes a set of norms, principles of law and public law institutions that carry out law-making, law enforcement and law enforcement activities. Globalization, as an objective process of development of human civilization, causes the interpenetration of different levels of legal order and changes in its content, which in turn justifies the need for further research.

### **Introduction**

It is observed that in recent years Ukrainian scholars have been increasingly using the “law and order” category in their theoretical

legal research. Notably, this phenomenon is characteristic of theoretical works as well as sectoral-based works. It is not accidental because pluralistic legal consciousness has opened up opportunities for a new, broader

perception of a number of categories of law theory.

On the other hand, globalization processes, whose new wave began after the Second World War and continues to this day, actualize the need to delineate and determine the essence of such spatial forms (dimensions) of the existence of law and order as national, supranational and international.

Methodologically, this work is based on the system of methods, scientific approaches, techniques and principles with the help of which the realization of the research aim is carried out. There have been applied universal, general scientific and special legal methods.

The purpose of the article is the disclosure and analysis of different approaches to the concept of law and order, as well as the definition of its essence as a complex category of theoretical and legal science.

### **Presenting the main material**

Revealing the essence of law and order as the legal organization of modern society, first of all, refers us to H. Kelsen's concept. The scholar admits that the modern state is the manifestation of the highest degree of centralized law and order. Law and order in turn is a normative system based on the fundamental norm – the main factor of law-making, the starting point in creating positive law. The basic norm of law and order is not a material norm which is defined as the highest one and from which norms of human behavior can be deduced<sup>1</sup>.

It is law and order that constitutes the courts and other bodies that are entitled to take coercive

measures to ensure collective security. "The goal of collective security is peace, id est, the absence of physical violence. Determining under which conditions and by which individuals coercion should be applied, legal order pacifies the society constituted by it". Considering law as mandatory order, H. Kelsen notes that the essence of law and order lies in the fact that under certain circumstances the determined acts of coercion must be applied. It means that law and order defines the behavior, committed or non-committed, according to which a certain sanction will be applied<sup>2</sup>.

Hans Kelsen's teaching was the impetus for further research into the essence of law and order. The position of the Italian philosopher, lawyer N. Bobbio is worth paying attention. In his work he points out that legal order is a system of rules of conduct (norms) that set up a coherent regime. Since the legal system consists of a set of norms, there can arise collisions between them as they come from different sources and thus the consistency of law and order can be broken. Such collisions can be resolved taking into account the content of the norms, not just the public authority that issued them. At the same time, while supporting the concept of law and order which cannot feature any contradictory norms, the scholar suggests three aspects of their analysis: chronological, hierarchical and special. First, the norm adopted recently takes precedence, then the one carrying the highest legal force, and, finally, the one specifically regulating the relevant legal relationship.

Hence, the main purpose of law and order is to ensure consistency between the norms in order to avoid the possibility of their different

---

<sup>1</sup> Hans Kelsen's Pure Theory of Law. Issue 1: devoted to the 13<sup>th</sup> Congress of the International Association of Legal and Social Philosophy (Tokyo, 1987): a collection of the translated works / exec. ed. N.V. Kudriavtsev, N.N. Razumovich; resp. for the publication S.V. Lezov. Moscow : INION RAN Publishing House, 1987. P. 110.

---

<sup>2</sup> Hans Kelsen's Pure Theory of Law. Issue 1: devoted to the 13<sup>th</sup> Congress of the International Association of Legal and Social Philosophy (Tokyo, 1987): a collection of the translated works / exec. ed. N.V. Kudriavtsev, N.N. Razumovich; resp. for the publication S.V. Lezov. Moscow : INION RAN Publishing House, 1987. P. 24.

applications and, as a consequence, different decisions on similar cases<sup>3</sup>.

The position of the Dutch scholar Hendrik Jan van Eikem Gomez is interesting as well. He states, if a plurality of legal norms expresses legal unity, we can talk about legal order or the legal system. The scholar distinguishes such levels of law and order as international, national, supranational and, legal orders of a private nature. The international legal order is the unity of all legal norms that manifest themselves in international relations between states and international organizations. The national legal order is the legal unity of the rules of conduct created by government authorities in different areas of competence. The supranational legal order is intermediate between the international and national ones, these are the rules of conduct established by the European Community in specific fields which are delegated by the member countries to the supranational level.

In the author's opinion, answers to the question – what ensures the stated legal unity of a plurality of legal norms and what legal factors determine the legal order, – should be sought in substantive principles (legal unity, legal competence, legal harmony, legal equality), on which any legal order is based, since they are fundamental in the concept of law and order<sup>4</sup>.

A clearer definition of the essence of law and order was formulated by A. Petters. She believes law and order should be perceived through the lens of legal means and regularized law<sup>5</sup>. This

<sup>3</sup> Bobbio N. *Teoria do Ordenamento Jurídico / apresentação* Tércio Sampaio Ferraz Júnior; trad. Maria Celeste C.J. Santos; rev. téc. Cláudio De Cicco. Brasília : Editora Universidade de Brasília, 6th ed., 1995. 185 p.

<sup>4</sup> Hendrik Jan Van Eikema Hommes. Legal order and legal principles. URL: <https://archivos.juridicas.unam.mx/www/bjv/libros/1/468/5.pdf> (Last accessed: 01.02.2019).

<sup>5</sup> Petters A. Legal Systems and the Process of Constitutionalization: the New Determination of the Correlation. *Digest of Public Law*. 2013. No. 2. P. 229–332. URL: [http://dpp.mpil.de/02\\_2013/02\\_2013\\_229\\_332.pdf](http://dpp.mpil.de/02_2013/02_2013_229_332.pdf) (Last accessed: 01.02.2019).

means that law and order has two interrelated aspects: normative – something is regulated by law, and systematic – law itself is regulated. These two dimensions of law and order are in the position of mutual influence: the normative system of international law is supported by its rigorous framework and dogmatics.

Law and order is “the proper order”, it is not autonomous and is one of aspects of the political system of the state. Since the norms established by law and order do not exist independently of one another, they are interrelated, the order is something bigger than the combination of parts. In this aspect, the legal system is synonymous with law and order.

Addressing the levels of law and order, A. Petters stresses: “The answer to the question whether national law – European-international law” is the single law order or different ones, is determined depending on the legal objects (acts) or legal entities. On the one hand, specific law sources and forms of legal acts (treaties, directives, law) are characteristic of international, communitarian and state law and they operate within their borders. On the other hand, although law-making bodies and legal entities in international law, EU law and state law overlap, they are not identical. Based on the above-mentioned criterion, we are talking about different law orders”<sup>6</sup>.

Y.V. Bulyhin and K.Y. Alchurron produced their concept of law and order which is valuable, though not easy to perceive. These scholars view law and order in connection with the normative system. These categories are correlated as part and whole, where law and order is a separate aspect of the normative system. Law and order should be understood as the multiplicity of legal prescriptions (judgments) that are valid

<sup>6</sup> Bulygin E.V., Alchurron K.E. Regulatory Systems. *Annual Digest of the Theory of Law*. 2010. No. 3. P. 265.

according to the so-called “establishment criterion”. According to the scholars, the “establishment criterion” includes: a) recognition rules, which establish the conditions under which the prescription becomes valid; they point to different sources of law: legislation, precedent, custom; b) rejection rules, which determine when legal prescriptions lose their validity. Legal order is not constant, its change causes it to lose its identity, and essentially means the replacement of the existing law and order with the new one.

Each of the afore-mentioned positions reflects a certain side of law and order, and a comprehensive study of these issues requires the analysis of works written by international as well as Ukrainian theorists of law.

M.P. Pisov, particularly, in his dissertation indicates that, in a broad sense, legal order is, based on the norms of law, a set of all legal relations that actually exist in society, as well as the social result sought by the state and the whole society, using various levers and tools. The scholar emphasizes that the key characteristics of any order are: first, the subordination of elements of the system to certain regularities; second, the stability of structural relations within the system; third, the ability to reproduce the necessary connections that ensure the proper functioning of the system according to its purpose<sup>7</sup>. The author also defines integrative law and order as a systemic formation arising in supranational, international relations in connection with the formation of supranational unions and alliances. Integrative law and order is directly determined by the interests and needs for integration and ensuring the legal ordering and organization in the relations between the participants of this process. An example of this type of law and order

is the one in the European Union, because it is this legal order that contributed to enshrining the legal mechanisms that have made it effective in the domestic law of the member states – parties to the international treaty.

T.S. Podorozhna interprets the essence of law and order in a somewhat different way. She defines it as the condition of ordering social relations, in which the state guarantees the realization and protection of subjective rights, the fulfillment of legal obligations of participants of legal relations; this legal order is based on the realization of law and it is maintained by a special constitutional-legal mechanism. The scholar further stresses that the cognition of legal order involves studying the mechanisms of its constitutional-legal regulation, constitutional influence and protection by the norms of the constitution. As a result, a new complex scientific direction is formed at the intersection of political and legal sciences, the theory of state and law, and constitutional law – the constitutionalization of legal order<sup>8</sup>.

N.V. Panarina defines law and order as the actual state of order, regulation and organization of social relations, which is formed and operates on the basis of law, being manifested in the lawful behavior of participants of law and order and is guaranteed and protected by the state. The scholar underlines that the highest level of law and order, which is constantly improving in accordance with the dynamic needs of social development, can only be achieved in a democratic legal state that subordinates its power to legal standards, recognizing human beings, their honor and dignity, rights and legitimate interests as the central element of the state legal system. N.V. Panarina’s opinion on law and order

<sup>7</sup> Pisov M.P. National and Integrative Law: the General Theoretical Study : the abstract of the thesis of Candidate of Economic Sciences : 12.00.01. Odesa, 2018. P. 7.

<sup>8</sup> Podorozhna T.S. Legal Order: The Theoretical and Methodological Foundations of Constitutionalization : the thesis of Doctor of Laws : 12.00.01, 12.00.02. Kyiv, 2017. Pp. 413–414.

is interesting in the way that she states that it is based on the system of principles underlying its formation and development. The principles of law and order cannot be considered separately, in isolation from other principles that operate in the legal system, since they all are closely related and based on common fundamental principles (common human principles) and they are in the dialectical unity<sup>9</sup>.

The common point of the above-mentioned positions is the understanding of law and order as a certain result, the state of social relations, which reflects the aspect of legal reality, ordered by legal means. The state, represented by public authorities, on the one hand, plays a key role in law enforcement and, on the other hand, is the manifestation of law and order.

The main means of ensuring legal order is the process of constitutionalization. Constitutionalization is a criterion of concretization of the principles and values of the constitution in the current legislation and public relations, which forms the legal regime where fundamental rights and freedoms of man and the citizen are used. Constitutional values should permeate all structural elements of the legal system. Consequently, these elements are constitutionalized, relations are established between them, and the whole system becomes constitutional<sup>10</sup>.

A.F. Kryzhanovskiy's work is the most thorough study of domestic law and order. His understanding of law and order is based on the cognition of this notion from the standpoint of phenomenological, synergistic and hermeneutical approaches. The scholar points out that

phenomenology gives grounds for the distinction between the notions of "law and order" and "legal order". The first limits its meaning to "order in law", and the second indicates that legal order exists beyond law<sup>11</sup>.

The modern legal order is the state of ordered, safe and predictable legal existence of individuals, social groups and the whole society, which is formed, renewed and changed in the social framework and on the basis of the established and dynamic system of legal coordinates (value-normative system, patterns and models of behavior, common types of legal relations in society); it is ensured by public legitimation and rule-making, law-enforcement activity of the state, the functioning of the justice system with the civil society's active support.

Analyzing the state of law and order in modern Ukraine, A.F. Kryzhanovskiy concludes that legal order in Ukraine was developing under the influence of controversial tendencies of legal development – its anthropologization in Western and etatization – in traditional (collectivist) societies. Today the tendency of anthropologizing legal order in Ukraine is becoming determinative. The current state of legal order is largely determined by the specificities of the transition period of Ukrainian statehood. The legal order is one of the forms of this process, which is manifested above all as the search for opportunities by the society to reliably regulate the basic relations that are important to it. The state itself degrades unless institutions of civil society pay due attention to the process of preserving and maintaining legal order and legality<sup>12</sup>.

<sup>9</sup> Panarina N.V. Law as the Normative Basis for the Formation of Law and Order : the abstract of the thesis of Cand. of Laws : 12.00.01. Kharkiv, 2008. P. 13.

<sup>10</sup> Podorozhna T.S. Legal Order: The Theoretical and Methodological Foundations of Constitutionalization : the thesis of a Doctor of Laws : 12.00.01, 12.00.02. Kyiv, 2017. P. 413.

<sup>11</sup> Kryzhanovskii A.F. Law and Order of the Sovereign Ukraine: the Formation and Tendencies of Development (the general theoretical study) : the abstract of the thesis of Doctor of Laws : 12.00.01. Odesa, 2009. P. 12.

<sup>12</sup> Kryzhanovskii A.F. Law and Order of the Sovereign Ukraine: the Formation and Tendencies of Development (the general theoretical study) : the abstract of the thesis of Doctor of Laws : 12.00.01. Odesa, 2009. P. 31.



We agree to the author's position on the important role of civil society in the process of forming and functioning the domestic law and order at the present stage, which will be discussed below.

Law and order as a category of theoretical and legal science being constituted and undergoing development in a particular state, is not the result of accidental coincidence, it is determined by a number of factors, whose clarification is important for revealing the essence of this complex notion.

Y.Y. Borodin states that law and order exists in the system of determinants which determine a holistic picture of human existence, an important component of which is its legal orderliness. Being a vital component of this existence, on which the very functioning of the society depends, law and order is closely linked not only to legal conditions and phenomena, but also to those that affect all spheres of social life. Therefore, any attempt to comprehensively understand law and order should be based on the analysis of all the major social and legal determinants that cause one or another effect on the functioning of legal order in society.

These determinants are of an international character – globalization, postmodernity, terrorism, international law and order, or domestic – economic, social, political, ideological, legal conditions of existence of a particular country. The

specific “set” and the state of the determinants inherent to the functioning of law and order in a particular country should influence the choice of scientific means of researching law and order<sup>13</sup>.

### Conclusion

Therefore, law and order makes up part of the legal reality, a prerequisite for the existence of a modern state-organized society. The essence of law and order is revealed, at least, in such properties as systematicity, normativity, hierarchy, the ensuring by the state (if we talk about national law and order) or international legal institutions. Generalizing scientific approaches to the notion of law and order makes it possible to define it as part of the legal reality, which includes a set of norms, principles of law and public-law institutions that carry out activities linked to law-making, law-enforcement and the realization of rights, ensuring the orderliness of the legal sphere in the life of society. Globalization, as an objective process of the development of human civilization, causes the interpenetration of different levels of law and order (national, supranational, international) and changes of its content, which in turn justifies the need for further scientific research.

---

<sup>13</sup> Borodin Y.Y. The Notion, Indications and Properties of Law and Order. *Bulletin of the Lviv State University of Internal Affairs*. 2012. No. 2 (1). P. 212.